



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 284/17

In the matter between:

HOPE TSHEPO PHETO

Applicant

And

BNT MASINGA TRADING AND PROJECTS (PTY) LTD

Respondent

Heard: 11 February 2019

Delivered: 28 May 2019

**Summary: Application to have the applicant's dismissal declared
Procedurally and substantively unfair.**

JUDGMENT

RAPHULU, AJ

Background

- [1] The applicant was employed by the respondent as its SHEQ Manager, responsible for Occupational Health and Safety. He was retrenched from that position in February 2017.
- [2] The respondent was late in paying salaries for its employees in respect of the months of August and September 2016. The respondent contends

that, this is because of its difficult financial position. The applicant contends that he understood that the respondent's client, the Department of Public Works, was late in paying the respondent, hence the late payment to employees, but that there were funds available.

- [3] The respondent engaged a company called Yellowstone, run by one Lesley Brewitt, to take over some of its projects. It also engaged the services of Mr Brewitt as a consultant, to assist it in its financial management and in its attempt to rescue its business.
- [4] The respondent contends that its auditors told it that its employees earned too much, as none of its employees earned below R20 000 per month.
- [5] The respondent commenced the process as required by section 189 of the Labour Relations Act 66 of 1995, as amended ("LRA"), by issuing section 189 (3) letters to all its employees, including the applicant.
- [6] On the same day (it is in dispute whether before or after the applicant was issued with his section 189 (3) letter), the applicant submitted a grievance to one Mr Zoyisile Ngetu, the respondent's Human Resources Manager. The grievance was lodged against Mr Brewitt, based on alleged bad treatment of the applicant at a meeting that took place on 31 January 2017, and Mr Brewitt's alleged bad treatment of other employees of the respondent.
- [7] It is common cause that other than being issued with the section 189 (3) letter, no consultations as required by section 189 of the LRA took place in relation to the applicant.
- [8] The applicant's case is that he was prepared to engage in the s189 process, but that when he got to the meeting, it was Mr Brewitt, the very person he had laid a grievance against, who was running the process. The applicant's case is that Mr Brewitt, by virtue of the fact that he was not an employee of the respondent, was a person that the applicant viewed as unauthorized to run the process, and that he challenged Mr Brewitt on this.

- [9] The applicant's case is that Mr Brewitt told him that he was being dismissed with immediate effect, and that he told the applicant to leave the company laptop and keys behind. The applicant's case is that he found this confusing because on the one hand the section 189 (3) letter invited him to make representations, but Mr Brewitt was telling him that his dismissal was with immediate effect. The applicant contends there was no need for him to be told by Mr Brewitt to leave the company laptop and keys behind, as he was still an employee of the respondent, and he had work to do.
- [10] The applicant alleges that his retrenchment was procedurally unfair in that he was called into a meeting, handed the section 189 (3) letter, told that he was being retrenched with immediate effect, told to do as he pleased with the letter, and told to hand in his company computer and keys.
- [11] The applicant alleges that his retrenchment was substantively unfair in that the respondent was not in financial difficulty as it alleges, that it was being paid late by its client, the Department of Public Works, but not that it was a matter of it not having the finances, and warranting his retrenchment.
- [12] The respondent's case is that it had every intention to consult with the applicant as required by s189, but that its intentions were thwarted by the applicant's behaviour. The respondent contends that the applicant became aggressive and threatening, that he said he would take the company down, and that it could not engage with the applicant, as the applicant would not participate in the consultation process.
- [13] Under cross-examination, it was put to the applicant why he took so long to lodge a formal grievance. The applicant testified that he took time to lodge the grievance because he first attempted to address the issue with Mr Mbheri and Mr Masinga, but when it became apparent to him that they were not going to intervene, he then lodged a formal grievance. It was put to the applicant that Mr Masinga's brother was there and witnessed the s189 letter, therefore the applicant could have spoken to

the brother. It was put to the applicant that the full context should have been considered by the applicant, and that the statement made by Mr Brewitt that he could leave immediately did not necessarily mean that the applicant was dismissed. It was put to the applicant why he did not follow the section 189 (3) letter, and disregard Mr Brewitt, who was a “long ugly word”. It was put to the applicant that when he was told to do whatever he wanted to, why did the applicant not comply with the section 189 (3) letter and make his representations.

