IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

Case No: JS717/06

In the matter between:

BEMAWU OBO MANLEY MOHAPI Applicant

And

CLEAR CHANNEL INDEPENDENT (PTY) LTD Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The second and third applicants in this matter claim that their dismissals for operational reasons by the respondent were automatically unfair. In the alternative they claim that their dismissals were both procedurally unfair for failure to comply with the provisions of s189 of the Labour Relations Act 66 of 1995 (the LRA). The applicants do not seek reinstatement but only compensation.

Background facts

[2] The respondent is a company registered in terms of the company laws of South Africa and conducts business in the advertising industry where it *inter alia* sells outdoor advertising to its clients.

[3] The second applicant was initially employed by the respondent as a graphic designer and was at time of her dismissal employed in the sales department of the respondent. The third applicant was at the time of her dismissal for operational reasons employed by the respondent as a sales secretary. The salary structures of both the second and third applicants included in them payment of commissions.

[4] The respondent informed the applicants at the sales meeting held on the 9th June 2006 that their salaries would be restructured to take the form of costs to the company and no longer include payment of commission. This was then followed with a letter dated 12th June 2006, where the applicants were issued with letters which confirmed the restructuring as of the 1st June 2006 and that from that date they would no longer be entitled to earn a commission. They were further informed in the same letter that their job profiles would be realigned to match the rest of the group performing the functions similar to theirs. In terms of the restructured salary the second applicant's cost to company remuneration was to be a gross amount of R90 000 per annum effective 1st June 2006 and that of the third applicant was to be a gross amount of R72 000 per annum. The applicants were entitled to performance bonuses which would be paid from time to time depending on the financial results of respondent.

[5] In essence the restructuring of the salaries of the applicants amounted to the change in the terms and conditions of employment which they rejected.

[6] Thereafter the respondent convened a meeting with the applicants on 21st June 2006, where the applicants were informed that the commission they earned previously

was taken into consideration in the restructuring of their salaries and further that the new packages were put in line with those of the other sales coordinators employed by the respondent. The applicants again refused to accept the changes to their terms and conditions of employment.

[7] The applicants were thereafter issued with the notices of possible retrenchments dated 26th June 2006. The respective notices read as follows:

> *"The company is contemplating embarking upon a retrenchment process which may lead to the possible termination of your services; accordingly it is necessary in such circumstances to consult with you regarding the possible retrenchments, on issues as detailed below. We wish to confirm that none of these issues have been finally determined. The company's final decision would depend on such representations you may make.*
>
> *In order for you to have full appreciation of the company's in principle vision, we provide you with the following information, which information you will be required to respond upon in due course if necessary.*
>
> ***Why the company is contemplating retrenchments:***
>
> *It came to management's attention that the current 2 (two) positions of the Sales Co-ordinators commission structure leaves the door open for possible abuse to such an extent where possible fraud and misuse could take place. The company is of the opinion that they have little control over this and needs to eliminate the risk factor that is involved in the current commission structure in an attempt to safe guard the company. Therefore, the company is of the opinion that basic salary without any*

commission for the sales co-ordinators will be more viable. This will also bring the 2 (two) positions in line with the other sales co-ordinators as they only function on a basic salary and have no commission structure. It will also make it more manageable for the company. The company thus intends to create the so called "new" positions for the sales co-ordinators and the current positions will possibly be made redundant.

Alternatives to retrenchment

The company is willing to offer the new position to all affected employees. The new position will be a position where no commission will be payable. There will only be basic salary that will be calculated on a total cost to the company basis. The actual amount of salary will be discussed during the upcoming consultations. The new salary will be approximately 75% (seventy five percent) of the current salary.

How many employees may be affected:

At the present the company anticipates that should retrenchments take place 2 (two) positions might be made redundant as the terms and conditions of the current sales co-ordinators might be changed.

