THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 426/11

In the matter between:

MOIPONE GARE **Applicant**

and

T-SYSTEM SOUTH AFRICA (PTY) LTD **First Respondent**

ARIVIA.KOM (PTY) LTD **Second Respondent**

Heard: **13 to 16 August 2018**

Submissions: **3 September 2018**

Delivered: **21 November 2018**

Summary: **Section 189A applicable – dismissal for operational requirements consequent transfer in terms of section 197 of the LRA.**

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] In this action, the applicant, Ms Moipone Gare (Ms Gare), is challenging her dismissal on the basis of the first respondent's, (T-System South Africa (Pty) Ltd (TSSA)), operational requirements. She asserts that her dismissal was procedurally and substantively unfair because it was not effected in accordance with section 189 of the Labour Relations Act[1] (LRA).

[2] TSSA is objecting to this Court's jurisdiction to deal with the procedural challenge and it submits that Ms Gare's dismissal was consequent to a section 189A process. The number of employees in its employ at the time were 2002 and it intended retrenching 50 employees.

[3] These proceedings sat over a period of four days, commencing from 13 to 16 August 2018. The parties agreed to file written submissions and the submissions were received by the Court on 3 September 2018. TSSA was allowed to lead evidence by way of Skype video conferencing. I, however, deem it unnecessary to rule on the admissibility of this evidence as nothing turns on it.

Background facts

[4] Ms Gare was employed by the second respondent, Arivia.Kom (Pty) Ltd (Arivia), a state owned information technology company which came into existence out of a merger between Datavia, Eskom ITS and Ariel Technologies. Arivia was successfully procured by TSSA in January 2010 and as a result of the merger of the two companies, Ms Gare and all Arivia's employees were transferred to TSSA in accordance with section 197 of the LRA.

[5] During the sale negotiations it was anticipated that there may be redundancies as a result of the merger. As a result, Arivia and TSSA agreed to establishment a Career Centre as holding place for employees affected by the integration. The Career Centre was aimed at assisting unplaced

[1] Act 66 of 1995 as amended.

employees to secure alternative placement internally or externally through, *inter alia*, reskilling and experience learning with salary guarantees up to 31 December 2010.

[6] Ms Gare remained unplaced after she unsuccessfully applied for the position of DB2 Database Administrator, the same position she was occupying whilst still in Arivia's employ, in September 2010. She was immediately transferred to the Career Centre where she applied for other position that had been advertised internally without success.

[7] In October 2010 she was informed that her position was redundant and was issued with a section 189(3) notice. Ms Gare sought assistance from TSSA with her business initiative in order to mitigate the adverse effect of the retrenchment to no avail. She was informed that he business initiative was not in line with TSSA's core business.

[8] On 26 October 2010, a consultation meeting was held with Ms Gare, at her instance. In that meeting, other than being offered the emotional support in terms of TSSA's wellnesses programme, none of the issues referred to in terms of section 189(3) notice were discussed. This fact was conceded by Ms Charlene Benade, who was the Career Centre Manager in Midrand and a scribe in that meeting. Ms Gare received a notice of termination on 26 November 2010 and her services were terminated on 31 December 2010.

[9] It is common cause that Ms Gare was a member of South African Transport and Allied Union (SATAWU). SATAWU had been consulted on the integration process and the placement model that was going to be implemented. SATAWU was aware of the number of its members that had not been placed in terms of the integration process. Mr Keven Wilson (Mr Wilson), the TSSA' Employee Relations Consultant, testified that he was part of most consultations meetings with the general body of employees and SATAWU, particularly. On 9 November 2010, he provided SATAWU shop-stewards and officials with a list of SATAWU members who were at the Career Centre at that time.

[10] Despite the fact that SATAWU members were issued with section 189(3) notices individually and without notifying it, SATAWU did not intervene. Even when its members were subsequently served with notices of termination, SATAWU did not object. Ms Gare was adamant that she did inform her shop-stewards about the conduct of TSSA and she was told to wait up until 31 December 2010.

