THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

CASE NO. **D1219/10**

In the matter between:

CEPPWAWU obo S HLOPHE & OTHERS Applicant

(Whose names appear on annexure "A" to the

Statement of Case)

and

BAYFIBRE CENTRAL CO-OPERATIVE LIMITED Respondent

Heard: 1 April 2016

Delivered: 10 November 2016

Summary: Claim of unfair dismissal based on operational requirements of the employer - it is not the function of the Court to second guess the commercial

or business efficacy of the employer's ultimate decision – dismissal substantively unfair – partial retrospective reinstatement ordered.

JUDGMENT

Cele J

Introduction

[1] At the commencement of this matter the claim of the Applicant, acting on behalf of its 42 members and estates of two deceased members, was couched in the following terms:

1.1 An order declaring that the employment contracts of its members, as erstwhile employees of the Respondent, were not lawfully terminated on notice (the contractual claim), alternatively

1.2 reinstatement from date of dismissal alternatively compensation for unfair dismissal (the unfair dismissal claim).

[2] The Respondent opposed both claims acting in its capacity as the erstwhile employer of the 44 employees. After the trial ran its full length the first claim was correctly withdrawn by the Applicant.

Factual Background

[3] A number of the facts of this matter became common cause either at the inception of the trial or in the course of the trial. The Respondent came into

existence during or about March 2009, and as a wholly owned subsidiary of NCT Forestry Co-operative Limited ("NCT"). The Respondent is thus a secondary co-operative. NCT is a primary co-operative which has as its members some 2000 farmers, the majority of which are small timber growers. NCT owns 18 000 hectares of farmland, on which timber is grown. The remainder of NCT wood supply is produced and supplied by its member farmers. NCT as a primary timber farmer co-operative, it is responsible for sourcing contracts for the supply and delivery of raw materials from its co-operative members into the market and in this regard, also the processing of that timber through its wood chipping operations and accordingly for the sourcing of supply contracts for wood chips into the market. Its primary concern is to ensure that the farmers obtain the best price for their wood and that the wood chipping operations are run as efficiently as possible so that the benefits of those trading operations are ultimately received by them.

[4] NCT has shares in 3 wood chip companies and co-operatives, being:

4.1 Durban Wood Chips (Pty) Ltd;

4.2 Shincel (Pty) Ltd;

4.3 The Central Timber Co-operative ("CTC" - of which NCT owned 50% and a separate company TWK (Pty) Ltd owned 50%).

[5] On or about 31 December 2008, NCT, TWK and CTC concluded a dissolution agreement in terms of which TWK retained one chip line and CTC acquired one chip line. TWK's member shares in CTC were cancelled. NCT then established the Respondent (Bayfibre Central Co-operative Limited) which took over ownership of one chip line and the entire staff compliment for both chip lines. The undisputed evidence of the Respondent dealt with the manner and tradition of the Japanese end users, doing business in South Africa. That

business was, at least in respect of Shincel and the Respondent, placed through agents acting on behalf of the Japanese customer. Each agent represented a specific end user, and customarily, those customers were supplied from a particular wood chip plant, which was geared to meet the end user's specific requirements insofar as the wood chip specifications quality and dust content was concerned. Shincel supplied the Japanese market via the agent Marubeni, traditionally stationed on or in the near vicinity of the wood chip plant. CTC, and thereafter the Respondent, conducted business through the agent Sumitomo, also situated in Richards Bay, and had one customer in the open market which it supplied through NCT, namely Nippon.

[6] As a consequence of the dissolution of CTC and accordingly the transfer of only one chip line to the newly established Respondent, that:

6.1 the full staff compliment previously employed by CTC would be transferred to the Respondent notwithstanding the fact that TWK retained one of the chip lines. The Respondent was thus immediately saddled with a double compliment of staff;

6.2 the contract previously in existence for the supply of woodchips to Nippon, represented by Sumitomo, by CTC was 2 million air dry tons of woodchips whereas after dissolution, the tonnage to be supplied by NCT to Nippon and accordingly to be produced by the Respondent, was reduced as per the contract value to 650 000 air dry tons. 400 000 of that was wattle and 250 000 was eucalyptus. The tonnage of 650 000 was also not guaranteed and could be reduced in terms of clause 5.3 of the agreement.

