



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 548/16

In the matter between:

**NATIONAL UNION OF METALWORKERS UNION
OF SOUTH AFRICA**

First Applicant

MANDLA PHAKHATHI

Second applicant

And

**ASSMANG MACHADODORP CHROME WORKS
(PTY) LTD**

Respondent

Heard: 15 - 16 February 2018

Delivered: 6 March 2018

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] With this claim, the first applicant, National Union of Metalworkers of South Africa (NUMSA), seeks to have the dismissal of its member, the second applicant, Mr Mandla Phakhathi be declared substantively and procedurally unfair. Phakhathi's services were terminated together with those of other employees on account of the respondent's operational requirements.

- [2] The respondent, Assmang Machadodorp Chrome Works (Pty) Ltd (Assmang), opposed the claim. At the commencement of trial proceedings, the applicants wisely abandoned a claim of procedural unfairness.

Background:

- [3] The background facts to this dispute are to a large extent common cause and are summarised as follows:

- 3.1. Assmang operates a chrome and manganese open cast mine in Machadodorp, Mpumalanga Province. Phakhathi commenced his employment with Assmang in November 2007 as a Raw Material Assistant. In November 2011, he was elected as a NUMSA Shop-Steward. In January 2012, he was elevated to the position of Full-Time Shop-steward. The position of full-time Shop-Steward is regulated in terms clause 8¹ of the Recognition Agreement dated 19 April 2002, concluded between Assmang, NUMSA and other trade unions.
- 3.2. At the time that Phakhathi was elected as a Full-Time Shop Steward, Assmang had about 700 employees. The first operational requirements exercise by Assmang took place in 2012, when 404 employees were retrenched. The second exercise took place in 2014, when 168 employees were retrenched. In 2015, Assmang's remaining furnaces were switched off, and it was forced to run limited operations.

¹ Clause 8: **RECOGNITION OF A FULL-TIME STOP STEWARD**

8.1 **Full time shop stewards**

Management will recognise a Full Time Shop steward from the majority union on condition that the number of members of such union is above 50% of the number of employees in the recognised bargaining unit. The full time shop steward will perform his/her function in terms of the Full Time Shop stewards' agreement. Should the number of members of the majority union decrease below 50% of the number of employees in the recognised bargaining unit, this position will be reconsidered.

8.2 ...

- 3.3. This resulted in a further retrenchment exercise in February 2015, leaving it with only 60 employees after a facilitation process under the auspices of the CCMA in terms of the provisions of section 189A, read with those of section 189(3)² of the Labour Relations Act³.
- 3.4. The parties initially held two consultation meetings facilitated by the CCMA. On 6 March 2015, a third meeting was held where Assmang had indicated that Phakhathi was amongst the employees identified for retrenchment. In that meeting, NUMSA held the view that the contemplated dismissal of Phakhathi had to be dealt with in terms of the Recognition Agreement internally, and outside the facilitation proceedings.

² Section 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 not *collective agreement* that requires consultation –
 - (i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and
 - (ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;
 - (c) if there is no *workplace forum* in the *workplace* 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*; or
 - (d) 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 employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and 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 issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to –

...
³ Act 66 of 1995, as amended

- 3.5. On 13 April 2015, the parties convened a further meeting to discuss the contemplated dismissal of Phakhathi. In that meeting Assmang disclosed its reasoning for selecting Phakhathi as one of the employees identified for retrenchment. Its contention was that taking into account that the total workforce was in all probabilities going to be reduced to approximately 60 employees, the position of Full-Time Shop-Steward was no longer going to be necessary. The parties could however not reach an agreement in respect of that issue.
- 3.6. On 20 April 2015, Assmang terminated its employment relationship with Phakhathi. On 7 May 2015, the applicants referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council (MEIBC). Conciliation having failed, the dispute was referred to this Court for adjudication.

