



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: P341/10

In the matter between:

THE NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA (NUMSA)

Applicant

and

GENERAL MOTORS SOUTH AFRICA (PTY) LTD

Respondent

Heard: 5-7 September 2012, 12-15 March 2013, 18 June 2013

Delivered: 14 December 2017

Summary: The gravity of the procedural unfairness resulting from the respondent's failure to issue the notice in terms of section 189(3) of the LRA when it contemplated retrenching the individual applicants warrants an order for compensation for the procedurally unfair retrenchment.

JUDGMENT

LALLIE J,

- [1] The applicant, the National Union of Metalworkers of South Africa which will be referred to as the NUMSA in this judgment approached this court challenging the substantive fairness of the dismissal of the individual applicants for operational requirements of the respondent. The respondent is a motor vehicle manufacturer and had employed the individual applicants in different positions. Some as permanent employees and others on fixed term contracts. In 2009, pursuant to the dismissal of the individual applicants, NUMSA launched an application in terms of section 189A (13) of the Labour Relations Act¹ (the LRA) for an order declaring the dismissal of the individual applicants procedurally unfair and concomitant relief. In the judgment handed down on 17 June 2009, the court found the individual applicants' dismissal procedurally unfair. The court left the determination of the amount of compensation (if any), due to the individual applicants to the court determining the substantive fairness of the individual applicants' retrenchment. This matter is opposed by the respondent. I am indebted to Mr Niehaus and Mr Redding SC (with him Mr Wesley); the parties' legal representatives for their heads of arguments.
- [2] The respondent's case was that the individual applicants' retrenchment was substantively fair as it was a product of the global economic meltdown which led to the reduction in the demand for its products. The applicant differed and submitted that there was no economic rationale for the retrenchment. The individual applicants were dismissed as punishment for not accepting a new shift configuration which the respondent sought to introduce in its restructuring. They further submitted that in the absence of a proper consultative process, alternatives to their dismissal were not properly considered. A further ground was that the selection criteria were neither fair nor objective.
- [3] In an attempt to discharge the onus of proving the substantive fairness of the individual applicants' dismissal, the respondent called Ms Logie, its Human Resources Manager. During the retrenchment exercise which led to the

¹Act 66 of 1995 as amended.

dismissal of the individual applicants she was the respondent's Industrial Relations Manager. She testified that in determining the number of vehicles that have to be produced the respondent makes a projection in terms of the number of vehicles it anticipates selling in a given year. The respondent then set a budget of one year for the next year. The projections are reviewed at least monthly. In January 2008 the respondent anticipated building 72 600 vehicles. The respondent follows a procedure known as rebalancing to ensure that the number of its employees is commensurate to the volume of work that has to be done. A decrease in demand of the respondent's products translates into a decrease in the number of the employees it needs.

- [4] In 2008 the respondent budgeted for 72 689 units but managed to build only 51 822. In 2009 the respondent budgeted for 37 599 units but produced 25 846 vehicles. As a result of the reduction in production volume which was informed by the need for the respondent's vehicles, the respondent decided to engage NUMSA in connection with its employment levels. It consequently issued NUMSA with a notice in terms of section 189 (3) and 189A of the LRA July 2008. The rationale for the notice is stated as follows:

"RATIONALE

- 3.1 The Company's manufacturing operations as conducted in the Kempston Road and Struandale facilities, are currently geared to produce a total of approximately 300 vehicles per day.
- 3.2 This daily production capacity comprises the following:
 - 3.2.1 140 vehicles on the Corsa line.
 - 3.2.2 105 vehicles for the Isuzu line.
 - 3.2.3 40 vehicles on the Hummer line.
 - 3.2.4 16 vehicles on the Commercial line.
- 3.3 The numbers of employees engaged on the production lines, and in allied functions in direct support of production remain directly

proportional to the employment levels required to meet this production output.

