REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, AT JOHANNESBURG

JUDGMENT

Reportable

Case No.J2539/10

In a matter between:

BIFAWU & SACCAWU OBO

P.V. MPANZA & 9 OTHERS Applicants

and

ZURICH INSURANCE COMPANY OF SOUTH AFRICA Respondent

Heard: 26 June 2014

Delivered: 23 April 2015

Summary: Claim of unfair dismissal due to operational requirements of the employer - consultation facilitated in terms of S189A – effect of S189A (19) to procedural fairness - new structure created and job offers made but unreasonably rejected- right to severance pay forfeited.

JUDGMENT

CELE J

Introduction

[1] The applicant seeks an order for the re-instatement of nine of its members who were in the employment of the respondent, following their dismissal carried out consequent on a facilitated consultation in terms of section 189A (3) of the Labour Relations Act[1] ("the Act"). The applicant also relies on section 187 (1) (c) of the Act to contend that the dismissal of its members was automatically unfair. The respondent opposed this application and simultaneously raised three points *in limine*.

Factual Background

[2] The respondent is a company operating in a short term insurance industry in South Africa. It is a wholly owned subsidiary company of the Zurich Group with the head office in Zurich, Switzerland. During 2008/2009 this industry faced severe economic challenges compounded by the economic recession which hounded the financial markets of the world at the time. Quite apart from the general recession, the respondent believed it sustained an underwriting loss in 2009 of more than half a billion rand and a net loss of approximately R300 million. The respondent believed that the loss incurred was contained by having its Botswana operation as a rescue package for its South African company. As a listed entity, the financial statements of the respondent are a matter of public record. In October 2009, the respondent had a new Chief Executive Officer ("CEO"), appointed in the person of Mr Guy Munnoch. He took the decision that the significant financial loss incurred by the company was not acceptable and that a business transformation was to take place.

[3] The employees involved in this matter and on whose behalf the applicant referred this dispute were part of more than one thousand staff compliment of the respondent. About 840 of those employees were not members of any union. The applicant was one of at least three unions operating in the workplace of the respondent in various provinces of South Africa. The other two were SACCAWU and SASBO.

[4] On 8 February 2010, the respondent issued a section 189 (3) notice to its employees and to the unions operating in its workplace. Soon thereafter, the

[1] Act Number 66 of 1995.

respondent embarked on various road shows dealing with intended remedial steps it wanted to initiate. The CEO handled the presentations in all offices of the respondent, including those in Johannesburg, Cape Town, Durban, East London, Nelspruit, Polokwane and Bloemfontein. The presentation was done through various slides. The applicant unions were given such slides in March and April 2010. Employees at smaller non-metro offices attended road shows at their closest head office.

[5] The Executive was largely remodeled and replaced in late 2009 such that the business transformation was a top down rather than a bottom up exercise. The result was that the Executive and Senior Management were affected in the formation of a new organogram and this was some months before the employees in the main retrenchment exercise were impacted. The recruitment process and the advertising of the organogram followed and the population of the new organogram was implemented in June 2010, although certain senior placements were undertaken earlier.

[6] A section 189 (3) notice of retrenchment issued to the employees' representative was couched in terms which included the following:

> 'Contemplation of Business Transformation Programme. Section 189 (3) Letter
>
> 1. The Company is embarking on a business transformation program designed to build a platform for delivering its future growth aspirations. As a result the program may involve rationalization/restructuring which may lead to the retrenchment of some of its employees for operational requirements.
> 2. It should be emphasized that no final decision has as yet been taken in the regard nor will any final decision be taken in the absence of full and proper consultation with your Employee Consultative representative. However, the Company firmly believes that the changes proposed are vital to the future success of the Company.
> 3. In order to ensure due compliance with the law and accepted industrial relations practice the Company is now commencing

a consultation process with regard to the contemplated transformation program. The consultation process will be conducted with the trade unions which represent a small number of employees in the work place. Those employees who are not members of the trade unions will be represented by their Employee Representative Forum currently operational in the organization.

4. In order for representatives of the employees to make a meaningful contribution to the proposed transformation program during the consultation process, and in keeping with the Labour Relations Act, we now provide you with the following relevant information.

The reasons for the proposed dismissal

To ensure that we are able to compete successfully in the market and that we can deliver strong financial and business results in the future, we need to implement a business transformation program that will provide us with a solid platform for future growth. Before we reposition ourselves strategically, we must first take some immediate action to reshape ourselves operationally. This will ensure we can facilitate this growth and continue to meet our customers' and brokers' evolving demands. As stated above we are now entering into a formal consultation process and no final decision will be taken in this regard until employees have been fully consulted.

Employees affected

There are approximately 600 employees affected as a result of the Business Transformation Program. See annexure A for a complete list of job categories affected.

Timing of the proposed retrenchment

The retrenchment exercise in which the Company contemplates engaging will be in terms of section 189A of the Labour Relations Act 1995 (the LRA) due to the size of the Company and the number of employees who will be affected. The Company has requested that a facilitation process under the auspices of the CCMA be conducted. This means that the Company will only be in a position to give notice of termination

in the event that it becomes necessary to do so after a period of sixty (60) days has elapsed from the date of this letter, unless an earlier date is agreed to during the consultation process.

Number of employees employed

The Company employs 1007 employees as at date of this notice.

Request for facilitation

The Company attaches LRA Form 7.20 requesting the CCMA to appoint a facilitator. Annexure B.