[7] Shortly after the dissolution of CTC in early 2009, the Japanese customer, Nippon, communicated to NCT and accordingly the Respondent, that its contractual requirements of 650 000 tons was not going be called for the 2009 year, but would be reduced by 30% leaving the demand at a figure of 455 000

air dry tons. Therefore, at the commencement of business of the Respondent there was a staff compliment required to operate two chip lines, 350 000 tons less per annum on the demand which would have been fulfilled by one chip line previously, that is, a maximum of 650 000 tons annually as opposed to 1 million tons which was previously being supplied by one of the CTC chip lines under the 2003-2008 contract. There was thus a further reduction on the already reduced maximum contract value of 650 000 tons, namely 650 000 tons to 455 000 tons. It had all the staff and only 23% of the previous volume of woodchips to produce.

[8] In August 2009 the Respondent which operated a 4 shift system finalized a retrenchment process of a number of its employees due to excessive staff compliment previously servicing two chip lines and the reduced demand for the period. As at the end of the August 2009 retrenchment, the Respondent had been reduced from a 4 shift system to a 3 shift system and each shift was reduced from 26 employees to 16 employees. According to the Respondent, after the first retrenchment, circumstances appeared not to be improving. It then embarked upon a second retrenchment exercise, which was ultimately not proceeded with in December 2009, in view of the fact that the Respondent was informed that an additional ship was being scheduled for January 2010. The Respondent hoped that matters would improve, given the fact that the proposed second retrenchment was over December. It then withdrew the second retrenchment exercise.

[9] In May 2010, the employees of the Respondent engaged in a strike and the Respondent invoked a lock out. Ultimately, an increase in salary in the form of an increased housing allowance was agreed at R1000.00 per month per employee. A back-pay of approximately R2000.00 per employee was paid thus causing an increase in the costs of production. The strike ended on 7 July 2010.

[10] In the middle of 2010 NCT communicated to the Respondent and it's other subsidiaries, including the NCT Forestry (Pty) Ltd, Shincel (Pty) Ltd and Durban Wood Chips (Pty) Ltd, that the economy remained depressed due to the infamous worldwide downturn in the economy during 2008/2009 and which was sustained for a substantial period. All the subsidiaries were required to tighten their respective belts where they could. The retrenchment at the Respondent was reported on at NCT board level.

[11] On 1June 2010 the Respondent issued a notice in terms of s189 (3) of the Labour Relations Act[1] (the Act) to its 46 employees represented by the Applicant, for a proposed restructuring due to its operational requirements. The Respondent indicated that it intended to reduce its shifts from 3, consisting of 16 employees, to 1 shift of 6 employees. It was to operate that shift in accordance with the employees listed in the production department set out in the organigram attached to the s189 (3) letter. Five facilitated consultation meetings were held between the periods 17 June 2010 to 26 July 2010 by the parties with the employees represented by the Applicant. Such consultation included an exchange of various correspondences, going beyond 26 July 2010. On 2 August 2010 the prescribed 60 days consultation period expired. On 4 August 2010 the 46 employees were dismissed by the Respondent. On the same date the Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation. The dispute was not capable of a resolution and it was referred to this court by means of the statement of case.

[12] After the dismissal of the employees, the Respondent ran its business for a substantial period utilising 1 shift and boosting production for short periods at a time with additional shifts. For about 2 weeks in August or September 2010 the Respondent supplied either the primary or the second shift from internal staff such as artisans, supervisors and cleaning staff. In December 2010 48 employees were employed by the Respondent through a labour Broker and a 4 shift system was put into operation. Then in January to February 2011 a 2

[1] 66 of 1995.

shift system was used. From 2011 to 2014 the shift system fluctuated and in 2014 there was an upturn in the business of the Respondent.

Evidence

Respondent's version

[13] The dismissal of the employees remained common cause and therefore the Respondent was settled with the onus of proving the substantive fairness thereof. As a result of the strike in 2010 a substantial increase in the costs of production was experienced by the Respondent as approximately R56000.00 per month was added to the Respondent's costs of production from the wage increase compelled in the strike alone.

[14] The May 2010 NCT communication to the Respondent and its other subsidiaries that the economy remained depressed due to the worldwide downturn in the economy during 2008/2009 was decisive on its way forward. All the subsidiaries had to tighten their respective belts. Mr Kime who was a recipient of the communication letter and the General Manager of NCT, confirmed that the letter meant that all subsidiaries were to tighten their respective belts where they could and not that they all had to share each other's burdens. At no stage did the board or author of the letter allege that Bayfibre's operational requirements were to be ameliorated by inter-company staff transfers or the sharing of customers from Shincel, or Durban Woodchip's only client Hokuetsu, with which it contract directly.

