IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 460/04

In the matter between:

NUMSA OBO MEMBERS APPLICANT

AND

TIMKEN SA (PTY) LTD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant, the National Union of Metalworkers of South Africa (NUMSA) brought an application on behalf of six of its members, claiming that their dismissals for operational requirements by the respondent were both substantively and procedural unfair. The relief sought by NUMSA on behalf of five of its members is that they should each be reinstated with compensation and that in the case of Mr Samson Dlamini who passed away in 2005 only maximum compensation should be granted.

[2] In relation to Mr Ben Motaung, one of the individuals applicants, the respondent placed in disputes his *locus standi* and the right to claim any relief. The respondent contended that Mr Motaung was not selected for retrenchment but volunteered to make the place for the fellow employee Mr Mahlaba.

The issues

[3] The issues for determination by this Court are:

> *"6.1 The fairness of the selection criteria;*
>
> *6.2 Failure by the respondent to re-employ any of the individual applicants after their retrenchment; and*
>
> *6.3 The appropriate relief to be awarded to the individual if successful in their claim."*

[4] Other issues that arose relates to the role of the Black Economic Empowerment (BEE) and its influence on the failure to re-employ the applicants. The applicant did not pursue the ground concerning the validity of the retrenchment.

Background facts

[5] All the individual applicants were before their retrenchment employed at the Original Equipment Manufacturing plant (OEM Plant). It is common cause that prior to their retrenchment the respondent issued section 189 notice and held several consultation meetings with NUMSA.

[6] The one main issue which the parties could not agree on during the consultation process was the selection criteria. During the discussion about the selection criteria, the respondent proposed to apply a criteria that would have included LIFO, skills, competencies, attendance record, disciplinary record, relevant

qualification, training and performance. NUMSA on the other hand proposed LIFO with retention of skills as criteria to use in choosing those to be retrenched.

[7] The parties having failed to reach consensus, the respondent in selecting the individual applicants, used a criteria comprising of years of service, attendance record, disciplinary records and tardiness.

The case of the respondent

[8] The first witness of the respondent was Mr Leppan (Leppan) a former manager of the respondent, focused on the consultation process during his testimony. He confirmed that the parties could not agree on the selection criteria, but that the criteria applied by the respondent was ultimately fair in the circumstances.

[9] In relation to the re-employment of the individual applicants when vacancies arose, Leppan testified that the understanding of the respondent was that the duty to re-employment the individual applicants would only take effect after six months of the retrenchment.

[10] Leppan was not sure whether or not in applying the criterion the respondent included days when an employee would have had a valid reason to be absent or absent due to injury at work. He testified further in this respect that whenever an employee was late the respondent would deduct from such employee's pay for the hours that he or she was late. The employees who were absent from work would not be paid for that day or days unless they produced a medical certificate. In addition such employees would lose shifts allowance resulting in

them also losing part of their leave bonuses and leave pay. An employee who was absent and who had exhausted the 30 days leave within the three years' cycle would get half pay for each day that he or she was absent.

[11] Except for knowing about the employment of the BBE employees, Leppan did not know why the applicants were not informed or invited to apply for the vacant positions that had become available. He also was not aware of the 36 (thirty-six) months period for re-employment of the retrenched employees as provided for in the main agreement. According to him those employees who were employed after the retrenchment were appointment at PRS and 10 (ten) of them were transferred to OEM on a temporary basis.

[12] Mr Nel (Nel), in support of the respondent's case testified that in October 2007, the respondent lost 50% of the Spoornet tender. The tender which the respondent lost from Spoornet constituted 75% of respondent's market share according to Nel. He initially testified that 78 (seventy eight) workers were retrenched in October 2007 however under cross examination confirmed that the 78 (seventy eight) workers were in fact not retrenched but offered early retirement packages. He could not however confirm as to the category in which these employees fell in.

[13] Ms Booysen (Booysen) who was human resource manager of the respondent until 2005, stated in her testimony that there was no dispute about the accuracy of the records of the individual applicants which were used in applying the selection criteria which the respondent had chosen. The criteria as indicated

earlier included amongst other things the disciplinary record and absenteeism record of the individual applicants.

