REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA16/12

In the matter between:

NKOSINATHI MBONGISENI MTSHALI **Appellant**

and

BELL EQUIPMENT **Respondent**

Date Delivered: 22 July 2014

Summary: Dismissal for operational requirements- Agreed selection criteria- Employee contending that agreed selection criteria not properly applied, the criteria applied unfair and not objective- Labour Court finding that selection criteria fair and objective- Appeal - Respondent failing to show that the agreed selection criteria for retrenchment was fair, objective and was fairly applied. Respondent failing to consider and apply bumping as part of LIFO. Dismissal for operational requirements substantively unfair - Labour Court judgment set aside. Appeal upheld with costs.

CORAM: Tlaletsi ADJP, Dlodlo et Mokgoathleng AJJA

JUDGMENT

TLALETSI ADJP

Introduction

[1] This is an appeal against the order of the Labour Court (Van Voore AJ) in an alleged automatically unfair dismissal dispute alternatively, an alleged unfair dismissal dispute referred to that court by the appellant against his former employer, the respondent. The respondent contended that the appellant's dismissal was due to the respondent's operational requirements and was fair. The appellant did not challenge the procedural fairness of his dismissal. The Labour Court dismissed the appellant's claim of automatically unfair dismissal, found that the appellant's dismissal was substantively fair and ordered the appellant to pay the respondent's costs. The appellant is in this Court with leave of the court below.

Background

[2] The respondent manufactures and distributes a range of heavy material handling equipment, notably the articulated dump trucks. Its headquarters is at Richards Bay where the appellant was employed. The respondent has distribution operations network in Kuruman, Bloemfontein, throughout the African Continent, Europe and the rest of the world. The production facility at Richard's Bay includes the building of articulated dump trucks, research and development facility. The respondent is the only company in South Africa that does work of this nature.

[3] The appellant was employed since 2004 and, at the time of his dismissal on 30 September 2009, he was holding the position of production supervisor 1 in the building of chassis for the B40 articulated truck. It is common cause that during 2009, the respondent was experiencing economic and financial difficulties. The respondent's profits dropped drastically due to a decline in world markets. The respondent issued a letter dated 31 March 2009 to all employees informing them of possible staff, salary and wage reductions.

[4] Despite embarking on two rounds of voluntary retrenchments, termination of all independent contractor's contracts and salary reductions, it became evident to the respondent that forced retrenchments would still be necessary. By this time, the situation was so grave that the respondent's auditors would

not certify its going concern status. On 6 May 2009, an official notice in terms of section 189 of the Labour Relations Act[1] ("the Act") was issued to the employees. This process culminated in the formal facilitation by the Commission for Conciliation, Mediation and Arbitration (CCMA). There were consultation meetings and interactions that took place over the period April to August 2009. The meetings took place between the respondent, the unions and other employees not belonging to the unions. The unions involved were NUMSA, UASA and Solidarity of which the appellant was a member.

[5] In the process, the respondent considered moving employees between various and far flung geographic centres such as Kuruman and Bloemfontein. However, in the respondent's view, it would be difficult given the associated costs involved to implement such a programme. On 26 August 2009, the respondent concluded a Retrenchment Agreement with Solidarity, UASA, NUMSA and representatives of non-unionized non-scheduled employees. The agreement was intended to regulate the retrenchment and related matters between the respondent and the unions. In terms of the agreement, the agreed selection criteria were formulated as follows:

> 'The parties agree that where positions are not critical to the operations of the Group in the short to medium term, the following criteria will be used:
>
> a. The geographical location of the position;
>
> b. Qualification, competency and experience;
>
> c. Last-In-First-Out (LIFO).'

[6] According to the respondent, having agreed on the selection criteria, the respondent looked at its current circumstances as well as production trends in relation to each specific product. A production rate was given and a structure was put in place. The respondent looked at how many managers, welders, supervisors and other employees who would be required to achieve the production rate. Following voluntary retrenchments and cutting down on contractors, a number of employees still remained unsustainably high.

[1] 66 of 1995.

Consideration was then given to business process by process. The respondent was reluctant to move persons from one production line or store to another as this would, according to the respondent, lead to what it called, a range of unintended consequences.