[15] NCT communicated to the Respondent on or about 2 June 2010, that Bayfibre's only customer's, through NCT, demand for wood chips would be sustained at a reduced contract value, namely 455 000 tons per annum. It became evident that there was no longer a need for the Respondent to maintain full capacity in order to meet its maximum contract value which was not guaranteed in any event in terms of the contract and the Respondent

contemplated to commence once more with the second retrenchment exercise, which it duly did. Only 9 employees were retained by the Respondent apart from Management staff such as Supervisors and the Production Manager. The plan was to use crane and loco Drivers as skilled employees to do in a multitasking fashion. According to the Respondent its employees were trained in all rolls, across the work force, generally and those who had progressed to the higher skilled positions, such as welder, crane operator, clerk and loco driver could perform all the tasks below their ranks. The suggestion that the retrenchment exercise came as surprise during the strike was not true as it was a continuation of the previous exercise.

[16] The Respondent being responsible for the training of its employees assumed that it would have been acutely aware of the various skills of each of them. It said that it could and did operate a single shift system utilising only 9 employees so that 200 000 tons could be chipped across the year, with the additional tonnage of 255 000 tons being chipped over the wattle season which lasted only 3 months in the year, utilising additional temporary staff. It said that in that seasonal period of 3 months it ran at full capacity with a full shift compliment chipping directly from the log deck and not storing logs in the field. In August and September a second shift was run for two weeks supplied from internal staff such as artisans, supervisors and the cleaning staff. During the three and a half years post retrenchment, there was a positive turnaround in the business of the Respondent. There were periods of additional shift work. The Respondent resorted to the use of employees through a temporary employment service provider. So, in December 2010 48 employees were employed by the Respondent through a labour Broker and a 4 shift system was put into operation. Then in January to February 2011 a 2 shift system was used. The Respondent conceded that from 2011 to 2014 the shift system fluctuated and in 2014 there was an upturn in the business of the Respondent. It assumed that each time permanent employees were engaged, to terminate them after the short period of employment, would require a fresh retrenchment exercise and further severance pay to make.

Applicant's version.

[17] The retrenchment exercise came as surprise soon just after the strike. Soon after the retrenchment exercise there was an upward turn in the business of the Respondent suggestive that was no need to retrench. In August or September 2010 there was a second shift that was brought into operation by the respondent. Then in December 2010 the Respondent utilised a labour broker to employ 48 people and a four shift system was put into operation. In January and February 2011 a two shift system was in place at the Respondent. During the period 2011 to 2014 the shift systems fluctuated to include the use of a four shift system. 2014 to 2015 saw an upturn in the business of the Respondent such that in 2015 a four shift system with 17 employees on one shift was put in place. In 2015, of the 64 employees on the shop-floor, nine were permanent staff retained post the 2010 retrenchment and 55 were employed through a labour broker. When the Respondent needed more employees after the retrenchment it never consulted the applicant to source out labour from the retrenched staff.

[18] The contention was that the dismissal was substantively and procedurally unfair in that they were not operationally justifiable, there was no consideration of alternatives and the selection criteria were not fair and objective. The reduction to one shift with nine employees could not be sustainable. The production of 110 000 tons for the period July to the end of 2010, referred to by the Respondent, was based on a shift of 16 and not 9 employees. Therefore the capacity of one shift of 16 or 17 employees could chip 200 000 tons per year. Post retrenchment therefore it was inevitable that the Respondent would engage more employees. Reliance on employees such as Artisans and Managers could never be, and was not sustainable as the Respondent needed to fulfil its contractual obligation of 650 000 tons per annum. The same would apply even if the contractual volume remained at 455 000 tons per annum. The Respondent was supposed to contact the dismissed employees when it needed more employees after the retrenchment but it did not do so as it had recourse to the labour broker instead.

[19] Even after the last facilitation meeting the Applicants were expecting the Respondent to furnish them with relevant information as justification for retrenchment, which the Respondent had hitherto failed to supply.

