IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PS 29/2014

In the matter between:

WELLINGTON LEBEPE **Applicant**

and

UMSO CONSTRUCTION (PTY) LTD **Respondent**

Heard: 12-13 September 2018

Delivered: 8 November 2018

JUDGMENT

Lallie. J

[1] The respondent conducts business in the construction industry. It has offices in a number of provinces including Gauteng and the Eastern Cape. It benefited from the economic growth in the industry which resulted from the country's preparation for the 2010 world cup. It also felt the slump which followed and resulted in retrenchment of a number of employees. The applicant was employed by the respondent as a buyer in 2007. He was dismissed at the end

of 2012 at a time he was based at the East London office of the respondent owing to operational requirements of the respondent (retrenched). In these proceedings he seeks relief for his alleged substantively and procedurally unfair retrenchment. The matter is opposed by the respondent on the grounds that the retrenchment was both substantively and procedurally fair.

[2] In its attempts to prove the fairness of the applicant's retrenchment the applicant called 2 witnesses. Messrs Komane (Komane) and Kasha (Kasha). At the time of the applicant's retrenchment Komane was employed as the respondent's Human Resources Director. Substantiating the alleged substantive fairness of the applicant's retrenchment he testified that at the end of 2010 the respondent had a lot of projects and employed over 700 employees, 200 of whom were permanent employees. Toward the end of 2011 going forward the respondent had no projects as there was a lack of work in the market. He testified that employees were aware that the respondent was not getting work as tenders and projects were displayed on notice boards and made available electronically. It is the lack of business which resulted in the economic position that necessitated the retrenchment of employees including the applicant.

[3] Section 213 of the Labour Relations Act[1](the LRA) includes economic requirements in its definition of operational requirements. Under cross-examination the applicant conceded that as a buyer he was busy in 2008. He was even busier and the respondent extremely busy in 2009 as they were preparing for the 2010 world cup. He acknowledged that the jobs they were busy with would be displayed on the notice board. He further conceded that in 2011 there was a significant decline in work and in 2012 there was not even a notice board displaying work that had to be done. All the concessions made by the applicant give credence to the respondent's version that its economic position in 2012 justified retrenchment. I therefore accept that the respondent discharged the onus of proving the substantive fairness of the applicant's retrenchment.

[1] 66 of 1995

[4] The applicant challenged the procedural fairness of his retrenchment on the grounds that his retrenchment was not preceded by a meaningful consultation. Although the respondent called Kasha to corroborate Komane's evidence, he did not help much as he was unable to remember a lot of material facts. Procedural fairness of retrenchments is governed by section 189 of the LRA. Section 189 (1)(d) requires an employer contemplating retrenching an employee or employees to consult employees likely to be affected by the proposed retrenchment. Section 189(2) requires the consulting parties to engage in a meaningful joint consensus-seeking process and attempt to reach consensus on a number of issues which include measures to avoid and minimize dismissal, change in its timing and mitigation of its adverse effects. The consultation must be preceded, in terms of section 189(3), by the issuing of a written notice by the employer to the consulting party disclosing relevant issues. The issues include the following:

> *'(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;*
>
> *(h) the possibility of the future re-employment of the employees who are dismissed;*
>
> *(i) the number of employees employed by the employer; and*
>
> *(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.'*

[5] I reject the arguments on behalf of the respondent that it proved that the applicant's retrenchment was preceded by a fair procedure as envisaged in section 189 of the LRA. That argument is not supported by evidence. Komane

conceded that the respondent did not issue a notice in terms of section 189(3) of the LRA. It is common cause that on 29 October 2012 the respondent's managing director called a staff meeting in which the applicant was present and informed staff of the difficult financial position the respondent was in. He further told them that if things did not change the respondent would be forced to retrench. Komane testified that he told staff members to convey their ideas to their manager. Staff members were given an opportunity to ask questions but no one posed any. A second meeting was held on 29 November 2012 in which staff was told that the respondent's financial position had not changed as a result employees would be retrenched. In the afternoon of the same day Komane and Spamla (Spamla) had a one on one meeting with the applicant and informed him that he had been selected for retrenchment. He was shocked and asked for reasons for his selection. They told him that Spamla was going to add the applicant's duties to his. On 30 November 2012 the applicant was given his retrenchment letter and offered transport for his belongings to his home in Gauteng at the respondent's cost.

[5] Komane's evidence proved the respondent's failure to follow a fair procedure when retrenching the applicant. The consequences of the applicant's failure to issue the written notice in terms of section 189(3) are that the applicant was not given relevant information before attending the meeting of 29 October 2012. Komane conceded that employees were told of the meeting on the morning of 29 October 2012 and its purpose was not disclosed. They were therefore not prepared for the meeting. The respondent cannot seek to use the employees' failure to ask questions at that meeting to its advantage. The employees including the applicant were not prepared. All the issues they were supposed to consult about should have been included in the notice the respondent failed to provide. The meeting of 29 October 2012 does not constitute consultation as envisaged in section 189(2) of the LRA. In the absence of compliance with section 189(3) the quality of the intended consultation was compromised. The applicant was denied of the opportunity to influence the respondent to protect his job including avoiding his selection for retrenchment.

[6] Komane testified that the applicant was shocked when they told him that he had been selected for retrenchment. The retrenchment procedure in section 189 is designed to protect employees from being surprised by the news of their retrenchments. The respondent's attempts to rely on the meeting on 29 November 2012 to substantiate its submission that it followed a fair procedure and consulted with the applicant cannot succeed. By Komane's own admission, the decision to retrench the applicant had already been taken. The real reason for the meeting was to convey the decision that he had been retrenched. The applicant's dismissal was procedurally unfair.

[7] The applicant sought 12 months compensation as relief for his unfair retrenchment. As his retrenchment was only procedurally unfair the appropriate relief is compensation. The amount of compensation which is just and equitable in all the circumstances for the solatium of the procedurally unfair retrenchment is R122 000.00 which is equivalent to remuneration the applicant would have earned over a period of 8 months calculated at the applicant's rate of remuneration on the date of his dismissal. The applicant sought a costs order against the respondent. Both the law and fairness justify the grant of the order as the applicant should not be out of pocket for asserting his right to fair procedure which was flagrantly violated by the respondent.

[8] The applicant also sought an order for the costs reserved on 12 September 2014 which were occasioned by the postponement of the trial at the instance of the respondent. The respondent sought to launch a rescission application which was refused, *inter alia*, because it was ill-conceived. As the applicant incurred costs as a result of the postponement which the respondent sought very late, fairness justifies that the respondent take responsibility for the costs.

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

<u>Order</u>

1. The Applicant's dismissal for operational requirements of the respondent was substantively fair but procedurally unfair.

2. The respondent is ordered to pay the applicant compensation in the amount of R122 000.00 .The respondent is ordered to pay the applicant's costs such costs include the costs reserved on 12 September 2014.

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Z Lallie

Judge of the Labour Court of South Africa

<u>Appearances</u>

For the Applicant:	Mr Sehunane of Sehunane Attorneys
For the Respondent:	Advocate Ellis
Instructed by	Boqwana Burns Inc