



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 556/16

In the matter between:

NKABELA RICHARD KOBUA

Applicant

and

AVK VALVES SOUTHERN AFRICA (PTY) LTD

Respondent

Heard: 09 - 10 November 2017

Delivered: 26 January 2018

JUDGMENT

MAMOSEBO; AJ

Introduction

[1] The issue which this Court is called upon to decide in terms of sec 188 of the Labour Relations Act¹ (LRA) is whether the dismissal of the applicant was for a fair

¹ Act 66 of 1995 as amended.

reason based on the respondent's (AVK Valves) operational requirements and whether it was effected in accordance with a fair procedure. Both parties led their evidence through single witnesses. In assessing both the procedural and substantive fairness of this dismissal, the provisions of s 189 of the LRA must be taken into account.

[2] Sec 189 provides:

“189. Dismissals based on operational requirements.—(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult—

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires consultation, a work-place forum if the employees likely to be affected by the proposed dismissals are employed in a work-place in respect of which there is a work-place forum;

(c) if there is no work-place forum in the work-place in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;

(d)

(e) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

(2) The consulting parties must attempt to reach consensus on—

(a) appropriate measures—

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

(3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to—

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

(h) the possibility of the future re-employment of the employees who are dismissed.

(4) The provisions of section 16 apply, read with the changes required by the context to the disclosure of information in terms of subsection (3).

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting.

(6) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(7) The employer must select the employees to be dismissed according to selection criteria—

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.”

- [3] The applicant, a single witness, alleged that AVK Valves did not comply with sec 189 because it failed to engage him in a meaningful consensus seeking process, failed to consult with him about the retrenchment, in general, and the selection criteria, in particular, and it had no good reason to retrench him.
- [4] AVK Valves' defence is that it had a compelling reason following a directive from the Board of Directors to restructure the logistics department and to declare the position of the Supply Chain Manager redundant and create a new position of Group Logistics Manager. It alleges that it tried to involve the applicant in meaningful consultations but all was in vain because of his recalcitrant conduct. It has even paid him a retrenchment package.
- [5] The following background is necessary:
- 5.1 The applicant was employed by AVK Valves as a Supply Chain Manager from 01 February 2016 to 03 May 2016, a period of about 3 months. His employment was terminated on 03 May 2016 allegedly based on the company's operational requirements. AVK Valves's Board of Directors took a decision in a meeting held on 20 April 2016 to declare his position redundant and create a new position at executive level of Group Logistics Manager. The incumbent of the new position was required to have: A financial background in addition to Information Technology (IT) and Logistics qualifications. Although the applicant possessed a degree in logistics and a diploma in computer science he lacked a formal qualification and experience in financial management. He only passed three accounting modules.
- [6] The applicant was invited to a disciplinary enquiry on 21 April 2016. The process was abandoned on that day. Instead, the employer served him with a letter signed by Mr Brian McGugan, the Managing Director, dated 21 April 2016 under the head: 'Notice of possible redundancy due to restructuring'. This letter sets out in a summarised version, the process contemplated in sec 189 when an

employer embarks on a process of retrenchment. The applicant was invited to attend a follow up meeting on 26 April 2016 at 09:30, which he did.

- [7] Present at the mentioned meeting was Ms Van der Walt, Mr Fanus, and Mr Brian Mc Guban. Mr Fanus is normally utilised by the employer to assist with labour related matters affecting the company. The applicant contended that he did not engage with anybody on the day the notice was read and presented to him. He was asked to prepare written representations which would be dealt with on another date. Ms Van der Walt on the other hand testified that the issue of redundancy was discussed with the applicant on that day. The sec 189 notice is dated 26 April 2016 but as testified to by Ms Van der Walt, it was only served on the applicant on 29 April 2016. Be that as it may, the opening sentence thereof reads:

“This serves to advise you that the company is proposing to restructure the business. The position of Supply Chain Manager is one of the affected positions and therefore you are a potentially affected employee.”

