"NOT REPORTABLE"

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: **JS312/02**

In the matter between:

Aviation Union of Southern Africa First Applicant

R F MYBURGH & TWO OTHERS Second to Further Applicants

and

SOUTH AFRICAN AIRWAYS (PTY) LTD Respondent

JUDGMENT

Waglay, J:

1. The first applicant herein is a trade union. The second to fourth applicants who I shall refer to as the affected employees are members of the first applicant. The applicants have come to this court seeking an order that the dismissal of the affected employees was both substantively and procedurally unfair. The relief sought is that of reinstatement.

2. The affected employees were dismissed with effect from 1 February 2002 on the grounds of respondent's operational requirements. The applicants claim the dismissal to be unfair because of the respondent's failure to comply with section 189 of the

Labour Relations Act ("Act") as amended.

3. Briefly, the background to the dismissal is as follows: Sometime towards the end of September 2001, the Chief Executive Officer (CEO) of the respondent company made known to all of the respondents staff that for the financial year ending in March 2001, the respondent's business had made a loss in the region of about R700 million. In order to stem such loss it proposed that consideration be given to various cost cutting measures. While vague reasons were given for the losses incurred it was decided that with immediate effect all external employment would cease and internal transfers could only take place if motivated and approved by the various executive vice-presidents. The moratorium covered all employees including casual employees, fixed term contract employees and temporary employees.

4. A further meeting was then held in October 2001 and at this meeting the CEO explained the need to restructure the respondent company and to cut costs. One of the proposals made by the CEO was to reduce management staff between 20 to 30 percent particularly because this layer of staff had increased by about 39 percent between May 1999 and September 2001.

5. Each section or division within the respondent's enterprise was headed by an Executive Vice President (EVP). There EVP's assisted by the Human Resources Manager for each section or division were entrusted to design and implement a new

structure within their section or division and identify employees who were excess to requirement or redundant and to conduct the consultation process as required by section 189 of the Act.

6. A communiqué was issued to the management staff which included the affected employees which also detailed a time line to effect the retrenchment this included:

   6.1. EVP's to review structure by 15 October 2001;

   6.2. The persons to be affected were to be identified by 24 October 2001;

   6.3. A presentation was to be made to the staff on 25 October 2001;

   6.4. Consultation with affected employees to take place on 1 November 2001;

   6.5. Responses to proposals plus advise as to respondent's final decision to be given on 6 November 2001;

   6.6. Compulsory severance to be finalised on 14 November 2001;and

   6.7. the date of retrenchment would be 30 November 2001.

   6.8. Those interested in applying for voluntary severance packages could do so between 26 October and 14 November 2001.

7. The above communiqué also set out how the affected employees were to be selected. It stated that the selection was based on best competency fit or levels of performance and employment equity. Best competency fit included criteria such as knowledge, skill and attitude. Levels of performance related to previous years performance assessment and employment equity meant that at least 50% of the affected grades and

areas should be represented by black employees.

8. The affected employees were the three managers identified as the potential retrenchees by the EVP of their department. Once they were advised as being the persons selected for retrenchments, they approached their union, the first applicant, for assistance. The first applicant immediately sought to be included in the process but the respondent refused to allow the first applicant to participate in the retrenchment exercise. The first applicant did however become involved but not before two court applications were brought by it to be allowed to participate in the retrenchment process.

9. The second court application took place on 30 November 2001 at this date the respondent also decided that the intended date for finalising the retrenchment would be extended to 15 December 2001. After the involvement of the first applicant a meeting was held on 10 December 2001 this meeting followed various correspondence including a letter from the respondent advising the first applicant why the three persons then selected for retrenchment were chosen.

10. At the meeting of 10 December 2001, the respondent again explained the need to retrench and the first applicant requested to see the past structures and the proposed structures and the criteria used to identify the affected employees, it also requested financial information. The respondent then provided information relating to selection

criteria which was what was contained in the communiqué referred to in paragraph 7 above. The information relating to structure was finally supplied by 21 December 2001. By this time the date for the implementation of the retrenchment (15 December 2001) had passed.

11. Attempts to meet after 21 December 2001 seemed almost impossible. A consultation meeting did eventually materialised on 23 January 2003. During the first part of this meeting respondent arranged for the Human Resources Managers of every department to be present to explain the old and new structure and to answer any and all questions which the first applicant had.

12. The minutes of the above meeting indicates that the first applicant was satisfied with the information provided and that the first applicant agreed to revert to the respondent. This notwithstanding the first applicant by letter stated that further information was required before the process could be continued. Respondent was surprised and disappointed by this and a meeting was arranged for 31 January 2002. Again the respondent was requested to supply their written proposals to finalise the retrenchment.

13. All the respondent received from the first applicant was a document that can best be described as a circular letter rather than proposals that sought to deal with the issues relating to the affected employees. This letter which constituted the proposals is one

which applicant, if it was serious about the consultation process have forwarded to the respondent before or immediately after the meeting of 10 December 2001 not when respondent was seeking to finalise the retrenchment.

14. The inference that the respondent drew, having regard to the proposals made by first applicant was that the applicant was intent on delaying the process and not seriously engage the respondent in an attempt to constructively deal with the retrenchment. Despite the inference the respondent prepared a detailed response to the proposals which was handed to the applicants at the meeting on 31 January 2002. At this meeting first applicant's chief negotiator was, and not for the first time, under severe time constraints and could not be present for over 30 minutes. It was at this meeting again agreed that the first applicant would revert to the respondent before the end of that day (31/01/2002). It did do so. The response that he respondent received was that, it (the fist applicant) was not satisfied with the information provided by the respondent and as such until the respondent provided documentation to their satisfaction the process could not continue any further. The response from the first applicant also added that it was still in the process of studying respondent's reply to their proposals ad would react thereto "as soon as possible".

