



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS821/22

In the matter between:

**MENZI HLANGANANI BUTHELEZI &
6 OTHERS**

Applicants

and

MABOTWANE SECURITY SERVICES

Respondent

Heard: 28 May 2024

Delivered: 28 February 2025

JUDGMENT

MOLOTSI, AJ

Introduction

[1] This is a default judgement. The applicants are Menzi Hllanganani Buthelezi, Delisile Yvone Hlatshwayo, Jenifer Mabungu. There were only three applicants who were in attendance at the hearing on 28 May 2024. The order

below relates only to these three applicants namely: Buthelezi, Hlatshwayo and Mabungu. The respondent is Mabotwane security services.

[2] The dispute related to the dismissal of the applicants on 28 January 2022 for the reasons relating to operational requirements of the respondent. The applicants were dismissed without any consultation and no joint consensus seeking process was followed by the respondent as required by section 189(2) of the Labour Relations Act¹ (LRA). The notice provided to the applicants fell short of complying with section 189(3) of the LRA. The applicants sought compensation for their unfair dismissal.

Evidence

[3] The applicants called three witnesses to testify. Mr. Buthelezi testified that he was employed as a security guard by the respondent. He earned a monthly salary of R5 805 and he was posted at Charlotte Maxeke Hospital. On 26 January 2022 he was called to the office of the respondent. He was informed that the client does not need them (including other applicants) at the site as they are members of the union and that they will instigate workers to strike. He was told to choose a site outside of Gauteng province. He was later provided with a termination letter.

[4] Ms. Hlatshwayo testified that she was employed by the respondent from 17 May 2014 as a security guard and earned a monthly salary of R5 800. She was working night shift on 28 January 2022. She received a call from the human resources department of the respondent and was told to come to the office. Upon arrival at the office, she was told that the client does not want them anymore and was told to choose a site outside of Gauteng province. She was later informed there were no sites available and was then provided with a termination letter. She was not invited to any consultation process and no other sites were provided to her as an option to consider.

¹ Act 66 of 1995 as amended.

[6] Ms. Jenifer Mabungu testified that she was employed by the respondent on 6 December 2014 and earned a monthly salary of R5 800. She met with the human resource personnel of the respondent on 25 January 2022. She was told to come back on 26 January 2022. On 26 January 2022 she was told that the CEO of Charlotte Maxeke Hospital does want them anymore and that she must choose a site in Cape Town and she must come back the next day with her a decision. When she arrived at work the following day, she was not given a chance to speak and was given a notice of termination. The respondent informed her that it does not have work for her anymore.

Evaluation

[7] In the notification to retrench due to operational requirements as per section 189 of the LRA, the respondent states the reason for retrenchment as follows:

‘The company, during the last financial year has suffered immensely due to the ongoing economic crisis, the COVID – 19 pandemic and dwindling economic environment. The company simply suffers from the same down turn in the economy that most of its clients are suffering from and as a result the company has to engage itself with cost cutting measures to keep the company in operation’

[8] Section 189(1) of the LRA requires an employer contemplating dismissal based on operational requirements to consult any person including trade union whose members who may be affected by the proposed retrenchments, prior to implementing dismissals. Section 189(2) of the LRA requires the employer and other consulting parties to ‘engage in a meaningful joint consensus- seeking process and attempt to reach consensus’ on the issues listed in section 189(2)(a)-(c).

[9] In *Solidarity obo members v Barloworld Equipment Southern Africa and Others*², the Constitutional Court held that:

‘[43] The concept of a meaningful joint consensus- seeking process that is envisaged in section 189(2) is not defined in the LRA. In *Atlantis Diesel Engines*, the Appellate Division had the following to say about it:

‘[This] approach requires consultation once the possible need for retrenchment is identified and before a final decision to retrench is reached. It proceeds on the premise that consultation requires more than merely affording an employee an opportunity to comment or express an opinion on a decision already made. It envisages a final decision being taken by management only after there has been consultation in good faith.

...

However, an employer cannot be expected to disclose information which (a) is not available to it, (b) is not relevant to the issues under discussion, and (c) could harm the employer’s business interests for reasons other than its relevance to the consultation process e.g. trade secrets and other confidential information’

[44] Sufficient information must be disclosed to make the process of consultation meaningful. This includes information concerning the need for retrenchment, as well as information that will assist the employees or trade union, as the case may be, in making contributions about ways of avoiding retrenchment.’

[10] The respondent was expected to follow the procedure as laid down in section 189 (3) of the LRA. The respondent was required to issue a written notice to the applicants disclosing in writing all relevant information, including but not limited to: the reasons for the proposed dismissals, the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives, the number of employees likely to be affected and the job categories in which they are employed, the proposed method of selecting which employees to dismiss, the time when or the period

² (2022) 43 ILJ 1757 (CC) para(s) 43 – 44.

which, the dismissals are likely to take effect, the severance pay proposed, any assistance that the employer proposes to offer to the employees likely to be dismissed etc. The respondent failed to comply with the provisions of section 189(3) of the LRA. The respondent failed to consult with the applicants and engaged in a joint consensus seeking process for the purposes of avoiding dismissals. Consequently, there was no procedure followed by the respondent prior to the dismissal of the applicants.

[11] The evidence of the applicants shows that the so-called reason for the retrenchments was just a ruse. The real reason for retrenching the applicants was that the respondent's client no longer wanted the applicants at the site namely, Charlotte Maxeke Hospital. On the evidence, this was a no fault dismissal and constituted dismissal based on operational requirements.

