



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

Not Reportable

CASE NO. D729/09

In the matter between:

**NATIONAL UNION OF METAL WORKERS OF SOUTH
AFRICA (NUMSA) obo ERIC SHEZI & 20 OTHERS**

Applicant

and

LASER CNC (PTY) LTD

Respondent

Heard: 15 December 2016

Delivered: 31 January 2017

Summary: Claim of unfair dismissal due to operational requirements – discrimination on union membership - selection criteria Lifo per department, with skills retention fair and objective – reinstatement exercise discriminatory against applicant's members – compensation appropriate.

JUDGMENT

CELE J

Introduction

- [1] This is a claim of unfair dismissal by the Respondent of employees that were members of the Applicant, due to the operational requirements of the Respondent in terms of section 189A of the Labour relations Act.¹ The Respondent contemplated retrenchment during the global economic crisis of the time in 2009. While the reason for retrenchment was heavily contested in the pleadings and during trial, the Applicant has conceded that there was a need for the Respondent to retrench. The Applicant has also withdrawn its complaint on procedural fairness. In any event 21 employees were dismissed at an industry where, more than 200 employees were employed.² The gravamen of the Applicant's complaint is that its members were unfairly discriminated against on the basis of their union membership. The Applicant seeks reinstatement for its members and in the alternative, compensation. The Respondent opposed the claim and the relief sought.

Factual Background

- [2] The Respondent had a positive record month for its business in June 2008, being its last financial month as the Respondent's financial year ran from July to June of each year. It then experienced a huge and sudden downturn that occurred in orders coming to it, especially from by far its largest customer, Bell Equipment. It was as if somebody had turned the tap off. As from July 2009 onwards the business just collapsed. There was a negative turnaround of some R20 million. The forecasts received by the Respondent suggested that the drop in orders might be temporary but that turned out not to be so and sometime around December 2008 or January 2009 the Respondent realised that retrenchments

¹ Act Number 66 of 1995 hereafter referred to as the LRA.

² See section 189A (18) of the LRA.

were likely. As such, a genuine economic rationale existed which justified retrenchment in general.

- [3] The Respondent tried several alternatives to resist forced retrenchments, including short time, general cost cutting, the waiver of salary and loan interest by the majority shareholder, pay cuts by directors, changes to working methods, an exemption from the Metal and Engineering Industries Bargaining Council (MEIBC) wage increase, the disposal of equipment, borrowing money and, eventually, a voluntary retrenchment exercise. The employees whose applications for voluntary retrenchment were accepted included 12 members of the Applicant and 31 non-unionised employees.
- [4] On 10 February 2009 the Respondent, which falls within the jurisdiction of the MEIBC, held a meeting at its premises to advise its employees of a forthcoming retrenchment exercise. Two members of Applicant were invited. One was Mr Themba Nene, who is an individual Applicant in this matter. Those Applicant members advised the Respondent that they did not have a mandate to deal with the matter and did not remain in the meeting. A trade union official as well as shop stewards did attend subsequent convened meetings. The initial meeting and subsequent meetings were also attended by representatives of the Respondent's non-unionised employees.
- [5] The Respondent issued out a notice in terms of section 189 (3) of the LRA to the Applicant dated 10 February 2009 advising it that the Respondent was contemplating retrenchments that might affect its members, and disclosed relevant information in terms of the sub-section. The selection criteria proposed were "last in, first out", per department, with consideration being given to the company's need to retain certain skills and experience. The Applicant was invited in the notice to consult with it regarding those issues as well as any other matters that might be of relevance and to make proposals regarding a method for

determining the skills and experience which would be retained and whether individual employees possessed such skills and experience.

- [6] Various meetings were held, in particular, on 12 February, 24 February and 5 March 2009. Among the employee representatives present at each meeting were Mr Mncube, who is the Applicant's official, Mr Themba Nene and Mr Raymond Mabizela, who were Applicant's shop stewards. In attendance there were also people representing non-unionised employees, several of the respondent's directors, and an agent employed by the MEIBC, Mr Sean Drabble.
- [7] At the meeting of 12 February 2009 the Respondent set out its position regarding the proposed retrenchments and put up an organogram, though without employees' names appearing on it. In a letter dated 12 February 2009 the Respondent wrote to the applicant responding to two points that had been raised at the meeting of 12 February 2009. On 19 February 2009 the applicant sent its proposals to the Respondent in writing. In a letter dated 19 February 2009 the Respondent replied to those proposals in writing. At the meeting of 24 February 2009 the Respondent advised that 43 applications for voluntary retrenchment had been received and accepted by it. The company showed a slide projection at the meeting of 5 March 2009 where the documents at pages 107 to 133 of the bundle were presented. At the meeting of 5 March 2009 the union representatives held a caucus with the MEIBC agent after whom the union official, Mr Mncube, spoke and the meeting terminated shortly after that. On 5 March 2009 the applicant sent complaints about the retrenchment process to the Respondent in writing. In a letter dated 6 March the Respondent responded in writing.
- [8] The individual applicants, who were all members of Applicant, were dismissed on or about 12 May 2009, ostensibly for reasons based on the Respondent's operational requirements. Following the retrenchments the Respondent did re-

employ certain retrenchees, both voluntary and otherwise, among whom were some of the original individual applicants.

