REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: JS 402/2011

In the matter between:

MOHLOTSANE MALEFU ELIZABETH **Applicant**

and

MOBILE TELEPHONE NETWORK (PTY) LTD **Respondent**

Heard: **27 May and 3 June 2013**

Delivered: **29 October 2013**

Summary: Retrenchment- unfair- selection criterion determined on the basis of serving the interest of the holding company, ignored the interest of the applicant, employee. Lifting of the corporate veil: Section 20 (9) of the Companies Act- The holding Company not joined and thus uplifting of corporate veil would be improper in these circumstances.

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant, in this matter, claims that her dismissal for operational reasons by the respondent was both substantively and procedurally unfair. The applicant contends that the dismissal was unfair because the respondent did not comply with the provisions of section 189 of the Labour Relations Act of 1995(the LRA) and its retrenchment policy.

[2] The respondent is a subsidiary of MTN Group, hereinafter referred to as "Group." It is common cause that both Group and the respondent (MTN SA) are independent entities registered as such in terms of the South African company law.

[3] The applicant together with five other employees in the finance unit known as "manco" were dismissed for reasons related to the alleged operational requirements. The applicant, being unhappy with that, challenged the dismissal. The challenge is based on a number grounds including that there was no justifiable reason for the termination, the consultation process was not proper and was unfair. It was further contended that there was no proper consideration of alternatives and no attempts were made to avoid or minimise the impact of the dismissal.

The respondent's case

[4] In support of its case that the dismissal was for a fair reason, the respondent presented a number of witnesses. The first witness of the respondent Mr Lodge, the general manager: financial, testified how the respondent was adversely affected by the global economic downturn at the time. It was as a result of this that the respondent developed a number of measures to address the problem including voluntary retrenchment.

[5] He further testified that during the second part of 2010, Group cancelled the financial service contract it had with the respondent. In terms of that contract, the respondent provided Group with management and administration services of its financial affairs. The respondent employed six people including the applicant to render that service.

[6] According to Mr Lodge, the respondent approached Group when the cancellation of the contract was announced and proposed that the unit be taken over as a going concern. The proposal was rejected by Group. It was as result of this that the respondent decided to embark on a retrenchment exercise. A meeting was subsequently arranged with staff including the six from the financial unit on 9 November 2010. The purpose of the meeting according to Mr Lodge was to inform the employees of the decision taken by Group and also to inform the six employees that their services would no longer be required.

[7] After this meeting, the respondent approached Group to discuss the recruitment of the affected employees by it. The respondent had no vacancies at that time according to Mr Lodge. Another meeting was held with the affected staff members on 2 December 2010, the purpose of which was to inform them that their services were no longer required by MTN SA and also to advise that Group would be advertising posts and that those who qualified may be invited for interviews.

[8] The applicant was absent at the meeting of 2 December 2010. All the employees, including the applicant were according to Mr Lodge informed through the calendar email system used at the workplace about that meeting. At that meeting, a letter of possible retrenchment was presented to those present . Those present at that meeting were also informed that Group had vacant positions and was willing to fill them in.

[9] The employee was notified of her dismissal with a letter date 16 December 2010 which reads as follows:

> ‘Dear Malefu
>
> **Confirmation of dismissal for operational reasons**
>
> We hereby confirm that the company has been unable to avoid your dismissal for operational reasons after consultation regarding the proposed re-structuring of the business.

> In the absence of any further communication from you, an agreement regarding the terms and conditions of your retrenchment has been and is attached to this letter.
>
> The company wishes to thank you for your support and wishes you every success in your search for alternate employment.'

[10] The second witness of the respondent was Ms Ramadan. Her testimony was that they briefed the affected staff on 25 October 2010 about the rational for the approach which management was to adopt in relation to the situation which MTN SA was faced with.

[11] The second meeting according to her was held on 27 October 2010. At this meeting, the employees were informed about the attempts made to engage with Group to see if they could be accommodated. The respondent had a further engagement with MTN Group after this meeting.

[12] On 9 November 2010, a further meeting was held with employees where they were given feedback as to the position of Group with regard to their taking the employees as a going concern. The employees were also informed about vacant positions at Group which they could apply for. The employees were also assisted with upgrading their CVs.

[13] Another meeting was held on 2 December 2010 where the employees were informed that the respondent had resolved to dissolve their unit and, thereafter, issued them with section 189 notices. The Applicant was not present in that meeting. A day after, Ms Ramadan called the applicant to a meeting where she was issued with the retrenchment letter which she was not happy to sign and requested that she be allowed to consult with her attorney first. The employee brought the signed letter of retrenchment to the respondent on 6 December 2010.

