REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 660/12

In the matter between:

KALENDA KABONGA **Applicant**

and

STRATEGIC HR SERVICES CC **Respondent**

Heard: **28 October 2013**

Delivered: **31 October 2013**

Summary: Dismissal for operational requirements – LRA s 189 -- procedurally unfair – offer made in terms of rule 22A – applicant ordered to pay one day's costs.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mr Kabonga, was employed by the respondent, Strategic HR Services cc. The respondent is a temporary employment service as defined in s 198 of the Labour Relations Act[1].

[2] Strategic HR dismissed the employee for operational requirements. Those operational requirements arose from the fact that its client, Swift Engineering, experienced a drop-off in demand due to an economic downturn. The employee worked as a fitter and turner at Swift but he was employed by Strategic HR. He was one of 12 employees, all working at Swift through Strategic HR, who were dismissed for operational requirements over the period May to July 2012.

[3] It is common cause that the respondent did not issue a written notice that included all of the information stipulated in s 189(3) of the LRA. At the beginning of the trial Mr *Jacobs*, for the respondent, handed up a written offer in terms of rule 22A. The respondent offered to pay the employee R40 000 by way of settlement of both costs and any other claim. The employee rejected it. It is common cause that he earned R9 513, 60 per month.

[4] The employee claims that his dismissal was substantively and procedurally unfair. He claims reinstatement, alternatively compensation equivalent to 12 months' remuneration, i.e. the maximum amount allowed by s 194 of the LRA.

Background facts

[5] Much of the background facts are common cause. Where they are not, I shall consider the evidence led by the respective parties.

[6] The employee initially worked for Swift as a turner since 2003. He resigned to pursue other alternatives. He was re-employed by Strategic HR in 2008 and was again placed at Swift as a turner. He was initially employed on a series of fixed term contracts. In January 2012 he was offered permanent employment. He was dismissed for operational

[1] Act 66 of 1995 (the LRA).

requirements in July 2012. He was one of 12 employees employed by Strategic and working at Swift to be dismissed for operational requirements during the period May to July 2012. He was the only one who referred an unfair dismissal dispute to the CCMA.

[7] Swift is an engineering company that manufactures steel equipment. The employee worked in a department that manufactured neck rings and man lids. He worked on the lid line using a conventional turning machine.

The evidence

[8] The respondent called two witnesses and the applicant testified on his own behalf.

Hull

[9] Mr Wayne Derek Hull is a member of Swift. He provided some background information about the manufacturing process. He has known the employee for a number of years.

[10] At the beginning of 2012, Swift purchased a press to assist in the mechanised manufacturing process. At the same time, it experienced a downturn in production due to a drop off in demand from its international customers. Hull told the site supervisor of Strategic HR, Jonathan Stevens, that he no longer required the full complement of employees placed by Strategic.

[11] On 17 January 2012 Stevens and Hull held a meeting with all the affected employees. Mr Kabonga attended the meeting. Stevens and Hull informed them that they were contemplating retrenchments due to a downturn in production. They contemplated the redundancy of twelve posts. Stevens placed notices on the notice board at Swift. It read as follows:

> "**NOTICE**
>
> **DOWN SCALING OF STAFF**
>
> **Dear employee**
>
> As per consultation during our meeting on 17 January 2012, we have been informed by our client that due to operational requirements the unfortunate

reality is that downscaling of staff is unavoidable. We regret to advise you that your position with the company might be affected by this.

I will start consultations with the effective personnel starting Wednesday, 18 January 2012.

Yours faithfully

Jonathan Stevens."

[12] Stevens had further individual meetings with the affected employees. Hull and Stevens also had regular meetings on Wednesday mornings with the employees. They reiterated the need to retrench. Employees were retrenched in a scattered fashion: some in May and some in June and July 2012. They tried to keep Kabonga on for as long as possible until his dismissal became inevitable.

[13] On 31 May 2012 Stevens placed a further notice on the notice boards in similar terms to the one of 17 January 2012. He also handed copies of this notice to all of the affected staff members. Kabonga signed receipt of the notice. Hull pointed out Kabonga's signature on the notice included in the court bundle.

[14] At no stage did Kabonga approach Hull to propose alternatives to retrenchment. Kabonga was then issued with a notice of retrenchment that included the following clauses:

"As you are aware discussions have been held with personnel since 12 June 2012 about present manpower and personnel reduction. The circumstances unfortunately do not allow us to continue with the present manpower and personnel reduction at Strategic HR Services – site: Swift Engineering has become necessary.

We regret to inform you that your position at Strategic HR Services – site: Swift Engineering is affected by this and that your services will be terminated on 13th of July 2012. If it applies, you will receive a severance package of one week's salary for each completed year of service as of July 2011 [*sic*].

