IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS79114

In the matter between:

SOUTHERN AFRICAN CLOTHING AND TEXTILE WORKERS UNION — **First Applicant**

MAGGIE MALALA — **Second Applicant**

LESEGO RACHEL NKHUMANE — **Third Applicant**

and

STEPHEAD MILITARY HEADWEAR CC — **Respondent**

Heard: 25 – 26 August 2016

Delivered: 20 March 2017

JUDGMENT

TLHOTLHALEMAJE J

Introduction and background

[1] SACTWU approached this Court by way of a statement of claim to challenge the substantive and procedural fairness of the dismissal of its members, viz, Ms Maggie Malala, and Ms Lesego Rachel (the Employees) on 23 April 2014. Their dismissal was pursuant to a purported retrenchment exercise in terms of the provisions of section 189 of the Labour Relations Act.[1]

[2] The respondent conducts its business as a designer and manufacturer of military headwear, badges and other accessories for the military, the SAPS, other security agencies and non-military institutions. The Employees were employed with effect from 1 September 2009 and 8 October 2010 respectively as Machinist/sample and pattern makers in the respondent's Development Department until 23 April 2014.

[3] As recorded in the parties' pre-trial minutes, the Employees' key performance areas included *inter alia*, translating the drawings, products, specifications and samples into pattern paper; maintaining and opening communication with the respondent's operational manager and production factory manager; producing 'product patterns; ensuring that sample patterns matched original designs; altering, adjusting and redesigning sample products.

[1] 66 of 1995 (LRA).

[4] It was common cause that with effect from 13 September 2013, the Employees were placed on short time and were informed not to report for duty from 16 September 2013. They were only paid two weeks' salary for that month. Whilst they were placed on short time between October and November 2013, the respondent employed two new employees within the same department that they were employed in. The one individual was employed as Design and Development Manager, and had performed the functions which were performed by the Employees before they were placed on short time. The other individual was employed as a Sample Maker.

[5] On 3 December 2013, the respondent issued a notice in terms of the provisions of section 189(3) of the LRA[2] in which it was stated that:

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[2] Section 189(3) provides:

> "(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—
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> (a) the reasons for the proposed dismissals;
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> (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
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> (c) the number of employees likely to be affected and the job categories in which they are employed;
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> (d) the proposed method for selecting which employees to dismiss;
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> (e) the time when, or the period during which, the dismissals are likely to take effect;
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> (f) the severance pay proposed;
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> (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
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> (h) the possibility of the future re-employment of the employees who are dismissed;
>
> (i) the number of employees employed by the employer; and

"Due to the following circumstances based on economic needs and reductions of the company's production. The company/employer is considering retrenchments. Step Head Military Headwear is experiencing financial difficulty, due to the down turn in procuring new contracts and has led to a loss of finances and a substantial decline in the workload. To ensure the economical well-being of the company the employer is considering retrenchments and needs your written reaction to this as soon as possible but no late than close of business 11/12/2013 (one week)."

[6] A meeting was held on 11 December 2013 between the representatives of the respondents and those of the Employees' Union. The purpose of that meeting was purportedly to attempt consensus on the contemplated dismissal. In the course of the meeting, the Union raised concerns surrounding the fact that the respondent had not disclosed its financial status in support of the contention that it was not doing well; the employment of new people whilst the Employees were placed on short time; the selection criteria; and the reason only one department was affected.

[7] A further meeting was held on 12 March 2014 and again the Union raised its concerns surrounding the employment of the other two people in the Employees' positions. The Union had suggested that all departments must be considered and where necessary, LIFO ought to be the preferred method of selection. Amongst the respondent's responses to these concerns was that to confirm that indeed new people were employed, but that they were more skilled and able to

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(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months."

perform other functions which the Employees could not perform. A severance package of a pay equivalent to 1.5 weeks' wages for each year of service was proposed by the respondent. No agreement could be reached on the retrenchments and as a result, the Employees were handed their notices of dismissal on 23 April 2016.