We propose to consult with representative of the employees regarding the issues raised in this letter on 15 February 2010. Should you require any further relevant information in respect of the consultation process please advise your Manager immediately'.

[7] Consultations were set for the dates: 19 February 2010, 02 March 2010, 15 March 2010, 08 - 09 April 2010 and 18 - 19 May 2010. Mr M D Ally a Commissioner of the Commission for Conciliation, Mediation and Arbitration, ("the CCMA"), presided over the consultation process though he was later replaced by Senior Commissioner Shaun Christian. The Applicant did not attend on the 02 March 2010 although it was invited to send a replacement representative following its suggestion that it had other commitments. The unions had their own meetings hosted by the respondent on 07 and 08 March 2010. There was also an exchange of information and correspondence between the respondent and all three unions.

[8] Initially, it was agreed that the consultation process would be carried out with all participants sitting together. Differences in strategies began to emerge among consulting parties. These led to the respondent finally consulting with the unions separately. A separate consultation took place between the respondent and the Employee Forum. Unions and the Employee Forum submitted a number of questions to the respondent as part of the consultation exercise and the respondent furnished answers thereto. Some of the answers

were not to the satisfaction of the unions and further questions were raised. How this process unfolded and the extent of the deliberations is demonstrated by a few of such questions and answers on business transformation and financial information:

'**Business transformation**

Questions	Answers
Part 1: **QUESTIONS/ CONCERNS REGARDING THE COMPANY'S BUSINESS RATIONALE FOR THE PROPOSED CHANGES IN RESPECT OF TRANSFORMATION AND SKILLS AND DEVELOPMENT**	
1.1 The transformation programme requires the introduction of new work processes and systems. Could you please explain what **different skills, knowledge**, **experience** and **expertise** are required to effectively and efficiently support new business model?	This will vary across the specific technical functions and will be dependent on the level of change within each individual role. It is also important to recognize that people may already have the skills sets required to operate within the new roles in the structure. To use the Claims function as an example, at a general level, the following would be some of the skills required in the new model for specific areas: • Enhanced skills around customer and broker relationship management and knowledge will be needed. (What is meant by "enhanced skills"?) • Complex claims will require specialized in-depth knowledge of motor and non-motor insurance

	claims. (What is meant by “complex skills”?) • The technical claims department will need an enhanced legal knowledge, particularly with respect to managing high value complex claims. (What is meant by “technical skills”?) • The fraud roles will require strong experience in forensics. • Quality assurance will need a good understanding of TQM (what is TQM?) methodology and other quality assurance techniques. (What is meant by “QA techniques”?) The required skills set, experience and expertise for each role is documented for each role profile in each area of the organization. Now that it is documented the Union requires the job profile of all positions in both the current and new structures.
1.2 What are the objectives of this transformation?	The overarching objective of the transformation is to ensure we take the immediate action necessary to improve our financial and business performance, supporting the development of a platform for future profitable growth. To achieve this ambition and to ensure we deliver an underwriting profit in future years, we need to significantly improve our Combined Ratio and we are targeting a >6% improvement in 2010. Along this, our proposals reflect the need to enhance focus

	around areas such as underwriting rigour and control, claims efficiency and effectiveness and cost efficiency. This response fails to address the objectives and "objectives" relate to the means/tools that the company wishes to implement to ensure that the company is more profitable.
1.3 Why is the Company taking away underwriters from geographical areas like George and moving them to Port Elizabeth if they know the brokers and type of business so well?	The new model separates the sales and underwriting roles, allowing the market underwriters to focus exclusively on risk selection and rating. Thus having underwriters in Port Elizabeth to deal with George business allows us to obtain greater efficiency (reduced costs due to economies of scales and task specialization [this has not been proven at any stage and it is our submission that the company is making a serious mistake to eliminate knowledge anchors in a specific areas- and for this reason please explain why Klerksdorp and George will not have any market underwriters when the intention is to enhance and retain a sound broker and company relationship? <refer also to 4.5 which read: "it will ensure that we are able to efficiently and effectively deliver a high quality service to our customers and brokers, placing that at the heart of all we do.">}), consistency and control of the underwriting, improving the quality of our risk selection and pricing, which will ultimately improve the underwriting result. The underwriters will still have direct contact with brokers and the sales force will continue to operate in George so that broker insights and local knowledge

	can be effectively transferred between the two teams.
1.4 Why does the Company not review its position to retain its competitive edge whilst other competitors are increasing their foot prints in rural and coastal areas and moving closer to their clients yet Zurich is moving away from their business and customers?	We have carefully reviewed our market footprint as part of the proposed plans and we are confident that the new operating model will support our growth strategy and present the opportunity to increase market share. (Lack of information) whilst we are proposing to close four of our Sales offices, we are confident that these areas will continue to be serviced effectively through our other Sales locations. In addition, we intend to introduce a 'home working' model which creates the flexibility we require to ensure that we have the right level of presence in the right regions going forward. (Staff in virtual office positions: why can there not be sales staff and market underwriters? The company's response does not address the unions' concerns.
Questions	Answers

Part 2:

