IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JS 1016/04

In the matter between:

UPUSA OBO CHAIPUS KHUMALO	**APPLICANT**
And	
MAXIPREST TYRES (PTY) LTD	**RESPONDENT**

JUDGMENT

Molahlehi J

Introduction

[1] This matter concerns, the alleged unfair dismissal of the applicant, Mr Khumalo due to the operational requirements of the respondents. The applicant who was employed as a driver by the respondent was retrenched during October 2004. According to the respondent the termination of the employment of the applicant was due to commercial reasons arising from the loss of a contract and managers leaving and taking with them clients in the Wadeville branch.

Issues for determination

[2] The applicant contended that the dismissal was unfair because of the following reasons:

> *"a. The respondent failed to comply with the provisions of section 189(1) of the Labour Relations Act 66 of 1995 (the Act), in that it took the decision to retrench the applicant before commencing with the consultation process*

b. The respondent failed to comply with the provisions of section 189(2) of the Act in that he failed to attempt to reach consensus with the applicant on appropriate measures to ovoid or minimize the retrenchment or delay the dismissal.

c. The respondent failed to comply the provisions of section 189 [3] and [4] in that it failed to disclose the information to the applicants.

d. The respondents failed to comply with section 189 [6] of the Act; in that it failed to consider and respond to representations made by UPUSA on behalf of the applicant and failed to provide reasons for not accepting the same."

The respondent's case

[3] The first witness of the respondent, Mr Angelos who at the time of the retrenchment was responsible for national sales and acting manager of the Wadeville branch, testified that the retrenchment of the applicant arose due to the fact that during August, 2004, the respondent lost a contract at its Wadeville branch. The other factor which impacted on the business of the respondent at the time was the departure of senior employees who on their departure took with them some of the customers of the respondent.

[4] Initially five employees were identified for the possible retrenchment but the number was reduced later to three. The selection criteria used to select the three employees who consisted of two fitters and the third being the driver, was based on the principle of "last in first out"(LIFO).

[5] According to Mr Angelos, the consultation process which led to the dismissal of the applicant commenced during the middle of August 2004, when he met with

UPUSA represented by Mr Chokoe, one of the shop-stewards. At this meeting he informed Mr Chokoe about the retrenchments caused by the loss of both the site contract and customers. He indicated that it was contemplated that approximately five employees would have been affected.

[6] Subsequent to the above meeting the respondent addressed a letter to UPUSA requesting a meeting to discuss a possible retrenchment of a number of their members. The meeting was convened on the 9 September 2004, and this time UPUSA was represented by Mr Ntsoane. At this meeting UPUSA was informed that the reason for the contemplated retrenchment was due to financial difficulties that faced the respondent.

[7] Mr Angelos further testified that UPUSA was invited to make proposals regarding alternatives to avoid the retrenchment. One of the alternative positions proposed by the respondent during the consultation process according to the version of the respondent was that the applicant be given the position of a fitter. Although carrying substantially the same terms and conditions of employment, the applicant rejected the proposal. It was indicated to the respondent that the applicant did not want to take any other position but that of being a driver. UPUSA was however informed that the applicant would be offered the driver position should one become available.

[8] The deliberations of the first consultation meeting were confirmed by the respondent in a letter to UPUSA by Mr Kalatsis. In addition to confirming the details of the issues which were discussed at the meeting, Mr Kalatsis also confirmed that UPUSA's representative had requested that they be given the opportunity to have a meeting with all their members about the matter and that he would revert back to the respondent by the 16th October 2004.

[9] On the 19th October 2004, the applicant was issued with a notice advising him that he was to be retrenched, and that his last working day would be that 2nd

November 2004. Subsequent to this notice UPUSA, per Mr Ntsoane send a fax to the respondent raising a number of issues regarding the retrenchment of the applicant. The key issues raised in that fax were as follows:

- "That the retrenchment of our member was unprocedural therefore we regard the retrenchment of our member as unfair both procedurally and substantively unfair.
- We have noted the fact that your reasons for retrenchment is not due to financial constraints but the course of your restructuring program.
- Therefore since the reasons for retrenchment is not based on economy rationale, therefore there are some alternatives to be considered first such as transfers, training of the employees for other skills for deployment.
- We also take note of the fact that no short time was ever worked as the employees were working ordinary hours and even overtime."

[10] In response to the above issues the respondent address the letter to UPUSA dated 1st November 2004, wherein it amongst others stated that:

> *"We refer to our meeting with your representatives Michael and Godfrey on the 6 October 2004, when you were notified that the proposed retrenchments at the time were due to the loss of a major contract and were because of operational reasons. Writer and your representatives even discussed the option(sic) given your member of an alternative position which he had rejected at the time. We further refer you to our telefax of the 7 October 2004 same which was received by yourselves on the 8 October 2004 as well as our manager's fax of the 19 October 2004 wherein we had complied with the request of your representatives.*

No short time was worked as that specific contract was lost as discussed, and the once again placed on record as you were well aware of that the retrenchments were for operational reasons and not as you allege due to the restructuring."

