IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: DA 17/2015

In the matter between:

MSC CONTAINER DEPOTS (PTY) LTD **Appellant**

and

DENZEL DOORASAMY **Respondent**

Heard: **30 August 2016**

Delivered: **13 June 2017**

Summary: Appeal against finding that dismissal of respondent, an estimator, employed by the appellant was substantively and procedurally unfair. On appeal it was held that the dismissal was for operational reasons and had been preceded by consultation and the application of LIFO. The appeal was upheld.

Coram: Ndlovu, Coppin and Landman JA

Neutral citation: **MSC Container Depots (Pty) Ltd v Doorasamy** (LAC DA 17/2015)

JUDGMENT

LANDMAN JA

[1] The judgment in this appeal has been delayed on account of the unfortunate ill-health of our colleague Ndlovu JA who subsequently passed away. We offer our apologies to the parties for the delay.

[2] MSC Container Depots (Pty) Ltd, the appellant, appeals against paragraphs 2 and 3 of the findings and the whole order of the Labour Court (Cele J) delivered on 27 May 2015 that the retrenchment of Denzel Doorasamy on 31 March 2009 was procedurally and substantively unfair and ordering his reinstatement and costs. The appeal is with the leave of this court.

[3] The court *a quo* dismissed the respondent's claim that he, a shop steward, was victimised by the appellant. There is no cross-appeal.

The background

[4] The appellant is part of an international group of companies. The appellant operates a container depot where shipping containers were received, stored in stacks, inspected, repaired and later dispatched to various destinations worldwide. The inspection of the containers was done to ensure that they were air and water tight. If a container failed the inspection, it would be sent for repairs. The inspections and, where necessary, an estimate of the repair costs, are performed by employees of the appellant called "estimators".

[5] The appellant maintained a depot and employed three estimators. Later, the appellant also leased land from Transnet referred to as "the Shosholoza land" where it had the necessary space to inspect containers. At that stage, the appellant employed four estimators. The lease of the Shosholoza land terminated in July 2007. The appellant attempted to lease another site known as "Ambrose Park" without success. The appellant was left to fall back on its original depot with its space constraints.

[6] On 5 January 2009, the appellant notified the respondent that it was contemplating retrenchment for the following operational reasons:

(a) consequences of the loss of the Shosholoza land;

(b) financial loss;

(c) the Geneva audit; and

(d) the world economic collapse.

[7] The appellant proposed to reduce the number of estimators on its staff and a managerial employee. The appellant said that it proposed applying LIFO and this meant that the respondent was in danger of being dismissed. It proposed consultation with the respondent. Some consultations took place, but the respondent was dismissed.

The issues on appeal

Appeal against finding of substantive unfairness

[8] Mr Schumann, for the appellant, submitted that the court *a quo* misdirected itself by not finding that the appellant's operational requirements necessitated the retrenchment of one estimator. He referred to paragraph 28 of the judgment in support of his submission. This paragraph reads:

> 'On this aspect the applicant testified that there was overtime worked by Estimators after the move from the Shosholoza Land in April, 2009, and such overtime extended into the night till about six or seven o'clock, and in the summer it extended beyond those hours. The volume of containers entering and leaving the MSC Depot after the closure of the Shosholoza land had increased substantially. In the light of such an increase in volume of containers, applicant's dismissal on operational grounds was completely unfair.'

[9] I am satisfied that there was an operational basis for retrenchment arising from the loss of the Shosholoza land and a return to the original depot, with its space

restrictions. Only three estimators were able to do the work there because there was insufficient space to place containers on the ground. This aspect was barely challenged even when the respondent was given a second opportunity to do so.

[10] The court *a quo* did not specifically reject the economic proposition that the appellant needed to save costs or the outcome of the audit. It seems to have considered the downturn in the global economy but found that the original depot received more containers than what it had previously received.

[11] However, the court *a quo* held that the respondent's dismissal was procedurally and substantively unfair because:

(a) The appellant appeared to have made a deliberate choice to avoid the retention of skills where the use of LIFO with the retention of skills would have been objectively fair in the circumstances.

(b) The appellant acted prematurely as it had an obligation to delay the dismissal of the respondent while looking for (and securing) another site as the number of containers coming into the depot had not decreased but had increased and the remaining estimators were required to work overtime after the respondent's dismissal.

(c) The appellant did not adequately consider alternatives to the dismissal of the respondent because of the attitude it adopted towards the respondent. For example, the storeman position should have been offered to the respondent.

(d) The appellant resorted to retrenchment as a quicker and easier solution to eliminate the respondent, being an employee who was found to have been much less productive than other estimators and to have caused massive loss of productivity.

(e) The appellant used retrenchment as a quick fix solution for the problems it associated with the respondent.

(f) There was no evidence presented by the appellant of a rational connection between the number of estimators and the financial strain at the depot.

[12] Each of the reasons requires consideration. The respondent was adamant that he had longer service than a fellow estimator, Mr Naicker. There is simply no merit in this. The respondent acknowledged that after he signed a contract of employment with the appellant on 1 August 2005 he asked to be allowed to commence his employment on 1 September but he nevertheless maintains that his length of service commenced on 1 August. It did not. Naicker had the longer service as he commenced work on 1 August 2005.

