THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS1079/12

In the matter between:

SOUTH AFRICAN COMMERCIAL & CATERING WORKERS UNION obo J BHEKI & 24 OTHERS **Applicants**

And

ENTABENI PRIVATE GAME LODGE (PTY) LTD **Respondent**

Delivered: 18 November 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction and background:

[1] This matter came before the court by way of a statement of claim in terms of which SACCAWU challenged the procedural and substantive fairness of the retrenchment of its members that took place 31 July 2012.

[2] The Respondent operates in the tourism and hospitality business. The background to the dispute is fairly common cause as succinctly captured in the parties' signed pre-trial minutes and is further summarised as follows;

2.1 SACCAWU acting on behalf of its members had entered into wage negotiations with the Respondent on 16 May 2011. Negotiations had reached deadlock and a dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 5 July 2011.

2.2 Failing the resolution of the dispute, a certificate of outcome was issued on 3 August 2011. The parties had nevertheless agreed to extend the period for further negotiations from August 2011 to February 2012 in order to allow the Respondent's business to improve and to give it an opportunity to re-evaluate its financial position. During that period the Respondent and SACCAWU had held a meeting on 17 October 2011, followed by a meeting between the Respondent directly with the employees and shop stewards to explain its financial position.

2.3 Wage negotiations resumed on 9 February 2012 and the parties again reached deadlock on 6 April 2012. A dispute was again referred to the CCMA on 9 May 2012, and following the issuing a certificate of outcome, the employees commenced with their protected industrial action on 14 May 2012.

2.4 On 12 July 2012, SACCAWU and the Respondent agreed to end the lock out and the strike action. This resulted in a memorandum of agreement between the parties on 16 July 2012 which was confirmed in writing on 17 July 2012. The employees were to return to work with effect from 16 July 2012. A meeting between the Respondent and SACCAWU followed shortly the following day.

2.5 Prior to the resolution of the strike, the Respondent had held a meeting with the employees on 29 March 2012 where it had discussed its financial position. On 2 May 2012 the Respondent issued a notice to the employees informing them of possible termination due to operational requirements.

2.6 The Respondent had addressed correspondence to SACCAWU on a number of occasions inviting it for meetings. SACCAWU's response was that it was only available after 9 May 2012. Further proposed dates were not suitable for SACCAWU and on 14 May 2012, it had responded that it would not be available on 16 May 2012 and for the whole month until 5 June 2012.

2.7 On 15 May 2012 the Respondent wrote further correspondence to SACCAWU advising it that the matter was urgent and its unavailability for the whole month was unacceptable. SACCAWU was further advised that if it did not provide a date, the Respondent would proceed and consult directly with its members and shop stewards.

2.8 When SACCAWU failed to respond, the Respondent then on 23 May 2012 invited employees to accept voluntary retrenchment. Three employees accepted the offer.

2.9 A meeting was held between the Respondent and the shop stewards on 28 May 2012 regarding possible retrenchments due to the Respondent's financial position. A further meeting was held with SACCAWU on 6 June 2012.

2.10 On 14 June 2012 the Respondent addressed correspondence to SACCAWU stating that the union had a duty to cooperate and participate in the retrenchment process. The Respondent reiterated that it was not making any profit and it implored SACCAWU to consult with its members failing which it would have no choice but to proceed with the retrenchments.

2.11 A meeting took place between the Respondent and SACCAWU on 5 July 2012. Flowing from that meeting, the Respondent on 10 July 2012 confirmed that it had no option but to restructure.

2.12 On 16 July 2012 the Respondent confirmed that it would proceed with the restructuring and gave SACCAWU until 19 July 2012 to consult with its members. On 23 July 2012 the Respondent held a further meeting with the employees and shop stewards. On 24 July 2012 the Respondent confirmed the job categories to be affected by the restricting being the drivers, storemen, bar waiters, rooms, kitchen, front office and management.

2.13 On 25 July 2012 the Respondent gave notice of retrenchment, and all 33 employees affected were retrenched on 31 July 2012.