[14] During cross examination, Ms Ramadan was adamant that the applicant attended the meeting of 25 October 2010 but could not positively confirm that. In terms of assisting the applicant in finding alternative employment, the

witness testified that she did receive the applicant's CV and had forwarded it to the HR Group.

[15] The third witness of the respondent was Ms Mahommed who at the time was the supervisor of the affected unit and was one of the employees affected by the retrenchment. She testified that at the first meeting, the employees were advised of the restructuring process which management had to embark on. At the second meeting which was attended mainly by the employees affected by the retrenchment, the management informed them of the cancellation of the contract with Group. They were also told to prepare their CVs. She also testified that the applicant was present at the first meeting but did not attend the other meetings.

[16] It is common cause that Ms Mahommed, who was one of the retrenched employees, did not apply but was “mapped” into a position at Group. According to her, the work that she used to do at MTN SA was matched with the one at Group.

[17] The only witness who testified about the unfairness of the dismissal was the applicant herself. It is common cause that the applicant’s job title was team leader. There is some dispute as to what that meant in substance. The respondent contends that the title was inherited from the previous structure and that it did not carry with it any supervisory of leadership responsibility. The applicant on the other hand testified that she was responsible for the supervision of two of her colleagues’ work.

[18] The applicant testified that she attended only one meeting where she was given a letter to sign. She refused to sign the letter and indicated that she would only sign the letter once she has had an opportunity to seek advice about its contents. She subsequent to obtaining advice signed the letter and handed it to the respondent.

[19] The applicant testified that she applied for several positions but was unsuccessful and was in most instances never shortlisted. She was unsuccessful in the only interview she attended.

[20] The applicant conceded, during cross examination, that she declined a temporary position which was offered to her. The reason for declining the offer according to her was because the position was at the level low than the one she had occupied and the salary was very low compared to what she earned before she was retrenched. She earned in range of R16 000.00 and in the offer the salary was pitched at R7000.00.

[21] The applicant denied that she failed to attend meetings despite having been notified of the same. She did not deny the existence of the email which was attached to the respondent's documents indicating that she was invited to one of the meetings. She testified that the possible explanation for her not seeing the email was that it could have been sent to her during the period when she had gone to Lesotho for the funeral of her mother. She also testified that previously, the management would phone if a person failed to attend a meeting scheduled through an email.

Legal Principles

[22] The essential principle governing dismissal for operational reasons is that an employer has the right to terminate the employment of an employee on the ground of operational requirements. At the same time, the law imposes a duty on the employer to act fairly in terminating employment relationship for operational reasons.

[23] The duty to act fairly entails both in terms of the procedure followed prior to the termination and the substance of the reason for the termination. The procedural requirements for a fair dismissal are set out in section 189 which imposes a duty on the employer to consult with either the representatives of the affected employees or the employees themselves.

[24] The consultation has to be conducted with the objective of reaching a consensus on the appropriate measures to avoid the dismissal, to minimise the number of dismissals, to change the timing of the dismissal if possible and to mitigate the adverse effects of the dismissal. The other aspect of the procedure entails reaching a consensus on the selection criteria. Where an

agreement as to the selection criteria cannot be reached the employer has a duty to apply selection criteria that is objective and fair.[1]

[25] Turning to the issue of substantive fairness, it is trite that because of the notion that dismissal for operational reasons is a no fault termination, it has to be carried out as an act of last resort. In dismissal for operational reasons, the employer must show that before termination of the employment contract he or she had considered all other alternatives to retrenchment. It would thus be unfair for an employer to terminate employment on the basis of operational requirements if there is work that an employee can perform. It would also be unfair to dismiss if that employee can be trained for positions that requires skills higher than the one that he or she possess. In *Oosthuizen v Telkom SA Ltd*, the Court held that:[2]

> 'Implicit in sections 189 (2) (a) (i) and (ii) of the Act is an obligation on the employer not to dismiss and employee for operational requirements if it can be avoided. Accordingly, these provisions envisage that he employer will resort to dismissal as a measure of last resort. Such obligation is understandable because dismissals based on the employer's operational requirements constitutes so called no fault terminations.'