The evidence

[8] The respondent called two witnesses in support of its case, viz, its Managing Member, Ms Maureen Simoes, and Emily Taukobong, its Human Resources Manager. The applicants had closed their case without calling witnesses. The respondent's initial stance on the matter as can be gleaned from the pleadings was that the dismissals were effected on the basis of its operational requirements and/or their inability to do their designated jobs properly.[3]

[9] In these proceedings and based on the evidence led on its behalf, it transpired that the Employees were effectively dismissed for poor work performance. To the extent that this was the case, it was argued on its behalf that the dispute must be remitted back to the relevant Bargaining Council to be conciliated and adjudicated as a dismissal for poor work performance. The Employees on the other hand maintained that they were retrenched in accordance with the process contemplated by section 189 of the Act and therefore the procedural and substantive fairness of their dismissal ought to be tested in accordance with the provision of section 189 of the LRA in the light of the evidence presented.

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[3] Statement of Response at paragraph 3.1.

[10] Maureen Simoes' testimony can be summarised as follows:

10.1 The Employees started their employment as sewing machinists and sample markers. At some point during their employ, they were promoted to positions of pattern maker in 2011 after they had received their certificates including a diploma in dressmaking;

10.2 The respondent's business is dependent on tender work, and had over time expanded, with orders being also received from *inter alia*, Israel Military (Ministry of Defence) in 2008 to produce berets, badges etc;

10.3 It was at some point noticed that the Employees were not performing according to standards, especially in respect of the SAA and SANDF contracts. The respondent had been appointed by SAA with effect from 12 November 2012 to supply and deliver *inter alia* shirts and blouses for the Airline. The proposed contract was to be for a period of three (3) years, but the respondent failed to meet its delivery deadline;

10.4 The respondent was anticipating another tender, and had assigned the Employees to the SAA order. They however did not make the correct samples, which turned out to be of poor quality. Of concern were the samples produced for SAA, and the number of times the samples had been submitted to SAA and only to be rejected. The respondent was given time to resolve these issues and to submit proper samples;

10.5 The above turn of events proved to be an embarrassment for the respondent, and final warnings were then issued to employees in the factory. On 3 June 2013, the respondent was scheduled to make a final presentation to SAA. Still, the presentation revealed that the samples were defective, and a further meeting was then held with the employees;

10.6 In view of these problems, the respondent on 3 June 2013 decided to cancel the contract with SAA on the basis that it could not meet delivery deadline. The respondent however received another tender from the South African Navy to deliver 3 000 ties by March 2013. This being a new venture, the pattern makers had to produce samples but could however not do so. The work had to be outsourced to another company, resulting in deliveries being made about 6-7 months out of deadlines;

10.7 The respondent received another tender from the South African Army to deliver shorts. It had not produced shorts before, and the pattern markers could not produce the necessary samples or do so correctly. Inspectors from the SABS having inspected the samples had rejected them, resulting in the respondent being penalised for late delivery or the products ordered. Again, the work had to be outsourced to another company based in Cape Town, and this implied additional costs as fabric material already ordered for the products had to be shipped off to Cape Town;

10.8 There was another tender received on 18 February 2013 from the South African Military Health Services for the supply of ruby ties. The respondent could not produce the right samples after receiving the order in May 2013. The samples were again rejected by the SABS. The problem was with the quality, deviations from specifications, constructions, workmanship quality and dimensions. The ties were due to be delivered in

July 2013. Again, the respondent had to acquire the services of another company located in Durban to make the samples;

10.9 The respondent made a profit of R1 million at the financial year end of February 2013. However, in the financial year end of February 2014, it made a loss of approximately the same amount. Over time, it was realised that the Employees had performance issues despite these being discussed with them informally, especially with Malala who was also a shop steward. The Operations Manager, HR, and the Factory Manager had discussions with them and when spoken to, they had failed to react in any positive manner. Amongst concerns raised with them was the poor quality of samples, the use of cell phones in the workplace and general poor performance;

10.10 The Employees were placed on short time in September 2013, and before then, they had been rotated. This was due to the fact that there was not much work at the time. Simoes was uncertain whether any other employees were placed on short time;

10.11 Another person was employed as Design Development Manager during November 2013 while the Employees were on short time. Simoes denied that this person’s duties included making patterns and contended that productivity had improved when this new person came in, as she could also use a machine for patterns;

10.12 Simoes blamed the Employees for three years in loss of production and contended that the respondent could not retain them. Had they performed according to expected standards and been productive, they would have been retained;

