IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 469/15

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA **First Applicant**

R JELE & 12 OTHERS **Second Applicant**

And

ASSMANG MACHADODORP

CHROME WORKS (PTY) LTD **Respondent**

Heard: **7 - 8 December 2017 - 10-11 December 2018**

Delivered: **31 July 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The individual applicants as assisted by NUMSA approached this Court by way of a statement of claim, to seek an order declaring their dismissal by the respondent (Assmang) on account of operational requirements to be substantively unfair. In particular, the applicants submit that Assmang failed to apply a fair selection criterion as agreed to in terms of the Facilitation Agreement concluded between the parties under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) dated 14 October 2014.

[2] Assmang operates in the mining industry in the Northern Cape Province. It mines ore which is then transported to Machadodorp in Mpumalanga Province for smelting. As at 2011, Assmang had a staff complement of 712 employees. Following a restructuring process in 2012, three hundred and eight (308) employees were retrenched.

[3] In August 2014, Assmang again initiated a restructuring process in terms of the provisions of section 189A of the Labour Relations Act (LRA) owing to its operational requirements. The parties agreed to a facilitation by a CCMA Commissioner as 200 employees were affected by the process.

[4] On 14 October 2014, a Facilitation Agreement was entered into between Assmang, NUMSA, and other trade unions. Clause 2 (3) of that agreement, which is central to the determination of this dispute provides that;:

> **2. SUBSTANTIVE CLAUSES**
>
> …
>
> 3. **Selection Criteria**
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> The parties agree that the employer will use LIFO with the retention of skills to select the employees that will be affected. The Company will implement the selection criteria and then provide the unions with a copy of the spreadsheet to justify the deviation from the pure LIFO principle. The employer undertakes to provide justifications to the committee made up of organized labour whether deviations from LIFO are to be implemented.

[5] On 27 October 2014, the applicants referred a dispute to the Metal and Engineering Industries Bargaining Council (MEIBC) for conciliation. The retrenchment process was nevertheless concluded in April 2015. On 24 April 2015, the MEIBC issued a certificate of non-resolution of the dispute. In their statement of claim, the applicants contend that Assmang deviated from the agreed selection criteria and thus their dismissals were unfair.

The evidence:

[6] Assmang lead the evidence of its Human Resources Superintendent, Mr Dirk Hattingh (Hattingh). His testimony pertained to the implementation of the selection criteria in accordance with the provisions of clause 2 (3) of the Facilitation Agreement. He further testified in regards to the necessity to deviate from pure LIFO in favour of the retention of skills in respect of the individual applicants. In this regard, he testified that:

6.1. He was employed by Assmang since October 2011 and was involved in the conclusion of the Facilitation Agreement. Flowing from that agreement, at least four meetings were held with the representatives of the individual applicants. The full time shop-steward and also one of applicants in these proceedings, Mr Mandla Phakathi attended those meetings, at which management had presented spreadsheets in order to explain the necessity for deviation from LIFO is respect of the affected employees.

6.2. In regards to specific individual applicants, Hattingh testified that Mr Ronnie Jele (Jele) was employed in the Raw Material and/or production department. As he was affected by the restructuring, he was provided with an opportunity to apply for another position in a different department. This was on basis that he was the only employee within that department.

6.3. In respect of Mr Jacob Duma (Duma), the evidence was that he occupied one of the four positions which were rendered redundant. The new structure only contemplated one position and as such, all the

employees were given an opportunity to apply for the one available position. Duma was not successful in his application.

6.4. The position of receptionist which was occupied by Ms Irene Sibanda (Sibanda) had also become redundant. Assmang took the decision to consolidate the position of the receptionist with that of the administrator. In respect of Mr Paulos Mnisi (Mnisi) and Ms Sibongile Ntuli (Ntuli), there were initially eleven positions which were reduced to just four positions. LIFO was implemented and the employees with four years' service and job experience were retained.

6.5. In respect of the human resources department, the number of positions was reduced from nine to three. This meant that Mr Legodi Tema (Tema) had to compete with the human resource development officer, with the retention of skills being the primary focus. Taking into account a variety of factors including that Tema and the human resources development officer were on the same salary level, and that Tema lacked the relevant experience in skills development, a decision was taken to retain the human resource development officer over Tema.

