IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 1016/17

REGAOGETSWE MARIPE HEZEKIEL MASHILE **Applicant**

and

WINGS TRAVEL MANAGEMENT **Respondent**

Heard: **29-30 April 2019**

Delivered: **11 June 2019**

JUDGMENT

MAHOSI. J

Introduction

[1] The applicant approached this Court by way of a statement of claim to challenge the substantive and procedural fairness of his dismissal based on the respondent's operational requirements. The relief that he seeks is retrospective reinstatement.

[2] The key question is whether the applicant's dismissal was substantively and procedurally fair.

[3] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

Relevant background facts

[4] The essential facts are not in dispute and are summarised by the parties in the pre-trial minute. The respondent employed the applicant as a consultant in its Systems Support Department (SSD) from 2 December 2014.

[5] The retrenchment that forms the subject matter of this dispute occurred in the SSD. Prior to the retrenchment, the SSD consisted of the following positions: Team Leader, two consultants (including the applicant) and a hardware technician.

[6] During or about the last quarter of 2014, the respondent concluded a service level agreement (SLA) with a service provider named Alchimea in terms of which it would provide a range of Information Technology (IT) services to the respondent which include, but not limited to IT support services relating to the respondent's mid-office systems (TMA). In terms of the SLA, Alchimea would provide IT support to the respondent's staff in regard to the TMA queries that were escalated to it, as well as analysis and development relating to the TMA application.

[7] The applicant, along with another consultant, Nkhwazi, performed an internal support function in the SSD and their duties comprised primarily of assisting staff with first line IT support in regards to the respondent's TMA and to escalate any IT

support issues in regards to TMA to Alchimea to resolve such issues. The hardware technician, Demetri Christofides (Christofides), performed extremely basic hardware maintenance functions, like troubleshooting and swopping out malfunctioning hardware, general cabling and fixing PC's. The team leader in the SSD was responsible for supervising the SSD staff.

[8] There was an overlap in the services rendered by the SSD consultants and Alchimea in that both Alchimea and the SSD consultants provided IT support to staff in regards to the respondent's TMA. However, prior to the retrenchment, Alchimea would provide such support when the SSD consultants escalated the queries, which happened often and caused the business to incur additional out of SLA costs. In other words, prior to the retrenchment, the staff members would first escalate TMA queries to the SSD consultants who in turn would escalate such queries to Alchimea.

[9] The applicant and the Team Leader were selected for retrenchment based on the last in first out (LIFO) criteria. Both Nkhwazi and Christofides, respectively had longer years of service with the respondent than the applicant and the Team Leader. All the affected employees were issued with a notice of compliance with section 189(3) of the Labour Relations Act [1] (LRA) on 10 October 2017. Retrenchment consultations were conducted on 17 October, 25 October, 27 October and 02 November 2017.

[10] Subsequent to the consultations, the applicant and the Team Leader were dismissed. Dissatisfied with the respondent's decision, the applicant referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and conciliation was held on 11 December 2014. The parties were unable to settle the dispute and the commissioner issued a certificate of outcome. As a result, the applicant brought this application.

Evidence of parties

[1] Act 66 of 1995 as amended.

[11] The applicant testified in support of his case and Mr Nomanja Kirstic (Kirstic) testified for the respondent.

The respondent's case

[12] The respondent's case was that there was a sound operational rationale for retrenchment. Mr Kirstic testified that in order to increase its efficiencies and profitability, the respondent evaluated its internal structures with the aim of cutting costs. As a result, a decision was taken to declare the applicant's position redundant. Mr Kirstic further testified that the applicant's dismissal was not motivated by any arbitrary consideration, including but not limited to a purported personal vendetta.

[13] The section 189(3) notice recorded that should the respondent proceed with the retrenchment, the selection criteria would be agreed upon by the parties. However, should the parties not agree, then a fair and objective criteria would be used. In addition, the respondent further proposed using specfic criteria, such as productivity measures and recorded that it might in addition look at LIFO as a qualifying criterion. At the end, the respondent decided to use LIFO because the performance of the applicant and that of the other consultant, Nkhwazi was on the same level.