The subsequent paragraphs notified him that he was the only affected employee and the company has considered other alternatives but could not find any but still invited his inputs on the aspect of alternatives. The redundancy was anticipated to take effect by the end of the same month, April 2016. The meeting was adjourned to 29 April 2016 on which date the applicant rejected the advice offered by Mr Fanus. The meeting was then adjourned to 02 May 2016 and further rolled over to 03 May 2016 due to a fatality at work which required the presence of Ms Van der Walt.

- [8] On 03 May 2016 the applicant furnished his written response and read out his (counter-) proposals in the meeting after which he was asked to step out of the boardroom to enable the employer contingent to caucus. On resumption, he was

informed that his services are terminated; he will be furnished with the certificate of service and asked to vacate the premises.

- [9] Over and above the common cause factors above, Ms Van der Walt, the Group Human Resources Manager, added that: AVK Valves SA has expanded and merged with other companies, namely, AVK Holdings SA, AVK Manufacturing SA, PV Group which necessitated a restructuring of the company, its organogram and roles. The applicant was not excluded from applying for the newly created position. His scope of work was restructured to add the financial responsibilities at an executive level, which functions were earlier performed by his Managing Director. The restructuring brought about a clear demarcation of roles at the top levels.
- [10] The applicant's case on the other hand was that the company should have promoted him to the new position or should not have restructured his position at all because he is a suitable candidate. His own legal advisors, FNB on Law, advised him to engage in the consultation process during internal processes, which were correct. They also advised him that the process followed was correct. Neither the applicant nor his legal advisors requested the company to extend the consultation period or sought any other alternatives. He conceded that the employer had afforded him adequate opportunity to consult.
- [11] The conclusion in the applicant's written response merit full quotation:
- "It has become crystal clear that the proposed restructuring of only my position (Supply Chain Manager) is nothing but racism and discrimination which stems out of hatred for black African people to hold senior position[s] at both AVK Valves and Premier Valves. And this will be supported by the rejection of the above representations. And I am prepared not to rest until it has received [the] necessary attention and the impact may not be the nice one. Also due to the fact that I have noticed that management has already made

[a] decision regarding my dismissal but only whitewashed as restructuring, I refer to it as Automatically Unfair Dismissal and I am prepared to fight to the end.”

Discrimination was not pleaded and there was no evidence to substantiate this allegation. However, this response resulted in the employer stopping the process and terminating the applicant’s services.

- [12] The following appears in the applicant’s letter of appointment dated 04 December 2015 written by Mr Brian McGugan, Managing Director and a member of the Board of Directors to whom the applicant reported:

“We are pleased to offer you employment at AVK Valves Southern Africa (Pty) Ltd. We feel that your skills and background will be valuable asset to our team.

The position we are offering you is Supply Chain Manager. Your immediate supervisor will be Brian McGugan. Working hours will be from Monday to Thursday 08:00 – 17:00 and Fridays 08:00 – 16:00. This is a permanent position with 3 months’ probation period. The probation period may be extended. We would like you to start as soon as possible.

We are confident you will be able to make a significant contribution to the success of AVK Valves SA and we look forward to working with you.”

Three months later, this did not seem to be the position.

- [13] The issue that stands for determination is whether, based on the above exposition, the dismissal of the applicant was procedurally and substantively fair.
- [14] Mr Khomola, appearing for the applicant, sought to persuade me that I should consider the contradictions in the testimony of Ms Van der Walt to discredit her. She stated in her evidence-in-chief that on 03 May 2016 when the applicant left the room the meeting recessed but later in cross-examination changed and said

she cannot recall when he left the meeting. In my view, this is not a material contradiction. See *S v Mafaladiso*².

