



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. JS 159/16

In the matter between:

NUMSA OBO THEMBA KILI AND 10 OTHERS

Applicant

and

VIVA STEEL FAB ENGINEERING (PTY) LIMITED

t/a VIVA ENGINEERING

Respondent

Heard: 10 may 2017

Delivered: 06 September 2017

Summary: Dismissal based on operational requirements. Reduction of customer orders and introduction of voluntary severance packages sufficient to demonstrate the Respondent's operational difficulties. The Applicants' dismissal not unfair.

JUDGMENT

BALOYI AJ

Introduction

- [1] Eleven individual employees (Applicants) assisted by the trade union, National Union of Metal Workers of South Africa (NUMSA) approached this Court to prosecute an unfair dismissal claim based on operational requirements. The application is opposed and both parties led evidence in support of their respective cases. The Applicants sought relief of reinstatement while the Respondent moved for dismissal of the Applicants' claim with costs.

Background

- [2] The Respondent is a metal fabrication company supplying its finished products to companies conducting mining activities. In 2013 it had two workshops, one in Germiston and another in Spartan (known as shop 1 and shop 5 respectively) in the East Rand. The painting functions were outsourced to V n V Short Blasters that was carrying out its activities in Brakpan, also in the East Rand owned by one Hennie Van den Veen (van den Veen). The Respondent took over the business of V n V (the paint shop) under desperate circumstances as Van den Veen abandoned his business. He disappeared without trace, thus leaving his employees and landlord unpaid. At that time the Respondent had huge customer orders which V n V had to paint on its behalf. As a result, it found itself with no option but to foot V n V's bills in order to get the production going. The Respondent facilitated introduction of V n V employees to a Labour Broker. Later on and out of negotiations with the trade union, the Respondent dispensed with the services of the Labour Broker and took a decision to employ them on permanent basis. At the beginning of 2015 the Respondent experienced a shortage of orders and its operations were severely

affected to a point that it invited employees to apply for voluntary severance packages. The services of 34 employees from various sections were eventually terminated out of this arrangement.

- [3] The four night shift employees were absorbed into day shift as the volume of work went down. On 08 April 2015 the Respondent issued notice in terms of section 189(3) of the Labour Relations Act¹ (LRA) contemplating to retrench employees in the paint shop. In terms of the notice four employees were likely to be affected. On 17 June 2015 a whilst consultation process was still in progress relating to the four workshop employees, the Respondent issued another notice in terms of section 189(3) contemplating further retrenchment. This time twenty employees were affected. 12 of the 34 employees who took voluntary severance packages were from the paint shop. Consultations took place on 29 April 2015, 03 June 2015 and 29 June 2015. Failure to reach agreement on renewal of lease agreement between the Respondent and the landlord affected the Respondent's operations. The lease agreement expired on 30 June 2015 and the Respondent was forced to close the workshop.
- [4] On 21 July 2015 the Respondent issued another notice in terms of section 189(3) of the LRA. The trade union and the Respondent agreed to facilitation before the Commission for Conciliation, Mediation and Arbitration (CCMA) which sat for some days between August and October 2015. Extensions were agreed to be based on the trade union's proposal for skills training. The trade union held a view that there was no need for further retrenchments as 34 people had already taken voluntary severance packages. The Applicants were ultimately dismissed on 14 October 2014. At the time of their dismissal the Respondent had already laid the Applicants off. The Applicants referred an unfair dismissal dispute based on operational requirements on 02 November 2015 to the Metal and Engineering Industries Bargaining Council (MEIBC). The dispute was thereafter referred to this Court in terms of Rule 6 following the issuing of

¹ Act 66 of 1995.

the certificate of outcome to the effect that the dispute remained unresolved.

The evidence

- [5] In support of its case, the evidence tendered by the Respondent's first witness, Mr Michael Pollestrini (Pollestrini) is essentially that the employment of workshop employees on a permanent basis on 29 October 2014 came at the time when there was sufficient work. Day and night-shift operations were set up on this basis. It had at a minimum of 150 tons of work to be done which had later dropped to 40 tons. The parties were unable to reach an agreement during consultation meetings. The Second notice in terms of section 189(3) of the LRA was precipitated by the landlord's intentions to increase rental to the paint shop by 80%. This left the Respondent with no option but to close the workshop as the increase was excessive. Lack of premises became an additional problem to the decreased work.
- [6] After expiry of the lease and closure of the paint shop, the paint shop employees were made to report at the Germiston workshop. It was not possible to do painting and blasting in Germiston and Spartan workshops. The paint shop employees were made to work short time in that they were divided into two teams with team A working for the period between Mondays and Wednesdays while team B was working between Wednesdays and Fridays. It was the Respondent's inability to secure new business which led to its decision to offer voluntary services packages. On 30 June 2015 a skills test (also referred to as skills audit) was conducted and Mr Philip Diamond (Diamond) was tasked to steer the process. The employees volunteered to be tested with exception of Ngobese and Myeni. They all passed after being tested.
- [7] There were only three grinders amongst the 34 people who took voluntary severance packages and the Respondent was only capable of filling two of the three grinding positions by J Nxumalo and W Monyamangene while