[14] On the issue of procedural fairness, the respondent's case was that it complied with all the procedural obligations in terms of section 189 of the LRA in that the notice of intention to retrench was issued to all affected employees on 10 October 2017, which notice disclosed the respondent's intention to embark on a retrenchment process including possible termination of the employee's services, the reasons why retrenchment was necessary, the number of employees to be affected, the selection criteria, timing of the retrenchment, severance pay, assistance to be provided to the affected employees and possible re-employment.

[15] The applicant was given an opportunity to make submissions regarding possible alternatives and the only suggestion he made was that of a desktop engineer which position was not available. There were vacant positions open at the time and the applicant applied for a Business Development position in which he had no relevant experience and qualification. This resulted in his application not being successful.

The applicant's case

[16] The applicant's case was that he was retrenched because the respondent and his managers had a personal vendetta against him. Although the applicant did not dispute the fairness of the selection criterion, he contended that the selection criterion was changed from performance to LIFO and that this was not disclosed in writing as required in terms of section 189(3)(d) of the LRA. The applicant further contended that the consultations held were not meaningful, as the alternatives he proposed were not considered by the respondent. He contended that consultation meetings were held just for the respondent to be seen to have complied with the provisions of the LRA.

Legal principles and analysis of evidence

[17] The first issue is whether the respondent had a sound operational rationale to retrench the applicant. Section 192(2) of the LRA requires an employer, in any proceedings concerning any dismissal, to prove that the dismissal was fair. Similarly, section 188(1) of the LRA obliges the employer to prove that the reason for the dismissal was fair, where an employer dismisses employees on account of its operational requirements. The term "operational requirements" is defined in section 213 of the LRA as "requirements based on the economic, technological, structural or similar needs of an employer". Item 1 of the Code of Good Practice on dismissal based on operational requirements provides that:

'(1) The Labour Relations Act (Act 66 of 1995) ("the Act") defines

> a *dismissal* based on the *operational requirements* of an employer as one that is based on the economic, technological, structural or similar needs of the employer. It is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by *requiring* employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

[18] In *Haveman v Secequip (Pty) Ltd,*[2] the Labour Appeal Court (LAC) restated the test to evaluate the substantive fairness of dismissal related to operational requirements as follows:

> 'A fair reason is one that is *bona fide* and rationally justified, informed by a proper and valid commercial or business rationale. The enquiry is not whether the reason put up is one which would have been chosen by the court but whether the reason advanced considered objectively is fair.'

[19] The respondent's evidence is that its management took a decision to evaluate its internal structures with the aim of increasing efficiencies and profitability and to further cut costs. This decision was taken because there was an overlap in services rendered by the SSD consultants, one of whom was the applicant and Alchimea. As a consequence, the position of one SSD consultant was declared redundant. This evidence was not challenged and in fact, it was common cause between the parties.

[20] The applicant's claim that the respondent had a personal vendetta against him was not supported by any evidence before this Court. In fact, the applicant

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[2] JA 91/2014 at para 28, delivered 22 November 2016; See also *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC*)*. *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 36; *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at para 19 and *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).

seemed to be making his case as he went along. In his statement of claim, he submitted that his retrenchment was caused by the fact that he requested a salary increase during the first quarter of 2017. However, during the trial, he argued that he was dismissed because he had previously referred a dismissal dispute against the respondent to the CCMA. This is notwithstanding the fact that he conceded in the pre-trial minute that there was an overlap of services.

[21] Under cross-examination, the applicant could not explain the reason he made two contradicting versions except to state that he was not legally represented. This cannot be an excuse as it is common cause that the first pre-trial meeting was postponed to afford the applicant an opportunity to amend his statement of claim. It is apparent from the different versions presented by the applicant that he was not a credible witness as he kept making his case as the trial proceed. Therefore, there is nothing before this Court to suggest that the restructuring and the retrenchment process embarked upon by the respondent was not based on a *bona fide* commercial rationale and need to cut costs in order to improve profits.

