In The Labour Court of South Africa

Case No: D1013/99

In the matter between:

Applicant

and

Respondent

JUDGMENT

Ngcamu AJ:

[1] The applicant was employed by the Respondent as a security guard. The applicant's duties were to escort Respondent's vehicle during the delivery and collection of assets from and to various clients of the Respondent.

[2] The Respondent is a company duly incorporated. The Respondent operates in the security industry and conducts business from various branches in South Africa.

[3] The Applicant was employed at the Respondent's Durban branch. The services of the Applicant were terminated by the Respondent on 30th April 1999. The applicant is challenging his dismissal on the basis that it constitutes an automatic unfair dismissal

alternatively, it constituted an unfair dismissal.

[4] The Respondent's defence is that the dismissal of the applicant was on operational requirements and accordingly fair.

[5] The Applicant commenced employment with the Respondent on 20th January 1994 as a vehicle guard. On 25th July 1996 he was appointed to a position of a crewman and later promoted to be a bank marshal. During March 1997 the Applicant and one Samuel Wornyo whilst on duty was seriously wounded in a robbery. The applicant was hospitalised and returned to work during 1998. He was not in a position to perform the duties of a crewman due to the injuries he sustained. On the other hand Wornyo was able to perform his duties as a crewman.

[6] During March 1999 the Respondent embarked on a retrenchment exercise which resulted in the dismissal of a number of the employees including the Applicant. This was as a result of the huge losses the Respondent had during 1998.

[7] Certain facts were recorded in the pre-trial minutes as common cause. A number of facts were set out as being in dispute. Some of the issues placed in dispute should have been agreed by the parties but were left open for decision by the Court. The basic issue to be decided by the Court is whether the dismissal for

operational requirements was fair from a procedural and a substantive point of view.

[8] As the dismissal was admitted, the Respondent had the onus to prove that the dismissal was procedurally and substantively fair. The Respondent called two witnesses Messrs Bax and Pillay in support of its case: The Applicant gave evidence and also called witness Mr Shamase, a shop stewart.

[9] Mr Bax testified that in 1998 the Respondent showed huge losses. A memorandum was

sent to the staff regarding the retrenchment to turn the Respondent into a profitable business. Consultations were held with the two Unions representing the employees. The two Unions were The Motor Transport Workers Union and The Transport and General Workers Union. Mr Wornyo was a member of The Motor Transport Workers Union. I make reference to Mr Wornyo for the reason that it was submitted on behalf of the Applicant that Wornyo was reinstated but not the Applicant. It was alleged that his reinstatement constituted unfair discrimination against the Applicant. To bring the Respondent into a profitable business, Respondent increased the price charged to the customers. This resulted in the customers terminating their contract with the Respondent. The result of this was that the Respondent remained with few contracts and then embarked on the retrenchment. The alternative to this was to close down the Durban branch.

[10] Several suggestions were made by the unions. These included the transfer of employees to other branches and back up to other vehicles. These suggestions could not work out. The LIFO was agreed as the criteria for the retrenchment as
well as the severance package. It has not been disputed by the applicant that there were such discussions and consultations with the two Unions. Applicant has also not disputed that he belonged to the Transport and General Workers Union which took part in the consultations. Both Unions are not party to these proceedings.

[11] The direct consultation with the Applicant took place on 30th April 1999. This meeting was attended by the representatives of the two unions and the applicant. At this meeting a request was made for the re-employment of the applicant and Wornyo or that they should not be dismissed. The request was based on the fact that they were injured on duty. There was no challenge to the application of the LIFO principle to them. Mr Bax testified that as he was concerned with selective re-employment. He asked that letters be submitted by the Unions stating that the re-employment will not constitute selective re-employment. A letter was received from the Union to which Wornyo belonged but nothing from the Applicant's union. Wornyo was re-employed but not the applicant. He testified further that being a crewman needs a person who is physically fit and that physical work is involved in the work

of a bank marshal.

[12] Mr Bax denied that the retrenchment was a vehicle to discriminate the applicant and that Wornyo was never retrenched. He agreed that some of the employees have been re-employed.

[13] Mr Pillay confirmed the evidence of Mr Bax. He testified that he knew the applicant's condition. The applicant was given light duty in accordance with the doctor's recommendation. According to Pillay, the applicant was given the duty of being the bank marshal. Applicant failed to perform it. Applicant was given
the duty of a gate guard but could not do it. He was then given duties in the armoury. This was a position specially created for the applicant. Applicant failed to charge members who refused to sign for the firearms. Applicant thereafter reported at the gate but did nothing. Mr Pillay denied that the applicant was ill-treated.

[14] Applicant testified that when he commenced work after the injury he did light duties. He was unable to work as a crewman. He was using crutches and foot drop. He could not feel when he had to relieve himself. He could not sit or stand for a long time. When he worked in the armoury he was not paid for overtime but had no problem in working there. He was not given instructions about working in the armoury. It was not his duty to charge members who did not sign for the firearms. It is unlikely that the applicant would work in the armoury when he did not know what the job entailed. I cannot accept that he was not given any instructions. He testified that Bax gave instructions that Wornyo should be looked after and his case was going to be checked in Pretoria. He confirmed that his case is not as Wornyo's. He sent a letter to Bax but did not receive a response. The letter alleged to have been sent to Bax was produced by the applicant. This letter is dated 19th August 1999. The letter reads:

"Dear Mr Tim Bax

I Goodman hereby beg to write this letter pleading to be reinstated at Coin Armed Banking Division. As I was a bank Marshal, I would like to work in the bank until I am completely healed. Since my injury till today I am still under my doctor's treatment. I can also resume

work anytime I'm ready from now on.

I'm no more using crutches but walking with the aid of a foot splint on my left foot. Bullet still stuck within my back-bones, but for more information please contact my doctor or Mr T. Pillay. He also got files and records of my incident. On my side I can and I would be very much happy to be starting even at month end."

[15] What is important in this letter is that the applicant did not raise any challenge to the dismissal as he has done in these proceedings. The letter seems to accept the dismissal but he is pleading for the reinstatement. Applicant has also requested to work as a bank marshal. This contradicts his evidence that he is totally unfit to do any work. It also contradicts his evidence where he said he could not work as a co-ordinator, crewman or bank marshal. I will however, return to these issues. Applicant contended that the Respondent should have given him light duties but did not ask for work at half his salary. Applicant's case is basically that he was dismissed because of his disablement. This appears from the gist of his evidence.

[16] Mr Amos Shamase testified that the applicant was treated unfairly. According to him the management gave applicant extra work to charge subordinate. This piece of evidence contradicts the evidence of the applicant who denied that the was told to charge those who did not sign for the fire-arms. It thus confirms the evidence of Mr Pillay in that the applicant was told to charge other employees. I therefore have to accept the evidence of Pillay in that it was the applicant's duty to charge those who did not sign for the fire arms and Applicant failed to do so.

[17] Shamase confirmed that applicant could not work as a crewman or bank marshal. This again contradicts the letter the applicant sent to Mr Bax which I have quoted herein. He further stated that the applicant was not consulted about the retrenchment. Mr Shamase forgets that applicant was represented by the Union and there was therefore no obligation for Respondent to consult individually with the applicant. See Section 189 (1) (e) of Act 66 of

1995.

[18] He further stated that he was aware that the applicant was not prepared to charge people not signing for the fire arms.

[19] I have mentioned that some of the issues placed in dispute should have been agreed by the parties. I will however deal with such issues. The applicant has not presented evidence regarding the period of hospitalisation. This is in my view not relevant to the issues to be decided. The evidence presented by the applicant is that he is unable to do any work. This then raises a question as to whether the employer is obliged to keep a person who is unable to perform his duties or alternative duties assigned to him.

[20] The applicant testified that he is still being treated by a specialist who has recommended light duties. The evidence presented was that the applicant was given light duties which he could not perform. I am satisfied that at the time of the institution of this matter, the applicant could not perform physical work and is still unable to do so.

