REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D915/08

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA) **First Applicant**

C MATHABA AND 6 OTHERS **Second to Further Applicants**

and

CHIN LUNG ELECTRON (PTY) LTD **Respondent**

Heard: **17 September 2012**

Delivered: **10 May 2013**

Summary: Retrenchment – fairness of - decision to retrench based upon sound economic considerations will not be interfered with if it was taken with a view to, for instance, cutting losses or even to improving profits.

JUDGMENT

CELE J

Introduction

[1] This claim raises the question whether there was material compliance with the provisions of section 189 of the Act[1] by the respondent when it retrenched the second and further applicants in this matter. According to the respondent, there was material and effective compliance. The applicants dispute the contention and called on the respondent to prove its assertion.

Factual Background

[2] The second to further applicants (the employees) were in the employment of the respondent, a close corporation or the CC, with Mr David Wu as a Manager. In 2008, the CC operated a manufacturing facility in Isithebe area for turning components which it supplied to the electrical and motor industry. Prior to August 2008, the CC employed, apart from the administrative staff, some 21 persons in the factory, comprising of:-

1. seven machine operators in what was called the "first process";

2. eleven machine operators in the "second process"; and

3. a packer, a driver and a cleaner.

[3] The first process required more skills as it involved the ability to read drawings and to check dimensions. The second process required less skill and was more manual in nature.

[4] Prior to August 2008, the CC realised that it was cheaper to import finished goods than to manufacture goods in South Africa and it began importing more goods than it manufactured. By importing more goods, the need to manufacture locally was reduced and production was reduced. That led to the CC no longer having work for the night shift which used to work from 18h00 to 06h00, thus limiting its production to a dayshift. The CC also embarked on periodical short time.

[5] Mr Wu said that he compared the various prices of certain goods which he

[1] The Labour Relations Act Number 66 of 1995.

imported on a regular basis and the cost of manufacturing those goods locally. The differences were significant and represented a big saving. As a result of importing more goods, production dropped and the CC did not need the same number of machine operators in its production facility.

[6] The CC contemplated retrenchments and it engaged the services of labour consultants, SEESA, to assist with proposed retrenchments process for its machine operators. At the request of the CC, SEESA prepared notices of anticipated retrenchment and an invitation to consult and sent one to the union and a similar one to the CC. On 25 August 2008, he received a copy of the invitation to consult and he noticed that, included in the reasons for the proposed retrenchment, it was stated that "orders have dropped". This, he said, was an error as orders had not dropped. He said that he instructed his Administrative Assistant, Ms Sindy Naidoo, to contact SEESA and to remedy the defect in the letter, which they duly did on 26 August 2008.

[7] On 26 August 2008, Mr Wu, together with Ms Naidoo, tried to hand the notices to employees, in groups, according to employee work number, but this process was stopped by a shop steward Mr Senzo Mathaba. Mr Mathaba was handed a copy of the notice to give to the union. The reasons given for the retrenchment were that "production halved due to nightshift coming to an end and now employer is able to import stock at cheaper prices".

[8] In terms of the notice, 9 machine operators were identified as likely to be affected, and the selection criteria was LIFO. A meeting was scheduled for 3 September 2008 but was postponed to 9 September 2008, and a second notice was sent to the union on 2 September 2008, with the same terms as the earlier letter. The consultative meeting was held on 9 September 2008 and all affected employees attended with Mr Simon Makhanya an official of the union. Mr Shannon Sukhu of SEESA and Mr Wu attended for the CC. There is a dispute about the attendance of Sindy Naidoo and about the time when Mr Wu’s brother arrived at the meeting.

[9] In the meeting, the union suggested that there was a possibility of employees being transferred to a “sister” company of the CC called Cogra, owned by the

brother of Mr Wu. Cogra operated a similar business to that of the CC, but they used different machinery requiring different skills and expertise. Mr Wu and his brother discounted that possibility by distancing the business of one company from that of the other.