Issues in dispute:

[3] SACCAWU disputes the procedural and substantive fairness of the retrenchment, contending that there was no need to retrench. It further contends that the reason for the dismissal was due to the individual applicants having participated in a protected strike. The Respondent on the other hand contends that there was in general a need to retrench due to financial difficulties it faced, which the Applicants were aware of since 2011. As a result of these difficulties in 2012 it had to close some of its camps. It further contended that the retrenchment process commenced prior to the strike action on 29 March 2012 and was finalised only after the strike action was ended.

[4] The selection criteria used is not disputed. SACCAWU nevertheless contends that since there was no need to retrench, no proper consultations were held prior to the retrenchments being effected. It further holds the view that the meetings held were not for the purposes of consultations but were held for the purposes of wage negotiations and the resolution of the strike.

The evidence:

[5] Evidence led on behalf of the Respondent by its Group Financial Manager Mr. Andries Wolmarans was as follows;

5.1 The Respondent is in the hospitality business and provides guest services in the form of lodges. Following the wage negotiations held between the parties in May 2011, the parties had agreed to an extension until August 2011. At the time, the Respondent was making loses, and the purpose of the extension was to enable the Respondent time to improve its financial position.

5.2 At the meeting held with SACCAWU on 17 October 2011, the financial position of the Respondent was restated and SACCAWU was informed that the Respondent had not made profit in the last five years; that measures such as retrenchments at the Respondent's head office and salary decreases were implemented to improve the financial position.

5.3 In further illustrating the parlous financial position of the Respondent, reference was made to a summary of its financial statement for the period June 2008 to December 2012[1]. During the 16 months period, only in June 2010 was a marginal profit made, and the total losses made over that period amounted to R3.2 million. There was essentially no return on investments.

5.4 The occupancy levels[2] determined any profits and the financial statements indicated that from 2008 there was a consistent drop in the occupancy rate. Amongst factors that contributed to the drop in occupancy rates was an increase in competition for accommodation prior to the 2010 World Cup, which saw lodges struggling and some of them closing down; the world-wide recession and low occupancy rates. Despite efforts by the Respondent's shareholders to invest more money in the business, attempts to sell off assets and shares in the company with a view of raising money, returns failed to materialise as income raised was utilised mainly towards the payments of salaries. It had reached a point where the shareholders could not continue putting money into the business and the Respondent had no other sources of income to pay for its expenses.

5.5 The wage negotiations with SACCAWU had resumed in February 2012 and deadlock was reached in April 2012. The Respondent as a result of loses made could not meet SACCAWU's wage demands, and this

[1] Page 145 of the trial bundle
[2] Page 35 of the trial bundle

was emphasised in meetings where discussions were held with both SACCAWU and the employees surrounding ways and means of improving the business. As at March 2012 the financial position of the Respondent had deteriorated as the occupancy rate was at 15%. SACCAWU and the employees were showed all the financial statements, and were aware of the Respondent's financial position and could see that the occupancy rate was consistently low.

5.6 Between March and May 2012 there had still been no improvements. The strike action between 14 May 2012 and 16 June 2012 did not assist in alleviating the Respondent's financial problems. When the memorandum of agreement was signed in July 2012, the Respondent could only afford to pay employees minimum wages as per the sectoral determination.

5.7 In the light of the Respondent's financial position since 2008, it was therefore no true that there was no general need to retrench. Currently, the Respondent has 20 employees and the occupancy rate had marginally increased to a consistent 42%. As a result of the restructuring process, other than the 33 retrenched in July 2012, five were previously retrenched in 2011 and 8 had taken voluntary packages. Furthermore, one side of the business (a lodge) was closed down for a period of 12 months from July 2012.

5.8 Alternatives looked at prior to retrenching the employees included outsourcing some of the support functions, and SACCAWU had been invited to look at the alternatives or suggest any. Wolmarans denied that any decision was taken in May 2012 to retrench employees as meetings were on-going. He further denied that any decision was taken in June 2012 as SACCAWU had not been available during that month for meetings. He further denied any contention that no consultations took place prior to the retrenchment, and disputed any suggestion that the dismissals were related to or due to the strike action. He contended that affected employees were not victimised for their participation in the strike action as 101 employees took part in the strike and only 33 of them were retrenched.