10.13 According to Simoes, the Employees were dismissed on 23 April 2014, and the retrenchments followed as they were on short time. Part of the reasoning for the retrenchments according to her was that the respondent intended to outsource patterns;

10.14 The Employees could have in fact been subjected to discipline due to poor work performance rather than being retrenched. She confirmed that they were the only employees in the respondent's employ to be retrenched, and contended that they have since not been replaced;

10.15 Under cross-examination, Simoes confirmed that there were different departments within the respondent, including administration, the cutting room, the production floor, the hand workers, the preparation department and the Design and Development;

10.16 The Design and Development Department was started in 2013, and the Employees were multi-skilled, and were initially promoted because they had skills which added value after being given performance agreements. Prior to their promotion, they had not done patterns before;

10.17 Malala in particular was a good machinist and regarded as the most proficient all-rounder in 2007, and there were no concerns in regard to her performance;

10.18 She confirmed that the Employees were retrenched due to poor work performance because that is what the respondent thought was correct at the time. This was despite the fact that performance appraisals conducted in March 2013 in respect of both of them revealed that they had met expectations;

10.19 She further confirmed that prior to the retrenchment process no comparison were made between the performance of new sample marker (Mapane) and the Employees. A decision was made in accordance of what the respondent deemed as a choice between two inefficient people or to close down the factory;

10.20 The Employees nevertheless had to be retrenched as a choice had to be made amongst multi-skilled employees, those that had performed, were committed and showed willingness to work. According to Simoes, LIFO was not an option as the Employees lacked commitment or willingness. She contended that long service did not necessarily get the work done;

10.21 There were no alternatives considered as the Employees' performance was assessed against the performance of other employees. The respondent, in hindsight, and in view of performance concerns, ought to have followed the disciplinary route rather than retrenching them. There was according to Simoes, a basis for charging them with misconduct, and poor work performance. This was due to the fact that they were given an opportunity to improve, were put on short time, and thereafter retrenched. A further problem encountered in not instituting disciplinary measures against them was that one of them was a shop steward.

[11] The evidence of Ms Emily Taukobong was that the Employees were promoted in 2011 to positions of pattern markers as they had the necessary qualifications. At no point did they raise any problems and concerns about training, and it was only when they got a performance contract that they raised the issue of grading. In 2012 when

performance assessments were done, they had then raised the need to be trained on grading and computers.

[12] When the SAA order was secured, the Employees had struggled with the patterns. Meetings were held with them in June and August 2013 in the presence of the Production Manager surrounding the delay in samples, patterns and lack of production. The Employees nevertheless showed no commitment or intention to improve, resulting in them being placed on short time, particularly after work on patterns had to be outsourced and after the SABS rejected certain samples.

[13] In her capacity as HR Manager, she had advised management to start with the process of retrenchments. This had resulted in a meeting of 13 December 2013 with the Union representative. At that meeting, the Union representative had made suggestions, including that the Employees should be moved to other departments. The Union also suggested LIFO as a selection criteria. The respondent's attitude however was not to support LIFO. Taukobong's view was that had the Employees performed well, they would still be employed.

[14] Cross-examination of Taukobong revealed that there was one other machinist with lesser service than the Employees. Other employees such as Anna Baloyi and Sarah Mthobeni were employed at the same time as them. During the two consultations, the Union was informed that only one department was to be affected by retrenchments, and that it could be closed down because the samples and patterns were a problem and further since those services were to be outsourced. She conceded however that the department was not closed down especially after the appointment of Design and Development Manager and a sample maker. She denied that the new sample maker

performed the same tasks as the Employees, and that she mainly did new samples. Her performance contract was also different, and her responsibilities were extended to include training others on the pattern machine which the respondent acquired in 2014 after it had received funds from the Department of Trade and Industry.

[15] Taukobong reiterated that there were concerns with the performance of the Employees, especially Malala after her appointment as shop steward and promotion as pattern marker. She nevertheless contended that concerns surrounding willingness to work and attitude were not the selection criteria, and that the two positions had become redundant after the respondent employed a person who could do the work.

The legal framework and evaluation

[16] In accordance with the parties' pre-trial minutes, this Court is required to determine:

i. Whether the dismissal of the Employees was procedurally and substantively unfair;

ii. Whether there was an agreement that the Employees ought to be placed on short time;

iii. Whether the NBCCMI has jurisdiction to hear and determine the dismissal dispute.