[10] At the meeting, it was suggested by the union that two Chinese employees, Mr Han-Bin Lin and Mr Yung-Min Chen should be retrenched as they were employed later than the affected machine operators. Mr Wu explained that the two individuals were employed in a completely different capacity and were not machine operators. Mr Lin was said to be the Overseas Administrator/Quality Controller, who was required to deal directly with clients from whom the CC imported its goods, and who needed to know the Chinese language. Mr Chen was said to be the Factory Manager whose duties were production planning, dispatch control and servicing machines, and was also required to liaise in Chinese. The union asked the contracts of employment of the two Chinese employees, to be furnished at the end of the meeting. Parties are in dispute as to whether such contracts were furnished. The respondent said they were given to the union but the applicants dispute being given them.

[11] On 22 September 2008, the CC proceeded to implement the retrenchments. The applicants were given notice pay until the end of October 2008, plus an extra week's bonus, which according to the respondent but disputed by the applicants, had been agreed upon at the meeting. The business of the CC was transformed into an almost entirely import-based enterprise. Only one machine operator remained with the CC. Sometimes employees of the CC would assist at Cogra. However, on 05 March 2011, the fifth applicant, Mr Sibiya, was re-employed by the CC and in April 2012, the sixth applicant Mr Shandu was also re-employed by the CC.

[12] In September 2009, the Production Manager, Mr Chen, left the CC to go and set up his own business. On 11 September 2009, 10 machine operators from the CC were transferred to Mr Chen's new business. The business of Mr Chen was run with only seven machine operators.

[13] The applicants referred an unfair dismissal dispute for conciliation which failed to resolve the dispute and they referred it to this Court by means of the statement of case. The respondent opposed the claim with its statement of defence. On 12 September 2011, parties filed their pre-trial-minute which they dated 26 July 2011. In terms of the directive on retrenchments, each party had to state whether there was a need to retrench and the following was recorded in the minute:

> '1.1 The Applicants allege that there was no general need to retrench.
>
> 1.2 The Respondent alleges that there was a general need to retrench. The orders received by the Respondent dropped, production had decreased as a result of which income dropped. The Respondent had no option but to cut costs, and also started importing stock rather than manufacturing. Operationally, the Respondent required only one machine operator per 15 machines, rather than two operators.'

[14] The dismissal of the second to further applicants by the respondent remained common cause between the parties. In terms of paragraph 16 of the statement of case, the relief sought by the applicants was a declaration that the respondent's dismissal of the second to further applicants was procedurally unfair. They sought retrospective re-instatement and compensation as an alternative. The pre-trial-minute described the issues in dispute as whether the dismissal of the applicants by the respondent was substantively and procedurally fair, with re-instatement as the relief sought. According to the statement of case, in the meeting of 9 September 2008 the representatives of the respondent proceeded to announce to the workers in front of the union official that it was proceeding with the retrenchments. The union officials intervened by calling for a proper procedure to be followed before any retrenchment could be carried through. At the trial, the respondent had to prove that it had a fair reason to dismiss the applicants due to its operational reasons and that it followed a fair procedure. Two witnesses testified for the respondent and two testified for the applicants.

Evidence

Respondent's version

[15] Mr Wu and Ms Naidoo testified that in the meeting of 9 September 2008 the minutes were taken by Mr Sukhu. They confirmed that they had read the minutes and that such minutes accurately recorded what transpired on that day. Both said that it was during the course of the meeting, that Mr Wu's brother was called to the meeting and that Cogra was located next door to the CC. Mr Wu said that he had informed the meeting that Cogra had no vacancies. According to Mr Wu, the attitude of the union throughout the meeting was that they would simply dispute every aspect of the retrenchment. He said that at the end of the meeting, in addition to the job descriptions, he furnished the union with a copy of the cost comparison document. According to him, subsequent to the meeting, there was no feedback from the union whatsoever.

[16] Mr Wu further led evidence that, in July, August and September 2008, the CC sold machinery from its production facility, as a result of importing more goods. In addition to the documented sales, the CC disposed of a substantial amount of machinery as scrap.

[17] In respect of the proposed retrenchments, Mr Wu testified that he utilised the services of SEESA in order to ensure that the procedure was correct, and he said that he went to the meeting prepared to hear what the employees' representations were. He indicated that if their proposals had been reasonable, he would have accepted them. When it was suggested to Mr Wu that, at the conclusion of the meeting, there were a substantial number of issues on which the CC was to revert to the union, he denied that the assertion was true, stating that the CC dealt with all the union representations at the meeting itself, and that the information regarding the Chinese employees had been handed to the union after the meeting.