[11] When pushed by shops-stewards in January 2011, Mr Tinzi Lubabalo (Mr Lubabalo), SATAWU official responded as follows:

> 'The issue of retrenchment has been on the cards from T-Systems toward the end of 2010. In light of the report that you forwarded to us, it becomes clear that the employer is executing its plan. Of course SATAWU would not turn a blind eye and pretend as if there is nothing that is happening. I propose that we must declare a dispute guided by section 189 of the Labour Relations Act. …
>
> <u>SATAWU is not in position to interdict the integration process as that case is not winnable</u>. We shall oppose every step of the way belief from the employer that suggests that for the integration to be successful only former Arivians must bear the b[ru]nt. We shall have to advance that argument in front of the judge at Labour Court.' (Emphasis added)

[12] Mr Lubabalo conceded in cross examination that SATAWU had been part of the integration discussions and it remained recognised as a collective bargaining party up until 31 May 2011. Even though he had promised SATAWU members that their retrenchment would be challenged, that never happened. He still maintained that interdicting the integration process had no prospects of success.

<u>Section 189A</u>

[13] Section 189A provides:

> '(1) This section applies to employers employing more than 50 employees if –

(a) the employer contemplates dismissing by reason of the employer's operational requirements, at least –

(i) 10 employees, if the employer employs up to 200 employees;

(ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;

(iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;

(iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or

(v) 50 employees, if the employer employs more than 500 employees; or

(b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph (a).

…

(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –

(a) compelling the employer to comply with a fair procedure;

(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;

(c) directing the employer to reinstate an employee until it has complied with a fair procedure;

(d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

…

(18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191(5)(b)(ii).'

[14] It is not in dispute that TSSA anticipated to retrench 50 employees in an employ of 2002 workforce after the merger. Therefore, section 189A is applicable and the procedural challenge ought to have been dealt with in accordance with section 189A(13). Clearly, SATAWU was ill-advised in its view that it had no prospects of successfully interdicting the integration process.

[15] TSSA correctly submitted that in terms of section 189A(18), this Court lacks jurisdiction to deal with the procedural fairness.

<u>Substantive fairness</u>

[16] As mentioned above, SATAWU did not challenge the integration process which sought to deal with the duplication of structures and facilities consequent to the merger between Arivia and TSSA. In my view that is the major handle for Ms Gare as the decision to retrench need not be the best but must be genuine and not merely a sham. In *SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok*

Holdings,[2] referred to by TSSA, the Labour Appeal Court (LAC) held as follows:

> 'For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. <u>That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process</u>.' (Emphasis added)

[17] TSSA consulted with its employees and in particular, SATAWU as a recognised trade union, about its intention to align the amalgamated structure on the basis of its International Business Operating Model. In fact, Mr Wilson testified that TSSA had a bilateral meeting with SATAWU where the whole integration process was explained. This evidence was not disputed.

[18] Clearly, what emerged from the consultation meetings with SATAWU was that the decision to embark on the integration process was operationally and commercially justifiable on rational grounds; hence it was never challenged.

[19] Also, Ms Gare asserts that she had been confronted with a *fait accompli,* defined as 'when an employer takes unilateral action which forecloses the

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[2] See: *SACTWU and Others v Discreto (A Division of Trump and Springbok Holdings)* [1998] 12 BLLR 1228 (LAC) at para 8; see also *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at para 19; *CWIU and Others v Algrorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC) at paras 69 – 70.

prospect of meaningful consultation on one or more of the issues in respect of which it ought to consult'.[3] In my view, a *fait accompli* challenge is unsustainable in the contexts of a section 189A retrenchment. Instead of waiting for the process to conclude and cry foul later, section 189A(13) provides a swift remedy for any procedural indiscretions during the consultation and before the retrenchment is effected.

[20] With regard to the selection criteria, Ms Gare is challenging the objectivity thereof. She testified that LIFO should have been applied and her colleague, Mr Codowell, ought to have been selected as he had less years of service. Mr Wilson, on the other hand, testified that TSSA applied excellent fit criteria which entailed appointing the most suitable candidate for the position. Ms Gare and Mr Codowell were interviewed for the position of DB2 Database Administrator. Mr Codowell was successful because he was found to be the best fit for the position. On 22 September 2010, Ms Gare was transferred to the Career Centre since her position was redundant.

[21] SATAWU and Ms Gare did not challenge the outcome of Ms Gare's interview and/or her non-placement. Mr Wilson testified that in the consultation meeting that was held on 9 March 2010, with SATAWU represented by Ms Zodwa Dlamini, a presentation of the Dispute Resolution Process Relating to Integration was tabled for discussion. In terms of the process, an employee aggrieved by the matching process had to lodge a formal grievance within 3 days after the decision that led to the grievance. The period was extended to 7 days after the consultation meeting of 9 March 2010, at the instance of organised labour, including SATAWU.