INCOMPLETE OR OMITTED FINANCIAL INFORMATION

2.1 Why is the financial information not disclosed or release in order to measure the alleged declining trends since 2004?	As with any organization, financial information is extremely sensitive and confidential and so we have to work within company guidelines around what we are able to release into the public domain. As a listed company, for Zurich South Africa, this governance is even more critical. It is noted that this is no excuse in terms of the Company's Act (especially after the new

	amendments) and the King II report. However, we recognize the need to ensure that people are kept informed and up to date with our performance and going forward we have committed to share our results at relevant points during the year so that people can see how we are performing. As part of the business case proposals we have presented a high level summary relating to the key financial indicators around the transformation programme, however more detailed information is available if required (Union is requesting same).
2.2 Why are the financial statements showing a profit for the year ended at December 2008 but the reviews financial report shows a loss- what really happened between 2008-2009?	The financial statements are audited by Price Water House Coopers and are publicly available for review. In addition, the business case highlights some of the key trends and influencing factors on our business performance- please refer to slides 4-7.
2.3 We are perturbed by certain statements that do not tie up:	
2.3.1 In your "in touch" news dated 26 Feb 2010, you mentioned that the gross premium income has grown by 1,7% (in 2008 it was R5,3b) - which you described as an incredible performance but further stated that you suffered an underwriting loss of R564 m, how can the company have liquidity problems if the income exceeds the losses?	This is incorrect. The wording to describe the growth in gross written premium (GWP) was 'credible', not 'incredible'. As specified in the CEO In Touch, this comment was based on the fact that with respect to our top line, we had still achieved a small amount of growth, despite cancelling R500 m of underperforming blocks of business mainly in the Personal Lines Group Schemes portfolio. The underwriting loss quoted in the question

	is correct and is the result of expenses (what expenses?) that exceed income. When expenses exceed income then it results in a loss. With respect to the comment around liquidity, very often companies suffer from liquidity problems even when the income exceeds the expenses. A good example is when sales are made on credit but the clients are slow to pay. Clearly when expenses exceed income then liquidity problems will ensue. In the business case however management highlights solvency as a much more urgent and compelling concern than liquidity.
2.3.2 How can the company declare dividends despite the losses suffered?	There was no dividend declared."

[9] While the consultation process had commenced, the respondent was simultaneously running skills development workshops. On 12 March 2010, the respondent issued a circular to all staff apprising them of the areas covered by the workshop and the details for the various sessions. A copy of the circular was sent to the applicant. The consultation process had various challenges and, at some stage, the facilitating commissioner had to be substituted. The unions complained bitterly about the inadequate supply of relevant information by the respondent and a failure of the first commissioner to assert his authority over the process. As an international company, the respondent wanted to introduce a business plan requiring highly specialized skills within an acquired model which it had introduced globally. According to the union that was done without proposing to host a workshop on lay-off scheme for consulting parties. A further complication came about when the respondent began to implement some of the decisions it had reached with the Employee Forum. The unions took exception to the approach, regarding it as a unilateral implementation of the changes to their exclusion. One communication made

by one employee to the respondent and a response thereto demonstrates the challenge confronting the respondent thus:

'Good day

I refer to the Road Show held on the 8th February 2010 in respect of the business transformation of Zurich South Africa.

It was advised that Allen's Neck, Klerksdorp, Bellville and Benoni office would be closing on the 31 May 2010. It was proposed that these employees apply for positions in Johannesburg when advertised- which should have been on the 22 February 2010. Those who did not apply would stand a chance of not receiving a proposed retrenchment package. I would assume that an office such as Klerksdorp would receive the proposed package as logistically they would be unable to travel to Johannesburg. In addition to this, in the case of an office such as Rustenburg where the representative of the Company will be home based, would the other employees be entitled to the purposed retrenchment package?

I would like to be considered as an extreme case for the following reasons-

- I have been with the Company for 20 years
- I am 59 years old
- I am only six years away from retirement
- I live 10 km from Benoni offices
- I have been blind in my right eye for eight years
- As a result of my disability travelling distances is a problem for me
- As far as a lift club is concerned, I only know of one person who lives in Springs and this would be out of her way.

Due to the delay in advertising the positions, would this have any effect on the said branches closing on the 31 May 2010?

Finding a position in the Insurance industry at this point in my career, should I not be successful at Zurich, would be difficult for me.

I have been approached for a senior position in the insurance Industry at all the same benefits currently given to me by Zurich. The distance of travel is an extra 12km and extra petrol will be included in my package with them. An

advantage here is that retirement age is completely open and not 65 definite. I feel confident in obtaining this position. Should I not be successful in a position with Zurich, would this give me a proposed retrenchment package? Could I be considered as an extreme case and not be subjected to the recruitment and selection process i.e. applying for a position, assessment testing and psychometric testing.

Your urgent attention would be appreciated- thanking you in anticipation'.

'Dear Francis

Please accept my apology for the delay in responding your email. I have tried to answer your queries as comprehensively as possible and trust that this clarifies any areas of uncertainty.

Office closure and effective dates

We do appreciate that for some people, personal circumstance may mean that relocation is not feasible. Affected employees would however be expected to apply for positions to location within a commutable distance from their current location. Should a suitable position not be available in their areas, employees would qualify for a retrenchment package. In instances where employees wish to be considered for a role in a location that is not within a commutable distance from their current location and are found to be suitable for a specific role, the company will provide relocation assistance in terms of our relocation policy.

Regarding office closure, there is a strong possibility that some of the areas may close later than the dates originally anticipated. Certain milestones that form part of the consultative process need to have been achieved before these changes are implemented.

Alternative positions

If you are employed by Zurich when your location is closed and your application for other positions is unsuccessful you will be offered a retrenchment package. If your employment with Zurich is terminated before your branch is closed you will not qualify for a package.

Consideration as an extreme case

Regrettable, we are required by law to apply a consistent selection process. We are therefore unable to treat individuals differently.