[12] When a client of the employer does not want an employee at its site, the employer cannot just merely make up a story for the reasons for retrenchment. When there is no longer work available for an employee due to the fact that the client does not want an employee at the site (*dismissal on demand of a third party*), the employer is obliged to follow the procedure laid out in section 189 of the LRA. Anything contrary to section 189 will render the dismissal both substantively and procedurally unfair.

[13] In *Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distribution*³, Francis J, had the following to say:

[19] The present case is in my view not different from one where a third party demands that an employee be dismissed. Metcash in the present case demanded that the applicant be removed from their premises which was the same place where the applicant worked. The principles laid down in *Lebowa Platinum Mines Ltd v Hill* applies equally to the present facts. The court stated in that case that the question whether it was fair to dismiss an employee in response to a demand of a

³ 2002 23 ILJ 492 (LC) at para 19

third party depends on the circumstances of each case. The court laid down certain principles which must be taken into account:

- 19.1. the mere fact that such a demand had been made was not enough to justify the dismissal;
- 19.2. the demand must have a good and sufficient foundation;
- 19.3. the threat of action by the third party if its demand was not met had to be real or serious;
- 19.4. the employer had to have no other option but to dismiss;
- 19.5. the employer must take reasonable steps to dissuade the third party making the demand from persisting with it;
- 19.6. the employer must investigate and consider all alternatives to dismissal in consultation with the employee;
- 19.7. the extent of injustice to the employee must be considered; and
- 19.8. the blameworthiness of the employee should be taken into account.'

[14] From the evidence before this Court, it is clear that the respondent failed to comply with the principles laid down in *Lebowa Platinum Mines v Hill*⁴. This is so because: [i] the demand from Charlotte Maxeke Hospital was not enough to justify the dismissal of the applicants; [ii] there was no good and sufficient information disclosed to the applicants by the respondent, [iii] the respondent did not investigate alternatives to dismissal.

[15] Non-compliance with section 189 (3) of the LRA, renders the dismissal substantively and procedurally unfair. The respondent was not present to discharge its onus in terms of section 192 (2) of the LRA. There was no reason to doubt the evidence of the applicants.

[16] The respondent in its letter of retrenchment, provided different reasons for retrenchment of the applicants as compared to the actual reasons given individually to each applicant which is that the client does not want them at the site.

⁴ [1998] 7 BLLR 666 (LAC).

[17] These two contradictory reasons for the retrenchment, prove that there were no genuine operational requirements for the retrenchment of the applicants. There was therefore no fair reason or *bona fide* reason which rationally justified the retrenchment of the applicants. The dismissal was therefore substantively unfair.

[18] If for some other reason, one of the reasons for retrenchment had been genuine, the respondent simply failed to comply with the law in that there was no consultation and respondent failed to comply with the procedure laid out in section 189 (3) of the LRA. From the facts, it appears that the respondent considered retrenchment of the applicants as a first resort after the client indicated that that it does not want the applicants at its site. This was unfair towards the applicants.

[19] In *SACTWU and another v Discreto*⁵, the Labour Appeal Court (LAC) held that:

‘[6] The importance of a proper resolution of these two material issues arise from the legal requirements for a fair retrenchment process, flowing from the unfair labour practice definition in the old Act. The requirements are inter alia, that consultation with employees and, where applicable, a trade union, is required once the possible need for retrenchment is identified and before a final decision is taken on retrenchment...., as well as that sufficient information be disclosed to the affected employees or their union to enable the consultative process to take place fairly.

[7] The need to consult before a final decision on retrenchment is taken, is said to found its rationale in both pragmatism (the need to avoid retrenchment altogether or at least to minimize dismissals and mitigate their consequences) and principle (to give employees a chance to be heard and to avoid or minimize industrial conflict’.

⁵ (JA95/97) [1998] ZALAC 9 (22 June 1998).

[20] In *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others*⁶, the Constitutional Court in a dissenting judgement by Jafta J, stated:

‘The question that arises is whether it is procedurally fair to terminate employment of workers in circumstances where they were not to blame and without affording them the opportunity to make representations and where that opportunity was given to other workers. With regard to dismissals, a pre- dismissal hearing is core to procedural fairness. Whether the reason for the dismissal is misconduct on the part of the dismissed workers or operational requirements makes no difference. The baseline is that procedural fairness requires an employer to afford an employee a chance to make representations against dismissal before the guillotine falls on him or her.’

[21] The applicants sought compensation. In *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk*⁷, the LAC held that:

‘The requirement that an award of compensation be ‘just and equitable in all the circumstances’, envisages that the Labour Court will be informed about all the circumstances which may bear upon justice and equity. The starting point should be the injustice and harm suffered by the employees and the conduct of the parties. Equity requires proper consideration of the interests of both parties. ‘

[22] In the present case, the dismissal of the applicants was both substantively and procedurally unfair. The respondent’s conduct in dismissing the applicants was blatantly unfair, callous and provided contradictory reasons for dismissing the applicants for operational requirements. There was no attempt to consult the applicants and to consider avoiding dismissals. There was no full disclosure of the relevant information to the applicants. The applicants were dismissed without being heard.

⁶ (2020) 41 ILJ 555 (CC).

⁷ (2020) 41 ILJ 1360 (LAC) at para 50.

[23] A just and equitable compensation to each applicant is five months.

[24] In the premises the following order is made:

Order

1. The dismissal of the applicants on 28 January 2022 for reasons based on operational requirements was both substantively and procedurally unfair.
2. The respondent is ordered to pay each applicant five (5) months compensation calculated at the rate of their pay at the time of dismissal.

H. Molotsi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr C Meyer
Instructed by: SASLAW (Pro bono office)

For the Respondent:
Instructed by: