IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA 49/07

In the matter between

SCREENEX WIRE WEAVING MANUFACTURING (PTY) LTD **Appellant**

And

JAFTER NGEMA & OTHERS **Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] This is an appeal from a judgment of the Labour Court that was issued by Hendricks AJ in a dispute between the appellant and the respondent. The dispute was whether or not the dismissal of Mr Jafter Ngema and the other former employees of the appellant on whose behalf the United People's Union of South Africa ("**UPUSA**") instituted proceedings in the Labour Court to challenge that dismissal was fair. For convenience I shall refer to Jafter and the other former employees of the appellant involved in this case as "**the individual respondents.**" Hendricks AJ found that the dismissal was both substantively and procedurally unfair and ordered the appellant to reinstate them with retrospective effect to the date of dismissal. He also ordered the appellant to pay costs.

Subsequently, the appellant applied to the Labour Court for leave to appeal against the judgment and order of that Court. That Court granted the appellant leave to appeal to this Court against the whole of its judgment.

The facts.

[2] Most of the facts which are material for the adjudication of this appeal are not in dispute. Most of the evidence and facts relevant to this matter are set out in the judgment of the Labour Court. It is not necessary to repeat them in this judgment except in so far as to do so may be is necessary for a proper understanding of this judgment.

[3] The appellant employed about 260 employees just before the dismissal of the individual respondents. It is common cause that the appellant dismissed the individual respondents and other employees for operational requirements with effect from the 20th September 2005.

[4] The dismissal of the individual respondents and other employees occurred after certain meetings had been held between the appellant and various trade unions. It is also common cause that, although UPUSA attended some of the meetings, there are other meetings which it did not attend. Those meetings were consultation meetings relating to the then proposed dismissal of employees for operational requirements. The identification of the meetings which UPUSA attended and those it did not attend will be made in due course.

[5] The consultation meetings were preceded by a notice dated the 7th July 2005 which was issued by the appellant to the trade unions inviting them to a consultation process which was to begin with a meeting scheduled for the 13th July 2005. The heading and body of the notice read as follows:

> "**NOTICE OF INTENTION TO RATIONALISE OPERATIONS.**
>
> **The poor economic circumstances being experienced in the mining sector at present has had an adverse effect on the operations of this company, and this has resulted in certain financial difficulties.**
>
> **As Screenex is mainly manufacturing products for the mining industry, which at present is in a downward trend, Screenex is experiencing a major loss of orders.**
>
> **Unfortunately Screenex cannot continue indefinitely in this manner and if the company is to remain financially viable certain measures will have to be taken as soon as possible.**
>
> **Various methods to cut costs have already been considered, but the stage has now been reached where other, more drastic measures have to be taken, and this means that some employees may be affected.**
>
> **A meeting will be held with Representatives of Employees to discuss the following:**

(a) The reason for these measures – and to consider the possible alternative ways to avoid any potential retrenchments.

(b) To discuss criteria for selection of employees to be retrenched, if retrenchments have to take place.

(c) To discuss a time table of potential measures which may have to be taken.

(d) If retrenchments are unavoidable to discuss what benefits and assistance - severance pay, can be provided by the company to the affected employees.

(e) Assistance in the process.

(f) Possible re-employment or other alternatives.

The meeting will be held on Wednesday the 13th July 2005, @ 10h00 in the Factory Boardroom."

The author of the notice was Mr Stefan Griessel who was the human resources manager.

[6] As indicated above the first consultation meeting was on the 13th July 2009. The other meetings were held on the 22nd and 27th July, 3, 8, 10, 17 and 29 August 2005. The discussion of the 13th July does not seem to have focused on the issues relating to a possible dismissal of employees for operational requirements. It would seem that the only trade union which attended the meeting of the 13th July 2005 was UPUSA. The Workers Committee was also present. The discussion at this meeting related to Old Mutual and the Provident Fund because, according to the appellant's notes of

the discussion in that meeting, the UPUSA official who attended the meeting insisted that he wanted to first have a meeting with Old Mutual to establish the status of the Provident Fund in case retrenchments occurred. On the 22nd July 2005 a meeting took place which involved representatives of UPUSA, the appellant and Old Mutual. Nothing more needs to be said about that meeting.

[7] On the 27th July 2005 another meeting took place. In this meeting the unions asked a number of questions, such as what the appellant had done to avoid dismissals and what selection criteria the appellant proposed to use. The appellant's Mr Griessel explained that the company had suffered huge losses and had lost some orders. A Mr Rens told the meeting that the company was running at a loss of R1,5m. Another meeting was scheduled for the 3rd August 2005 at 12h00.