5.9 Under cross-examination, Wolmarans further testified that the purpose of the meeting held with employees on 29 March 2012 was a consultation process and was to discuss the Respondent's financial position and its occupancy levels. Despite the exchange of communication in regards to scheduling of meetings, the union was not available for the whole month and the indication according to Wolmarans was that it was not prepared to consult.

5.10 He conceded that the Respondent was given at least six months to improve its financial position. He denied however that the Respondent had ulterior motives when it issued notices on 2 May 2012, or that the retrenchment notices were issued to circumvent the strike action.

[6] The Respondent's Resorts Security/Health and Safety Manager, Mr. Willem Koen's testimony was as follows;

6.1 He was present in a meeting held with shop stewards and other employees on 28 May 2012 during the strike. At that meeting, the issue of possible retrenchments was discussed, and possibilities of outsourcing of other departments and vacancies in surrounding lodges were also looked at. Employees were invited to look at alternatives and make suggestions as to how the company could be salvaged.

6.2 At the meeting, the attitude of the shop stewards according to Koen was to be uncooperative and obstructive. The shop stewards had displayed arrogance, had walked out at some point and appeared to have viewed the entire process of consultation as a waste of time.

[7] The Applicants' evidence as presented by Ms. Salome Rakobela, the then shop steward and Senior Matron was as follows;

7.1 The meeting held on 17 October 2011 was in respect of wage negotiations, and not retrenchments. She was also part of the meeting held on 28 May 2012 and although mention was made of retrenchments, she did not know whether the purpose of that meeting was consultative or not, as she was not familiar with the law. She conceded having said that the meeting was a 'waste of time', as the shop stewards and employees who had attended the meeting did not know the law and thus it was a waste of time talking to them rather than the Union organiser.

7.2 She denied having walked out of the meeting and testified that she had differed with management on various issues and had opted to keep quite. She further denied having seen the financial statements during the meetings and contended that she saw them for the first time during these proceedings.

7.3 The retrenchments were as result of the strike action embarked upon by the employees because only a few of those that were on strike, including two shop stewards were retrenched. This was also evident from the fact that the strike action ended on 16 July 2012 and immediately thereafter on 31 July 2012 the retrenchments had followed. She further testified that subsequent to those retrenchments, other employees were recalled and re-employed. She denied that any meetings held with the Respondent were for the purposes of discussing retrenchments.

7.4 Under cross-examination, she denied that the company had financial problems despite the financial statements placed before her for the period 2008 to 2012. She conceded that in the meeting of 29 March 2012 the company's financial position was discussed. She still however contended that she had no knowledge of the company's financial losses.

7.5 She also conceded having attended the meeting of 28 May 2012 as a shop steward where management had discussed issues surrounding retrenchments. She however contended that they were not informed of the intention to retrench. When it was put to her that management had informed that the company found itself in a position where it was forced to retrench, she conceded that this was so, but that however they disagreed with the retrenchments as the Respondent did not have any financial problems.

7.6 It was further put to her that attempts were made to consult with the employees and the Union and further that they were informed to consider alternatives to retrenchments. Her response was that the Respondent did not wait for the Union, and had instead discussed the matter with the employees who had no knowledge of labour laws. It was according to her, unfair for management to speak directly to the employees and shop stewards. She nevertheless conceded that issues pertaining to retrenchments were discussed.

7.7 She further conceded that the Union was invited and did not attend meetings hence the respondent discussed the matter directly with the employees and shop stewards. She further conceded that no decision was taken in May and June 2012 to retrench employees. She insisted that the retrenchments were rushed after the strike action was ended. This was despite it being put to her that notices of retrenchments were only issued on 2 May 2012 and the retrenchments were effected on 31 July 2012.