the third one became redundant. On 25 July 2017 Ngobese and Myeni volunteered to work as labourers at Shop 5 in Spartan. Mntambo volunteered to do cleaning despite his willingness to do grinding that he passed its tests. On 01 September 2015 the Respondent undertook another skills test on advice of the CCMA facilitator which the employees refused to take on reason that they did not have overalls. In January 2016 the Respondent re-employed Joe Mashiloane as a forklift driver because he had the relevant operator licence. The Respondent was unable to find positions for the remaining 11 employees. On comparing the Respondent's financial position for 2014 and 2015 financial years, the Respondent suffered losses in excess of R2 million.

- [8] Contrary to the Applicants' propositions he maintained that there was significant drop of work as they used to have 150 – 250 tons of work and the financial statements reflected loss of revenue. He admitted to having outsourced part of the Respondent's work in November 2014. The reason being that there was sufficient work then, the Respondent had deadlines to meet and retrenchment was never an issue then. He further pointed out that there was no longer outsourcing at the time of closure of the workshop in June 2015. The work was reduced and the Respondent was experiencing financial losses. Although the Respondent did not specifically cite financial reasons for the retrenchment in two meetings, the losses were experienced. Inheriting Van den Veen's debts also took its toll on the Respondent.
- [9] In April 2015 they outsourced work to Majestic for sandblasting as the Respondent was only doing short blasting. In July 2015 the Respondent outsourced work to JR & L for paint work after closure of its workshop. He did not dispute the Applicants' proposition that the employees who were not tested for grinding did not refuse to do so but Diamond did not want to test them because they did not have clean overalls. He went on to state that the employees were normally provided with new overalls in June or July and it did not happen because the paint shop was already closed. According to what Diamond told him they blatantly refused to take the

skills test. He admitted to the fact that Cronje had indeed asked them about the skills they had on advice from the CCMA. He was unable to give account to the effect that none of the employees were advised to apply for general worker positions.

[10] Diamond was the Respondent's second witness and confirmed that he conducted the first and second skills audits. On the first one only Monyemangene, Hugo, Mntambo and Khumalo told him that they could work with a grinder hence he tested them. During the second skills audit held on 27 July 2015 only Monyemangene participated, the rest refused. He was asked by management to find two labourers at shop 5 in Spartan, Ngobese and Myeni volunteered. He had no knowledge that the Applicants were not tested because of dirty overalls. He was able to remember that Chipape told him that he could operate a forklift. He was however not sure on whether Chipape was asked about the fork lift or whether he volunteered the information. He tested the employees on the grinder based on what they told him.

[11] Phehello Samuel Tshabalala (Tshabalala), one of the Applicants and NUMSA shop steward testified in support of the Applicants' case. He disagreed with any suggestion that there was no work in the paint shop. The Respondent took the work away and gave it to the subcontractors who were used during the period between November 2014 and January 2015. Closure of the workshop was highly unnecessary as 34 people had already taken voluntary severance packages. The Respondent's losses were caused by paying both paint shop employees and the subcontractors at the same time. He was aware of 9 people who were placed in shops 1 and 5 while the remaining 11 were retrenched. On 30 June 2015 Diamond asked them as to which jobs were they doing at the paint shop. He took those with overalls in good condition for testing and told the rest that they would be supplied with overalls. They were told that the purpose of testing them on grinding and drilling was to have them ready for consideration should the positions be available. He had never refused to be tested and it

was never brought to his attention as a shop steward that some employees refused to be tested.

- [12] When they were invited to the work place on 01 September 2015 they were already laid off. What happened on that day did not amount to an interview as in his case he was specifically asked if he could weld. He also played a role of an interpreter for the other employees. Ngobese and Myeni did not volunteer as alleged, they were telephonically contacted and told to report at Shop 5. It was never suggested to the paint shop employees that they should volunteer to perform cleaning duties.
- [13] He stated that a '*lot of work*' in the paint shop he referred to was the very work that was available during November 2014, December 2014 and January 2015. He maintained that even after January 2015 three subcontracting companies operating in the same premises as the Respondent were receiving substantial workflow from the Respondent, namely Majestic, MCS and Hender. JR & L were also used after the retrenchment. He denied that there was a difference between short blasting done in the paint shop and sandblasting that was outsourced to Majestic. He agreed to the proposition that the Respondent had time frames within which it had to deliver to its customers. He did not find rationale behind outsourcing that was carried out when they were working on short time if the Respondent was worried about the time frames. He agreed that the Respondent's consultation with the trade union on short time was precipitated by shortage of work. He had no knowledge about finances, he was therefore not in a position to testify to that effect. He emphatically pointed that the Respondent never mentioned financial problems as a reason for the retrenchment. He however agreed that the state of the Respondent's finances was shown to the trade union. He did not know the reason for closure of the workshop. He admitted that the other workshops did not have equipment for sandblasting such as air receivers, dust extraction unit and compressors. He denied that Diamond asked him if he had other skills, he was only asked if he could grind.