[18] When it was suggested to him that Mr Chen was in fact a machine operator Mr Wu denied the assertion and he described the nature of the functions of Mr Chen and how they differed from those of machine operators. He reiterated

that he had explained those differences to the union at the meeting of 9 September 2008.

[19] Mr Wu said that the documents drawn by him to explain the advantage of importing goods as opposed to producing them locally had not somehow been "doctored" for the purposes of the trial, in anticipation of the CC's failure to show Court that its orders had dropped. Mr Wu and Ms Naidoo denied the theory on the fabrication of evidence, explaining how it was not possible to have doctored the said documents, saying one of them was the original fax received in September 2008, and had the facsimile transmission report of the same day.

[20] He contested a suggestion that he had no valid reason to retrench the employees, and that he simply wanted to get rid of 9 of them. Regarding the time period prior to his consideration of retrenchment, and considering that he knew that imports were cheaper than local manufacturing, it was put to him that it was odd that he had known about cheaper imports for so long, but had not retrenched. He explained that he had not yet established stable suppliers. He also needed to look at factors such as exchange rates, import costs, and he waited until 2008 to do the viability study. He said that he did not really want to retrench employees, and that it was unfortunate that this had occurred.

[21] It was suggested to Mr Wu that, when Mr Chen formed his business, there was a more efficient way to produce goods in South Africa and that Mr Chen's business was nothing more than a "disguised" CC of Mr Wu. Mr Wu denied the contention. It was put to him that the union had proposed that Cogra was to take some employees from the CC, and that Mr Wu had refused to do so simply on the basis that they were two independent companies. He denied this, reiterating that the minutes of the meeting at which the representative from Cogra was in attendance, had indicated that there were no vacancies at Cogra.

Applicants' version

[22] Mr Mathaba gave evidence and said that the notice of anticipated

retrenchment had been affixed on the notice board at the workplace. He could not explain why his evidence had never been put to either of the respondent's witnesses. He said that he had been informed by Mr Simon Makhanya, as union official who was the recipient of all the correspondence from SEESA, and who was the applicants' representative and a spokesman at the consultation meeting, that the reason for the retrenchment was because imports were cheaper and because orders had dropped. He confirmed that they had had short time at work since 2005/2006. He denies any knowledge about any change to the notice of retrenchment as testified to by Mr Wu and Ms Naidoo.

[23] He stated that at the meeting on 9 September 2008, the reasons for retrenchment that were raised were that it was cheaper to import and that orders had dropped. He denied that Ms Naidoo was at the meeting and that any minutes were taken of that meeting, thus disputing those produced by the respondent at trial. He said that he did not take any notes either as to what transpired at that meeting. According to him, Mr Wu's brother attended the meeting from its start and was not called later.

[24] He said that they also wanted to know what selection criteria would be used for retrenching employees. He confirmed that they had raised the issue of the two Chinese employees but that, after the meeting, they had never had any feedback in that regard, nor did they receive copies of the Chinese employment contracts. He indicated that he knew the work done by Mr Chen was that of an operator and that it was not possible that Mr Chen did something else unbeknown to him. Mr Mathaba could not explain why Mr Chen was not included, as a "machine operator" in the notice of short time of 11 September 2008 which included all the machine operators.

[25] He indicated that, at the end of the meeting, they were to arrange a date for a further meeting and that there were four issues that had not been concluded. He could not explain why, if there were so many issues outstanding after the meeting, neither he nor the union ever followed up on the outstanding information or on the next meeting. Nor could he explain why the union, upon receiving the letter confirming retrenchment of the employees, also did not

raise any objection regarding outstanding information or the alleged follow-up meeting.

[26] He said that Mr Makhanya left the meeting about five minutes after it had concluded, and he said that he had been with Mr Makhanya until he left. He was not in a position to dispute that the respondent might have had communications with the union, through Mr Makhanya by telephone, fax or e-mail without him knowing. According to him, a severance package was never discussed at the meeting on 9 September 2008 as alleged by Mr Wu. He was given a chance but could not explain why his evidence, that at the meeting of 9 September 2008 the union had requested proof that orders had dropped, was never put to Mr Wu in cross-examination.