If a vacancy should arise within the following six months for which you are qualified, you will be given the first option."

[15] None of this evidence was seriously challenged under cross examination. Hull confirmed that Swift was still using three conventional turning machines. Another turner who was working there at the time when Kabonga was retrenched, Tshunza Mboyamba (aka Patience), was still operating one of the machines. Kabonga had not been replaced.

[16] Mr *Lawrence* did not dispute any of this; nor did he ask Hull to explain when Mboyamba had been employed and why he had not been dismissed. Although he asked Hull about the consultations in January and May 2012, he did not dispute that Kabonga had attended those meetings.

Stevens

[17] Jonathan Stevens is a site supervisor employed by Strategic HR. Swift Engineering is one of the sites that falls under his supervision.

[18] Stevens confirmed that he offered Kabonga permanent employment from January 2012 after he had been employed on a series of fixed term contracts. However, during January 2012, Hull informed Stevens that he had to reduce the staff complement placed at Swift through Strategic HR because of a downturn in production.

[19] Stevens and Hull held a meeting with all of the affected employees on 17 January 2012. They explained the rationale for the contemplated retrenchments. Kabonga was at the meeting. After the meeting, Stevens placed the notice dated 17 January 2012 on the notice boards at Swift.

[20] Stevens also confirmed that he handed the notices of 31 May 2012 to employees and that Kabonga signed for receipt of the notice. Kabonga was kept on until July 2012 but by then there were no longer sufficient orders to keep his position open. On 12 June 2012 Stevens handed Kabonga the notice of retrenchment effective from 13 July 2012. Although Strategic HR also placed employees at John Thomson Africa and at Polyoak in the Western Cape, those companies did not have any positions available for turners. Should a position become available, it would be offered to Kabonga.

[21] Once again, Mr *Lawrence* did not place any of this evidence in dispute under cross-examination. Stevens confirmed that Swift was still using

three conventional turning machines and that Mboyambo was operating one of them. He conceded that Strategic HR had not followed the provisions of section 189 (3) of the LRA to the letter.

Kabonga

[22] In his evidence, Kabonga disputed for the first time that he had attended the meeting on 17 January 2012. According to him, he first heard of his contemplated retrenchment on 12 June 2012. He testified that it was only on 2 July 2012 that he received the letter that, according to Stevens, had been handed to him on 12 June 2012. He also disputed, for the first time, that Hull and Stevens had consulted with him and other employees on 17 January 2012; 31 May 2012; and at the regular Wednesday meetings.

[23] Even more surprisingly, Kabonga denied that it was his signature that appeared on the notice of 31 May 2012. He could not explain why his counsel did not dispute that when Hull and Stevens were cross-examined. Under cross-examination, he said that it was "the first time" that he saw the notice. In re-examination he testified that his counsel showed him the notice on the morning of the trial.

[24] In his evidence in chief, Kabonga testified that Mbyambo only started working at Swift in 2011. That version was not put to either Stevens or Hull. In cross examination, the version changed. Kabonga said that he was initially employed by Swift in 2003; he resigned; and when he was re-employed by Strategic HR and placed at Swift, Mbyambo had been employed in the interim.

[25] Kabonga further testified in cross-examination that he did not know of anyone else who had been dismissed during the period May to July 2012, despite the fact that the evidence of Hull and Stevens that 12 employees had been dismissed for operational requirements during that time went unchallenged.

Evaluation / Analysis

[26] In order to assess the probabilities, I have regard to the well-known test set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et cie & others:*[2]

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[2] 2003 (1) SA 11 (SCA) para [5].

[27] Kabonga was a particularly poor witness. His credibility leaves much to be desired. On a number of issues he proffered a new version contrary to the unchallenged evidence of the respondent's witnesses:

27.1 He denied that he attended the meeting on 17 January 2012;

27.2 he denied that he had been consulted at all;

27.3 he denied that he attended the meeting on 31 May 2012;

27.4 he denied that the signature on the notice of 31 May 2012 was his;

27.5 he offered a contradictory version as to when Mbyambo was employed by the respondent and placed at Swift;

27.6 he denied any knowledge of the other 11 employees that were dismissed for operational requirements while he was still working at Swift;

27.7 he denied that any weekly meetings took place on Wednesday mornings; and

27.8 he first offered the improbable version that he only saw the notice of 31 May 2012 during cross-examination, and then, in re-examination, he said that his counsel had shown it to him on the morning of the trial.

