REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEALCOURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 40/2012

In the matter between:

ASTRAPAK MANUFACTURING HOLDINGS

(Pty) Ltd t/a EAST RAND PLASTICS **Appellant**

and

CHEMICAL, ENERGY, PAPER, PRINTING,

WOOD AND ALLIED WORKERS UNION **Respondent**

Heard: **17 May 2013**

Delivered: **22 August 2013**

Summary: Dismissal for operational requirements – application of s 41(4) of the BCEA- employer offering alternatives to retrenchment to some employees with increased salaries - employees rejecting offer to claim severance pay- Labour Court ordering employer to pay severance pay to employees- held that an employee, who rejects an employer's offer of reasonable employment for no sound reason cannot then claim severance pay- respondent's members who were offered an increased package acted unreasonably by refusing to accept this offer –s 41(4) of the BCEA principles relating thereto restated– Appeal upheld- labour Court's judgment set aside and dismissal of respondent's members found to be substantively fair.

Coram: Tlaletsi ADJP, Davis JA and Molemela AJA

LABOUR APPEAL COURT

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against the order of the court *a quo,* in terms of which it held that the dismissal of the respondent's members based on operational requirements was substantively fair but that the appellant was to pay the members of the respondent severance pay to be computed in terms of s 41 of the Basic Conditions of Employment Act 75 of 1977. With the leave of the court *a quo,* the appellant has approached this Court on appeal against this order of the court *a quo.*

The factual background

[2] Respondent had referred a dispute to the court *a quo* on behalf of its members who were retrenched by the appellant on 21 June 2010. Although respondent's members were numbered from 1 to 323, it appears, according to an agreed minute from the parties that only 286 respondent's members formed part of the dispute before the court *a quo* and thus fall within the scope of this appeal.

[3] Appellant and, in particular the Astrapak Group, consisted of two divisions, each of which comprises a number of companies. The two divisions are known as the Rigids division and the Flexibles division. The latter manufactures plastic products that are flexible, such as cling wrap and plastic bags, while the former manufactures products such as plastic bottles. Appellant in this dispute fell within the Flexibles division.

[4] It did not appear to be in dispute, when the matter was argued before the court *a quo,* that the Astrapak Group was faced with a situation where profits in the Rigids division had increased by 31% during the period 2009 to 2010, while profits in the Flexibles division had declined by 31% during the same period. It was further not disputed that those companies, which fell within the Flexibles

LABOUR APPEAL COURT

division, would have to close unless a further investment was made in them, which investment would have to be funded by the shareholders. The shareholders were not prepared to make the necessary investment unless the companies in the group were able to demonstrate that they could reduce costs and thus increase profits. It appears that the Flexibles division was required to increase its profit margin from 7% to 12% in order to convince shareholders that a further investment in the companies would be prudent, which investment in turn would secure the long term survival of these businesses. It was further common cause that appellant indicated that it aimed to reduce costs by R106 million which required changes to wage structures and the reduction of overtime.

[5] The Regional Chief Executive Officer of the Cape Region, Mr Keith Watkins told the court about the deliberations which took place on 24 February 2010 and which provides insight into the strategy of appellant. A 10 point plan was proposed which, according to the testimony of Mr Watkins, related:

> 'To the controls in the company and the fact that working capital was not well controlled, the debtors were not well managed, the company had to much stock, and different companies were not utilising the computer system effectively, and that is Sispro. Sispro is the manufacturing computer system which we used in the group, consists of not only financial modules, but also integrates into the production modules, and stock modules so that if you can use capacity planning and material requirements planning, a computerised basis were generating, your procurement needs over time, that is the first point, working capital management to remain as part of the ten point plan, working capital management, you got the information from Sispro about the levels, but the actual management of working capital required certain techniques and those techniques were to buy materials on a short interval basis, so rather than buy three months with the material at one time, we would buy week by week, to share materials between different companies in the group, when one company was overstocked, we would move to another company, in the debtor's front, we would deal with the reasons for debtors not paying immediately on the first day that the debt became overdue, rather than allow it to drag out for two or three months before we try to address

LABOUR APPEAL COURT

> those issues and on the creditor's side, which is the other aspect of working capital, we sought to negotiate, extend the terms with our creditors so that we did not pay for the polymer and the goods that we bought as quickly as we had been. And the combination of reducing the stock levels, and getting our debtors to pay promptly and getting the creditors to extend the terms, improved the strain on working capital. And then Capex to be controlled at Exco level.'

The plan also envisaged the implementation of a continuous shift system (a so called four shift system) which was designed to increase productivity and reduce costs. Mr Watkins described this system thus:

> 'The continuous shift system, it speaks here about the ongoing implementation as I explained earlier, it was not a new initiative, we had been implementing continuous production, going back some nine years in the group. Certain companies moved more rapidly to implement than others, because there was consultative process taking place at each company with a work force, and not the same shift system went into every company, there were different agreements which had different companies around how continuous production would be implemented.'

