



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable
Case No: JR 1806/21

In the matter between:

WILLAM MANKGANE MALEKUNUTU

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

PITSI MAISHA N.O.

Second Respondent

JOBURG BOLT (PTY) LTD

Third Respondent

Heard: 26 November 2024

Delivered: 17 January 2025

JUDGMENT

NONDWANGU, AJ

Introduction

[1] The applicant, William Mankgane Malekunutu (Malekunutu or the applicant), has launched an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitrator's award dated 23 July 2021 by the second respondent under the auspices of the first respondent. The second respondent (or the commissioner) had found the dismissal of the applicant based on operational reasons to be substantively and procedurally fair.

The background facts

[2] The applicant was employed by Joburg Bolt (the third respondent) on or about 01 January 2017 in the position of warehouse supervisor until the end of September 2017. She was then appointed as a stock receiver assisting with overseeing stock control and she held this position until she was dismissed on 08 July 2020.

[3] It is common cause that on 11 June 2020 the third respondent's employer's organisation addressed an email to the applicant's union recording the following:

"my member (Joburg Bolt) is sitting with a situation where one of the employee (a union member) are earning quite a bit more than the others on his level / doing the same work and he has short amount of years (in) service. They will not just reduce his salary as it will be a unilateral change in terms and conditions of employment and I do not believe the employee will agree to it if it (as this can only be done via consideration and mutual agreement). Our advice to them was to embark on the retrenchment process, hoping that alternatives (such as the reduction in salary) will avoid the retrenchment. I shall draft and issue the section 189 shortly and forward it to you"²

[4] Subsequent to the provision of the advice, the third respondent then issued a notice in terms of section 189(3) of the LRA informing the applicant that the company is restructuring due to financial distress relating to Covid-19 and non – payment of

¹ No. 66 of 1995, amended.

² See: Email dated 11 June 2020 at p 225.

customers. The notice further informed that the company will engage in a meaningful joint consensus seeking process in order to reach consensus on how to minimise, avoid or change the timing of retrenchments.

[5] The said notice contemplated that the number of employees is 40 and that in the last 12 months there was no employee retrenched and that the employees affected by restructuring will receive severance pay equivalent to one week remuneration for every completed year of service.

[6] On 25 June 2020 the third respondent started the consultation process contemplated in section 189(3) of the LRA and a consultation between the third respondent (as an employer) and the union was held. Of importance to note is that the third respondent, through its representative, Erika, referred to the email dated 11 June 2020 regarding one employee earning more than others on his level but doing the same job as others. The email further contemplate that the employer will not unilaterally change the working conditions hence they are embarking on the retrenchment process. The union officials enquired as to the period the retrenchments will take and the meeting was adjourned to allow the union to consult with the affected member. The parties agreed to have another meeting on 30 June 2020.

[7] A further consultation was held on 28 June 2020 between the applicant and the third respondent where the applicant was offered a 40% salary cut. The applicant declined the proposal on the basis that he is the sole breadwinner at his home. The applicant made it clear that he is willing to accept a salary cut which is reasonable. The parties were to have further meetings to discuss further proposals.

[8] The record indicates that on 30 June 2020 a meeting was held between the union representatives and the third respondent and the third respondent enquired from the union if the applicant has accepted the offer made for 40% salary cut and the response from the union was that the third respondent may proceed with the retrenchments as they were of a view that the applicant will take the salary cut. However, it is common cause that the applicant employee did not take the offer of a

salary cut. The union then requested the third respondent to present the salaries of the other supervisors.

[9] On 08 May 2020 the respondent responded to the union by stating that they cannot disclose the supervisors' salaries in terms of the Protection of Personal Information Act (POPI). The third respondent further issued a letter informing, amongst others, that the applicant is dismissed for operational reasons.

[10] The applicant challenged the dismissal for operational reasons by referring a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged unfair dismissal. The commissioner found the dismissal of the applicant for operational reasons to be procedurally and substantively fair. The applicant dissatisfied with the award launched these proceedings and the third respondent is opposing this application.

Grounds for Review

[11] The applicant contends that the commissioner's award is unreasonable when considering the evidence which had been presented before him and that he failed to apply his mind properly to the facts and evidence placed before him.

[12] The applicant contends further that it was not common cause that the third respondent was facing financial difficulties due to Covid-19 or that a proposal to reduce salaries of all employees had to be explored due to the entity's financial position because the third respondent failed to provide documentary proof to substantiate such an allegation.

[13] Furthermore, the applicant contends that it was not common cause that all the employees had accepted a salary cut of 40% or that they agreed to a salary reduction because no evidence was led to that effect. In fact, the applicant asserts that the restructuring process only affected him.

[14] The other contention raised by the applicant is that the commissioner failed to have regard of the testimony of Seger that the third respondent wanted to alter the

terms of employment and not because the third respondent was experiencing financial constraints.

Evaluation

[15] It is trite that any decision to invoke the section 189 process must be based on genuine operational requirements such as economic or technological reasons and employers are obliged to consult with affected employees on issues relative to such a process. An evaluation of substantive fairness of a dismissal consequent upon the employer's operational requirements requires an examination of whether there is a fair reason, which is in essence *bona fide* and rationally justified, based on a proper and valid commercial or business rationale.