[22] In the recent decision of the LAC in *South African Breweries (Pty) Ltd v Louw,*[4] confronted with a similar impugn, the following was stated:

> [21] In this matter, what has been inappropriately labelled as the "selection criteria" is the inclusion of past performance ratings in the assessment process for the competitive process to select an

[3] See: *SASBO v Standard Bank of SA* [2011] JOL 26928 (LC) at para 36.
[4] [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC); (2018) 39 ILJ 189 (LAC) at paras 21-23.

incumbent for the new job of area manager, George. This is not a method to select who, from the ranks of the occupants of potentially redundant posts, is to be dismissed and is not what section 189(2)(b) is concerned to regulate. The fact, as illustrated in this matter, that a dislocated employee, who applies for a new post and fails, and by reason thereof remains at risk of dismissal if other opportunities do not exist does not convert the assessment criteria for competition for that post into selection criteria for dismissal, notwithstanding that broadly speaking it is possible to perceive the assessment process for the new post as part of a long, logical, causal chain ultimately ending in a dismissal. Accordingly, in our view, it is contrived to allege that the taking into account of performance ratings in a process of recruitment for a post is the utilisation of an unfair method of selecting for dismissal as contemplated by sections 189(2)(b) and 189(7).

[22] An employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses sections 189(2) (b) or 189(7). The filling of posts after a restructuring in this manner cannot be faulted. Being required to compete for such a post is not a *method of selecting for dismissal*; rather it is a legitimate method of *seeking to avoid the need to dismiss* a dislocated employee.

[23] Intrinsically, a competitive process for appointment makes assessments of the relative strengths and weaknesses of the candidates. What Louw is aggrieved about is that he was uncompetitive in these assessments. This condition, so he says, derives from unfair treatment in an earlier, routine performance rating process. It is not apparent to us that this allegation was substantiated on the evidence, but assuming that such a view was plausible, he went into the interview process well knowing of this circumstance. It is common cause he could have invoked standard procedures to have a poor performance rating re-examined. He failed to exhaust those remedies.' (Emphasis added)

[23] Even in the present case, Ms Gare failed to exhaust the internal procedures that were specifically designed to deal with complaints in relation to non-placement. Instead, Ms Gare pursued opportunities for business partnership with TSSA after her retrenchment which, unfortunately, did not yield any fruit. In her evidence, she lamented the TSSA's decision to turn down her proposal for business partnership as she intended to involve other retrenched employees. It would seem that Ms Gare had accepted her fate and was willing to move on as an entrepreneur.

[24] TASSA vehemently disputed Ms Gare's assertion that the Career Centre was solely established as a departure lounge so to speak. Ms Benade testified that the Career Centre was used for talent management to reskill and train all impacted employees for placement in alternative roles in other parts of the organisation. Employees were assigned to learn new skills, assisted to apply for positions and placed. There were employees who were successfully reintegrated after reskilling. Ms Gare did not avail herself to the assistance that was offered at the Career Centre as she was expecting to be offered a position without competing for it. Ms Gare on the other hand testified that she did apply for other position but was not successful. However, there was no position offered to her as an alternative to retrenchment.

[25] Ms Gare was a member of SATAWU and it owed it to her to diligently represent her during the consultation on the integration process. All the issues she is raising in these proceedings go to the core of fairness of the consultation process. SATAWU is a notable trade union with vast experience in labour legislation. Clearly, they dropped the ball by failing to challenge the procedural fairness of the consultation process in terms of section 189A(13).

<u>Conclusion</u>

[26] In all the circumstances, I am satisfied that the retrenchment of Ms Gare was substantively fair.

<u>Costs</u>

[27] The only issue remaining is that of costs. SATAWU is not cited as party in these proceedings and it does not look like they are funding this litigation. In any event, it is trite that costs in this Court do not follow the result and that in making an order for costs, the Court must consider the principles of law and fairness. This is a matter where a cost order will offend the aforementioned principles, especially since Ms Gare is an individual litigant.

[28] In the circumstances, I make the following order:

Order

1. The dismissal of the applicant, Ms Gare is substantively fair.

2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the applicant: Mr JCM Roets

For the applicant: Advocate T Molokomme

Instructed by: Moshoana Mabena Mogane Inc.