[6] Mr Pierre Wentzel, a senior employee of appellant, testified that meetings were held with employees about these planned strategies, in particular that 'the operating methodology of the Group shall be changed to a, two by twelve hours continuous shift system, which was referred to by the parties as a 'four shift system'. Mr Wentzel referred to a letter of 14 April 2010 which constituted a notification of possible dismissals in terms of s 189 A of the LRA and which set out the background to the impasse.

> 'On 15 March 2010, as the Company (ERP was about to issue the first invitation to engage CEPPWAWU at East Rand Plastics on the issues of the 4 - Shift System and related subjects, the Union issued a notice to commence a secondary strike.
>
> As a result of such strike, the Company thought it best to hold back on the proposed changes and first attempt to resolve the strike issues. As we were not

LABOUR APPEAL COURT

able to resolve these within a reasonable time period, the Company is in a position where we have to start with this process now, allowing the parties sufficient time for consultation before final decision have to be made.

As the proposed changes within the Company may also affect the five and three employees which formed the cornerstone of the current strike and also have a bearing on their income, we thought it wise to deal with the abovementioned issues at this stage. We therefore want to avoid a piecemeal approach whereby these employees have to be negotiated with, only to be included in a section 189 A process immediately thereafter for the reasons mentioned in this letter in support of the section 189 A process.

To this end Management has decided to embark on a consultation process with regards to the restructuring of the Company in order to:

1. comply with the Group initiative to change over to a 4-shift system;

2. attempt to make up the loss of production and turnover it has suffered and continues to suffer as a result of this strike;

3. remove the cause of the strike;

4. rationalize the conditions of service in the Company so as to bring these in line with other Group Companies;

5. reduce all unnecessary costs to raise profitability levels in order to secure the return on investment for the Shareholders.

Collectively, these actions would place the Company in a position where it could ensure the sustainability of the Company.'

This letter had been necessary because employees had continued to protest against the four shift system and no consensus could be reached.

[7] The letter of 14 April 2010 issued in terms of s 189 A and 189(3) of the Labour Relations Act 66 of 1995 (LRA) thus informed employees of the possibility of retrenchment, and invited them to engage in a process of consultation.

LABOUR APPEAL COURT

[8] The reasons for the proposed retrenchment, in the event of acceptable alternatives not being found, were stated to be:

1. for appellant to comply with the initiative to change from a three shift system to a two shift system;

2. for appellant to attempt to make up the losses in production and turnover suffered and which it continued to suffer as a result of the strike, which had taken place in March 2010, and to reduce all unnecessary costs and raise profitability levels in order to secure a return on investment for shareholders and thereby ensure the financial sustainability of appellant.

Three facilitated consultation meetings then took place on 4 May 2010, 17 May 2010 and 28 May 2010 under the auspices of the CCMA. On 28 May 2010, the third meeting ended in disagreement between the parties with regard to the proposed changes. Appellant sought a further meeting on 8 June 2010 to provide respondents with final opportunity to participate in the consultative process. On 11 June 2010, letters were addressed to each individual employee affected by the changes, providing these employees with extensive details on how the changes would affect them and with the exception of five employees offering alternatives to their retrenchment. Some employees accepted the changes and alternative positions were offered to them and they were therefore not retrenched as consequence thereof. Five employees were not offered alternative employment as no suitable position was available. They were paid severance pay equal to one week's remuneration per year of completed service.

<u>Judgment of the court *a quo*</u>

[9] So much for the essential facts. Mokoena AJ, after an evaluation of this evidence, held that the appellant had experienced a loss of profit, that the performance of the Flexibles division had incurred serious losses as compared to the Rigid division, that the situation in the Flexibles division was of such a nature that ultimately it would be forced to close down, unless significant changes were

LABOUR APPEAL COURT

implemented. The learned judge also accepted the evidence of appellant's witnesses that the shareholders of appellant were unwilling to invest further funds in the Flexibles division unless a cost cutting exercise could be implemented which would contribute to an increase in profits and, that further, there was a financial justification to implement the four shift system.

[10] On the basis of an evaluation of this evidence, the learned judge concluded, on the probabilities, that appellant had proved that there was a clear reason for the retrenchments that is there were substantive grounds upon which the dismissals based on operational requirements could be justified and further, there was 'indeed a commercial rational decision for the respondent to invoke the provisions of s 189 read with s 189 A'.