- [15] It may be so that the applicant was invited to engage in the restructuring process and seemingly failed to do so. He testified that he did not engage because he was told to submit written responses. Despite the fact that he may have received advice from his legal advisors it is unclear what advice he received. Sec 189 places the onus on the employer to consult. The word 'must' is used. The invitation extended by the employer to the applicant to engage was, in my view, insufficient to encourage him to participate meaningfully.
- [16] The applicant comes across as a person who used the entitlement card to demand the new position. This position, coupled with the fact that he may not have fully understood the aspects around the creation of an executive position which partly absorbed his functions, save for the financial qualification, was inadequately dealt with by the AVK Valves. Seemingly, he did not even make an effort to enquire from the employer whether it will be an option for them to train him in the required area of financial management or at least afford him the opportunity to acquire the requisite skill in that area. He did not engage in asking them to identify his shortcomings in order to meet the requirements for the incumbent's or potential candidate's skills and competencies relating to the required financial skills and whether the company would be willing to fast-track him for that purpose. I do not think the company canvassed this aspect at all with the applicant. The impression I gain is that the company stopped engaging the applicant as soon as they reached a stage of being accused of racial discrimination.
- [17] I observed the applicant when he gave his testimony in court. I am inclined to believe that he could have participated and engaged in a meaningful joint consensus seeking process or to even attempt to consider any of the factors as

² 2003 (1) SACR 583 (SCA) at 593i – 594f; *S v Mkohle* 1990 (1) SACR 95 (A) at 98f – g.

listed in the Act. I am mindful of the fact that he does not have a legal background neither does he possess qualifications in the employment relations field. He was also unassisted during the 'so-called' consultation proceedings.

[18] The Constitution³ guarantees everyone the right to fair labour practices. However, the meaningful participation of parties in such processes is within each party's control. The applicant was not a rank-and-file employee but a manager with a tertiary qualification. However, retrenchment processes are highly emotive because they involve bread and butter issues and a person's job is on the line. It is unfortunate that the applicant went into all but one meeting of 03 May 2016 and remained silent when the process was that of his engagement. The applicant was very long-winded. The only inference that I can draw under the circumstances is that based on the fact that he came to attend the disciplinary process and may have been shocked to learn that the process had changed to a consultation process, where his job was on the line, following a decision that was already taken by the board. His was a knee-jerk reaction and may not have been in the right frame of mind.

[19] Coming to the role of the company. If the Board took the decision on 20 April 2016 that the applicant's post ought to be declared redundant and he was only notified of the consultation process on 21 April 2016, it becomes necessary to determine if sec 189 was complied with. Mr Khomola, in his written submissions, argued that none of the meetings was going to change the fact that the applicant had to go as no other alternatives were considered. This, counsel submitted, was admitted by Ms Van der Walt. Ms Van der Walt further suggested that even if alternatives were to be considered the applicant was not participative. I do not see what positive result the engagement alternatives could yield because in the sec 189 notice the company stated that there were no other alternatives. The company contended that it planned to suggest other

³ S 23 of the Constitution of the Republic of South Africa, 108 of 1996 as amended

options but they could not even get to that stage because of the applicant's conclusion, invoking racism, left them shocked and speechless. In my view, if there were other options available the company ought to have been forthright with the applicant and placed those on the table for consideration and not wait for that easy escape route. Ms Van der Walt did not mention during trial what those other options were. The company representatives had to seek an adjournment during the last meeting to determine a way forward, having taken a few minutes to recover from the applicant's representations. With the applicant, it was either the promotion to this job or nothing. In my view, a cooling off period was necessary for both parties to absorb the representations and on the return date re-engage in a more meaningful manner.

- [20] The head office of this company, whose Board of Directors took the decision to declare the position of the applicant redundant, is in Denmark. Their other offices are in the United Kingdom. This is a global company. The applicant was previously permanently employed in another company before he joined AVK Valves. The company cannot tell me that they did not know earlier about the future plans for the merging or expansion of the companies. The applicant's employment lasted for three months only. Had he known he would not have left his previous stable employment to join AVK Valves. Borrowing from the words of Froneman DJP in *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*⁴

“Wondrous and mysterious though the ways of global capitalism may be for some, for others they bring only cold comfort.”

- [21] The retrenchment of the applicant took effect on 03 May 2016. This means the entire process was only afforded seven working days. AVK Valves seems to suggest that the blame for the inadequate consultation should not be placed at its doorstep but that the applicant failed to participate fully and meaningfully

⁴ (1999) 20 ILJ 89 (LAC) at para 2

in the consultation process. Froneman DJP made the following remarks in the *Johnson & Johnson* case⁵:

“[23] Every person has a fundamental right to fair labour practices (s23 (1) (a) of the Constitution). In the present context expression is given to this in the LRA by affording an employee the right not to be unfairly dismissed (s185) and an employer the right to dismiss an employee for a fair reason based on the employer’s operational requirements and in accordance with a fair procedure (s 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.”

