



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 44/12

JS 62/12

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA**

First Applicant

PHILLEMOM BUTHELEZI & 37 OTHERS

Second to Further Applicants

and

DC STEEL CONSTRUCTION

Respondent

Heard: 23 and 24 April 2015

Delivered: 6 October 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This matter came before the court by way of a statement of claim in terms of which the fairness of the dismissal of the Second to Further Applicants on account of the Respondent's operational requirements was challenged. The applicants seek an order declaring their dismissals to be substantively unfair. They further seek an order of retrospective reinstatement, alternatively

compensation. The retrenchments took place in October 2011. The claim is opposed by the Respondent.

- [2] The matters under case numbers JS44/12 and JS62/12 were consolidated as the disputes are based on the same set of facts. At the commencement of the proceedings, it was indicated on behalf of the Respondent that of the original Applicants, five have since been re-employed.
- [3] The applicants allege that the retrenchments were substantively unfair due to the selection criteria applied when deciding which employees the Respondent should retain and which ones should have their services terminated. In this regard, it was contended that employees with lesser years of service were retained instead of those with more years of service, and further even those with more skills were retrenched.
- [4] It was common cause that the selection criteria applied was based on LIFO, taking into account specialised skills and length of service. The applicants set out in detail in the pre-trial minutes who they believe should have been retrenched instead of certain applicants who were in fact retrenched. The Respondent in the same pre-trial minutes equally gave an explanation as to the basis of differentiation and selection. The respondent's contention was that in considering which employees were to be retained, those with skills were favoured over unskilled employees, even in the event where the unskilled employees had a longer employment history.
- [5] The issue for determination before the court is whether the selection criteria applied by the Respondent was fair and objective, and if not, whether the individual Applicants should be awarded any relief.

The evidence:

- [6] The Respondent called two witnesses, viz, Ms JS Oosthuizen, its Payroll Administrator, and Mr J Oosthuizen, its Managing Director. The applicants called three witnesses, viz, Mr J Masilela a Welder at the time of his retrenchment, Ms L Mahlangu a shop steward and Grinder at the time of her retrenchment, and Mr P Buthalezi, a shop steward and semi-skilled Boiler

Maker at the time of his retrenchment. A summary of the most pertinent aspects of the respective witnesses testimony is contained hereunder:

The evidence of Ms JS Oosthuizen:

- [7] Ms Oosthuizen as Payroll Administrator is responsible for capturing the details of all employees onto a computerised database from the date that they are employed. She is also responsible for ensuring that the data base is kept up to date, and was also responsible for the calculation of retrenchment packages, and salaries due to employees where applicable, and all the statutory payment due to employees at the time that they were retrenched.
- [8] Her evidence essentially was to give an account in respect of employee records that were damaged as a result of flooding that occurred in the archives where they were kept. The flooding was as a result of a leaking roof in the premises. For the purposes of these proceedings, the only employee records that could be produced were those that were in the data base as captured on her computer system. The records for the period 2009 to 2013 were damaged in the flooding. Her evidence was also in respect of the employees' service since there was a dispute in regards to which ones had longer service. In this regard, she had testified that prior to the retrenchments, there had been a transfer of other employees to a separate company called DC Swart Maintenance, but that those employees were ultimately transferred back to the respondent during February 2011.

The evidence of Mr J Oosthuizen:

- [9] Oosthuizen's testimony was as follows;

9.1 The Respondent draws, fabricates, cuts and installs steel for clients as per specification and size provided by clients. That process also involves welding, assembling, galvanizing and painting of steel as per drawings provided. Its operations are inherently intricate and technical, and its clientele is mainly in the mining industry.

9.2 The retrenchments were effected after consideration was given to the employees' skills and length of service, and were as a result of the introduction of new technology which had resulted in the need for less employees.

9.3 Prior to the retrenchments, a commercial agreement was concluded with a company called DCS Construction, in terms of which the latter would manage the Respondent's fabrication operations. As a result of this agreement, a large number of the Respondent's employees were transferred to DCS Construction for the duration of the agreement. That agreement lasted for three months and on 27 February 2011, some of the employees of DCS Construction were transferred back to the Respondent.

9.4 Because of the specialized nature of the welding required, all welders get tested by an independent company which then certifies the individual as compliant with certain standards required for them to undertake specific procedures. This certification is highly specialized to a specific type of operation or task, and only employees who had attained the specific standards and been certified as competent are permitted to undertake certain procedures and tasks. There were varying types of welding, and each was specific, specialised and accordingly also certified separately. Only the welders who had been certified as competent could perform certain functions.