[11] Turning to the question of alternative employment which was offered by appellant, the court *a quo* held that the evidence revealed that members of the respondent had earned more money through the overtime system. Once the four shift system was implemented, the loss of overtime would result in these members earning far less than previously had been the case.

[12] On the basis of this evidence, Mokoena AJ framed the key question for determination thus:

> 'Even though they are not entitled as a matter of right to work overtime, however, this is a factor which one would have to consider in assessing whether or not having worked overtime over a long period of time and having planned and budgeted their lives on the money received for overtime, they acted unreasonably by not accepting the alternative employment offered by the respondent.'

[13] Mokoena AJ then found that, as members of the respondent had acted upon the expertise and knowledge of the respondent as a trade union and as they would have been significantly impoverished had they accepted alternative employment offered by the appellant, these members of respondent had not acted unreasonably by not accepting alternative employment offers which had been

LABOUR APPEAL COURT

made to them by the appellant. For this reason, he found that the failure by the appellant to pay these members severance pay was in violation of s 41 of BCEA.

<u>The appeal</u>

[14] When the matter was argued on appeal, the factual basis required for determination of the appeal was the following: In terms of letters of 11 June 2010, save for the five employees to which reference has already been made, the balance of the employees were offered alternatives to retrenchment. These alternatives were essentially based on the four shift system which abolished overtime. Respondent contended that the affected employees were justified in not accepting what was an unreasonable and unfair set of conditions which were to be imposed upon them by appellant, pursuant to this new offer. Appellant contends, in terms of s 41(4) of the BCEA, that an employee, who unreasonably refused to accept the employers offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of s 41(2) of the BCEA and that the refusal in the present dispute was sufficiently unreasonable to justify the application of s 41(4).

[15] This Court has previously examined the scope of s 41(2) read together s 41(4) of the BCEA in a typically learned and comprehensive judgment by Zondo JP (as he then was) in *Irvin and Johnson Ltd v CCMA* (2006) 27 ILJ 935 (LAC). Zondo JP sought to answer what he considered to be the fundamental question that arises in the interpretation of s 41(4) namely: 'What is the mischief that s 41 (4) of the BCEA seeks to address or, put differently, what is the purpose of s 41(4)?' In answering this question, Zondo JP found that, where an employer arranged alternative employment for an employee and the employee rejected the alternative employment for no sound reason, but simply in order to take the severance pay, severance pay should not be paid to such employee. The justification for this conclusion was as follows:

> 'The purpose (of this section) was to discourage employees from unreasonably rejecting offers of alternative employment arranged by their employers simply

LABOUR APPEAL COURT

> because they might prefer cash in their pockets in the form of severance pay.' (at para 41)

Zondo JP went on to say that the BCEA had also sought to promote employment and therefore to incentivize employers to take the necessary steps to provide alternative employment for all employees facing dismissal for operational requirements.

[16] In a further analysis of the scope of the section, Zondo JP held that there was no basis by which an employee could obtain both severance pay and alternative employment. There was however a case where the employee would get neither severance pay nor alternative employment:

> 'Where he has himself to blame because he has acted unreasonably in refusing the offer of alternative employment. When he refused the offer of alternative employment but cannot be said to have acted unreasonably in doing so, he would still get his severance pay.' (at para 45)

[17] In the present dispute, the essence of appellant's case is that 126 of the members of respondent were offered either a higher basic wage or the exact same basic wage that they had earned immediately prior to the restructuring. In addition, 86 of the members had been offered the same basic wage while the basic wages of another 34 respondents would have been cut by between 1.19% and 3.65% with the majority suffering a reduction of 2.96%.

[18] Appellant further submitted that all the respondent's members would have to incur less travelling expenses as they only needed to travel to work three times per week instead of seven times a week. There was no unsafe travelling at night as their shifts would have started or ended at 07h00 or 19h00 compared to the previous shift changes at 07h00, 15h00 and 23h00 daily. Appellant further submitted that, although these employees had lost payment for overtime, they had no right to overtime and appellant could not be compelled to provide respondent's members with overtime work. Furthermore, their bonuses, notice,

LABOUR APPEAL COURT

leave and severance pay were calculated on actual shifts which excluded overtime worked.

[19] Appellant pressed the additional point that 176 respondent's members would be earning more than what they would have earned prior to the restructuring as from 1 July 2010 when a new wage structure came into effect in terms of a new industrial agreement; that is agreed in the Metal and Engineering Industry Bargaining Council. Although the increased wages would not be as high as would have been the case for some of them, had their wages not been changed, pursuant to the restructuring all 176 would have enjoyed a higher wage some nine days after the restructuring took effect.

