THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1483/17

In the matter between:

MARK ANTHONY SAMPSON **Applicant**

And

TRUVELO MANUFACTURERS (PTY) LTD **Respondent**

Heard: **8 – 9 November 2018**

Submissions: **28 November 2018**

Delivered: **18 April 2019**

Summary: **Section 189A is applicable - no jurisdiction to deal with procedural challenge.**

Dismissal for operational requirements – retrenchment was not operationally justifiable on rational grounds – selection criteria not applied fairly – no proper consideration of alternatives.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] The applicant, Mr Mark Anthony Sampson, was employed by the respondent, Truvelo Manufacturing (Pty) Ltd, as a Gunsmith. He was dismissed on account of the respondent's operational requirements. In this action, the applicant is challenging the procedural and substantive fairness of his dismissal, asserting that it was not effected in accordance with section 189 of the Labour Relations Act[1] (LRA). The respondent disputes this and maintains that the dismissal was fair in all respects.

Background facts

[2] The facts in this matter are mostly common cause. The respondent is a family business that has been trading since 1974. At the time of the applicant's retrenchment, it had 53 permanent employees. The business consists of Electronic and Armoury Divisions. The Electronic Division specialises in the design, development, manufacturing and marketing of speed enforcement equipment locally and internationally; while the Armoury Division specialises

[1] Act 66 of 1995 as amended.

in design, development, manufacturing and marketing of precision refiles commonly known as sniper guns.

[3] The applicant commenced his employment with the respondent on 2 April 2007 on fixed term basis in the Armoury Division. On 1 October 2007, he was appointed to a permanent position of an Assistant Gunsmith. On 1 September 2010, he was certified as a Gunsmith by the Department of Labour in terms of the Manpower Training Act[2] read with the Skills Development Act[3].

[4] According to the applicant's undisputed evidence, he was issued with a competency certificate to conduct business as a Gunsmith in terms of section 10 of the Firearms Control Act[4] for the period between 26 September 2012 to 25 September 2017. The respondent utilised the applicant as a fit and proper individual legally responsible for its operations as the gun manufacturing entity in terms of the Firearms Control Act for the period between 24 April 2014 to 20 May 2016. Thereafter, the applicant refused to perform this responsibility and the respondent has since utilised the services of a contracted Gunsmith.

[5] On 27 March 2017, the respondent commenced a retrenchment process by calling a meeting with its employees in the Armoury Division. It was in that meeting where all the employees in the Armoury Division were issued with a section 189(3) of the LRA notice. Mr Gebert, the respondent's Managing Director, explained to the employees the reason for the retrenchment as being the negative growth in the Armoury Division order book due to the pricing that was non-competitive in the international markets and as a result there was little or no interest. The local commercial and military markets also showed little interest due to economic constraints, so he further explained. The employees were requested to suggest alternatives to retrenchment by 3 April

[2] Act 56 of 1981 which has since been repealed.
[3] Act 97 of 1998 as amended.
[4] Act 60 of 2000 as amended.

2017 and the respondent had contemplated to conclude the process by the end of April 2017.

[6] Mr Gebert testified that the respondent had considered retrenchments in 2015 but did not proceed with the process at that time. However, at the beginning of 2017 the respondent resolved to proceed with the retrenchments as it became clear that the profits which were generated by the Electronics Division were drained by the costs and overheads in the Armoury Division because of cross funding.

[7] On 6 April 2017, a second meeting was held with all the employees in the Armoury Division. It is common cause that the meeting was very brief and was facilitated by the respondent's attorney, Ms Isa Voster from Stegmanns Incorporated Attorneys (Stegmanns). Stegmanns was briefed to assist the respondent with the section 189 process. The employees were informed that no one came forth with alternative suggestions to retrenchment as requested. Not so long after that meeting, the applicant was called to a meeting with Ms Dekker, the respondent's Financial and HR Director. It was in that meeting that he was informed for the first time that he had been selected for retrenchment and was issued with the termination letter.

