REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 924/10

In the matter between:

STEPHEN P MAWER **Applicant**

and

NORTECH INTERNATIONAL (PTY) LTD **Respondent**

Heard: **15 – 17April and 3 May 2013**

Delivered: 31 January 2014

Summary: Retrenchment. Respondent having decided to retrench applicant after consultation on who was to be retrenched failed to consult on the timing of the dismissal, ways to mitigate the adverse affects of the dismissal and severance pay. Compensation awarded.

JUDGMENT

GUSH J

[1] The applicant in this matter who, until his dismissal for operational requirements with effect from 7 May 2010 was employed by the respondent as an operations manager. The applicant avers that his dismissal was both substantively and procedurally unfair and seeks an order that he be reinstated and/or compensated for his unfair dismissal.

[2] The respondent carries on business as a manufacturer and wholesaler of electronic parking and traffic modules in Pietermaritzburg.

[3] In the pre-trial minute prepared and filed by the parties under the heading "Facts that are Common Cause", the parties recorded the essential facts and background to the dispute. These facts are

(a) The applicant was employed with effect from 2 January 2002 and was dismissed on 7 May 2010.

(b) The applicant's duties included the purchasing of component resources for the purposes of manufacturing electronic modules; the planning of the materials, time and human resources required for the purposes of manufacturing various products; invoicing despatching and delivery of final products from point of manufacturer to customers; stores and inventory; quality control; maintenance and housekeeping and process control.

(c) During September 2008, the respondent created a new position of Operation Services Manager and recruited Mr B Dickson into that position. The position of Operation Services Manager was on the same level as the applicant's position. A number of functions previously performed by the applicant were transferred to the newly appointed Operations Services Manager. These responsibilities included maintenance control, process control and quality control.

(d) In January 2010 the respondent created a department called the "Industrialisation department under the control of Dickson, the Operations Services Manager. The function of this department was to facilitate and undertake the mass production of the products designed by the development engineers.

(e) On 4 March 2010, the respondent convened a staff meeting at which meeting it advised the employees that it was facing financial challenges and that retrenchments were becoming a possibility. At this meeting the respondent proposed to the staff that in order to assist the company

and in an attempt to alleviate the financial problems that they agree to the respondent taking a “pension contribution holiday" as a measure to attempt to avoid retrenchments. This entailed the respondent with the seeking the necessary approval to defer the payment of pension fund contributions for a period of a year The staff including the applicant acceded to the respondent’s request.

(f) On 26 March 2010, the respondent addressed a letter to the applicant notifying him in terms of section 189(3)[1] that the respondent was contemplating the termination of his services for operational reasons. The respondent addressed an identical letter to Mr Dickson, the Operations Services Manager. The letter referred to the restructuring of operations department (the department in which the applicant and Dickson were employed) in accordance with a revised organogram. The essence of the restructuring was to amalgamate the departments managed by the applicant and Dickson respectively and appoint one of them to manage the new department. The other manger would be retrenched.

(g) This letter set out, *inter-alia*: reasons why the respondent was contemplating the retrenchment; steps it had taken to avoid retrenchment, the number of employees the respondent proposed retrenching and set out a proposed severance package. The respondent concluded the letter by advising the applicant and Dickson that it wished to meet with them and offered to provide any information that they might require for this purpose.

(h) Various consultation meetings took place with the applicant and Dickson on 29 March 2010, 31 March 2010, 19 April 2010, 21 April 2010 28 April 2010 and 29 April 2010. During the consultation process various proposals on cost saving measures were submitted by both the applicant and Dickson. These proposals were discussed during the consultations and the respondent replied thereto in writing.

[1] Of the labour relations Act 66 0f 1995.

(i) The respondent at the initial meeting advised both the applicant and Dickson that it did not intend applying the LIFO principle to the selection of the candidate for retrenchment as it needed to retain the best skills taking into account the consolidated position that the respondent needed to fill. At the meeting of 28 April 2010, the respondent handed to the applicant and Dickson a competency evaluation sheet and advised both of them that intended using this assessment to determine which of the two employees was best suited and skilled for the new position.