[26] The onus to show that the dismissal for operational reasons was fair lies with the employer.[3] The requirement that an employer must act fairly in a dismissal for operational requirements extends beyond the termination of the contract and has been stated in *NUMSA obo Members v Timken SA (Pty) Ltd*,[4] in the following terms:

> '[38] It is an established principle of our law that when the situation that led to the retrenchment improves, resulting in the need for additional personnel, the employer is obliged to give preference to the re-employment of the retrenched employees should they be suitably qualified.'

[1] See *Chemical Workers Union v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 (LAC) at para 84.
[2] (2007) ILJ 2531 (LAC) at para 4.
[3] See *NEHAWU and Others v Agricultural Research Council and Others* [2000] 9 BLLR 1081 (LC) at paras 41-49 and decision of *Decision Survey International (Pty) Ltd v Dlamini and Others* [1999] 5 BLLR at paras 27-28.
[4] (2009) 6 BLLR 548 (LC).

[27] The above principles are also embodied in the retrenchment policy of Group. It has not been disputed that the provisions of that policy is also applicable to MTN SA. Clause 5 of the policy specifically provides as follows:

> '5.1 Prior to any consultation taking place, the business rational for the contemplated restructuring and or retrenchment should be documented and authorised by the relevant Group Executive, Human Resources Executive and Group ER Manager.'

[28] Before dealing with the general principles governing a fair retrenchment, it is convenient to deal firstly with the relationship between Group and MTN SA and what its impact, if any that had on the fairness of the dismissal. The essence of the applicant's case in this regard is that the Court should uplift the corporate veil and find that the fiction in law that the two are separate entities does not apply because of the manner in which both conducted themselves in as far as the retrenchment of the applicant is concerned.

[29] It is common cause that whilst MTN SA is a subsidiary of Group, it is, however, registered a separate legal entity. However, the applicant contends that the corporate veil should be pierced because in all respect, the affairs of MTN SA are conducted by Group and more specifically as concerning the decision to retrench the applicant.

[30] The law regarding the piercing of the corporate veil is governed by the recently introduced section 20 (9) of the Company's Amendment Act 3 of 2011, which provides as follows:

> 'If on application by an interested person or in any proceedings in which a company involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, institutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may:
>
> (a) Declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of

a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) Make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).'

[31] It was argued on behalf of the applicant that the approach that was adopted in the English case of *Chandler v Cape PLC*[5] should be followed and, accordingly, the corporate veil should be uplifted. In that case, the parent company was held to owe a duty of care to an employee of the subsidiary company where the employee of the subsidiary was exposed to asbestos and as a result suffered asbestosis.

[32] I was also referred to the recent case of *Ex Parte Gore N.O and 37 Others*[6] where the Court had the opportunity to interpret the provisions of section 20(9) of the Companies Act. In that case, the Court after an extensive analysis of the concept of piercing the corporate veil and a comparative analysis with other jurisdiction, held that:

'[32] The language of s 20(9) is cast in a very wide terms, indicative of an appreciation by the lawgiver that the provision might find application in widely varying factual circumstances. The statute enjoins that its provisions be construed with the appropriate regard to subsection 5(1) and (2) read with s7 of the Act (including, the extend appropriate, a consideration of foreign company law) Approaching the interpretation of s 209(9) of the Companies Acct in that manner I am unable to identify any discord between it and the approach to piercing the corporate veil evinced in the case decided before it came into operation.'

[33] The Court further held that the relief under section 20(9) of the Act may be granted on application by any interested party or *mero motu* in any proceedings in which a company is involved.

[5] [2012] EWCA Civ 525.
[6] (18127/2012) [2013] ZAWCHC 21; [2013] 2 All SA 437 (WCC) (13 February 2013).

[34] The uncontested facts as they stand in this matter suggest very strongly that the lines between the two entities are blurred and at least in as far as the employment relations are concerned, Group seems to have full control over MTN SA. As stated earlier, Group refused the arrangement of a takeover but was prepared and engaged in the process of mapping in certain employees and subjecting others to interviews. However, Group having not been afforded an opportunity to respond, (through joinder) the corporate veil cannot be uplifted to place any liability on it in as far as the fairness or otherwise of the applicant.

Evaluation

[35] Turning to the issue of the unfairness of the dismissal of the applicant, I am of the view that it was both substantively and procedurally unfair.

[36] In as far as procedural fairness is concerned, I find that the respondent acted unfairly in dismissing the applicant in that it failed to follow the retrenchment procedure in particular those laid down in its policy. After making consultation compulsory, the policy requires a member of the Group, which includes the respondent to document the contemplated restructuring or retrenchment and for that to be authorised by officials specified therein. the exception to this rule in terms of policy is only where the affected employee waives his or her right in writing. The policy further sets out the steps and things which a member of the Group has to do and follow and these includes, having to put management's proposition to the employee at the first meeting of consultation, discussing the proposition with the employee and the HR ensuring that the record of the discussions are kept at all times.