[27] He was asked but could not explain why, in the applicant's bundle of documents, there was no attachment to the letter from SEESA dated 2 September 2008 which was said to be the same letter received by the respondent. Mr Mathaba was not in a position to state what correspondence the union had or had not received from the CC. He was asked to identify what document he had refused to sign on 23 September 2008 but could not indicate it.

[28] He could not explain why, in the pre-trial minute, no mention had been made that Chen ought to have been retrenched instead of the Applicants and why, it was a common cause fact that the applicants had proposed more machine operators per machine, yet he had not given any evidence to this effect and could not recall it being discussed at the meeting. He could not explain why, in the pre-trial minute, it was stated, on behalf of the applicants, that "no meetings were held with NUMSA", when clearly, on 9 September 2008, a meeting was held with NUMSA.

[29] He was asked to but did not explain the numerous discrepancies between his evidence and what was contained in the pleadings of the applicants:-

1. In pleadings, paragraph 12 of the statement of case, it was stated that, at the meeting, it was suggested that some of the employees could be transferred to Cogra and that the respondent did not comment on this

suggestion. However, Mr Mathaba's evidence stated that, at a meeting, the respondent did in fact comment to the effect that the two companies were separate legal entities.

2. In the pleadings, it was stated that, at the meeting, discussions occurred regarding the number of men who could operate a machine at that particular time. However, Mr Mathaba never mentioned this in his examination in chief and, upon being queried as to whether he had mentioned all the issues that were discussed at the meeting, he replied in the affirmative. He could not explain why he had not mentioned the discussion regarding the operators and the machines.

[30] Mr Alex Ngubo also gave evidence on behalf the applicants and he confirmed that Mr Chen was the sole owner of Wei Ching, a business which was about 20 minute drive from the respondent's premises. He said that Wei Ching had seven employees, that it produces for the respondent only, and received all its raw materials from the respondent. He said that he did not see any management from the respondent at Wei Ching premises. Mr Ngubo said that the respondent, after retrenchment, continued operating its business with only 10 machine operators and that Wei Ching did so in the same manner. He confirmed that the business could operate with only seven machine operators.

Analysis

[31] Section 189 of the Act, provides that, an employer who contemplates dismissing one or more employees for reasons based on the employer's operational requirements must consult with the appropriate persons and engage in a meaningful joint-consensus seeking process and attempt to reach consensus on a number of issues.[2] The employer is also required to issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to, the reasons for the proposed dismissals.[3] Further, the employer is required to consider and respond to the representations made by the other consulting party and, if the

[2] See S189 (1) – (2).
[3] See S189 (3) (a).

employer does not agree with them, to state the reasons for such disagreement.[4]

[32] The applicants correctly submitted that it is not sufficient for the employer, only after the fact, that is, after dismissing, to come up with the reasons, satisfactory or not, to justify dismissals that have already taken place. There can be no question of adequate consultation over a proposal if one party is left in the dark about the facts by which the other party seeks to justify it. In the retrenchment context, employees or their representatives will clearly be unable to make sensible suggestions about matters over which the Act enjoins consultation, unless they have sufficient information to appraise themselves of or to challenge the employer`s proposals, or to formulate alternatives.[5]

[33] The respondent had to demonstrate through the trial of this matter that it had a fair reason and followed a fair procedure to retrench the second to further applicants.

Substantive fairness

[34] Once the respondent contemplated retrenchment, it acted through SEESA to issue the notice inviting the union to a joint consultative meeting of 9 September 2008. In the notice, the applicants were called upon to consult regarding a possible retrenchment resulting from dropped orders, production having decreased as a result of which income dropped and also the fact that the respondent started importing stock rather than manufacturing. The same grounds featured in the statement of defence.

[35] The only two witnesses of the respondent spoke with one voice to say that the first of the three grounds of retrenchment was erroneously included by SEESA in the notice and that such error was subsequently corrected with the issue of a second notice. In the pleadings, the said error was repeated. At the commencement of the trial, the respondent sought to amend the statement of defence so as to remove the ground that retrenchment resulted, *inter alia*,

[4] See S189 (6) (a).
[5] Workplace Law, Eighth Edition, John Grogan, page 232 at para 8.

from dropped orders. The applicants strenuously opposed the amendment and the application stood over until evidence was led and submissions were made.