[7] The respondent had 19 Production Supervisors and only needed 8. Through a process of voluntary retrenchments, 5 Production Supervisors level 1 left the employ of the respondent. With regard to B40 at Supervisors level 1 was the appellant and there was also one Naidoo who was a Supervisor level 2, a level higher than that of the appellant. He commenced employment with the respondent about two years prior to the retrenchment exercise and according to the respondent had the most experience in large truck chassis. The respondent needed only 1 Supervisor in this division.

[8] The evidence tendered by the respondent was further that they considered retaining the appellant in another part of the business. However, they were of the view that moving someone from one area or line of the business to another was not part of the criteria and further that the respondent wanted to avoid the "domino effect" and further avoid putting people into positions for which they had no experience.

[9] On the appellant's selection for retrenchment, the respondent's evidence (Hodgson) was that it was not motivated by a personal vendetta and that it was not 'some grandiose scheme to get rid of one individual.' The appellant was identified for retrenchment because he was in a "company" that was eventually going to "shut down". The selection was not on qualification as he had "excellent qualifications". The part of the business which produced or manufactured articulated dump trucks was severely affected by the dire economic conditions.

[10] It was put to Hodgson that there was a position that was offered to one J Naicker and not to the appellant. He replied that the position was not a permanent vacancy that was in existence and re-employing someone into a temporary vacancy would have aggravated the situation. He testified that

temporary vacancies were not advertised and that J Naicker had taken a voluntary retrenchment package.

[11] Hodgson testified that bumping would have involved moving one employee from one process or post to another process or post. However, it had been agreed with all the parties during the consultation process that the respondent should not consider or apply bumping. He mentioned further that an employee named Rolando was preferred over the appellant because, *inter alia*, the appellant had no prior safety experience and did not possess the necessary qualifications that would enable him to satisfy safety requirements. Rolando on the other hand had acquired the necessary safety courses and experience from the previous company he came from and was safety orientated. He showed an interest in safety which was not shown by the appellant.

[12] The appellant's evidence relevant for this appeal is that Rolando was junior to him and lacked experience in fabrication or welding. He mentioned that he did a course in risk assessment, legal liability, health and safety. As a supervisor he had to be competent in health and safety matters. He was therefore proficient in safety matters. He was upset upon receiving a notice of his retrenchment and believed that Rolando should have been the one to be retrenched as he was employed after him.

[13] The appellant testified that he had consulted his union organiser, Vosloo who was to discuss his selection for retrenchment. Vosloo later informed him of a settlement offer made by the respondent and he rejected it. He would have accepted it if it was payment equivalent to 12 months remuneration. The appellant confirmed that he did receive an advertisement for vacancies and he did not apply. Other jobs were also brought to his attention including supervisory post and he did not apply for them.

<u>The Labour Court</u>

[14] In its judgment, the Labour Court remarked that a further issue to consider was whether the dismissal was substantively unfair because the selection criteria were not properly applied, alternatively because the selection criteria were in and of themselves fair and objective. The Labour Court held that the

established evidence shows that the selection criteria was agreed and further that the respondent's witnesses gave detailed evidence on the application of those selection criteria across various production lines or units including the B40 production area. The Labour Court held:

> 'I am satisfied that the selection criteria were in and of themselves objective, fair and reasonable. I am also satisfied that the company had established that the consultation process included the application of the selection criteria in various business units and productions lines. In these circumstances the company considered LIFO and the retention of skills.'

[15] As regards the application of the principle of bumping, the Labour Court held that:

> 'Counsel for [the appellant] contended that the dismissal was also unfair because the company did not consider bumping. However, the evidence points against the application of bumping. This was the first time that the company had undergone a retrenchment exercise and so there is no practice of bumping. Yet further the largely undisputed evidence is that the company has operations at Richards Bay, Bloemfontein in the Orange Free State and Kuruman in the Northern Cape. The undisputed evidence was also that it was not reasonably practicably possible for employees to be moved from one facility to another. In these circumstances no case has been made out on facts for either horizontal bumping or indeed vertical bumping. The company had in assessing its staffing needs in the face of a severe crisis conducted a careful assessment of the various business units. On the facts of this matter I am satisfied that no proper case would be made out for the application of bumping.'