- 3.4 In January 2008, the projection of production requirements for locally produced vehicles for the year was in the order of 68 500 vehicles.
- 3.5 The Company's production capacity, including its employment levels, accorded with this projection.
- 3.6 Since January 2008 a dramatic shift has taken place in the market for the Company's locally produced vehicles.
- 3.7 The projected production requirements for the year, as at June 2008, have declined by some 24%.
- 3.8 The total annual requirement for locally produced vehicles is now in the order of 50 000 vehicles.
- 3.9 All production lines are equally affected.
- 3.10 During the intervening period between January and June 2008, the company has endeavoured to absorb the steady decline in production requirements, by implementing short time.
- 3.11 This however is a short-term solution which has failed to adequately address the nature and extent of the market shifts which have occurred, and which has not addressed the ever- increasing stockpile of unsold vehicles.
- 3.12 It is clear that the forecast referred to above will not improve, and at best for the Company, will remain stable in the medium to longer term.

4

PROPOSAL

In order to address the decline in production requirements, and give effect to the Company's objectives as referred to above, the Company proposes to reduce its employment level to one commensurate with its projected production requirements".

- [5] The applicant's attempts to substantiate the allegation of the absence of an economic rationale for the individual applicants' dismissal have been rendered unsuccessful by the concession the applicant made during the urgent application in which the applicant successfully challenged the procedural fairness of the individual applicants' dismissal. The concession was that the global economic meltdown had a negative effect on the respondent's business. The concession led to the court in the urgent application to note that "The parties to this application (to whom I shall refer as NUMSA and GM) have been directly and adversely affected by the global economic crisis". The respondent's allegation in the urgent application that in January 2009 there was a further and dramatic decline in the demand for its vehicles was not challenged. The applicant's concession led the court to refer to the situation the respondent was in as 'undeniable operational requirements'. In paragraph 5.1 of the statement of case, the applicant conceded that the respondent issued the section 189A notice on 1 July 2008 because it was confronted with the global collapse in markets and the commensurate decline in actual and projected sales figures for its locally produced vehicles in 2008. The applicant's argument that there was no economic rationale for the individual applicants' dismissal for operational requirements of the respondent is therefore untenable and rejected.
- [7] The applicant submitted that the true reason for the retrenchment was that the respondent used the retrenchment exercise to punish the applicant for refusing to participate in the implementation of the respondent's new working arrangement. The allegation was not supported by evidence. It further does not negate the concession the applicant gave that the decrease in the demand for the respondent's products led to the retrenchment. I therefore accept the respondent's version that the individual applicants were dismissed for the respondent's operational requirements
- [8] The applicant argued that the procedure and substance were inextricably linked in the matter at hand because the dismissal fell within the ambit of section 189A therefore, the applicant and its members were denied the opportunity to enjoy the benefits of a facilitation by an independent third party.

As there was no proper consultation, alternatives to dismissal were not considered and the respondent applied selection criteria which were neither fair nor objective. The applicant further argued that the respondent did not even follow the criteria it set for the 2008 retrenchment but took into account other considerations like wage anomalies in selecting employees for retrenchment. In support of the argument that the procedural unfairness of the dismissal cannot be separated from its substantive unfairness as the two are inextricably linked, the applicant relied on *National Union of Metalworkers of SA obo members and others v Bell Equipment Co SA (Pty) Ltd*² and *Buthlezi v Municipality Dermacation Board*³.

- [8] The respondent denied that it failed to apply its own selection criteria which the applicant found unfair. The respondent argued that it informed the applicant of its selection criteria and its intention to apply it in letters of 4 February 2009 and 8 April 2009 and in meetings of 16 February 2009 and 8 April 2009. The applicant did not object to the selection criteria but acquiesced to them. The respondent denied deviating from the criteria.
- [9] I have considered both cases the applicant sought to rely on in arguing that the procedural unfairness of the dismissal is inextricably linked to its substantive unfairness and therefore rendered the dismissal also substantively unfair. Each case is judged on its merits. The facts of both cases are distinguishable from the fact of the matter at hand. A material difference is that when the decisions were taken, the procedural fairness of the dismissals had not been determined. In this matter the court, in the urgent application dealt extensively with the procedural fairness of the dismissal particularly the respondent's failure to issue the applicant with a notice in terms of section 189 (3) for the 2009 retrenchment. The court found the dismissal procedurally unfair. In view of my finding based on the concession given by the applicant that there was an economic rationale for the dismissal and the fact that the procedural fairness of the dismissal has already been determined, I am not convinced that the procedural unfairness is inextricably

² (2011) 32 ILJ 382 (LC).

³ (2004) 25 ILJ 2317 (LAC).

intertwined with the substantive fairness of the dismissal or has an impact on it. The procedural defects therefore did not render the dismissal substantively unfair.