9.5 The testing and certification was a requirement of the Respondent as well as of its clients. If the employees of the Respondent were to perform work at Impala Platinum Mines as an example, they would be required to undertake a further competency test, in order to be permitted to undertake procedures at the mine premises. The process of testing employees and the certification of competency was conducted by a Mr Lottering who was completely independent of the Respondent and qualified to test and certify competency levels. Lottering is registered with the relevant professional body.

9.6 Having been referred to various test results as contained the bundle¹ Oosthuizen testified that these results were indicative of the level of skill of the relevant employee who had undergone the testing, as they reflected whether the employee had achieved acceptable ratings in three aspects being the visual appearance of the work, the radiography and MPI. If an employee does not attain acceptable standards in these areas, they do not pass the test.

9.7 Even though a person may have been certified and utilised in a position, the level of skill differed between employees. This was also measured by the individual's key performance areas, exceptional skills, specialization, qualifications, standard of work, speed, accuracy, literacy, understanding of steel and dynamics, knowledge of new technology, and ability to take control. In selecting employees for retrenchments, these factors were looked at holistically, including reports from clients on the level of performance of the employees.

9.8 He testified that one employee may have been more skilled and be more efficient than another one who was equally qualified and not underperforming. He stressed that the relevant employees who were retrenched were in no way underperforming but that the ones which were retained were simply more skilled and retained on that basis, as the need for skills goes to the heart of the Respondent's business.

9.9 Even though underperformance was not necessarily a consideration, in cases in the past where this may have been an issue, this would have been addressed through continuous interaction between the employee and their superiors. Reports were only compiled if there were cases of serious concern about the employee's performance. Performance was monitored through regular meetings with supervisors and management where *inter alia*, the employee performance, tonnage and project performance were monitored. Deadlines were very important and meetings were crucial to ensuring that projects ran on time.

¹ Pages 26-36 of the Respondent's bundle

9.10 In regards to specific comparisons between those employees retrenched and those kept, Oosthuizen further testified that where vacancies arose, attempts were made through shop stewards to locate ex-employees identified for recall and where they could not be found, the next best skilled ex-employee would be contacted. This had resulted in employees with lesser years of service being recalled as was the case between Mr. T Moyo and Mr R Makhanya, who had a longer period of service than Mr Moyo. He testified that when the decision to employ someone was taken that was in terms of the agreement for preferential re-employment of retrenched employees, and the intention had been to reemploy Mr Makhanya. However since he could not be contacted within a reasonable time, Mr Moyo was contacted and thereafter re-employed. He testified further that the agreement did not specify that service history should be a consideration when re-employing retrenched employees.

Evidence of Mr J Masilela:

[10] Masilela's testimony was as follows;

10.1 He was employed by the Respondent as a Welder since 19 June 2007. Upon his appointment he was already certified as a Welder, but was still tested for competency, which test he had passed resulting in him being commencing his employment.

10.2 He was also tested once by Impala Platinum when he was sent to perform work at the mine premises. He denied that he had been tested on any other occasion, including the test reflected in the bundle of documents used at the trial which reflects that he did not pass the competency test. He testified that the said test was fraudulent. He alleged that during the time period when the test was indicated as having been conducted that he was on short time and accordingly was not at work to have had done the test. He testified that while on short time an employee only worked for four days in a month (which was disputed by the Respondent). He testified that he could not remember which days he had worked that month but that he wasn't at work on the day of the test and

even if he was he did not do the test. He could however not dispute that the other employees had undertaken the test on the particular day as he was unaware of whether they were tested or not.

Evidence of Ms L Mahlangu:

[11] Mahlangu's testimony was as follows;

11.1 She was employed by the Respondent on 2 February 2007 to perform grinding duties in the fettling department. She was at some point moved to the material control department where she was based until her retrenchment. She further testified that she was a shop steward of NUMSA.

11.2 She and her fellow employees were all assistants to a Mr Guntherie who operated the machines in the department. Her responsibilities essentially entailed cleaning cut pieces of metal, and packing them for the Boiler Makers.

11.3 She denied the allegation that two of her colleagues who were retained operated the punching and bending machines and were accordingly more skilled than the employees who were retrenched. She nevertheless testified that she could not operate those machines as she did not know how to.

Evidence of Mr P Buthelezi:

[12] He was employed by the Respondent on 16 August 2006 as an Assistant Boiler Maker but was later promoted to the position of a semi-skilled Boiler Maker, he was also a shop steward of NUMSA.