[17] I intend to dispose of the last two issues first. The issue of whether or not there was an agreement to place the Employees on short time does not take this matter any further in the light of the common cause fact that they were indeed placed on short time.

[18] The issue of whether the NBCCMI has jurisdiction to determine the dismissal dispute is in my view moot at this point of the proceedings. As shall be further illustrated below, in regards to the issue of onus and jurisdiction, once the applicants were informed at the time of the dismissal that those dismissals were as a result of operational requirements, they were entitled to follow the dispute resolution procedures laid down in sections 135;[4] 191 (5) (b) (ii);[5] and

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[4] Section 135 is headed: "*Resolution of disputes through conciliation*" and provides—

"(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

(2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30-day period.

(3) The commissioner must determine a process to attempt to resolve the dispute which may include—

(a) mediating the dispute;

(b) conducting a fact-finding exercise; and

(c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.

(3A) If a single commissioner has been appointed, in terms of subsection (1), in respect of more than one dispute involving the same parties, that commissioner may consolidate the conciliation proceedings so that all the disputes concerned may be dealt with in the same proceedings.

(5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties—

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;

(b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and

(c) the commissioner must file the original of that certificate with the Commission.

(6)(a) If a dispute about a matter of mutual interest has been referred to the Commission and the parties to the dispute are engaged in an essential service then, despite subsection (1), the parties may

191 (11) (a)[6] of the LRA. The mere fact that the respondent at this belated stage sought to have the reason for the dismissal changed to alleged poor work performance cannot deprive the court of jurisdiction to determine the issue whether the dismissals were procedurally and substantively fair or not.

[19] An initial preliminary point in regards to whether the real reason why the Employees were dismissed related to operational reasons or whether they were dismissed for poor work performance as raised by

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consent within seven days of the date the Commission received the referral—

(i) to the appointment of a specific commissioner by the Commission to attempt to resolve the dispute through conciliation; and

(ii) to that commissioner's terms of reference.

(b) If the parties do not consent to either of those matters within the seven day period, the Commission must as soon as possible—

(i) appoint a commissioner to attempt to resolve the dispute; and

(ii) determine the commissioner's terms of reference."

[5] Section 191(5)(b)(ii) states that—

"(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved—

. . .

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—

. . .

(ii) based on the employer's operational requirements"

[6] Section 191(11)(a) provides:

"The referral, in terms of subsection (5)(b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved."

the respondent was abandoned at the commencement of the proceedings, and correctly so in the light of the concessions to be made and the evidence led.

[20] The starting point in this case in the light of the pleadings and the evidence led is that in instances where an employer dismisses employees on account of its operational requirements, the provisions of section 188(1) read together with those of section 192(2) of the LRA obliges the employer to prove that the reason for the dismissal was fair. In emphasising the question of onus, Tlaletsi JA (as he then was) in *Super Group Supply Chain Partners v Dlamini and Another*[7] restated that it is expected of the employer to discharge the onus of proving that the dismissals of the employees were fair. In doing so, evidence was to be presented to demonstrate that there was indeed a need to retrench in the sense that there was a fair reason to retrench; the selection criteria was fair and objective; and the dismissals were effected in accordance with the requirements of a fair procedure.

[21] The immediate difficulty that arises in this case pertains to what the respondent's case was as stated in the pleadings, and what that case turned out to be during these proceedings. As already indicated with the summation of the evidence as above, the respondent's initial stance was to concede that it—

"went through an ostensible process applicable to dismissals for operational reasons involving an official from First Respondent and that it purported to dismiss Second and Third Applicants for operational reasons."

It was further stated in its reply that this was—

"*done for the benefit of Second and Third Applicants by causing them to be paid severance pay in excess of the statutory minimum, the*

7 (2013) 34 ILJ 108 (LAC); [2013] 3 BLLR 255 (LAC) at para 27.

alternate being that they would have received no severance pay; and *'preventing the publication of the true reason for their dismissal, being an inability to do the job, which would have prejudiced their efforts to seek alternative employment elsewhere."*[8]

[22] The above being the case, it is trite that litigants stand and fall by their pleadings. Counsel for the respondent had at the end, correctly conceded that the evidence led in these proceedings demonstrated that the real reason for the dismissal was poor performance. It was further conceded that even if the Employees were dismissed for poor work performance, there might indeed be a case of procedural unfairness to answer to.