[22] AVK Valves had the primary obligation to ensure that the applicant was not unfairly dismissed. If the applicant only made representations on 03 May 2016 and the consultation process was stopped on the same day, it cannot be argued even by a stretch of imagination that a joint consensus seeking process was followed. In my view AVK Valves frustrated the process by abruptly stopping it. It may even befit the view, as argued by the applicant, that the process was followed with no intention of ever reaching consensus. The applicant bluntly labelled the process ‘a sham’ and one can see where he was coming from.

[23] This period of seven days was not of sufficient duration to enable the parties to put their respective proposals on the table, to consider them and to engage in a joint consensus-seeking exercise. The information on the new position and any other alternatives was never explored fully and meaningfully. In my view the employer, whose responsibility it was to initiate the process when contemplating retrenchments ought to have considered the representations carefully and its disagreement with the applicant should not have resulted in uncalled for

⁵ At paras 23 and 24.

termination of the process and dismissal of the applicant. I therefore find that the employer failed to follow a fair process.

[24] The applicant maintained his stance that he was competent and capable to occupy the new position. This aspect was not interrogated at all. The company seems to have moved from the premise that because the applicant lacked the formal financial qualification he was not the right person for the job. The exact details and nature of the job were never canvassed to eliminate him completely from the competition. I am not satisfied that AVK Valves has shown good cause dismissing the applicant, particularly because the applicant's appointment letter showed that AVK Valves was impressed by the applicant's skills. There was inadequate disclosure and no meaningful consultation in respect of the requirements for this new position. There was clearly insufficient information before the parties to confirm that there was a good reason to dismiss the applicant. Sec 16 requires the disclosure of all relevant information that will allow the consulting party to engage effectively in consultation. The reasons proffered by AVK Valves for declaring the applicant's position redundant are that he lacked a formal qualification in finance. I cannot help but take cognisance of the fact that the consultation process was predicated on the Board declaring the applicant's position redundant irrespective of the reasons advanced. This defeats the purpose of consultation because a decision was predetermined. The phrase "when the employer contemplates terminations" therefore finds no meaning. For these reasons, I am also of the view that there was substantive unfairness.

[25] Having found that the decision to retrench the applicant was unfair, what remains is to determine the appropriate award to him. The applicant has prayed for an order of reinstatement or compensation. I am of the view that reinstatement is not a viable option considering that employment relationship is dependent on trust and compatibility. The incident of 03 May 2016 may have damaged relations irretrievably.

[26] Sec 158 (1) of the LRA stipulates:

“(1) The Labour Court may –

- (a) Make any appropriate order, including ...
- (v) an award of compensation in any circumstances contemplated in this Act.”

[27] Sec 193 of the LRA provides:

“(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may –

- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
 - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
 - (c) order the employer to pay compensation to the employee.
- (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –
- (a) the employee does not wish to be reinstated or re-employed;
 - (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
 - (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
 - (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[28] Mindful of the fact that the employer has already paid a severance package to the applicant, I am of the view that compensation is an appropriate remedy. This will also make up for the applicant’s lost right to a fair hearing before he was dismissed. The applicant is therefore entitled to compensation for the remuneration that he would have been paid between the date of dismissal and

the last day of the adjudication, calculated at the employer's rate of remuneration on the date of dismissal in terms of s 194 (1).

[29] On the question of costs, there is no reason why costs should not follow the result.

[30] The following order is made:

Order

1. The dismissal of the applicant was both procedurally and substantively unfair
2. The respondent, AVK Valves Southern Africa (Pty) Ltd, is ordered to pay the applicant compensation for the remuneration he would have been paid between the date of dismissal and the last day of the adjudication of this case calculated at the employee's rate of remuneration.
3. The respondent is to pay the costs of this application on a party and party scale.

M C Mamosebo
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv ML Khomola

Instructed by: Mudau & Netshipise Attorneys

For the Respondent: Mr IT Allis of Allis Attorneys

LABOUR COURT