(j) The consultations and the assessment were conducted by the respondent's managing director: components, Kemp, and its managing director: systems, Loubser. They completed the evaluation sheets. This evaluation of the applicant and Dickson and the outcome thereof formed the subject matter of the consultation that took place on 29 April 2010.

(k) The minutes of this meeting reflect that both the applicant and Dickson were present and the evaluation by Kemp and Loubser of both the employees was discussed at some length.

(l) The outcome of the respondent's evaluation was that Dickson had "scored" better than the applicant and was the person to be appointed to the new position. At the conclusion of the meeting the applicant was advised that accordingly he was to be retrenched. The respondent then handed the applicant a pre prepared "Settlement Agreement" which recorded that the parties had agreed that the applicant was to be retrenched and *inter alia* detailed the severance package ("calculated in accordance with the Basic Conditions of Employment Act) that he was to receive.

[4] Two witnesses gave evidence. The respondent had agreed that it bore the duty to begin and led the evidence of Mr Barry Kemp who is currently the Chief Operating Officer of the respondent and at the time of the applicant's

dismissal was the Managing Director of the Components Division. The applicant himself was the only other witness.

[5] During the proceedings, the parties agreed that the dispute was confined to an allegation by the applicant that his dismissal was unfair substantively and procedurally on the grounds of the selection criteria applied by the respondent that resulted in the selection of the applicant as the employee to be retrenched; and that the dismissal of the applicant was procedurally unfair as "the respondent failed to consult with the applicant [on] severance pay, notice period, separation dates and any other assistance that ought to have been given to the applicant in consequence of his identification of retrenchment" (sic).[2]

[6] Before analysing the evidence, it is necessary to set out the provisions of section 189 of the Labour Relations Act and the obligations and rights that it confers upon the parties.

[7] Section 189 of the Labour Relations Act headed: "Dismissals based on operational requirements" provides:

> 1. When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult- ...
>
> (d) ... the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.
>
> 2.The employer and the other consulting parties must in the consultation ... engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-
>
> (a) appropriate measures-
>
> (i) to avoid the dismissals;
>
> (ii) to minimise the number of dismissals;
>
> (iii) to change the timing of the dismissals; and

[2] Paragraph 4.2.8 of the applicant's statement of claim page 10 of the pleadings.

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.

3. The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or the period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;

(h) the possibility of the future re-employment of the employees who are dismissed;

(i) the number of employees employed by the employer; and

(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

...

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed dismissals.

(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the employees to be dismissed according to 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.

[8] In his evidence, Kemp explained in some detail the reasons behind the respondent's decision to restructure and the necessity for the retrenchments. He explained that the respondent is an electronics design and manufacturing company that distributes the products it develops and manufactures both nationally and internationally. 85% of the respondent's products are exported. It is involved in essentially four industries viz

(a) the parking industry division, which is the "most established" section of the business;

(b) a traffic division which supplying electronics for traffic equipment;

(c) "IdentiPark", a new system that the respondent had recently designed and developed; and

(d) a division called Head Count: a people counting system. The people counting system is the only system that is predominately sold locally.

[9] The IdentiPark system had been successfully developed and launched towards the end of 2007. It is a system designed to identify empty bays in a parking garage. The success of this system had led to the respondent obtaining loans from the Department of Trade and Industry for the purposes of acquiring equipment and properly structuring the company's production to deal with the anticipated production demand.

[10] Prior to this the applicant was the respondent's Operations Manager responsible for the production in the factory including procurement and logistics. The respondent had up to this time only produced small batches. The success of the of the IdentiPark system had necessitated an increase in mass production levels and the respondent had identified the need to establish an "industrialisation department" to ensure the management and facilitation of the production in the factory of the products designed by the engineers, or in other words to "manage the transfer of the engineering into the factory". This was the reason why the respondent had employed Dickson and appointed him to manage this process. Dickson's role was to oversee the technical side of production viz the manufacturing; process control management; and quality management.

[11] Towards the end of 2008, Kemp explained that the effect of the global financial crisis and the strengthening of the Rand had begun to have an impact on the respondent's sales and orders to its overseas customers. During 2009, the respondent's financial position had deteriorated due to the falloff in business. This had led to the respondent reassessing its budgets and forecasts. As a result, the respondent had commenced taking measures to reduce costs such as terminating the employment of contract of staff and encouraging all employees to reduce expenditure on electricity, telephone calls contracts and placing moratorium on overseas travel.