The arguments

[14] The drop in work flow followed by financial losses were major factors calling for retrenchment, so argued the Respondent. The closure of the workshop was caused by an 80% increase on rental which the Respondent found unsustainable. Opening a new workshop as intimated by the Applicants was not a viable option because of work shortage. The work that came after closure of the paint shop was indeed outsourced as the Respondent was no longer capable of performing it. Such work did not solve the Respondent's work shortage problems. The Respondent had taken steps to avoid job losses in the paint shop and only succeeded in placing 7 employees out of 18 to the alternative positions.

[15] The Applicant's arguments were heavily rested on the fact that there was no need to retrench the paint shop employees because the shedding of 34 employees through voluntary severance packages created vacancies. Only 4 employees were affected by the retrenchment in the paint shop but the Respondent elected to hide behind the paint shop closure in order to unfairly dismiss the Applicants. Its financial statement for the period ending February 2016 reflected that profits were made. Pollastrini and Diamond gave evidence of poor quality on their attempt to demonstrate that the Respondent took measures to place the employees in alternative positions. The Respondent's claim that the Applicants refused to be tested was a way of escaping that the Applicants were turned down due to dirty overalls.

Analysis

[16] It is highly appropriate at this very point to pay attention to those issues the Court is required to determine as identified by the parties in paragraph 4 of the pre-trial minute which reads as follows:

“4.1 Whether the dismissal of the individual applicants was automatically unfair in that the reason for their dismissal

was that the respondent unfairly discriminated against them on an arbitrary ground.

- 4.2 Whether the dismissal of the individual applicants was substantively unfair.
- 4.3 The relief to be awarded.
- 4.4 Costs.”

[17] In so far as item 4.1 above is concerned, no case was laid in support of this issue. I therefore see no harm being perpetuated by considering it abandoned. What matters most is the substantive fairness of the dismissal which the Respondent is, as it is the case here placed to the task of establishing. Relief sought as identified flowed from the Respondent’s failure to establish the fairness of the dismissal. In *South African Chemical Workers U and Others v Afrox Ltd*² the Labour Appeal Court laid down the employer’s duty in this regard at paragraph 44 follows:

“[44] The requirements that must be proved to show substantive fairness are those set out on section 189 (2), read with sections 189 (7) and 196 (para [36] above). The employer bears the onus of proving substantive fairness and the other requirements set out above (in para [37]), and must do so on a balance or preponderance of probabilities (the civil standard of proof). If a presiding officer is unable to conclude, on the basis of the evidence presented to her or him, that a dismissal was fair, it follows (because of the incidence of the onus) that the employer will fail in its defence to a claim by an employee for unfair dismissal.

[18] In *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd*³ the Labour Appeal Court called for caution to be applied upon determination of

² 1999 10 BLLR 1005 LAC

³ (2003) 11 BLLR 1081 (LAC) The Court in paragraph 70 went further to point that the Court should not hesitate to deal with an issue that requires no special expertise, skill or knowledge particularly where logic and common sense prevail.

substantive fairness of the dismissal based operational requirements and had this to say at paragraph 69:

“[69] Sometimes it is said that a court should not be critical of the solution that an employer has decided to employ in order to resolve a problem in its business because it normally will not have the business knowledge or expertise which the employer as a businessperson may have to deal with problems in the workplace. This is true. However, it is not absolute and should not be taken too far. When either the Labour Court or this Court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair”.

[19] In this instant case the Applicants denied that the Respondent was under financial distress. The reason being that there was sufficient work which the Respondent had elected to outsource to subcontracting companies instead of giving it to them to execute. The facts of this matter undoubtedly revealed that the following issues were not in dispute:

- 19.1 During November 2014, December 2014 and January 2015 the Respondent had to deliver 150 to 250 tons of steel work.
- 19.2 The Respondent had time frames within which it had to deliver its customers' finished work.
- 19.3 Short blasting was during those peak periods carried out at the paint shop situated in Brakpan.

- 19.4 After January 2015 the Respondent felt an impact of economic downturn experienced in the mining industry which led to reduction of work flow from the Respondent's customers.
- 19.5 The Respondent subsequently introduced voluntary severance packages which 34 people had taken.
- 19.6 Only 2 of the 34 employees who took voluntary severance packages were grinders.
- 19.7 The drop in workflow caused the Respondent to transfer the night shift employees in the paint shop to day shift.
- 19.8 The increased rental for the paint shop led to its closure as the Respondent was unable to sustain it.
- 19.9 Shops 1 and 5 were not equipped to perform sandblasting functions.
- 19.10 By agreement between the trade union and the Respondent, the Applicants had to work short days at shop 5 after the paint shop was closed.

