
Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: JS 947/11

In the matter between:

**NUMSA obo MEMBERS** **Applicants**

and

**KENCO ENGINEERING CC** **Respondent**

**Delivered**: 11 November 2015

**Summary:** (Retrenchment – substantive fairness)

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**JUDGMENT**

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LAGRANGE J

Introduction

[1] In this matter, the individual applicants were retrenched on 29 May 2011. They allege that their retrenchment was substantively unfair. In essence, the applicants dispute that: there was a valid and fair reason for their retrenchment; whether there was a proper consideration of alternatives, and whether they were selected for retrenchment using fair and objective

criteria. The respondent admits that it did not follow LIFO, but in selecting candidates for retrenchment, it used criteria based on skills, work performance, attendance records and safety records. The applicants believe they were selected based on the basis of their union membership, though they did not claim that their dismissal was automatically unfair as a result. They also argued that the employer retrenched longer serving permanent workers and retained shorter serving employees on fixed term contracts.

[2] Initially, the applicants had also disputed the procedural fairness of their dismissals, but as the retrenchments were large-scale retrenchments falling within the scope of section 189A of the Labour Relations Act, 66 of 1995 ('the LRA') and as no application had been launched under s 189A (13) of the LRA, they could not pursue this aspect of the claim in the course of this trial. A ruling to this effect was made at the commencement of proceedings.

[3] Mr L Lourens, an employer's organisation representative who represented the company in the retrenchment consultations ('Lourens'), and Mr N van Pittius, a business consultant to the respondent at the time ('van Pittius'), gave evidence for the respondent. Mr F Lebepe, a former NUMSA official ('Lebepe'), and Mr W Mailula, a former employee and shop steward of NUMSA (' Mailula') testified for the applicants.

Consideration of the evidence

[4] The notice of possible retrenchment under section 189 (3) was given to employees and sent to the union on 5 April 2011, though the union claimed that it first received the notice from its members the following day. In any event, the union responded on 7 April after Lebepe said he received a copy faxed by one of the shop stewards from another union's office. The principal reason highlighted for the possible retrenchments was that the respondent's major sub-contract with Bateman, an industrial engineering firm contracted to the Foskor mine in Phalaborwa, came to an end on 31 March 2011. The notice also cited a serious downturn in

contract work from other major industries in the area. Without the Bateman contract, the company could not sustain itself in its existing form.

[5] The company's first strategy was to look for other contracts in the region, in particular, at Phalaborwa Mining Company ('PMC'). It also invited employees to apply for voluntary severance packages but granting an application was at its discretion. It also offered to reemploy people for the period of any new contract obtained in the next three months.

[6] The respondent proposed that candidates for retrenchment would be selected on the basis of skills, work performance, attendance record and safety record.

[7] Retrenched employees were given a month's notice at the end of April 2011.

*Consultations*

[8] For the sake of contextualisation only, it is useful to outline the consultation process. It must be said that both parties focused unduly on the consultation process, even though that should no longer have been the main focus of the evidence. The employer had called for a meeting with the workplace forum or the union on 11 April 2011, but Lebepe said he was not available for a meeting because of a CCMA commitment and would only be available on 21 April. In defending his unavailability, Lourens said that he was the only organiser responsible for the Limpopo province and in that month the region was 'overloaded' with work.

[9] Lourens claimed that Lebepe had said that he could nonetheless address employees in his absence on 11 April. The meeting proceeded on 11 April and was attended by 52 of the entire workforce of 74, including the two owners of the business. Mailula claimed that the meeting had only consisted of union members, even though Lebepe claimed that the union had 31 paid-up members. At the meeting, Lourens claimed that non-unionised workers had been asked to elect a so-called workplace forum of two individuals to consult at the next round of consultations to be dealt with the union on 21 April. Lourens had gone through the notice with the

meeting and advised workers to consider the proposals and come with others at the next consultation meeting.

[10] However on the appointed date, Lebepe had not arrived by 11H30 and Lourens had to leave for another appointment. He had attempted to meet with shopfloor representatives of the union but they would not meet without Lebepe present. Lourens angrily denied the contention that the shop stewards had said they wanted to discuss selection criteria with him claiming that was a complete fabrication. Mailula claimed that they had said they could talk to him but he had declined to do so without Lebepe being present. When Lebepe testified he also gave the impression that it would have been improper for Lourens to hold discussions with the shop stewards, contrary to the view held by Mailula.

