REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 77/10

In the matter between:

SUPER GROUP SUPPLY CHAIN PARTNERS **Appellant**

and

ARTHUR DLAMINI **First Respondent**

BENJAMIN NKOSANA FUNANI **Second Respondent**

Heard: **22 March 2012**

Decided: **29 August 2012**

JUDGMENT

TLALETSI JA

Introduction

[1] The respondents' services were terminated by their employer, the appellant on 30 April 2008. They contended that their dismissal was unfair. The appellant on the other hand contended that the respondents' dismissal was

both procedurally and substantively fair and was based on its operational reasons.

[2] The respondents referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration ("CCMA") at the end of May 2008. The dispute could not be conciliated and what remained was for the respondents to refer the matter to the Labour Court for adjudication.

[3] Indeed, on 15 July 2008 the respondents served and filed their statement of case. The claims were opposed by the appellant as well as Eugene van Wyk who was cited as second respondent. The matter was set down for trial in the Labour Court before Molahlehi J on 23 March 2010. The learned judge *a quo* handed down his judgment on 18 August 2010 in which he found that the dismissal of the respondents by the appellant for operational reasons were substantively unfair.[1] The appellant was ordered to reinstate the respondents to its employ retrospectively to the date of dismissals plus costs of suit. The appellant is now appealing against the judgment and the order of the Labour Court with leave of this Court, having failed to obtain leave to appeal from the Court *a quo*.

Factual Background

[4] The appellant carries on the business of Fast Moving Consumer Goods ("FMCG"). It provides warehousing and distribution services to three entities namely, UniLever, Kimberly-Clark and Colgate. In terms of the appellant's operations, all resources including staff and vehicles were not allocated and dedicated to a specific contract, but to all three contracts in totality. There was a significant amount of overlap in this regard. Whilst products were received on separate vehicles from the three different contracts referred to, the same receiving staff in the warehouse attended to the receipt and warehousing of these particular items.

[1] A point *in limine* was raised by the appellant concerning the claim against Van Wyk who was cited as the second respondent. It was contended that Van Wyk was merely an author of the dismissal letter and no claim could be instituted against him personally. The Labour Court found that the respondents had failed to make out a case against Van Wyk in his personal capacity. No order was however made either in favour of or against Van Wyk.

[5] The products were stored in the warehouse on approximately 40 000 pallets and the pick-up and delivery of products consisted of approximately 110 000 to 140 000 boxes per day. These operations ran continuously over a five day week.

[6] It is common cause that during or about 31 January 2008, Unilever and Kimberly-Clark, the two biggest contracts awarded to the appellant were cancelled. Certain functions were extended until 14 April 2008 and the Kimberly-Clark contract ended on 31 May 2008 in respect of warehousing functions. The loss of these contracts had the effect of the appellant losing about 80% of its business.

[7] The appellant employed approximately 700 staff to service the contracts of its customers. Accordingly, upon the expiry of the aforementioned contracts, the appellant only required the services of a total of 100 employees to attend to the duties in respect of the remaining Colgate contract which was the smallest of the three contracts.

[8] The appellant thereafter contemplated a restructure of its operations and on or about 1 April 2008 issued a letter to the employees including the respondents to that effect. The letter read, *inter alia,* as follows :

> 'NOTICE OF TERMINATION OF SERVICE: SHIFT IN OPERATIONAL REQUIREMENTS
>
> 1. Our various consultations during February and March 2008 have reference.
>
> BACKGROUND
>
> 2. The Fast Moving Consumer Goods (FMCG) business unit of the Supply Chain Partners Division is currently providing warehousing and distribution services to three (3) major principles. Unilever's contract with Super Group FMCG ends 30 April 2008. This of course implies a shift in our operational requirements and it affects all FMCG sites nationwide. To this end, the new F.M.C.G. structure at Super Park will be much smaller with limited positions. The company considered making use of, amongst others, the LIFO (last-in first-out) principle, but in order to ensure that the process is

substantively and procedurally fair it was agreed that the filling of the new structure's positions will be done by means of "open competition", i.e. allowing everybody to have an equal chance to apply and to be considered for the positions in the new FMCG Super Park structure. In terms of the process all applications were reviewed and short listed applicants was (sic) invited to attend interviews towards the end of March 2008. Unfortunately your application as part of the open competition process, was **not** successful. To this end the company will continue to explore all possible alternatives to dismissal in order to avoid the retrenchment of employees. The company will also consider proposed alternatives to dismissal by employees.

TIME SCALES

3. This letter serves as notice that should the company not be able to find any alternative to dismissal your services will be terminated on 30th April 2008, in accordance with FMCG operational requirements.