Issues to be decided

[8] The issues that I must decide are:

8.1 Whether the respondent had a *bona fide* operational rationale to retrench the employees and in particular the applicant;

8.2 Whether the retrenchment of the applicant was substantively fair;

8.3 Whether the respondent followed a fair procedure in terminating the applicant's services; and

[9] If the Court finds that the termination of the applicant was indeed unfair, whether the applicant is entitled to compensation, and if so, the amount of compensation to be awarded.

Whether the respondent had a *bona fide* operational rationale to retrench the employees and in particular the applicant

[10] Mr Gebert testified that the respondent had been contemplating retrenchments since 2015 and the main driver was cost saving. In this regard, he relied on the Management Accounts compiled for the period between 2013 and 2017 to show that the Armoury Division experienced losses since 2013. He was adamant that the biggest contributor to the losses was salaries.

[11] A close inspection of the figures contained in the Managements Accounts shows that the losses were on a downward spiral from R13,6 million in 2013 to R1,4 m in 2016 and R2,8m in 2017. By the same token, the turnover also grew significantly. Contrary to Mr Gebert's explanation, these figures clearly show that there was a growth in the Armoury Division's order book during the period under review as correctly submitted by the applicant.

[12] In fact, the applicant testified that the respondent secured the biggest order in 2016 and that was confirmed by Mr Gebert during the year end Christmas party. Mr Gebert conceded that this order was received at the end of 2016 but

was only finalised after the retrenchment of the applicant. Even if this order was only effected after the retrenchments, in my view, the mere fact that it was secured in 2016 and was still being serviced to date put to question the rationality of the retrenchments.

[13] It is also strange that, whilst the respondent had been contemplating retrenchments as early as 2015, the very same year it commenced with an international recruitment drive. Mr Gebert testified that he went on a skill hunt abroad and recruited Mr Simon Temmel (Mr Temmel), an Austrian citizen. In the letter supporting Mr Temmel's application or a work visa dated 30 July 2015, Mr Gebert asserts the following:

> 'Truvelo currently has 56 full-time employees and envisages increasing to 80 employees with our planned expansion programmes with our products being distributed across Africa, Europe, Far East, Middle East and North America.
>
> Truvelo's innovative technical and product development focus on a niche markets, with a provision of backup and repairs, maintenance and calibration support, coupled with a total service excellence package to customers, thereby placing the at a competitive advantage within the sector.'

[14] Clearly, according to these representations, the respondent was not only doing well, but was contemplating expansion. When Mr Gebert was confronted about the contradictions, his response was that he always hoped that things will improve. I am not convinced by Mr Gebert's explanation. Mr Temmel's recruitment in September 2015 increased the operational costs exponentially as his monthly salary was almost R80 0000.00. As such, it is highly implausible that retrenchments were ever considered in 2015.

[15] Similarly, in 2016 retrenchments could not have been on the cards as the respondent further increased operational costs by appointing Mr Gebert's son who had just qualified as a Gunsmith abroad and was paid a monthly salary of almost R70 000.00. The respondent unashamedly paid the applicant a monthly salary of R16 261.88 despite him being a qualified Gunsmith with 27 years' experience. The applicant correctly submitted that the cumulative effect of these appointments is that the respondent increased its operational cost by almost 2 million per annum, a figure that is very close to the overall losses the respondent incurred since their appointments.

[16] While I accept that employees with international exposure may be sourced at a premium, in this instance it is inconceivable that the respondent could have drastically increased its costs when it was contemplating retrenchments. Particularly, since Mr Gebert conceded that the applicant's skills could not be faulted. Clearly, the salaries of the two highly paid employees ought to have been the first consideration in an attempt to avoid retrenchments, particularly, the applicant's.