7.8 In regards to her contention that the retrenchments were as a result of the strike action, she could not comment when it was put to her that firstly, the retrenchment process started earlier than the strike action and ended after that action and secondly, that only 33 out of 202 employees were retrenched, and thirdly, that one of the camps had closed down after the strike for a period of twelve months.

[8] Mr. Malebo Mphahlele, the Union's local organiser's testimony was as follows;

8.1 The purpose of the meeting of 9 May 2012 was to discuss the retrenchment of employees. During the strike which commenced on 14 May 2012, various meetings were held to end the strike, and not to discuss retrenchments.

8.2 Under cross-examination, he conceded that the Union had received a letter on 2 May 2012 inviting it to consult and to make proposals. He conceded that the Respondent had made various suggestions for meetings to be held but that the Union was not available on certain dates including for the whole month of May 2012. He further conceded that the Respondent had sent correspondence to the Union on 15 May 2012 requesting a meeting to consult over possible retrenchments and that the Union did not respond until 31 May 2012 when it suggested the date of 6 June 2012. He further conceded that the Respondent had made various attempt to accommodate the Union.

8.3 He confirmed having attended the meeting of 6 June 2012. Despite it being pointed out to him[3] that retrenchments were discussed in that meeting, including alternatives considered by management, he insisted that the meeting had nothing to do with retrenchments. His reasoning was that the Union wanted the issue of the strike to be finalised first before retrenchments could be discussed.

8.4 He further conceded that between 2 May and 23 July 2012 the Union was invited on no less than seven occasions for consultations and had failed to meet with the company. He further conceded that the Respondent did not take any decision to retrench until on 26 July 2012.

Evaluation:

[9] Three issues are central to this dispute. The first is whether there was in fact in general, a need to retrench the employees. Secondly, whether the retrenchments were not in retaliation to or due to the strike action embarked upon by the employees, and thirdly, if there was a genuine need to retrench, whether the Respondent had followed a proper consultation process.

[10] The starting point is Section 23(1) of the Constitution[4] which provides that "*everyone has the right to fair labour practices".* The Labour Relations Act[5]

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[3] At page 41 of the trial bundle
[4] Act 108 of 1996
[5] Act 66 of 1995 as amended

(the LRA) gives effect to this constitutional right, and provides in section 185, that every employee has the right not to be unfairly dismissed.

[11] Section 188(1)(a)(ii) of the LRA provides that a dismissal is not fair if the employer fails to prove, *inter alia*, that '*the reason for dismissal is a fair reason based on the employer's operational requirements'*. Furthermore, section 188(1)(b) provides that a dismissal which was not effected in accordance with the fair procedure is unfair.

[12] Section 213 of the LRA defines '*operational requirements'* to mean requirements based on economic, technological, structural or similar needs of an employer. Item 1 of the Code of Good practice on dismissal based on operational requirements states that:

> "…..As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."

[13] The onus is on the employer to prove the fairness of the dismissal. In this regard, the Labour Appeal Court in *Super Group Supply Chain Partners v Dlamini and Another*[6] restated that it is expected of the employer to discharge the onus of proving that that the dismissals of the employees were fair. In doing so, evidence should be presented to show that there was indeed a need to retrench, that there was a fair reason to retrench the employees, that the selection criteria was fair; and the dismissals were effected in accordance with the requirements of a fair procedure.

Proper consultations?

[14] The Respondent as already indicated had at the time of the retrenchments, a total workforce of 202 employees, and 33 were ultimately retrenched on 31 July 2012. The applicable provisions in this regard are those in section 189A

[6] (2013) 34 ILJ 108 (LAC) at para 27

of the LRA. These provisions received attention in *Edcon v Steenkamp and Others*[7], where the Labour Appeal Court held that;