[21] It was not disputed by the applicant that the question of retrenchment for operational reasons was discussed with both unions including the union representing the applicant. I must point out that the applicant is not the only

person who was retrenched. Evidence was given on behalf of the Respondent to prove that the Respondent had huge losses for 1998. According to the Applicant, the Respondent's business was going well. However, there was no attack on the losses presented on behalf of the Respondent. It was argued that the retrenchment was only a vehicle for the dismissal of the applicant. There is no basis for these submissions and I therefore reject same. I come to the conclusion that the dismissal of the applicant was for operational reasons. I do so on the basis that the Respondent would not have incurred expenses of paying retrenchment packages simply to get rid of the applicant. In fact several other employees were retrenched together with the Applicant.

[22] The Applicant's case has been presented and argued on the basis that he was dismissed for non-performance. For this reason it was argued that there was alternative employment for the applicant other than being a crewman or bank marshal. This argument can be well considered if I come to the conclusion that the Applicant was dismissed for poor performance as a result of his injuries. The evidence presented by Respondent is that applicant failed to perform the alternative work assigned to him including that of working in the armoury. The applicant denied that he failed to perform but stated that he was removed because he wanted to be paid for overtime. This cannot be true on the grounds that Mr Shamase's evidence confirmed that of Mr Pillay in that the applicant had to charge people which he failed to do. This was the reason for his removal from the armoury. Applicant could also not work as a base co-ordinator. He further mentioned that he was never offered work as a gate guard. Judging from the line of cross examination followed by Applicant's representative, it was not suggested that Applicant could perform those duties. I say this because it was suggested to the Respondent's witnesses that being a gate guard involved patroling and checking vehicles. This was denied by Respondent and it was stated that the gate is automated and no vehicle search is done. However, there was a gate guard at the Respondent's premises. I do not consider it material to decide on the length of time the Applicant was positioned at the gate.

[23] The evidence was led on behalf of the Respondent regarding the meetings in which the Respondent's financial position was discussed as well as retrenchment. It was not disputed by the applicant in evidence that such meetings did take place. I therefore accept that there were meetings and the retrenchment was discussed. I base this on the facts that this has not been disputed and none of the Unions attacked the substantive or procedural fairness of the retrenchment of the employees.

[24] It was alleged that the applicant was discriminated against as Mr. Wornyo was - reinstated and not the applicant. The applicant presented evidence tendering to prove that the alleged discrimination is not based on the reinstatement of Wornyo but other employees. The applicant never applied for the amendment of the Statement of Case to allege this. I

therefore cannot accept such deviation from the statement of case. The applicant testified that Wornyo was never retrenched. The evidence before me proves that he was selected for retrenchment and was in fact retrenched. He was later reinstated after the Respondent had received a letter from the Union stating that his re-employment was not going to be treated as selective re-employment. There was no such letter from the applicant's Union. I am satisfied that on the evidence, the applicant has failed to prove the discrimination.

[25] The Respondent submitted that the dismissal of the applicant was based on operational requirements. On 22 July 1998 the respondent sent a letter to the applicant regarding his inability to perform the alternative duties offered. The duties offered were those of bank marshall and gate guard day shift. The last paragraph of this letter reads:
" Should you feel that you are unable to perform either of these functions, we have no alternative but to terminate your employment based on incapacity to perform a job function due to health reasons ".
The respondent never acted on the suggestion contained in this letter. For the Respondent to wait for 9 months before dismissing the applicant on the basis of non performance does not make sense. I therefore accept that the dismissal was on operational grounds.

[26] The question to be answered now is whether the dismissal on operational grounds was fair from a procedural and a substantive point of view. At this stage I wish to point out that I consider the applicant to have been dismissed on operational grounds only. The employer's reasons for dismissal are not mixed in this case.