The issue

[9] Essentially, the applicant's complaint is that the individual employees were unfairly selected for retrenchment in circumstances where others ought to have been selected in their places, and that they were targeted for selection because they were members of the Applicant's union.

[10] The complaint that the Applicant's members had been specifically targeted for retrenchment arose in a number of contexts, being:

- the appointment of team leaders who were thereby immunised from selection;
- transfer of employees to the Fettling Department which was then closed down;
- the refusal to appoint a facilitator;
- the pressure coming from employees to finalise the process and the allegation that people were saying that the Applicant was holding up the process;
- the entries that allegedly appeared in Mr Raymond Mabizela's diary concerning incidents that allegedly suggested a campaign against the Applicant's members.

- the selection criteria and their application, which included the failure of the company to bump people from one department to another;
- the failure to re-employ the Applicant's members when work, even of a temporary nature, became available;

Evidence and analysis

[11] A retrenchment process which leads to a dismissal is a no fault dismissal exercise. The onus to prove the fairness thereof lies with the employer and in this case the Respondent.

Appointment of team leaders

[12] In the consultative meeting of the parties held on 5 March 2009 the Applicant's representatives came across surprised by the existence of a group of employees called team leaders. According to the respondent's evidence, in particular Mr Fletcher, the appointment of team leaders took place at various times. Most of the appointments were said to have taken place before the respondent contemplated retrenchments, many of them well before then. Only three of the team leaders are said to have been appointed after the company's record month, June 2008. The appointment dates are set out in the list of team leaders in the bundle of documents supplied. It was conceded that none of the team leaders were appointed from Applicant's members. The explanation is that the Applicant represented nowhere near the majority of employees in the Respondent's workplace and several of the individual applicant's members, being fettlers, runners and general workers, performed tasks that required relatively little skill.

[13] The approach adopted by the witnesses of the Applicant was to deny knowledge about the appointment of team leaders. Mr Themba Nene then said that he could not dispute some of the appointment dates and, in relation to others, he said that he disputed them because he was not told about them at the time of the appointments.

[14] The minutes of 5 March 2009 have an entry with the following of relevance here:

“NM and Themba Nene (TN) raised their disapproval on how the Team Leaders had been elected. Carl Clark (CC) responded stating that the Team Leaders had been identified on certain strengths and attributes and that this had been done long before there was any economic collapse. Secondly, if they were so very concerned about the selection process, why did they not approach management then for clarity?”

[15] NM was reference to Mr Njabulo Mncube. It was submitted by Mr Reddy for the Applicants that Mr Clark's response (quoted in the minutes) was both remarkable and strange. The response suggested that this was the first occasion when the work force and union were informed of the fact that team leaders had been selected and further what the selection criteria therefor were. It further suggested that the work force would have been unaware that certain of their co-workers were team leaders, which in itself was rather odd. Mr Reddy, hopefully erroneously and not deliberately, left out the second part of the minutes which answered the very issue he raised. That part of the minutes reads:

“Secondly, if they were so very concerned about the selection process, why did they not approach management then for clarity?”

[16] According to the minutes the Applicant would have known about the appointment of team leaders when that was done and the Applicant did nothing to raise any

concern in relation thereto. I accept that the Applicant was supplied with a copy of the minutes and that this aspect was never corrected. The inference to be drawn is that the Applicant knew about the appointment of team leaders and had no concern to raise in respect thereof. Further, I accept the undisputed evidence of the Respondent that the Applicant represented nowhere near the majority of employees in the Respondent's workplace and that several of the individual applicant's members performed tasks that required relatively little skill.