[8] At the meeting of the 3rd August 2005 UPUSA had some questions about its members' money at Old Mutual and/or Metal Industries. The appellant made two proposals relevant to a possible retrenchment at this meeting. The one proposal was that age be part of the selection criteria because, so the appellant said, about sixty of its employees had made verbal requests for early retirement. The other was that the selection criteria to be used in the Wire Department was what the appellant called "**FIFO**" which stands for "**First In, First Out**." In terms of the FIFO selection criterion employees with many years of service would be selected for dismissal and those with the short service period would be retained. With regard to the Wire Department, Mr Griessel said that wire was not in demand in the mining industry. He said that that

department was the most expensive department. Issues were not finalised. Another meeting was then scheduled for the 8th August 2005.

[9] On the 8th August 2005 a further meeting was held. The discussion at this meeting included UPUSA saying that they wanted LIFO to be used as a selection criterion. Another union, UASA, asked for inter alia financial statements. UPUSA also said that it wanted "**the figures**" after which it would ask the appellant to make proposals. Another meeting was then scheduled for the 17th August 2005.

[10] On the 10th August 2005 Mr Griessel, prepared a document bearing that date in which he dealt with rationalisation. In that document the appellant explained why it was necessary for it to embark upon rationalisation and also included its retrenchment proposals. The document read as follows:-

> " **re: Rationalisation**
>
> 1. **Although it was clearly stated in the Notice of Intention to Rationalise dated 13th July 2005, it will be re-iterated again.**
> 2. **The reason for looking at dismissals based on operational requirements is as follows:**
>
> **(a) Screenex has been operating at a financial loss of R1,5 million for the past 2 years and if a company wants to remain financial viable drastic measures will have to be taken.**
>
> **(b) The Mining Industry is experiencing financial difficulties and seeing as they are**

the sole clients of Screeenex, a significant drop in orders has been experienced.

(c) There is not sufficient work for the current workforce within Screenex.

(d) Short time has been implemented in the past, without the desired result.

(e) Mr van Rensburg stated at the meeting on 13th July 2005, that the financial statements are available only for auditing purposes by auditing specialist.

Therefore the following retrenchments are proposed by Screenex.

(f) Selection criteria: Age

All personnel above 60 years of age will then receive a retrenchment package, as well as early retirement benefits. The total amount of personnel in this category is 13.

(g) Selection Criteria: FIFO – this will only be affective in the Wire Section, and will be applicable for the first 30 people. (names will be supplied at the meeting).

(h) <u>Retrenchment package</u>

4 weeks notice pay

1 week for each completed year of service.

(i) <u>Effective Date</u>

31st August 2005

(j) Re-employment within 6 months will take place if the situation becomes more favourable.

(k) No other personnel was retrenched in the last 12 months.

(l) <u>Reason for FIFO</u>:

Will have a major cost saving in the long run."

[11] It is to be noted that in the document quoted above the selection criteria to be used as proposed by the appellant was age and the so-called FIFO but FIFO was only going to be applied in the Wire Section and would only be applicable to the first 30 employees. In the document the reason that Mr Griessel provided for the proposal to use FIFO as a selection criterion was that the use of FIFO would have a "**major cost saving in the long run**."

[12] On the 17th August 2005 another meeting took place between the appellant and trade unions including UPUSA. Mr Luthuli of UPUSA stated at the beginning of the meeting that UPUSA would not continue with the meeting until such time as the appellant provided the financial statements. The appellant did not provide the financial statements and UPUSA then left the meeting. Mr Luthuli intimated that UPUSA would take the appellant to court. After UPUSA had left the meeting, the appellant and the other trade unions continued with the meeting but NUMSA also called upon the appellant to provide financial statements. Opposition to the proposed FIFO selection criterion was also expressed. A NUMSA representative is recorded in the minutes of the meeting as having inter alia said:

> "**No we do not want a presentation. We want Financial Statement reports – all this other stuff is hogwash**."

At the end of the meeting, another meeting was scheduled for the 29th August 2009.

[13] On the 29th August 2005 the last consultation meeting took place but UPUSA did not attend because, when the date for this meeting was agreed upon at the meeting of the 17th, UPUSA had walked out of the meeting and the appellant did not inform UPUSA that it would have the financial statements available to the unions at the meeting of the 29th August. At the end of that meeting the appellant pointed out that the retrenchments would take effect on the 20th September 2005. The employees selected for dismissal for operational requirements were dismissed with effect from the 20th September 2005.

[14] Subsequent to the 17th August 2005 – the day when UPUSA walked out of the consultation process pending the appellant furnishing it with financial statements – UPUSA referred a dispute concerning the appellant's refusal or failure to provide it with financial statements to conciliation. That dispute was not taken through to finality. It seems to have been regarded as academic after the appellant had gone ahead and dismissed the employees including the individual respondents. UPUSA sought to have the appellant ordered to furnish the financial statements. Of course such an order would not have been competent at the stage of the conciliation of the dispute but would have been competent at arbitration if the dispute was referred to arbitration after the conciliation process failed.