[11] An hour after leaving the respondent, Loourens claims he got a call from Lebepe who had arrived for the 10h00 meeting, two and a half hours late. He heard that the reason for Lebepe being late was that his car had broken down on the Tzaneen Phalaborwa road, but he did not see him when he travelled on that road afterwards. When Lebepe testified he also made various other claims about his interaction with Lourens and Mailula but these were not canvassed with Lourens in cross-examination. In any event, when they spoke on the phone they agreed that he could make written representations by 25 April but Lourens said that if they did not receive anything by then he would assume that the union accepted the firm's proposals. Lourens claimed that it was only when he was already near Tzaneen that he received the call from Lebepe. In the days following 21 April, he spoke to Lebepe again who said that he could not make representations until he had met with members.

[12] No written representations were received from the union by 25 April, apparently because of the Easter weekend and Lebepe's commitments on subsequent days up to and including 28 April. On 29 April final notices of retrenchment was sent to the 23 workers identified for retrenchment. Originally, it had been suggested that 32 employees might be retrenched. The number of retrenches was determined by the availability of funds at

the time. The letter recorded the failed consultation process with the union and the fact that no proposals had been received.

[13] Lourens claimed that was only after the individual retrenchees had been issued with the letter that a letter was received from Lebepe in which it was proposed that:

13.1 Employees on the Bateman contract should be retrenched because their contracts have expired.

13.2 LIFO and not the 'bumpy method' should be the method of selection because by now long serving employees should have a good knowledge of the work and it was for the company to explain why they were not suitable despite this.

13.3 The letter confirmed that the severance packages laid down by the main engineering agreement should be applicable.

Lebepe agreed that at the time he had not suggested alternative candidates for retrenchment as was suggested in paragraph 11.4 of the pre-trial minute, because at the time he believed that the proposals made were sufficient and at the time he did not know the names of the temporary employees engaged on the Bateman contract.

[14] The letter containing the union proposals was received at approximately 10 h38 that morning and Lebepe doubted that Lourens had left the firm already. He and Mailula further claimed that the retrenchment notices were only given to workers at around lunchtime though this version was not put to Lourens during his cross-examination. The firm did agree to adjust the severance pay in line with the main agreement.

*The selection of retrenchees*

[15] The union contended that all the employees on the Bateman contract had been employed for the duration of the contract and therefore ought to have been the ones who were retrenched, whereas it claimed that all those who had been retrenched were permanent employees who started working for the respondent before the Bateman contract began in 2010. According to Lourens, who was not directly involved in the selection process, a

percentage score was attributed to each employee based on the listed criteria. It was put to him that it was the higher paid permanent employees who had been retrenched and not the contract employees whose wages were lower, but he was unable to comment on this.

[16] Van Pittius testified that in 2011 an alternative source of work for the respondent became available from a firm of design engineers, Gauge Engineering ('Gauge'). Gauge was a smaller contractor which was required to develop instrumentation and valve controls for Foskor and PMC. It needed a reliable partner that could manufacture and install the finished products and entered into a joint-venture with the respondent, which could do the manufacturing and installation. The nature of the work involved required a skilled workforce. Gauge had previously suffered when its own manufacturing partner had produced poor quality products, which had necessitated the reinstallation of valves.

[17] Van Pittius, who acted as a consultant in the joint venture between Gauge and the respondent, assisted in advising on the staff capabilities required for the new joint-venture and skills were given a weighting of 40% because of the risks of employing unskilled workers. If the joint-venture failed it would be the end of the respondent and Gauge. There were other companies that could have been considered by Gauge for the manufacturing work but the respondent was given preference because of the quality of its work. These requirements were the reason why skills and work performance were prominent amongst the selection criteria applied by the respondent. Gauge also identified attendance records and health and safety records. This was because the installation work was done in teams and the absence of one member of the team created problems, and the mines placed great emphasis on health and safety issues. LIFO was discussed but Gauge insisted that skill and attention should be prioritised. The evaluation of individuals selected for retrenchment was done by three persons who knew each individual and if they arrived at a scoring which differed by more than 20% they were supposed to discuss the score and try and agree. If the respondent had not been willing to use such criteria in determining the character of the workforce which had retained after retrenchment, Gauge would probably have considered other

manufacturers as partners. With the benefit of hindsight, the joint-venture proved a lifeline to the respondent's business. Like Lourens, van Pittius had no first-hand knowledge of how the evaluation was implemented by the respondent. Mailula claimed he was unaware of any evaluation process being conducted by the respondent.

