THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 602/13

In the matter between:

SHARON BANKS **Applicant**

and

UIS ANALYTICAL SERVICES (PTY) LTD **Respondent**

Heard: **17, 18 and 28 May 2018**

Delivered: **12 October 2018**

Summary: **The retrenchment is operationally justifiable – there is proof that there was proper consultation – claim that the applicant was confronted with a *fait accompli* is untenable.**

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] In this matter, the applicant is challenging the procedural and substantive fairness of her dismissal on the basis that it was not effected in accordance with section 188 read with section 189 of the Labour Relations Act[1] (LRA).

[2] The applicant was employed by the respondent as a Business Development Manager in August 2005. She was dismissed on 14 June 2013. At the time of her dismissal she was earning a gross monthly salary of R 82 068.94.

Pertinent facts

[3] The respondent incurred substantial financial losses during the 2012/2013 financial year. As a result, it began to experience cash flow challenges and was unable to pay salaries and creditors that were overdue. According to Ms Sara Pins (Ms Pins), the General Manager, it became apparent to the respondent that the salary bill was a burden. Comparatively, the ratio between wages and gross revenue was above the industry norm set at 45%.

[4] Ms Pins was adamant that had any of the loans from sister company been recalled, the respondent would have closed its doors. The Exxaro Sands tender which the applicant referred to was only awarded on 19 June 2013. Even though the amount was R 7 650 229.00 only R 258 000 was invoiced against the contract for the period ending in April 2014. Therefore, that tender did not do much dent in the respondent's dire financial position.

[5] It was Ms Pins' further evidence that nothing was untoward about the payment of staff bonuses at 35% of monthly salaries in December 2013, as alleged by the applicant. The deal was consequent to the negotiations with the trade union (CEPAWWU) for 2012/2013 financial year. The Commission for Conciliation Mediation and Arbitration (CCMA) had ordered that 7% wage increase plus bonuses. The deal was extended to all employees earning below R 217 000 per annum. The staff earning above R 217 000 had an

[1] Act 66 of 1995 as amended.

option of receiving R7500 bonus or 5 additional leave days, subject to performance appraisal.

[6] On 12 and 24 April 2017, the respondent held consultation sessions with the employees and their representatives. The respondent's financial position was discussed and the fact that it had necessitated reduction of employees and job restructuring. Employees were given an opportunity to consider the presentation and to suggest any other means to improve the operational efficiency. It is instructive that the applicant did not make any suggestions at that stage.

[7] It is undisputed that there were other alternative measures that had been considered to obviate retrenchments which are, *inter alia*, reduction of the salary bill through termination of contracts, moratorium on recruitment of new staff, optimisation of staff complement, salary reduction of high earning staff, no salary increase in July and unpaid leave.

[8] The applicant's assertion that Human Resource (HR) function should not have been outsourced as it increased the financial burden and was only kept because Mr Belcher had a personal financial interest was disputed. According to Ms Pins, the use of external HR was also evaluated and found not to be excessive. Nonetheless, the HR contract was terminated in July 2013.

[9] Also, the position of Technician in Water Laboratory that became vacant in February 2013 due to the resignation of the incumbent was not suitable for the applicant hence she was not considered. That position had the targeted salary of R350 000.00 per annum whilst hers was 974 532.00 per annum. In any event, the applicant was not a qualified water technician and her involvement in overlooking the Laboratory for a few months in 2012 did not count.

[10] On 2 May 2013, the applicant was served with a letter headed 'Notice of restructuring of Position' from the Managing Director, Mr Blecher. It was mentioned that:

10.1 On 12 and 24 April 2017, the finical problems of the respondent had been discussed with personnel and representatives;

10.2 The respondent was not in a position to continue with the present manpower and personnel reduction and job restructuring had become necessary;

10.3 The applicant's own job had been affected and that a job of Sales and Marketing Manager was being made redundant;

10.4 The applicant was invited to consider a new proposed role of a Sales Executive and a detailed job description was attached, with turnover targets and commission structures;

10.5 The applicant was advised that if she chose not to pursue the opportunity in offer, necessary retrenchment steps would be initiated.

[11] Ms Pins had discussions with the applicant about the alternative position that had been offered. As a result, a commission structure that had been offered to the applicant in the letter dated 2 May 2013 was revised twice, that is, on 9 and 13 May 2013. The applicant rejected all the offers. In her email dated 14 May 2013, the applicant states:

> 'I have considered the Sales Executive position on offer, dated 13 May 2013, and decline such based on the following,
>
> - The offered position is a demotion, current position – Business Development Manager.
> - The remuneration is less than two thirds of my current package.
> - The offered position and remuneration is subject to review after three months and so does not offer security.
> - It is envisaged that the quarterly reviewed package be target driven. Failure to meet set target will incur further salary sacrifices with possible disciplinary action resulting in dismissal for not performance.