[23] There are however inherent difficulties that are faced by the respondent in this case. The ultimate determination of this dispute cannot solely be on the grounds that concessions have been made. In its misguided effort to show 'benevolence' towards the Employees, the respondent had in the same vein, sugar coated the real reason for the dismissal, which does not assist it when it comes to discharging its onus of proving that the *reason* for the *dismissal* was fair as required in terms of the provisions of section 188 of the LRA.[9]

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[8] See under heading 2.2 paras (i) – (ii).

[9] Section 188 of the LRA is entitled **"Other unfair dismissals"** and provides:

"(1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove—

(a) that the reason for *dismissal* is a fair reason—

(i) related to the *employee's conduct or capacity; or*

(ii) based on the employer's *operational requirements*; and

(b) that the *dismissal* was effected in accordance with a fair procedure.

(1) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in

[24] Ultimately, the Court is required to determine what the real reason for the dismissal was and whether it was fair or not. It goes without saying that an employer is not permitted to dismiss employees for X reason, and then come to court and contend that those employees were instead dismissed for Y reasons. This is so in that there is a distinction between a dismissal for a reason based on an employer's operational requirements and a dismissal based on conduct or capacity. Furthermore, the dispute resolution mechanisms contained in the LRA, read together with applicable Codes of Good Practice dictate or provide guidelines in respect of distinct forms of dismissals, inclusive of appropriate remedies in that regard. Other than these factors, aligned to the dispute resolution procedures is the important factor of jurisdiction in regards to how and which forum these various disputes can be determined.

[25] It has long been held in *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River*[10] that an employer cannot dismiss employees for operational requirements simply because of the difficulties involved in proving misconduct, or as in this case, proving poor work performance. It can further not be correct for employers to disguise the real reason for a dismissal as there are consequences that flow from that dismissal. Any contention that such a disguise was to benefit the employees should be rejected out-rightly.

[26] To the extent that evidence was led in this case in respect of the purported retrenchments, I am prepared to accept that the ultimate decision to retrench or real reason for the dismissal was therefore not

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accordance with a fair procedure must take into account any relevant *code of good practice* issued in terms of *this Act*."

[10] (2010) 31 ILJ 1654 (LC); [2010] 9 BLLR 903 (LC).

properly and genuinely justifiable by operational requirements or, based on any commercial or business rationale.

[27] In *Havemann v Secequip (Pty) Ltd*,[11] Savage AJA held that—

> "a fair reason is one that is bona fide and rationally justified, and informed by a proper and valid commercial or business rationale. The enquiry is not whether the reason put up is one which would have been chosen by the court but whether the reason advanced considered objectively is fair."

In this case, the reason for retrenchments, to the extent that it was a means of getting rid of what the respondent deemed to be poor performers was a sham[12] , as it was unrelated to any operational requirements as defined in section 213 of the LRA[13].

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[11] [2016] ZALAC 53 at para 28.

[12] See *Decision Surveys International (Pty) Ltd v Dlamini and Others* [1999] 5 BLLR 413 (LAC) at para 27 where it was held that:

> "The ultimate decision to retrench must be fair. In this context, fairness means that the ultimate decision to retrench must "properly and genuinely" be justified by operational requirements. The ultimate decision must be "genuine and not merely a sham" (*SACTWU & others v Discreto* (supra) at paragraph 8). The court's function, therefore, is not merely to determine whether the requirements for a proper consultation process have been followed and whether the decision to retrench was commercially justifiable. There may be other options open to the employer other than retrenchment such as short time, casual employment, or demotion. If the employer resorts to retrenchment when alternatives to retrenchment are available, it cannot be said that the ultimate decision to retrench is necessarily fair. The court will, therefore, examine the reasons advanced for retrenchment in order to determine whether the ultimate decision to retrench is genuine and not a sham. However, this is not to say courts are to second guess the commercial or business efficacy of the employer's decision. Nor is the enquiry whether the best decision was taken . . . The enquiry is whether the retrenchment is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances."

[13] Section 213 defines "operational requirements" to mean—

> "requirements based on the economic, technological, structural or similar needs of an employer."

