THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case no: JS 628/11

In the matter between:

LUCKY MAZIBUKO **Applicant**

and

AVUSA MEDIA LIMITED **Respondent**

Heard: **19, 20 and 30 May 2016**

Delivered: **03 June 2016**

Summary: A referral wherein the applicant challenges the substantive fairness of his dismissal which occurred in the context of Section 189A of the Labour Relations Act as amended.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is a referral brought in terms of section 191 of the Labour Relations Act. The applicant contends that his dismissal on 31 March 2011 was substantively unfair. He ought not to have been selected for dismissal. Termination was premature as he was still to make representations on the selection criteria applicable to the CSI department that he was employed in. He does not wish to be reinstated.

Pertinent common cause issues

[2] In terms of the pre-trial minutes agreed to by the parties, it is common cause that the applicant was appointed as a Deputy Manager in the Corporate Social Investment department (CSI). He was so appointed on 1 April 2000. At the time of his dismissal he earned R36 878.61 (total cost to company) per month. The CSI department consisted of a Manager, Deputy Manager and the Coordinator.

Issues to be decided by the court

[3] In the agreed minutes, the parties called upon the court to determine whether there was a need to retrench. Whether the selection criteria applied is fair or not. In opening address the applicant contended that his dismissal was not a measure of last resort. In other words, his dismissal was avoidable.

[4] Accordingly, this judgment will be confined to the evidence pertinent to those issues and the law applicable to those issues. It is unnecessary to traverse other ancillary issues in this matter.

Background facts

[5] The respondent operates in a media space. The late Dr Aggrey Klaaste started an initiative around community building. As a result a CSI department was formed in order to drive the initiative. Various companies were approached to sponsor certain activities within the initiative. At a point, the sponsor began to withdraw from the initiative. Following that,

the respondent took a view to restructure itself. The CSI had in its employment three people. Two of the positions were declared redundant. The applicant occupied one of such positions. Having declared his position redundant, he received a section 189 (3) notice calling him for consultation within the section 189A context. A facilitator was appointed to assist the parties in a consultation process. The applicant was represented by a Union, MWASA. Having failed to save his job, the applicant was dismissed on 31 March 2011 on reasons of operational requirements. Aggrieved by the aforesaid termination of employment, the applicant referred the dispute to the CCMA and ultimately to this court for adjudication.

Evidence Led

[6] Before evidence could be led, I drew the attention of the representatives to the provisions of section 189A (18). The section prohibits this court to deal with issues of procedural fairness at the referral stage contemplated in section 191 of the Act. In addition, representatives were referred to the decision of this court in *Lethlake and Another v Metcash Trading Ltd*.[1] This position was recently echoed by the Constitutional Court in *Steenkamp and Others v Edcon Ltd (NUMSA intervening)*.[2] Following that, both parties agreed that this court could only hear evidence relevant to substantive fairness as opposed to procedural fairness. However, since at times issues of substance and procedure are inextricably intertwined, some leeway was allowed in relation to procedural fairness evidence.

[7] The respondent called two witnesses, namely, Jason Sequiera and Puleng Cynthia Namane, who I must mentioned testified in the circumstances where she was bereaved after loosing a daughter, who she was burying over the weekend.

[1] [2007] 10 BLLR (LC).

[2] (2016) 37 *ILJ* 564 (CC) at para 58.

[8] Jason Sequiera held a position of General Manager for Sowetan and Sunday World. Around October 2010, the applicant held a position of Deputy Manager Corporate Social Investment. A department known as the CSI is a legacy of the late Dr Aggrey Klaaste. Three employees staffed the department. A manager, the applicant and a coordinator. The applicant assisted the manager with some of his functions, stakeholder relations and funding of new projects. CSI had as its objectives, nation building, community upliftment and education. Various companies sponsored certain of the initiatives or projects. Anglo American, Old Mutual, Telkom and Transnet were amongst the sponsors.

[9] In October 2010, the respondent lost most of the sponsors. They withdrew from the initiative. The department spent the entire year or so looking for other sponsors. At that time, the economic conditions were not conducive. This made the ability to fund the department internally impossible. Ways and means were to be found to save the costs. On 3 November 2010, a section 189(3) notice was issued to MWASA. Various consultation meetings unfolded. He and one Mondli Makhanya made a presentation to the consulting parties. He informed the consulting parties that since the withdrawal of the sponsors, the respondent could no longer be able to fund the CSI department internally. Two of the positions were affected. Lindiwe Obose, the coordinator, applied for a position in marketing and was placed. Her dismissal was averted thereby. The manager continued with managerial role and assisted with editorial functions but left the respondent at some point.

