



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 07/15

In the matter between:

SAMUEL MOTLOUTSI

First Applicant

SIBUSISO MAZIBUKO

Second Applicant

and

PABALLO & KHUMO TRADING CC

Respondent

Heard: 02-03 November 2017

Delivered: 17 November 2017

Summary: A referral in terms of which the applicants alleged that they were unfairly dismissed. The respondent stating that the dismissal was for operational reasons and accordingly fair. The duty rests on an employer to prove that a dismissal of an employee was unavoidable. An employer must disclose all relevant information prior to consultation to ensure meaningful joint consensus-seeking engagement. The dismissal was unfair and the applicants were compensated.

JUDGMENT

MOSHOANA J

Introduction

- [1] This is a referral in terms of section 191 of the Labour Relations Act.¹ (LRA). The applicants allege that the respondent dismissed them unfairly. The respondent states that the dismissal is fair as it was based on its operational reasons.

Background facts

- [2] The respondent is a close corporation operating in the electrical industry. Between the periods April to October 2014, the respondent suffered a loss of workload in its Services Department. As a result thereof, the respondent had to consider restructuring of its business operations. Following the decision to restructure, the respondent identified the two applicants as affected employees. The two applicants were invited for consultations. The respondent held three consultation meetings with the applicants. Ultimately the applicants were dismissed for operational reasons.
- [3] The applicants were aggrieved by their dismissal and approached this Court for relief. They were represented through a *pro bono* programme. The respondent resisted their claim.

¹ Act 66 of 1995, as amended.

Evidence Led

- [4] Mr Salvadore Dorasamy (Dorasamy) testified that he is the member and business owner of the respondent. His company provides electrical services. It provides maintenance and new installations. The Projects Department does the new installations. Samuel Motloutsi, the first applicant qualified as an electrician without any assistance of the respondent. Similarly, Sibusiso Mazibuko, the second applicant had qualified as an electrician without the assistance of the respondent. The first applicant was employed with effect from 20 June 2011.
- [5] During 2014, there was a decrease in workload. Employees had to work two to three hours a day. There was no work. The respondent decided to restructure. The first applicant was identified for retrenchment using LIFO. The second applicant was identified because he had qualified as an electrician and the respondent had no position for a qualified electrician. Keeping the second applicant in employment would have amounted to contravention of the main agreement as advised by the Bargaining Council. The loss of workload started showing signs from April 2014 and he had hoped that the situation will improve. It did not and in October 2014 the respondent could not cope with the situation.
- [6] On 23 October 2014, he issued the two applicants with notices advising them of change in operational requirements of the business. He invited them for consultation at 13h00 on that day. At the consultation meeting he explained to the applicants a decline in workload and informed them that no decision was taken as yet. Alternatives were discussed and the applicants demanded documents which were not relevant. Bumping was not a viable option since employees in the Projects Department possess different skills. He confirmed the minutes of the consultations as a true reflection of what transpired. In the afternoon of 23 October 2014 he took the applicants' mobile phones as they abused them. The applicants were placed on paid leave. He disputed the fact that the dismissal for operational reasons was predetermined and unfair.

- [7] Access cards of the applicants were retrieved after the unprotected strike ignited by the applicants. In cross-examination he testified that out of 25 employees of the respondent only two employees were affected. He disputed that the applicants worked with live power although they switched from one department to another during their training period. Further he testified that he discovered in July 2014 that the second applicant qualified as an electrician. The second applicant could have been retained as an Assistant Electrician if the Main agreement allowed that.
- [8] Ms Du Preez was a labour consultant in the employ of a company that advised the respondent on labour issues. She played an advisory role during the retrenchment process. She assisted in drafting the notices and had dispatched them to the applicants. She explained everything to the applicants. All the points listed in the notices were discussed. She took the consultation minutes. She drafted letters at the request of the applicants. Alternatives were considered and a proper process was followed.
- [9] Motloutsi testified that he was employed effective June 2011. He started work at the Projects Department. As an electrician he checked generators, installed plugs and did fittings. He used to move from one department to the other. At the time of his dismissal, he was at the Services Department. He is experienced in both departments. He worked with live power. On 23 October 2014, one Mr Moolman informed him and the second applicant to attend a meeting. They were not told the reason for the meeting. The meeting was held at Sunnyside in Pretoria. Du Preez told them on arrival that she had bad news for them since they were going to be retrenched. The notices for change of operational requirements of business were handed to them on arrival at Sunnyside. Du Preez explained the contents after they refused to sign for the notices. It is not correct that he worked some few hours. He worked the whole day.

- [10] Six people were employed after him. In a meeting he suggested reduction of salary as an alternative. After the meeting, his and the second applicants' mobile phones were taken by Moolman. He considered this to be a dismissal. On Monday the following week there was a strike. As a result, all the access cards were retrieved but later returned to other employees to the exclusion of him and the second applicant. They requested financials and were told that they are irrelevant. He made suggestions for alternatives during the meeting.
- [11] During cross-examination he testified that the issue of the workload was discussed and that there was a need for two qualified electricians as opposed to three. They engaged a lawyer only after the first meeting, whereafter they did not.
- [12] Mazibuko testified that he was employed as a learner electrician. On 17 January 2014, he qualified as an electrician. He started at the Projects Department. He performed qualified electrician duties and had assistants. He was told that there was no position for a qualified electrician. He did not insist on a salary of a qualified electrician. He knows nothing about the provisions of the Main agreement. He was not offered any alternative position.