[28] In the light of the above conclusions, it would not be necessary to examine whether other requirements applicable in dismissals based on operational requirements were met. This is so in that once it is concluded that the real reason for a dismissal was disguised as a retrenchment, any purported procedures followed in that regard are equally deemed to have been a charade, as they could not have been intended to follow the spirit of the provisions of section 189 of the LRA.

[29] Even if these other considerations were to be examined, first, regarding the need to retrench, it was common cause that not long after the Employees were placed on short time, the respondent employed other people to essentially perform the same tasks that the Employees had performed[14]. If indeed operational requirements compelled the respondent to place the Employees on short time, it is inexplicable that they would have been replaced immediately by someone else in their positions. There was therefore in any event, no genuine or rational basis for declaring the Employees redundant, let alone placing them on short time.

[30] A second factor is that it was common cause that two purported consultation meetings were held between the respondent and the Union representing the Employees. The meetings cannot in my view be construed to have been meant for any meaningful engagement with the Union in that none of its proposals pertaining to bumping or selection criteria were even considered. The Union's concerns surrounding the need to retrench in the light of the employment of new people did not appear to elicit any positive response from the respondent. The respondent's attitude was merely to present a

[14] See also paragraph 2.8 of the Pre-trial minutes.

severance package equivalent to 1.5 weeks' wages for each year of service and to get rid of what it perceived to be non-performers.

[31] Equally, the criteria adopted in selecting the Employees, i.e. willingness to work, attitude or performance can hardly be considered as fair or objective. Taukobong's evidence was that the concerns surrounding willingness to work and attitude were not the selection criteria, and that the two positions had become redundant after the respondent employed a person who could do the work. This evidence however does not take the respondent's case any further in that its contention throughout these proceedings was that the Employees were poor performers who lacked commitment. In any event, it was common cause that that new people were employed in the Employees' department after they were placed on short time. Their placement on short time and the employment of new people in their stead goes to the very essence of fairness of their dismissal. The employment of new people in positions previously occupied by the Employees was the *sine qua non* of them being declared redundant in the first place.

[32] Section 189(2)(b) of the LRA requires an employer and the other consulting parties to engage in a meaningful, joint consensus-seeking process and attempt to reach consensus on the method for selecting the employees to be dismissed. From these consultations, the employer is obliged to consider and respond to any suggestions made by the Union or employees, and not to simply ignore those suggestions.[15] Thus, even if there is no agreement between the parties, ultimately the respondent must still prove that the method of selection was fair and objective.

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[15] *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292; [2006] 2 BLLR 142 (LAC).

[33] It was held in *CWIU and Others v Latex Surgical Products* that the use of selection criteria that are not fairly and objectively applied renders a dismissal procedurally and substantively unfair.[16] Simoes and Taukobong had conceded that the Employees had longer service than other employees not selected for retrenchment. To this end, the suggestion by the Union that LIFO should have been considered could not simply have been dismissed on the basis that 'long service did not make a difference' or that 'long service does not get the job done' as Simoes had contended. This dismissive response can hardly be objective.

[34] To the extent that it was confirmed that the dismissal of the Employees was due to alleged poor work performance, it was argued on behalf of the respondents that the Court should then determine whether the dismissal was in any event unfair in the light of the evidence led. To deal with the fairness or otherwise of the dismissal based on poor performance on its own would not be within the jurisdiction of this Court, as ordinarily such a matter would have been the subject of arbitration. I however intend to deal with the issue of poor performance not as a stand-alone reason for the dismissal, but within the context of a determination of whether the selection criteria adopted was fair or objective. This is so in that in accordance with the principles enunciated in *Food and Allied Workers Union obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River; Premier Foods Ltd t/a Blue Ribbon Salt River v Food and Allied Workers Union obo Kapesi and Others.*[17] It is permissible in certain circumstances for employers to use grounds such as misconduct, and by implication,

[16] Id at paras 94-6.

[17] (2012) 33 ILJ 1729 (LAC).

capacity and/or performance as acceptable and reasonable criterion for selecting employees for retrenchment.

[35] In this case, even if the respondent could use poor performance as a reasonable criterion, the evidence led in regard to the Employees' poor performance cannot on a balance of probabilities lead to a conclusion that dismissals were fair. It was correctly pointed out on behalf of the applicants that Item 9 of Schedule 8 of the LRA provided guidelines in regard to dismissals for poor work performance. It was in any event conceded on behalf of the respondent that procedural fairness might be an issue in this regard.