> "Having carved out distinct alternative procedures for the resolution of disputes about the substantive fairness of large scale retrenchments, section 189A of the LRA additionally creates a distinct procedure for disputes about procedural fairness in dismissals falling within the ambit of the section. Section 189A(18) of the LRA provides that the Labour Court may not adjudicate a dispute about the procedural fairness of an operational requirements dismissal referred to it in terms of section 191(5)(b)(ii) of the LRA. Consulting parties who allege procedural unfairness in the consultation process are now required to approach the Labour Court by way of an application made in terms of section 189A(13) of the LRA within 30 days after the employer has given notice to terminate or, if notice of termination is not given, within 30 days of the date of dismissal. In an application made in terms of section 189A(13) of the LRA, the consulting party may seek an order, if need be on an urgent basis,-
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> (a) compelling the employer to comply with a fair procedure;
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
> (c) directing the employer to reinstate an employee until it has complied with a fair procedure; or
> (d) awarding compensation, if an order in terms of paragraphs (a)-(c) is not appropriate."
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> And
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> "The object of section 189A(13) of the LRA, as appears from a purposive interpretation of section 189A read as a whole and in context, is to separate out procedural issues and to provide a means whereby the consultation and facilitation processes are not undermined by procedural flaws. It offers a useful expedient to the parties to seek the assistance of the court, acting as the guardian of the process, to ensure that the issues are adequately identified, considered and ventilated in the process of consultation or facilitation before it ends. It thus ensures that only disputes about the fairness of substantive reasons and outcomes will generally be subjected to resolution

[7] 2015 (4) SA 247 (LAC) at paras 19-20

by means of collective action or in a trial involving the hearing of oral evidence".

[15] In the light of the above principles, it would not be necessary to deal with the alleged procedural unfairness of the dismissals save to state the following;

SACCAWU's main submissions in regards to consultations was that these were not meaningful as they were held with employees and shop stewards who were not familiar with the process and thus could not meaningfully make any contribution to that process. The common cause facts however indicated that the notice of contemplated retrenchments was issued on 2 May 2012. A total of seven invitations were issued to SACCAWU for consultations between 2 May 2012 and 20 July 2012.

[16] A consultation meeting was held between the Respondent and the shop stewards on 28 May 2012, which was followed by another consultation with SACCAWU on 6 June 2012. Following a further meeting with SACCAWU on 5 July 2012, the latter was informed on 10 July 2012 that the Respondent would proceed with restructuring. On 25 July 2015 notices of retrenchments were issued and still SACCAWU had not taken any action until after the process of retrenchment was completed on 31 July 2012.

[17] From the above, it is apparent that SACCAWU was fully aware of the contemplated retrenchments and planned consultation meetings. If it was aggrieved by the process at any stage prior to or immediately after 25 July 2012, it should have approached the court in terms of section 189A(13) of the LRA. To the extent that there is a substantive component to the consultation process which the Applicants may have cause to be aggrieved about, the evidence placed before the court as shall be illustrated below nevertheless established that there was indeed a commercial and business rationale for the decision taken by the Respondent.

Was there in general a need to retrench?

[18] The question to be determined in this regard is whether the Respondent had a genuine and fair operational reason for deciding that retrenchments were

necessary. The test applicable in determining the substantive fairness of retrenchments was also restated in *Super Group*. The LAC endorsed its earlier decision in *Kotze v Rebel Discount Liquor Group (Pty) Ltd*[8] where it was held that;

> "The final decision to retrench must be informed by what transpired during consultation. That is why consultation must precede the final decision. The requirement of consultation is essentially a formal or procedural one, but it also has a substantive purpose. That purpose is to ensure that such a decision is properly and genuinely justifiable by the operational requirements or by a commercial or business rationale."

And

> "The function of the court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process."

[19] A further principle established over time in determining the substantive fairness of retrenchments is that a court is not entitled to dictate to an employer as to the most commercially viable way of running its business. This however does not imply that the decision by an employer should not be scrutinized for the purpose of establishing whether there was justification for that decision[9]. Thus unless the court is satisfied that there was a proper explanation of the reasons for the dismissal, which reasons are supported by credible evidence, the employer will not be regarded as having discharged the onus placed on it to prove the existence of a substantively fair reason for the dismissal.