6.6. In respect of the Second Assistance Raw Material section, the number of positions was reduced from 20 to eight. The eight employees retained had possessed certain licenses which were a requirement for those positions. Ms Gugu Mahlangu (Mahlangu) and Ms Thabile Sindane (Sindane), who were on maternity leave during the retrenchment process, did not have the required licenses. They were however represented in the consultations by NUMSA, and were only informed of their retrenchment upon their return from leave.

6.7. In respect of the Raw Material Controllers, only two employees were retained on the basis that they possessed six licences which were a requirement for the job. The individual applicants who came from that section and those who were not retained did not possess the required licences.

[7] Under cross-examination, Hattingh further testified that:

7.1. Although Mahlangu and Sindane were on maternity leave during the retrenchment process, they were however members of NUMSA and Hattingh had telephonically communicated the commencement and conclusion of the retrenchment process to both of them. He could however not recall the specific details of the telephone calls.

7.2. Hattingh insisted that Assmang had consistently applied the selection criteria with the purpose of skills retention. He further maintained that the employees who were retrenched had limited skills notwithstanding the fact that they were afforded training opportunities during the course of their employment. He further rejected the allegation that some employees were denied an opportunity to acquire additional skills through training.

7.3. He maintained that Jele was not retained as his position was redundant and further since he was the only employee in that department who reported directly to a supervisor. He denied that two other shift leaders were retained in that section. Hattingh further reiterated that Jele had an opportunity to apply for other positions in other departments and had not done so.

7.4. When confronted with the allegation that Sibande had a diploma in public administration, Hattingh's contention was that the position of receptionist was amalgamated with that of administrator and the new position was benchmarked at a higher salary level. Notwithstanding the amalgamation, Sibande had refused to apply for the new position, leading to the appointment of another person who had less service than her.

7.5. Hattingh maintained that the deviation from LIFO was done as a last resort with the sole purpose of retaining skills. This included considerations of whether the employees were in possession of relevant licences to operate the machinery, and invariably this meant that some employees with less service were retained to the detriment of those with more service.

[8] Mr Mandla Phakathi (Phakathi) was a full time shop-steward and is also one of the individual applicants. His evidence is summarised as follows:

8.1. His understanding of the selection criteria was that LIFO would be applied together with the retention of skills as per the provisions of clause 2 (3) of the Facilitation Agreement. The respondent however retained the obligation to justify any deviation from LIFO.

8.2. Phakathi participated in the facilitation process and testified that NUMSA did not agree to the deviation from LIFO.

8.3. In respect of the position of foreman, he testified that Duma had the most working service with Assmang and ought to have been retained. He further contended that although there were interviews held for other positions, the decision to advertise these positions and to conduct interviews was not an issue agreed to by NUMSA.

8.4. In the Metal Recovery Plant, another employee, Mr Vusi Mokoena, was appointed to the position notwithstanding the fact that he was previously employed in the Palates Plant and had less working service. In Phakathi's view, the deviation from LIFO in this instance constituted unfair treatment towards Duma.

8.5. Phakathi further disputed that Jele did not attend the job interview and moreover testified that Jele ought to have been retained in the light of his longer working service than those retained. A Mr Bongani Motha was ultimately retained in the position despite having less service as opposed to Jele.

[9] Under cross-examination, Phakathi further confirmed that:

9.1. NUMSA had initially proposed pure LIFO as selection criteria, but in the end, had agreed to clause 2(3) of the Facilitation Agreement. He further confirmed that the spreadsheet in respect of how the deviation was to be implemented was presented and explained at the facilitation meetings.

The legal framework and evaluation:

[10] It being common cause that the only issue for consideration in this case is whether Assmang had applied the selection criteria fairly and in accordance with the provisions of the Facilitation Agreement, the starting point is that the provisions of section 189(2)(b) of the LRA read with those of section 189(7) of the LRA requires of the employer to consult on selection criteria to be applied and adopted, and to select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties. If no criteria have been agreed, the employer is required to apply and adopt criteria that are fair and objective.

[11] In this case the agreed selection criteria is that to be found in clause 2 (3) of the Facilitation Agreement from which it is apparent that;

(a) The parties agreed that the employer would use LIFO with the retention of skills to select the employees that were to be affected.