[10] One Tuwani Gumani represented the Union. The applicant was personally present in all the consultation meetings. The non-performance of CSI affected Sowetan, since it funded it. The Union accepted the situation. During cross-examination, he testified that the manager left in October 2014 as he continued to take care of small operations. On 31 March 2011, it was not only the applicant who was dismissed. There were other employees. He also testified that the retention of skills and undergoing interviews was discussed and agreed upon as selection criteria. After the agreement, a list of vacancies was circulated to the

Union and its members. The manager was well aware of the difficulties facing the department. The applicant and the manager continued to look for sponsors but in vain. He denied a half-hearted approach to look for sponsors and to rescue the department. Angie Makwetla's company was not solely tasked to look for sponsor. Nation building was the flagship of Sowetan hence all the attempts to save the department. In re-examination, he testified that he is not aware if the applicant applied for the available positions. Applicant could have qualified in some of the positions that were available. He confirmed that from December 2010 to February 2011, there were vacant positions.

[11] Puleng Cynthia Namane testified that in October 2010, she held a position of General Manager Human Resources. She took part in the consultations. The respondent's proposed selection criteria was mentioned in the consultation process and was discussed. It entailed redeployment either automatically if skills match a vacant position or application and appointment on merits. The Union appreciated the selection criteria. The vacancy list was circulated on 24 February 2011. The applicant, as a writer, could have applied for reporter's positions and or Deputy News Editor's position. The applicant did not apply for any of the available positions. The union was in agreement that redeployment would be on merit. She provided the Union with progress reports as to who applied for positions and the status thereof. CSI was included in the criteria for selection.

[12] The applicant was not the only one notified of termination that was to happen on 31 March 2011. In cross-examination, she disputed a version that whilst consultation was taking place, the respondent unilaterally terminated the applicant. She testified that the applicant made no other representations. The termination letter is a standard letter and contained an error, which should not have been there. When the manager of CSI left, he was an assistant editor. She explained to the court that automatic redeployment entailed matching and placing effectively. In the old structure of CSI, two positions became redundant. Around 2012, she ceased to support Sowetan with Human Resources duties.

[13] Tuwani Emmanuel Gumani testified that he is the General Secretary of MWASA since 2010. He was part of the consultation process leading to the dismissal of the applicant. In his view, the consultation process was an afterthought and he felt that a decision has already been taken. Many issues were not canvassed sufficiently or not at all. He authored the letter on page 86 of Bundle B. In his view, termination was premature since the process was still underway. A selection criterion for CSI was never discussed. Since the criteria for CSI was not discussed, termination was not permissible. He did see the vacancy list. He was seeing page 15 of Bundle A for the first time at trial. In his view, there was no rationale to restructure in CSI and there was no agreement on the need to restructure. In cross-examination, he agreed that he was in all the consultation meetings. He was referred to portions of the transcript where CSI was mentioned.

[14] He gave context to each of the concessions made by the union in the transcript. He accepted that a list of questions was sent to the respondent and such questions were replied to. He agreed that merit was part of the criteria. Where a criterion was discussed, his evidence was that it was for the editorial department and not the CSI. He suggested integration of the CSIs and the respondent did not accept such suggestion. He blamed Sequiera for wanting them as a Union to do what they are supposed to do. After 22 February 2012, he made no further representations.

[15] In his mind, the door was closed after that. In re-examination, he testified that each title was to be discussed separately. He expected to still be consulted on the CSI title. He testified further that page 21 of Bundle A is part of the representations that were awaited as referred to in page 15 of Bundle A. He cannot confirm that the respondent applied the criteria discussed in the consultation meetings. CSI issue, according to him, was parked and never discussed. He testified that the vacancies as per the list would be a misfit for the applicant.

[16] Applicant was employed from 1999 but officially on 1 April 2000. His responsibilities included assisting the manager in CSI. He is vastly experienced in fundraising and conceptualising programs. He was seconded to the office of the late President Mandela to advise on HIV. Sowetan was paying his salary. Sponsors will fund programs and in exchange of pages in the newspaper. He is a recipient of an honorary doctorate. As such, it became easier for him to raise funds. He brought in Standard Bank and Tracker as potential funders but he does not know what became of them. He was aware of companies like those of Angie Makwetla, which looked for funding for nation building. On paper, he was part of management but in practice not. He had no relationship with his managers. He did not sit in managerial meetings. He received no reports on the performance of CSI.

[17] As such, he was never asked to develop a turn around strategy. CSI has a strong link with marketing. The Standard Bank deal would have delivered R10 million rand in three years. Tracker would have delivered R5 million rand. So he would have ensured that he brings a lot of ideas and a lot more sponsors had he been asked to do something. In terms of the companies that withdrew sponsorship, he believes they could have been replaced since companies like publicity.