[17] In the recent Constitutional Court judgement in *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited,*[5] the test set out *in SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings*[6] was endorsed. In *Discreto*, 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. That purpose is to ensure that the ultimate decision on

[5] (CCT275/17) [2018] ZACC 44 at para 25.
[6] 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.

> 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.' (Emphasis added)

[18] In the present case, the respondent failed to meet the above threshold. It failed to prove that the applicant's retrenchment was operationally justifiable on rational grounds. Therefore, the dismissal of the applicant is substantively unfair.

Whether the respondent applied the selection criteria in a fair manner

[19] It is common cause that the applicant had longer service compared to Mr Temmel and Mr Gebert's son. According to Mr Gebert, Last-In-First-Out (LIFO) criterion was never considered at all despite being referred to in the section 189(3) notice. Retention of critical skills was the primary method of selection that was effected.

[20] The applicant testified that he was never informed that he had been identified for retrenchment during the two consultation meetings. The selection criteria were never discussed during the meeting of 27 March 2017. Mr Gebert promised to discuss the retention of skills during the next meeting, a meeting that was held on 6 April 2017. It is common cause that the meeting of 6 April

2017 did not discuss any of the skills set required for the position of a Gunsmith. The applicant testified that, as a result, he was not expecting to be retrenched because he had long service and requisite skills as a Gunsmith. It came as a shock to him when he was issued with a retrenchment letter, so he further testified.

[21] Mr Gebert was adamant that the respondent was justified in retaining his son and Mr Temmel as they both had been trained and qualified from Ferlach Institute in Austria, an internationally recognised training institute for Gunsmiths. Even though there is no equivalent qualification in South Africa, Mr Gebert conceded that the applicant had more experience than Mr Temmel and his son. In fact, he also conceded that these internationally qualified employees were assisted by the applicant in their activities.

[22] The respondent submitted that the said qualification made their skills, or at least their potential, more critical for the Armoury Division than the applicant's skill set. It would seem that the respondent had forgotten its obligations in terms of Mr Temmel's general work visa approval. In the letter from the Immigration and Civic Services in the South African Embassy Austrian,[7] the following is stated:

> 'Dear Mr Temmel
>
> Please be advised that the Department of Home Affairs has waived certain requirements of your general work permit which include: [8]

[7] See page 118 of the bundle of documents.

[8] In terms of Immigration Act 13 of 2002 Regulation 18(3), an application for a general work visa must be accompanied by-

'(a) a certificate from the Department of Labour confirming that-

(i) despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;

(ii) the applicant has qualifications or proven skills and experience in line with the job offer;

(iii) the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic; and

(iv) the contract of employment stipulating the conditions of employment and signed

- A Certification from the Department of Labour.
- Poof of qualification to be evaluated by SAQA.

However, you are required to submit a confirmation from your prospective employer in South Africa confirming the following:

- That the company will ensure that it has a skills transfer plan in place.
- That training of South Africans will be a concerted effort and that proof will be available on request.
- And that proof of jobs for South African citizens are available on request.'

[23] Clearly, the respondent had an obligation to ensure that the job security of its South African employees and citizens in general is not jeopardised by the recruitment of Mr Temmel. In the event there were skills gaps identified, the training of local employees was imperative.

[24] In this instance, however, it would seem that the applicant's skills experience was superior to that of Mr Temmel. It is common cause that at some stage he was appointed as Head of Department with employees reporting to him. The applicant testified that he was not only assisting Mr Temmel and Mr Gebert's son in their jobs, he also spent most of his time fixing their mistakes. This evidence was not disputed.

[25] The respondent seemingly only considered the international qualification as a selection criterion. However, such a consideration was never discussed with the applicant. Most importantly, the international qualification in question was never evaluated by SAQA due to the exemption by the Department of Home Affairs. Therefore, Mr Gerber's testimony about its superior worth as compared to the applicant's qualification is obviously subjective.