The transfer of employees

[17] The transfer of employees to the Fettling Department which was then closed down was another basis for the attack of the selection of the Applicant's members. It was Applicant's version that all of the employees that were transferred to the fettling department and who were compulsorily retrenched were union members. Each one of them, prior to their alleged transfer was situated in either the bending, welding or quality department. The Applicant further said that not a single employee who was transferred to the fettling department was non-unionised. Mr Fletcher's conceded in his evidence that the fettling department had its numbers swelled with union members prior to the decision taken to close down the same. He said that every Driver who did the Bell Equipment deliveries knew the needs of the customer had years of experience on that route and had then to be retained. Reluctantly, he conceded that other Drivers employed by the Respondent could do the self-same delivery.

[18] I am persuaded by Mr Reddy's submissions that a number of welders were moved from one department to another, which second department was, according to the Respondent, not identified for retrenchment. Again those transferees were not union members who, had they not been transferred, would have been susceptible to retrenchment as they were possessed of shorter service than a number of union members. It is further not in dispute that the

lateral restructuring as testified to by Fletcher involved only non-union members and no union members were transferred from one department to another, save fettling.

- [19] Further, I agree also that, whatever might have been the intention of the Respondent, the fact of the matter is that all employees who were transferred, and who happened not to be union members, were not retrenched. It is wondered why not a single union member was considered a suitable candidate for such similar transfer. By way of a further example no welders in the stainless steel department were retrenched. It is indeed worth noting that at the time of the retrenchment that department grew to include employees Messrs Coleman, Xulu, Gordon and Smith. Had they remained in their original departments they would have had to compete with union members with longer service records for retrenchment. And those four just happened to be non-union members. The Respondent did not produce any objective facts to demonstrate the business rationale underlying the transfer process. The selection process to identify employees to be transferred and the timing thereof left much to be desired.

The refusal to appoint a facilitator.

- [20] The Applicant asked that, a facilitator be appointed. The Respondent did not agree with the proposal. The Applicant conceded that, there was no obligation on the Respondent to accede to the request but said that, the fact that the request was made was indicative of a measure of mistrust by the union towards the employer in the manner in which the selection of retrenchees was predicted to unfold; otherwise it would not request a facilitator in the first place. It averred that an employer committed to embarking upon a fair process for retrenchment would be expected readily to agree to the appointment of such facilitator. What the Applicant said it intended was the facilitator would act as some sort of mediator in identifying whether the Respondent was playing fair in identifying a particular

union employee for retrenchment and likewise whether the union was making appropriate concessions when one of its members was correctly and fairly suggested for retrenchment.

- [21] I find nothing sinister in the Respondent refusing to have a facilitator appointed. The Applicant could equally request for the appointment of a facilitator as a consulting party representing the majority of employees whom the employer contemplated dismissing. In my view, nothing turns on this issue.

The pressure coming from employees to finalise the process

- [22] According to the Respondent, there was also the pressure coming from employees to finalise the process and the allegation that people were saying that the Applicant was holding up the process. This pressure was said to come from the majority of the employees in the work place and that those were mostly none-unionised workers. Mr Sipiwe Xulu, A Director of the Respondent testified about the meeting that was called by employees who wanted the retrenchment process to be expedited and about the list of more than 100 of them who signed what might be termed a petition intended to indicate that, if they were selected for retrenchment, they would not challenge the process. Some of the people who signed the document were Applicant's members themselves, and a few were even applicants in this matter. He also said that there were stories that the Applicant was holding up the process but that, these had not emanated from management. Management was committed to going through a fair and proper consultation process. Not much came from the Applicant on this aspect. A number of queries raised by the Applicant might have contributed to some delay in finalising the retrenchment process but the Applicant has not referred to any display of impatience by the Respondent. Nothing of significance therefore turns on this issue.

The entries that allegedly appeared in Mr Raymond Mabizela's diary

- [23] There were entries that allegedly appeared in Mr Raymond Mabizela's diary concerning incidents that, allegedly suggested a campaign against the Applicant's members. While this aspect was introduced by Mr Reddy through cross-examination, the issue could not be taken much further as Mr Mabizela referred to, never came to testify. This issue was never raised in the pleadings to alert the Respondent of it. Therefore no adverse inference may be drawn to the failure of the Respondent to call a rebutting witness for this aspect.

The selection criteria and their application

- [24] The selection criteria and their application, which included the failure of the company to bump people from one department to another was yet another source of complaint by the Applicant for its members. Evidence of the Applicant is that it is not without significance that each one of the 30 names proposed by the Respondent for compulsory retrenchment, the majority of whom were union members, despite union members being in the minority, turned out to be the very same persons who were ultimately retrenched. Applicant's complaint was that no amount of debate on the matter, of which there was none, would conduce to dissuade the Respondent from altering its departmental Last in First Out (LIFO) approach as the targeted union members were not, according to the Respondent, going to be spared.
- [25] Mr Reddy then submitted that any argument that non-union members were also retrenched cannot be destructive of the argument that union members were targeted. He contended that by devising this stratagem of LIFO, departmentally, it was no more than a ruse to safeguard the jobs of so many others who would ordinarily have been in front of the retrenchment queue but who were able to avoid those consequences by nifty manipulations. Further that it was a departure

from the well-established approach to fair retrenchment criteria, unless some rationale existed for its invocation. Whatever might be the acceptable guidelines or requirements for invoking this method, the Respondent, apart from only merely contending that it considered it necessary to employ LIFO departmentally, failed to demonstrate that there was such a need.