[16] It is trite that 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. In the end, it is not the duty of the court to second guess the employer's decision to restructure an employer's operations, which, if commercially rational, must be accepted as fair.³

[17] The court has held in *SACTWU and others v Discreto (A Division of Trump and Springbok Holdings)*⁴ that the 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 judgment on whether the ultimate decision arrived at was genuine and not merely a sham.

[18] The question, therefore, is whether the decision to retrench the applicant is based on a genuine operational reasons of economic nature and the third respondent in addressing this question asserts the fact that the company was in

³ See: *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at para 19; *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).

⁴ [1998] 12 BLLR 1228 (LAC) at para 8.

financial distress. However, I find it difficult to accept the third respondent's assertion that the entity was in financial distress because when regard is had to the email dated 11 June 2020 from Erika (the employer representative) addressed to David (union representative) the third respondent, through Erika, records that there is one employee who is being paid more than his equals or those doing the same work as him and there is a need to alter the terms of employment.

[19] It appears that the third respondent was aware that the applicant may well not agree to the unilateral alteration of the terms of employment and it sought an advice regarding that situation and the advice received proposed that the third respondent should consider embarking on a retrenchment process contemplated in section 189 process with a view that reduction of salaries would be an alternative in that process. The third respondent's email concludes by stating that a section 189 notice will be issued in due course which indicates that the third respondent will be proceedings to implement the advice received. Subsequent thereto, the third respondent proceeded to issue the section 189(3) notice on 23 June 2020.

[20] The third respondent then proceeded with the consultation processes and a meeting was held on 25 June 2020 between the third respondent, the applicant and their representatives. Of importance to note is that at the commencement of this meeting, Erika, referred the parties to the email sent to Davit on 11 June 2020 which stated that *"there is one employee earning more than others (or his comparators) on his level or doing the same work and that the employer will not unilaterally change the working conditions hence they are embarking on the retrenchment process."*

[21] So, it is plain that the retrenchment process was not invoked because the third respondent was in a parlous financial position but, in their own version, the third respondent wanted to alter the terms of employment for the applicant and invoked the section 189 process to do so.

[22] In any event, if the third respondent was really in a parlous financial situation it would not matter what the applicant is earning or that he is earning than his comparators because what would have been important for the third respondent would be the parlous financial position the entity finds itself and how best to save

such an entity instead of worrying about altering the terms of employment for the applicant.

[23] The other issue is that it cannot be disputed that the third respondent did not address any of the issues related to the retrenchment process such as the alternatives available to the employee in the consultations held with the applicant but the discussions were limited to the one employee earning more than his comparators doing the same job and that the employer does not want to alter the terms of employment unilaterally or whether the applicant would take the salary cut of 40% and / or how will the applicant will be clearing compared to his comparators.

[24] Lastly, the third respondent's witness, Seger,⁵ under cross examination was asked why the third respondent wanted the applicant to take a salary cut and his response was that because he was well overpaid for the job he was doing, and he was no longer doing the job he used to anymore as he was downgraded to a stock controller. Thus, he was no longer a supervisor anymore and this was unfair to others.

[25] I point out that Seger's testimony is aligned with the contents of the email dated 11 June 2020 and thus, it cannot be gainsaid that the decision to invoke the section 189 process was not because there was a commercial rationale predicated upon a parlous financial position of the third respondent but because the third respondent wanted to alter the terms of employment for the applicant.

[26] In the premises, the third respondent's justification for the invocation of the section 189 process was a sham and to this end, there was no proper and valid business rationale to embark on the retrenchment process. Accordingly, the basis for the retrenchments is not *bona fide* and / or rationally justified.

[27] The commissioner has failed to consider much of the indisputable evidence such as the email of 11 June 2020 as well as the minutes of the consultation held between the parties on 25 June 2020 which made it plain that the invocation of the

⁵ See: p 13 of the Record at line 19 – 25.

section 189 process by the third respondent was a sham in as far as it sought to alter the terms of employment of the applicant. It follows that the commissioner's acceptance that the third respondent was in a financial difficulty due to Covid-19 is unreasonable given the evidence before him.

[28] The commissioner failed to consider Seger's testimony which was in line with the evidence before him that the objective of the invocation of the retrenchment process was to ensure that the applicant's salary is reduced because he was being paid more than his comparators or those doing the same job as him.

[29] The commissioner failed to have regard to the fact that the third respondent's assertion that other employees has already accepted salary cuts because they were not members is unsustainable because if such employees were affected as suggested by the third respondent, such employees could only have accepted any alteration of the terms of employment after the invocation of the section 189 process.

[30] With regard to the issue of procedural fairness, it is not in dispute that the third respondent had issued a notice under section 189(3) of the LRA inviting the applicant, as the affected party, to embark on a consultative process with it or that there are meetings which were held between the parties. What the applicant raised is an issue that the notice did not specify the positions affected by the restructuring process and / or which positions or employees accepted the salary cuts.