Regards'

[10] The unions rejected the business plan of the respondent. According to the respondent, there was much anxiety and frustration expressed by rank and file non-unionized employees because of the delay in finalizing the business plan, as demonstrated by the letter from Francis. The respondent felt that it had to strike a balance between pandering to the unions and addressing the concerns of the largely non-unionized workforce who communicated their concerns to the respondent over time. The respondent decided to populate its new organogram and it invited the employees to lodge their applications for the advertised positions. There are 234 employees who signed the settlement agreement for the voluntary termination of their services with the respondent. Mr Ally delivered his report to the parties with the applicant receiving it on 10 June 2010. The last five paragraphs of that report read:

'20) The SACCAWU official Mr Joseph had behaved in a very aggressive and abusive manner to the point that he had physically threatened the commissioner and had made very serious xenophobic statement towards the CEO of the company.

21) The process had degenerated due to the actions of the SACCAWU to a point that I felt that the lives of people were in danger together that of my own.

22) I ruled that the facilitation was adjourned upon further advise and left the meeting.

23) At this point at least 100 days had passed since the employer had issued the S189 (3) notice to employees.

24) I felt that no purpose will be served by continuing to facilitate the process as more 60 days had passed without any progress being registered'.

[11] The unions discouraged their members from applying for any positions with the respondent. Finally, on 1 July 2010, the respondent issued letters to terminate, with effect from 31 July 2010, the employment of the applicant`s members who had decided neither to apply for any positions in the new company structure nor to accept the voluntary severance pay. A dispute pertaining to the fairness of the dismissal arose and it was referred to conciliation and when the dispute could not be resolved, it was referred to this Court by means of 37 pages of the statement of case. The respondent filed its 31 pages of the statement of defense and it raised some points *in limine*.

[12] It is appropriate at this stage to consider the points which were raised *in limine*. A decision on them will indicate what evidence to consider. In the statement of defense the respondent submitted three points *in limine* but only one need be considered here while others, though not clearly pleaded, need to be considered with evidence led. The one point is that:-

> '1. The factual matrix of this application relates to a large scale retrenchment in terms of S189A. As such the Honourable Court is prohibited by S189A (18) of the LRA from determining procedural fairness.
>
> 2. Applicants already and failed (with costs) to launch an urgent application in terms of S189A (13) on 29 July 2010 and have exhausted their procedural remedies.
>
> 3. Notwithstanding this, the bulk of the allegations contained in the Applicants' Statement of Case concerns procedural matters and as such are irrelevant to this application….'

[13] Thus the respondent maintained throughout the trial that the large portions of the statement of case concern allegations of procedural unfairness that are irrelevant to the present matter in that they fall outside of the jurisdiction of this Court in terms of section 189A (18). In particular the respondent has referred to the following paragraphs of the statement of case as being excipiable:- 29.24.4 to 29.27.1; 29.33; 29.34; 29.41.3; 29.42.4; 29.41.7; 29.42; 29.48; 29.51; 29.52.11; 29.54; 29.55 to 29.68; 29.72; 29.76; 31 and 42 (42.1 to 42.6).

[14] The applicant contended that the paragraphs referred to were to serve as background facts but declined to amend its statement of case at the commencement of the trial. Instead a submission was made that, while this Court did not have jurisdiction in respect of procedural matters, procedural fairness was not only a value in its own right, but was a means of establishing whether substantive grounds were in fact present. Reliance was placed on *NEHAWU and Others v Agricultural Research Council and Others*[2] where it was held that:

> '…not merely to determine whether the requirements for a proper consultation process has been followed and whether the decision to retrench was commercially justifiable… The enquiry is whether the retrenchment was properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances'.

[15] While taking part in the consultation process, the applicant formulated an opinion that the respondent was not acting fairly. The applicant was not without a remedy. Section 189A (13) provided it with some options to consider as it states that if an employer does not comply with a fair procedure, a consulting party may approach this Court by way of an application for an order-

(a) compelling the employer to comply with a fair procedure;

(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;

(c) directing the employer to reinstate an employee until it has complied with a fair procedure; or

(d) awarding compensation, if an order in terms of paragraphs (a) - c) is not appropriate.

[16] The applicant was alive to these provisions as it did approach this Court on urgent basis after its members had been dismissed by the respondent. While negotiations were on-going it was up to the applicant to pick up the most

[2] [2000] 9 BLLR 1081 (LC) at para 27.

opportune moment to approach this Court in terms of section 189A (13). As already alluded to, the applicant did approach this Court, on urgent basis, even though with no success. For the application to be within the threshold of the Act, it had to be brought not later than 30 days after the respondent had given notice to terminate the employees' services[3]. The Legislature deemed it appropriate that a consulting party had to strike while the iron was still hot to bring to book a recalcitrant employer so as to comply with a fair procedure. A further protection accorded to the employees who have been served with a dismissal notice when 60 days have elapsed since the employer gave notice in terms of section 189 (3) of the Act, is to give notice of a strike[4]. To obviate any delays in this regard, the legislature dispensed with a need to conciliate the dispute. The applicant did not choose to exercise this option.

[17] The applicant's submission in this regard appears to conflate the provisions of s189A (18) with those of S189 (19). Section 189 (18) states that this Court may not adjudicate a dispute about the *procedural fairness* (my emphasis) of a dismissal based on the employer's operational requirements referred to it in terms of section 191(5)(b)(ii). Contrary to this provision, s189 (19) then provides that in any dispute referred to this Court in terms of section 191(5) (b) (ii) concerning the dismissal of a number of employees, this Court must find that the employees were dismissed for a *fair reason*, (my emphasis) if the conditions listed in (a) to (d) of the subsection exist. The applicant has confused the considerations for the determination of a fair procedure with those for substantive fairness.

