



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 474/03

In the matter between:

NATIONAL UNION OF MINE WORKERS

First Applicant

EPHRAIM MASOMA

Second Applicant

and

NEW DENMARK COLLIERY

Respondent

Heard: 5 March 2012, 28 May 2012 & 18-20 February 2013

Delivered: 16 October 2015

Summary: When the respondent has made an undertaking to transfer an applicant to a vacant position instead of retrenching him, failure to fulfill the undertaking renders the applicant's retrenchment substantively unfair.

JUDGMENT

LALLIE J

- [1] The second applicant, Mr Masoma ("Masoma"), was employed by the respondent in 1985. At the time of his dismissal on 12 December 2001 for the respondent's operational requirements, he was a storekeeper and a member

of the first applicant. He was remunerated at the monthly rate of R5 755.00. Masoma's position fell in the category of senior skilled employees who are also referred to as officials. He therefore fell outside the first applicant's bargaining unit which consisted of category 2-8 employees. Aggrieved by the dismissal, the applicants referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration. The dispute was not resolved at the conciliation stage and the applicants escalated it to this Court. The applicants seek an order reinstating Masoma on the basis that his dismissal was substantively and procedurally unfair.

- [2] The respondent conducts business in the coal mining industry. It supplied Eskom with coal for purposes of generating electricity. In 2000, Eskom's demand for coal dropped by two million tonnes *per annum*. The change had a *domino* effect on the respondent's production and the number of employees it needed. Consequently, the respondent embarked on a retrenchment exercise which claimed Masoma's job. The applicants submitted that Masoma's dismissal for the respondent's operational requirements was substantively unfair because there was no need to retrench him as at the time of his retrenchment, Masoma was a candidate for transfer but his transfer was scuppered by his supervisor.
- [3] In terms of section 188 of the Labour Relations Act 66 of 1995 as amended ("the LRA"), an employer's failure to prove that a dismissal for operational requirements was effected for a fair reason and in accordance with a fair procedure renders the dismissal unfair. Section 192(2) of the same Act places the *onus* of proving the fairness of a dismissal on the employer. In its endeavour to discharge the *onus* of proof, the respondent, through its witness, Mr Westermeyer ("Westermeyer"), testified that it responded to Eskom's reduced coal demand by briefing and consulting with all affected employees. It consulted with all the trade unions with members at the respondent in one meeting in July 2001. The trade unions were the first applicant, National Employees Trade Union ("NETU"), UASA and the Mine Workers Union. They had continuous follow-up meetings in which they came to an agreement that the respondent would try by all means to relocate employees to various

mines, and transfer them to prevent retrenchment. A further meeting was held in December 2001. A retrenchment agreement was eventually entered into between the respondent and the trade unions. Between the meetings, the respondent liaised with the unions continuously and kept them informed of the progress, transfers and employees who took voluntary severance packages. It updated the unions on the numbers and sent them updated figures. The information the respondent furnished the union with related to all employees affected by the retrenchment. The respondent's first option was to offer voluntary severance packages and where ever there were vacancies in alternative mines, it would place employees in those positions.

- [4] Justifying the economic *rationale* for retrenching Masoma, Westermeyer testified that Masoma was employed at the finance and administration department as an assistant storekeeper. The stores were a central department which provided services to all the three shafts the respondent operated. It stored mining materials, equipment used underground, spares, protective equipment and clothing which was issued daily to employees. Before the retrenchment exercise which led to Masoma's dismissal commenced, the respondent operated three shafts to which three assistant storekeepers rendered a service. The effect of the reduction of Eskom's demand for coal was that two thirds of the mine had to stop operations. With the closure of the Central and North shafts, the services of two thirds of the storekeepers became redundant. The respondent was left with a position of only one storekeeper which was given to the longest serving storekeeper on the basis of LIFO.
- [5] After receiving an email informing him that interviews for three candidates for the assistant storekeeper position at Bank Colliery were arranged for 7 August 2001, Westermeyer called Masoma to a meeting. Masoma informed Westermeyer that he was not interested in a transfer. Westermeyer explained to Masoma that his lack of interest in transfer could lead to his retrenchment. He further reminded him that he had to try to allocate employees to vacancies which existed at other Anglo mines. He referred to a meeting he held with Masoma after receiving a letter in which the latter complained about the

retrenchment process and the selection criteria. The meeting was held around 8 August 2001. Masoma informed Westermeyer in the meeting that he did not want to be transferred to other mines and operations. He preferred a demotion. Mr Luus ("Luus") to whom Masoma reported directly, testified that Masoma attended a job interview for the position of assistant storekeeper at Bank Colliers but did not secure the position. The successful candidate was Ms Van Der Merwe ("Van Der Merwe"). Masoma was dismissed for operational requirements of the respondent in December 2001.