SEVERANCE PAY

4. As per Basic Conditions of Employment Act, Act 75 of 1997, all affected employees will receive a severance pay of one week's remuneration for every completed year of continuous service.

5. The company understands that you may have certain, special requirements and may grant leave in order to provide you the opportunity to seek alternative employment provided this does not have an adverse impact (on) current operational requirements.

GENERAL

6. You are welcome to consult with Mike van Staden, Lee Johnson or Graeme Barnard about any matter discussed in this letter.

7. A more detailed letter, highlighting the details of your leave pay, pension and provident fund as well as severance pay will be forwarded to you shortly.

8. I would like to take this opportunity to thank you for your support and service during your tenure with Super Group.'

[9] On or about 18 April 2008, the appellant issued further letters to the respondents notifying them that "as agreed" their employment was being terminated with effect from 30 April 2008 and further setting out what was due to them as a consequence of the termination of their employment.

[10] Mr Graham Barnard ("Barnard") is the Human Resources Executive of the appellant. He testified that the appellant tried to look for alternatives to retrenchment within the company and could not find any. They also approached DHL which had acquired their two lost contracts and were unable to find alternatives. He testified that for Colgate structure, the best way out was to retain skills by means of "open competition process". By that process they would ensure that only the best skill was retained. The respondents were also part of the people that were invited to apply for these particular positions at that point in time as part of the open competition process. However, despite their checking the records they could not find copies of applications submitted by the two respondents.

[11] In response to the contention that there was no consultation as required by law, Barnard testified that there were consultation sessions held with specific groups of people, and after these consultations they issued letters in which they physically invited employees to come and consult with specific individuals within the company. As far as he was concerned, he was neither personally consulted nor were there any specific individual one-on-one consultations. He mentioned further that the "onus" was placed on the respondents to actually engage with the company in terms of those consultations.

[12] The process of open competition entailed a request to the employees to apply by means of submitting their CV's as well as a predictive index survey. The latter was aimed at making sure that one gets the best match in terms of the specific talents required for a job and compared that to the applicant's specific talents or tracts. Through this method they decided which employees to keep and which to terminate. He concluded that the financial loss then was about a billion Rand.

[13] Under cross-examination, Barnard testified that he was present at some of the administrative meetings but could not recall whether he was present at the meetings addressing the warehouse and distribution consultations. He estimated that a minimum of two meetings were held per group but was not aware if the meetings were also held for night shift which was worked by the respondents. He mentioned that although he was the Human Resource Executive, the operations departments took control and ultimate ownership of the staff reduction process. He could not dispute the respondent's version that there was only one "mass meeting" that lasted five minutes where they were simply informed that the appellant had lost the two contracts and that there was going to be structural changes within the company.

[14] Barnard testified that he could not comment on the version of the respondents that they received the letter(s) dated 1 April 2008 on 30 April 2008 when they were dismissed and as such they would not have known that they had to consult. He emphasised that it was upon the employees to initiate meetings for further consultations.

[15] Eugene Van Wyk ("Van Wyk") testified that he is the Chief Executive Officer of FMCG Division of the first respondent. He confirmed that he was the author of the letters dated 18 April 2008 and that they were given to the employees who refused to sign the letters on the space provided for as they were unhappy that they were to be dismissed. He testified that they received notice on 31 January 2008 that the contracts would be cancelled and from February 2008 they held meetings with all the employees to report what was happening. They further reported that they were going into a process to look for other alternatives for where they could use the staff elsewhere in the company. He held a meeting with the National Inland Director for DHL to take over their staff as they were going to take over the two contracts. He was told that DHL had also lost other contracts and was unable to employ all employees and that they would allow them to apply for positions at DHL and appoint them through a screening process.

[16] Van Wyk mentioned further that they could not use LIFO as selection method since most employees started together when they obtained the two contracts

respectively and as such there would have been about 300 to 400 employees eligible for the 100 positions at Colgate. LIFO was then disqualified as it was not practical to use it. They then used the open competition method. There were a lot of people who did not apply for the advertised positions and indicated that they wanted their severance money. Those who applied were evaluated by the computer system to determine those suitable for retention.

[17] When confronted by the allegation in the letter issued to the first respondent that his application was unsuccessful, Van Wyk replied that the letter was a standard letter issued to 600 employees after they could not find alternatives. He, however, checked the files and could not ascertain whether first respondent had indeed applied for a position for the letter to read that his application was unsuccessful. He did not keep minutes of the meetings he had with the employees.