The Labour Court.

[15] As indicated earlier, the Labour Court found that the dismissal was both substantively and procedurally unfair and ordered the appellant to reinstate the individual respondents with retrospective effect.

The appeal

[16] It was submitted on behalf of the appellant that the findings made by the Court below that the dismissal of the individual respondents was both procedurally and substantively unfair were not correct and not justified by the evidence. With regard to procedure, Counsel for the appellant pointed out that UPUSA had been invited to the consultation process but had elected to walk out of the consultation process. It was submitted on behalf of the appellant that, as UPUSA had walked out of the consultation process, it could not thereafter complain that there had been no consultation before the individual respondents were dismissed.

[17] Counsel for the respondents supported the finding made by the Court below that the dismissal was procedurally unfair. He submitted that UPUSA left the meeting of the 17th August on the basis that, as the appellant had failed to make financial statements available at that stage, there could be no effective consultation and that UPUSA would participate in a consultation process when the appellant made financial statements available.

[18] Whether or not the dismissal was procedurally fair or not depends upon whether or not UPUSA was entitled or justified in walking out of the consultation process on the 17th August. In this matter it was not argued on behalf of the appellant that financial statements

were irrelevant to the consultation process that was embarked upon. Accordingly, the matter must be decided on the basis that such financial statements were relevant to the issues that were to be the subject of the consultation process. Indeed, the appellant later made the financial statements available to the trade unions which participated in the consultation process in the meeting of the 29th August 2005.

[19] It is common cause that UPUSA did not attend the meeting of the 29th August 2005. It is also common cause that the appellant did not give UPUSA any notice of or invite UPUSA to, the meeting of the 29th August. It is also common cause that, despite knowing that UPUSA had said in effect that it wanted to see the financial statements before it could participate or continue with the consultation process and despite knowing that the meeting of the 29th August would provide an opportunity for trade unions to discuss consultation issues after seeing the financial statements, the appellant did not give UPUSA the financial statements nor did it invite UPUSA to such meeting. When asked why the appellant did not invite UPUSA to the meeting of the 29th August 2005, Mr Griessel sought to justify this omission on the basis that that was because UPUSA had walked out of the consultation process.

[20] The reason advanced by Mr Griessel as to why the appellant was not invited to the meeting of the 29th August 2005 falls to be rejected because UPUSA did not just walk out of the consultation process for lack of interest in that process per se. UPUSA made its stance clear. That is that they only wanted to engage in the consultation process after the appellant had made financial

statements available. UPUSA even referred to the Commission for Conciliation Mediation and Arbitration a dispute concerning the provision of such statements by the appellant. Obviously, the outcome that UPUSA wanted out of the conciliation process or the arbitration that could follow after the conciliation process was that the appellant agree or be ordered to furnish the financial statements to UPUSA.

[21] Since the financial statements were relevant to the consultation process, UPUSA was entitled to be furnished with such statements because, without them, it would have been hampered in playing its proper role in the consultation process. In these circumstances UPUSA was entitled to take the stance it took that it would in effect suspend its participation in the consultation process until the appellant furnished those statements. Once the financial statements were available, the appellant had a duty to notify UPUSA of the availability of the financial statements or to furnish them to UPUSA and to invite UPUSA back to the consultation process. It failed to do so. Its failure to do so and its conduct in dismissing UPUSA's members including the individual respondents without consultation infringed UPUSA's right provided for in sec 189 of the Labour Relations Act, 1995 to be consulted by the appellant on various issues when the appellant contemplated the dismissal of UPUSA's members. Such failure rendered the dismissal of the individual respondents procedurally unfair. Accordingly, the Court a quo's finding to this effect was correct and must be upheld.

The Court a quo's finding that the dismissal was substantively unfair.

[22] The appellant also attacked the finding of the Court a quo that the dismissal of the individual respondents was substantively unfair. It contended that the appellant had suffered a huge financial loss as a result of losing certain orders and it was justified to dismiss the employees that it dismissed for operational requirements including the individual respondents. The appellant also contended that the selection criteria of first in, first out (FIFO) which it used to select the individual respondents was fair and objective. It pointed out that such criterion was accepted by the other trade unions and that, therefore, it was entitled to use it.

[23] I am not certain that the trade unions other than UPUSA accepted FIFO as the selection criterion that could be used to select employees to be dismissed for operational requirements. However, whether or not they agreed to such selection criterion is irrelevant to the question whether or not the appellant was entitled to use it in selecting UPUSA members for dismissal. This is so because in terms of sec 189 of the LRA the union whose agreement the appellant required in regard to the dismissal of UPUSA members was UPUSA and not the other unions- even if together they would represent the majority of the appellant's employees. Sec 189(7)(a) and (b) of the LRA requires an employer, in selecting employees for dismissal for operational requirements, to select the employees to be dismissed on the basis of either agreed selection criteria or criteria that are fair and objective. Since the individual respondents were UPUSA members and UPUSA had not agreed to FIFO as a selection criterion, the appellant could only use FIFO to select them if FIFO was an fair and objective selection criterion. The

question is whether or not FIFO as a selection criterion is fair and objective.