- [14] It was put to the applicant that he was holding the company ransom by not responding to the section 189 (3) letter, as he wanted his grievance against Mr Brewitt to be dealt with first, and that he lodged the grievance in order to take the company's attention off the s189 process. The applicant denied this. It was put to the applicant that the word “engage” goes both ways and that if he wanted information, he should have asked for it. The applicant responded that he was asked to leave immediately, and therefore he was not given the opportunity to engage with the company. It was put to the applicant why he did not go to his lawyer, as he did for the grievance. The applicant responded that he thought it was the right thing, to go to the CCMA for help. It was put to the applicant that losing his job was more important than a grievance against Mr Brewitt, and that he should have accordingly taken legal advice. The applicant responded that he had gone to the CCMA to seek assistance in this regard.
- [15] Mr Mbheri testified that the applicant never discussed his problem with Mr Brewitt with him, prior to lodging a formal grievance.
- [16] The respondent contends that the instruction was for the applicant to leave, and to leave the laptop etc. behind so there could be business continuity despite the applicant being very upset.
- [17] The respondent, through Mr Mbheri's testimony, contends that the HR Manager was the first person to receive the section 189 (3) letter, he then decided not to become part of the process in relation to the other employees and left, and that much later he returned and gave Mr Mbheri

the applicant's grievance letter, after the applicant had already received his section 189 (3) letter. The respondent contends that at the time that the applicant received his section 189 (3) letter, the respondent was not aware that the applicant had laid a grievance against Mr Brewitt.

- [18] The respondent alleges that when the applicant received the section 189 (3) letter he became very upset, refused to sign the letter, left the room, and only later returned and signed the letter. The respondent contends that it was Mr Mbheri who was doing the explaining of the s189 process, and that Mr Brewitt was assisting him. According to the respondent, the reason Mr Brewitt was assisting Mr Mbheri with the process is because Mr Masinga fell ill and could not be there, and Mr Ngetu, the Human Resources manager, became an affected employee in the process and therefore chose not to consult the other employees.
- [19] The respondent alleges that the applicant was issued with the s189 (3) letter as required by the LRA, that the applicant became violent and that even Mr Mbheri testified that he was frightened of the applicant, that the applicant said that he would take the company down, and that he indicated that he was not going to be part of the consultation process.
- [20] The respondent contends that it took the company laptop as it was the only way to access the Health and Safety system on the company's server and ensure business continuity, that it had to take the laptop as it could not operate without health and safety, and it was worried, as the applicant was the only person who had access to that system through the company laptop.
- [21] The respondent contends that the applicant should have complied with the contents of the s189 (3) letter and made his representations, and that the applicant cannot use Mr Brewitt as a reason for not engaging in the consultation process.
- [22] The respondent contends that just as the applicant took legal advice in lodging the grievance, the applicant should have done the same after

receiving the s189 (3) letter, and thereafter provided the respondent with his representations.

- [23] The respondent contends that it had a substantive reason for the applicant's retrenchment, as evidenced by the late payment of salaries for August and September 2016, the non-payment of the year-end bonus for 2016, and advice from its auditors that it had too many high earning employees as none earned less than R22 000 per month.
- [24] The respondent contends that the applicant subsequently got his company laptop back under supervision, purportedly to access his personal emails, but that he in fact proceeded to wipe everything off that laptop, including all the health and safety material.
- [25] The respondent contends that had the applicant complied with the section 189 (3) letter and made his submissions, the process could have been followed as planned and the applicant's dismissal even avoided, as the applicant's role could have been combined with that of another one of its employees, Mr Viljoen, due to the fact that the applicant had both skill sets of Health and Safety, as well as those of the Quality job held by Mr Viljoen.
- [26] The respondent contends that of the approximately 40 employees employed by the respondent, it ultimately retrenched 32 employees, and that 8 jobs were accordingly saved.

Evidence and analysis:

- [27] The parties are in dispute about the role Mr Mbheri played in the meeting at which the applicant was issued the s189 (3) letter, about the reason no consultations took place, about the proposed retrenchment date, and about the actual retrenchment date.
- [28] The parties are not in dispute about the fact that the applicant was issued with the s189 (3) letter but that no consultation took place on that day, or on any other day.

- [29] The parties make much of the date of the s189 (3) letter, the retrenchment date, as well as the date of the certificate of service and the date of the UI.19 form. Whilst I appreciate the date relevance in contextualizing what time the applicant was given to revert with his proposals as per the section 189 (3) letter, and the time allocated to the section 189 consultation process as a whole, I do not think that the dates take us any further in terms of why consultation simply never took place. It is trite in our law that the dates in a section 189 (3) letter are proposed dates, intended to be flexible as required by the consultation process. Accordingly, I am of the view that whichever version of the dates is accepted, the question of the lack of consultation is not satisfied.
- [30] The duty to consult when it is contemplated by an employer to dismiss one or more employees for reasons based on the employer's operational requirements, falls on the employer. Similarly, the duty to have procedurally fair dismissals falls on the employer. Whilst I accept that there are circumstances in which an employee is unruly and refuses to participate thereby making it difficult for the employer to consult, I do not believe that this is one of those circumstances. I say that because, save from the day on which the section 189 (3) letter was handed to the applicant, the respondent took no other steps to try and engage with the applicant.
- [31] In effecting the duty to consult, the employer nominates its representative, and on whom it entrusts the responsibility. The respondent entrusted Mr Brewitt with this responsibility. For one reason or the other, Mr Brewitt did not comply with what the LRA requires of the employer and did not consult on any of the consultation topics on the day the section 189 (3) letter was issued to the applicant. Even on the respondent's version that the applicant was violent and threatening to take the company down etc., this did not exonerate the respondent from a subsequent attempt to consult. Especially as on the same day, either before or after the applicant's meeting with Mr Brewitt, but on the same day nonetheless, the respondent became aware of the applicant's grievance in relation to Mr Brewitt. Based on that awareness, the