[26] He said that the Respondent was, by no means, a large-scale employer with its set up located at different places, that might render inter departmental transfers unwieldy. On the contrary, it was a medium sized employer, employing less than 200 workers, most of whom fell into six to seven different categories of skills namely drivers, welders, machine operators and others, with approximately 20 to 30 within management. Further, its entire operations were situated in one location and the evidence suggested that, while there were different departments within the work force, just about the entirety of the manufacturing processes undertaken at the work place was carried out in a very much inter-mingled fashion, meaning that the entire workforce appeared to be in close physical proximity to each other and interacted with each other throughout the course of a day's work.

[27] There is a dispute between the parties as to whether the departmental LIFO approach was complained of during the meetings of February and March 2009. Mr Reddy said that it was improbable in the extreme, if not simply false, that this would not have been complained of by the Applicant. He averred that the suggestion that the Applicant had in fact agreed to the retrenchment of its members was a too generous interpretation of the minutes of the 5th March 2009 and it was far more probable that, as both Messrs Nene and Mncube stated, the Applicant merely acquiesced in the Respondent choosing the date when the voluntary retrenchees would terminate their employment. It was submitted that, at least on the probabilities, there could not have been agreement that compulsory retrenchments would take place departmentally.

[28] When the Respondent issued out a notice in terms of section 189 (3) of the LRA to the Applicant, in respect of the selection criteria proposed, letter read:

"4.1The company proposes that employees are selected for retrenchment on the basis of "last in, first out", per department, with consideration being given to the company's need to retain certain skills and experience. You are invited to consult and make proposals regarding a method for determining the skills and experience which will be retained and whether individual employees possess such skills and experience.

4.2Where several employees possess substantially the same skills and experience, then the company proposes that selection for dismissal be on a "last in, first out" basis."

[29] Therefore the selection criteria proposed upfront were "last in, first out", per department, with consideration being given to the company's need to retain certain skills and experience. The Applicant was invited in the notice to consult with it regarding those issues and to make proposals regarding a method for determining the skills and experience which would be retained and whether individual employees possessed such skills and experience. The invitation was unequivocal about the proposed selection criteria. One expects that if the Applicant was opposed to the proposal its position would be made adequately clear in its dealings with the Respondent.

[30] Mr Xulu testified that the Applicant agreed to the proposed selection criteria and he said that he would produce minutes of a meeting where the above was agreed to. He was ultimately unable to produce such minutes. Mr Xulu said that a company organogram was displayed that showed the jobs but not the names of people performing those jobs and that this was done by way of a slide projection. The minutes of the meeting of 12 February 2009 reflected the same. He

conceded though that the Applicant did not take any part in the subsequent meeting at which the compulsory retrenchees were selected. In its letter dated 19 February 2009 the applicant proposed: "LIFO system and bumping". The minutes of the meeting dated 24 February 2009 stated:

"SD (Stephen Dalbock, a director of the respondent) presented the selection criteria process the company was contemplating and stated that the following approach was envisaged:

- A panel would be convened (Respective Senior Management, Respective Line Management, Employee Representative and NUMSA Employee Representative)
- Each Department shall be assessed independently
- Last-in First-out and skills retention criteria shall be adopted
- Where applicable Department restructure may take place in line with skills retention.

[31] I agree with Mr Haslop for the Respondent that although the minutes reflected that the Applicant did raise certain issues about other aspects of the retrenchment, there is no minute that this particular proposal met with any resistance from it. Indeed, they reflect that the applicant requested, amongst others and through Mr Drabble, a list of each affected department and the affected employees. Mr Drabble asked that the lists be distributed at the meetings with the allowance of a caucus if requested. Even the agenda for the meeting of 5 March 2009 reflected that a list of affected departments and names was a matter arising from the previous meeting. The minutes do indeed reflect

that the union representatives did raise certain issues at the meeting of 5 March 2009 and the fact that Mr Sabelo Ntuli's situation as well as those relating to the team leaders and the bending department was specifically raised seems to indicate that there was a discussion about individuals as well as posts. Again the minutes are silent about the Applicant objecting to LIFO per department, with consideration being given to the Respondent's needs to retain certain skills and experience. I hold therefore that the Applicant did not object to the selection criteria proposed by the Respondent. The Applicant merely acquiesced in the Respondent choosing not only the date when the voluntary retrenchees would terminate their employment but also to the selection criteria proposed by the Respondent. Accordingly, selection criteria agreed to or even fair and objective.