[12] On 4 March 2010, the respondent's management had met with the staff regarding the "pension contribution holiday" and had thereafter issued a section 189(3) notice to the applicant and Dixon and commenced the consultation process, as referred to in paragraph 3 above.

[13] In addition, Kemp explained that the positions held by the applicant and Dickson to a large extent overlapped and that it was it was not feasible to employ two managers in the production department. This had been behind the respondent's approach and reasoning that led to the proposed restructuring of the production facility that had led to the decision to employ only one manager in the operations department.

[14] The consultation process and the contents of the minutes were not in dispute. Aside from the applicant's averments that there was no valid and fair reason to retrench and in particular that the company's financial position was not such as to make it necessary and that the merits of his cost saving proposals would have obviated the need to retrench, the dispute revolved around two basic issues:

(a) firstly whether the procedure and implementation of the respondent's selection criteria was fair, substantively and or procedurally; and

(b) secondly whether the dismissal of the applicant was procedurally unfair in respect of whether the respondent complied with the provisions of section 189 regarding the obligation to consult in respect of "severance pay notice pay separation dates and any other assistance".

[15] Dealing firstly with the issue of whether the respondent had a valid and fair reason to retrench, I am satisfied that Kemp's evidence in this regard discharged that *onus*. The reasons proffered by Kemp as to why it was necessary for the respondent to restructure the management of the respondent's production that resulted in the retrenchment were proper logical and reasonable.

[16] Likewise, it is clear from the minutes of the consultation meetings that the proposals made by the applicant and Dickson were seriously considered and that the respondent's response thereto was reasonable.

[17] I am satisfied that the process adopted and followed by the respondent in dealing with the process surrounding the need to retrench the respondent complied with the principles succinctly enunciated by the Honourable Basson J as follows:

> The courts have consistently required a high degree of fair treatment in retrenchment cases because it is recognized that the employee is being dismissed through no fault of the employee. Integral also to the whole retrenchment process is the requirement that the employer approach the process bona fide and with an open mind especially with regard to measures and proposals to avoid retrenchment. An employer who approaches mala fide

> or with a closed mind in respect of alternatives or measures to avoid retrenchment can hardly come to court and argue that the dismissal was substantively and procedurally fair.[3]

[18] The next issue to be considered is whether the selection criteria applied by the respondent satisfied the test set out in section 189 of the Labour Relations Act. Subsection 7 provides:

> The employer must select the employees to be dismissed according to 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.

[19] It is clear from the evidence that the selection criteria applied by the respondent were not agreed between the parties, that being so it is necessary to consider whether the approached by the respondent satisfied the requirements that they be fair and objective.

[20] The evidence established that the respondent from the outset had identified the need to restructure the production department and that only one manager was required. I am satisfied that this decision was reasonable and fair in the circumstances and that the respondent was therefore left with the duty to determine fairly and objectively which of the two managers should be retained for this purpose. At the commencement of the process the respondent made it clear to both potential retrenchees that this decision was to be based on the respondent's requirements for the position and the relative skill and experience levels of the two employees in relation to that position.

[21] Having so advised the employees the procedure followed by the respondent, and having regard to the minutes of the consultation meetings the respondent properly and fairly addressed their representations and proposals on cost saving measures and alternatives to the retrenchment. Having done so the next step in the process was to select which employee was to be retrenched.

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[3] *Maritz v Calibre Clinical Consultants (Pty) Ltd and Another* (2010) 31 ILJ 1436 (LC) at page 451-2

This entailed an assessment of the relative strengths and abilities of the applicant and the Dickson. The two most senior managerial employees who both had dealings with the applicant and Dixon assess them on the basis of an evaluation form made available to the employees and which formed the subject of consultation.