(b) The Company would implement the selection criteria and then provide the unions with a copy of the spreadsheet to justify the deviation from the pure LIFO principle.

(c) The employer undertook to provide justifications to the committee made up of organized labour whether deviations from LIFO are to be implemented.

[12] Central to the applicants' arguments as advanced by Mr Masutha on their behalf was that the manner with which the selection criteria was implemented was not in accordance with the provisions of the Facilitation Agreement, and that LIFO was to be strictly applied unless certain skills required deviations.

[13] It is accepted as can be gleaned from various decisions of this Court[1] that although the objectivity of the LIFO is recognised, that principle on its own was never endorsed as the only fair and objective criterion. Other criteria such

[1] See *National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd* (JS529/14) [2016] ZALCJHB 344 (30 March 2016); *Mweli and Another v MTN Group Management Services (Pty) Ltd* (JS610/16) [2019] ZALCJHB 119 (22 May 2019) at paras 18 - 25

as experience and skills have been regarded as equally fair. Obviously the primary consideration is that since any such criteria might have an element of subjectivity, the issue remains whether it was applied in a transparent, consistent and objective manner, taking into account that a retrenchment is ordinarily a “no-fault dismissal”. If the evidence demonstrates that the employer met the threshold of objectivity and fairness, there would be no basis for a Court to find unfairness.

[14] The evidence of Phakathi that NUMSA did not agree to LIFO with the retention of skills is belied by the very provisions of the clause 2(3) of the Facilitation Agreement. In any event, he had conceded under cross-examination that the agreed position was that as stipulated in the provision in question.

[15] The facts of this case points to the fact that in line with those provisions, once LIFO with the retention of skills was agreed upon as a fair and objective criterion, Assmang was required to implement it and then provide the unions with copies of the spreadsheet to justify the deviation from the pure LIFO principle, and to further provide justifications to the committee made up of organized labour whether deviations from LIFO were to be implemented.

[16] It was correctly pointed out by Mr Van As on behalf of Assmang that the allegations made on behalf of the applicants that the deviations from LIFO were not justified were without substance. The applicants spent considerable amount of energy in identifying various departments or sections where the deviations were not justified. The complaints come about in circumstances where Messrs Masutha and Phakathi had conceded that Assmang had provided the union with spreadsheets explaining the need for deviations. Masutha however contended that there was a need for more engagement on those spreadsheets before a final decision could be taken, and that in the end, the deviations were implemented subjectively.

[17] In circumstances where there is such a concession, and where it was also not in dispute that subsequent to the conclusion of the Facilitation Agreement at least four consultative meetings were held with the unions where they were

provided with the necessary spreadsheets and charts, and where management had at length made attempts to justify the deviations, I fail to appreciate what else or what further engagements would have led to the non-retrenchment of the applicants.

[18] In my view, it is not sufficient for the applicants to nick-pick as to who and under what circumstances certain employees should or should not have been retained. References by Mr Masutha to certain employees with longer services being unfairly retrenched despite showing allegiance to the company, and that it was unfair to select them on the basis of skill retention, the result of which was that employees without skills were effectively punished, clearly lack substance. A show of allegiance to the company was not a criterion, nor can it be regarded as a fair and objective one in any event.

[19] The aim of the retrenchment exercise was not to punish any employee, but purely to implement the agreed provisions of the Facilitation Agreement, and to make an assessment amongst the employees as to who had the necessary skills to keep the company going given its parlous financial circumstances. It was therefore of no consequence as to whether the one employee had more years of service or not, as that was not the sole criterion. In any event, more years of service cannot by necessity, be equated to more skills or experience. It is purely a factor to be considered within the context of a strict application of LIFO.

[20] The same views are expressed in regards to the contention that Tema, who was employed in the HR Department, had a degree in HR and was retrenched, whilst another employees with a mere certificate in HR was retained. The fact that an employee has a degree does not make him/her more skilled than another employee who holds a certificate, unless of course such academic qualifications are a known requirement. More was required to put up a case as to the reason the person with a degree ought not to have been retrenched.

[21] It was further submitted on behalf of the applicants that even though some of them had applied for advertised posts, there was never an agreement

reached with Assmang that available posts would be advertised or that employees would be required to avail themselves for interviews.