[24] FIFO entailed that the longest serving employees would be dismissed and the employees with the shortest service period would be retained. The appellant sought to justify the use of FIFO on the bases that less employees would lose their jobs than if LIFO was used, that the appellant would make more savings by using FIFO than by using LIFO and that the long serving employees stood a better chance of getting alternative employment because of their experience than the employees with short service.

[25] In considering the question whether FIFO is an fair and objective selection criterion, the starting point is that FIFO is the opposite of a very well-established selection criterion in our labour law jurisprudence which is accepted by all as fair and objective, namely, Last in, First Out ("**LIFO**"). In terms of LIFO the last employee to be employed is the first one to be selected for retrenchment unless, for example, he performs a job which a longer serving employee cannot do or cannot do reasonably satisfactorily without a costly training.

[26] It seems to me that it cannot be said that FIFO is fair and objective as required by sec 189(7)(b) of the LRA inter alia because it is easily open to abuse. This is because an employer who wants to get rid of a long serving employee can simply employ a new employee even if there is no clear need for another employee and, after a few months, complain that the workforce is excessive by one employee. At that stage he would initiate a consultation process and

ultimately use FIFO to select the long serving employee for dismissal for operational requirements. The long serving employee would be dismissed and the new employee would be retained to perform the duties previously performed by the employee with long service who has been retrenched. That can simply not be justified.

[27] FIFO is a very strange way to "**reward**" the loyalty to the employer that long serving employees would have shown the employer over many years. In my view FIFO does not meet the requirement of sec 189(7)(b) of the LRA that a selection criterion that is not agreed upon between the parties must be fair and objective. The result of this conclusion is that the dismissal of the individual respondents by the appellant was substantively unfair. Accordingly, the Court below was justified in reaching the conclusion that the dismissal was substantively unfair.

[28] With regard to relief, the appellant attacked the decision of the Court below to order the appellant to reinstate the individual respondents. Its Counsel submitted that the Court a quo should have found that reinstatement was not reasonably practicable because:

(a) the appellant company's business had been sold to a different entity;

(b) the wire section of the appellant company had been substantially reduced in size which was the purpose of the retrenchments.

(c) the poly-utherane section used different technology and workers could not be used in that section.

[29] The answer to the appellant's contention is that, since the appellant's selection of the individual respondents was on the basis of a selection criterion that was not fair and objective and since the appellant selected long serving employees for dismissal and retained employees with shorter service period, the individual respondents are the ones who should have been retained in the appellants' employment. That being the case, once they are back at work, the appellant may be justified in embarking upon a retrenchment exercise afresh, if a need therefor still exists, which may result in other employees being dismissed for operational requirements. This is necessary to ensure a reversal of the injustice which occurred when long serving employees were selected for retrenchment and employees with shorter service periods were retained. The argument that the appellant's business was sold presents no difficulty because in fact what had happened is that the appellant remained the employer but its shareholders sold their shares. The fact that the poly-utherine section used different technology and workers could not be used in that section is neither here nor there because, once the employees have been reinstated and attempts have been made to accommodate them rather than the employees with short service periods, the appellant would be at liberty to embark upon a retrenchment afresh. It was also pointed out to us that since the sale of shares referred to above, there had been a further change of hands in the business. However, this seems to have happened after the judgment of the Labour Court had been handed down. I deal with this below.

[30] When this Court decides an appeal from a judgment of the Labour Court, it is required to decide the matter in the same way as the

Labour Court ought to have decided it at the time it did and on the basis of what was before the Labour Court then. This is the general rule. Accordingly, in an appeal this Court cannot, generally speaking, take into account events that occurred after the Labour Court had given its judgment. This Court cannot make an order which the Labour Court could not have given at the time it handed down its judgment. That being the case, it seems to me that the order which I propose to make is the correct order to be made.

[31] In the light of all the above it seems to me that the Court a quo was right in ordering the reinstatement of the individual respondents. With regard to costs I am of the view that the requirements of the law and fairness dictate that the appellant should pay the respondents' costs.

[32] In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

Jappie JA

I agree.

Leeuw JA

Appearances:

For the appellant	:	Adv S.D. Maritz
Instructed by	:	Nelson Borman & partners Inc
For the respondent	:	Adv K Lengani
Instructed by	:	Maserumule Inc
Date of judgment	:	2 September 2009