- [6] The applicants maintained that the respondent's failure to relocate, transfer or demote Masoma to the vacancy created by the employment of Van Der Merwe at Bank Colliery rendered his dismissal substantively unfair. It was argued on behalf of the respondent that various positions were available within the group of companies which the respondent was part of and that the longest serving employees were given the first opportunity to apply for the positions. The respondent's argument that the evidence in relation to the transfer was, at the end of the day, neither here nor there because Masoma was given an opportunity to apply for jobs at other companies and was unsuccessful, is untenable. Westermeyer testified that the respondent was going to transfer employees affected by the retrenchment to alternative mines in order to prevent their retrenchment. Being assisted to apply for a vacancy in a sister mine is materially different from being transferred to a suitable position instead of being retrenched. Had the respondent kept its word of transferring employees instead of retrenching them, Masoma would have been transferred to the assistant storekeeper vacancy at Bank Colliery. His employment at Bank Colliery would have been assured. He would have been transferred from the position of assistant storekeeper at the respondent to the same position at Bank Colliery without having to compete with other candidates for the position. Van Der Merwe would not have been eligible to be interviewed for the storekeeper position which she was eventually appointed to at Bank Colliery because her position at the respondent was not affected by the retrenchment. She was also not an assistant storekeeper. The respondent proffered no valid reason for not transferring Masoma in terms of its undertaking to the storekeeper position at Bank Colliery. It therefore had no

economic rationale for dismissing Masoma. Masoma's dismissal was substantively unfair.

- [7] The respondent's evidence that Masoma's dismissal was procedurally fair was largely unchallenged. It shows that the respondent, in keeping with its obligation in section 189(1) of the LRA, consulted with the first applicant who represented Masoma, soon after receiving notice of the drop in coal demand from Eskom. It therefore consulted when it contemplated dismissing a portion of its employees which included members of the first applicant. The consultation was not limited to a meaningful joint consensus seeking process in an attempt to reach consensus on issues affecting the retrenchment of employees as envisaged in section 189(2) of the LRA, it culminated in a retrenchment agreement. The first applicant and the respondent therefore reached consensus on the retrenchment exercise. Masoma's attempt at painting a picture that his dismissal came as a surprise in December 2001 was not supported by his own evidence. His evidence, including correspondence addressed to the respondent's managers expressing his concerns about the retrenchment process is consistent with the respondent's version that there was consultation and continuous sharing of information between the applicants and the respondent. The applicants' failure to locate a witness who could have rebutted the respondent's evidence on the procedural fairness of Masoma's dismissal cannot be laid at the door of the respondent. No valid reason was provided for the applicants' inability to locate the witness. Evidence in favour of the respondent is overwhelming. The respondent discharged the *onus* of proving the procedural fairness of Masoma's dismissal.
- [8] The applicants sought an order reinstating Masoma. Section 193(2) of the LRA makes reinstatement the primary remedy for substantively unfair dismissal. Security of employment is a core value of the LRA. In this regard, see *NUMSA obo Maifo v Ulrich (Pty) Ltd*¹. However, section 193(2)(c) of the LRA provides that reinstatement may not be granted when it is not reasonably practicable for the employer to reinstate the employee. Masoma was

¹ (2012) 33 ILJ 20 918 (LC).

dismissed in December 2001 but the applicants filed their statement of case on 27 August 2003. The applicants' substantial delay in the prosecution of this matter has an impact in determining whether reinstatement is practicable. It is trite that when applicants delay in challenging the fairness of a dismissal, the respondent has a right to assume that the decision will not be challenged and pursue its business by, *inter alia*, filling the vacancy left by the dismissal. Reinstatement means restoring the employee's employment as though he or she had never been dismissed. It is common cause that the respondent dismissed Masoma because his position became redundant owing to the reduction in coal demand by Eskom. It is therefore not reasonably practicable to reinstate him. Compensation is therefore the appropriate relief. In determining the amount of compensation due to Masoma, I have considered Masoma's length of service and that his dismissal was substantively unfair. I find it just and equitable in all the circumstances of this matter to award Masoma compensation equivalent to remuneration he would have earned over a period of 10 months at the rate of R5 755.00 per month, the rate at which he was remunerated on dismissal.

[9] I could find no reason both in law and fairness for costs not to follow the result.

[10] In the premises, the following order is made:

10.1 The dismissal of the second applicant for the respondent's operational requirements was substantively unfair but procedurally fair.

10.2 The respondent pay the second applicant compensation in the amount of R57 550.00 which is equivalent to remuneration he would have earned over a period of 10 months.

10.3 The respondent pay the applicants' costs.

Lallie J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

FOR THE APPLICANTS: Advocate Memani

Instructed by Makinta Inc

FOR THE RESPONDENT: Advocate Snider

Instructed by Cliffe Dekker Hofmeyr

LABOUR COURT