Selection criteria

Should the company have no alternative but to proceed with terminating the employee's services, the company will use selection criteria that has been agreed upon, or failing agreement a criteria which will be both fair and objective. At present the company proposes using the redundancy of

the current position of sales co-ordinator on its current terms and conditions of employment as the selection criteria."

[8] On the 27th June 2006, the first applicant addressed a letter to the respondent, indicating that it was acting on behalf of the applicants and that it was awaiting an invitation to attend the necessary consultations with the respondent. In response to that letter the respondent through its labour consultant proposed several dates for consultation which did not suit the first applicant. The first applicant indicated that it was available for the consultation between 17 to 21st July 2006.

[9] The respondent convened the first consultation on 5th July 2006 but had to adjourn the meeting because the applicants were not willing to continue with the consultation in the absence of their union representative. The consultation meeting took place on the 17th July 2006 and again in the absence of the union. There is some dispute about certain aspects of this consultation. The following are however common cause:

- The second and third applicants stated that they would accept a basic salary only if their salary was in line with the basic salary and commissions earned by then;

- The respondent proposed that average commissions over the last twelve months will be used to be added to the proposed basic salary, which the second and third applicants were not unhappy about;

- The respondent reiterated that the new salary packages were market related and in line with those of the existing sales coordinators;

- The respondent formally offered the second and third applicants the alternative positions of sales coordinators on a basic salary only, and discretionary performance bonus;

- The second and third applicants also stated that they were not willing to entertain discussions about severance pay at that stage.

- The second and third applicants wanted to consider the matter and discuss it with their union (the first applicant) before the next consultation;

- The consultation was by agreement adjourned to 20th July 2006.

[10] A further meeting took place on 20th July 2006, which was attended by the first, second and third applicants. The hand written minutes of that meeting headed *"Retrenchment consultation . . ."* records the following:

- The first applicant indicated that it viewed what the respondent was doing as a unilateral change of terms and conditions of employment disguised as a retrenchment;

- The respondent stressed that there was no intention to trench the applicants and explained the reasons for the restructuring.

- The first applicant indicated that it would make a proposal in writing.

[11] On 20th July 2006, the respondent's consultant addressed a letter to the first applicant wherein it indicated that it did not the intend terminating the employment of the second and third applicants and that the offer of the alternative positions were still on the table and a further consultation meeting was proposed for the 24th July 2006.

[12] The first applicant responded to the above letter and indicated that it was not available for the consultation meeting proposed by the respondent for the 24th July 2006. The first applicant also proposed that the salaries of the second and third applicants be fixed at R15 000 per month, in exchange for commission being forfeited.

[13] A further consultation meeting was convened on the 26th July 2006. At that meeting the respondent rejected the applicants' proposal of R15 000 basic salary for each of the second and third applicants. The offer for the alternative positions was again made by the respondent, with the proposed new contracts of employment for the applicants. The offer was again rejected by the first applicant and proposed that the commission structure be renegotiated. This was rejected by the respondent, on the basis that, it had very little control over the commission, the commission system was open for abuse, there was a possibility of fraud which it wanted to eliminate, and no one else in the company was on the same commission structure as that of the applicants.

[14] During the morning of 31st July 2006, the respondent addressed a letter to the first applicant stating that the reasons behind the changes to the conditions of employment of the applicants and that the consultation process had been

completed. The respondent further indicated in the same letter that it would not entertain any further discussions about the matter, and that the second and third applicants had all the information necessary to make a decision in relation to the offer that had been made. And during the course of the same day the respondent issued the applicants with notices of termination of their employment.

[15] The applicants were further to the termination of their employment paid one months' notice pay but were not paid any severance pay for the reason that they, according to the respondent, declined to accept the alternative employment which had been offered to them. Thereafter the applicants referred a dispute to the CCMA concerning an alleged unfair dismissal based on operational reasons. The parties having failed to reach consensus during the conciliation process, the matter was referred to this court for adjudication.