[20] In his closing argument, Mr. Lekala on behalf of the Applicants had submitted that the fact that the Respondent had re-employed some of the dismissed

[8] (2000) 21 ILJ 129 (LAC) at para 18(h)-(i)

[9] *Forecourt Express (Pty) Ltd. v SA Transport & Allied Workers Union & Another* (2006) 27 ILJ 2537 (LAC)

employees indicated that there was no need to retrench, and further that the Respondent failed to furnish the employees and the Union with the necessary financial statements to support its contention that its business was not making a profit.

[21] Advocate Prinsloo for the Respondent had submitted that in determining whether the decision to restructure the Respondent's business operations was commercially rational, the evidence of Wolmarans, its Group Financial Manager is instructive. Evidence led in this regard pertained to the background and current state of the Respondent's financial position, and it is my view that despite the Applicants' denials that the Respondent's financial position was not a justification for retrenchments, such evidence nevertheless indicates otherwise.

[22] Firstly, in the 16 months between June 2008 and December 2012, only once in June 2010 did the Respondent make some profit which was in any event marginal. In essence, the Respondent had consistently over a period of five years failed to make any profit, and had as a result, suffered losses in a region of R3.2 million. Nothing presented on behalf of the Applicants could gainsay this evidence.

[23] Secondly, and as further testified by Wolmarans and supported by documentation[10], the Respondent's occupancy rate, which was its core business was at 55% in the 16 months up to June 2008; 45.70% in the 12 months up to June 2009; 38% in the 12 months up to June 2010; 34.85% in the 12 months up to June 2011; 42.76% in the six months up to December 2011 and 42.40% in the 12 months up to December 2012. In regards to the financial position of the Respondent and these figures in the periods mentioned, it was correctly pointed out on behalf of the Respondent that these could not be disputed during the cross-examination of Wolmarans.

[24] Rakobela's insistence on the other hand that the Respondent did not have such problems was clearly not based on any tangible evidence to indicate otherwise. She had grudgingly conceded during cross-examination that during

[10] Page 145 of the trial bundle

the consultation process, the financial position of the Respondent was discussed on numerous occasions. As it was also correctly pointed out during her cross-examination, her own personal views on the financial position of the Respondent were not in any event relevant, as they were not supported by any evidence to indicate otherwise.

[25] A third consideration pertaining to the Respondent's finances was its inability to meet the employees' wage demands. It was common cause that wage negotiations had commenced in May 2011. The parties had agreed to extend the period of negotiations from August 2011 until February 2012. The Applicants had conceded that this was for the purposes of allowing the Respondent time to improve its financial position. This in my view can only be confirmation of acknowledgement on the part of SACCAWU and the employees of the Respondent's dire financial position. It therefore does not make any sense to contend that the Respondent did not have any financial problems necessitating a need to restructure.

[26] As at February 2012, the financial position had not changed and still the Respondent could not afford to meet the wage demands made by the employees. It was not disputed that the Respondent could only afford to pay minimum wages as per the sectoral determination. This was despite its efforts to sell off some of its assets or shares and other measures taken to improve the situation. Despite all these attempts and discussions of the Respondent's financial position in March 2012, I fail to appreciate any insistence on the part of the Applicants that the Respondent had not been faced with a dire financial position.

[27] The Respondent's financial position as also illustrated during the cross-examination of Rakobela did not change much as evident from the closure of the Respondent's Ravine Camp for 12 months between July 2012 and July 2013. To this end, it should be concluded that decision taken by the Respondent to embark on a retrenchment process was genuinely justifiable, as it was based on a commercial or business rationale.

[28] A further ground relied upon by the Applicants in contending that the Respondent's financial position was not dire was the allegation that it had re-employed some of the ex-employees after the retrenchments. Wolmarans had no knowledge of two ex-employees subsequently re-employed after the retrenchments. Rakobela had testified that she was aware of three ex-employees that were re-employed as they are her neighbours.