[22] It is not unreasonable or unfair given the seniority of the employees in question and the nature of the restructuring process that criteria other than the simple application of LIFO should be applied. I am of the view that in the particular circumstances of this matter the respondent was entitled to adopt the retention of the most appropriate skills as the selection criterion. In so doing the respondent's most senior managerial employees based, according to Kemp on their knowledge of the various skills and aptitude of the applicant and Dickson concluded that Dickson was the most suitable candidate.

[23] There was no suggestion that the respondent in any way approached this exercise *mala fides* or having prior to the commencement of the consultation process determined that the applicant was to be dismissed and that the consultation process was merely a sham.

[24] I am satisfied that the process adopted by and the decision of the respondent selecting Dickson as opposed to the applicant, given circumstances under which this decision was made is in accordance the long line of cases in which it has been held variously that the test for substantive fairness is:

(a) whether "the decision is properly and genuinely justified by the operational requirements...That it was a reasonable option in the circumstances"[4]

(b) "...fairness is found not only in the consultation process and in the justifiability of the employer's decision on rational grounds; the reason must be fair. This is an objective enquiry that the court must undertake on the basis of the information available to it."[5]

[4] *FAWU and Others v S A Breweries* 2004 ILJ 1979 (LC).
[5] *Van Rooyen and Others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC) at 2750.

(c) "The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test."[6]

[25] The process however does not end there. Turning then to the issue of whether the procedure adopted by the respondent having concluded the selection process was fair. It is abundantly clear that the respondent despite having carefully and diligently complied with the requirements of section 189 of the Labour Relations Act regarding the consultation over the need to retrench and the selection of the employee to be retrenched, seemingly abandoned all consideration of what was required of an employer thereafter.

[26] In this regard it must be recorded that Kemp was a patently honest witness. He gave his evidence clearly and honestly. He made no attempt to justify the respondent's actions following the decision that the applicant was the employee selected to be retrenched.

[27] His description of what transpired at, and immediately after, the final consultation meeting established beyond any doubt that the respondent having diligently and properly consulted with the applicant on

appropriate measures to avoid the dismissals;

to minimise the number of dismissals; and

the method for selecting the employees to be dismissed;

[6] *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 ILJ 2264 (LAC).

simply proceeded to ignore the obligation to consult on:

the timing of the dismissals;

ways to mitigate the adverse effects of the dismissals; or

the severance pay for dismissed employees.[7]

[28] Kent described how, having identified the applicant as the employee to be retrenched he was, somewhat startlingly given his attitude towards the whole process, presented with a so-called "settlement agreement". That the applicant unsurprisingly did not sign.

[29] This “agreement” advised the applicant of the date of his dismissal and the severance pay he would receive. No consideration had previously been given to these issues let alone was the applicant given any opportunity to make proposals on these issues. It must be borne in mind that the process adopted at that stage was confined to the need to restructure, consideration of alternative proposals and the identification of which the two managers was to be retrenched.

[30] The process prescribed by section 189 of the Labour Relations Act however requires compliance with all aspects of the consultation process. The respondent’s failure to comply with this aspect thereof constitutes serious procedural unfairness. It is not sufficient for an employer to simply establish the need to retrench and identify the candidate for dismissal. The consultation process is at that stage incomplete.

[31] In the circumstances and for the reasons set out above, I am satisfied that whilst the dismissal of the applicant was substantively fair his dismissal was procedurally unfair. The level of procedural unfairness is not, as the respondent suggested, "extremely limited". The areas in respect of which the respondent failed to consult are issues related to the consequences of retrenchment. This, given the nature of a retrenchment viz a dismissal that is not the fault of the employee, is an important and vital part of the process. I

[7] See section 189(2).

am therefore satisfied that the applicant is entitled to the maximum compensation allowed by the act.

[32] As regards costs, there is no reason why in law or fairness that the costs should not follow the result.

[33] I accordingly make the following order:

(a) the respondent's dismissal of the applicant was procedurally unfair;

(b) the respondent is ordered to pay the applicant compensation in an amount equal to 12 months remuneration;

(c) the respondent is ordered to pay the applicant's costs.

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D H Gush

Judge

APPEARANCES

APPLICANT: L Naidoo

Instructed by Edward Nathan Sonnenbergs

RESPONDENT: W Shapiro

Instructed by Redfern and Finlay Attorneys