Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 529/14

In the matter between:

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA **FIRST APPLICANT**

COLLEN MAHLANGU & OTHERS **SECOND APPLICANT**

and

COLUMBUS STAINLESS (PTY) LTD **RESPONDENT**

Trial: 3-4 March 2016

Heads submitted: 8 March 2016

Judgment delivered: 30 March 2016

JUDGMENT

VAN NIEKERK J

Introduction

[1] The individual applicants were retrenched by the respondent during February 2014. The statement of claim incorporates an amalgam of substantive and procedural issues, but it was agreed at the outset of the trial that the only issue to be determined by the court is the fairness of the selection criteria applied by the respondent.

Factual background

[2] The only witness to testify for the respondent was the general manager: manufacturing, Mr Johan Strydom. Strydom's evidence canvassed the respondent's circumstances that prevailed at the time of the retrenchment exercise, a period that straddled the end of 2013 and February 2014. His undisputed testimony was that during the course of 2013, after having been exposed to a series of losses in previous financial years, the respondent was exposed to a liquidity risk and the real prospect that its bankers would review the facilities that until then had been extended to the respondent. Strydom testified further that the respondent developed a strategy to meet the perfect storm of weak demand, low prices and significant cost pressures. What it proposed was the reduction in some 220 permanent jobs across the business, at all levels, and a focus on the 'excellence 3 plan' to address, amongst other things, productivity and quality.

[3] A formal s 189(3) letter was issued on 26 November 2013. The letter was addressed to the first applicant (NUMSA), which represented about 500 out of the

some 1600 employees then employed by the respondent and to Solidarity, which represented a lesser number of employees, and to the balance of the respondent's employees, being members of smaller unions or having no union affiliation. Since the nature and extent of the proposed retrenchment fell within the ambit of s 189A of the LRA, the consultation process was chaired by a facilitator appointed by the CCMA.

[4] All of the respondent's employees were represented in the consultation process, either by union representatives or persons elected for the purpose by non-unionised employees.

[5] In so far as selection criteria are concerned, early during the consultation process, the respondent tabled what was termed a multi-rating selection criteria, in essence a matrix which afforded weight to a number of components including performance, qualifications, years of service and direct supervisor review. Proposals were made by representatives of Solidarity which, in broad terms, accepted the model tabled by the respondent subject to some variation in relation to the weight to be accorded particular factors. The position adopted by Numsa was that LIFO will to be applied.

[6] Consultation meetings were held during December 2013, January 2014 and February 2014. Agreement was ultimately reached between the respondent and Solidarity and the representatives of those employees without union affiliation, representatives of about two-thirds of the respondent's workforce, on a matrix which comprised the following components:

(a) best performance assessment (out of three) - 25%;
(b) second best performance assessment (out of three) - 25%;
(c) qualifications - 20%;
(d) years of service - 15%.

The remaining 15% was made up of the following factors, each attributed the weight of 2.14%:

(a) commitment to company and team goals;
(b) teamwork and dependability;
(c) discipline;
(d) attendance;
(e) flexibility;
(f) initiative; and
(g) career potential.

[7] The application of the matrix contemplated that every employee would be rated. The best two of the last three performance appraisal assessments were assessments done on an individual basis from June to June of each year. The assessment extended to the measure of workstation required outputs, team required outputs and individual required outputs. These assessments were used for the purpose of determining eligibility for promotion as well is wage increases although for the years in question, the respondent's financial position was such that all employees were extended an across-the-board increase. It warrants mention in that the assessments were carried out in terms of collective agreements reached between the respondent and unions representing its employees, including Numsa and that for present purposes, there was no evidence of any objections made at the time that any of the assessments were done.

[8] The evidence led by Numsa's witness, Mr Vusi Mnisi, a section controller and shop steward, did not contradict Strydom's evidence in any material way. There was some disagreement over the extent to which Numsa had engaged in the consultation process (Strydom testified that Numsa had failed to engage on the issue and walked out; Mnisi testified that Numsa had engaged but disagreed with the respondent's proposals and asked to be excused from the meeting). Not much turns on this disagreement, nor does it raise issues of credibility in respect of either Strydom or Mnisi. The fact remains that by the last substantive consultation meeting held on 27 February 2014, all of the parties to the consultation process but for Numsa had agreed to the matrix that was to be applied to select employees for retrenchment.

Applicable legal principles

[9] Section 189 (7) reads as follows:

> The employer must select the employees to be dismissed according to selection criteria –
>
> (a) That have been agreed to by the consulting parties;
> (b) If no criteria have been agreed, criteria that are fair and objective.

[10] This formulation gives primacy to criteria that have been agreed to by the consulting parties. Where no criteria are agreed, it requires the employer party to meet the dual or combined requirements of fairness and objectivity. To the extent that Numsa's position throughout the consultation process and indeed this litigation has been that the respondent ought to have applied LIFO to the exclusion of all other criteria, this court has recognised the objectivity of length of service but never endorsed LIFO as the only fair and objective criterion. On the contrary, there are numerous decisions in which the court has held that an employer is entitled to adopt selection criteria such as experience, competency, efficiency and special skills. In *NUM and others v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC), Murphy AJ considered an employer's deviation from LIFO and its selection criteria based on key skills retention and continued service delivery to its clients. In that instance, a skills matrix was developed but regard is also had to performance appraisals. The court held that in the circumstances in which the company found itself, the criteria applied within objective as required by s 189 (7)(b). Similarly, in *Van Rooyen and others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC), the court held that an employer was entitled to have regard to competency, qualifications and experience as selection criteria.