[11]UPUSA responded with a fax dated the 04 November 2004. In relation to the issue of consultation it is stated in that fax that:

"... even though you have discussed the losses of your major contract it does not justify the reason to retrench our member as there are alternatives that are applicable to have been considered instead of retrenchment".

[12]The second witness of the respondent, Mr Kolatsis who at the time was the legal director of the respondent testified that he got involved in this matter subsequent to the letter from UPUSA wherein the dates for the consultation meeting were proposed. The meeting was scheduled for the 6 October 2004.

[13]Although, Mr Ntsoane arrived at the meeting of the 6th October 2004, he had to leave because of other commitments. However, he indicated that the meeting should proceed with UPUSA represented by Michael and Godfrey including the branch shop-steward, Mr Chokoe.

[14]According to Mr Kolatsis in addition to discussing the details regarding the reason for the retrenchment including the procedure required by the bargaining council, they also discussed the alternatives to retrenchment. The respondent proposed the position of a fitter as an alternative to retrenching the applicant. The UPUSA representatives present in the meeting rejects the proposal.

[15]The other alternative considered according to Mr Kolatsis was that of looking at positions vacated by employees who were retiring. There was no driver position in these positions. The introduction of short time was regarded as not being feasible because of the nature of the business of the respondent.

The case of the applicant

[16]In essence the case of the applicant was that the respondent did not consult him or UPUSA before the retrenchment. He also testified that he never attended any meeting nor was he advised of meetings with management where his entrenchment was to be discussed.

[17]The applicant further testified that he discovered during the middle of 2005 and subsequent to his retrenchment that the respondent had engaged the services of other drivers. This information he obtained from other employees. He could however not confirm whether these drivers were in fact employed by the respondent.

[18]Mr Michael Luthuli, an official of UPUSA testified on behalf of the applicant. He testified mainly about what happened on the 6th October 2004, regarding the meeting which was scheduled to take place at the respondent's offices. He denied that there was any meeting between UPUSA and the respondent on that day. According to him he attended at the respondent's offices on that day for a meeting which was arranged between the respondent and UPUSA. On his arrival at the premises of the respondent he was, despite producing the letter confirming the meeting, told by one of the respondent's manager that there was no meeting arranged for that day.

Points in limine

[19]After the testimony of the first respondent's witness the respondent correctly abandoned its first point in *limine* concerning the jurisdiction of this Court to entertain the dispute. However the respondent persisted with its application to have UPSA joined as a party in the proceedings.

[20]In opposing the joinder application, Mr Luthuli argued that UPUSA should not be joined because its role in the proceedings was simply to represent its member and was in this regard acting in the same way as attorneys and advocates would

do. He further argued that in his 20 (twenty) years of experience in the labour field he has never heard of UPUSA being joined as a party to the proceedings where he was defending its member. He persisted with his argument and position even after the Court referred him to the judgment of *Similane v and Others v Letamo Estate (200) 28 ILJ 2053 (LC)*, where UPUSA was joined as a party to the proceedings before the Labour Court. Mr Luthuli argued that the judgment was made in error but UPUSA had decided not to appeal against it.

[21]In *Letamo Estate's* case the court held that UPUSA was a party to the dispute regard being had to the fact that it was one of the parties that referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") as was reflected in the LRA 7.11 referral form. The same is applicable in the present instance in that UPUSA is cited in the LRA 7.11 form as the referring party.

[22]Mr Luthuli further indicated in his argument that should the court find that UPASA is an interested party and should therefore be joined in the proceedings, he would immediately note leave to appeal against such a ruling because the Court did not have the right to cite UPUSA as a party.

[23]The court, thereafter issued an order that UPSA should be joined as a party to these proceedings. However, before the adjournment to allow Mr Luthuli the opportunity to consult further with the applicant for purposes of cross examining the first witness of the respondent who at that time was still in the witness box, he (Mr Luthuli) issued a threat to the witness to the effect he would "*get your neck when I comes back"*. The witness took exception to this threat and insistent on the court providing him with protection. Initially Mr Luthuli sought to play ignorance to the complaint of the witness. He later conceded and stated that he was joking and withdrew the statement he had made.