[18] The first respondent testified that he held a position of picker controller together with other two pickers. He was working on UniLever and Colgate contracts and the two had the same system. Prior to his retrenchment, a certain “Kaifas Mkhari” was brought in from “Invoicing” and he shared the duties of Colgate and Unilever with him. The first respondent confirmed that he attended a meeting called in January 2008 where Mike van Staden, who was the Distribution Manager, informed them that Kimberly-Clark and Unilever contracts were going to be cancelled and that there would be restructuring as a result. He then told them to consider that meeting as the first step in the consultation process and he left. The first respondent thereafter went to his immediate manager for him to clarify what it was meant and whether they are going to be retrenched. The manager told him that he did not know. He was thereafter not called to any other meeting. During one of his night shifts, the warehouse manager came to their office and informed them that they had to apply for either their jobs or any other position they considered suitable because of the new restructuring exercise. There were about five employees in that office when the manager spoke to them. Gerda Pieterse who was the Admin Manager sent him an e-mail in which he attached a form with instructions for him to complete. He did not know what that form was for. He

was reluctant to complete it. At some stage, Pieterse phoned him and warned him that if he did not complete the form he would be disciplined. He then completed the form and submitted it.

[19] The first respondent insisted that he did not attend any meeting convened by Van Wyk. He testified further that he received the letter dated 1 April 2008 referred to above on 30 March 2008 and the subsequent letter dated 18 April 2008 on 30 April 2008. This letter was one of many letters in the box and the employees were told to search through the pile to identify the one bearing his or her name. There was no discussion as the box was only left there for them to search for their letters. He did not know the reason why he was selected for retrenchment. He believed that he had the skills to do the job since, *inter alia*, there were no changes to the technology used. His job is still there and was given to someone else. He was at no stage before his retrenchment told that his position was redundant. He had been working for the appellant since the year 2003. He tried to secure a meeting with Van Staden and he had to go through Pieterse who told him that he could not meet Van Staden as he was either busy or was in a meeting. The Night Warehouse Manager could also not assist him as he was also in the dark and did not know if his job was secured. He testified further that Van Staden offered jobs to six people who did not apply for the positions and even extended the closing date for applications to accommodate these people only. He supported his averment by referring to the letter written by Van Staden to those people.

[20] The second respondent also started working for first respondent in 2003. He confirmed that there was a “mass meeting” called by Van Staden in January 2008 and made a report about the loss of two contracts. He did not have access to a computer. He does not know whether he completed the predictive index survey as he did not even know what it was. He however recalled that he completed a form which was a job application in 2008. He applied for the position of “cage controller” and “receiving” and he and one Edgar Ntuli submitted their applications to one Hensom on the last day for submission of the applications. Edgar Ntuli was retained and he was retrenched. He was never called individually to a meeting before his retrenchment. He is not

aware of any consultation meetings that took place. He was mainly working on the Colgate contract though he at times assisted in the other two contracts for stock-taking duties. He could also operate the picking machine; drive a forklift and a "reach truck". He was licensed to operate these vehicles. He did mention this aspect in his CV that he submitted when he applied for a position. He was never told to apply for a position at DHL. He was prepared to accept alternative positions but was not granted an opportunity to consider them. Edgar Ntuli who was retained did not have the necessary licenses to perform the functions he did when he was retrenched.

Findings of the court *a quo*

[21] The Labour Court found that the authorities are in agreement that in terms of s 189 A (19) of the Act,[2] it may not adjudicate a dispute about procedural fairness of a dismissal for operational requirements. Since the case of the respondent fell within the provisions of s 189 A read with s 191(5) (b) (ii) of the Act, it was precluded from determining the procedural fairness of the respondents' dismissal. In relation to substantive fairness, the court *a quo* found that the version of the appellant that the operational requirements for terminating the respondents' employment were necessitated by the cancellation of the two contracts by its clients was not challenged. It held further that what was key in the determination of the substantive fairness of the dismissal of the respondents is the selection criteria. The nub of the Labour Court's reasoning is found in the following extracts from passages in the judgment:

> '[21] … whilst the [appellant] contended that it had consulted with the [respondents] through their chosen representatives, there is no evidence that there was consultation in as far as the selection criteria was concerned. It therefore means that the [appellant] did not comply with the requirements of the first part of s 189(7) of the LRA. In my view [appellant] has also failed to satisfy the requirements of fairness in as far as part (b) of the section is concerned.'

And:

[2] Labour Relations Act 66 of 1995.