[18] When the provisions for section 189A (18) are properly construed this Court is prohibited from adjudicating the part of the dispute which is about the procedural fairness of the dismissal based on the respondent's operational requirements as were referred to this Court by the applicant in terms of section 191(5)(b)(ii). The exception accordingly succeeds. The result is that all those paragraphs in the statement of case which bear reference to the fairness of procedure are ruled to be excipiable. They include paragraphs: 29.24.4 to 29.27.1; 29.33; 29.34; 29.41.3; 29.42.4; 29.41.7; 29.42; 29.48;

[3] See s189A (17)(a) and (b).
[4] See s189A (7)(b) (i).

29.51; 29.52.11; 29.54; 29.55 to 29.68; 29.72; 29.76; 31 and 42 (42.1 to 42.6). Any and all of the evidence led in relation to these paragraphs is found to be inadmissible. This Court will henceforth make no pronouncements on procedural fairness.

Substantive fairness

[19] As already indicated s189 (19) provides that in any dispute referred to this Court in terms of section 191(5) (b) (ii) concerning the dismissal of a number of employees, this Court must find that the employees were dismissed for a fair reason, if the conditions listed in (a) to (d) of the subsection exist. Those conditions are:

(a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs[5];

(b) the dismissal was operationally justifiable on rational grounds;

(c) there was a proper consideration of alternatives;

(d) selection criteria were fair and objective.

[20] Evidence led in this trial must therefore be seen against all the four factors.

Evidence

Was the dismissal to give effect to a requirement based on the employer's economic, technological, structural or similar needs?

[21] It remained common cause that the respondent dismissed the nine employees that were members of the applicant union. The respondent had then to prove that such a dismissal was carried out on the basis of a fair reason. Mr Clifford Nkosinathi Zungu, the Head of People Management, otherwise known as HR, was the only witness called by the respondent. According to him, the respondent frequently issued circulars to the staff through what it called "InTouch". One such circular was dated 26 February

[5] See also the definition of operational requirements in section 213 of the Act.

2010, issued by the CEO, Mr Guy Munnoch with the first to the fifth paragraphs reading:

> 'Dear Colleagues
>
> On 8 February I referred to our forthcoming annual results announcement and said that there was an immediate need to strengthen and improve the performance of our business. Our results have been released to the market and you will see from the explanation below that they reflect the difficult and challenging year we experienced in 2009.
>
> Gross premium income, in other words, the premiums we received from our customers grew by 1. 7 % to R5.4b (2008:R5.3b). This is a credible performance considering the cancellation of the underperforming blocks of business amounting to R500m, mainly in the Personal Lines Group Schemes portfolio, which no longer met our stricter underwriting criteria. Premiums in the Risk Finance division decreased for the same reason.
>
> Claims during 2009 increased by almost 19% and our expenses increased by 17% due to a number of large once-off costs like, for example, the data loss incident.
>
> Taking all of these factors into account, we ended the year with an underwriting loss of R564m. Compared to last year's figure – a loss of R38m – you will see that we are 400% down on 2008. Our combined ratio, which is our result expressed as a percentage, increased to 113.2%. A ratio that is greater than 100% means that the company is paying out more than it is receiving. Our general insurance result which includes investment income is also in a loss situation at R458m.
>
> Having seen these results, I am sure you will agree that swift and decisive action has to be taken to transform our business and lay the foundation for future growth and profitability. As I have said before this is an exciting new chapter in Zurich South Africa's history and is one that will position us strongly as we aspire to be a leader….'

[22] Mr Zungu confirmed the position of the respondent as stated in the circular. He said that it was in January 2010 that the Board of the respondent endorsed the executive decision to transform the respondent. The

respondent, he said, found itself confronted by a storm of compounded simultaneous forces from the market, customer and regulatory considerations. The market drivers for a change were due to:

- The industry underwriting margins showing a declining trend since 2004;
- The UW cycle was in its longest downward phase for many years;
- Short term insurance market was shW cycle was in its longest downward phase for many years;
- Short term insurance market was shrinking due to economic downturn;
- Fraudulent claims were on the increase;
- Competitors were actively lowering their cost base – to provide them with a competitive edge.

[23] The regulatory considerations were born out by the fact that:

- International Solvency target ranged 40% to 50% - Zurich had fallen to 39% in 2009;
- Statutory solvency minimum was set at 15 %. Falling below 20% would result in Zurich being under FSB directive;
- FSB would prevent Zurich from taking on new business;
- FSB would evaluate business and operating models and initiate cost cutting measures.

[24] The customer drivers for a change were due to:

- Customer pressure on prices to drive affordability;
- Brokers and customers were demanding high levels of service at reduced prices;
- Brokers and customers were demanding specialist knowledge and skill;
- Customers' buying habits were changing towards more interactive channels.

[25] There was also the financial consideration that had to be added to the scale. Zurich was consistently underperforming in the market over the last 10 years. There were significantly deteriorating underwriting results for the last three

years. The underwriting loss in 2008 was R38 million and in 2009 it was R564 million. The general insurance results, including investment income, was a loss of R458 million. The operating costs increased by 62 % over the last three years.

Was the dismissal operationally justifiable on rational grounds?