[36] In their very initial document, the statement of case, the applicants sought a relief of a declaration that their dismissal was procedurally unfair. They did not concern themselves with substantive fairness of their dismissal. Mr Wu testified that at the end of the meeting, in addition to the job descriptions, he furnished the union with a copy of the cost comparison document. According to the applicants, no document was produced in or after the meeting of 9 September 2008 to explain the financial position of the respondent.

[37] From 9 September 2008 until 22 September 2008, neither the union nor the second to further applicants sought any supporting documentation of the respondent to show them the financial position of the respondent. When letters of retrenchment of the employees were issued on 22 September 2008 the union never took issue with the respondent on why it was dismissing employees when there were still outstanding issues to be resolved. All of these considerations point to the probabilities of this matter favouring the version of the respondent, namely that during the meeting cost comparison discussion was done and after the meeting a document was produced by Mr Wu explaining the position of the respondent and the applicants were constrained to dispute the presented facts. The applicants accepted their fate and began to consider alternative employment, such as one with Cogra.

[38] The evidence of the respondent that importing finished products was cheaper than manufacturing them locally stood unchallenged throughout the trial. The implementation of that decision by the respondent was shown to have been based on sound economic considerations. As such, the respondent decided to increase the importing side to its business, as a result of which it required less manufacturing, which in turn resulted in less need for the machine operators. One cannot criticise this approach to the running of a business. This ground alone is sufficient to justify the reason for the retrenchment of the second to further applicants. There shall be no harm or prejudice in allowing the amendment of the statement of defence to exclude, as a ground for

retrenchment, an averment that orders had dropped. The amendment is accordingly granted.

[39] As a general rule, once the court is satisfied that the decision to retrench is based upon sound economic considerations it will not interfere with that decision if it was taken with a view to, for instance, cutting losses or even to improving profits[6]. I am of the view that the respondent's conduct in the circumstances has been shown to be in line with this general rule. Consequently, the dismissal of the second to further applicants was premised on substantively fair reasons.

Procedural fairness

[40] The respondent has shown through its discovered documents that SEESA issued the notice of anticipated retrenchment to the union. Two fax transmission slips show that SEESA sent notices to the union, for the attention of Mr Simon Makhanya on 28 August 2008 and on 02 September 2008. In the absence of the evidence of Mr Makhanya, a bare denial of the receipt of these notices by Mr Mathaba lacks evidential weight. The probabilities of this case are that the union received the partly amended notice as well. This notice was in material compliance with section 189 (3) of the Act.

[41] There is merit in the contention of the respondent that proper consultation took place. The employees were represented by the union which made representations at the consultation, and the respondent replied to those representations. There is no basis to criticise the selection criteria adopted, and the applicants led no evidence to suggest that the selection criteria was not fairly applied. The position of the two Chinese employees was explained and was not met with any serious challenge. A list of operators was produced and it was said it was drawn in the ordinary business of the respondent. The two Chinese were not listed as operators. Their employment contracts showed that Mr Lin was an Overseas Administrator/Quality Controller and Mr Chen was a Factory Manager.

[6] See *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA and Others* (2003) 24 ILJ 133 (LAC).

[42] The version of the respondent accords with the probabilities of this matter that minutes of the meeting of 9 September 2008 were kept and they are those on file which were produced during the trial. The minutes reflected that the union opposed retrenchment throughout the consultation and made certain counter proposals. Following the consultation meeting, the union made no further suggestions or representations. In the absence of further deliberations by the union, the respondent was entitled to implement the retrenchment. Accordingly the dismissal of the second to further applicants by the respondent was also procedurally fair.

[43] The order to be issued is that:

1. The claim of the applicants is dismissed.

2. No order as to costs is made.

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Cele, J

Judge of the Labour Court

APEARANCES:

For the Applicants: Mr H D Matukane of History Matukane Attorneys, Greymont, Johannesburg.

For the Respondent: Mr J R Forster of Forster Attorneys, Durban.