The evidence:

- [4] Assmang led the evidence Mr Dirk Hattingh (Hattingh) its Human Resource Superintendent in support of its case. His evidence is summarised as follows:
- 4.1. During the time that Assmang embarked on its restructuring in 2014 and 2015, it had questioned the logic of having a Full-Time Shop Steward in the light of the declined number of employees in the bargaining unit. It was thereafter agreed with NUMSA in 2014 that Phakhathi in addition to his Shop-Steward duties, would be expected to perform those duties on a part-time basis, and also assume an additional role as a storeman within Assmang's stores.
- 4.2. Prior to the restructuring exercise in 2015, there was only one employee employed as a storeman. Phakhathi was thereafter required to assist in the stores as part of his dual role. The other storeman had a longer service record within Assmang than Phakhathi when LIFO was applied.

- 4.3. At the facilitation meetings, NUMSA had flatly refused to engage Assmang on the position of Phakhathi, insisting upon a separate process to deal with his contemplated dismissal in terms of the Recognition Agreement.
- 4.4. In a letter dated 13 April 2015, Assmang terminated the full-time Shop-Steward agreement. The letter *inter alia* recorded the following:

“ ...

CANCELATION OF FULL TIME SHOP STEWARD AGREEMENT:
ASSMANG MACHADODORP

...

The Company would like to confirm that we fully agree that NUMSA, in terms of section 8 of the Recognition Agreement, is not in contravention of the agreement by this date having more than 50% membership on site. The Company further agrees that even under the proposed structure NUMSA's membership is not foreseen to be less than 50% of the workforce.

It is however due to large scale changes in the ambit of the recognition agreement that the Company needs to inform you that we will not be able to perform our responsibility in terms of section 8 that deals with a Full Time Shop Steward being paid by the Company. Our employee number at the signing of the Recognition Agreement was more than 500 in the bargaining unit. After this unfortunate Section 189 process that we are busy with it seems as if there will not be more than 60 people. We believe that it will be unreasonable to expect us to continue performing our responsibilities accordingly.

You are thus hereby formally being given notice that the Full Time Shop Steward position will be terminated in line with the finalization of the Section 189 process.”

- 4.5. Phakhathi was identified for retrenchment due to the application of the LIFO criterion. As mentioned above, the other employee in the stores had more service when compared to Phakhathi.
- 4.6. Under cross examination, Hattingh testified that at the commencement of the restructuring process, no names were attached to the list of employees that were identified for retrenchment, and that only the positions within different departments were identified. However, all departments within Assmang were to be affected and more specifically, a position within stores was identified for retrenchment. He denied that the issue of the full-time Shop-Steward was raised only raised with NUMSA on the last scheduled consultative meeting. According to Hattingh the issue was raised prior to 7 April 2015, and during the retrenchment process, and NUMSA was aware that Assmang could no longer financially afford to retain the position of full-time shop-steward.
- 4.7. According to Hattingh, NUMSA was of the view that irrespective of the number of employees that were to be retained in the bargaining unit, it was still entitled to have a full-time shop-steward on site.
- 4.8. In terms of clause 16.2⁴ of the Recognition Agreement, if NUMSA had an issue with the abolition of the full-time shop-steward's position, it could have declared a dispute. It is common cause that NUMSA did not declare a dispute in terms of clause 16.2 of the Recognition Agreement.

⁴ Clause 16: **DISPUTE RESOLUTION**

- 16.1 No party shall be entitled to recourse to the dispute resolution provisions in the [LRA] in respect of any dispute, which is the subject matter of this dispute resolution clause, until such time as the provision of this clause have been exhausted.
- 16.2 dispute regarding the interpretation or application of this agreement.
- 16.2.1 Any dispute regarding the interpretation or application of this agreement shall be dealt with in accordance with the procedure provided for in this sub-clause.
- 16.2.2 Any dispute regarding the interpretation or application of this agreement may be declared by either party by way of written notice to the other party.
- 16.2.3 ...