respondent would have become aware of how Mr Brewitt being in the meeting would have accordingly affected the applicant. The respondent took no other steps to reach out to the applicant and attempt to fulfil its duty to consult. The respondent did not even send follow up correspondence to the applicant to record what had transpired at the meeting that had made consultation not occur. It simply went ahead and retrenched the applicant. This rendered the process procedurally unfair.

- [32] Section 189 (2) of the LRA says that the parties must engage in a meaningful joint consensus-seeking process, and attempt to reach consensus. However, I am of the considered view that this does not take away the employer's duty to fairly dismiss an employee, complying with the requirements for both procedural fairness and substantive fairness.
- [33] There is mention of the operational requirement in the section 189 (3) letter, but by virtue of the lack of consultation, the operational requirement itself was never delved into and substantiated or interrogated in any concrete way.
- [34] In considering the essence of procedural fairness, our courts have held that fairness to the employer is considered to be expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not, but for the employee, fairness is found in the consultation prior to the final decision on retrenchment. This requirement is essentially a formal or procedural one, but it has a substantive purpose, which purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements.¹ An integral connection exists between procedural and substantive fairness. It is through the constructive engagement implicit in this process that the need to retrench is confirmed.² It is not possible to determine prior to the consultation process what may emerge from the process, and to what extent these results may have on the final decision.

¹ *SACTWU v Discreto (A Division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC).

² *Keil v Foodgro* [1999] 4 BLLR 345 (LC).

- [35] It is trite in our law that the process of consultation in terms of section 189 imposes obligations on both parties requiring both to act in good faith, however, even if the other party adopts delaying tactics, the onus remains on the employer to follow a fair procedure as far as possible and arrive at a fair decision.³ Further, the duty to follow procedure on employers is significantly higher in regard to dismissal for operational requirements than it is in regard to dismissal for other reasons.⁴
- [36] The consultative process has value even if the fate of the employee is apparently already decided and, even if dismissal is unavoidable, adequate consultation is required on the various topics under section 189.⁵ A court determining the fairness of a retrenchment must consider, in addition to the matters for which section 189 provides, whether the employer really needed to retrench, what steps it took to avoid retrenchment, and whether a fair criteria were employed in deciding whom to retrench.⁶ The courts function in scrutinising the consultation process is not to second-guess the business efficacy of the employer's final decision, but to pass judgment on whether the ultimate decision arrived at was genuine and not a sham, and on whether it was a rational commercial or operational decision, properly taking into account the result of the consultation process.⁷
- [37] The present matter is one where, without proper justification, procedural fairness has not been complied with. As to substantive fairness, the lack of procedure left the substantive reason for the retrenchment without having been delved into as required by the LRA.

³ *NUM v Crown Mines Ltd* [2001] 7 BLLR 716 (LAC); *NUMSA v Ascoreg* (1999) 20 ILJ 2649 (LC).

⁴ *Chetty v Scotts Select A Shoe* (1998) 19 ILJ 1465 (LC). See also *Maritz v Calibre Clinical Consultants (Pty) Ltd* [2010] JOL 24936.

⁵ *Whall v BrandAdd Marketing (Pty) Ltd* [1999] 6 BLLR 626 (LC).

⁶ *Sikhosana v Sasol Synthetic Fuels* [2000] 1 BLLR 101 (LC).

⁷ *SACTWU v Discreto (A Division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC). See also *Woolworths (Pty) Ltd v SACCAWU* [2017] 12 BLLR 1217 (LAC).

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

Order:

1. The applicant's retrenchment was procedurally and substantively unfair.
2. The respondent is ordered to pay the applicant compensation equivalent to 12 months' remuneration, payment is to be made within 15 days of this judgement.

L Raphulu

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate QM Dzimba

Instructed by: Kobras Attorneys

For the Respondent: BC Edwards of BE Labour Law and Associates

LABOUR COURT