12.1 Two of his colleagues (Mthombeni and Mahlangu) were appointed after him and they were retained when he was retrenched. He testified that the retained employees were currently still doing the work which he had done, and that this was unfair because he believed that the Respondent had dismissed older employees but retained younger employees with

less service, and further that that the Respondent did not consider skills when retrenching.

12.2 He had conceded that a Mr. Sithole who was retained in his stead had skills in managing the steel yard. He further conceded that other employees retained, viz, Mthombeni and Mahlangu had also been promoted to his level of semi-skilled boiler makers but emphasized that he had been the person who had taught them the work. He denied that the work done by semi-skilled boiler makers was measureable on considering the speed and the mistakes made on the work on the basis that no one had approached him concerning the speed of his work. He also denied the proposition that one semi-skilled boiler maker could be better than another one on the basis that they did not compete with each other when performing their tasks.

Submissions:

[13] In his closing arguments, Mr. Beaton on behalf of the Respondent made the following submissions;

13.1 New technology was introduced to make the respondent more efficient, which had resulted in the retrenchments. The Respondent had considered the principle of LIFO which it had applied unless an employee with less service had more skills than one with longer service in which case the one with the most skills was retained.

13.2 It was argued that employees were tested and the evidence of Mr Masilela should be rejected as a result of the accusation that his test was a fraudulent document as he had never done the test in circumstances where this aspect was never previously challenged or raised.

13.3 It was further argued that the retrenched employees were not underperforming but that the ones which were retained were simply better than their retrenched colleagues in terms of skills and experience.

[14] Mr. Masutha on behalf of the Applicants submitted that;

14.1 The Respondent only retained employees who were employed later with skills, over unskilled colleagues with longer service. It was further argued that assessments done were random and only in respect of welders and not boiler makers, and that those assessments were not based on the performance of employees. He further argued that there was no form of assistance in place relating to performance.

14.2 Emphasis was also placed on the fact that employees who were employed later, and acquired skills while employed, were retained over others who had been employed for a longer period of time such as in the case of Mr Buthelezi in relation to Mr Mahlangu and Mr Mthombeni.

Evaluation:

[15] In this case, it was common cause that there was no challenge to the reason for and the procedure leading to the retrenchments. Thus the only issue for consideration is whether the selection criteria applied by the Respondent was fair and objective. Item 9 of the Code of Good Practice on Dismissal based on Operational Requirements² provides that selection criteria that are generally accepted to be fair include length of service, skills and qualifications. It further provides that generally, the test for fair and objective criteria will be satisfied by the use of LIFO principle.

[16] It is further acknowledged in this Code that there may be instances where the LIFO principle or other criteria may need to be adapted, including the retention of employees based on the criteria mentioned, which may be fundamental to the successful operation of the business. It would therefore be

² As contained in the Labour Relations Act, 66 of 1995 as amended. See also Section 189A(19) of the Act which provides that:

“ In any dispute referred to the Labour Court in terms of section 191 (5) (b) (ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if-

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was a proper consideration of alternatives; and
- (d) selection criteria were fair and objective.”

See also section 189 (7) of the LRA which provides that :

“The employer must chose the employee to be dismissed according to a selection criteria-

- (a) that have been agreed to by the consulting parties or;
- (b) if no criteria have been agreed, criteria that is fair and objective.

permissible to retain employees for example, with a skill that is vital to the business of the employer despite their years of service, their production output and work record. This criteria is obviously subject to the proviso that it is fairly and objectively applied.

[17] In circumstances where the fairness and objectivity of the selection criteria is questioned, the onus is on the Respondent to prove on a balance of probabilities that it applied the selection criteria fairly and objectively. In this case, having had regard to the evidence presented, the oral submissions made on behalf of the parties, the documentary material before the court, and the circumstances that led to the retrenchment, I am satisfied that the Respondent had on a balance of probabilities, discharged the onus placed on it to show that it had applied a fair and objective criteria when retrenching the Applicants. My conclusions are fortified by the following;

17.1 It was common cause that the final retrenchments were preceded by a facilitation process under the auspices of the CCMA in terms of section 189A (3) of the LRA. It appears from the bundle that two sessions were held with the facilitator, and a further consultation meeting took place internally on 11 August 2011. It does not further appear that any agreement was concluded in that after the Respondent had issued its first notice of the retrenchment of identified employees on 14 October 2011, NUMSA had referred a dispute to the MEIBC on or about the same date.

17.2 It can therefore be accepted that selection criteria applied by the Respondent was that in accordance with the provisions of section 189 (7) (b) of the LRA. From the signed pre-trial minutes, the Respondent had three departments, viz, workshop, construction and administration. It contended in these minutes that it had proposed that the selection criteria should be based on length of service and skills per department, and that the proposal was accepted by the Applicants. The Applicants nevertheless denied that there was such an agreement.