[16] The Labour Court continued thus:

> 'Whilst it is so that Mr Mtshali was understandably upset at being selected for retrenchment, this does not compromise the essential features of the consultation process. The company had embarked on a thorough-going consultation process which involved also the unions to which its employees belong and CCMA facilitation. On the largely undisputed facts of the matter the company's selection criteria were fair and objective and were in fact consistently applied. On or about 5 August 2009 the company distributed a

> list of proposed retrenchment. Mtshali's post of productions supervisor 1 was on that list. From that time Mtshali and the union representative knew that his post level was affected. They had a reasonable opportunity to engage the company with queries and concerns. Mr Mtshali's union was consulted during the process and participated in the consultative process. Mr Mtshali's selection for retrenchment was the outcome of the reasonable application of fair selection criteria. In all of the circumstances the company has established a fair reason for Mr Mtshali's selection for retrenchment.'

[17] As pointed out already the Labour Court rejected the appellant's claims of unfair discrimination, automatically unfair dismissal and found that his dismissal was substantively fair and ordered the appellant to pay the respondent's costs.

The Appeal

[18] The appellant has filed a notice of appeal without stating his actual grounds of appeal against the judgment of the Labour Court. The appellant had lodged several claims against the respondent in his statement of claim which had to be adjudicated by the Labour Court. The respondent was placed in a situation whereby it believed that each and every finding made by the Labour Court was being challenged. However, it only became clear in the heads of argument filed on behalf of the appellant that not all of the findings made by the Labour Court were being challenged. It is in my view imperative that an appellant should serve and file a notice of appeal stating in some detail the grounds of appeal on which it relies to challenge the judgment appealed against. Doing so would inter alia, remove any element of surprise and direct focus on the real issues from an early stage.

[19] In this Court, counsel for the appellant indicated that the appellant does not pursue his initial contention that his dismissal was automatically unfair as well as his allegations regarding racial discrimination. The challenge was only limited to the Labour Court's finding that the appellant's dismissal due to the respondent's operational requirements was fair. It was contended that the appellant's selection for retrenchment was neither in accordance with the

criteria that had been agreed between the parties nor criteria that were fair and objective.

[20] As regards the agreed criteria, it was submitted that there is nowhere in the Retrenchment Agreement where the respondent was authorised to apply the selection criteria selectively per lines of production but between geographical locations. The respondent's limitation of the criteria to the lines of production was therefore an unfair application of the agreed selection criteria. Put differently, it was contended that the agreed selection criteria meant that the employees would not be moved or bumped between the respondent's centres such as Kuruman, Bloemfontein and Richards Bay to avoid retrenchment but that an employee in the position of the appellant would be compared against all other supervisors employed at the Richards Bay Plant without limitation to production lines only. For this reason, it was contended, the appellant's selection for retrenchment was therefore substantively unfair because it was not in accordance with either agreed or objectively fair criteria.

[21] LIFO (last in, first out) as a method of selection entails that employees are selected for retrenchment according to the period they have been with the employer. It simply means that employees who have served for a shorter period would be higher on the list of those likely to be retrenched. Although it has its own difficulties, LIFO is still regarded as the most objective and fair method of selecting employees.

[22] The application of LIFO may also have the effect of longer serving employees being moved to take up positions of employees with less service and who were not necessarily targeted for retrenchment. This process is known as bumping. This Court had an occasion to consider bumping as a method of selection in our law in *Porter Motor Group v Karachi.*[2] The Court summarised the principles applicable to bumping as follows:[3]

> '(1). It should be reiterated once again that fairness is not a one way street. It must accommodate both employer and employee. Section 189(2) of the Act requires both parties to attempt to reach consensus on

[2] [2002] 4 BLLR 357 (LAC).
[3] At para [16].

alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.

(2). Bumping is situated within the "last in-first out" (LIFO) principle which is itself rooted in fairness for well-established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise is an invaluable asset. Their long service is an objective tribute to their skills and industry and their avoidance of misconduct. In the absence of other factors, to be enumerated hereinafter, their service alone is sufficient reason for them to remain and others to be retrenched. Fairness requires that their loyalty be rewarded.

(3). The nature of bumping depends on the circumstances of the case. A useful distinction is that of dividing bumping into horizontal and vertical displacement. The former assumes similar status, conditions of service and pay and the latter any diminution in them.

(4). The first principle is well established, namely, that bumping should always take place horizontally, before vertical displacement is resorted to. The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping. Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.

(5). Where large scale bumping, sometimes referred to as "domino bumping", necessitates vast dislocation, inconvenience and disruption, consultation should be directed to achieving fairness to employees while minimising the disruption to the employer. Examples of disruption include difficulties caused by different pay levels, client or customer reaction to a replacement of employees and staff incompatibility. In evaluating the competing interests of the employer and the affected employees the consulting parties should carry out a balancing exercise. Where minimal benefits accrue to employees,

while vast inconvenience is the lot of employers, fairness requires that fewer employees should move.

