REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: C635/99

DATE: 19-7-2000

In the matter between:

Applicant

and

Respondent

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J U D G M E N T

PILLAY, AJ:

1. A dispute was referred in terms of section 191(5)(b)(ii).

2. The applicant was employed by the respondent since 2 December 1996 as an administration clerk on the recommendation of a manager, Mr Colin Schmidt.

3. When the applicant accepted employment at the respondent at the respondent's Cavendish Mazda dealership, she did so on the express condition that she would not be required to work beyond 4:00pm and that she would be provided with parking. Although her contract of employment was not amended to include these terms, they were observed until about 1999.

4. The respondent purchased Electromac, an auto-electrical business, which it conducted from the same premises as the Mazda dealership at Cavendish. The applicant did the banking and answered the telephones for Electromac, in addition to her administrative duties for the Mazda dealership.

5. The respondent was awarded the Pajero dealership. Mr Scmidt returned from the Rondebosch branch to Cavendish to manage the dealership.
6. The applicant was informed that she would be required to work until 5:30pm and that she would no longer have space to park her car because the new dealership brought with it additional stock. Furthermore, as an up-market dealership, it had to ensure that it maintained a suitable image.

7. The applicant objected to the changes in her conditions of service and Mr Allie Ryklief, an organiser for NUMSA, was approached to represent her. The outcome of the discussions was that the applicant was required to work exclusively for Electromac. She was able to keep the same working hours as before and she was also given two weeks to find alternative parking.

8. Another employee, Agnes Engels, who had been employed in 1988 was transferred to take over the applicant's responsibilities at the Pajero dealership. Ms Engels had become redundant and had previously been transferred to a position that was not entirely suitable. She was better suited to the Pajero dealership and was able to work after 5:00pm. Furthermore, her salary was R 2700.00 which was less than the applicant's salary of R 3 400.00.

9. The applicant resisted the transfer to the Electromac, even though it accommodated what she considered to be the two material conditions of her employment, namely the parking and the hours of work.

10. On her version, the applicant was forced to take the Electromac position. The respondent alleged that she was transferred pursuant to an agreement with NUMSA. From the evidence of Mr Ryklief it would appear that although the transfer was not desired, there was a degree of acquiescence, even if it was under protest, as it was accepted practice for the respondent to transfer its employees from time to time.

11. Accordingly the applicant started working at Electromac exclusively from 17 May 1999. When Electromac was moved to Rondebosch the applicant also went along.

12. On or about 22 July 1999 the staff and the union NUMSA were informed about the closure of Electromac. The closure was occasioned by John Gordon, a partner and shareholder in Electromac, emigrating to Australia and the fact that Electromac sustained a loss of more than R60 000.00 over the previous seven months.

13. The respondent invited NUMSA to consult about the retrenchments. Most of the Electromac employees were absorbed in other branches. Two of them were unavoidably retrenched.

14. In the applicant's case Mr Ryklief confirmed that there had been in-depth discussions about the alternatives to the retrenchment. One of the options proposed by the respondent was that the applicant be transferred to Noordhoek into the position held by one Ms Rosendorff who would in turn "bump" Ms Lendes in Diep River. After conferring with the applicant, Mr Ryklief indicated to Mr Welter that the proposal would be acceptable.

15. The respondent contended that it did not make an offer to bump Ms Rosendorff but had merely indicated that it would explore that option, provided Ms Rosendorff was prepared to accept voluntary retrenchment. If she refused it then Ms Lendes would have to be "bumped" to make way for the applicant.

16. The reason why Mr Welter identified Ms Rosendorff was that she seemed unhappy, as evidenced by her frequent absenteeism. Mr Welter felt that the applicant would be a better candidate for the position. The respondent was also prepared to contribute to the applicant's petrol expenses with the extra travelling to Noordhoek in exchange for her ferrying documents between the head office and Noordhoek.

17. It is clear that the most desirable outcome for both parties was the transfer of the applicant to Noordhoek and the "bumping" of Ms Rosendorff. Perhaps Mr Welter expressed his enthusiasm for his proposal in such a manner that it was perceived as a firm offer. Mr Rycliff's version was that it was an option. I

am satisfied that Mr Welter did not intend it to be a firm offer.