[14] Nel further confirmed that new employees were engaged after the retrenchment and that the individual applicants were not considered for employment in this regard. He contended however that although the individual applicants were not invited to apply for the vacant posts, NUMSA shop stewards should have known about the new positions since the posts were advertised in the respondent's notice board.

[15] According to Nel the respondent concluded a BEE agreement with ASGDA in writing on 2nd August 2005. He also confirmed during cross examination that OEM was always under pressure to increase production and that was the reason for the employment of new and temporary workers in OEM. The need for new employees to meet the production demand was contained in a memorandum from Mr Coetser, managing director dated 15th October 2004 which reads as follows:

> *"TO: Associates via notice boards operational management team via email:*
>
> ***SUBJECT**: Black Economic Empowerment*
>
> *I refer to my memo of 2004-10-11 notifying associates of our Black Economic Empowerment status.*

In view of the fact that an announcement is expected to be made by Tuesday, 2004-11-30 associates are advised that we are withdrawing the two permanent vacancies advertised in respect of the Heap Treatment and AP Grind Area. Our immediate production requires 5 additional associates to work in Heap Treatment and 5 additional associates to work AP Grind. These additional vacancies will be ***TEMPORARY*** *and some will involve the change in current conditions of employment. All associates who have applied for the permanent vacancies will be considered for these temporary functions. Any other associate on site applied through the internal transfer application process (forms obtainable Mrs Girleen Bopha).*

Interested associates are to submit their application for transfer by 15h00 on Monday, 2004-10-18 to Mrs Girleen Bopha."

The case of the applicant

[16] The first witness of the applicant was Mr Julius Jiki who was employed at the cone grind section of OEM and was employed there for more than 10 (ten) years. He testified that had the respondent applied LIFO he would not have been retrenched as he was the most senior to most of the employees in that section. He also testified that he was highly skilled and had the ability to operate 7 (seven) machines in the grind section. He was however certified as an AA grade which qualified him to operate 4 (four) machines. At the time of his retrenchment he had already worked in all the sections of OEM.

[17] In relation to his attendance record, Jiki testified that the 17 (seventeen) days reflected in the attendance record includes 8 (eight) days when he was off duty due to the injury he sustained at work.

[18] The second witness of the applicant, Mr Mbatha was prior to his retrenchment employed as a cone grinder and was certified as AA grade and could operate 4 machines. All the other witnesses of the applicant testified about their employment background prior to their dismissal and to what happened to them in relation to finding alternative employment subsequent to their dismissals.

[19] Mr Motaung who at the time of the retrenchment had an AA grade which like others qualified him to operate 4 (four) machines, testified that he was advised by the union to accept the retrenchment in the place of Mr Mahlabe. The reason for this approach by the union was as stated earlier because of the financial situation which confronted Mahlabe. Mahlabe had recently divorced and had also purchased a house which he would to afford if he was to be retrenched.

[20] Motaung disputed his attendance record and his tardiness. He contended in this regard that the respondent refused to disclose when required to do so by the applicant.

Analysis

[21] The respondent contended that the parties had agreed to abandon skills retention as a selection criteria due to the fact that they could not reach consensus as to how such a criteria was to be used. And in relation to the criteria it used the respondent contended that it was fair because it was debated at length with the

applicant. LIFO was used only to break a tire when the attendance score of two or more employees was the same.