[27] It was submitted that the respondent embarked on a retrenchment exercise which resulted in the dismissal of a number of employees. It was also submitted that consultations with Unions were held. I have stated that there is no dispute on this. The applicant however disputed that there was any merit for the retrenchment. I have stated that his submission has no factual basis in that not only the applicant was dismissed.

[28] In Free state Consolidated Gold Mines Bpk t/a Western Holdings Goudwyn v

Labuschagne (1999) 20 ILJ 2823 (LAC), the court held that the employer who dismisses a partially disabled worker must consult with the employee concerning disablement and investigate whether the employee can be accommodated elsewhere in the employer's business. This decision refers to a case where the ground of dismissal is the disability. However, the present case is different. There was therefore no need for the consultation referred to in the Labuschagne case. The position of the applicant as well as that of Wornyo was discussed on 30th April 1999. There is no dispute on this. What is in dispute is what Mr Bax said about the applicant's position and that of Wornyo. The court has conflicting versions regarding this. According to Mr Bax, he requested letters from the Union that the reinstatement would not constitute selective re-employment which never came from the applicant's union. This evidence was supported by Mr Pillay. The applicant testified that he was told his position was still going to be considered. However, the evidence is to the effect that his union did not send the undertaking requested.

[29] I accept the respondent's version on this point. I do so on the grounds that, Wornyo was reinstated as stated by the applicant in his statement of case. I am of the view that the applicant's union did not want to submit an undertaking. I come to this conclusion because after the applicant's dismissal, the union never took up the matter with the respondent. They, in my view regarded the matter as closed. The applicant had to personally make a written request on 19th August 1999. Applicant produced a letter dated 23rd August 1999 as a reply to his letter. This letter is signed on behalf of Mr. Bax. It was stated in that letter that there were no vacancies. Mr. Bax denied receiving any letter from the applicant or sending a reply. He does not know the person who sent such reply to the applicant.

[30] It was submitted on behalf of the applicant that he is severely handicapped and permanently disabled. This contradicts his own letter he alleged to have sent to Mr Bax. The applicant is permanently disabled as submitted, it serves no purpose to offer him alternative employment. This is on the basis that the employer is under no obligation to keep the employee who is permanently disabled in employment.

[31] I was referred to several cases regarding the fairness of the dismissal. In NUMSA v Atlantis Diesel Engines (Pty) LTD 1993 14 ILJ 642 LAC, it was stated that fairness goes further than bona fides and the commercial justifications for the decision to retrench. In my view this decision does not mean that the employer is precluded from making commercial decisions to make his business viable and competitive. The question is whether having considered all possibilities, the retrenchment was the only alternative left. In Mohamedy's v Commercial Catering and Allied Workers Union of S.A. (1992) ILJ 1174 (LAC) the court held that an employer is not entitled to take the final decision to retrench without prior consultation with its employees or trade union. In the present case I have accepted that there was consultation with the Unions including the one representing the applicant. Special consideration had to be taken regarding the applicant and Wornyo and for that reason, a consultation was held with them. The Union representative representing the applicant was requested to send a letter of undertaking to Mr Bax. This was not done and the applicant was accordingly not reinstated. Mr Mutengwe was not called by the applicant to refute that he had to send a letter of undertaking. I accept that Mr. Bax did not receive the letter sent by the Applicant.

[32] Accordingly, I find that the Respondent has proved that the dismissal of the applicant was for operational reasons. I also find that consultations were held with the unions and that a consultation took place with the applicant on 30th April 1999. I accept that the selection criteria was agreed. I do so on the basis that there is no challenge on this. The applicant was afforded a chance to send a letter of undertaking for his position to be considered and he and his union failed to do so. I have come to the conclusion that the treatment of the applicant was fair both on substantive and procedural point of view. The applicant has failed to prove any discrimination.

In the light of the evidence before me and the submissions made, the application must fail. I have considered the question of costs but I have come to the conclusion that I should not award costs against the applicant. I have considered his position and I do not wish to burden him with costs. He now has a life time problem.

In the result, the application is dismissed. There is no order as to costs.

Ngcamu AJ