[36] It is my view that it was not sufficient for the employer to simply allege that employees were poor performers. It needed to demonstrate in what material respects, even if they were poor performers, it had confronted that problem in the sense of training, counselling etc. Even on the evidence of Simoes, the individual applicants were good performers, were trained, qualified, and were also promoted at some point of their employment. I have no reason to doubt Simoes' evidence that there were indeed performance concerns surrounding the Employees, and that concerns were raised with them. However, even if this was the case, and in the light of what has already been stated, there was no reason for them to be dismissed after being placed on short time especially. There were various contradictions presented in this case as to whether the Employees were poor performers or not. At some point, they are praised as qualified, all-rounders, capable, and competent to deserve promotion. When matters went pear-shaped however, the respondent was quick to vilify them for having caused loss of production or tenders.

[37] Ultimately however, even if there were concerns surrounding the Employee's performance, there was no justification to first place them on short time, and as if that was not enough, then retrench to make

way for other employees it deemed suitable. This approach cannot by any stretch of imagination be fair. Overall, I am therefore satisfied that the respondent failed to discharge the onus of proving that the dismissal of the Employees was procedurally and substantively fair.

Relief

[38] The Employees as per their statement of claim sought retrospective reinstatement. It was submitted on behalf of the respondent that if any relief was to be granted, it could only be in respect of procedural unfairness, and even then, it must be taken into account that the Employees were already paid six weeks' salary as part of the severance package.

[39] There is merit in the submissions made on behalf of the Employees that there is no reason in section 193(2) of the LRA that militates against an order of retrospective reinstatement. On the evidence of the respondent's Taukobong, the department where the individual applicants used to be employed is still fully operational, and there was nothing placed before the Court to justify why a reinstatement was not appropriate. In any event, reinstatement is the primary remedy in unfair dismissal disputes, and section 193(1)(a) of the LRA confers a discretion on this Court to determine the extent of retrospectivity of the reinstatement.[18] In this case, the Employees were dismissed on

[18] See *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (2) BCLR 111 (CC) at para 36, where it was held that:

> "The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of section 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The

23 April 2014, having been placed on short time since September 2013. The six weeks' salary paid to them as severance package is small comfort in the circumstances where, immediately after their placement on short time, the respondent had employed someone else in their stead. That amount is also of small comfort when it is taken into account that they were dismissed after going for almost seven months without a salary. Furthermore, the fact that their dismissal was disguised as a retrenchment when the respondent knew that this was not the case makes it even more grossly unfair.

[40] In the light of these considerations, I am satisfied that retrospective reinstatement in this case would be appropriate. It is my view however that given the circumstances of this case, any amount of back-pay due to the Employees as a result of retrospective reinstatement ought to exclude any severance payments made at the time of their purported retrenchment on 23 April 2014.

I have also had regard to the requirements of law and fairness in regards to the issue of costs, and I am satisfied that a cost order is not warranted given the circumstances of this case.

Order

[41] Accordingly, the following order is made:

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only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The ordinary meaning of the word "reinstate" means that the reinstatement will not run a date from after the arbitration award. Ordinarily then, if a Commissioner of the CCMA order the reinstatement of an employee that reinstatement will operate from the date of the award of the CCMA, unless the Commissioner decides to render the reinstatement retrospective. The fact that the dismissed employee has been without income during the period since his or her dismissal must, among other things, be taken into account in the exercise of the discretion, given that the employee's having been without income for that period was a direct result of the employer's conduct in dismissing him or her unfairly."

1) The dismissal of the second and third applicants was procedurally and substantively unfair.

2) The respondent is ordered to reinstate the second and third Applicants in its employ, with retrospective effect from 23 April 2014, and on the same terms and conditions as applicable to their employ.

3) Payments of back-pay in the form of remuneration and benefits due to the second and third applicants as a result of their retrospective reinstatement shall exclude any severance payments made to them as a result of their purported retrenchment.

4) There is no order as to costs.

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Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: R Daniels of Cheadle Thompson & Haysom Inc.

For the Respondent: R. G Beaton SC

Instructed by: De Villiers & Du Plessis Attorneys