The issue to be determined

[16] In terms of the pre-trial minutes this court is required to determine whether or not the dismissal of the second and third applicants by the respondent was substantively unfair, based on the following grounds:

(i) there was no valid and fair reason for the respondent to dismiss the second and third applicants;

(ii) The respondent unilaterally changed the terms and conditions of service of the applicants and when this was not accepted by the second and third applicants, the respondent simply terminated the services of the second and third applicants under the veil of a retrenchment;

(iii) The retrenchment was a fait accompli and the decision was made to retrench before any consultation process.

[17] The court is further required to determine whether the respondent followed a fair and proper procedure in terminating the employment of the second and third applicants. In challenging the fairness of the procedure the applicants contended that the procedure was unfair in that:

- The respondent failed to comply with Section 189(2) and (3) of the LRA;
- The respondent failed to disclose to the applicants the information required;
- The respondent failed to engage in a meaningful joint consensus seeking process and adopted a mechanical check list approach.

[18] In the amended statement of case the applicants contended that their dismissals were automatically unfair in that the respondent sought to compel them to agree to the change in their terms and conditions of their employment in breach of the provisions of s187) (1) (c) of the LRA. The applicant contended that the dismissal was alternatively unfair in that the respondent failed to comply with the provisions of s189 of the LRA.

[19] The respondent's first witness Mrs. Adelaide Mckelvy, a sales marketing director of the respondent, testified about the concerns the respondent had with the salary structure that included a commission. The concern with the commission salary

structure was its weakness and the risk associated thereto which related to the possibility of duplicating payment of the commission claimed. The other challenge concerned the ability to determine whether the deal clinched was as a result of the initial call made by any of the applicants or other employees.

[20] The second witness of the respondent was Mr Francio Gouws, an employee of the consultant who was instructed to conduct the consultation process with the applicants, testified that the decision to terminate the employment of the applicants came at the end of the consultation process.

[21] In relation to the criteria used for selecting the applicants Mr Gouws testified that LIFO could not be used because the only affected positions were those of the applicants. He further testified during cross-examination that the two positions became redundant during the consultation process.

[22] The essence of the testimony of the third witness of the respondent is that employees who were willing to accept the payment of the salary based on costs to the company were appointed in those positions previously occupied by the applicants.

Applicant's case

[23] Mr Du Buising, the official of the first applicant, testified that at the first engagement with the respondent it was clear that the respondent had made up its mind as to what was to happen to the applicants. He further testified during cross-examination that the reason for the dismissal of the applicants was because they refused to accept the new terms of their contracts which the respondent

sought to impose on them. The consultation process commenced, according, to him as soon as the applicants refused to accept the proposed change in the terms and conditions of their employment. He disputed the proposition that the reason for not engaging in asking details was because he had accepted the reasons for the process. He testified that the reason for not asking for details was because the applicants wanted further consultation.

Evaluation

[24] There are two main issues for determination in this matter. The first relates to the claim that the dismissal of the applicants were automatically unfair as envisaged in s 187 (1) (c) of the LRA. In this respect the onus is on applicants to show that the dismissal was unfair.

[25] The second issue for determination arises only if the applicants are unsuccessful with their automatic unfair dismissal claim. The alternative claim by the applicants is that the dismissal was unfair as envisaged in terms of s 189 of the LRA.

Automatic unfair dismissal

[26] In relation to automatically unfair dismissal the applicants relies on the provisions of s 187 (1) (c) of the LRA. Section 187 (1) (c) reads as follows:

> *"187 (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-*
>
> *(a) . . .*
>
> *(b) . . .*

(c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and the employee."