Evaluation

[20] In scrutinising the consultation process it is not the function of the Court to second guess the commercial or business efficacy of the employer's ultimate decision. Rather, the aim is to determine whether the ultimate decision arrived at was genuine and not merely a sham. When determining the rationality of the employer's ultimate decision, it is not the function of the Court to decide whether it was the best decision under the circumstances but whether it was rational commercial or operational decision.[2] A point of departure though in this matter is that the consultation process was a facilitated exercise with the result that the applicants are not at liberty to contest the procedural fairness of the retrenchment exercise.[3]

[21] It was only after a few weeks that the Respondent realised that the single shift it had resorted post retrenchment could not cope with the amount of work there was to be done in terms of its contract with the Japanese customer. Even at this early stage of events, there exists an overwhelming probability that the retrenchment exercise, even if justified, cut too deep. In a period of four months thereafter the Respondent employed 48 people to do precisely what the applicant's retrenched members had been doing. The disturbing feature of this development is that the Respondent never consulted the applicant to help it trace the employees it had recently retrenched. There was even a collective agreement binding the Respondent to re-employ there employees. The fear that it could be more expensive to have to retrench them again had no factual basis. A conclusion is irresistible that the Respondent wanted to rid itself of these employees.

[2] See *Sactwu v Discreto (A division of Trump & Springbok Holdings)* [1998] 12 BLLR 1228 (LAC).
[3] See section 189A (18).

[22] The period that followed these development, that 2011 to 2014, saw a fluctuation of shifts during which even a four shift system was implemented. Yet again the 2010 retrenched employees were not recalled. During the hearing of this matter the position at the Respondent had so improved that a four shift system was running.

[23] It certainly would not be second guessing the commercial efficacy of the Respondent's ultimate decision to say that there was no rational operational justification for the decision taken to retrench all 47 employees, 44 of which are now before Court. I take note that on the Applicants' own concessions, the Respondent would have been fully entitled to reduce its compliment of staff from 3 shifts at 16 employees per shift, to 2 shifts at 16 employees per shift in the retrenchment process. According to this version the Respondent only needed to retain 32 employees instead of 9, leaving a difference of 23 employees that could have been retained. At the times when a four shift was used even more employees were needed. At times when a two shift system could be justified the Respondent could negotiate with the Applicant on measures such as implementation of short time. It has to be born in mind that retrenchment proceedings are a no fault dismissal and that the employer has an obligation to endeavour to avoid such dismissals.

[24] While the economy remained depressed due to the infamous worldwide downturn and while the Respondent also experienced economic challenges there was still time to see how thing would pen out, as shown by the four months following after the retrenchment. The Respondent therefore acted precipitately in retrenching the 47 employees. This retrenchment therefore, has not been shown to have the rational operational justification.

[25] The Respondent dismissed the 44 employees now before Court in August 2010. A period more than 6 years has since passed. The interests of both parties need to be considered at this stage. All employees want their jobs back. They have been unemployed since their dismissal. They had their unfair

dismissal dispute referred on the date of their dismissal thus entitling any of them who died thereafter to the claim. The Respondent has about 46 employees engaged through a labour broker. The applicant contributed to the delay in the trial as a result of the two claims initially referred and a bulk of the time was spent on the contractual claim which was finally withdrawn. The Respondent did have a financial downturn albeit not as serious as it was understood. In considering how reasonably practicable it is for the employer to reinstate or re-employ, the current financial status of the employer is a relevant consideration.

[26] I find no impediment against reinstatement as is contemplated in section 193 (2) of the Act. If reinstatement is ordered with full retrospective effect, that would have a disastrous effect on the business of the Respondent. All things considered, including the costs aspect, I find the following to be an appropriate finding and an order:-

26.1 The dismissal of each of the 44 employees by the Respondent in August 2010 was substantively unfair;

26.2 The Respondent is ordered to reinstate each of the 42 employees with retrospective effect of only six months, that is, with effect from 10 May 2016. The salary of each employee should be what he would have earned but for the dismissal;

26.3 The Respondent is granted three months within which to pay back the arrear salary of six months, that is up to end of February 2017;

26.4 Each employee is to report back at work on 14 November 2016 but no later than 17 November 2016. Any employee who fails to tender his services on or before 17 November 2016 without an acceptable explanation losses the right to reinstatement and is only entitled to 10 months compensation, calculated on the salary he would have earned

but for the dismissal. Such payment is to be made within two months from the date of this order. Similarly, the Respondent is to pay ten months compensation to the estate of any of the 44 retrenched employees who died at any time from 4 August 2010 to the date of this judgment.

26.5 The Respondent is ordered to pay only half of the costs of this application.

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Cele J.

Judge of the Labour Court of South Africa

Appearance:

For the Applicant: Mr T E Seery

Instructed by: Shanta Reddy Attorneys.

For the Respondent: Ms C A Nel

Instructed by: MacGregor Erasmus Attorneys.