[26] Zurich in South Africa was said to be operating from a burning platform which required a fresh strategic approach. It was necessary to review and clearly define a new strategy that would operationally position the respondent in the current environment. The business model needed to be re-engineered to counter the external forces. New sources of income needed to be found as the respondent was generating 95% of its income from a shrinking market through one channel with traditional products. Capabilities for positioning future expansion and growth had to be built. There was thus a need to fundamentally change the core-operating model and processes. It was thus necessary to:

- To split sales from market underwriting functions by:
  - Creating a pure sales capability focusing on customer retention and growing the business;
  - Creating a dedicated underwriting team to deliver on improved risk selection and pricing control
- To create a centre of technical excellence and centre of service excellence through a claims target operating model;
- To create a centre of business service excellence that would process all high volume, low complexity transactions by centralizing all administration processes;
- All of the above were underpinned by optimized operational processes and new IT systems to improve efficiencies and effectiveness which would address all operational shortcomings.

[27] Mr Zungu said that it was foreseen that operational efficiencies would result in job reduction of more than 15% due to some location closures and down scaling of regional operations. He thus confirmed having issued the S189 (3)

notices dated 8 February 2010 to the employees and their representatives, saying that there were 600 employees it was envisaged might be affected by the anticipated retrenchment. He attended all consultation meetings. Retrenchment costs were expected to amount to R51 million and R5 million was to be spent on training and upskilling. The entire transformational program was to cost in the region of R85 million. Various slides were produced as indication that the respondent considered a number of proposals enabling a change. The existing position was compared to the position sought to be attained. New organograms were then created as a vehicle to attain set goals and the process of populating them included affected employees having to apply for positions best suited to them, if they did not opt for voluntary retrenchment. The deadline for receipt of applications for Extended Leadership Team (ELT) and specialist roles was Wednesday 28 April 2010 and for all other positions the closing date was Friday 7 May 2010. 18. He said that the ELT positions were executive leadership teams which were senior positions. They were not roles which were at the level of consultation and none of the parties that were consulting would have members to fill those positions. He thought that those positions were very difficult to find and that is why the respondent had to start the process early otherwise it would not have been able to identify and get people to fill those positions. Also, the Employee Forum and SASBO accepted the business case on 19 May 2010. The appointments were, however, only made in July 2010 after the retrenchment process had been completed or commenced. The applicant felt that the consultation process was unduly hastened. It advised its members not to apply for any positions in the new structure.

Was there a proper consideration of alternatives?

[28] Mr Zungu said that the respondent decided to use communication channels to provide progress feedback and information so as to reduce anxiety, uncertainty and to ensure consistency, transparency and the truth. According to him there was a slide provided to show actions to avoid or delay dismissal. In order to avoid dismissals, he said that respondent opted that:

- Retiring employees and resignations would be replaced only in exceptional cases;
- Training and upskilling was to be done where skills gaps were small;
- Inter-company and inter-departmental transfers were done where appropriate;
- Salary increases were frozen;
- In economically unviable areas home based offices were to be resorted to;
- FTE replacement was frozen; and
- To change the timing of dismissals the respondent resorted to staggered de-commissioning.

[29] He said that various measures were taken to minimize and mitigate the adverse effect of dismissals. Such measures included creating new and specialized roles, staff re-deployment and new career opportunities. In order to mitigate the adverse effect of the dismissals a generous severance package was structured and offered, skills assessment and training were done and opportunities for re-employment for a year were created and offered. He said that some of the applicant's members might have been appointed into the new structure had they applied at various periods when positions were available.

Were selection criteria fair and objective?

[30] Mr Zungu's testimony was that administrative and policy administration work was moved to Durban. Most of the employees who were represented by the applicant performed administrative work as policy administration technicians in Johannesburg. They did not apply for any of the roles that relocated to Durban. Eight of the ten technicians were those employees represented by the applicant. New roles were created because the focus of the work was different. Mr Zungu said that the claims Target Operating model (TOMS) entailed creating a centre of technical excellence and a centre of service excellence which entailed focusing the technical expertise in one area and the administrative function in another area, namely Johannesburg and Durban respectively, were thus ultimately implemented. Certain office location

closures and downscaling of regional operations were resorted to in favour of specialization. He testified that the regional operations impacted mainly, were the smaller offices on the sales side and in that the number of outlets was reduced from 45 to 6 located in Cape Town, Durban, Johannesburg, Bloemfontein, PE and Nelspruit. The Cape Town office was the main area affected by the changed operations because they did not have either the administration or the technical centres located there. He averred that during consultation no alternative proposals were presented by any employees' representatives in respect of those aspects. Not only did none of the individual employees represented by the applicant apply for any posts but the consultant parties did not make any queries about the individual posts within the structure, for instance to say that they were superfluous or ought to have been changed or ought not to appear at all because they were the same as positions held by any individual employees.

[31] He said that the selection process was that, in terms of the jobs that were redundant, the respondent looked at those employees who were applying for any available positions that were going to be part of the new structure. It also looked at the skills that were not available in the organization that were going to be required for the new structure as well. He said that the selection process was done by way of internal recruitment and some employees relocated from Johannesburg to Durban. The affected areas and the proposed head count were detailed in the first slide presentation. He said that the claims target operating model was not complex and simply meant creating one centre of technical excellence in Johannesburg and one centre of service excellence in Durban.