18. When MISA, the union representing Ms Rosendorff, protested about the possibility of her being retrenched, the respondent abandoned "bumping" her as an option. The respondent tried to steer the consultation towards selecting the most suitable person to have been employed last in the administration category. That person was Ms Lendes at Diep River. The applicant was willing to be transferred there until it became apparent to her that she would have to sustain a salary reduction of about R800.00. She refused the alternative employment at Diep River.

19. NUMSA accepted that the administrative position attracted varying rates of pay, depending on the job content. The applicant also accepted that the salary for the Diep River position had been validly set by the management at Diep River. However, she contended that a recently employed person should have been given the lower paying Diep River position.

20. The consultations broke down. The respondent was not prepared to consider any other alternatives. The applicant and NUMSA were not prepared to negotiate the retrenchment package, believing that the retrenchment of the applicant could have been avoided.

21. Mr Vazi of NUMSA conceded on behalf of the applicant the substantive fairness of the retrenchment by accepting that there was a commercial rationale for the closure of Electromac. The crux of the dispute which remained substantive is the selection criteria applied by the respondent, and more specifically the application of "bumping" as a method of selecting employees for retrenchment.

22. The respondent's stance was that LIFO had been agreed as a criterion for selection. It had been practised in the past and MISA, the other trade union, having a presence amongst the respondent's employees, relied on LIFO as a criterion. The application of LIFO was qualified by the skills and operational needs of the respondent and practical "commonsense" considerations. The respondent denied that salary was a criterion for selection or qualification of the application of LIFO, as contended by the applicant and NUMSA.

23. It is common cause that LIFO was agreed as a criterion for selection. What is not clear is the full terms of the agreement as to how LIFO would be applied. The parties had agreed to use the full list of administrative personnel employed in all the branches of the respondent as a basis for discussion. There was also acceptance that LIFO would be qualified having regard to the skills and operational needs of the respondent and practical considerations. This was evidenced from the mutual consensus not to select Ms Vermeulen, even though she was the last to be employed.

24. However, the parties were in dispute as to whether a salary match was an agreed or fair qualifying criterion. It is clear that the salary match was not an agreed criterion to qualify the application of LIFO.

25. The question for determination by the Court then is whether it was a fair and objective qualifying criterion in terms of section 189(7).The Court would not embark on this line of enquiry if the terms of the agreement for the application of LIFO were clear and complete, as the primacy of private agreements should be respected. In the absence of any agreement as to whether to apply or not to apply comparative salary scales as a criterion to qualify LIFO, the Court is free to consider whether it is in the circumstances, a fair criterion. Similarly, in the absence of any agreement to use or not to use

"bumping" as a tool in retrenchment, the Court may also evaluate whether it would have been a fair method of selecting retrenchees in this case.

26. From the evidence of Mr Ryklief, it emerged that the identification of Ms Rosendorff was not arbitrary. It was consistent with NUMSA's submission that the application of LIFO should be qualified by comparative remuneration. It was common cause that Ms Rosendorff was the person most recently employed to have a salary and skills that were comparable to those of the applicant. Hence NUMSA proposed that Ms Rosendorff be selected for retrenchment.

27. The respondent rejected this proposal once Ms Rosendorff and MISA, her union, indicated their resistance to any suggestion that she might be "bumped" downwards into Ms Lendes' position, to make way for the applicant. The respondent was firmly of the view that in the absence of agreement from Ms Rosendorff, it was bound to apply LIFO strictly.

28. As the respondent was prepared to qualify the application of LIFO in order to address its own interests, its refusal to consider qualifying criteria in order to meet the interests of the applicant was unreasonable. The respondent was able to and did modify the application of LIFO whenever it suited its own interests.

29. The respondent was mindful of the inconvenience and costs caused generally by restructuring during "bumping" and the so-called "domino effect". Hence it was not a practice that it usually applied. However, it was prepared to implement "bumping" in these circumstances. Therefore the disadvantages of "bumping" was not a primary consideration for the respondent in this case where it was prepared to bump sideways to substitute Ms Rosendorff with the applicant.