[5] Phakhathi's evidence in support of his claim is summarised as follows:

- 5.1. He commenced his employment with Assmang in November 2007 as a Raw Material Assistant. Prior to his election as a Full-Time Shop Steward, he was stationed at the stores as a Procurement Assistant. During that time there were five other employees stationed at the stores. As a consequence of the various restructuring processes at Assmang, there was only one employee that was retained at the stores in 2015.
- 5.2. He aligned himself with the position that his position was to be discussed outside of the facilitation process. Notwithstanding NUMSA's position on the matter, Assmang had on 13 April 2015 presented them with a letter terminating his role⁵.
- 5.3. He testified that the first time that Assmang raised the issue of the retrenchment the full-time shop-steward was at the meeting of 20 March 2015. Further, Assmang did not comply with clauses 8.1, 17⁶ and 18⁷ of the Recognition Agreement.
- 5.4. He conceded that during 2014, it was agreed with NUMSA that he would assist at the stores. Notwithstanding the agreement, he retained

⁵ *Supra* para 4.7

⁶ Clause 17: **COMMENCEMENT AND TERMINATION OF THIS AGREEMENT**

17.1 This agreement shall come into operation on the date of last signature hereof and shall remain in force until terminated in accordance with the provisions of this clause

17.2 This agreement will terminate under the following circumstances:

17.2.1 in respect of a bargaining unit, should the union cease to have sufficient representation in that bargaining unit;

17.2.1 should either party breach the terms of this agreement, and fail to remedy the breach within 14 days of being given notice to do so by either party; or

17.2.3 on one month's notice by either party.

⁷ Clause 18: **AMENDMENTS TO THIS AGREEMENT**

18.1 ...

18.2 No amendment of any term or aspect of this agreement shall be effective unless it is reduced to writing and signed by the parties.

18.3 Any term of this agreement may be re-negotiated by either party, provided 30 days' written notice is given to the other party of the intention to re-negotiate.

his position as a full-time shop steward and as such, when the section 189 process commenced, he should not have been affected.

- 5.5. He was of the view that his dismissal was unfair based on the fact that Assmang failed to comply with the provisions of the Recognition Agreement. Further there was no meaningful consultation between NUMSA and Assmang in respect of abolishment of the position of full-time shop-steward.

Evaluation:

- [6] Recently in *Woolworths (PTY) Ltd v SACCAWU and Others*⁸ the Labour Appeal Court restated the test for substantive fairness in operational requirements dismissal disputes as follows;

“...It is the general consensus of writers on this subject that the test for the fairness of a retrenchment where s189A applies differs from that applicable to retrenchments to which the section does not apply. We agree with this view. Section 189A(19) which is worded in peremptory terms provided that in any dispute referred to the Labour Court in terms of s191(5)(b)(ii), concerning the dismissal of this category of employees, the Labour Court must find that the employee was dismissed for a fair reason if four grounds are satisfied namely:

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the dismissal was operationally justifiable on rational grounds;
- (c) there was a proper consideration of alternatives; and
- (d) selection criteria were fair and objective.

It is trite that the onus of proving this rests upon the employer”

- [7] The insurmountable difficulties the applicants are faced with in this case as I understood it, is that they do not dispute any of the four factors mentioned

⁸ [2017] 12 BLLR 1217 (LAC); (2018) 39 ILJ 222 (LAC) at para [35]

above, including the fact that there was commercial rationale for the removal of the Full-Time Shop Steward's position.

- [8] Their case is mainly grounded in the provisions of clause 8 of the Recognition of Shop Stewards' Agreement, which by all accounts, cannot be construed as a legitimate basis for attacking the fairness of a dismissal for operational requirements. A recognition of shop stewards agreement cannot by any stretch of imagination be equated with operational requirements as defined in section 213 of the LRA.
- [9] If I understood the applicants' case, and notwithstanding Phakhathi's vacillation and refusal to answer a direct question under cross-examination, their case is essentially that by virtue of his position as a Full-Time shop Steward, he was immune from Assmang's decision to retrench, because that position was entrenched by virtue of the provisions of clause 8 of the Agreement. There is everything wrong and illogical with the applicants' approach, for the following reasons;
- a) It was not in dispute that at the time that Phakhathi was appointed as a Full-Tim Shop Steward, there were about 700 employees falling within the bargaining unit, and there was obviously justification for the existence of that position.
 - b) When the number of employees dwindled to 60 as at 2015, and even if as per the Agreement, NUMSA still enjoyed 50% of the number of employees in the recognised bargaining unit, there is no rational basis advanced by the applicants as to the reason the position of a Full-Time Shop Steward was necessary. It is not clear from the evidence as to how many of the 60 remaining employees were still in the bargaining unit for the purposes of the 50% representation. Even if there was a significant number of NUMSA members, I can still not find any reason why the position of a Full Time Shop Steward was still necessary, especially within the context of Assmang's dire financial constraints that were accepted by all parties.