[32] Against evidence led by the respondent, the applicant called two witnesses, Messrs Mosii and Nhlapho. None of the employees affected by the retrenchment testified. Mr Mosii was the Organizer of SACCAWU and he took part in the consultation process. His evidence was essentially on procedural unfairness in respect of which an *in limine* ruling has been made. That apart, he said though that the respondent failed to notify the unions of the availability of the ELT positions and appointment in relation thereto which the In Touch

circular of 1 June 2010 referred to. He denied that in June 2010, the consultation process had considered the recruitment and selection process as suggested in the circular.

[33] When commenting on the Claims Department[6], he said that the respondent refused to consider the counter proposals made by the unions. He said that such counter proposals could be found in the minutes and elsewhere. He was referred to the questions and answers but there were no such alternatives. Later, he conceded that the unions did not file any documents containing suggested alternatives to respondent's business case, the organogram and position profiles. He attributed the failure to an atmosphere which he said was not conducive to doing that and that there was lack of sufficient time. He did not give any clear answer when it was put to him that in the consultative and facilitated meeting of 19 May 2010 he lost his cool, shouted and carried out a verbal xenophobic attack on respondent's CEO, was rude to and threatened the Employee Forum representatives.

[34] He did not have much to say when he was referred to paragraph 29.78 of the statement of case which reads:

> 'On the 28th of June 2010 a further meeting chaired by the Senior Commissioner Shawn Christian took place at the respondent's premises. Unfortunately this attempt could not resolve the dispute as the Respondent had rejected the proposal made by the Senior Commissioner relating to the Lay–off training Scheme, after having been taken through the workshop by the CCMA Facilitators'.

[35] As with Mr Mosii the bulk of evidence led by Mr Nhlapho was concerned with procedural unfairness. He was an employee of the applicant as a Dispute Resolution Officer. He was the drafter of the statement of case for the applicant in this matter. He attended the facilitated consultation meetings on behalf of the applicant. Upon receipt of the S189 (3) notice from the respondent he replied to it by raising a query about the transformation program proposed by the respondent in the notice. To him transformation related to political, economic and workplace programs. Workplace

[6] See Respondent's bundle pages 626 to 628

transformation had to do only with gender equity, salaries and other considerations. His query was raised to seek clarification on what the notice, which he regarded as defective, was about. The respondent did not respond to the query, rightfully so in my view, but scheduled the first facilitated consultation meeting. When seen in its entity the notice was very clear what it was about.

[36] On 4 March 2010, the respondent supplied the unions with its business case. He however, said that the respondent did not give them any business proposals or business rationale to indicate exactly how the employer was intending to implement that process and how the change would successfully turn around the situation as proposed in various slides[7]. He said that no business model was presented to them in support of the stance taken to fix business. He said that no slide presentations were done for the unions. The unions indicated to the respondent that they wanted to find out what type of IT system would be introduced and what skills were required for it. Yet no specific proposals were given to them, which was reminiscent to all structures. In the absence of details, such as job requirements, job description and job profiles it was difficult to see the difference between the old and the proposed structures. There was concern that the business model might have been imported from Europe or United Kingdom which might not advance the course of the employees. An addition to their misery was the failure of the compact disc, supplied to them by the respondent, to open and when hard copies thereof were requested none were supplied.

[37] He said that the unions were concerned that the respondent wanted to introduce new terms and conditions of employment under the guise of the S189 (3) notice. It was said in the notice that, should the contemplated business transformation program be implemented, some positions might be redundant or the contents thereof might change for instance from a permanent to a fixed term contract. There was also the fear that mobile employee concept might be introduced, as a foreign type of proposal in South Africa. In respect of actions to avoid or delay dismissals, the concern was that

[7] See pages 73 to 96 of the respondent's bundle.

the salary increase freezing, to have home based offices and the staggered decommissioning all related to the terms and conditions of employment, the change in respect of which needed the consent of an employee. He said that the unions asked the facilitating commissioner to make a ruling on their concerns as they felt the matter also related to a matter of mutual interest and not a dispute of rights. He also denied that the unions were informed of the availability of some jobs as on 16 April 2010. When the issue was queried the respondent came out with a version that the business structure model was approved in January 2010 in a special Board meeting which was a contradictory version to one that approval was given on 16 April 2010.

[38] Mr Nhlapho conceded that his members employed by the respondent were not advised by the union to lodge an internal appeal once they were notified of retrenchment. He found it strange that in retrenchment proceedings there was an appeal system in place. He said that the respondent was supposed to offer alternatives. He confirmed writing a letter of 21 May 2010 to the respondent in which he pointed out, *inter alia*, that the consultation process was halted before all requested information was supplied to the unions by the respondent. Further, he said that consultation was not to be limited to the population of a new structure but that the unions were to be involved as well in the creation of a new structure, which the respondent failed to do.

[39] Finally, on the issue of financial loss incurred by the respondent in the period leading up to the retrenchment, he said that the respondent's version was that regulatory considerations were born out by the fact that International Solvency target ranged 40% to 50%. He said that the unions queried that assertion by asking if the assessment was locally or internationally based. A further concern was about why the respondent would use 'international insolvency merging' locally.

Evaluation

[40] As already alluded to, I am called upon to determine if the conditions listed in (a) to (d) of S189A (19) were shown by the respondent to exist in this matter, in which case, I would have to find that the dismissal of the

employees represented by the applicant was fair. The question could be framed as to whether the decision to retrench was a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective. Court is here entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious[8].