(6). There will always be geographical limitations to bumping in that fairness will require that limits be placed on how far an employee is expected to move to bump another. Although prejudice to the employer in long distance relocation cannot be excluded, in practice this will be rare. Generally it will be the employee who will suffer as a result of being removed from a cultural and social environment he or she has become accustomed to. Second-guessing the desires of the employees is undesirable; if they are happy to translocate then bumping should take place whatever the distance involved.

(7) The pool of possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of the company within the parameters if its activities, national or international; fairness requires that the same circumference should define the limits of potential candidates to be bumped. The career path of the employee in the company will often be a useful indication of scale of mobility.

(8). The independence of departments as separate business entities may be relevant but the argument that a company's departments are managed separately should be strictly scrutinised. Even if there is no past practice of transferring between branches or departments, the employer must consider interdepartmental bumping unless it is injurious to itself and to other employees.

(9). Bumping does not apply to employees in a different grade if the longer-serving employees cannot do the work of the employee with shorter service in that grade. This limitation applies most frequently where competence, technical or professional knowledge or experience and specialised services are involved. Where the necessity arises of retaining those, who are transferred, this should be carried out, unless it places an unreasonable burden on the employer.

(10). The status of the post into which an employee is bumped is relevant, as the employer's prerogative to choose someone of managerial/supervisory level should be respected. Management concerns that downgrading an employee will be demoralising will not justify a decision not to bump downwards where the employee is prepared to accept downgrading. On the other hand the unwillingness of the affected employee to accept a lower wage may justify not bumping."

[23] In *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU and Others,*[4] this Court held, *inter alia*, that the fact that the employees had not explored the possibility of "bumping" during consultations did not mean that they were precluded from challenging the fairness of their selection during the trial. The preclusion could only be applicable where an employee or its union has specifically made an undertaking not to rely on bumping in challenging the fairness of a dismissal arising from the consultation process in question.

[24] The Retrenchment Agreement concluded between the consulting parties in this case constitutes a binding collective agreement. The consulting parties have agreed on the selection criteria to finally identify and select the employees to be retrenched. The selection criteria agreed to in the agreement is therefore the only basis for identifying the employees to be retrenched. However, the agreement makes provision for its variation. It provides that variation of the agreement shall not be of any force or effect unless reduced to writing and signed by the parties or duly authorised by their agents.[5] Any other basis for selection of employees for retrenchment outside or contrary to the agreement can therefore not be regarded as the agreed method for selection. There would in that case have to be justifiable reasons for the application of the said method for selection and the method itself and its application would have to pass the test of fairness.

[25] To recap, the agreed selection criteria for employees to be retrenched in this case provided that where the positions are not critical to the operations of the

[4] [2004] 9 BLLR 849 (LAC).
[5] Clause 15.1 of the agreement which also provides that "The Agreement records all the terms that have been agreed upon between the parties."

Group in the short to medium term, the criteria to be used is the geographical location of the position, qualification, competency and experience and LIFO. It means therefore that the respondent bore the *onus* to prove on a balance of probabilities that it applied the selection criteria as agreed and that its application was done fairly.

[26] In my view, it is important to note that the common cause facts that follows: The entire process of restructuring of the respondent's business was a subject of an extensive process of consultation and negotiations. The employees were part of the process as represented by their trade unions. The appellant was no exception as he was represented by his union Solidarity which played an active role in the consultation process. The procedural fairness of the process is not challenged. The need to restructure the respondent's operations as well as the need to retrench the employees is not disputed. What is challenged is therefore the application of the agreed selection criteria that led to the retrenchment of the appellant.

[27] It is not disputed that the appellant identified other employees who according to him should have been retrenched if LIFO together with "bumping" was applied. These employees were David Ronaldo, Mashudu Mafinya and Asogan Naidoo. These employees, together with others such as Alfreds, Kanaye and Blignaut had fewer years' service with the respondent than the appellant.

[28] The reasons advanced on behalf of the respondent why these other employees were not retrenched are simply that they were incumbents in their current positions and were at the crucial time not considered for retrenchments; that because of the approach adopted by the respondent it was never a consideration that the appellant had more years of experience; or that in some cases he had similar qualifications and was capable of performing the functions of the other employees with less experience and qualifications than him. The respondent simply decided not to consider applying bumping at all or across the lines of production. No cogent evidence was presented to show that the employees that were retained were better skilled, qualified or capable than the appellant. Some of the employees such

as Ronaldo and Robertson were only redeployed to their positions a few months before the retrenchment.