[27] In *National Union of Metalworkers of South Africa and Others v Fry's Metal (Pty) Ltd 2005 (5) SA 433 (SCA)*, the court held that a dismissal would be automatically unfair when such a dismissal is effected for the purposes of compelling the employee to agree to the employer's demand and such a dismissal is temporary, pending the acceptance of the changes to the terms and conditions of employment. The dismissal in the circumstance as envisaged in s 187 (1) (c) is temporary pending compliance with the demand of the employer. Once the demand is accepted the dismissal is withdrawn and the employee is retained. In other words the dismissal is conditional on the employee complying with the employer's demand.

[28] In this respect the court in *Fry's Metal* in the middle of paragraph [56], had the following to say:

[56] . . . . On this approach, only conditional dismissals can fall under s 187(1)(c), and it is this that distinguishes them from the broader category of dismissals where the employer - irreversibly - 'has terminated' the employment contract. Dismissals intended to be and operating as final - not, in other words, reversible on acceptance of the demand - can thus never have as their reason 'to compel the employee to accept' that demand. They will therefore not be automatically unfair. In such cases, the only factual enquiry

confronting a court is the employer's reason for effecting the dismissal: once compulsion to accept the disputed demand (with ensuing reversal of the dismissal) is excluded, no further enquiry into the nature or categorization of the demand is required."

[29] There seems to be no doubt that an employer can in law utilize the principles of operational requirements to terminate the employment of an employee who refuse to accept the changes to the terms and conditions of employment. However, a dismissal based on operational requirements would be automatically unfair if no valid operational requirement exist to justify changes and also as indicated earlier the dismissal is not final and intended to replace an employee with those who may be willing to accept the changes in the conditions of employment. See also A van Niekerk et all , Law @ Work (LexisNexis 1st Ed) page 226 to 227 where the learned authors after a brief analysis of both decisions of *Fry Metals* and *CWIU & Others v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC)*, say that:

> *"At present, the law would appear to determine the application of the automatically unfair dismissal provision by reference to the employer's conduct and intention. If the employer intends to finally terminate the employment relationship by dismissing and to employ a new workforce on the terms rejected by those dismissed, there is no automatically unfair dismissal"*.

[30] Turning to the facts and circumstances of the present case, there is no doubt that the reason for the dismissal was based on the refusal by the applicants to accept

the changes which the respondent saw as necessary to address its business risk which had not occurred but which could potentially happen. Thus the respondent was not introducing changes addressing something that has occurred in its business but sought to address a risk which could reasonably be expected to occur even after introducing all the necessary measures to prevent it from occurring. In this respect I have no reason to doubt the version of the respondent that the risk could reasonably materialized even with the introduction of the computer system to deal with the processing of the payment of the commission. The risk of fraudulent claims for payment of commissions remained even after the introduction of the computer system because of the human element in feeding the data into the computer. The other reason which I belief constitute a good and reasonable aspect of the operational requirements is the fact that the restructuring was introduced to align the salary structure of the applicants with those of the other employees of the respondent.

[31] It is therefore my view that the reasons for the dismissals of the applicants for operational requirements were clearly permanent and not conditional on the applicants accepting the changes which the respondent sought to introduce at the time. The fact that the dismissal was not conditional but final was confirmed by Mr Du Buisson of the first applicant who stated that their understanding was that the dismissal was final and not negotiable.

[32] It is for the above reasons that I find that the applicants have failed to show that their dismissals by the respondent were automatically unfair. Thus the applicants' claims for automatically unfair dismissal stand to fail.

Was the dismissal substantively and procedurally unfair?

[33] Having found that the dismissal was not automatically unfair, I now proceed to consider the fairness of the dismissal in terms of s 189 of the LRA. In terms of s 189 of the LRA, an employer is required to consult with various stakeholders envisaged in that section when it contemplates dismissing one or more employees based on operational requirements. Subsection 2 of that section requires the employer and the consulting parties to engage in a meaningful joint seeking process geared towards finding appropriate measures to:

- avoid the dismissals
- minimize the number of dismissals
- change the timing of the dismissals
- mitigate the adverse effects of the dismissals.