[29] The Respondent did not strenuously challenge the version that some ex-employees were re-employed. Nevertheless, to the extent that that the issue was raised within the context of disputing that there was a need to retrench, the re-employment of three ex-employees out of a total of 33 can hardly in my view be considered as a factor indicating that the Respondent's finances prior to those retrenchments were sound. It is further not known when these ex-employees were re-employed and the circumstances that led to their re-employment. On the whole however, there is no merit in the argument advanced in this regard.

Were the retrenchments due to the protected strike embarked upon by the employees?

[30] Ordinarily, this issue would have been dealt with within the context of an automatically unfair dismissal as contemplated in section 187 (1) (a) of the LRA[11]. It was however never the Applicants' case that their dismissal was automatically unfair as can be gleaned from the fact that the dispute referred to the CCMA pertained to an alleged unfair dismissal relating to the Respondent's operational requirements. Furthermore, the Applicants' pleadings do not in any manner indicate any allegation of an automatically unfair dismissal.

[31] The allegation that the employees were retrenched as a result of their participation was raised for the first time in the parties' pre-trial minute[12]. The

[11] **187 Automatically unfair dismissals**

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

(a) That the *employee* participated in or supported, or indicated an intention to participate in or support, a *strike or protest action* that complies with the provisions of Chapter IV

[12] See paras 4.3 and 19 of the minutes

Respondent however did not raise any preliminary point in this regard, and to the extent that it had dealt with these allegations, it is deemed convenient to equally deal with them.

[32] It was argued on behalf of the Applicants that the timeline of events indicate that the retrenchments were rushed flowing from the commencement of the strike action on 14 May 2012. In this regard, it was further argued that the fact that immediately after the strike action was ended on 16 July 2012, the decision to effect the retrenchments on 31 July 2012 is an indication that the Respondent clearly intended to dismiss employees.

[33] The chronology of events indicate that with effect from 16 May 2011, the parties had been engaged in wage negotiations that were extended until February 2012 after a certificate of outcome was issued by the CCMA. When further negotiations failed on 6 April 2012, the employees had embarked on a protected strike action with effect from 14 May 2012. It was common cause that throughout this period, the parties had engaged each other with a view of resolving the wage dispute.

[34] The Respondent had issued a notice of possible retrenchments on 2 May 2012, some 12 days prior to the strike action being embarked upon. Thus the retrenchment process started before the commencement of the strike action, and was finalised after the strike came to an end. An issue that had caused the protracted negotiations and inability to resolve the wage demands was the Respondent's financial position which has already been dealt with elsewhere in this judgment. On the sole issue of the Respondent's financial position, there can be no substance in the allegation that the retrenchments were for any other reason.

[35] A further factor that makes the Applicants' allegations improbable is that out of its total workforce of 202 employees, 101 had participated in the strike action, and only 33 were ultimately retrenched. If there was indeed any intention on the part of the Respondent to punish those employees that had participated in the strike action, such intention in my view would have been reflected in the number of those retrenched.

[36] It therefore follows from the above that there is no merit in the contention that the retrenchments were in retaliation of the employees' participation in the strike action. It is accepted that the process of wage negotiations with a view of ending the strike became intertwined with the retrenchment process when notices were issued on 2 May 2012. Inasmuch as it was important for the employees and the union to find a solution to the wage demands, it was equally important for the Respondent to take measures to ensure its survival. Given its financial position as at the end of the strike action, the Respondent was within its rights to proceed with the finalisation of the retrenchment process, and the mere fact that the two processes coincided does not imply *mala fides* on the part of the Respondent.

[37] In conclusion, I am satisfied that the Respondent established a general need to retrench, and that there were no viable alternatives to retrenchment of the individual Applicants. I have further had regard to the issue of costs, and it is my view that considerations of law and fairness militate against such an order. Accordingly, the following order is made;

Order:

i. The dismissal of the individual applicants on the grounds of the Respondent's operational requirements was substantively fair.

ii. There is no order as to costs.

Tlhotlhalemaje

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Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants: Mr. N Lekala of SACCAWU

On behalf of the Respondent: Adv. C Prinsloo

Instructed by: Nel van der Merwe Smalman Attorneys