[29] The respondent could not produce any evidence to support its view that the retrenchment agreement precluded the consideration and application of bumping across the production lines. There is also no provision that one can find in the agreement that supports that view. Prohibition if any, may be against moving employees across geographical regions; that is moving employees from Richards Bay to either Kuruman, Bloemfontein or vice versa. The finding by the Court *a quo* to the effect that it was agreed in the consultation process that bumping would not be applied between the lines is in my view not correct. In any case, such agreement, be it by either implication or inference would be contrary to the written agreement and would therefore be of no force or effect.

[30] It is clear from the authorities referred to above that bumping forms part of LIFO as a method for selection of employees to be retrenched. It was therefore incumbent on the respondent to have consulted on its application to determine whether its application would have been appropriate in the circumstances of this case. It was not for the respondent to decide unilaterally that it would not be appropriate to apply bumping especially where it was not specifically prohibited in the collective agreement. Reasons why the respondent considered the application of bumping inappropriate or unfair should have been tabled for consideration by the consultation parties before a final decision could be taken. Any decision taken together with the consulting parties should have been reduced to writing and singed by the parties if it was to contradict the collective agreement.

[31] The appellant has, in my view, succeeded to show on a balance of probabilities that had bumping been applied he would not have been dismissed because of, *inter alia*, his years of experience, qualifications and skills. He was also not offered other positions for which he qualified. Bumping in this case would not qualify to be regarded as large scale bumping. There is also no cogent evidence on record to suggest that bumping would have led to disruptions, dislocation or inconveniences.

[32] Advising the appellant to apply for a position is not tantamount to offering him a position for his consideration. His application may be ruled unsuccessful and remain retrenched. If the respondent was of the view that the appellant was suitable for the positions he was advised to apply for it was necessary for it to offer those positions to the appellant for him to decide whether to accept them or not. This was not an instance where positions for a structure were identified and all the employees were to compete in a selection process in filling those positions in a newly created structure. I am of the view that the respondent has failed to show that the agreed selection criteria was applied alternatively that the selection criteria it applied to select the appellant for retrenchment was fair, objective and was fairly applied. For these reasons his dismissal for operational requirements was substantively unfair.

[33] The appellant prayed that he be reinstated. I am mindful of the fact that a period of time has lapsed since his unfair dismissal. That reason on its own is not sufficient to deny him his primary remedy for a substantively unfair dismissal. It is also not his fault that there has been a delay between his dismissal and the prosecution of the appeal to finality. It was also not the respondent's case that the exceptions listed in section 193(2) of the Act are in existence for one to conclude that he should not be reinstated. The appellant's reinstatement should be with full retrospective effect and inclusive of all benefits that he would have been entitled to but for his unfair dismissal. The parties have agreed to place on record the fact that the appellant had been unemployed until a month prior his testimony during May 2011. On that day, he commenced a temporary employment earning a monthly salary of R17 000,00 as opposed to the amount of R21 215,00 he earned at the respondent at the time of his dismissal. The appellant has been permanently employed on contract since that time. The period of his employment as well as his earnings should be taken into account when calculating the benefits due to the appellant.

[34] As regards costs both parties have submitted that costs must follow the result. I am of the view that it would be according to the requirements of the law and fairness that the respondent should be ordered to pay the appellant's costs.

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

a) The appeal is upheld and the order of the Labour Court is set aside and replaced with the following:

1) The appellant's dismissal is hereby declared substantively unfair.

2) The appellant is to be reinstated with retrospective effect to the employ of the respondent and is to receive the benefits he would have been entitled to but for his dismissal, and such benefits are to exclude the agreed remuneration the appellant received whilst employed by another employer during the period of his dismissal.

3) The respondent is to pay the costs.

b) The respondent is ordered to pay the costs of the appeal.

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Tlaletsi ADJP

Dlodlo et Mokgoatlheng AJJA concur in the judgment of Tlaletsi ADJP

APPEARANCES:

FOR THE APPELLANT: Adv Shuman

Instructed by Brett Purdon Attorneys

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FOR THE RESPONDENT: Adv M M Poseman

Instructed by Macgregor Erasmus Attorneys

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