[34] The consulting parties also have a duty in terms of the law to seek consensus regarding the selection criteria for choosing those employees whose employment is to be terminated due to the employer's operational requirements. This includes seeking consensus regarding severance pay to be paid to the dismissed workers. If no consensus is reached regarding the selection criteria the employer is required to apply a selection criteria that is objective and fair.

[35] Section 189 of the LRA requires an employer who contemplates a retrenchment to issue a written notice inviting the other party to consult with it and to also disclose in writing all the relevant information to facilitate the consultation

process. The information which the employer has to disclose includes the following:

> *" (a) the reasons for the proposed dismissals;*
>
> *(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;*
>
> *(c) the number of employees likely to be affected and the job categories in which they are employed;*
>
> *(d) the proposed method for selecting which employees to dismiss;*
>
> *(e) the time when, or the period during which, the dismissals are likely to take effect;*
>
> *(f) the severance pay proposed;*
>
> *(g) any assistance that the employer proposes to offer to the employees likely to be dismissed;*
>
> *(h) the possibility of the future re-employment of the employees who are dismissed;*
>
> *(i) the number of employees employed by the employer; and*
>
> *(j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months."*

[36] Turning on to the facts of the present matter, it is apparent from the evidence presented that up until the 26th July 2006, the parties were engaged in a consultation initiated by the respondent with the view of obtaining the consent of the applicants regarding the changes to their terms and conditions of

employment. Although there is evidence that makes reference to retrenchment, for instance in the minutes of the 20th July 2006, there is no evidence that the respondent contemplated a retrenchment as envisaged by s 189 of the LRA. In this respect nothing is said in the letter of the 12th June 2006, concerning the possible retrenchment.

[37] It is clear even from the version of the respondent that all meetings which took place prior to the 26th July 2006, were not consultations as envisaged in terms of s 189 (1) of the LRA. Accordingly, for the purposes of s 189, the meetings cannot be regarded as bona fide or genuine consultations concerning possible retrenchments. They were meetings which were not geared towards avoiding or minimizing retrenchments because at that stage retrenchment was not contemplated. What seems to have been envisaged was that the applicants would agree to the proposed restructuring of their salaries. It would also appear that even as late as the meeting of the 26th July 2006, the respondent had not contemplated retrenching the applicants. The minutes of that meeting reflects the respondent having indicated that the original offer relating to the salary to be paid if they were to agree to the changes in the terms and conditions of employment remained. The respondent explained during that meeting how it arrived at the salary it proposed. And more importantly as concerning the issue of whether that meeting constituted consultation envisaged in terms of s 189 of the LRA, it is stated at page 41 of the bundle that the respondent is said to have stated that, "*Company said never foresee job loss as there is (sic) positions for both people.*"

[38] The respondent issued its notice of possible retrenchment on 26th June 2006. The reason for the contemplation of the retrenchment is set out in the letter the contents of which are quoted above. It would seem to me that the issue of contemplating a retrenchment arose after the applicant rejected the offer made during the meeting and when the first respondent insisted in re-negotiating the commission to be paid to the applicants. This becomes even clear from the reading of the letter dated 26th July 2006, wherein the respondent sought to confirm what transpired during that meeting. The letter reads as follows:

> *"We refer to the consultation that was held this afternoon.*
>
> ***We would like to place the following on record:***
>
> 1. *It was never the company's intention to retrench your two members as they had positions available for both employees.*
> 2. *The company offered both the employee reasonable alternatives in order to avoid any job losses.*
> 3. *By the employee not accepting the company's offer, they leave the company as indicted today's consultation, with no option but to terminate their services with the company.*
> 4. *The company has agreed to afford the employees an opportunity until noon on Monday the 31st of July 2006 to finally decide whether they want to accept the offer or not.*
> 5. *The company was willing to negotiate on the issues relating to severance pay and re-employment. However you indicated that this will not be necessary as you will waive your claim on these issues.*

6. *Should the employees not accept the company's offer of employment on Monday as per point 4 of this fax, their service will terminate with effect from the 1st of August 2006. They company will not require the employees to work their notice period and in return the employees will be paid for their notice period of 1 (one) month.*

Please do not hesitate to contact the writer directly should you have any further queries."

