THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JS845 /17

In the matter between:

RICHARD MFANIMPELA MVUBU **Applicant**

and

PHARMACEUTICAL CONTRACTOR (PTY) LTD **Respondent**

Heard: **6 June 2019**

Delivered: **31 July 2019**

Summary: **Dismissal based on operational requirements – no *bona fide* consideration of alternatives – employee was confronted with a *fait accompli*.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant (Mr Richard Mfanimpela Mvubu) referred a dispute of unfair dismissal based on operational requirements in terms of section 189 of the Labour Relation Act[1] (LRA), alternatively, that his dismissal was automatically unfair. However, he withdrew the automatically unfair dismissal claim at the commencement of the proceedings.

[2] The applicant is challenging both the substantive and procedural fairness of his retrenchment and is seeking reinstatement with full back pay, alternatively, maximum compensation. The respondent, Pharmaceutical Contractors (Pty) Ltd, is defending its decision to retrench the applicant.

Background

[1] Act 66 of 1995 as amended.

[3] The respondent is a pharmaceutical company that manufactures and packs the pharmaceutical products for third party companies. The drugs are made from raw products and the ingredients used have high value. The respondent is licenced to keep the drugs and raw products in its premises. The scheduled drugs and raw products are kept under lock and key as breaches in the safe keeping of these commodities may jeopardise the respondent's licence.

[4] The applicant was employed by the respondent on a permanent basis in the manufacturing and granulation unit, earning R3 850.00 per month.

[5] It is common cause that on or about February 2017 the respondent experienced an incident of attempted armed robbery and demand for a ransom. On 25 May 2017, the respondent convened a meeting with all its night shift employees and it was at that meeting that a notice in terms of section 189(3) of the LRA was issued. According to the section 189(3) notice, the need to retrench arose as a consequence of, *inter alia*, the economic situation at the time and security concerns due to the attempted armed robbery at the respondent's premises. The section 189(3) notice clearly stated 25 May 2017 as the date for commencing and concluding the consultation process; and the retrenchment would be effected on 31 May 2017.

[6] It is disputed that there was a second consultation meeting on 29 May 2017. On 31 May 2017, the respondent went ahead to effect the retrenchment of employees who worked night shift on 25 May 2017, including the applicant. The applicant was also issued with a certificate of service and a letter of reference, dated 2 June 2017.

[7] The applicant, together with other employees, represented by a trade union, referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA). The matter was set-down for conciliation on 24 July 2017 and remained unresolved. The other employees have since withdrawn from the matter.

<u>Issues for determination.</u>

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

8.1 Whether there was a need to retrench;

8.2 Whether the notice issued in terms of section 189(3) constituted sufficient notice;

8.3 Whether there was a proper consultation in terms of section 189;

8.4 Whether the applicant is entitled to relief prayed for or any other relief.

Respondent's case

[9] Mr Hendrich Adriaan Pretorius (Mr Pretorius), the respondent's Human Resources Manager, testified that the respondent operated a two shift system; the day shift which ran from 07:45 to 16:30, and night shift which ran from 18:00 to 06:00. Night shift only worked from Monday to Thursday.

[10] The respondent decided to stop the night shift because it could not put the safety of its employees and the products at risk. During the attempted robbery in February 2017, the robbers held the employees at gunpoint and demanded the raw products. Fortunately for the respondent, the keys are not kept at the premises. The robbers left empty handed and there were no casualties. On 25 May 2017, the respondent received a tipoff from an anonymous caller about a robbery that was planned to take place that Thursday night. Consequently, the respondent decided to restructure its operations, particularly the night shift.

[11] The night shift employees were told not to work that night, 25 May 2017. Instead, Mr Pretorius held a consultation meeting with the night shift employees as they were the only ones affected. The copies of the section 189(3) notice were handed to individual employees and each signed them in acknowledgment of receipt. He, Mr Pretorius, went through the section 189(3) notice paragraph by paragraph, explaining the respondent's position so that employees understood what was stated in the document.

[12] The section 189(3) notice informed the employees that the respondent was contemplating embarking upon a retrenchment process which may lead to possible termination of employment contracts due to the following reasons:

12.1 The bad economic situation and the sudden downfall of work. The work that was done by the night shift could be done by day shift.

12.2 The security reasons due to the attempted armed robbery.

[13] Despite the final day of consultation being 25 May 2017, there was an agreement to hold another consultation meeting on 29 May 2017. The employees were placed on paid leave for security reasons.