> Coupled with the known client requirements for method accreditation and improvement turnaround time (workflow steaming) from our operations, I am of the view that the tabled offer is not reasonable offer for me to accept. Please advise whether/when my current position will be made redundant.'

[12] On 15 May 2015, the applicant was served with a notice of retrenchment with particulars of the retrenchment.

Evaluation

[13] The applicant's impugn on substantive fairness of her retrenchment was not vigorously pursued. She conceded in cross-examination that the respondent was in dire financial position and that her salary was too high. I, however, deem it necessary to interrogate the applicant's assertion that there were other cost saving measures that could have obviated her retrenchment.

[14] The determination on whether the decision to retrench was justified by the employer's operational requirements entails a finding on whether the ultimate decision arrived at was genuine and not merely a sham and not whether it was the best decision under the circumstances. This point was aptly expounded in *SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings.*[2] The LAC stated:

> '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. 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

[2] *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.

> 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.' (Emphasis added)

[15] With regard to the consultation process, the crux of the applicant's case is that she was confronted with a '*fait accompli*'. In *SASBO v Standard Bank of SA,*[3] this Court, per Lagrange J, stated that:

> 'It is trite law that when employees are confronted with a *fait accompli* any subsequent consultations may be fatally flawed. A fait accompli in the context of retrenchments manifests itself typically when an employer takes unilateral action which forecloses the prospect of meaningful consultation on one or more of the issues in respect of which it ought to consult. Under such conditions a …party that is asked to consult where the employer has taken such action may rightly cry "foul"'. (Emphasis added)

[16] I reckon the converse is true in the present case. The applicant testified that she was part of management discussions and consultation meetings, particularly, the staff meeting held on 17 April 2013, that discussed the respondent's financial challenges. She also conceded in cross-examination that there was no firm decision on the outcome of the consultation meetings at that stage. The staff was also invited to come up with suggestions on how to increase operational effectiveness and avoid retrenchments. Regrettably, the applicant did not avail herself to this opportunity. All the suggestions she has offered in her evidence as best measures that could have saved her job are too little too late.

[17] It is instructive that the applicant acknowledged that she was part of the consultation meetings. In her email dated 29 April 2013, she states:

[3] [2011] JOL 26928 (LC) at para 36

> ‘In closing, from next month (May) I would like to participate in the offer to all staff, as presented in the second staff restructuring consultation meeting, of unpaid leave to ease the interim payroll burden.’

[18] Clearly, the letter dated 2 May 2013 was preceded by several consultation meetings. The discussions continued as the applicant was consulted on the alternative position in offer. The applicant seemingly accepted that her salary was unaffordable at that time but was not willing to come to the party and accept a salary cut.

[19] The applicant testified that she was willing to take any job or even work half a day to save the situation. However, the she rejected the alternative position she was offered even though one of the offers was for half day with a salary package that is 50% percent less than what she was paid at that time. In my view, the applicant did not give a serious consideration to the reasonable alternative position and proposed packages she had been offered. The respondent went out of its way to tweak the proposed packages in order to accommodate her. In all instances, the applicant did not propose any alternatives.

[20] There was no way the parties could have reached consensus given the applicant’s intransigent stance. Despite accepting that there was no business generated to justify her salary, the applicant rejected a salary cut that would have been commensurate to the business generated and relieved the respondent of its financial burden. Clearly, she proverbially wanted have her cake and eat it too.

[21] The picture that emerged from all the parties’ engagements is that the applicant’s retrenchment was commercially justifiable and was preceded by a proper consultation process. If follows that the applicant failed to prove that she had been confronted with a *fait accompli*.

<u>Conclusion</u>

[22] All things considered, I am convinced that the applicant's dismissal based on the respondent's operational requirements is substantively and procedurally fair.

Costs

[23] The only issue remaining is that of costs. It is trite that costs in this Court do not follow the result as the requirements of the law and fairness are a consideration.[4] In my view, the applicant, like most individual litigants in this Court, was clearly misguided in launching these proceedings. Nonetheless, I am not convinced that she was *mala fide* so as to be saddled with costs.

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

Order

1. The dismissal of the applicant based on the respondent's operational requirements is substantively and procedurally fair.

2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[4] Section 162 of the LRA.

<u>Appearances:</u>

For the applicant:	Advocate C Strydom
Instructed by:	Avery Inc.
For the respondent:	Advocate P Kirstein
Instructed by:	Couzyn Hertzog & Horak Attorneys