[13] The respondent was the only estimator who had obtained an IICL certificate, although the certificate had recently expired. He had trained some estimators. Last in, first out ("LIFO") is a fair and neutral selection criterion. It may also be accompanied by the retention of skilled employees with lesser service if the employer requires those skills. The finding of the court *a quo*, that the appellant appeared to have made a deliberate choice to avoid the retention of skills where the use of LIFO with the retention of skills would have been objectively fair in the circumstances, constitutes a misdirection. It is fair for an employer's right to retain skilled staff that may have been at risk by the application of LIFO for retrenchment. If an employee with such skills is targeted for dismissal, it is open to that employee to persuade the employer to retain him or her, but if the employer declines to do so, it does not constitute an unfair decision.

[14] The finding that an obligation, as it was phrased, rested on the appellant to delay the dismissal of the respondent while looking for (and securing) another site, does not take cognizance of the fact that the appellant had stayed its hand for at least a year while it waited for clarity on the Ambrose site that it wanted to lease. The fact that the number of containers arriving at the original depot had increased and overtime was worked, does not take into consideration that the problem was the shortage of ground space upon which to place the containers

for inspection. There is no suggestion that the overtime worked was such that it could have been used to structure a shift system and so have saved the respondent's position.

[15] The respondent did not suggest an alternative post when the appellant consulted him. Neither did the respondent respond to an invitation made at the pre-trial conference to list the alternative posts that could have been offered. The court *a quo* held that the appellant should have offered the respondent a storeman position. But this overlooks the fact that the storeman's post was not available during the consultation process. The post was only advertised in October 2009, some seven months after the respondent's dismissal. In the absence of evidence suggesting the contrary, it may be inferred that it became vacant shortly before it was advertised.

[16] The court *a quo* found that the appellant resorted to retrenchment as a quicker and easier solution to eliminate the respondent, being an employee who was found to have been much less productive than other estimators. But LIFO was applied and as the respondent had the lesser service, he was retrenched. The fact that the appellant regarded him as the least productive estimator was not the cause of his dismissal.

[17] The court *a quo* found that there was no evidence presented by the appellant of a rational connection between the number of estimators and the financial strain at the depot. Assuming that this finding is correct, it is completely outweighed by the fact that operationally there was no space at the original depot and therefore no need for a fourth estimator when the appellant lost the Shosholoza land. The original depot could only accommodate three estimators.

[18] I conclude that in the circumstances the dismissal of the respondent was substantively fair.

Appeal against procedural unfairness

[19] The court *a quo* found as regards the procedure followed by appellant that led to the dismissal of the appellant as follows:

(a) The appellant failed to provide the respondent with a notice as envisaged by section 189(3) of the LRA.

(b) The respondent learnt of the contemplated retrenchment on 5 January 2009 while attending a meeting.

(c) The respondent communicated about this by letter on 9 February 2009 but he did not complain of the procedure followed to initiate the process. Nor did he complain that his trade union had not been formally served with the section 189(3) notice. The respondent did not suffer any prejudice.

(d) A consultation meeting was held on 23 February 2009.

(e) After the meeting of 23 February 2009, the appellant sent a written communication outlining four reasons why retrenchment was contemplated, the alternatives considered and proposed that LIFO would be used and two employees were affected; the respondent and a managerial employee.

(f) A further meeting was held on 4 March 2009.

(g) On 9 March 2009, information that the respondent sought was supplied to him in writing.

(h) On 18 March 2009, the respondent sought further information on losses incurred by the appellant and raised a number of issues, including an averment that the appellant was conducting undercover approaches to employees of both unions, particularly the shop stewards.

(i) On 23 March 2009, the appellant denied the allegations and emphasised that the depot was continually incurring losses.

(j) A further consultation meeting was held on 25 March 2009.

(k) On 27 March 2009, the appellant replied to queries raised in the meeting.

(l) On 31 March 2009, the respondent was dismissed.

(m) While the respondent raised certain issues during the consultation process, he did not do so with as much vigour as he did during the trial.

(n) The appellant selected LIFO and the respondent did not resist it.

[20] Having made these findings the court *a quo* ought to have concluded that the dismissal was at least procedurally fair. It did not. The court *a quo*, in the face of the evidence, could only have decided that the process followed was unfair if it had been a sham. But the court *a quo* expressly rejected the respondent's claim that he was targeted because he was a shop steward. This goes to show that the retrenchment was not a sham.

[21] In the result, the appeal must be upheld and the order of the court *a quo* set aside.

Costs

[22] Costs in this Court and in the court *a quo* are awarded on the basis of law and fairness. There is no warrant to order costs in this Court or the costs of the application for leave to appeal in the court *a quo* against a retrenched employee.

Order

[23] The following order is made:

1. The appeal is upheld.

2. The order of the Labour Court delivered on 27 May 2015 is set aside and replaced with the following order:

'(1) The dismissal of the applicant was substantively and procedurally fair.

(2) There is no order as to costs.'

3. There is no order as regards the costs of the appeal including the application for leave to appeal.

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AA Landman

Judge of the Labour Appeal Court

Coppin JA concurred in the judgment of Landman JA

APPEARANCES

FOR THE APPELLANT:	Adv P Schumann
	Instructed by Shepstone Wylie.
FOR THE RESPONDENT:	Mr T Pillay attorney.