[18] In his evidence, Lebepe explained that when the union referred to the 'bumpy method' it was a reference to the fact that the employer was picking and choosing those who were retrenched so the result was that the majority of those retrenched were union members. Of the 19 applicants retrenched only 4 were general workers: the others were semi-skilled workers classified as' assistants' who actually did the work of the person they were assisting if that person was absent. Mailula made a similar claim and said that most of those retrenched were semi-skilled or qualified staff who had been working for the respondent for more than seven years. However, of the 17 applicants whose commencement dates are set out on the list containing the applicants details attached to their statement of case, only seven of those had service of seven years or more, though it does seem that the remaining 10 were employed before the commencement of the Bateman contract in 2010.

[19] Lebepe also asserted that those who were not working on the Bateman Project were retrenched and most of them were union members. When it was suggested to him that there were good reasons for the employer requiring certain technical expertise of the kind outlined by van Pittius, Lebepe retorted that this is what the employer should have debated with the union at the time. Had it done so, the parties would not have found themselves sitting in court, in his view.

[20] Lebepe contended that the union had 31 members at the time and all 19 of the applicants were NUMSA members. The other four retrenchees who were not union members were re-employed shortly after their retrenchment according to Lebepe. None of these specific contentions were put to the respondent's witnesses. He could not dispute that one of the persons subsequently employed on a fixed term contract in 2012 was a former union member, but argued that this fact did not detract from the

way retrenchees were selected in 2011. Mailula claimed that he had heard from a colleague that Lourens had been given a budget to get the union out of the company. This claim, which had never been mentioned until Mailula gave his evidence cannot be given much credit. If it had been sent it would no doubt have featured prominently in the applicants' pleadings.

Evaluation

[21] As mentioned in the above, much of the evidence dwelt on the failure of the parties to engage with each other in the consultation process. Because the only matter to consider is the substantive fairness of the retrenchments, the importance of this evidence is less significant in determining that question, though it may have a bearing on any relief awarded.

[22] It was the respondent's case that it used fair and objective selection criteria,. It did not contend that those criteria were the result of a consensus, which they clearly were not. The union argued firstly that LIFO ought to have applied and secondly that if the respondent had in fact prioritised the retention of skill and work experience, it would not have retrenched the applicants. In the pre-trial minute it identified 10 other employees who ought to have been considered for retrenchment as they had been employed only since 2010. While it is true that these names were not put forward by the applicants before the retrenchments took place, the identity of the retrenchees was only known on the day that they were issued with their notices of retrenchment, and the applicants were hardly in a position to suggest those individuals as alternative candidates for retrenchment before then. On the other hand, the union had dragged its heels in the consultation process. Lebepe's delay in responding with its proposals cannot be justified just on the basis of his other priorities. He was aware of the respondent's timeline but did not engage until the eleventh hour. Had he been more proactive, the union would have been in a position to make its proposals before a final decision was taken and could have engaged with the selection process more meaningfully instead of doing it retrospectively in court. His failure to engage timeously on this, also means the issue of LIFO as an alternative method of selection was

not deliberated on. While LIFO has been recognised as a fair method of selection, the failure to adopt it does not necessarily mean the chosen criteria will be found to be unfair.

[23] The evidence led by the respondent in support of the substantive fairness of the retrenchments was twofold: firstly, it was faced with the loss of a major contract which placed it under great financial strain and secondly it had adopted selection criteria in line with the requirements needed to perform the manufacturing and installation work obtained from Gauge, without which it could not have survived. The applicants were unable to provide any cogent challenge to the general need to retrench and focused their main attack on the selection criteria. In relation to the justification of the criteria used, the applicants also were unable to meaningfully challenge the need for adopting them in light of the joint-venture commitments which offered some meaningful prospect of alternative work to the respondent at the time.