The failure to re-employ the Applicant's members

[32] The failure to re-employ the Applicant's members when work, even of a temporary nature, became available was also a serious issue raised by the Applicant. Out of the 33 non-union members who accepted voluntary retrenchment 31 of them were re-employed by the Respondent. Of the 12 union members who accepted voluntary retrenchment only 4 were re-employed. Out of 11 non-union members who were retrenched, 8 were re-employed. Of the 21 union members who were retrenched, only 3 were re-employed. A number of union members gave up their union membership around the time that they were re-employed. Mr Tyrone Coleman gave up his membership with the Applicant and, at the consultation process, he represented the non-union employees. Significantly his son, Mr Reece Coleman and his nephew Mr Clyde Gordon were saved from retrenchment through lateral transfer.

[33] When the issue of re-employment was dealt with Mr Xulu said that, at one point, the company required certain skills on an urgent basis. When he was unable to get hold of a particular person with that skill he moved on to the next one on the

list. He said that he had difficulty in tracing Applicant's members for reinstatement. He conceded that he could very easily have contacted the Applicant but he said that, he never thought of doing so. Mr Reddy argued that the failure or refusal to reinstate or re-employ a former employee in terms of an agreement is an unfair labour practice, yet neither the union nor any of the individual applicants referred such a complaint to the bargaining council. In addition, the company did re-employ some Applicant's members, including some of the original individual applicants in this matter.

[34] From the given figures more compulsory retrenchees came from the Applicant's members than from non-unionised employees. Yet unionised employees were in the minority. More non-unionised employees on compulsory retrenchment were reinstated than unionised workers. Almost all voluntary non-unionised employees were reinstated. A minority of unionised voluntary employees were reinstated. From these figures, assuming they are correct, there is overwhelming evidence that the Respondent took a position a firm stand against Applicant's members in the reinstatement exercise. The Respondent had to explain this disparity. The evidence of Mr Xulu is far from convincing when he said that he could not trace unionised employees but could easily trace non-unionised workers.

[35] The Applicant has successfully demonstrated that its members were treated differently than non-unionised employees during the reinstatement exercise. The overwhelming inference to draw from the proven facts is that the differentiation was premised on union membership. Discrimination on the basis of union membership has therefore been established by the Applicant. It remained for the Respondent to prove the fairness thereof. All that the Respondent did was to deny deferential treatment. No evidence was led to justify it and therefore to say it was fair. I conclude therefore, that discrimination of the Applicant's members on union membership in the reinstatement exercise was unfair.

[36] The primary remedy for the members of the Applicant is one of reinstatement. The Applicant has asked for that relief but that, in the alternative compensation may be ordered. Undisputed evidence was however led that, the Respondent was undergoing another retrenchment exercise. I find therefore that it is not reasonably practicable for the Respondent to reinstate or re-employ the employees represented by the Applicant. Compensation is found to be an appropriate remedy. The dismissal of the employees by the Respondent in this matter was automatically unfair in terms of section 187 (1) (f) of the LRA. In striving to determine a just and equitable amount of compensation, the following facts and factors are part of the considerations:

- a) There existed a fair reason to embark on retrenchment;
- b) The Respondent attempted to follow a fair procedure;
- c) The respondent acted under the pressure of non-unionised employees who were in the majority;
- d) The Respondent is undergoing yet another retrenchment exercise;
- e) The employees were dismissed in 2009 and a period just more than 7 years has elapsed;
- f) The employees concerned have not found alternate employment;
- g) This is a no blame dismissal.

[37] In the circumstances the following finding and order shall issue:

1. The dismissal of the thirteen employees of the Respondent represented in this matter by the Applicant was substantively unfair due to them being discriminated against by the Respondent on their union membership.
2. The Respondent is ordered to compensate each employee in an amount equivalent to twelve (12) months of the salary each earned on the date of dismissal.
3. Such payment is to be made within 14 days from the date of this order.
4. The Respondent is ordered to pay half of the costs of this claim.

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: Mr Reddy

Instructed by: Harkoo Brijlal and Reddy

FOR THE RESPONDENT: Mr Haslop

Instructed by: Woodhead Bugby Inc.

Labour Court