IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS15/15

In the matter between:

MEDWUSA **First Applicant**

GLADWIN XHALI **Second Applicant**

DENNIS NXUMALO **Third Applicant**

AUBRREY SEKGOBELA **Fourth Applicant**

and

STRAPPING & PROFILE MANUFACTURE C.C. **Respondent**

Heard: **04 August 2017**

Delivered: **05 April 2017**

JUDGMENT

MAHOSI AJ

The first applicant, MEDWUSA, approached this Court by way of a statement of claim to challenge the substantive and procedural fairness of the dismissal of its members ('The individual applicants"). The relief sought is that each be retrospectively reinstated with compensation.

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Background facts

[1] The salient feature of this matter may be summed up thus. The individual applicants were all employed by the respondent as machine operators earning R5 039.45 on 30 June 2009 and were retrenched on the 31st of October 2014. It is common cause that the reason for the retrenchment was that the specific section had become totally, completely and uneconomically viable in the manufacturing process of the company. As a result of the retrenchment, MEDWUSA referred their unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA") on 1 December 2014. The dispute was unsuccessfully conciliated on 6 January 2015 and an outcome certificate was issued. MEDWUSA then referred the dispute to this Honourable Court on the basis of that outcome certificate.

[2] MEDWUSA' contention is that no proper or fair consultation took place, that no specific selection criteria could be agreed upon and that the respondent's decision not to transfer the individual applicants to other departments was unfair. The respondent opposed this matter and contended that the decision to retrench the individual applicants was taken after due consultation with all the parties concerned and that the retrenchment was the last option in the prevailing circumstances. The respondent further contended that there were no other positions available in any of its other departments and could therefore not transfer them or invite them to apply. Furthermore, the respondent contended that bumping was not an option in the prevailing circumstances as the individual applicants were skilled employees and the "last in" employees were mostly general labourers who earned much less than the individual applicants, who in any way indicated that they were not interested in accepting any of the bumping positions. The parties led evidence through their respective witnesses to which I now turn.

Evidence of parties

[3] Two witnesses led evidence for the respondent and one witness led evidence for the applicants.

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The respondent's witnesses

Mr Hendrick Meyer's testimony

[5] Mr Meyer testified that he was the managing member of the respondent. He stated that on 30 April 2014, a meeting was held with the employees in which it was confirmed that the Pallet Net section was not financially viable. He confirmed that on 15 May 2014, a letter was sent on behalf of the respondent, by Frontier Employers' Association to the applicants in response to its letter dated 6 May 2014. In the said letter, the respondent denied the allegation that it threatened to dismiss the applicants' members if they do not give up their membership with the union. The letter further confirmed the meeting of 30 April 2014 and that the purpose of the said meeting was to inform the employees that certain of the operations were financially non-profitable and that retrenchment might be unavoidable and imminent.

[6] He testified that on 25 August 2014, the respondent received a letter from the union raising concerns about the designed shifts including arrangement of shift work. He stated that at the time the union was not recognised. The union requested a consultation meeting, through a letter dated 17 September 2014. In the said letter the union suggested two possible date, being 3rd or 10th of October 2014. On the 10th of October 2014, the union sent another letter to cancel the meeting of the 10th of October 2014 and suggested to reschedule the meeting to the 14th of October 2014.The meeting was finally held on the 14th of October 2014. On the 23 October 2014 the individual applicants were issued with a final notice of retrenchment.

[7] On the reasons for retrenchment, Mr Meyer testified that the Pallet Net section was not financially viable and, as a result, the whole section was closed. This necessitated the retrenchment of all the employees who were employed in that section. He stated that there were no other positions available in any of its other departments and could therefore not transfer them or invite them to apply. He further testified that bumping was not an option in the section as the individual applicants were skilled employees and the "last in" employees were mostly general labourers who earned much lesser than the individual

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applicants, who in any way indicated that they were not interested in accepting any of the bumping positions. It was his view that the respondent had a fair reason to retrench the employees of the Pallet Net and a fair procedure was followed in retrenching them.

[8] Under cross-examination, Mr Meyer testified that the employees were not issued with a written notice for the meeting of the 30th of April 2014 as it was a social meeting and the employees were aware that respondent was in trouble. He stated that the respondent broadcasted the notice to the employees. He denied the allegation that the closure of Pallet Net was not discussed in the said meeting. On the reason why a notice of consultation was not issued between 30 April to September 2014, he testified that he consulted with the employees and that he had witnesses to that fact. He stated that there were no minutes of consultation as the meeting was social.

[9] Mr. Meyer conceded that the respondent received a letter that proposed a meeting from the union on the 11th of September 2014. In this letter, the proposed agenda related to organisational rights and night shift work of the employees. He further conceded that the respondent's notice of retrenchment dated 10 September 2014 was sent to the union on 12 September 2014, which was after receipt of the union's letter dated 11 September 2014.