[22] The law is clear that where the parties are unable to reach consensus on the selection criteria, the prerogative as to the criteria to use rests with the employer. In choosing whatever selection criteria the employer has to ensure that such a criteria is both objective and fair. In this regard section 189 (7) of the LRA provides as follows:

> *"The employer must chose the employee to be dismissed according to a selection criteria-*
>
> *(a) that have been agreed to by the consulting parties or;*
>
> (b) *if no criteria have been agreed, criteria that is fair and objective.*
>
> *In addition to choosing a fair and objective criteria, the employer must ensure that implementation of such a criteria is also fair."*

[23] In *Chemical Workers' Industrial Union & others v Latex Surgical Products (PTY) (2006) 27 ILJ 292 at 320 A-B,* the Court in dealing with the issue of choosing the selection criteria held, per Zondo JP that:

> *"[84] ...The two types of selection criteria can be referred to as the agreed selection criteria and the fair and objective selection criteria respectively. Obviously the agreed selection criteria are selection criteria that have been agreed upon between the consulting parties. The fair and objective selection criteria must be*

used where the selection criteria have not been agreed upon between the consulting parties. What s 189(7), therefore, means is that, where the consulting parties have agreed upon the selection criteria, the employer is obliged to use the agreed selection criteria to select the employees to be dismissed. Where there are no agreed selection criteria, the employer is obliged to use only fair and objective selection criteria to select the employees to be dismissed."

[24] In the present instance it is common cause that attempts at reaching consensus on the selection criteria was unsuccessful. It was for this reason that the respondent developed and implemented its own criteria to be used in the selection of the employees to be chosen for the dismissal due to operational reasons. The issue that has then arisen which needs to be determined is the fairness or otherwise of criteria used to choose the applicants for retrenchment.

[25] The respondent argued that it acted fairly and objectively in applying the selection criteria to the employment data of the applicants when selecting them for retrenchment. It was further argued that the weighting allocated to each of the factors was calculated to be as neutral and fair as possible and "normal" behaviour, relating in particular to the average attendance record, was accorded a neutral score. What was taken into account was the abnormal behaviour such as excessive poor attendance which attracted negative implication in the calculation of the scores.

[26] In support of its argument the respondent relied on the case of *Engineering Industrial and Mining Workers' Union & another v Starpack (PTY) Ltd (1992) 13 ILJ 655(IC),* where the Court held that productivity and conduct have been held to be a fair selection criteria provided that the affected employees are given the opportunity to challenge the assessment. In the present instance the applicants were not afforded the opportunity to challenge the data used in arriving at the conclusion that the attendance records were negative and therefore influenced their scores in the assessment of whether or not they should be retrenched.

[27] It is generally accepted in retrenchment cases that LIFO is the most objective and fair criteria to use. This criteria need not be applied in those cases where its application could result in loss of skills or disrupt the business operations. There was no evidence to that effect in the present instance.

[28] Where the selection of employees is based on factors such as attendance record, tardiness and performance, such employees should be given an opportunity to make representation against the negative conclusion that may be drawn against them as a result thereof.

[29] In the present instance the analysis of the selection criteria shows clearly, in my view, that it was subjectively based on the elements of discipline. The criteria excluded from its scope skills, qualifications, experience and long service. What is also clear is that even if it was to be found that the criteria itself was objective and fair, its application was clearly unfair.

[30] The duty to show that the criteria used was both objective and fair in its definition and application rests on the employer. It was therefore the duty of the respondent in the present instance to show that the exclusion of the factors such as skills, qualifications, experience and long service did not result in unfairness on those selected for retrenchment as a result thereof. I have already indicated that once the employer successfully demonstrates that the criteria by its definition was fair, it then has to show that its implementation was also fair.

[31] In my view the respondent has in the present instance failed to show that the criteria it chose to use in the selection of the applicant was fair. The undisputed evidence reveal that the applicants had already received punishment for their attendance record which was used to select them for retrenchment. There is also evidence showing that the attendance factor was applied even in cases of absence due to ill-health arising from injury at work. In the case of Mr Jiki, for instance the respondent did not dispute that the 17 (seventeen) days of absence from work included those days when he was sick due to the injury suffered at work.

