THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS 211/17

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **First Applicant**

COOL NTULI AND 35 OTHERS **Second to Further Applicants**

and

BRAVO SPAN 119 CC **Respondent**

Heard: 23 May 2019

Delivered: 30 July 2019

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this matter, the first applicant, National Union of Metalworkers of South Africa (NUMSA), referred a dispute pertaining to an unfair dismissal based on operational requirements in terms of section 189 of the Labour Relation Act[1] (LRA), on behalf of its members, the second to further applicants (applicant employees). The applicants are challenging the procedural and substantive fairness of the retrenchment.

[2] The respondent, Bravo Span 119 CC (Bravo Span) is defending its decision to retrench the applicant employees.

Factual background

[1] Act 66 of 1995 as amended.

[3] The applicant employees commenced their employment with Bravo Span, a construction company, in May 2015. However, it is common cause that they were initially employed by a company called Hilo Trading (Pty) Ltd (Hilo Trading) at different intervals respectively.

[4] On 7 November 2016, Bravo span issued NUMSA with a notice in terms of section 189(3) of the LRA wherein it communicated its intention to embark on a retrenchment process. The reason given for the contemplated retrenchment was that the construction contract between Bravo Span and Four Arrows, its main developer, was ending at the end of November 2016.

[5] At that stage Bravo Span indicated that it intended retrenching all its employees. On 10 November 2016, Bravo Span proposed to hold a consultation meeting with NUMSA on 16 November 2016. Indeed, the first consultation meeting sat on 16 November 2016.

[6] During the consultation meeting of 16 November 2016, NUMSA officials requested the following information:

6.1 A list of all Bravo Span employees, including dates of engagement, rates of pay and positions;

6.2 The names of sub-contractors used by Bravo Span, including the list of their employees by position and department.

[7] The above request for information was confirmed by an electronic mail (email) dated 18 November 2016. Bravo Span responded by an email dated 21 November 2016 with a document attached thereto containing requested information pertaining to its employees' rate of pay, position and date of commencement. Also, the applicants were given the names of Bravo Span sub-contractors.

[8] The next consultation meeting was held on 2 December 2016. What transpired during this meeting is in dispute. However, it is common cause that NUMSA demanded the outstanding information, being the list of Bravo Span sub-contractors' employees and their positions. Bravo Span was adamant that the information requested was irrelevant. The meeting was abandoned because it degenerated into a swearing brawl.

[9] There was no further consultation between the parties. On 5 December 2016, Bravo Span issued the applicant employees with the retrenchment letters and stated that they would be paid as follows:

9.1 Payment up to and including 5 December 2016;

9.2 Notice Pay;

9.3 Statutory leave pay outstanding; and

9.4 Severance pay of one week for every completed year of service.

[10] It is common cause that each applicant employees received payment of one week for each completed year of service based on the calculation that they had been in the employ of Bravo Span as from May 2015.

[11] It is also common cause that the document headed Bravo Span Employees attached to the statement of case correctly reflects the dates of engagement of the applicant employees with Hilo Trading. Even though Bravo Span disputed the details of Mr Moses Mngomezulu, applicant employee number 11, the applicants successfully proved that he had always been in the employ of Hilo Trading.

Issues for determination

[12] The Court is called upon to determine the following issues:

12.1 Whether there was a need to retrench;

12.2 Whether Bravo Span supplied all the relevant information to the applicants for purposes of a meaningful consultation;

12.3 Whether there was a meaningful consultation; and

12.4 Whether the applicant employees' severance packages ought to have included the period of employment under Hilo Trading.

Was there a need for retrenchment?

[13] Bravo Span led uncontested evidence that phase 1 of the construction contract with Four Arrows was about to come to an end. Mr Gerhard Knoetze

(Mr Knoetze), Bravo Span's Managing Member, testified that Four Arrows was not happy with Bravo Span's performance and put them *in mora* whilst reserving its right to accept the repudiation and terminate the contract. That contract was completed and as a result, Bravo Span retrenched all its employees as of 15 December 2016. Mr Knoetze further testified that Bravo Span signed a new contract in the middle of January 2017. He did offer employment to some of the retrenched employees, particularly Mr Ntuli. However, it was on fixed term contract basis. The offer to re-employ all of the applicant employees on fixed term contract basis still stands because they were good employees, so Mr Knoetze further testified.

[14] The applicants, on the other hand, dispute the reason for the retrenchment and state in the pre-trial minute that there was no reason for retrenchment because soon thereafter, Bravo Span employed new employees. Mr Cool Ntuli (Mr Ntuli), applicant employee number four and NUMSA shop-steward at that time, testified that there were employees that remained to complete the work and are still employed to date. However, he conceded during cross-examination that all Bravo Span employees were served with retrenchment letters on 5 December 2016. Also, Mr Abraham Makame (Mr Makame), employee applicant number six and also a NUMSA shop-steward at that time, conceded that he had no detailed knowledge of the circumstances that led to the re-employment of some of the retrenched employees.