- [10] The applicant sought maximum compensation for the procedurally unfair retrenchment of the individual applicants. The respondent denied that the individual applicants should be compensated on the basis that notwithstanding its failure to issue the notice in terms of section 189 (3), there was sufficient interaction between the parties in the form of correspondence and meetings which preceded the retrenchment in which issues affecting the retrenchment were discussed. It was the respondent's further argument that the applicant led no evidence of the prejudice the individual applicants suffered as a result of its omission. I do not agree. I accept the applicant's argument that the purpose of issuing the section 189 (3) notice is clear. It is to afford the parties involved in a retrenchment exercise an opportunity to consult and engage in a meaningful joint consensus - seeking process and attempt to reach consensus on a number of prescribed issues. Before the individual applicants' dismissal, the applicant asked the respondent to issue the section 189 (3) notice but the respondent refused. The refusal had serious consequences because section 189 (3) creates rights and obligations for the consulting parties. The respondent did not fulfil its obligation to disclose to the applicant its anticipation of the retrenchment. The applicant was denied of information the respondent would have been obliged to disclose had the notice been issued. The power of having relevant information during a retrenchment exercise cannot be underestimated. The applicant was unable to influence important aspects of the retrenchment and was further denied of the intervention of an independent facilitator whose duty was to ensure the fairness of the retrenchment. The interaction between the parties that the respondent seeks to rely on does not constitute consultation as envisaged in section 189. Failure to issue the section 189 (3) notice was not a mere omission to follow a procedural step in a retrenchment exercise. It is a violation of rights of employees who faced the reality of losing their jobs through no fault on their part. I am therefore satisfied that compensation is due to the individual applicants.

- [11] I have considered the applicant's argument that the individual applicants be awarded the maximum compensation prescribed in section 194 of the LRA as well as the authority that the applicant sought to rely on. I am not convinced that the circumstances of this case justify the amount sought by the applicant. Section 194 (1) of LRA requires compensation to be just and equitable in all the circumstances. When all those requirements are taken into account including of the existence of an economic rationale for the retrenchment by the applicant, it is just and equitable to grant each individual applicant compensation equivalent to six months' remuneration.
- [12] The respondent argued that not all the individual applicants were properly before court because the applicant failed to discharge the onus to prove that all the persons listed in schedule A to the statement of case were its members and retrenched during the 2009 retrenchment exercise. It submitted that only 99 of the individual applicants were NUMSA members and were dismissed during the retrenchment exercise. One has since passed away. According to the respondent, only 98 individual applicants are properly before court. The applicant argued that the deceased employee did not automatically lose his right to compensation as it can be paid into his estate. Absent the date on which the individual applicant died, denying his estate of compensation cannot be justified. I further accept the applicant's argument that the evidence led by Ms Logie in an attempt to prove that certain employees were not properly before court was inadmissible hearsay evidence. When the urgent application to determine the procedural fairness of the retrenchment was argued, the respondent did not raise the issue that not all the individual applicants were properly before court. The court therefore found the retrenchment of all the individual applicants procedurally unfair. It is impermissible for the respondent at this late stage, after judgment on procedural fairness of the retrenchment has been handed down to allege that some of the individual applicants are not properly before court. In the urgent application the court found the retrenchment of all the individual applicants which appeared before it procedurally unfair and left the issue whether those individual applicants should be granted compensation and the amount of compensation due to them to be determined by this court. The individual

employees before the urgent court are the same persons listed in schedule A of the statement of case. This court lacks jurisdiction to interfere with the judgment on the procedural fairness of the retrenchment.

[13] I could find no reason both in law and fairness for costs not to follow the result.

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

Order:

1. The dismissal of the persons listed in schedule A of the statement of case for operational requirements of the respondent was substantively fair.
2. The respondent is ordered to pay each person listed in schedule A of the statement of case compensation for that person's procedurally unfair retrenchment.
3. The respondent is ordered to pay each person listed in schedule A compensation in an amount equivalent to 6 months' remuneration calculated at that person's rate of remuneration on the date of his retrenchment.
4. The respondent is ordered to pay the applicant's costs.

Z Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Niehaus of Minnar Niehaus

For the Respondent: Advocate Redding SC with Advocate Wesley

Instructed by Chris Baker Attorneys

LABOUR COURT