[10] On the proposed dates of meetings by the union, he conceded that the respondent did not propose the earliest date. He testified that there were two meetings that were held with the union, but stated that he did not bring the minutes of the said meetings. He conceded that he did not deal with the concerns that were raised by the union and that the meeting of 25 September 2014 was the only meeting. He did not issue the individual applicants with a written proposal of an alternative position. On the issue of transfer, he testified that the applicants had to drop salaries and had to be trained. However, he was of the view that training would take longer.

[11] Mr. Meyer testified that he bought the company called Flexinet in 2012 and that the said company was in Kings Williams Town. He confirmed that Flexinet made pallet net, but it was his view that it was on a sophisticated

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level. He conceded that there was no meeting on 14 October 2014. He confirmed that the second applicant was in hospital on 23 October 2014, when he signed his retrenchment notice. He said he could not wait for her to be discharged from the hospital as the section was closed.

[12] When asked if it was decided on the 25th of September 2014 who should be retrenched, Mr Meyer stated that the respondent decided to retrench all the employees of the Pallet Net section. He stated that about four or five employees were employed on a contract basis after the individuals were retrenched. He testified that the individual applicants were offered employment by Mr Ooshuizen but they refused to accept the offer. When it was put to him that the applicants' case was that the respondent employed 16 employees after the individual applicants' dismissal, he stated that it was done long after the retrenchment.

Mr Peter Oosthuizen

[13] Mr Oosthuizen testified that he was employed by the respondent as a general manager of Strapping and Profile department. He further testified that after the retrenchment of the individual applicants, there were positions at the Flexi Net SA. At the beginning of April 2015, he allegedly telephoned the second applicant on three occasions to offer him a job but he stated that he was waiting for the CCMA dispute to be resolved. He testified that the second applicant was the only one offered the position because he was more qualified and trainable.

[14] Under cross-examination, he denied that he only called the second applicant in 2014 to persuade him to drop the CCMA case. He further testified that he called him on three different occasions but that he did not send him a letter or an sms.

The applicant's witnesses

Mr Gladwin Xhali

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[15] Mr Xhali is the second applicant in this matter. He testified that he attended the meeting of 30 April 2014. In the said meeting, Mr Meyer allegedly threatened the employees that if they do not resign from the union he would dismiss them and close down his company. He further testified that the said meeting was attended by the union members, including a few who were not union members, and that they were not informed of the possible retrenchment. Mr Xhali testified that he was part of the meeting of 25 September 2014. He stated that the purpose of the meeting was to discuss the worker's right, but Mr Meyer mentioned the issue of possible retrenchment.

[16] On the issue of notice of intention to retrench, he testified that he received a letter dated 10 September 2014 whilst he was in hospital, before undergoing an operation. He testified that the respondent could avoid the retrenchment by transferring them to other departments as they could all operate all the machines. He denied the allegation that he was orally invited to apply for other positions and stated that he would have accepted a position with a lesser salary, as he was not employed.

[17] Mr Xhali testified that on 8 October 2014, he lost one of his fingers whilst at work. He was then admitted to the hospital and whilst he was there his manager came to the hospital to deliver a letter of intention to retrench him. The following day after his operation, a lady from his work arrived at the hospital with a final notice of retrenchment. Mr Xhali stated that he felt very hurt to be retrenched whilst he was at the hospital. On the fairness of the retrenchment, he testified that of the six employees who were retrenched four were union members and only two were non-union members. The two non-union members were re-employed within a week. On the closure of the Net Department, he testified that the function of the department was shifted from the Strapping and Profile to Flexi Net.

Legal principles and Evaluation

[18] Item 1 of the Code of Good Practice on dismissal based on operational requirements provides that:

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(1) The Labour Relations Act (Act 66 of 1995) ("the Act") defines a *dismissal* based on the *operational requirements* of an employer as one that is based on the economic, technological, structural or similar needs of the employer. It is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by *requiring* employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

[19] MEDWUSA's contention was that there was no need for the respondent to retrench the individual applicants. The respondent contended that the retrenchment of the individual applicants was unavoidable as the section in which they were employed, the Pallet Net section, was not financially viable. The question is whether, subsequent to its decision to close the Pallet Net section, the respondent complied with its obligations in terms of section 189 of the LRA. Section 189(1) requires the employee to consult with affected employees prior to embarking on retrenchment programmes and provides as follows:

'(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is not collective agreement that requires consultation –(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum ; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals ;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are

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employed, any registered trade union whose members are likely to be affected by the proposed dismissals ; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on:

(a) appropriate measures -

(i) to avoid the dismissals ;

(ii) to minimise the number of dismissals ;

(iii) to change the timing of the dismissals ; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

[20] In summary, the evidence shows that there was a social meeting on 30 April 2014. The respondent alleges that the purpose of the said meeting was to inform the employees that certain of the operations were financially non-profitable and that retrenchments might be unavoidable and imminent. MEDWUSA' contention is that the purpose of the meeting of 30 April 2014 was to threaten the employees with dismissal and closure of the company if they refused to resign from being members of MEDWUSA. In response to the alleged threats, MEDWUSA wrote a letter to the respondent to deny the allegations and to state that the purpose of the meeting was to inform the employees that the operations of the respondent has to be closed or sold because it had become financially non-profitable.

