



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 47/11

In the matter between

NELSON MENGGO AND 2 OTHERS

Applicant

and

DALY SALES AND MERCHANDISING (PTY) LTD

t/a CRAKSHAW DESIGNS

Respondent

Heard: 09-10 March 2015

Delivered: 11 December 2015

Summary: The applicant may not rely on its refusal to participate in consultation to prove the procedural unfairness of a retrenchment.

JUDGMENT

LALLIE, J

- [1] The first respondent operated in the business of fitting marble, granite and engineered kitchen and bathroom tops. Selling marble and granite tombstones formed a very small portion of the applicant's business. When the

first respondent indicated that it could no longer pursue the business owing to unfavourable economic conditions, the second respondent bought it in order to retain a presence in the Port Elizabeth area in the hope of retaining and expanding its market share. The individual applicants (“applicants”) were originally employed by the first respondent and became employees of the second respondent as a result of the sale of business.

- [2] During January 2010, the applicant trade union (NUM) commenced wage negotiations with the first respondent. NUM was acting on behalf of its members who were employed by the first respondent including the applicants. The meeting was followed by further interaction between the parties which I will deal with later in this judgment. It culminated in the applicants’ dismissal on 21 July 2010. NUM referred an unfair dismissal dispute on behalf of the applicants to the Commission for Conciliation Mediation and Arbitration (the CCMA). A certificate of the non-resolution of the dispute was issued on 3 September 2010 and on 06 September 2010, the dispute was referred to arbitration. At the arbitration which was scheduled for 22 November 2010, the first respondent submitted that the applicants were dismissed for its operational requirements whereupon the commissioner made a ruling that the CCMA lacked jurisdiction to arbitrate it. The matter was thereafter referred to this court for adjudication. The applicant submitted that the applicants’ dismissal was both substantively and procedurally unfair, a claim which the respondents denied.
- [3] The applicants submitted that their dismissal for operational requirements of the respondent was substantively unfair because there was no good, alternatively insufficient reason for their dismissal. The respondents did not disclose the reasons for and the operational difficulty which led to their dismissal. They further alleged that the respondent failed to demonstrate that the retrenchment was necessary or it was the only practical solution to the alleged operational problems or that the extent of the retrenchment was justifiable given the overall nature of the respondent’s operational position. They further pleaded that their dismissal was automatically unfair for two reasons. The first is related to the transfer of the business from the first to the

second respondent in terms of section 197 of the LRA. And the other is that their dismissal is in conflict with section 187 (1) (a) of the LRA as it occurred during and was motivated by their participation in a protected strike.

- [4] The factual basis of the applicants' claim is briefly that in 2009 the first respondent and its employees represented by NUM entered into wage negotiations. Early in 2010, the first respondent informed NUM that the wage negotiation could not be pursued as it sought to consult on retrenchment of some employees. It implemented short time unilaterally and in May 2010, NUM referred a dispute to the CCMA. NUM gave the first respondent a strike notice and its members employed at the first respondent went on a go slow. In June 2010, there were consultations between the first respondent and NUM. The purpose of the consultations was disputed by NUM which insists that it was a continuation of the wage negotiations while the first respondent maintains that the consultations related to the retrenchment of some employees. One of the applicants, Mr Mengo ("Mengo"), was a shop steward. He got to know a few days after his dismissal that the reason for the dismissal was retrenchment. The applicants submitted that the manner in which they were selected for retrenchment remained a mystery. After all the evidence was led the applicants submitted that they were no longer pursuing the arguments that their dismissal was automatically unfair.
- [5] Justifying the substantive fairness of the dismissal, Mr Daly ("Daly") who was the owner of the first respondent testified that he bought the business in 2006. Its purchase price was R4 million. The second respondent supplied it with the marble, granite and engineered tops which the first respondent cut and fitted in kitchens and bathrooms. As the owner, he was at the business daily and dispatched teams of workers to jobs. He monitored the business daily, weekly and its monthly turn over. The income was based on a commission which was paid to them at Crankshaw, Queenstown. It varied from 30% to 20% of the job. He dismissed the applicants on 2 July 2010 because of the downward trend in business which was affected by the world economic meltdown. The downward spiral of the business affected the construction business as well as competitors of the first respondent. In 2008, the first respondent had about 21

employees of five people teams consisting of a fitter and two general assistants and an employee in the office environment. As the recession progressed numbers dwindled and in 2009, the first respondent was left with about five people. By September 2011, the business was costing him a lot to keep afloat and he sold it at a loss at the price of R72 251,00 including property and plant on 10 November 2011. The reason for the retrenchment, therefore, was that the first respondent could no longer afford to pay all its employees and the employees were reduced by one team which consisted of the applicants. Daly's evidence on the reason for the retrenchment was not refuted. I, therefore, have to accept that the first respondent's financial constraints constituted valid reason for retrenchment. The applicant withdrew its claim that the applicants' dismissal was automatically unfair.