> '[22] The criterion used in selecting the [respondents] was based on PMS as indicated above. The [second respondent] stated in his testimony that he did not have knowledge about the PMS until this court case. It is also clear from the testimony of the [respondents] which was not challenged that they were never informed as to what the purpose of filling in the forms of the PMS was for. There is also no evidence that the [appellant] explained what the PMS was to be used for. And more importantly the [respondents] ought to have been made aware that the information they provided in filling in the forms would be used for the purpose of determining their future employment. Except for stating that the PMS was an objective system to match the position, there was no evidence as to in what way was the information derived from it, would result in a fair and objective assessment of those to be retained and those who had to go.'

[22] The court *a quo* held further that the fairness of the PMS lies in the manner in which it was implemented and found that the dismissal of the respondents was substantively unfair.

The Appeal

[23] The grounds of appeal relied upon by the appellant to challenge the judgment and the order of the Court *a quo* in this Court may be summarised as hereunder: The Labour Court:

23.1 erred in overlooking the fact that the appellant had to implement a major reduction to its workforce. Most of the affected employees had the same length of service; the criteria such as skills and experience were of paramount importance to the appellant's objective of providing an efficient service in terms of the last remaining contract operating in a highly competitive environment.

23.2 erred in not finding that the system (PMS) was independent and objectively compared to each employee's talent profile with the profile of the available positions. The selection criteria were both fair and objective.

23.3 overlooked the fact that the second respondent disqualified himself from a picking position because he did not even bother to apply for it.

23.4 erred in granting reinstatement because under the circumstances it was wholly inappropriate and impracticable. Their erstwhile positions no longer existed and it would place an unfair burden on the appellant to try and accommodate them in a structure where their services were redundant.

[24] It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do so successfully, it is obliged to have a *bona fide* economic rationale for the dismissal and to comply with the provisions of sections 189 as well as section 189A of the Act where applicable. Section 189 imposes an obligation on the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimise the effect of the dismissal.[3] The consultation envisaged by the Act is a 'meaningful joint consensus-seeking process' in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and where not possible to ameliorate the effects of the dismissal for operational requirements.[4]

[25] An employer should not approach the consultation process with a predisposition to a particular solution but to approach the process with a mind open to persuasion to alternatives that are practical and rational. The employee party or its representative should be given a fair opportunity to suggest ways in which job losses might be avoided or the effects of the dismissal might be ameliorated before the dismissal.[5] There also rests a duty on the employer to provide the employee or its representatives with relevant and sufficient information that would place them in a position to make

[3] See: *SA Chemical Workers Union v Afrox Ltd* (1999) 20 ILJ 1718(LAC) at para 36; *Johnson and Johnson (Pty) Ltd v Chemical Workers Industrial Union and Others* (1999) 20 ILJ 89 (LAC) at para 27.
[4] *Kotze v Rebel Discount Liquor Group* (Pty) Ltd (2000) 21 ILJ 129 (LAC) at para 18 *Johnson and Johnson* (supra) at paras 26 and 27.
[5] Grogan: Workplace law 10th Edition 2009 pages 274-5.

informed representations and suggestions on the subjects specified for the consultation.[6] It is not fair for an employer to shirk its statutory duty to consult and create and onus on an employee to ensure that he or she chases the employer around to ensure that consultation takes place.

[26] Section 189(7) places a duty on the employer to select the employee(s) to be retrenched according to criteria that have been agreed upon by the consulting parties. In the event there being no criteria that have been agreed upon, a criteria that are fair and objective should be used. The employer must prove on a balance of probabilities that the selection criteria used were fair and objective and was not used for ulterior motives. In *Kotze v Rebel Discount Liquor Group (Pty) Ltd*,[7] this Court had the following to say:

> 'A fair retrenchment process imposes an obligation on the employer to disclose to the employee all relevant information and that obligation has since been codified in the terms set out in section 189(3) of the Labour Relations Act 66 of 1995 (the Act) … the duty to engage in meaningful and genuine consultation is owed to all employees from the lowest to the executive level, … the process's fairness to the employee finds expression in the recognition of its prerogative to make the final decision to retrench … the final decision must be informed by what transpired during consultation. This is why consultation must precede the final decision. The requirement of consultation essentially formal or procedural one, but it also has a substantive purpose. That purpose is to ensure that such a decision is properly and genuinely justifiable by the operational requirements or by commercial or business rationale … The function of the court in scrutinizing the consultation process is not to second-guess the commercial or business efficacy of the employer's ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court's function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.' (References have been omitted)

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[6] *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 643G and 650B.
[7] Above n4 at para 18.

[27] What was expected of the appellant in the Court *a quo* was to discharge the onus of proving that the dismissals of the two respondents were fair.[8] In doing so, evidence was to be presented to show that there was a need to retrench, there was a fair reason to retrench the respondents and in particular, whether the selection criteria were fair; and the dismissals were effected in accordance with the requirements of a fair procedure.