[41] It always stood as common cause between the parties that for the 2008/2009 period the insurance industry faced severe economic challenges compounded by the economic recession which hounded the financial markets of the world at the time. The evidence of the respondent must be seen with this background in mind. The evidence of the respondent was that it went through an economic recession in the period preceding the retrenchment. Some details of that were given to the employees in the local circular, the In Touch, in the road shows carried out, in the financial statements that were finally handed to the unions and during the trial. All that the applicant did was to question the veracity of those submissions without any suggestion why that evidence was devoid of credence. The probabilities of this matter favour the acceptance of the evidence of the respondent that its business indeed suffered a great financial loss which needed urgent redress. I accordingly, accept that the retrenchment exercise was to give effect to the requirement based on the respondent's economic needs. In relation to the changes in the structure the main averment by the applicant was that the respondent did not give them any business proposals or business rationale to indicate exactly how the employer was intending to implement that process and how the change would successfully turn around the situation as proposed in various slides. The position of the majority of the applicant's members was not as complex as the applicant made it to be. It was either they were agreeable to move to Durban or were placed in positions similar to those they occupied. I find that the respondent restructured to transform its business and to lay the foundation for future growth and profitability.

[8] See *SATAWU v Old Mutual Life Assurance Co SA Ltd* [2005] 4 BLLR 378 (LC).

[42] To a consideration whether dismissal was operationally justifiable, the respondent said that its business model needed to be re-engineered to counter the external forces. New sources of income needed to be found as the respondent was generating 95% of its income from a shrinking market through one channel with traditional products. Capabilities for positioning future expansion and growth had to be built. There was a need to fundamentally change the core-operating model and processes. According to the respondent it was foreseen that operational efficiencies would result in job reduction of more than 15% due to some location closures and down scaling of regional operations.

[44] The ELT positions, which the applicant showed interest in, during the trial, were said to be executive leadership teams which were senior positions. The respondent's undisputed evidence was that they were not roles which were at the level of consultation and none of the parties that were consulting would have members to fill those positions. These positions were advertised internally. The probabilities are that the employees represented by the applicant saw the advertisement, as did other employees who applied, but they decided not to file their applications. It remained undisputed that the rest of the other posts were filled from July 2010 but that the employees affiliated to the applicant still decided not to apply for any those positions. A period longer than 60 days from the s189 (3) notice had lapsed. Section 189A (13) was available to the applicant to utilize at the right time to protect the interests of its members. It did not assist the facilitation process for the applicant to merely raise queries after queries and not to effectively participate in the process. In as much as the respondent was legally obliged to consult with all the unions, the respondent was also obliged to consider the plight of the rest of its staff in line with the majoritarian principle. In my view, the dismissal was operationally justifiable.

[45] Actions to avoid or delay dismissal to which Mr Zungu testified evinced that the respondent had a proper consideration of alternatives. All that the applicant did was to create some suspicions on these considerations. It

cannot be reasonably said that the respondent acted capriciously or arbitrarily in relation to these issues.

[46] It is beyond dispute that the parties failed to reach an agreement on the selection criteria. None of the individual employees represented by the applicant applied for any posts, neither did the consultant parties make any queries about the individual posts within the structure, for instance to say that they were superfluous or ought to have been changed or ought not to appear at all because they were the same as positions held by any individual employees. The selection process used was that, in terms of the jobs that were redundant, the respondent looked at those employees who were applying for any available positions that were going to be part of the new structure. It also looked at the skills that were not available in the organization that were going to be required for the new structure as well. The selection process was done by way of internal recruitment and some employees relocated from Johannesburg to Durban. I find that the selection criteria adopted by the respondent were fair and objective.

[47] There is a final consideration on substantive fairness. The applicant contended in the statement of case that the respondent contravened section 187 (1) (c) of the Act in that it compelled the employees to accept a demand in respect of a matter of mutual interest between the employees and the respondent. The pleadings lacked the factual foundation in support of these allegations. It was not surprising that no evidence of any substance was led by the applicant in this regard. This claim is accordingly dismissed.

[48] Where an employer changes its own structure, it would be unfair to dismiss an employee without offering the employee a position in the new structure, if the structure can accommodate the employee on their skills with minimal training. In this case, various positions were made available and offered to the employees. The offer was rejected. Where an employee has been offered alternative employment and rejects it severance pay should not be paid to such employee, *Irvin and Johnson Ltd v CCMA and Others*[9] where Zondo JP (as he then was) answered what he considered to be a fundamental question

[9] (2006) 27 *ILJ* 935 (LAC)

that arises in the interpretation of s 41(4) of the BCEA in these circumstances namely:

> 'What is the mischief that s 41 (4) of the BCEA seeks to address or, put differently, what is the purpose of s 41(4)?'

[49] Zondo JP found that, where an employer arranges alternative employment for an employee and the employee rejects the alternative employment for no sound reason, severance pay should not be paid to such employee because:

> 'The purpose (of this section) was to discourage employees from unreasonably rejecting offers of alternative employment arranged by their employers simply because they might prefer cash in their pockets in the form of severance pay'.

[50] At the commencement of the trial, the respondent made numerous attempts to have procedural fairness issues removed from the trial. The applicant adopted various strategies to retain those considerations under the guise that evidence on them would enlighten issues on substantive fairness. This never materialized. This trial was made unnecessarily protracted and difficult. It accords with the law and fairness therefore that the costs must follow the results.

[51] I accordingly find that the employees represented in this matter by the applicant were dismissed for a fair reason as envisaged in s189A (19) of the Act.

[52] Therefore, the following order shall issue:

1. The claim is dismissed in its entirety.

2. The applicant is to pay the costs thereof.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Mr. D Lebethe of BIFAWU

For the respondent: Mr. JD Crawford of Crawford and associates