15. On receipt of the above correspondence from the applicant on 31 January 2002, the respondent concluded that the applicants were simply seeking to delay the matter and were not bona fides in their desire to consult. The respondent decided to then

immediately dismiss the affected employees.

16. Based on the above background applicants seek their dismissal to be declared unfair and the respondent seeks this court to find the dismissals to be fair. The applicant gave no evidence at the trial. The only evidence was that of the respondent which the Court must accept unless the evidence is so far fetched and unreasonable that it has to be rejected.

17. The first issue that respondent was requested to satisfy this Court was that there was a commercial rationale for the respondent to embark on the reduction of its management strata. Clearly this was so. The evidence was that the respondent did incur losses, which amounted to approximately R700 million in the previous financial year. Although the reasons given for the losses were not altogether cogent, the respondent was required to address the financial haemorrhage that was occurring and demonstrated that it was addressing the problem by considering not only personnel reduction but also other costs saving measures. Its identification of reduction within the management strata was also justified as it was a strata which had within a year and a half ballooned by 39% and was therefore seen as an area where over twenty to thirty percent reduction was a possibility.

18. Having justified the area in which to affect reduction the respondent set down a timetable and the criteria that it would apply. While the timetable underwent changes

as consultations took place, respondent's proceeded to select the persons to be retrenched and communicated its decision to those affected.

19. Although there was some contradiction in the evidence presented as to exactly what criteria was applied, Van Jaarsveld the EVP who selected the affected employees said that the criteria he applied was the need for the personnel within the structure, years of service of the affected employee, and the employment equity plans of the respondent. The evidence of Van Jaarsveld was also that he took into account the potential of the personnel when identifying persons to be retrenched. He explained why one was chosen as opposed to another and his reasoning I am satisfied is not one which can be said to be such that it was so subjective that it amounts to a failure by the respondent to apply fair selection criteria in selecting the affected employees.

20. Even though the respondent has satisfied this Court that there was good reason to embark upon retrenchment exercise and that based on the evidence presented the selection of the affected employees was not unfair it still needs to satisfy me that it applied a fair procedure in affecting the dismissal.

21. In respect of the procedure adopted, the respondent had at best failed to enter into any consultation which sought an agreement between it and either the affected employees or their union. This in particular in respect of the selection criteria applicable. While applicants in their cross examination of the respondent's witnesses

tended to make much of respondent's failure to explain or provide information related to the new structure as opposed to the old one or provide some or other information I am satisfied that whatever information applicants required was furnished and details relating to the structure was also more than adequately dealt with by having the meeting between the Human Resources Manager of each department and the first applicant to explain the structure.

22. Although the information required and requested was provided by the respondent to the applicants there was neither a preparedness nor an invitation by the respondent to allow first applicant to review the process it had adopted. While I find that there was a rationale for its action and that the selection criteria was fair respondent was nonetheless required to consult with the applicants on these issues but refused to do so. Furthermore while the first applicant appeared merely to meet with the respondent whenever it found time to do so, the respondent displayed no urgency in its desire to deal with this matter. Meetings were held, as much as 3 to 4 weeks apart, neither party seemed to put the other on terms. The consultation meetings were no more than a getting together to say things that are expected to be said.

23. Applicant's failure to show urgency is understandable, its delayed reactions sought to take advantage of a respondent who simply sought acquiescence rather that a debate and discussion. Finally when the respondent formed the view that applicants were not serious in their dealings with the respondent but were seeking to delay the process it

simply went ahead and dismissed the employee when by exercise of some judgment it could have but applicant to terms in respect of time limits.

24. The one question that arises is, does the failure to properly consult not amount to the dismissal also being substantively unfair. In dismissals based on operational requirements this is always a possibility but in this matter the uncontradicted evidence was that the affected employees could not be occupied elsewhere within the respondents operation and in such circumstances the Court must accept that the dismissals though procedurally unfair were substantively unfair.

25. Having found the dismissal to be procedurally unfair the only relief I can consider is that of compensation. The amount of compensation can however not exceed twelve months.

26. This is not a matter in which twelve month's compensation is fair. This is however also not a matter in which this court can say that had the respondent put applicants to term that the matter would have been finalised in another month and thus grant each of the affected employees a months salary as compensation. For reasons stated earlier, I do not think that respondent even seriously contemplated entering into proper consultation with the applicant and having regard to the little information I have about the affected employees I believe the appropriate amount that each should receive is the amount they would have received had they remained in respondents

employ for a further period of 4 months.

27. In the event of there being a dispute as to the amount payable the applicants may petition this Court for the determination thereof, however in calculating the compensation it is specifically ordered that allowances paid to run a project or for acting in a position which was over and above the salaries payable must not be taken into account in calculating the compensation.

28. Finally with regard to costs I see no reason, both in law and equity, for costs not to follow the result.

29. In the result I make the following order

    29.1. The dismissals of the second to further applicants was unfair.

    29.2. The respondent must compensate the said applicants for their unfair dismissal in the sum equal to the amount they would have earned had they remained in respondents employ for a period of four months from the date of their dismissal.

    29.3. Respondent must pay the costs of this application.

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Waglay J
Date of Judgment: 10 October 2003
For the Applicant: Ruth Edmonds Attorneys
For the Respondent: Nicholls Cambanis and Ass.