30. This also confirms that the respondent was able to apply LIFO flexibly, if necessary.

31. The respondent should have explored the application of "bumping" and a salary match as qualifying criteria further. However, it had closed its mind to considering these as qualifying criteria to ameliorate the adverse effects of the retrenchment on the applicant.

32. The triangular "bumping", as it was referred to during the trial, would have minimised the adverse effects of the retrenchment on the applicant. Mr Rosendorff and Lendes would have been brought into the equation to share the brunt of the retrenchment, a result which would have been predictable for employees with lesser service, and in an environment where LIFO was the primary basis for retrenchment. NUMSA confirmed that it had prepared its member, Ms Lendes, for the retrenchment.

33. The applicant was required to bear a R800.00 reduction in her salary. She would have suffered a R200.00 loss if she went into Ms Rosendorff's position. Ms Rosendorff would have sustained a R600.00 loss of income monthly. To have imposed the full burden of the R800.00 salary deduction on the applicant who had longer service than Ms Rosendorff was unfair in the circumstances.

34. The respondent adopted the stance that NUMSA and the applicant became inflexible and positional by insisting on Ms Rosendorff. The respondent had anticipated that NUMSA would counter-offer, amongst other things, allowing
the applicant to take Ms Lendes' position at a higher salary. From the records of the meetings it appears that both parties became positional and mutually agreed to disagree.

35. However, the conduct of the respondent must be criticised because the onus rests on it to ensure that all options are explored to avoid the retrenchment, or minimise its adverse effects.

36. Consultations about retrenchment is not the same as negotiations in collective bargaining, during which the parties wrangle with each other to secure the best deal for their respective constituencies, often by bluffing and trying to outwit or out-manoeuvre each other. Collective bargaining is usually positional. It tends to close the mind to exploring in good faith all options for finding mutually acceptable solutions.

37. Retrenchment calls for a joint problem-solving approach so that the needs of all parties can be explored. Consequently if the respondent foresaw the possibility of a solution involving the substitution of the applicant for Ms Lendes at a higher salary, it should have proposed it. I refer to this option specifically since the respondent contemplated it at the time. I do not suggest that an employer is expected to propose every conceivable option, but only such options that are shored up in the dynamic of consultation.

38. An employer is, like the driver of a bus, the best person to determine what options would be viable for the organisation. Trade unions often have to accept the employer's evidence about the commercial rationale that underlie restructuring. Consequently, the onus rests on the employer to propose alternatives to retrenchment. It should not wait on the union to do so, since the union does not bear the onus of establishing that the dismissal was unavoidable and therefore fair. If, after proposing all reasonable options that it considered during the consultations, the union remains recalcitrant, an employer cannot be faulted (see Fletcher v Elna Sewing Centres (Pty) Ltd 2000 Vol. 21 ILJ 603).

39. It was submitted for the applicant that the retrenchment was carried out with the ulterior motive of getting rid of her. She relied on her transfer from the Pajero dealership to Electromac and the issuing of a written warning for being absent without permission when she was ill. The applicant's submissions were refuted by the respondent's willingness initially to transfer her to Noordhoek. It was also prepared to contribute to her petrol expenses so that she could perform certain courier functions for the respondent. Therefore I find that there was no ulterior motive on the part of the respondent to get rid of the applicant.

40. The applicant withdrew her claim for reinstatement as regards the procedural fairness. NUMSA conceded that the consultations were in-depth. However, the application of the selection criteria and the selection of the applicant per se ultimately renders the dismissal procedurally and substantively unfair.

41. The parties indicated that a ruling of this Court was desired so that "bumping" as a principle can be established. Hence the Court is disinclined to award costs to the successful party. The Court grants the following order.

1. The selection of the applicant for retrenchment was substantively and procedurally unfair.

2. The applicant is awarded R 27 200.00 as compensation.

D DATED AT DURBAN ON THIS 10TH DAY OF AUGUST 2000.

g: 13 July 2000

ent:

nt: NUMSA

For the respondent: Mr R L Brown of Herold, Gie & Broodhead Attorneys