17.3 Even if there was no such an agreement, the criterial applied by the Respondent has to be assessed within the context of the nature of its

operations. I did not understand it to be seriously disputed that the Respondent runs its operations on the basis of specialised skills in the light of the demands of its clients. Thus each Welder or Boilermaker had to be specifically tested to ensure that they possessed the necessary skills, qualifications and expertise to perform the tasks required of them. The Applicants did not take issue with the level of skills and expertise required of the employees. Their concern was mainly that on a comparison of both skills and years of experience, they ought to have been retained.

17.4 The above contention required a painstaking exercise of comparing the skills levels, years of service and qualifications of those employees that were retained and those that were retrenched. This exercise was embarked upon in the course of drafting the pre-trial minute and also as can be gleaned from the evidence presented by Oosthuizen.

17.5 At paragraph 17.8 of the pre-trial minute³ the individual employees alleged to have not been identified for retrenchment or those that were retained were identified, including in each department. It is not necessary to mention each of these individuals as their names appears in the pre-trial minute and the basis upon which it was alleged that they should or should not have been selected for retrenchment. However, central to the Applicants' contention was that those retained either had less skills or less years of service.

17.6 The Respondent in its response had in detail⁴ explained the basis of retaining or identifying these individuals for retrenchment. It had made detailed comparisons and explained the functions, skills, qualifications of each of these individuals, and further explained with particularity the reasons why skills in certain areas were preferred over years of service. During his evidence, and under extensive cross-examination, Mr Oosthuizen had further painstakingly made reference to individuals in regards to their certificates of training (e.g. Magagula, Nkosi, Masondo,

³ Page 79 of the pleading

⁴ At page 82 of the pre-trial minute

Simelane, Van Virmen, Masilela, Mahlangu, Mthombeni, Mashinini, Xaba, Mtshweni, Sithole, Maphanga, Gumbi, Sisho, Hlatswayo, Masuku, Buthelezi, Biyela, Masina, Malaza, Vilakazi, Mkhatswa, Mayike etc.), and justified the differentiation on the basis of qualifications, on-going assessments, specialization, exceptional skills, suitability, levels of skills, test results, the nature of work to be performed, the quality of work produced and demanded, speed, accuracy, literacy, product understanding, appreciation of dynamics, familiarity with new technology, ability to take control, material control, and management of storerooms. Oosthuizen conceded that some of the applicants were welders with skills, but having taken all factors holistically, decisions had to be made as to who was to be retrenched depending on the considered factors.

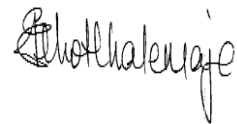
17.7 Masilela's main contention on the other hand was that he had more years of service than others that were retained. To be precise, and in comparison to those that were retained, he had more service by one year as compared to those retained. It having been accepted that the years of service was not the only consideration, his contentions cannot therefore be sustainable. The same argument was advanced by Mahlangu. She had conceded that her tasks involved the cleaning of cuts and could not operate the bending or punching machines. Nevertheless, it is not known what other skills she possessed that could have made her better suitable to her comparators. *Prima facie*, her tasks appeared mundane and required less skills.

17.8 Buthelezi was an assistant boilermaker and was later converted to semi-skilled boilermaker. His complaint was also that the Respondent failed to take into account years of service and skills. He nevertheless did not know the skills levels of his comparator, Sithole whom Oosthuizen had contended had more skills. His only explanation was that Sithole had not shown him his certificate to prove the level of his skills. He could not dispute it when it was put to him that he could not be at the same level of skills as a Boilermaker.

[18] In the light of the above, I am satisfied that the Respondent has given a proper account of the reasons some employees were retained whilst the Applicants were retrenched. There is no basis to conclude that the selection criteria applied was not fair, objective, and justifiable and based on rational grounds⁵. In the circumstances, the Applicants' claim should be dismissed. The Respondent did not seek a cost order in the light of the on-going relationship between the parties, and there is no reason why a cost order should be made.

Order:

- a) The Applicants' claim is dismissed.
- b) There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

⁵ *Van Rooyen & Others v Blue Financial Services (SA) Pty Ltd* [2010] 10 BLLR 1119 (LC)

APPEARANCES:

On behalf of the Applicant: Mr Masutha of NUMSA

On behalf of the Respondent: Adv R Beaton SC

Instructed by: de Villiers & du Plessis Attorneys

LABOUR COURT