[14] Mr Pretorius was adamant that the second consultation meeting did take place on 29 May 2017 and he again took the affected employees through the amended section 189(3) notice in detail. However, no alternatives or proposals were forthcoming from the employees. He told the employees that the matter would be taken back to the respondent's management. The respondent's management decided to shut down the night shift because the work was not enough for two shifts.

[15] During cross examination, Mr Pretorius was confronted with an incident that allegedly took place on 12 July 2017 where he called the applicant to report back to work. His response was that he could not recall that incident.

Applicant's case

[16] The applicant testified that, on 25 May 2017, the employees attended night shift duty as usual. However, they were told not to go to their work stations but directed to the boardroom. Mr Pretorius informed them that they would be retrenched and handed each one of them with a copy of the section 189(3) notice. The employees were shocked by the news. Mr Pretorius is the only one who spoke during the meeting and the employees were never afforded an opportunity to propose any alternatives. At the end of the meeting, Mr Pretorius forced them to sign the section 189(3) notices by threating them with armed security guards.

[17] The applicant denied that there was a consultation meeting on 29 May 2017. He testified that after the meeting that was held on 25 May 2017, all employees who were on night shift duty were placed on a leave of absence. On 31 May 2017, he was called back to the respondent's premises and was presented with a copy of the amended section 189(3) notice dated 29 May 2017 and Mr Pretorius forced him to sign the document. He was also presented with his retrenchment letter together with a long service certificate and a letter of reference.

[18] He further asserted that had the respondent gave him an opportunity to suggest alternatives, he would have suggested that the contracts of temporal employees who were on day shift be terminated instead of retrenching the permanent employees. His department had six permanent employees and six temporal employees. No employee was permanently appointed to work night shift or day shift as alleged by Mr Pretorius. Both shifts were rotating every two weeks.

[19] On 12 July 2017, the respondent called the applicant back to work. However, he worked half a day as Mr Pretorius told him that he was called back by mistake. He was paid R200.00 and told to go back home and wait for a call from Mr Pretoruis on 7 July 2017. However, that never happened and Mr Pretorius turned down his calls.

Legal Principles and application

[20] In terms of section 189(1)(d) of the LRA, an employer who contemplates dismissing one or more employees for reasons based on operational requirements is enjoined to consult with the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose. Section 189(2) provides that consulting parties must engage in a meaningful joint consensus-seeking process and attempt to reach consensus on the following:

> "(a) Appropriate measures –
>
> i) To avoid 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;
>
> (c) The severance pay for dismissed employees.'

[21] Similarly, section 189(3) unequivocally require an employer to issue a written notice inviting the effected employees to a consultation and to disclose in writing all relevant information, *inter alia,* the following:

> '(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;

(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 *operation requirements* in the preceding 12 months.'

[22] In *SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings*[2] the Labour Appeal Court (LAC), dealing with the issue of the rationality of the retrenchment, stated:

'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 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

[2] (1998) 19 ILJ 1451 (LAC); [1998] 12 BLLR 1228 (LAC) at para 8

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)

[23] In the present case, the respondent's section 189(3) notice dated 25 May 2017 categorically states the reasons for retrenchment as, firstly, the 'bad economical and the sudden downfall of work'; and secondly; the 'security reasons due to the attempted armed robbery two weeks ago'. Conversely, the respondent's statement of defence reflect that the respondent had experienced robberies in May and July 2017 and as a result it had to restructure its operations and particularly the night shift. During trial, the respondent led a totally different case. Mr Pretorius testified that the attempted armed robbery took place in February 2017 and on 25 May 2018 the respondent received a tip-off that there was going to be another robbery that same night.

[24] Counsel for the applicant correctly submitted in his written submissions that the pertinent part of the respondent's case was hinged on facts that were not pleaded. In fact, counsel for the respondent seemed to acknowledged in her written submissions that the facts pleaded in the respondent's statement of defence clearly contradict the evidence of Mr Pretorius in relation to the dates as to when the attempt robbery or robberies took place. However, she ascribed these contradictions to error. I disagree.

