IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS906/20

In the matter between:

VWSACRU OBO MEMBERS **Applicant**

and

SG COAL (PTY) LTD **Respondent**

Heard: 31 October 2022

Delivered: 10 January 2024

Summary: Trial proceedings – dismissal for operational requirements – force majeure declared by major client compelling employer to retrench employees working in terms of the contract with that client.

JUDGMENT

MKWIBISO, AJ

Introduction

[1] In this matter the applicants, being 12 individuals represented by their union, allege that their dismissal by the respondent for operational reasons was substantively and procedurally unfair. The applicants seek reinstatement with retrospective effect.

[2] The respondent contents that the dismissal for operational reasons was substantively and procedurally fair.

[3] The parties each called one witness to deal with the issue of the fairness of the dismissal. The parties further relied on a common evidence bundle that was indexed and paginated by the respondent's legal representatives.

Relevant facts and evidence

[4] It is common cause that the respondent dismissed 160 employees on 03 June 2020, due to operational requirements. The 12 applicants in this matter were part of the 160 employees who were dismissed.

[5] During the trial, the respondent relied on the testimony of Ms Lanette Fourie, who was its Human Resources Manager and had dealt with the dismissal of the applicants in 2020.

[6] Ms Fourie testified that she had been employed by the respondent since May 2010. She stated that the reason for the dismissal of the applicants for operation requirements was that a major client of the respondent, namely Msobo Coal (Pty) Ltd had declared a *force majeure* on 15 April 2020 in terms of a letter that read as follows:

> "*FORCE MAJEURE NOTICE*
>
> *We refer to the signed agreement between Msobo Coal (Pty) Ltd ("MSOBO") and SG Coal (Pty) Ltd ("Service Provider").*
>
> *As you are aware, and because of the Covid-19 virus, a "state of disaster" was declared in terms of Section 27(1) of the Disaster Management Act, No 57 of 2002 ("The Disaster Management Act"), various regulations have been promulgated under the Disaster Management Act, and President Cyril Ramaphosa on 23 March 2020 declared a "National Lockdown" from midnight on Thursday, 26 March 2020 until 16 April 2020, the ("Initial Lockdown Period").*
>
> *This "Initial Lockdown Period" has subsequently been extended until 30 April 2020, the "Extended Lockdown Period.*
>
> *As you are further aware, the "National Lockdown Period" falls within the definition of a Force Majeure Event in terms of the agreement which is unforeseeable circumstances beyond the control of Msobo.*
>
> *MSOBO hereby notifies you that it is declaring a Force Majeure Period until 30 April 2020 ("Extended Lockdown Period") or until the date on which the "National Lockdown Period" is lifted by Government and the economic activity of the country can return to normal.*
>
> *MSOBO has not yet been able to quantify the exact impact of the Force Majeure Events on the Agreement but, will advise you of such impact as soon as same become evident.*
>
> *MSOBO hereby records that it will do everything reasonably possible to mitigate the effects of the Force Majeure Events and perform in accordance with its obligations in terms of the Agreement. MSOBO will continue to keep you*

apprised of the impact of the Force Majeure Events on its performance obligations.

All MSOBO rights remain strictly reserved".

[7] Ms Fourie stated that there was no option but to retrench employees who were working on the contract with Msobo Coal because there would be no income during the period of the declared *force majeure*. Msobo Coal later extended the period of the *force majeure* and informed the respondent that it had no way of advising the respondent of when normal duties would be resumed.

[8] Ms Fourie referred to three SMSes that were sent to employees regarding the retrenchment. The SMSes read as follows:

"*In the event of a retrenchment, the method applied will consist of the following measures in order of priority: Voluntary Retrenchments Last in First Out (LIFO) Operational Requirement Disciplinary Records Severance pay will be calculated in the following manner: Final salary?* Unutilised *leave of days will be paid out by the NBCRFLI. Two weeks? Notice pay worked.? Not worked. One week for every year completed service. Currently 160 employees will be affected. Should the retrenchments take place, it will be communicated within the following week*";

"*Whilst management will continue to explore other options to avert further negative financial performance and impact, management will also explore all alternatives to staff reduction. However, failure to achieve this may result in retrenchments*"; and

"*The company would also offer re-employment first to retrenched employees upon opportunities present. You are welcome to contact the HR Department with any ideas how to avert/reduce the retrenchments before 19 May 2020. Management reserves the right to accept any of these ideas or not. Regards Management*".

[9] Ms Fourie testified that this was the best way of communicating with the employees at the time. The employees, including the applicants herein, did not respond by suggesting any alternatives to dismissal.

[10] When she was cross-examined, she was asked to explain the meaning of *force majeure*, to which she responded by stating that it is when a company cannot perform its duties due to circumstances beyond its control, such as the lockdown implemented as a result of the COVID-19 pandemic. She was further asked whether Msobo Coal had resumed operations, to which she responded that "*they resumed duties only a long time … I cannot say when exactly they resumed duties but it was not during COVID*". When further questioned on this

issue, she said she worked in Human Resources and was not informed when the mines resume duties. She said some of the retrenched employees were re-hired when Msobo Coal resumed operations, but she did not know the criteria that was used when re-hiring.