Argument

- [13] During argument, Ms. Lancaster for the respondent conceded that if the interpretation of the Main Agreement is wrong, then the dismissal of Mazibuko, the second applicant would be unfair. On the other hand Ms. Orken for the applicants argued that the Main Agreement cannot be used to prove the case as it was not part of the evidence before Court. Further she submitted that LIFO was not properly applied. The respondent hired new people thereafter. There was no proper compliance with section 189 of the LRA. The applicants seek compensation.

Evaluation

- [14] Since dismissal is not disputed, it was incumbent on the respondent to justify the dismissal. This Court determines substantive fairness on the basis of the evidence presented in court. Procedural fairness is determined with reference to what occurred at the employer's premises. Reduction of workload is an operational reason. The evidence of Dorasamy was not sufficiently disputed by the applicants. Therefore, on the balance of probabilities I accept that the respondent had a commercial rationale to restructure in order to respond to the issue of workload reduction.
- [15] It is the duty of the respondent to show why the applicants were dismissed. Out of 25 employees, only the two applicants were affected by this workload reduction. Ordinarily, workload reduction should affect effectively all the employees. Reduction of workload impacts on the profits of a company. From the evidence, it is clear that the first applicant was affected because he was employed last. The second applicant was affected simply because there was no position for a qualified electrician and he could not be retained as an Assistant Electrician because on the advice of the Bargaining Council, such will be in contravention of the Main Agreement. If the Main Agreement did not prohibit it, the second applicant could have been retained as an Assistant Electrician and not dismissed.
- [16] After argument I allowed parties to augment the oral submissions in writing. The respondents made a copy of the Main agreement available to the Court, without pointing out the clause that would have been offended had the second applicant been retained as an employee of the respondent. The owner relied on the advice of the Bargaining Council. Having perused the Main Agreement, it is apparent that the advice may have been wrong. It was incumbent on the respondent to demonstrate the prohibition in the Main Agreement.

- [17] The second applicant did not insist on a salary of a qualified electrician. In fact, he suggested to be kept in employment as a trainee. Accordingly, the respondent failed to prove that the dismissal of the second applicant could not be avoided. Dismissal for operational requirements must be a measure of last resort. The dismissal of the second applicant could have been avoided had it not been for the advice from the Bargaining Council. As pointed out above no provisions were pointed out to the Court which support the advice. It must follow that the dismissal of the second applicant was substantively unfair.
- [18] LIFO is generally a fair selection criterion. It simply implies that those employed last may be the first to suffer the consequences of a no fault dismissal. In this matter it was not disputed that as a result of the workload reduction, the respondent required two qualified electricians as opposed to three. Of the three qualified electricians, the first applicant was employed last. Accordingly, I do not find any unfair application of the criteria.
- [19] With regard to procedural fairness, the LRA requires an engagement in a meaningful joint consensus-seeking process aimed at reaching an agreement on appropriate measures, the method of selecting and severance pay. From the evidence before me, such a process was engaged in but parties failed to reach an agreement. Section 189(3) of the LRA obligates an employer to issue a written notice inviting the other party to consultation. Further the employer is obliged to disclose in writing all the relevant information. The notice termed "change in operational requirements of business" only invites the applicants but does not disclose the relevant information as required by the section. I accept the version of the applicants that when they attended the first meeting at Sunnyside, they were in the dark. How then can they meaningfully consult? Disclosing relevant information is an essential part of being engaged in a meaningful joint consensus-seeking process. The

provisions of section 189(3) are peremptory and must be complied with by the respondent. Failure to comply renders the dismissal procedurally unfair.

[20] Accordingly, I come to the conclusion that the dismissal of the first applicant is substantively fair but procedurally unfair. The dismissal of the second applicant is both substantively and procedurally unfair.

[21] Regarding the relief, the second applicant is entitled to the primary relief. However, he does not wish to be reinstated. Accordingly, there are no reasons why he should not be afforded maximum compensation. The first applicant's dismissal is procedurally unfair only in so far as the defect set out above. It will be inequitable and unjust to afford him maximum compensation. Compensation is not intended to punish but a *solatium*.

[22] In the results, I make the following order:

Order

1. The dismissal of the first applicant is substantively fair but procedurally unfair.
2. The dismissal of the second applicant is both substantively and procedurally unfair.
3. The respondent is to pay to the first applicant as compensation, an amount equivalent to **three months'** salary as at the time of dismissal less statutory deductions.
4. The respondent is to pay to the second applicant as compensation, an amount equivalent to **twelve months'** salary as at the time of dismissal less statutory deductions.
5. There is no order as to costs.

GN Moshwana
Judge of the Labour Court of South Africa

Appearances

For the Applicants: Advocate Orken (*pro bono*)

Instructed by: Bowman Gilfillan Inc, Sandton.

For the Respondent: S Lancaster of Lancaster Kungoane Attorneys,
Centurion.