[15] It is clear that the applicants' impugn on the rationale for the retrenchment lacks merit. Mr Makame testified that even though Phase 1 Project came to an end there was Phase 2 that was about to commence. Bravo Span's evidence that Phase 1 ended on 15 December 2016 and that the new contract was only sourced in the middle of January 2017 was never challenged. As such, subsequent to 15 December 2016, there was no work for all Bravo Span's employees, including the sub-contractors.

[16] It is trite that the determination of the commercial rationality of the decision to retrench entails an enquiry 'as to whether a reasonable basis exists on which

the decision, including the proposed manner, to dismiss for operational requirements is predicated'.[2]

[17] In the present case, it is clear that Bravo Span was confronted with operational challenges at the end of the building project with Four Arrows and had to rationalise its business and all its employees in that project were affected. In my view, the decision to retrench the applicant employees was operationally justifiable.

Was there was a meaningful consultation?

[18] The applicants' second peg to its case is that there was no meaningful consultation. It is common cause that only two consultation meetings took place. On 16 November 2016, NUMSA requested information for purpose of further consultation. Mr Knoetze testified that all the relevant information was accordingly provided, which was all its employees' details in relation to pay rates, date of engagement and positions they held; and the names of the subcontractors. However, it is common cause that the details of the sub-contractors' employees' rates of pay and date of commencement was never provided. That became the source of the quarrel that ensued between the parties during the second consultation meeting on 2 December 2016. It is alleged that the F-word was used but both parties are pointing fingers at each other as to who started the quarrel and used the F-word.

[19] The consultation meeting of 2 December 2016 was abandoned as parties could not agree on the relevance of the outstanding information.

[20] Mr Knoetze testified that Bravo Span was within its rights to proceed with the retrenchments on 5 December 2016 as NUMSA had refused to be consulted as they insisted on being provided with the information that was irrelevant and was not in the possession of Bravo Span. However, NUMSA was adamant that the information relating to the subcontractors' employees' contracts of employment was relevant because they wanted to compare their years of service in order to meaningfully consult on the selection criteria.

[2] See: *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at para 19; see also *CWIU and Others v Algrorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC) at paras 69 to 70.

[21] In *Association of Mineworkers and Construction Union (AMCU) and Others v Shanduka Coal (Pty) Ltd*,[3] this Court as per Lagrange J, pertinently stated:

> '[27] It is well established that the consultation process envisaged under section 189 is intended to be a joint goal orientated problem solving process. It is one in which the parties ought to try and reach a common understanding on the need for and extent of any retrenchments. In examining the need for retrenchment the parties must, as a matter of logic, and in terms of sections 189(2)(a)(i) and (ii), explore if there are ways of addressing the operational need without shedding jobs, or at least by minimising job losses. If job losses cannot reasonably be avoided there is a need to look at what can be done to ameliorate the position of those who will be affected and how they will be selected for retrenchment. Ideally, the logical progression of discussions would follow the sequence of issues set out in section 189(2). However, discussion on these issues often proceed in tandem, so that selection criteria might be discussed even though parties have not yet agreed on the need or extent of any retrenchments. Nothing prevents this happening but to avoid misunderstandings parties would be well advised at each round of consultations to review what has been agreed, what is still unresolved but requiring further consultation, and what is unresolved but where neither party has anything new to suggest which might break the impasse on an issue.
>
> [28] Because it is supposed to be a problem solving process, the process is not advanced if it consists of mechanically running through a checklist of items without any engagement between the parties. Likewise, the process is not advanced if obstacles are constantly placed in the way of consultation on the substantive issues taking place. (Emphasis added)

[22] It was further stated that:

> '[34] If the consultation process did not achieve its purpose, the question that needs to be asked is whether the employer can be blamed if it was not.'[4]

[3] [2013] JOL 29787 (LC) at paras 29 to 28.
[4] *Supra* at para 34.

[23] In the present case, Bravo Span was categorical in the section 189(3) notice to NUMSA that all its employees' would be affected. It was not disputed that the total number of its employees was 52 as opposed to 32 as stated in the section 189(3) notice. As such, I agree with Bravo Span that there could not have been a discussion of the selection criteria in the circumstances. In my view, it was ill-conceived of NUMSA to insist on the disclosure of information that related to Bravo Span sub-contractors' employees when they did not challenge the fact that the building project was concluded on 15 December 2016. In essence, it stands to reason that even the sub-contractors and their employees were affected as there was no work to be done after 15 December 2016. Clearly, that information was irrelevant as correctly contended Bravo Span.