[39] The letter of 31st July 2006, from the respondent which was a response to the demand for disclosure of information by the first applicant reveals very clearly, that the consultant confused consultation that may have occurred when the respondent sought approval of the applicants to change the terms and conditions of their employment and consultation as envisaged by s 189 of the LRA. The letter reads as follows:

"Dear Sir

We refer to your fax dated the 28th of July 2006.

We are of the opinion that the company has discussed the reasons behind the changes in terms and conditions of employment during consultation process. All the reasons are also addressed in the 189 (3) notice. It must also be noted that one of the biggest reasons is to bring the two employees in line with the other sales coordinators in the company and to have pay parity within the organization for specific positions.

We see the process as complete and are not willing to entertain any further issues pertaining to this matter. The company made their final offer to your members in the last consultation.

We are of the opinion that your members have all the information they need to make their informed decision. It is now up to them to do so.

Please do not hesitate to contact the writer directly should you have any further queries.

Kind regards."

[40] In this respect the point made earlier need to be re-emphasized. The purpose of the consultation which took place from the start to the end including the meeting of the 26th July 2006 was for the purposes of persuading the applicants to agree to the restructuring of their salaries. The respondent had not at that stage contemplated retrenching the applicants. In other words the consensus seeking process which the respondent embarked upon was not the one envisage by s 189 of the LRA. If the process was to be the one envisaged by s 189 (2) then the respondent was obliged to ensure that the applicants were properly informed of the nature of the process, and its possible out come. The respondent ought to have made it clear to the applicants that the process they had embarked on was not only seeking their agreement to the changes of their terms and conditions of the employment but that critically it was a process intended to avoid, minimize the consequences of dismissal or reduce the impact that dismissal may have on them.

[41] The other point to be taken into account in the consideration of the fairness or otherwise of the dismissal concerns the selection criteria. It is trite that once the retrenchment becomes a reality, the parties need to engage in a consensus seeking process with the view of reaching an agreement about the selection criteria. As stated earlier in this judgement, if no consensus is reached regarding the criteria the employer is obliged to apply an objective and fair criteria.

[42] In the present instance there is no evidence that the parties reached an agreement as to the selection criteria of those employees who were to be dismissed. The question that then arises is whether the criterion applied by the respondent was objective and fair.

[43] As indicated earlier, the criterion used in selecting the applicants for retrenchment amongst the sales employees of the respondent was "redundancy." In my view this is clearly an unfair criterion. In this respect I agree with the legal representative of the applicants that "*redundancy*" can never be a fair and objective selection criterion, as it is the cause of the retrenchment.

[44] In the light of the above I am of the view that the respondent has failed to discharge its duty of showing that the dismissal of the applicants were both substantively and procedurally fair. It is also my view that in the circumstances of this case, equity requires that the maximum compensation be ordered against the unfair dismissal of the applicants. And as concerning the costs, I see no reason why they should not follow the results.

[45] In the premises the following order is made:

1. The dismissals of the applicants for operational reasons were not automatically unfair.
2. The dismissal of the applicants for operational reasons was both substantively and procedurally unfair.
3. The respondent is to pay both the second and third applicants compensation for 12 (twelve) months calculated at the salary that each received as at the date of their dismissal.
4. The respondent is to pay the costs of the applicants.

Molahlehi J

Date of Hearing 7 May 2009

Date of Judgment 15 June 2010

Appearances

For the Applicant : Adv J H Dev Botha

Instructed by : Assenmacher Attorneys

For the Respondent: Mr R Orton

Instructed by : Snyman Attorneys