[25] In *National Union of Metalworkers of South Africa and Another v Clear Creek Trading 167 (Pty) Ltd t/a Wireforce*,[3] an unreported judgement, this Court dealt with the purpose of pleadings and stated:

'[13] It is important that we remind ourselves of the purpose of Pleadings in a lawsuit. Mainly, Pleadings are statements of what each party's contentions will be at the trial and give all such details as opponents

[3] *National Union of Metalworkers of South Africa and Another v Clear Creek Trading 167 (Pty) Ltd t.a Wireforce (JS656/16) [2018] ZALCJHB 340 (12 October 2018)* at paras 13 and 14.

need to know in order to prepare their case in answer. It is a cardinal rule that parties are bound by their Pleadings and are not allowed to adduce facts which they have not pleaded. Obviously, the reason is that cases must be decided on the issues that are on record and if it is desired to raise other issues, they may be placed on the record by way of an amendment.[4]

[14] By the same token, the pre-trial minute, a consensual document, is a binding contract between the parties and it obliges the Court to decide only the issues set out therein.[5] Hence, it impermissible for Wireforce to rock up in court with a new version of defence without, at least, seeking an amendment to its pleaded case. Wireforce must accordingly stand and fall by its pleaded version of defence. It is not for this Court to construe or infer from the asserted facts in the statement of opposition that they sustain another claim even though it is not pleaded.'[6] (Footnotes incorporated)

[26] Similarly, in the present case the respondent must stand and fall by its pleaded case. As such, the evidence of Mr Pretorius that on 25 May 2017 the respondent received a tip-off that there was going to be another robbery that same night stands to be rejected. Therefore, the respondent is bound by the reasons for the retrenchment stated in the section 189(3) notice.[7]

[27] Even though the applicant is challenging the rationality of the decision to retrench him, his evidence mainly pointed at the adequacy of the consultation process. In fact, the evidence of Mr Pretorius that the respondent's workload was seasonal was not disputed. In addition, the applicant did not dispute the

[4] *See: Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75; *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) at para 90. See *also Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 28.

[5] *See: MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA) [also reported at [2010] 4 All SA 23 (SCA) – Ed]; *Filta-Matix* (*Pty*) *Limited v Freudenberg and Others* 1998 (1) SA 606 (SCA) [also reported at [1998] 1 All SA 239 (A) – Ed]; *NUMSA v Driveline Technologies (Pty) Ltd and Another* [2000] 1 BLLR 20 (LAC); *Shoredits Construction (Pty) Ltd v Pienaar NO and Others* [1995] 4 BLLR 32 (LAC) at 34C–F); *Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and Others v CTP Ltd and Another* [2013] 4 BLLR 378 (LC); *Mosiane and Others v Murray and Roberts Cementation (Pty) Ltd* [2014] ZALCJHB 518 (12 December 2014) at paras 25 and 25; *Sethole and others v Dr Kenneth Kaunda District Municipality* [2018] 1 BLLR 74 (LC).

[6] *Gcaba supra* n 4.

[7] See: *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited* 2019 (3) BCLR 412 (CC); (2019) 40 ILJ 87 (CC); [2018] JOL 40545 (CC); [2018] ZACC 44 (CC); [2019] 4 BLLR 323 (CC) at para 32 and 33.

evidence of Mr Pretorius that the armed robbery which had taken place previously presented a risk to both the employees and the stock on site.

[28] The crux of the matter is, therefore, whether there was a due consideration of alternatives to retrenchment.

[29] The applicant was adamant that the respondent ought to have considered terminating the contracts of temporal employees before retrenching permanent employees. Mr Pretorius conceded during cross-examination that in March 2017 the respondent engaged the services of temporal employees as the industry is such that work is seasonal and workload is based on orders from clients.

[30] Clearly, there was no need for the temporal employees after May 2017 as the busy season seems to have come to the end and workload at that time could be handled by the day shift according to the evidence of Mr Pretorius. Also, the applicant's evidence that there were no employees attached to a particular shift was not vigorously challenged. Mr Pretorius, conversely, testified that no one objected to being a night shift employee during the consultation meetings. Notwithstanding, it was incumbent upon the respondent to consider alternatives to retrenchment and to disclose the reasons for rejecting those alternatives even before it commenced with the consultation process.

[31] I am persuaded that the respondent failed to properly consider alternatives to retrenchment and that rendered the dismissal of the applicant substantively unfair.

<u>The sufficiency of the notice in terms of section 189(3) and overall consultation process</u>

[32] According to the section 189(3) notice dated 25 May 2017, the consultation process was to commence and be completed on the very same day. It is common cause that the affected employees were only issued with the section 189(3) notice during the consultation meeting that was held on 25 May 2017 at the commencement of the night shift. Clearly, it is inconceivable that the respondent could have expected a proper engagement from the employees who had just been told for the first time that their jobs were at stake.