[18] By law, companies are supposed to have CSI. There is a tax rebate for CSI. It would not have been difficult to expand CSI. He does not believe that there was a rationale to render his position redundant. Mondli Makhanya had told him that restructuring was decided upon before the consultation started. In the consultation meetings, he was co-opted to represent other employees. At consultation, CSI was discussed briefly as it affected two people. Largely, editorial and sports were discussed. In the consultation, there was little in common.

[19] The majority of the time there was disagreement. At the time of the consultation, Mondli Makhanya was already occupying the position of group editor in terms of the new structure. There was no selection criteria discussed for CSI. He did not believe that CSI needed to be closed.

Page 21 of Bundle A contains the representation that was awaited from him. He expected management to still give him an opportunity to suggest a turn around strategy for CSI. He further expected discussions on the selection criteria after 28 February 2011. After he left, his manager was transferred to editorial. He could have applied for some position on the vacancy list. He was a good fit for positions like Deputy News Editor. In cross-examination, he testified that CSI was dying in the eyes of management and not his. Further, he testified that he was not aware of any sponsors withdrawing. The sponsors were important to the success of CSI.

Argument

[20] Both representatives submitted written heads after which the court heard oral submissions. In brief, the respondent's argument as presented by Mamabolo is that it had a fair reason to dismiss the applicant and he was selected using a criteria agreed upon during a consultation process. On the other hand, the applicant duly represented by Zilwa, argued that the respondent did not have a commercial rationale to dismiss the applicant. The selection criteria applied was not agreed upon and was not fair and objective. Even if it is found to be fair, it was not ranking top as required by the law and has not been applied properly and consistently.

Evaluation

[21] The first issue to be decided is whether the respondent had a commercial rationale to dismiss. In terms of section 213 of the LRA, operational requirements means requirements based on the economic, technological, structural or similar needs of the employer. In terms of the Code of Good Practice on Dismissal based on Operational Requirements GN 1517 in GG 20254 of 16 July 1999 provides that structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise.

[22] Economic reasons are those that relate to the financial management of the enterprise. In the matter before me, there is clear and uncontested

evidence that the CSI division of the respondent lost sponsors. Following that loss, a restructuring was embarked upon which saw the position of the applicant and the coordinator being phased out. This led to the positions being made redundant.

[23] Central to the above, is what role or duty does the court have in determining whether the respondent indeed needed to restructure. As a general principle, it is not the duty of the courts to run the businesses of employers. The LAC in the matter of *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*,[3] the following was said:

> '… Viewed accordingly, the test becomes less differential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'

[24] It must then follow that the duty of this court is to examine the reasons given by the employer in order to establish not the correctness thereof but the fairness thereof. The reasons given by the respondent are both economical and structural. The respondent's witnesses testified that the Aggrey Klaaste Nation Building Foundation projects were curtailed as a result of reduced funding from third party. Further, this court was told that by mid financial year 2009/10, it became clear that the respondent would post losses at the end of that fiscal year. However with the redesign and repositioning of the paper, the company was optimistic that it will improve revenues in the following fiscal year.

[25] The company posted losses of about R30million in the last quarter of 2009. It became common cause that CSI lost sponsors. Proper examination of this evidence suggests that the answer to redesign in order to address the financial position that the respondent was facing at the time is a fair one. This court has no basis to reject evidence that

[3] (2001) 22 *ILJ* 2264 (LAC) at para 19.

redesigning was the only answer to the economic downturn occasioned by the undisputed reduction of funding.

[26] It may not have been the correct answer as submitted by Zilwa but that is not the test. The test is whether it was fair of the respondent to have answered that situation by redesigning in order to improve its revenue. Applying that test, I come to an irresistible conclusion that the respondent had a rationale to restructure its operations. In terms of section 188(1) of the LRA, a dismissal is unfair if the employer fails to prove that the reason is a fair one based on the employer's operational requirement.

[27] Was the selection criteria agreed upon? The respondent contends that there was an agreement on the criterion-retention of skills. The applicant contends that there was no agreement. Section 189(7) requires an employer to select employees to be dismissed according to the selection criteria that has either being agreed upon or one that is fair and objective. Given the view I take at the end, it is unnecessary to resolve the dispute whether there was an agreement.

[28] In fact, during oral agreement Zilwa agreed that if this court finds that there was no agreement, what the court must do is to determine whether the criteria employed is fair and objective. He further submitted that even if the court were to find that it is a fair and objective criterion, it has not been applied properly.

[29] I then consider whether the criterion employed is fair and objective. It is common cause that in order to retain the skills necessary to run its operations, the respondent employed a matching and placing exercise. Where there is one person affected and a vacant position that matches the skills of the affected person, there will be automatic deployment. However, where there was fewer vacancies and a greater number of affected employees, employees will be required to apply for such few positions.