[20] It bears mention that the dismissals based on operational requirements are specifically regarded as dismissals occasioned on no fault basis. Section 189 of the LRA has been designed to prevent injustices in circumstances where dismissals based on operational requirements are likely to occur. The basics of this protection were clearly unpacked in *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*⁴ as follows:

“[23] Every person has a fundamental right to fair labour practices (section 23(1)(a) of the Constitution). In the present context expression is given to this in the LRA by affording an

⁴ (1998) 12 BLLR 1215 at paras 23 and 24

employee the right not to be unfairly dismissed (section 185) and an employer the right to dismiss an employee in accordance with a fair procedure (section 188(1)(a)(ii) and (b)).

[24] Section 189 regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to dismiss for operational reasons. It is a provision that is inextricably linked to the fairness or otherwise of a dismissal based on operational requirements. Apart from that it serves no other purpose”.

[21] As I am dealing with this matter I kept high note of the fact that only substantive fairness is the issue requiring determination. On the other hand, it is worth mentioning that the provisions of sections 189 or 189A largely bring about pre-dismissal mechanisms which boil down to procedures. The procedures are immensely helpful towards the establishment of whether a fair reason existed for the dismissal. This is certainly picked up from issues discussed during consultations as well as evidence tendered here. The cumulative effect of the above makes it difficult to find that no reason existed for the Respondent to offer voluntarily severance packages. The Applicants’ contention that the Respondent was nevertheless making profit is definitely lacking in foundation when taking into account that no evidence was led on behalf of the Applicants on this aspect. Furthermore that the departure of 34 people on voluntary severance packages created vacancies seem to be subjectively based on hope rather than reality consistent with undisputable facts appearing above. That the Respondent used the workshop closure as an excuse to effect dismissal is certainly an introduction of an unsustainable motive in the light of the undisputed issue about rental increases. In the *SACWU*⁵ case the Court was alive to this aspect and ultimately held as follows:

“[43] This does not necessarily mean that dismissal will only be

⁵ See footnote 1.

fair if used as a means of last resort. By making fairness of the dismissal a matter of proof (sections 188 (1) (a) and 192 (2)), the LRA has made the assessment of fairness dependent on the factors proved and canvassed in evidence in court. This imposes a discipline upon the parties to the dispute and the person hearing the case. If an employer wishes to show that it considered appropriate options other than dismissal it must present evidence to that effect and explain why it chose a particular course and not another. If an employee wishes to challenge that evidence it must do so by proper cross-examination on the relevant issues and, if considered necessary, by leading rebutting evidence. If this shows up the untenability of the employer's position, it will have a material effect in the final assessment of fairness. The presiding officer's assessment of the fairness or otherwise of the dismissal will also be dependent on the evidence presented before him or her. An assessment on 'moral' considerations not based on the evidence led at the trial will be impermissible. (All this is not new. It happens every day in all courts, in relation to all sorts of different kind of issues. It is the very stuff of litigation and adjudication.)"

[22] Particular regard in these circumstances should be given to the fact that by 30 June 2015, 34 employees had already left the Respondent after taking voluntary severance packages, secondly, consultations over workshop employees who were initially affected and those affected upon issuing of the second notice had already commenced. The CCMA's advice to conduct a skills audit was seemingly misconstrued as the Applicants incorrectly laboured under the impression that once tested for performance of a particular task, employment was guaranteed.

[23] Since it became quite clear that the Respondent did not have vacancies to accommodate all paint shop employees, it is therefore immaterial to decide whether the Applicants were not tested because they refused to or because they were turned away due to the condition of their overalls.

In actual fact even if they were tested and passed such tests, the situation as it stood could not render them employable within the Respondent due to unavailability of vacancies coupled with financial distress that was caused by little work flowing into the Respondent's operation. In the circumstances I see no reason for a finding that the Respondent has unfairly dismissed the Applicants. Based on the above the Applicant's application cannot succeed.

[24] The parties were well of the same mind about the relationship between the Respondent and the trade union that was still ongoing. In their view the award of costs was not a preferred item for determination by this Court. On this note making a cost order will in deed not serve the requirements of law and fairness.

[25] In the premises the following order is therefore made:

Order

1. The Applicants' unfair dismissal claim is dismissed.
2. There is no order as to costs.

M M BALOYI

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate. Van der Riet (SC)

Instructed by: Mabaso Attorneys

For the Respondent: Advocate. S Collet

Instructed by: Ken McDade Attorneys

LABOUR COURT