[37] In terms of clause 5.7 of the policy, the third session of the consultation entails giving feedback and advice as to the way forward to the affected employees. And in terms of clause 5.8, management is required after the third step to engage in a one-on-one consultation on the possible alternatives available with the affected employee.

[38] In relation to the email, notice requiring the applicant to attend the meeting, it is in my view, that it was incumbent on the respondent, noting that it was

dealing with a no fault dismissal, to have checked as to the reasons for the applicant not to attend the meeting. The respondent should in the circumstances of this matter have contacted the applicant to find out as to whether she did receive the email and what the reason was for her not to attend the meeting. It is, therefore, my view that had the respondent not been in a rush to terminate the employment contracts of the applicant it would have made enquiries as to why the applicant did not attend the meeting. Clause 10 of the policy provides that if there are no alternatives all employees who are affected has to be informed by way of a meeting and in writing. The respondent provided no evidence of compliance with the above.

[39] I am also of the view for the reasons that follow that the dismissal of the applicant was substantively unfair. Before doing so, it seems appropriate to address the issue of the applicant refusing to accept the offer of the temporary employment which was made by the respondent. It is indeed correct as the respondent contended that the law imposes the duty of consensus seeking and corporation on both an employer and an employee to find a solution to avoiding a retrenchment. It may on the basis of this principle be said that the employee is to blame for the ultimate result of her retrenchment. In my view, having regard to the totality of the facts and the circumstances of this matter, I do not believe that the applicant can be faulted for unreasonableness in rejecting the offer. In other words, the applicant was justified in rejecting the temporary employment accompanied by a significant reduction in salary which was offered to her.

[40] The principles of fairness requires an employer when contemplating retrenchment to constructively consult with an employee/s with the view to reaching consensus *inter alia* as concerning alternatives to retrenchment. In the present instance, as indicated above, the respondent failed to afford the applicant the opportunity to make such representation by assuming that because the applicant did not respond to the email notice she was not interested in participating in the consultation process. As indicated earlier, the respondent acted unfairly in folding its arms and assuming after communicating through an email that the applicant was not interested in

finding a solution to the problem of her retrenchment. This approach has deprived the applicant the opportunity to make submissions as to available alternatives to retrenchment. It also resulted in the respondent not sharing with the applicant what alternatives it had considered before resorting to the retrenchment.

[41] The other aspect of the unfairness of the dismissal of the applicant arises from the selection criteria. It is trite that in a retrenchment exercise an employer has a duty to consult with the affected employee/s with the view to reaching consensus with regard to the selection criteria for retrenchment. In this instance, no consultation took place because of the attitude the respondent adopted arising from the email notice referred to earlier.

[42] It is trite that where there is no agreement as to the selection criteria, the employer has the duty to adopt a fair and objective criterion. The criteria adopted by the respondent is stated in the letter date 1 December 2010, which *inter alia* provides:

> '4. Selection criteria
>
> The following will be adapted (sic) in this move
>
> - Mapping of jobs per the Group structure to +60% fit.'

[43] In my view, the mapping into the holding company as a form of a selection criterion is clearly unfair. The objective analysis of the facts in this case indicates very clearly that the criterion was developed to meet the interest of the holding company, namely Group and totally ignored the interest of the applicant. In doing so, the respondent shirked its responsibility of determining an objective and fair selection criterion by leaving its determination in the hands of a third party being its holding company.

[44] Turning to the issue of the re-employment of an employee who had resigned prior to the retrenchment, the version of the applicant was not disputed by the respondent. It was also not disputed that the position was never offered to the applicant. This does not accord with the principle of fairness in terms of which

an employer has a duty to offer employment to retrenched employee/s if the economic situation improves and the need to fill in positions arises.

[45] In light of the above and having regard to the totality of the facts and the circumstances of this matter, I find the dismissal of the applicant to have been both procedurally and substantively unfair.

Order

[46] In the premises, the following order is made:

1. The dismissal of the applicant for operational reasons was both procedurally and substantively unfair.

2. The respondent is ordered to reinstate the applicant retrospective to the date of her dismissal without loss of any benefit that may have accrued.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mashego R.K

For the Respondent: Advocate A.M Mtembu

Instructed by: Mashiane Moodley & Monama Attorneys