[21] MEDWUSA sent a letter dated 25 August 2014 to the respondent to raise concerns about the design or arrangement of night shift. There was no response. On 11 September 2014, MEDWUSA sent a letter to the respondent

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to request a meeting for the purpose of discussing organisational rights and the issue of night shift. The proposed dates were 25 or 29 September 2014. On12 September 2014, the respondent sent a *notice of retrenchment* to the union dated 10 September 2014. On the same day, the respondent sent a letter in response to the letter dated 25 August 2014 in which it stated that the issue of retrenchment would also be discussed in the proposed meeting. It is my view that the meeting of 30 April 2014 was not a consultation meeting as envisaged by section 189 of the LRA, as it was just a social meeting. The first written notice of retrenchment as required by section 189(3) is the notice of12 September 2014, which was sent after the union had proposed a meeting for organisational right. Section 189(3) requires that the employer must 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 –

> ‘(a) the reasons for the proposed dismissals;
>
> (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
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> (c) the number of employees likely to be affected and the job categories in which they are employed;
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> (d) the proposed method for selecting which employees to dismiss;
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> (e) the time when, or the period during which, the dismissals are likely to take effect;
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> (f) the severance pay proposed;
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> (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
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> (h) the possibility of the future re-employment of the employees who are dismissed;
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> (i) the number of employees employed by the employer; and
>
> (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.’

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[22] It is common cause that the consultation meeting was held on 25 September 2014. MEDWUSA's contention was that the meeting held on 25 September 2014 did not constitute consultation on the basis that the respondent insisted to add the issue on retrenchment in the meeting that was scheduled to only discuss organational rights. One of the respondent's directors, Mr Hennie Meyer, was allegedly aggressive towards the employees and MEDWUSA's official. The respondent denied this and submitted that the meeting was also scheduled to discuss possible dismissal based on operational retrenchment. The evidence proves that the notice of the retrenchment that was sent to MEDWUSA on 12 September 2014 was compliant with section 189(3) of the LRA.

[23] MEDWUSA's further contention is that on 25 September 2014, the respondent had already decided on the employees to be retrenched as he insisted that its decision was final and that only MEDWUSA members were selected to be retrenched. It is trite that where there is no agreement to a selection criteria, the employer may choose a selection criteria. In choosing the selective criteria, the employer has to ensure that such criteria are both objective and fair. In this case, the respondent submitted that no specific criteria could be applied as the whole whole section in which the individual applicants were employed was closed down. MEDWUSA did not dispute the fact that all the employees of the Pallet Net Section were retrenched.

[24] In *Nkosinathi Mbongiseni Mtshali v Bell Equipment,*[1] the LAC dealt with the issue of bumping and stated as follows:

> '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

[1] DA 16/12, delivered 22 July 2014.

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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.'

[25] In this case, the respondent decided not to consider applying bumping at all. No evidence was presented to show that the individual applicants were offered alternative positions and that they refused to accept lower positions. There was further no evidence presented to show that that there were no other positions available in any of its other departments.

[26] Item 12 of the Code of Good Practice on dismissal based on operational requirements provides that:

'(1) *Employees* dismissed for reasons based on the employers' operational requirements should be given preference if the employer again hires employees with comparable qualifications, subject to -

(a) the employee, after having been asked by the employer, and having expressed within a reasonable time from the date of dismissal a desire to be re-hired; and

(b) a time limit on preferential rehiring. The time limit must be reasonable and must be subject of consultation.

(2) If the above conditions are met, the employer must take reasonable steps to inform the employee, including notification to the representative trade union, of the offer of re-employment.'

[27] Mr Meyer testified that he bought the company called Flexinet, which made Pallet Net on a sophisticated level; that the respondent employed four or five employees on a contract basis after the retrenchment of the individual applicants and further 16 employees were employed long after the retrenchment. In addition, Mr Xhali's testimony that two non-union members were re-employed within a week is not disputed. The respondent could not produce proof that it took reasonable steps to inform the employee of the offer of re-employment.

[28] In my view, the evidence is compelling that, subsequent to a notice of retrenchment, there was only one consultation meeting. There is no evidence

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that the parties engaged in a meaningful joint consensus-seeking process and attempt to reach consensus on appropriate measures to avoid the dismissals; to minimise the number of dismissals; to change the timing of the dismissals and to mitigate the adverse effects of the dismissals. There was further no attempt to reach consensus on the method for selecting the employees to be dismissed. Lastly, the respondent failed to present proof that retrenchment was the last option. Therefore, it cannot be said that the individual's dismissal was substantively and procedurally fair.

Costs

[29] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

Order

[30] Accordingly, I make the following order:

a) The individual applicant's dismissal is hereby declared substantively and procedurally unfair.

b) The respondent is ordered to reinstate the individual applicants with retrospective effect from the date of dismissal.

c) There is no order as to cost.

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Mahosi AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Mr Solomon General Sebola, MEDWUSA' official.

FOR RESPONDENT: Mr Bokkas Potgieter of Frontier Employer's Association.

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