[11] It was never put to her that Msobo Coal had not declared a *force majeure*, during which period the respondent could not work and generate income on the contract with Msobo Coal. It was not put to her that the respondent continued its operations in terms of its contract with Msobo Coal with or without the declaration of *force majeure*. It was not put to her that the respondent was expected to continue paying the applicants their remuneration despite the fact that they were not working and the respondent's operations at Msobo Coal had stopped due to the *force majeure*. Importantly, it was not put to her that any alternatives, such as laying off of employees for the duration of the *force majeure*, were advanced by the applicants before or after the decision to retrench them. Also of importance is that it was never put to her that there were any severance payments that were outstanding to the applicants. Indeed, much of her testimony was unchallenged, to the extent that the respondent's legal representative rightfully elected to not engage in any re-examination once cross-examination had been concluded. The respondent closed its case after Ms Fourie's testimony.

[12] The applicants relied on the testimony of Mr Thabo Xolani Mkhabela. It is not necessary to reflect his testimony in any detail, as much of the propositions he put forward were not put to the respondent's witness. When asked under cross-examination why his legal representative did not put his version to the respondent's witness, he said he did not know. However, he later confirmed that everything his legal representative had done was according to the applicants' instructions. He complained about procedural unfairness, contending that the applicants were not issued with letters in terms of section 189(3) of the Labour Relations Act 66 of 1995 ("the LRA").

Analysis

[13] Section 189A of the LRA applied to the dismissals in this matter. The respondent employed more than 50 employees. Further, the respondent contemplated dismissing, and ultimately dismissed, 160 employees. This being the case, it was not open to the applicants to have this Court adjudicate a dispute about the procedural fairness of the dismissal, as contemplated in section 189A(18) of the LRA.[1] The applicants were, thus, restricted to a claim of substantive unfairness.

[14] Substantively, the applicants failed to put any version of substance to the respondent's witness. In this regard, it is trite that a failure to put one's version to opposing witnesses means such a version cannot be accepted. In *Masilela v Leonard Dingler (Pty) Ltd,*[2] the Court held the following:

> "[28] … It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit. In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438:
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> > "… It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved".'

[15] In *President of the Republic of South Africa and Others v SARFU and Others,*[3] the Constitutional Court held that:

> "[61] … If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts".

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[1] *NUMSA & others v SA Five Engineering & others* [2005] 1 BLLR 53 (LC); (2004) 25 ILJ 2358 (LC) at paras 7 and 8.
[2] *Masilela v Leonard Dingler (Pty) Ltd* [2004] 4 BLLR 381 (LC); (2004) 25 ILJ 544 (LC) at para 28.
[3] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 11999 (10) BCLR 1059 (CC), 2000 (1) SA 1 at para 61.

[16] The Labour Appeal Court, in *Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council & others*,[4] recently confirmed the need to put one's version when cross-examining and rejected the defence of the employee in that case on the following basis:

> "[26] The third respondent failed to make it clear to the complainant in cross-examination the precise nature of the imputation raised, in the sense not only that her evidence was to be challenged but how this was to be done. It was not put to her that her version was false or that it was denied by the third respondent. The result was that she was not given the opportunity to respond to such a challenge, including to deny any suggestion as to the falsity of her version".

[17] The respondent's version that it was not able to conduct its operations in terms of the Msobo Coal contract, under which the applicants were employed, with consequent financial hardship, must be accepted as it was not disputed. Under these circumstances, the respondent had a valid reason to contemplate retrenching the applicants. When the applicants were invited to provide alternatives to retrenchment, they did not accept the invitation and they provided no alternatives. They have no one to blame but themselves.

[18] It was not the applicants' case at the trial that the respondent should have considered laying-off employees for a limited duration consistent with the period during which Msobo Coal had declared *force majeure*, instead of opting for retrenchment.[5] The respondent was, thus, not given an opportunity to respond to such an averment and it would not be appropriate to make any finding on an issue that was not canvassed at the trial.

[19] The issue whether the respondent should have reinstated or re-employed the applicants after the resumption of operations by Msobo Coal, having re-hired some of the retrenched employees, is not before me as it falls outside the dispute that was conciliated. In terms of section 186(1)(d) of the LRA, such a failure to reinstate or re-employ would be a different form of dismissal to the

[4] *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and Others* (2022) 43 ILJ 825 (LAC); [2022] 4 BLLR 324 (LAC) at para 26.
[5] *SACCAWU obo Mvuyana and Others v Oyster Box Hotel (Pty) Ltd* (2018) 39 ILJ 2337 (LC); [2019] JOL 42245 (LC).

one occasioned by the retrenchment of the applicants. Section 190(2)(c) of the LRA provides that "*if an employer refused to re-instate or re-employ the employee, the date of dismissal is the date on which the employer first refused to re-instate or re-employ the employee*".

[20] Under all the circumstances, I find that the applicants' dismissal was substantively fair.

Costs

[21] The general approach in this Court is to not award costs. I see no compelling reason to depart from that approach in this matter.

[22] In the premises, I make the following order:

Order

1. The applicants' unfair dismissal referral is dismissed.

2. No order as to costs.

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VG Mkwibiso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv Frans Mahome

Instructed by: Khomola Attorneys Inc

For the Respondent : Mr C J Geldenhuys of C J Geldenhuys Attorneys