Arguments

[24]Mr Woodhouse, arguing for the respondent, submitted that in essence the case before the court was based on one version, which of the respondent as that of the applicant was bedeviled by contradictions. The contradiction arose between both the testimony of the applicant and his witness Mr Michael Luthuli on the one hand and the correspondence written by Mr Ntsoane on behalf of UPUSA and the applicant.

[25]Mr Luthuli, argued that the applicant was unfairly dismissed and that the applicant was the only person to be dismissed out of about 500 employees of the respondent, spread over 64 branches. He further argued that the applicant was dismissed at the busiest period of the business of the respondent and that the applicant was not consulted prior to his dismissal.

[26]After his dismissal, the applicant was according to Mr Luthuli replaced by another driver who was recruited from outside the respondent's workplace. In this regard he further argued that there was no reason to retrench because there was another driver employed after the retrenchment of the applicant.

[27]Similar to the respondent's point Mr Luthuli argued that the respondent failed to call Mr Ntsoane as a witness to support its case, and that in as for as reliance on correspondence from him (Mr Ntsoane) was concerned this was hearsay evidence. In relation to the calling of witnesses Mr Luthuli further argued that the respondent failed to call any of its supervisors or plant mangers to testify about the cancellation of contract.

Analysis of evidence and argument

[28]As a starting point the Court does not agree with Mr Luthuli that it was incumbent on the respondent to have called Mr Ntsoane as its witness. The evidence before the court indicate very clearly that Mr Ntsoane was a union official who was also a contact person in relation to this matter. In fact it would

appear from the testimony of Mr Michael Luthulu, the second witness of the applicant that Mr Ntsoane was incharge of dealing with this matter on behalf of the union. Exchange of correspondence prior to this litigation and the process leading to the dismissal of the applicant mainly originated from Mr Ntsoane, representing both the applicant and UPUSA. The testimony of Mr Ntsoane was key to the following facts:

- Whether the meeting of the 6th October 2004 took place.
- Whether the fitter position was offered as an alternative and,
- The applicant rejected the offer.

[29]Thus in my view the respondent having put forward a prima facie case, that Mr Ntsoane for the union and the applicant had conceded in correspondence to what transpired between the parties, it was for the union to have called him to clarify these issues, failing which to provide an explanation for such failure. There was no explanation why Mr Ntsoane was not produced as a witness and therefore the inference to be drawn is that the applicants feared that he would give adverse evidence against the applicant or for that matter confirmed the version of the respondent.

[30]It is well a established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn. See *Similane* (supra) and the authorities referred therein.

[31]In *Shitsonga v Minster of Justice and Constitutional Development and Another (2007) 28 ILJ 195 (LC)*, the court held that failure to call a witness is reasonable in certain circumstances, such as when the opposition fails to make out a prima facie case. In that case (at para 12) Pillay J, went further and held that:

> *"But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the*

facts as this failure leads notorally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case."

[32]It is important in the present instance to note that the letters written by Mr Ntsoane were not disputed by the applicant neither was his authority to represent the union and the applicant placed in issue.

The Legal principles

[33]An employee is protected from unfair dismissal by the provisions of s185 of the Act. Section 188 of the Act provides that a dismissal is unfair if an employer fails to prove:

"(a) that the reason for the dismissal is for a fair reason

(i). . .

(ii) Based on the employer's operational requirements and;

(b) That the dismissal was effected in accordance with fair procedure."

[34]Termination of employment based on operational reasons is governed by s189 of the Act. Section 189 (1) of the Act requires the employer to consult with the employees or their representatives when it contemplates a dismissal because of operational requirements.

[35]Section 189 (2) (a) (i) of the Act requires the employer and the consulting parties to reach consensus on the appropriate measures to avoid or to mitigate the adverse effect of dismissals.

[36]The employer is further required by section 189 (3)(b) of the Act to disclose to the other consulting parties the reasons for the proposed dismissal and the alternatives it considered before considering dismissal. Another requirement is that the employer is obliged to provide reasons for rejecting each of the alternatives proposed by the consulting party.

[37]The law does not distinguish between dismissal arising for economic reasons and restructuring based on other business considerations. In *Monika Lukomski v TTS Tool Technic System (PTY) Ltd,* case number JS3581/05, Francis J held that:

> *"I accept that an employer has a prerogative to restructure a business operations. . . Financial pressures or hardships are not always the only reasons for restructuring or retrenchment. This much is clear from the provisions of section 213 of the Act which it defines operational requirements based on economic, technology, structural or similar and needs of an employer."*

[38]Section 189 (7) of the LRA requires the employer to select the employees to be dismissed according to a selection criteria-

> "(a) *that have been agreed to by the consulting parties or*
>
> *(b) if no criteria have been agreed, criteria that are fair and objective."*

[39]It has been held that the test for substantive fairness in dismissals for operational reasons is whether the retrenchment is genuinely justified by the operational requirements. See *FAWU and Others v SA Breweries LTD* (2002) 11 BLLR 1093 (LC) at 1109B (D) and *Telkom SA (supra) and Decision Survey International (PTY) LTD v Dlamini and others (1999) 5 BLLR 413(LAC).*

[40]The issue that arises from the facts of the current case is whether the reasons advanced by the respondent were genuine and the dismissal was a measure of last resort. In other words the respondent could do nothing to avoid the dismissal of the applicant.