[31] Section 189(3)(c) of the LRA requires of the third respondent to disclose in writing all relevant information, including, but not limited to the number of employees or positions likely to be affected.

[32] In this case, the section 189(3) notice records, amongst others, that:

32.1 The company is in financial distress because of Covid-19 and non-payment from its customers;

32.2 That the company will embark on a joint consensus seeking process to avoid or minimize retrenchments and / or to mitigate the adverse effects of the retrenchments;

32.3 That the company will be engaging the union since the applicant is a member of a union;

32.4 that the number of employees employed (by the third respondent) is 40;

32.5 further that in the preceding twelve (12) months there was no retrenchment;

[33] Accordingly, the section 189(3) notice does not disclose how many positions or employees were to be affected by the ensuing retrenchments process except that it states that the employees employed by the third respondent is 40. Further, the notice does not indicate any criteria which the third respondent would employ in effecting the retrenchments or if there are alternatives available to any employee affected.

[34] In *Solidarity obo Members v Barloworld Equipment Southern Africa and Others*,⁶ it was held that for a consultation process to be meaningful in the context of section 189 of the LRA, the employer must keep an open mind, disclose sufficient information to enable consulting parties to make informed representations. The applicant has submitted that he was not provided an opportunity to engage in a joint consensus seeking process with the third respondent.

[35] It should be accepted that the third respondent had started consultations with the applicant and it is not in dispute that the third respondent has had one meeting with the applicant where they discussed the issues relating to the retrenchments and no further meetings were held where the parties explored any alternatives available if the employee does not accept the salary cut.

[36] The third respondent's approach was, therefore, pre – determined in as far as it was directed to alter the terms of the applicant's employment and not to

⁶ (2022) 43 ILJ 1757 (CC).

seriously explore alternatives which may avoid the retrenchment. In the *Solidarity case*,⁷ it was held that '*approaching the consultation process with a pre-determined outcome will render the consultation process not meaningful*'.

[37] So, the third respondent's approach to the consultations cannot be said to be meaningful when regard is had to the fact that only one meeting was held where the applicant was present and the third respondent dismissed the applicant when they had not explored any other alternatives available. To the extent that dismissal was effected before the exploration of any of the alternatives to retrenchments it cannot be said that there was meaningful consultation with the applicant.

[38] In the result, the outcome the commissioner arrived at cannot be reasonable and his decision does not fall within a range of possible justifiable decisions that could be reached based on the facts before him. Therefore, the commissioner committed a reviewable irregularity, and his award stands to be set aside.

[39] With the commissioner's award being reviewed and set aside, where to now? As stated above, it is up to this court to finally determine this matter. The facts in this matter are in essence largely uncontested and straight forward, there is simply no need to go through arbitration all over again. On the evidence which was placed before the commissioner and now before this court, it is apparent that the dismissal of the applicant was procedurally and substantively unfair.

[40] The decision whether to reinstate an employee whose dismissal was found to be unfair involves an exercise of discretion in terms of section 193 (1) and (2) of the LRA. In *Booi v Amathole District Municipality and Others*⁸, the Constitutional Court in dealing with the issue of reinstatement under section 193 of the LRA held that:

"[38] It is plain from this Court's jurisprudence that where a dismissal has been found to be substantively unfair, "reinstatement is the primary remedy" and, therefore, "[a] court or arbitrator must order the employer to reinstate or re-employ the employee unless one or more of the circumstances specified in

⁷ *Ibid* at para 46

⁸ [2022] 1 BLLR 1 (CC).

section 193(2)(a) (d) exist, in which case compensation may be ordered depending on the nature of the dismissal.

[41] In *Mathebula v GPSSBC and Others*⁹ the Labour Appeal Court held that:

“the underlying consideration in determining whether to reinstate or compensate an employee in terms of section 193 (1) and (2) of the LRA and whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or not reasonably practical has to be underpinned by fairness based on all the circumstances of the case”.

[42] The commissioner in paragraph 38 found that the applicant and the third respondent has had a good employment relationship except that the applicant was dismissed for operational reasons. No party has suggested otherwise in these proceedings or taken issue with the finding made by the commissioner and it is reasonable to conclude that the employment relationship remain tolerable and there is no evidence which suggest that the third respondent would not be able to reinstate the applicant.

[43] With regard to costs, the Constitutional Court has recently reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*, that costs orders should be made in accordance with the requirements of law and fairness. In this matter, the requirements of law and fairness dictate that there should be no order as to costs.

[44] Accordingly, the following order is made:

Order

1. The arbitration award issued by the commissioner acting under the auspices of the first respondent dated 23 July 2021 under case reference

⁹ (2024) 45 (ILJ) 979 (LAC) at para 15.

number GAJB 13016 – 20 is reviewed, set aside and substituted with the following order:

2. The dismissal of the applicant is procedurally and substantively unfair.
3. The third respondent is ordered to reinstate the applicant retrospectively with effect from the date of his dismissal on the same terms and conditions that pertained at the time of his dismissal.
4. There is no order as to costs.

Nondwangu AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Bianca Vos of CGG Attorneys

For the Third Respondent:

AJ Nel of Darran Ledden Inc.