[11] Following the influential article by Prof Alan Rycroft 'Corporate restructuring and 'applying for your own Job' (2002) 23 *ILJ* 678, the courts have held that criteria need to be clear and transparent and selection criteria and the application should ensure that the dismissal does not cross the line between a no-fault dismissal and

one based on performance. John Grogan (see *Dismissal* at 245) has summarised the position as follows:

> In summary, criteria for selection can be divided into those that are potentially fair, and those that are unacceptable in principle. Potentially fair criteria include length of service, balanced by the need to maintain history skills. In addition, criteria such as performance (with individual or group performance), conduct, experience, skill, adaptability, attitude, potential and the like – or a matrix or 'mix' of such criteria – are acceptable. Wind these criteria are adopted, however, the employer is required to ensure that a 'rating' system is used which can be applied fairly, consistently and objectively.

Analysis

[12] Turning first to the requirement that objective selection criteria be applied, it is clear from the above analysis that conduct, experience, skill, adaptability, attitude, potential and the like are, on the face of it, acceptable selection criteria. What the court has primarily warned against is the application of criteria that cause the reason for dismissal to shift from a no-fault termination to one based effectively on misconduct or incapacity, or to apply criteria that are neither clear nor transparent.

[13] Having regard to the matrix as a whole, 50% of the rating is comprised of prior performance assessments conducted in terms of system established by collective agreement and in place since 2003. These assessments were subject to procedural safeguards and in none of the affected cases, was there any challenge to the assessment. All employees were the subject of the same performance assessment process. There is nothing in the evidence to suggest that the assessments were not arrived at fairly, consistently and objectively.

[14] Educational qualifications comprised 20% of the rating and are undeniably an objective assessment, as are years of service, which comprised 15% of the rating.

[15] That portion of the rating that was subjected to specific attack, the supervisors' assessment, comprised only 15% of the rating. That assessment accounted for

employees' disciplinary and attendance records, which by any account, are objective benchmarks.

[16] Further, in order to remove any element of personal feeling and opinion from the assessments, Strydom's uncontested evidence was that a panel of supervisors was appointed, each of whom knew the employee from the relevant work area and was able to assess the employee against the stated requirements. The assessment was moderated by an area manager. As a further measure to avoid employees being prejudiced by any subjective assessment, the score was to be discussed with employees who were affected and any employee dissatisfied with his or her rating was afforded the right of appeal. To the extent that Mr Sibeko, one of the individual applicants, testified that he had not been provided with such an opportunity, this was the evidence of a single individual out of the 31 applicants and related to an alleged single instance. In any event, this evidence was never put to Strydom during his cross-examination and it would consequently be unfair for the court to take into account that evidence in contradiction when, as it was, it is led later.

[17] I deal next with the fairness criterion. What is fundamentally counts in the respondent's favour in the present instance is the nature of the factual matrix having regard to the operational challenges that it faced and to which the proposed retrenchment exercise was a response. As I have indicated, the nature of the challenge faced by the respondent was at the same time external (in the form of global market conditions, the demand and liquidity crisis) and internal (in the form of a failure to achieve required quality standards, poor work performance standards and the lack). Strydom emphasised that in these circumstances, the employees who remained after the completion of the retrenchment exercise were necessarily required to have the productive capacity to turn the respondent's business operation around. The basis on which the matrix was constructed was premised on this consideration which, in view of all of the evidence, is neither legitimate nor unfair.

[18] Further, the fact that the consulting parties in the present instance, in the form of the respondent and representatives of the majority of the representative's employees, agreed on the criteria that were ultimately applied, while not dispositive of this matter (and least to the extent that there was no consensus among all of the consulting parties on the issue), must weigh heavily in the respondent's favour. While it is correct that Numsa did not agree to the matrix and insisted on the application of LIFO, it was in the minority. The consultation process was conducted under the auspices of a facilitator. The respondent made proposals on the selection criteria to be applied; these were debated and modified during the discussions that followed. Agreement was reached with the majority of the employee representatives present. I fail to appreciate how in those circumstances it can be contended that the selection criteria applied were not fair. For an employer not to implement criteria agreed with the majority of representatives in a consultation process would in all probability be unfair; it would be equally unfair to apply a disparate range of selection criteria depending on a particular consulting parties' preferences or demands. In the present instance, in the context of the retrenchment process as a whole and the need to balance fairness amongst all of the various consulting partners, including the respondent, the respondent's decision was clearly a fair one.

[19] In short, I am satisfied that the selection criteria adopted by the respondent met the threshold of objectivity and fairness.

[20] In so far as costs are concerned, this court is a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. This court conventionally does not make orders for costs in circumstances where the parties to the dispute are parties to an ongoing collective-bargaining relationship. This case falls into that category and it seems to me fair and equitable that each party bears its own costs.

I make the following order:

1. The referral is dismissed.

PP ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Mr. C Phukubje of Finger Phukubje Inc.

For the respondent: Adv. A Redding SC, instructed by ENS Africa Inc.