[33] In my view, the meeting of 25 May 2017 could not have been a proper consultation meeting as there was no prior notice. To make matters worse, the respondent had intended to commence and conclude the consultation in one day, 25 May 2017.

[34] Nothing much turns on the consultation meeting of 29 May 2017. Even if I accept that it did take place, it is not clear what purpose it could have served as the respondent had already decided to shut down the night shift and retrench all the affected employees even before the meeting of 25 May 2017. It is also instructive that the amended section 189(3) notice dated 29 May 2017, which, according to Mr Pretorius, was discussed on the same date and was signed by the applicant as proof that he was in attendance, contradicts his evidence that the decision to proceed with the retrenchment was taken after this meeting. The document states:

> '**Timing for retrenchment**
> It is intended that the consultation process be finalized by 29 May 2017 no proposed alternatives was brought to the table from yourselves. The company has decided to continue with the process and your last day of work will be 31 May 2017 you were placed on paid leave from 25 May 2017 to date and will be paid to 31 May 2017.'[8]

[35] I am accordingly not convinced that the downturn in terms of the workload and security risk that was presented by the attempted robbery that had taken place in February 2017 justified the galloped manner in which the consultation process was undertaken. Clearly, this is a typical case where the employee was confronted with a *fait accompli*.[9] The respondent had categorically decided to retrench the applicant by the time it commenced the consultation process. As a result, there was no meaningful joint consensus-seeking process as contemplated in terms of section 189(2).

Conclusion

[36] In all the circumstances, I am satisfied that the applicant's retrenchment was substantively and procedurally unfair. The respondent failed to prove that it

[8] See: Page 10 of the pleadings bundle.
[9] *SASBO v Standard Bank of SA* [2011] JOL 26928 (LC) at para 36.

had properly considered alternatives to retrenchment and adequately embarked on a joint consensus-seeking process.

Remedy

[37] The applicant seeks reinstatement with full back pay, alternatively, compensation. It is trite that reinstatement is a primary remedy. In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[10] the Constitutional Court reaffirmed reinstatement as 'the primary statutory remedy in unfair dismissal disputes…aimed at placing an employee in the position he or she would have been but for the unfair dismissal… by restoring the employment contract…The extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.'

[38] In the present case, there are no compelling reasons tendered by the respondent to debar the applicant the primary remedy in terms of the LRA. Mr Pretorius conceded that there was no temporal employee effected by the retrenchment. Also, it would seem that the respondent has since resumed the night shift. Given the fact that retrenchment is a no fault dismissal and that the respondent's Production Manager, Mr Van der Westhuizen, gave the applicant a positive reference for future employment after his retrenchment, there is no reason why the applicant should not be reinstated.

[39] When it comes to amount of the back pay, I have considered that there has been a delay of almost two years in finalising this case, an issue that was not canvassed in evidence. However, from the perusal of the file it is clear that the applicant's statement of claim was filed three days out of time. He apparently only discovered that reality during the pre-trial conference where he was represented by his counsel, who is instructed by the SASLAW *Pro-bono* Office. Despite the inconsequential degree of lateness, the respondent vigorously opposed the applicant's application for condonation. The

[10] [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) at para 36.

condonation application was heard on 1 June 2018 and accordingly granted by Mabaso AJ.

[40] Clearly, the blame for the delay must be apportioned between the parties. Having considered the above delay and the fact that the applicant is still unemployed, I deem it just and equitable to order reinstatement with a back pay equivalent to 12 months' salary (R3 850.00 x 12 = 46 200.00).

Costs

[41] The parties did not pursue the issue of costs. In any event, it is trite that costs do not follow the result in this Court.

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

Order

1. The dismissal of the applicant, Mr Richard Mfanimpela Mvubu, is substantively and procedurally unfair.

2. The respondent, Pharmaceutical Contractors (Pty) Ltd, is to reinstate the applicant and pay him Forty-six Thousand Two Hundred Rand (R46 200.00) within two weeks from the date of this order.

3. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

Applicant:	Advocate B Bobison-Opoku
Instructed by:	SASLWA *Pro-bono* Office
Respondent:	Advocate L Pillay
Instructed by:	Yusuf Nagdee attorneys