[20] Ms Erasmus, who appeared for the appellant, contended that there had been no response to appellant's offer of alternative employment and the respondent had not taken the view that the alternative employment offered by appellant was unreasonable or did not constitute alternative employment in either its statement of case or in the pre-trial minute. Mr Van der Riet, who appeared on behalf of the respondent, contended that the question of reasonableness depended upon the facts before the court and thus respondent's approach to an alternative offer was not relevant to the assessment required by the Court.

[21] Assuming in favour of the respondent's members, and that their failure to raise objections to the alternative offer was not definitive of the resolution of the dispute, the reasoning adopted in *Irvin and Johnson Ltd, supra* regarding s 41(4), as applied to the present dispute, is dispositive: An employee, who rejects an employer's offer of reasonable employment for no sound reason cannot then claim severance pay. If an employer such as the appellant offers an increased amount or, at the very least, the same amount, viewed within the context of the specific conditions of employment that cannot on any reasonable basis be taken as more onerous than that which existed prior to the retrenchment exercise, and if an employee refuses to accept such an offer, that refusal is then unreasonable. The purpose of the Act, as explained by Zondo JP in *Irvin and Johnson Ltd,*

LABOUR APPEAL COURT

supra, namely to provide employers with incentives to take steps to try to provide alternative employment for employees facing dismissal for operational requirements, which, in turn, has been triggered by parlous economic conditions facing the employer, would be subverted, where a Court finds that, notwithstanding an equivalent offer, at the very least, an employer would be compelled to pay severance packages.

[22] The implications for the present dispute are therefore clear. Those respondent's members who were offered an increased package or at least one approximately similar acted unreasonably by refusing to accept this offer. In these circumstances, s 41(4) of the BCEA does apply. The evidence regarding precisely what the effect on respondent's wages was hardly a model of clarity; that this Court was uncertain as to the precise effect on each member. Accordingly, this Court required the parties to provide wage schedules subsequent to the hearing in order for a proper assessment to be made. Two schedules were then provided to the Court, namely a comparison of the initial wages versus the wages offered at the end of the restructuring and a comparison of the initial day wages as compared to wages which was offered after the new industrial wage rates for the Metal and Engineering Industry's Bargaining Council for the period 1 July 2010 to 30 June 2011, came into operation. The announcement of this increase was made public in a circular on 09 June 2010. Accordingly, the respondent would have certainly known of the new wage rates before the decision was taken to reject appellant's wage proposals. It is this particular knowledge that is critical in this case. For this reason, the wage rates, inclusive of the increases agreed by the Bargaining Council must be taken as the basis of comparison to test the reasonableness of the decision of respondent's members to refuse appellant's offer.

[23] According to this particular schedule, 173 of the respondent's members were made an offer which would have resulted in an increase in their wages ranging from 63.84% to 1.10%. In my view, all of these respondents' members faced as they were with an offer which ranged from extremely advantageous to

LABOUR APPEAL COURT

moderately positive, acted unreasonably in the context of this retrenchment exercise by refusing to accept these offers.

[24] By contrast, the balance of the respondent's members was confronted with decreased packages ranging from approximately 1% (in the case of two respondent's members) to significantly more than 30% in the case of six respondent's members.

[25] Although it is difficult to demarcate precisely when the offer can be refused by an employee without the danger of s 41(4) of the BCEA being invoked against him or her, in my view, once an employee is faced with a wage decrease, it cannot be said that he or she should not have the choice of refusing the offer and seeking employment elsewhere, notwithstanding the extremely difficult conditions which pertain to employment in general within the South African economy.

[26] To the extent that overtime payments were invoked by the respondent's members in support of their case, had the appellant decided to reduce or eradicate overtime, respondent would not have been entitled to claim compensation for the withdrawal or discontinuation of this overtime; hence this component must fall outside of the scope of the computation.

[27] In the light thereof, the court *a quo* erred in finding that severance pay should be paid to all of the individual members of respondent who claimed severance pay in circumstances where some would have enjoyed increases in their wages, had they accepted the offer of employment made by the appellant.

[28] Accordingly ,the following order is made:

1. The appeal is upheld.

2. The order of the court *a quo* is set aside and replaced with the following:

    2.1 The dismissal of the applicant's members based on operational requirements is substantively fair;

LABOUR APPEAL COURT

2.2 The respondent is to pay the members of the applicant save for those set out in a schedule attached hereto severance pay to be computed in terms of s 41 of the BCEA;

2.3 Each party is to pay its own costs.

____

Davis JA

I agree

____

Tlaletsi ADJA

I agree

____

Molemela AJA

LABOUR APPEAL COURT

APPEARANCES:

FOR THE APPELLANT: Adv L Erasmus

Instructed by Du Randt Du Toit Pelser Attorneys

FOR THE RESPONDENT: Adv Van der Riet S C

Instructed by Cheadle Thompson & Haysom Inc

LABOUR APPEAL COURT