[24] Even though NUMSA was insistent in its request for the information pertaining to the sub-contractors' employees, both parties could have handled the consultation meeting of 2 December 2016 civilly. Both parties are to be blamed for the degeneration of the meeting and its abandonment. It is not clear to me whether a meaningful consultation could have been pursued subsequently as NUMSA was not willing to budge in its demand for the disclosure of information pertaining to the sub-contractors' employees. In fact, both Messrs Ntuli and Makame testified that it would have been difficult to continue with the consultation after the meeting of 2 December 2016.

[25] Since Bravo Span was not the only party to be blamed for the collapsed consultation process, it cannot be said that the retrenchment process was procedurally unfair.

Severance pay

[26] The applicants' third peg of their case is that Bravo Span incorrectly calculated the severance pay and ought to have included the period of employment under the Hilo Trading. Mr Knoetze testified that he was employed by Hilo Trading as a Foreman. Hilo Trading was liquidated in 2015 and he was never paid any severance pay by Hilo trading. He founded Bravo Span in 2015 and decided to employ Hilo Trading employees, including the applicant employees. There was no connection between Bravo Span and Hilo Trading.

[27] Mr Ntuli, conversely, testified that the applicant employees knew nothing about the liquidation of Hilo Trading. However, he readily conceded that they were made aware of the liquidation of Hilo Trading for the first time during the proceedings at the Commission for Conciliation Mediation and Arbitration (CCMA). Strangely, he retracted this evidence, asserting that he made a mistake as they were never informed of the liquidation of Hilo Trading. This evidence was corroborated by Mr Makame.

[28] Even though Mr Ntuli retracted his evidence that they were informed for the first time at the CCMA that Hilo trading had been liquidated, I understood that evidence to mean that they were not aware of any liquidation before those proceedings. Nothing much turns on his retraction as the applicant employees were adamant that they were never made aware that Hilo Trading was being liquidated. In fact, Mr Makame testified that nothing changed after Bravo Spsn took over other than the name of the company. The applicant employees knew Mr Knoetze to be their employer as he was the one who sourced their services when they were initially employed by Hilo Trading.

[29] Bravo Span did not submit any proof that Hilo trading was indeed liquidated in a form of a final court order or any other form of documentary evidence. In the absence of any evidence that Hilo Trading was indeed liquidated, this Court cannot accept Mr Knoetze's say-so. I accordingly accept the applicants' evidence that they were taken over by Bravo Span which, in essence, automatically stepped into the shoes of Hilo Trading in accordance with section 197[5] of LRA. Hilo Trading business remained the same but in different

[5] '197. Transfer of contract of employment
(1) In this section and in section 197A –
(a) 'business' includes the whole or a part of any business, trade, undertaking or service; and
(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –
(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or

hands. Mr Knoetze testified that Bravo Span took over Hilo Trading's employees and carried on with the same business. Also, it would seem that the customers are the same. With all these factors present, Hilo Trading's business was transferred to Bravo Span as a going concern in terms of section 197(2) of the LRA.[6]

[30] Even if the liquidation order had been granted, section 197A[7] of the LRA would apply. Section 197A(2)(d) provides that 'the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer'.

[31] It follows that the applicant employees' continuity of employment was never interrupted by the transfer of the business in terms of section 197(2) or alternatively in terms of section 197A. Bravo Span is clearly responsible for the

---

act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'

[6] See *National Education Health and Allied Works Union v University of Cape Town & Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC). See also *Aviation Union of South Africa & Another v South African Airways (Pty) Ltd & Others* 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC); [2012] 3 BLLR 211 (CC); (2011) 32 ILJ 2861 (CC) at para 44.

[7] '197A Transfer of contract of employment in circumstances of insolvency

(1) This section applies to the transfer of a business –
   (a) if the old employer is insolvent; or
   (b) if a scheme of arrangement or compromise is being entered into to avoid winding up sequestration for reasons of insolvency.

(2) Despite the *Insolvency Act, 1936* (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197(6) –
   (a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding up or sequestration;
   (b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;
   (c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;
   (d) the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.

(3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6).

(4) Section 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding up or sequestration.

(5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section.'

severance pay for the years when the applicant employees were still in the employ of Hilo Trading.

Conclusion

[32] In the circumstances, I am satisfied that the dismissal of the applicant employees was both substantively and procedurally fair. Bravo Span, however, must pay the applicant employees severance pay for the completed years of service whilst they were still in the employ Hilo Trading as reflected in the document headed Bravo Span Employees attached to the statement of case.

Costs

[33] I am disinclined to award costs in the light of the circumstances of this case. In any event, the parties are partially successful.

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

Order

1. The dismissal of the second to further applicants (applicant employees) is substantively and procedurally fair.

2. Bravo Span (Pty) Ltd shall pay the applicant employees severance pay for the completed years of service whilst they were still in the employ of Hilo Trading (Pty) Ltd.

3. There is no order as to costs.

_____

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: N Masutha (Union Official)

For the Respondent: A.P Brandmullers from Brandmullers Attorneys