[41]In terms of section 188(1) of the Act a dismissal is unfair if the employer, in this instance the respondent fails to prove that the reason for dismissal is a fair reason based on the employer's operational requirement.

[42]The case of the applicant was that the dismissal was unfair because the respondent had employed other drivers after his dismissal. This issue was never raised in the applicant's pleadings. It was only raised during the trial.

[43]The respondent's version was that they had no idea who the three drivers listed in the list the applicant submitted during the hearing were. During cross-examination the applicant could not indicate when were these drivers appointed and also whether they were permanent or casual employees. He claimed that the list was given to him by the other employees of the respondent. These drives were accordingly to the applicant employed during 2005. The only employee who the respondent's witness could identify in the list was Daniel Motlatsi who was transferred from Meyerton to the Wadeville branch.

[44]The applicant had difficulties to explain why the issue of the employment of additional drivers was not previously raised but only to be raised on the first day of the trial. For this reason, I am of the view that balance of probabilities favours the version of the respondent that save for the transfer of Mr Motlatsi there were no other drivers employed after the dismissal of the applicant. However, there is no evidence showing that the transfer Mr Motlatsi had any bearing on the fairness of the dismissal of the applicant. He was transferred from another branch of the applicant.

[45]Before dealing with the selection criteria, I need to deal briefly with the reason given by the respondent for the retrenchment. In the statement of case the applicant contends that the respondent failed to give reasons for the retrenchment. The point is not pursued with the same vigor in the heads of argument. In the heads of argument it is contended that the applicant was not given the opportunity to be informed about the retrenchment to be able to put his case before management.

[46]The argument cannot be sustained in the face of the letter of the 30 October 2004, addressed by UPUSA to the respondent wherein the reason for the retrenchment is noted. This is further confirmed by another letter from UPUSA wherein the discussion regarding *"the losses of the major contract as the reason given for the retrenchment is confirmed."* The applicant could not explain why this was not raised in his statement of case.

[47]Turning to the selection criteria, it is well established that it could serve ground for both substantive and procedural fairness in a retrenchment case.

[48]The version of the respondent with regard to the selection criteria was that the applicant had been employed for a period not longer than that of the other drivers. The applicant in his evidence in chief testified that two other employees who were employed as drivers at the time of his retrenchment had lesser service than his.

[49]The testimony of the respondent's witness when he testified that the other drivers had longer service than that of the applicant was never challenged. The same applies to the testimony of the respondent that even Mr Motlatsi who had been transferred from another branch had longer service than the applicant.

[50]The applicant could not substantiate on what basis he based his allegation that the two drivers had a shorter period of employment with the respondent than him. He testified during cross-examination that he had no knowledge of the record of employment of the two employees and further conceded that he could not dispute the evidence of Mr Kalatsis and Mr Angelos' evidence that the two had longer services.

[51]In these circumstances it is hard to belief the version of the applicant particularly taking into account that such an important matter was not raised in the letter by Mr Ntsoane wherein all the related matters were raised in a precise manner. It is clear that in writing this letter Mr Ntsoane applied his mind and

fully understood the issues arising from this matter. This is an issue he could not, have missed if it at all existed.

[52]It is also strange that UPUSA never raised the issue of LIFO in the pre-trial minutes which was conducted on 21 June 2005. If it was an oversight the applicant had all the time to have sought an amendment and possible correction of the pre-trial minutes.

[53]In my view for the foregoing reasons the applicants' claim stands to be dismissed. I see no reason why costs should not follow the results in particular having regard to the manner in which UPUSA approach the prosecution of the matter.

[54]In the premises I make the following order:

1. UPUSA is joined as a party to these proceedings.
2. UPUSA is to pay the costs of the joinder application.
3. The dismissal of the applicant was both substantively and procedurally fair.
4. The applicants claim is dismissed.
5. UPUSA is to pay the respondent the costs of having to defend this claim.

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MOLAHLEHI J

Date of Hearing: 21st February 2008

Date of Judgement: 12th September 2008

APPEARANCES:

For the Applicant: Mr E Luthuli of United Peoples Union of SA

For the Respondent: Mr D Woodhouse of Perrott, Van Niekerk & Woodhouse Inc