

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

Case No. D1819/2001

In the matter between:

BLESSING EMSIE MDLULI

Applicant

and

COATS SOUTH AFRICA (PTY) LTD

Respondent

JUDGMENT

1. This is a matter about the retrenchment of the Applicant by the Respondent.

Although it is admitted that the Respondent had a general need to retrench at the material time, the Applicant nevertheless complains that :

- 1.1. the Respondent did not have a valid and sufficient reason for terminating his services;
- 1.2. the Respondent failed to properly consider alternatives to his retrenchment;

- 1.3. the selection criteria which were adopted by the Respondent were unfair;
 - 1.4. the Respondent's conduct in terminating the Applicant's services amounted to victimisation.
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2. The Respondent called two witnesses, Mr Ntshangase who was the Human Resources Manager of the Respondent at the material time and Mr Naicker, the Respondent's Operations Director. The Applicant testified himself and called no other witnesses.
 3. The Applicant contended that his poor performance was part of a plot to victimise him which culminated in his retrenchment but the evidence does not sustain that complaint. The Respondent did not rely on the Applicant's poor performance in selecting him for retrenchment. Moreover, the Applicant's post was but one of many that fell to be affected by the prevailing economic circumstances.
 4. It is so that there were differences of opinion between the Applicant and his superiors concerning his performance. Mr Naicker gave evidence to the

effect that although the Applicant's performance had improved at the time of his retrenchment he was still not altogether happy with it and although he was cross-examined extensively about victimising the Applicant, Mr Naicker's evidence was that he honestly believed that the Applicant was under-performing in certain areas at the times in question. I accept the Respondent's version in this regard.

5. In my opinion the evidence does not establish that the termination of the Applicant's contract of employment was founded on victimisation, as alleged by him.
6. In my opinion the material issue in this matter is whether or not the Applicant was fairly selected for retrenchment. On the evidence before me, the Applicant's selection for retrenchment could only be unfair if he established a case for vertical bumping. This is so because :
 - 6.1. the parties agreed that there was a general need to retrench;
 - 6.2. the Respondent demonstrated in court a commercial rationale for making the post of the Applicant redundant and there was no serious challenge to this;

6.3. the Applicant's duties were assumed by Mr Naicker, the Operations Director;

6.4. although the Applicant contended that there were other employees at his level whose jobs he could have taken (who had less service than him) the Respondent met this challenge in court with cogent reasons as to why the Applicant could not do the jobs in question, primarily because he did not have the skills to perform those jobs.

7. What the Applicant did establish in court was that there were a number of supervisor jobs which clearly were at a lower level than his own, which he could do. It was in fact common cause that he had the skills necessary for these jobs. Some of the supervisors in question clearly had less service than him and the issue is therefore whether they should have been retrenched by "*bumping*" them out of the organisation in view of the Applicant's right to their jobs by virtue of the operation of vertical bumping. On the facts before me I do not think that the Applicant has succeeded in establishing that his retrenchment was unfair for the following reasons :

7.1. the Respondent was obliged to consult SACTWU, the representative union in

its plant, about the contemplated retrenchments;

7.2. that obligation arose because of a collective agreement signed between the parties dated the 17th of September 1992;

7.3. the Respondent complied with the collective agreement and consulted SACTWU throughout the process. In fact, SACTWU were represented throughout the retrenchment consultations by the President of the Union, Mr Amon Ntuli;

7.4. on or shortly before the 27th of August 2001 the union were given a draft agreement on the proposed selection criteria. That agreement is set out at page 62 of the bundle of documents;

7.5. at a meeting on the 27th of August 2001 between the Respondent and SACTWU (see page 57 of the bundle of documents) the union insisted that because the company was not willing to accept their proposal concerning a three week retrenchment package, their "*fallback*" position was LIFO across the mill. In my opinion this is clearly not a motivated request to consider vertical bumping. In the context that it was made, this demand to apply a

selection criteria of LIFO across the mill appeared to be a negotiating tactic in order to compel the Respondent to accept the union's proposal concerning a three week retrenchment package;

7.6. in any event, the Respondent dealt with the demand to apply as a selection criteria LIFO across the mill. Mr Ntshangase said it's application was impractical and against past practice;

7.7. it is significant that in the meeting on 27 August 2001 all that was said in regard to the proposed dismissal of shop stewards was that they should be retained by the company and spared from retrenchment because they had skills valuable to the union movement;

7.8. by the 28th of August 2001 the Respondent and SACTWU had agreed upon the numbers to be retrenched, the basis for calculating the package and the date of exit (see page 60 of the bundle of documents);

7.9. the notice to employees at page 60 of the bundle of documents confirms that a list of retrenchees has been handed over to the union. Exactly when this was done is not clear from the evidence but the Applicant says that he saw his name on the list and he initially thought that the Respondent was "*joking*"

by including his name on the list of retrenchees;

7.10. the Applicant was given 30 days notice of termination of his contract of employment on 30 August 2001, as were the other employees who were being retrenched;

7.11. on the 7th of September 2001 SACTWU and the Respondent were still engaged in discussions concerning the retrenchment exercise (see page 67 of the bundle of documents);

7.12. notwithstanding all of this neither the union nor the Applicant ever raised with the Respondent any of the difficulties concerning his selection for retrenchment that were raised in court;

7.13. the Respondent's witnesses testified that they thought the union said nothing about the Applicant as an individual in this context because they were dealing with the matter collectively;

7.14. the Applicant when he was challenged as to why he had said nothing about his selection for retrenchment said that he was a shop steward representing

all workers and he could not advance a case about himself;

7.15. the Applicant testified that he in fact challenged the union about his own selection for retrenchment and they had undertaken to take the matter up for him and he did not know why that did not happen.

8. It is therefore clear that none of the material factors that the Applicant now raises in regard to his selection for retrenchment were ever raised by either SACTWU or him prior to his dismissal. In the particular circumstances of this matter I consider that to be fatal to the Applicant's case.

9. One has an overwhelming sense of sympathy for a man who has devoted twenty two years of his working life to his employer and who is then dismissed on a no fault basis. This must be balanced against the correct application of fairness, which involves an examination not just of what is fair to the employee, but also what is fair to the employer.

10. In this context, the conduct of the Respondent was not unfair. The Respondent consulted properly in terms of the collective agreement as it was obliged to and it engaged SACTWU in a proper manner on all of the relevant

issues. The Applicant was present in all of the relevant meetings and no alternatives were ever proposed by SACTWU or himself when his name was put on the list for retrenchment. In these circumstances it seems to me to be manifestly unfair to criticise the Respondent now for not dealing with objections that were never raised at the material time, more especially having regard to the fact that the Applicant was being represented by a powerful and experienced union (with the involvement of the President of that union) and, furthermore, where the Applicant himself was a representative shop steward in the consultations.

11. Therefore on the facts before me the retrenchment of the Applicant was procedurally and substantively fair. I do not think that the interests of fairness and justice would be further served by a costs order and I therefore do not intend to make one. In the result the following order is made :

11.1. the application is dismissed;

11.2. the termination of the Applicant's contract of employment was substantively and procedurally fair.

DATED at DURBAN this 5th day of MAY 2003.

N P WOODROFFE AJ