- c) It was further common cause that as a result of the 2014 retrenchments, Phakhathi was required to assume further roles in the stores. He conceded that after that exercise, he was no longer a Full-Time Shop Steward in the strict sense as he was required to perform other duties. This could only have been in appreciation that his full time role as a shop steward had been diminished to a large extent.
- d) The fact that an employee is a full time shop steward does not imply that he/she enjoys immunity from any operational requirements and exercise embarked upon by an employer. A shop steward is an employee in the first instance like any other⁹, and does not enjoy any other special privileges outside the scope of the provisions of sections 14¹⁰ of the LRA, or section 15, which regulates time off for union activities.

⁹ *Mondi Paper Co Ltd v PPWAWU & Another* (1994) 15 ILJ 778 (LAC)

¹⁰ "14. **Trade union representatives**

(1) ...

(2) ...

(3) ...

(4) A *trade union representative* has the right to perform the following functions -

(a) at the request of an *employee* in the *workplace*, to assist and represent the *employee* in grievance and disciplinary proceedings;

(b) to monitor the employer 's compliance with the workplace-related provisions of *this Act*, any law regulating terms and conditions of employment and any *collective agreement* binding on the employer;

(c) to report any alleged contravention of the workplace-related provisions of *this Act*, any law regulating terms and conditions of employment and any *collective agreement* binding on the employer to -

(i) the employer;

(ii) the representative *trade union*; and

(iii) any responsible authority or agency; and

(d) to perform any other function agreed to between the representative *trade union* and the employer.

(5) Subject to reasonable conditions, a *trade union representative* is entitled to take reasonable time off with pay during *working hours* -

(a) to perform the functions of a *trade union representative*; and

(b) to be trained in any subject relevant to the performance of the functions of a *trade union representative*.

- e) Significant with the applicants' case is that to the extent that they had relied on the provisions of clause 8 of the Agreement, when that agreement was terminated in April 2015, and prior to the termination of Phakhathi's services, despite the provisions of clause 16 pertaining to dispute resolution, NUMSA did not deem it necessary to approach the CCMA with a section 23 (4) and 24 (2) of the LRA referral. In fact, the dispute surrounding Phakhathi's position emerged at the facilitation proceedings, and yet nothing was done.
- f) Even if such a dispute had been referred, and an interpretation was made in favour of NUMSA, this would not have prevented Assmang from proceeding with its retrenchment of Phakhathi, specifically since an objective criterion as would have been applied through LIFO, would have required that he be retrenched. In essence therefore, the fact that he was a full time shop steward would not have shielded him from the application of an objective LIFO criteria.

[10] To conclude then, the applicants dismally failed to make out a case of substantive unfairness in respect of the dismissal of Phakhathi on account of Assmang's operational requirements. Once the dismissal was not challenged on any of the grounds restated in *Woolworths*¹¹, there was no basis in law or fact, for the applicants to approach this court with this claim, and they should have known better.

[11] This Court is always careful not to make an order of costs in circumstances where parties continue to enjoy a working relationship. In this case however, that relationship was abused with the bringing of this clearly frivolous claim. The claim was a non-starter, and even more disconcerting is that despite Phakhathi having been dismissed together with other members, NUMSA appears to have given him special treatment simply because he was a full time shop steward. In the circumstances, the requirements of law and

¹¹ *supra*

fairness dictate that NUMSA be burdened with the costs of having to defend this matter.

Order:

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

1. The applicants' claim is dismissed with costs.

E. Tlhotlhamajie

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

Mr N. Masutha: of NUMSA
(Union Official)

For the Respondent:

Adv. M.J. van As

Instructed by:

Cliffe Dekker Hofmeyr
Incorporated

LABOUR COURT