[28] The finding by the Court *a quo* that the version of the appellant that it had lost its two major contracts was not challenged, is correct. The respondents also confirmed that they were called to a meeting where they were informed of the loss of the two contracts. It must therefore be accepted that the appellant faced a calamitous situation by virtue of the loss of the two contracts and therefore had to embark on a restructuring exercise. However, the respondent's challenge was that there was no need to retrench them and that they were unfairly selected for retrenchment.

[29] Counsel for the appellant, in my view, found it difficult to demonstrate that the appellant successfully discharged the onus it carried in the Court *a quo* to show that the dismissals of the respondents were fair. What made his task more difficult is the fact that the appellant tendered evidence of a general and at times hearsay nature. There was no documentary proof of the minutes of meetings held with the respondents or their representatives or that the meetings indeed took place. There was therefore no evidence to prove that there was consultation on the selection criteria; that the employees knew and understood the selection criteria; that the selection criteria were fair and objective; the two respondents were fairly identified for retrenchment; that the two respondents did not apply for positions; and that the employees that were appointed to the respondents' positions had more skills or more appropriate skills than the respondents. Furthermore, the appellant unfairly placed onus on the respondents to ensure that the consultation process was undertaken. In light of the above shortcomings, I find it difficult to find that the Labour Court misdirected itself and should have found the dismissals of the two respondents to have been fair. There is nothing in the form of admissible

[8] S 192(2) of the Act provides that if the existence of the dismissal is established, the employer must prove that the dismissal is fair.

evidence to support a different conclusion. The Labour Court has in my view provided a well-reasoned judgment in support of its findings.

[30] This brings me to the challenge relating to the relief granted by the Labour Court. Counsel for the appellant submitted (which was admittedly the appellant's main contention) that the Labour Court ought not to have ordered reinstatement and that this was a case where compensation would have been appropriate. He contended that the respondents' positions no longer existed and as such it was impossible for the appellant to reinstate them on the same terms and conditions. He further submitted that the Labour Court's findings were severe and the consequent relief ordered reinforces the perception that our labour market is inflexible which in itself is an impediment to economic growth.

[31] Section 193 of the Act provides, *inter alia,* that if the Labour Court or an arbitrator finds that the dismissal of an employee is unfair it must order the employer to reinstate the employee from any date not earlier than the date of dismissal, unless (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.

[32] In *casu,* since the appellant contends that the Labour Court should not have reinstated the respondents on the basis that it was not reasonably practicable for the appellant to reinstate or re-employ them, it had to place facts and evidence before Court to support its claim. The record does not contain any shred of evidence to support the contention that it is not reasonably practicable to reinstate the respondents except that the first respondent had lost two main contracts and had to reinstate about 600 employees.

[33] The evidence on record suggests that first respondent's position was taken by another employee even before the retrenchment was finalised; the first respondent was a controller of five years tenure and the second respondent

was a picker manager of five years tenure. They both had been pickers and had moved up the ranks; second respondent was multitalented and the contract that he mostly worked with being Colgate was not cancelled; the appellant approached several employees who were junior to the respondents and encouraged them to apply for picker positions and, that the respondents' version is that their positions still exist and may only have changed in title or name. There was no admissible evidence presented to gainsay their version. In light of the above circumstances, the decision of the Labour Court to reinstate the respondents cannot be faulted. The argument that the Labour Court adopted a rigid approach which reinforces the perception that our labour market is inflexible is, in my view, without merit. This argument was not raised in the Labour Court and there is nothing on record to suggest that the Labour Court adopted a rigid approach. The appellant has failed to discharge the onus created by the Act to show that the dismissal of the respondents was substantively fair. Reinstatement is a primary remedy prescribed by the Act where the dismissal of an employee occurred under the circumstances such as of this case and the Labour Court could not depart from awarding such remedy without valid a reason to do so. The appeal should be dismissed.

[34] What remains is the issue relating to costs. Both parties are *ad idem* that costs should follow the result. In my view, it would be in accordance with the requirements of law and fairness that the appellant should pay the respondents' costs.

[35] In the result, the following order is made:

1. The appeal is dismissed with costs.

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TLALETSI, JA

Judge of the Labour Appeal Court

Ndlovu JA and Murphy AJA concur in the judgment of Tlaletsi JA.

Appearance:

For appellant:	Adv WJ Hutchinson
Instructed by:	Fluxmans Incorporated
For the respondents:	Mr AL Goldberg of Goldberg Attorneys