[24] However, when it came to demonstrating that the applicants had been evaluated and found wanting in terms of the chosen criteria, the respondent led no evidence whatsoever. The extent of the respondent's evidence in this regard was the evidence of van Pittius, who could only testify as to the reasons why the criteria were adopted and the method that was supposed to be applied in evaluating prospective candidates for retrenchment. No evidence was led by anyone who had conducted the evaluation process to demonstrate that the candidates had been evaluated and that their scores were lower than employees who were retained. Potentially, the criteria might have been fairly applied and a reasonably objective process might have been used if the panel evaluation method coupled with a predetermined weighting of criteria and the moderating mechanism mentioned by van Pittius had been used. However nobody was called by the respondent to verify that this is indeed what took place and what the outcome of the process was and in particular how the applicants scored in relation to the other employees that the applicants believed were more suitable candidates for retrenchment. I am mindful that the applicants did suggest, indirectly, that they were sufficiently skilled

to be retained by the respondent on the basis of its criteria, but this also was not properly canvassed with the respondent's witnesses.

[25] I am satisfied that the employer did establish a general need to retrench and that there were no viable alternatives to retrenchment of staff. As concerns the selection of those to be retrenched, even if the criteria might be considered fair and could have been applied in a sufficiently fair and objective manner in the circumstances, bearing in mind the operational needs of the respondent, the respondent did not demonstrate that the selection of the applicants for retrenchment using those criteria was done in a fair and objective manner. However, on the evidence available I also cannot go so far as to say that they would not have been retrenched if the criteria had been fairly and objectively applied to them.

Relief

[26] The applicants have asked for reinstatement or alternatively compensation. The basis on which the retrenchment of the individual applicants is found to be substantively unfair is confined to a finding that the respondent did not prove that it applied its selection criteria fairly and objectively in choosing the individual applicants for retrenchment.

[27] There was no evidence that the business conditions which had led to the retrenchments had improved. Nor was there reliable evidence that the applicant's skills could be utilised in the restructured business, in line with its changed operational requirements. In view of the unresolved issue of whether the applicant's would still have been selected for retrenchment if the criteria had been fairly and objectively applied, the court would just be assuming they would not have been selected and that their skills did meet the requirements of the new business, if it ordered their reinstatement. In the circumstances, I do not think it would be practicable to reinstate them.

[28] Consequently, bearing in mind the length of service of most of the applicants, the failure of the union to engage meaningfully with the respondent on the selection issue and the limited basis on which I find the

retrenchment was substantively unfair, I believe eight months' remuneration is a fair measure of compensation.

[29] On the question of costs, in view of the union persisting with its claim of procedurally unfair retrenchment, its partial success in the substantive claim and its failure to engage timeously in consultations, I do not think it appropriate that a cost award should be made in its favour.

Order

[30] The retrenchment of the 19 individual applicants in this matter was substantively unfair solely because the respondent failed to prove that it had fairly and objectively applied its selection criteria in identifying them as candidates for retrenchment.

[31] The respondent must pay each of the applicants, eight months' remuneration, within 14 days of this judgment, as follows:

| | Name of Applicant | Monthly Salary | Compensation due (Rands) |
|---|---|---|---|
| 1 | Widgar Magula | 7,510.82 | 60,086.54 |
| 2 | Aaron Malesa | 5,196.00 | 41,568.00 |
| 3 | Mponkwane C Pilusa | 3,680.50 | 29,444.00 |
| 4 | Masilu A Shayi | 3,680.50 | 29,444.00 |
| 5 | Stone Mametja | 4,110.04 | 32,880.29 |
| 6 | Fas Mathebula | 4,110.04 | 32,880.29 |
| 7 | Johana S Malatji | 4,113.50 | 32,908.00 |
| 8 | Eddie Mangena | 3,897.00 | 31,176.00 |
| 9 | Jacob Pilusa | 6,231.89 | 49,855.10 |

| | | | |
|---|---|---|---|
| 10 | Traully Monyela | 3,734.63 | 29,877.00 |
| 11 | German Mboneni | 6,668.20 | 53,345.60 |
| 12 | Lawrence Khoza | 3,422.87 | 27,382.92 |
| 13 | Edward Rapatsa | 4,110.04 | 32,880.29 |
| 14 | Samuel Mbombi | 8,133.80 | 65,070.37 |

In the event the parties cannot agree on the monthly rate of remuneration of Shadrack Sepawa, Daniel Madiba, Theo Sepawa, Kaizer Makofane and Jonas Khoza, either party may approach the court on application to determine the same

[32] No order is made as to costs.

**Lagrange J**

**Judge of the Labour Court of South Africa**

**APPEARANCES**

| | |
|---|---|
| APPLICANT: | C Phukubje of Finger Phukubje Inc |
| RESPONDENT: | M Meyer instructed by G van Pittius |