[28] The respondent's witnesses, on the other hand, were forthright and impressive. Hull was a no-nonsense witness who was clear about the requirements of his company and the role of Strategic HR. Stevens was rightly embarrassed by the fact that Strategic HR had not given its client proper advice conforming to the letter of section 189 (3). However, he maintained that he had a number of consultative meetings with the affected employees; that they were well aware of the need to retrench; that they had the opportunity to make alternative proposals; and that the spirit, if not the letter, of section 189 had been adhered to.

[29] Where there is a conflict between the evidence of Kabonga and that of the respondent, I have no hesitation in accepting the evidence of the respondent's witnesses.

[30] It is indeed startling that a temporary employment service that advertises itself as "your complete HR solution" could not so much as advise its client properly in terms of section 189 of the LRA. Strategic HR can also be criticised for the fact that it had employed Kabonga on a series of fixed term contracts over a period of four years; a state of affairs that was only corrected by offering him permanent employment shortly before he was dismissed for operational requirements. The fact that Swift Engineering had apparently outsourced most of its staffing to a temporary employment service also leaves much to be desired. All of this does nothing to dispel the bad reputation acquired by labour brokers in the South African labour relations landscape. However, none of that directly affects the merits of this case.

Conclusion

[31] The commercial rationale for the employee's dismissal was not challenged. Clearly, there was a fair reason for dismissal. The respondent concedes that it may have been procedurally unfair. However, that unfairness is of a technical nature. It is so that the respondent did not issue a written notice disclosing all of the relevant information outlined in section 189 (3). However, it did issue the affected employees with two notices explaining that "downscaling of staff is unavoidable" due to operational requirements; inviting those employees to consult; and it did, indeed, consult with them.

[32] The dismissal was substantively fair but procedurally unfair, albeit only to the limited extent outlined above. As the Labour Appeal Court pointed out in *Johnson & Johnson v CWIU:*[3]

> "[A] mechanical, 'checklist' kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved… If that purposes is achieved, there has been proper compliance with the section.

[3] [1998] 12 BLLR 1209 (LAC) paras [29] – [31], followed most recently in in *Makalima v Edu-Loan (Pty) Ltd* [2013] ZALCJHB 4.

> "Mention has already been made that section 189 is inextricably linked to the issue whether a dismissal based on operational requirements is fair or not. In testing compliance with its provisions by determining whether the purpose of the occurrence of a joint consensus seeking process has been achieved or frustrated, a finding of non-compliance by the employer will almost invariably result also in the dismissal being unfair for failure to follow proper procedure. It is difficult to envisage a situation where the result could be different. Non-compliance would not, however, necessarily result in the dismissal being substantively unfair."

[33] The respondent has attempted to comply with the provisions of section 189. It has not done so fully, in that the initial notice did not set out all of the required information in terms of s 189(3). That has led to some unfairness for the employee. The respondent acknowledged that and offered the employee a sum of R 40 000 in terms of rule 22A. That was a generous offer, equating more than four months' remuneration. Yet the employee rejected it.

[34] Given the technical nature of the respondent's non-compliance with section 189(3), I am of the view that the employee is entitled to no more than three months' compensation. That is a sum of R 28 540, 80.

Costs

[35] The employee has been partially successful. However, he has not been successful in showing that his dismissal was substantively unfair; indeed, he has put up no evidence to question the commercial rationale underlying his dismissal. In challenging the procedural fairness of his dismissal, his evidence was contradictory and disingenious. He did not play open cards with the court. Given that the evidence of the respondent's witnesses went unchallenged on crucial aspects that he later disputed in his own evidence, it is hard to fathom why he did not except the generous offer made by the respondent.

[36] Rule 22A(7) provides:

> "An offer may be taken into account by the court in making an order for costs."

[37] In this case, the compensation awarded by the court is less than the amount offered by the respondent in terms of rule 22A. That offer was in respect of compensation as well as costs. However, it was only made on the day of trial. In my view, the applicant should be ordered to pay the respondent's costs for that day only. Given the finding that the dismissal was procedurally unfair, I consider it to be equitable, according to the requirements of the law and fairness, for the respondent to pay the balance of the applicant's costs.

Order

[38] I therefore make the following order:

38.1 The dismissal of the applicant by the respondent was substantively fair but procedurally unfair.

38.2 The respondent is ordered to pay the applicant compensation in the amount of R 28 540, 80, being the equivalent of three months' remuneration.

38.3 The applicant is ordered to pay the respondent's costs for 28 October 2013.

38.4 The respondent is ordered to pay the applicant's costs for the balance of the application.

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Steenkamp J

APPEARANCES

APPLICANT:	A Lawrence
	Instructed by Parker attorneys.
RESPONDENT:	W Jacobs attorney.