[22] The next question is whether the respondent complied with its obligations in terms of section 189 of the LRA. Section 189(1) requires the employer to consult with affected employees prior to embarking on a retrenchment process and it reads:

> ‘(1) When an employer contemplates dismissing one or more employees for reasons based on the employer‘s operational requirements, the employer must consult -
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> (a) any person whom the employer is required to consult in terms of a collective agreement;
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> (b) if there is no collective agreement that requires consultation –
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> (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
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> (ii) any registered trade union whose members are likely to be

affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.'

[23] Section 189(2)[3] of the LRA requires the parties to engage in a meaningful joint consensus-seeking process in an attempt to agree on appropriate measures *inter alia,* to avoid and minimise dismissals; to identify the employees to be retrenched; to change the timing of the dismissal; and to mitigate the adverse effects of the dismissal.

[24] In terms of section 189(3), the employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to:

'(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;

[3] (2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on:
(a) appropriate measures -
(i) to avoid the dismissals;
(ii) to minimise the number of dismissals;
(iii) to change the timing of the dismissals; and
(iv) to mitigate the adverse effects of the dismissals;
(b) the method for selecting the employees to be dismissed; and
(c) the severance pay for dismissed employees.'

(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.'

[25] It is common cause that the applicant was issued with a retrenchment notice. The applicant's claim that the said notice was not compliant with section 189(3)(b) of the LRA has no merit. It is evident from the reading of the retrenchment notice that the respondent disclosed the alternatives that it considered before proposing the dismissals. The respondent further undertook to consider any proposed alternatives to be tabled by the affected employees during the consultation process and to discuss potential positions that could arise in the near future. In addition, the notice discloses that a fair and objective selection criteria would be applied and LIFO was also specified. The evidence is that the respondent's decision to apply LIFO was based on the fact that both SSD consultants performed equally.

[26] The applicant's contention that the consultation process was not adequate is not supported by the evidence before the Court. It is not in dispute that consultation meetings were held on 17 October 2017, 25 October 2017, 27 October 2017 and 2 November 2017. However, the applicant argued that the consultation was not adequate. What made the consultation inadequate, argued the applicant, was that the respondent was "not sincere". The minutes of the meetings placed by the respondent before the Court disclose the fact that the parties engaged in a joint

consensus-seeking process in an attempt to agree on appropriate measures to avoid the dismissals, to change the timing of the dismissal and to mitigate the adverse effects of the dismissal.

[27] The applicant's further contention was that the alternatives he suggested during consultations were not considered. The undisputed evidence is that the position of a Desktop Engineer that was suggested by the applicant as an alternative had not been created. Further evidence was that the applicant unsuccessfully applied for a vacant position of Business Development because he lacked relevant experience and qualification. It is apparent from the evidence that the applicant was given an opportunity to suggest alternatives, which were considered by the respondent. There is, therefore, no merit in the contention that the respondent disregarded the alternatives suggested by the applicant.

[28] The applicant also took issue with the timing of the retrenchment as he had proposed for its delay so that one of the affected employees could fill the position of a junior employee who indicated his intention to resign mid-2018. To counter the applicant's contention, the respondent submitted that it did not make business sense to retain the services of both the Team Leader and the applicant, and pay them until the resignation of the junior employee, just so that they can decide whether they want to offer him a position for a salary that is approximately half the applicant's salary when it became vacant. This is a fair proposition.

[29] In my view, the evidence is compelling that the respondent had a *bona fide* operational rationale to embark on the retrenchment process. Further that, subsequent to a notice of retrenchment, there were consultation meetings in which the parties engaged in a meaningful joint consensus-seeking process in an attempt to reach consensus on appropriate measures to avoid the dismissals, to minimise the number of dismissals, to change the timing of the dismissals, to reach consensus on the method for selecting the employees to be dismissed and to mitigate the adverse effects of the dismissals.

[30] As such, it follows that the applicant's claim falls to be dismissed. I had regard to the issue of costs and I am not inclined to order costs against the applicant taking into account the principles of equity and fairness.

[31] In the premises, I make the following order.

Order

1. The applicant's claim is dismissed.

2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Mashile (In person)

For the Respondent: Mr Orton of Snyman Attorneys