[22] The applicants' complaint as above again lacks merit. In the case of Jele for instance, he was the only person affected in his department and was required to apply for a different post in another department. The criterion surrounding the retention of skills was aimed at retaining employees best suited to the positions available in the restructured operations. Clearly if there were employees who were affected and considered themselves as being on the same footing with others in terms of skills and or service, a method requiring those employees to apply for the vacant limited positions in order to determine the skills to be retained can hardly be unfair. This is further borne out by the fact that some of the individual applicants had indeed applied for some of the positions and were unsuccessful. The applicants cannot complain about a process which they allege they did not bargain for, in circumstances where some of them unsuccessfully took part in it. They can further not complain about that process unless it can be demonstrated that the method of its application was unfair. In any event, as it was held in *Mweli and Another v MTN Group Management Services (Pty) Ltd*[2]*,* making an employee to apply for a position is not a selection method but a means to avoid that employee's dismissal. To that end, the issue of fairness and objectivity does not in any event arise in such a situation[3].

[23] In regards to the two female employees who were retrenched whilst on maternity leave, it was submitted that there was an obligation on management to communicate with them prior to effecting their retrenchment, and that by merely sending 'SMSs' to them informing them of their retrenchment, they were treated unfairly.

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[2] *Supra* Fn (1)

[3] At para 35; See also *South African Breweries (Pty) Ltd v Louw* (CA16/2016, C285/2014) [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC); (2018) 39 ILJ 189 (LAC) at para [22], where it was held that;

> "An employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses sections 189(2) (b) or 189(7). The filling of posts after a restructuring in this manner cannot be faulted. Being required to compete for such a post is not a *method of selecting for dismissal*; rather it is a legitimate method of *seeking to avoid the need to dismiss* a dislocated employee."

[24] It is accepted that in accordance with the provisions of section 189 of the LRA, the employer is obliged to consult with all employees likely to be affected as soon as it "contemplates retrenchment". In this case, it was common cause that the two female employees who were on maternity leave at the time that the restructuring process was initiated were members of NUMSA. There is nothing stipulated in the Act, and in particular, the provisions of section 189 of the LRA, as to what is expected of the employer to do when initiating a restructuring process that would affect employees who are on maternity leave or any other leave for that matter. In the light of this *lacuna*, one can only surmise that by virtue of the provisions of section 200(1)(b) and (c) of the LRA, in such circumstances, NUMSA as the representative union of such employees would also be acting on their behalf and in their interests in their absence in the consultative process. Furthermore, Hattingh's evidence was that for the purposes of implementing the agreed criteria, the two female employees did not possess the necessary licenses for the positions in question, and there was nothing coming from the applicants that suggested otherwise. To this end, there is no basis for any conclusion to be reached that the two female employees (Mahlangu and Sindane), were treated unfairly. In any event, it was not seriously disputed that their retrenchment was delayed until they returned from maternity leave. Thus, it was not as if they were not kept informed about the restructuring process and consultations in that regard.

[25] In summary, it is concluded that the parties had agreed on LIFO with the retention of skills, which selection criterion they had considered to be fair and objective. Assmang had in applying the criteria, complied with the provisions of the Facilitation Agreement by providing NUMSA and other unions with copies of the spreadsheet and charts, to justify the deviation from the pure LIFO principle. Assmang had further complied with its obligations and justified the need for deviations. The case by case and specific individual applicants circumstances were explained and deviations were justified. NUMSA and the individual applicants may not necessarily agree with the final outcome, but this does not imply that Assmang did not meet the threshold of objectivity,

transparency and fairness in implementing the agreed criteria. To this end, it follows that the retrenchment of the individual applicants was fair.

[26] I have further had regard to the requirements of law and fairness in regards to an award of costs. Inasmuch as I agree with Assmang's contentions that the applicants' claim had no merit, I hold the view that a costs order is not warranted in this case.

Order:

[27] In the premises, the following order is made;

1. The individual applicants' dismissal on account of the respondent's operational requirements was fair.

2. The applicants' claim is accordingly dismissed.

3. The is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: N Masutha of NUMSA (Union Official)

For the Respondent: M van As, instructed by Cliffe Dekker Hofmeyr Incorporated