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by both the employer and the applicant is in line with the labour standards in the Republic and is made conditional upon the general work visa being approved;

(b) proof of qualifications evaluated by SAQA and translated by a sworn translator into one of the official languages of the Republic…'

[26] In my view, in instances where a company contemplates retrenchments and has in its employ foreign employees, the selection criteria must be informed by the visa conditions of its foreign employees. In the present case, it is clear that Mr Temmel's skills set was not as critical as it was alleged and given the slow global appetite in the area he was meant to assist with, he was supposed to be released in order to protect the applicant's job as a South African citizen.

[27] It follows accordingly that the respondent failed to apply the selection criteria fairly and that rendered the dismissal of the applicant substantively unfair.

Consideration of alternative positions

[28] The applicant's alternative challenge is that the respondent ought to have applied LIFO and bumped out the employees who were less senior from the positions he had identified. Both Mr Gebert and Ms Dekker conceded that the alternative positions were never considered because they, firstly, thought that the applicant would not be interested in lower positions; and secondly, they were not aware that he had the skills to perform other duties. This was disputed by the applicant. He was adamant that he could have accepted any alternative position. Also, as a Gunsmith, he could perform almost all the functions in his department, a fact Mr Gerber was aware of.

[29] It is clear that there was no proper consideration of alterative positions in order to avoid the applicant's retracement. The respondent ought to have been better advised of the applicable legal requirements since it was assisted by a firm of attorneys during the retrenchment process.

[30] It follows accordingly that the dismissal of the applicant was substantively unfair because the respondent failed to properly consider alternatives to retrenchment.

Whether the respondent followed a fair procedure in terminating the applicant's services

[31] The applicant submitted that the respondent ought to have invoked the provisions of section 189A of the LRA as it had 53 employees in its employ and contemplated to retrench 10 of them.

[32] 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;
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> (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;
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> (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;
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> (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).'

[33] Indeed, section 189A is applicable and the procedural challenge ought to have been dealt with in accordance with section 189A(13). As such, in terms of section 189A(18), this Court lacks jurisdiction to deal with the procedural fairness.

Conclusion

[34 In all the circumstances, I am satisfied that the applicant's retrenchment was substantively unfair. The respondent failed to prove that the applicant's retrenchment was operationally justifiable on rational grounds; or that it fairly applied the selection criteria; or that it properly considered alternatives to retrenchments.

Remedy

[35] The applicant is not interested in reinstatement. In determining what is just and equitable compensation that can be awarded under s194(1) of the LRA, I have considered the following:

35.1 There was no business rationale for the applicant's retrenchment;

35.2 The respondent had vacant positions after the applicant's retrenchment but none was offered to him;

35.3 The applicant has not secured employment despite his active search; and

35.4 The respondent failed to fulfil its obligations in terms of the Mr Temmel's general work visa which mainly enjoined it to train and protect its South African employees.[9]

[36] To my mind, it is, therefore, just and equitable to award the applicant compensation equivalent to 12 months' salary.

[9] *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] ZALAC 34; [2015] 11 BLLR 1081 (LAC); (2015) 36 ILJ 2989 (LAC) at paras 23 to 25.

Costs [37] The applicant is an individual litigant who had to incur legal costs in order to vindicate his rights. Even though it is trite that in this Court costs do not follow the result, I am convinced that this case presents an exception.

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

Order

1. The dismissal of the applicant, Mr Mark Anthony Sampson, is substantively unfair.

2. The respondent, Truvelo Manufactures (Pty) Ltd, is to pay the applicant, Mr Mark Anthony Sampson, compensation equivalent to 12 months' salary within two weeks from the date of this order.

3. The respondent, Truvelo Manufactures (Pty) Ltd, is ordered to pay the costs of suit.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances

For the applicant: Mr DJ Coetsee

From: Dirk Coetsee Attorneys

For the applicant: Advocate DJ Withaar

Instructed by: Stegmanns Inc.