[30] The question that pops is whether that criterion is fair and objective. The code in clause 9 provides that generally, it is accepted to be fair to

consider length of service, skills and qualifications. Accordingly, using skills and qualifications is generally fair and objective. Zilwa, however, argued that the law requires ranking before choosing. At the top of the list is LIFO. Therefore, the respondent was bound to choose LIFO first and consider and rejects it with reasons before moving to other criterion. I am unable to find that such is the law. The law is first attempt to agree and if no agreement apply a criteria that is fair and objective. If the criterion applied is fair and objective then the employer satisfies the requirements of the law.

[31] To my mind, the question whether dismissal of the applicant was the only option is determinative of this matter. In other words, if the dismissal of the applicant could have been avoided, then his dismissal would be substantively unfair. The fact that the applicant's position was made redundant is common cause. The issue whether the respondent should have considered other options before making it redundant has been dealt with above and does not arise now.

[32] It is true that an employee whose position has been made redundant will ultimately be dismissed if no vacancy is found for him or her. In *SAA v Bogopa and Others*,[4] Zondo, JP as he then was had the following to say:

> '[60] The question, which arises, is what the obligation of an employer is in relation to the dismissal of employees for operational requirements when it does away with an old structure and adopts a new structure (for operational requirements). An employer has an obligation to try and avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position, the duties of which the employee concerned can perform with or without at least minimal training… Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such a position and

[4] (2007) 11 BLLR 1065 (LAC) at para 60.

> the ensuing dismissal would be without a fair reason. Where however, the employer offers the employee such a vacant position and the employee, having accepted the offer, fails to perform the duties attached to that position satisfactorily, the employer can deal with the case as a case of poor performance.'

[33] *In casu*, as at November 2010, the respondent had about 45 positions that were vacant. The court has been told that about 16 employees were affected by the restructuring. Clearly, this is not a situation where it can be said that the respondent had fewer positions and a great number of affected employees. On the contrary, the respondent had lesser-affected employees and a great number of vacancies. In *Bogopa*, *supra*, the Learned Judge went on to say:

> '[64] … an employer may not dismiss an employee on the basis that his position is redundant if he has another position, which such employee may occupy or has other work, which such employee may perform without additional training.'

[34] It has not been shown in this court that it was absolutely necessary for the applicant to apply. As pointed out earlier, there was no evidence to demonstrate that there were fewer positions, which would have objectively necessitated application. I do not find any reason to suggest that the applicant would not have been placed in any of the many vacant positions. In *Bogopa*, the LAC also stated that it is no answer to an unfair dismissal to say that an employee refused to apply for positions in the new structure where the necessity thereof has not been demonstrated.

[35] I am of a firm view that the dismissal of the applicant was not the only available option and or last resort.[5] According to the evidence of Namane, the applicant would have fitted the vacant position of a reporter. When I enquired from Mamabolo why such a position was not offered to the applicant, she submitted that there were more employees who fitted that the position and the only way was to have it contested for.

[5] See *NUMSA v Atlantis Diesel Engines (Pty) Ltd* [1993] 14 *ILJ* 642 (LAC) at 648E.

[36] However, the vacancy list shows that there were two junior reports positions in East London, one reporter position in East London, two News reporters in Rosebank, one political reporter in Rosebank, three reporters' positions in Rosebank. According to the progress report of 07 March 2011, only one reporter was affected and automatically redeployed. The court has not been told how the other eight reporters' positions were filled.

[37] It must follow that offering the applicant one of the vacant reporters position could have averted his dismissal. It is indeed correct as submitted by Zilwa that the respondent is under duty to offer a vacant and available position. On this basis alone, I am constrained to find that the dismissal of the applicant was substantively unfair.

[38] Turning to the question of the relief, I have found that the dismissal is substantively unfair. The primary remedy ought to have been reinstatement. However, the applicant did not wish to be reinstated. Therefore, there is no reason why the applicant should not be awarded the maximum compensation.

[39] On the issue of costs, there is no reason why costs should not follow the results.

Order

[40] In the results, I make the following order:

[41] The dismissal of the applicant is substantively unfair

[42] The respondent is ordered to pay to the applicant an amount of R442 543.32 (being an equivalent of 12 months' salary of R36 878.61) less the applicable statutory deductions.

[43] The respondent to pay the applicant's costs.

_____

Moshoana, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	S S Zilwa
Instructed by:	Makaula Zilwa Inc, Sandton
For the Respondent:	N O Mamabolo
Instructed by:	Mamabolo Phajane Inc, Cresta