- [6] I will now turn my attention to the issue of the procedural fairness of the applicants' retrenchment. On 4 December 2009, NUM submitted proposals for wage negotiations to the first respondent. They demanded 25% wage increase across the board, provident fund, housing and skills development. The first respondent forwarded the proposals to SEESA an employers association that it affiliated to for assistance. SEESA arranged a meeting with NUM officials for 12 January 2010. It, however, had to be postponed owing to the unavailability of a NUM official and shop steward. It was held on 2 February 2010 but no agreement was reached as NUM demanded a 25% wage increment while the first respondent refused to give any increment. On 11 March 2010, a further meeting was held where NUM officials reduced their demand to 15% but the first respondent insisted on no wage increment. On 13 April 2010, the NUM officials, having obtained a certificate of the non-resolution of a dispute between itself and the first respondent, served the first respondent with a notification to embark on industrial action. On 19 April 2010, SEESA invited the NUM officials to a meeting at the first respondent's premises to discuss short time. NUM officials were not available and the employees were represented by Mengo who agreed with the first respondent that employees would work short time. In a meeting of 06 May 2010, NUM reduced its demand to 11% but the first respondent did not move from its position not to grant wage increment as it alleged that it could not afford it.

- [7] On 12 June 2010, SEESA invited NUM officials to a retrenchment consultation scheduled for 15 June 2010 at the first respondent's premises. As NUM officials opted not to honour the consultation meeting, Mengo represented the employees. The first respondent informed Mengo that the short time which NUM had suggested would not work. It also intimated that it would proceed to retrench. The first respondent served its employees with retrenchment notices. The first respondent held a further meeting with NUM officials on 15 June 2010. NUM informed the first respondent that its employees were on a go slow and demanded a 5% wage increase. They refused to discuss retrenchment and insisted on pursuing wage negotiations. At the meeting of 23 June 2010, the first respondent disclosed the reason for retrenchment to be lack of business. In a meeting that the parties held on 20 July 2010, NUM officials refused to discuss the issue of the criteria to be used in the retrenchment exercise and walked out as an expression of their dissatisfaction to what they perceived to be the first respondent's unacceptable conduct of changing wage negotiations into retrenchment consultation. The first respondent selected applicants for retrenchment having used employees' skills to select fitters and LIFO to select general workers. It dismissed them for its operational requirements and paid them severance pay. The first respondent submitted that it did not employ new employees after the applicants' retrenchment except for one employee who was engaged in January 2014 to finish a job.
- [8] The applicants' claim that their retrenchment was procedurally unfair is based on the submission that it is contrary to the requirements of section 189 of the LRA and that the first respondent failed to disclose in writing or at all to the applicants and NUM representatives, all the relevant information as required by section 189 (3) of the LRA. It failed or refused to consult adequately, meaningfully or at all with the applicants or their NUM representatives in any or all of the matters that it was required to consult on in section 189 (2)(a). The first respondent's case was that its attempts to consult adequately with the applicants and their NUM officials were thwarted by their refusal to consult on retrenchment and their persistence to pursue wage negotiations. Although the applicants initially denied having received the notice in terms of section

189 (3), they later conceded that consultation meetings on the retrenchment were held. They conceded that a NUM official and representative were present when the consultations took place. They argued that the first respondent morphed retrenchments into the wage negotiations. It is common cause that on the consultation meeting of 20 July 2010, union representatives walked out in protest as they were refusing to consult on retrenchment but wished to pursue wage negotiations. NUM may not lay the blame for the quality of the consultation at the door of the first respondent when it abdicated its duty as a consulting party. In *NUMSA v General Motors of SA (Pty) Ltd*,¹ it was held that NUMSA could not rely on its intransigence during the consultation process in proving procedural unfairness of a retrenchment. In *SAA v Bogopa and Others*,² blameworthy conduct of an employee and his or her trade union which prevents consultation to reach finality may not be relied upon for proving procedural unfairness of retrenchment. As NUM thwarted the first respondent's efforts to comply with provisions of section 189 of the LRA, it may not seek to rely on the first respondent's failure to fulfil its obligations set out in section 189 of the LRA. It is common cause that consultation meetings were held between NUM officials, and representatives and the first respondent but the quality of the consultation was influenced by NUM's conduct. I, therefore, conclude that the first respondent discharged the onus of proving the procedural fairness of the applicants' dismissal for its operational requirements.

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

9.1 The applicants' claim is dismissed.

Lallie, J

Judge of the Labour Court of South Africa

¹ [2009] 9 BLLR 914 (LC) at para 56.

² [2007] 11 BLLR 1064 (LAC) at para 44.

Appearances:

For the Applicants: Advocate Grogan

Instructed by Wesley Pretorius & Associates

For the Respondent: Mr Unwin of Chris Unwin Attorneys

LABOUR COURT