Substantive fairness

[32] In addition to the above, substantive fairness requires the employer to show that the retrenchment of employees was an act of last resort. The employer has to show that there were no other alternatives to the retrenchment of the employee. An essential consideration when faced with retrenchment in a restructuring exercise is whether there is work available which the affected employee can

perform. If there is, then fairness would require the employer to offer such a position to the affected employee. In a case where a position is available but the employee lacks skills to perform in that position, the employer is obliged to consider any additional training that may assist the employee in achieving the level of performance required. As part of the principle of seeking to avoid retrenchment, as envisaged in section 189(2)(a)(i) and (ii), the same consideration would apply where new positions are created. Similarly, if the new position requires a higher performance level and the employee lacks the skills thereof, training as a means to avoid retrenchment has to be an option to consider. In this regard the decision of the Labour Court in *Andre Johan Oostehizen v Telkom SA Ltd (2007) ILJ 2531 (LAC),* is instructive. In that case (at para 4) Zondo JP held that:

> *"Implicit in section 189 (2)(a)(i) and (ii) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if it can be avoided. Accordingly, these provisions envisage that the employer will resort to dismissal as a measure of last resort. Such an obligation is understandable because dismissals based on the employer's operational requirements constitutes the so called no fault terminations."*

Zondo JP went to further [at para 8] to say:

> *"In my view an employer has an obligation not to dismiss an employee for operational requirements if the employer has work which such employee can perform either without any additional training or with*

minimal training. This is the because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid it and employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirements ... A dismissal that could have been avoided but was not avoid is a dismissal that is without a fair reason."

[33] The foundation for the above approach can be found in *General Food Industries Ltd v FAWU (2004) 7 BLLR 667 (LAC)* where Nicholson JA said:

"The loss of jobs through retrenchment has such a deleterious impact on the lives of workers and their family that it is imperative for that -even though reasons to retrench employees may exist -they will only be accepted as valid if the employer can show that all viable alternative steps have been considered and taken to prevent the retrenchment or to limit it to the minimum."

[34] In *Nehawu & others v The Agricultural Research Council & others [2000] 9 BLLR 1081 (LC),* the Court held that:

"[27] The ultimate decision to retrench must be fair. In this context, fairness means that the ultimate decision to retrench must properly and genuinely be justified by operational requirements. The ultimate decision must be genuine and not merely a sham. The court's function, therefore, is not merely to determine whether the

requirements for a proper consultation process have been followed and whether the decision to retrench was commercially justifiable. The enquiry is whether the requirement is properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances. In this regard see Decision Survey International (Pty) Ltd v Dlamini & others [1999] 5 BLLR (LAC) at 418E-J."

[35] The one alternative which if the respondent had considered may have avoided the retrenchment is the "bumping" process. This issue was put forward by the applicant as an alternative to retrenchment during the consultation process but was rejected or ignored by the respondent without giving any reason for doing so. The respondent failed to provide any reason for not considering "the bumping process" in contravention of section 189(6) of the LRA.

[36] The principles governing "bumping" were considered in *Porter Motor Group v Karachi (2002) 23 ILJ 348 (LAC)* and are stated as follows:

"(2) Bumping is situated within the 'last in first out' (LIFO) principle which is itself rooted in fairness for well-established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise are an invaluable asset. Their long service is an objective tribute to their skills and industry and their avoidance of misconduct. In the absence of other factors, to be enumerated

hereinafter, their service alone is sufficient reason for them to remain and others to be retrenched. Fairness requires that their loyalty be rewarded.

(3) The nature of bumping depends on the circumstances of the case. A useful distinction is that of dividing bumping into horizontal and vertical displacement. The former assumes similar status, conditions of service and pay and the latter any diminution in them.

(4) The first principle is well established, namely that bumping should always take place horizontally, before vertical displacement is resorted to. The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping. Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.

(5) Where large-scale bumping, sometimes referred to as 'domino bumping', necessitates vast dislocation, inconvenience and disruption, consultation should be directed to achieving fairness to employees while minimizing the disruption to the employer. Examples of disruption include difficulties caused by different pay

levels, client or customer reaction to a replacement of employees and staff incompatibility. In evaluating the competing interests of the employer and the affected employees the consulting parties should carry out a balancing exercise. Where minimal benefits accrue to employees, while vast inconvenience is the lot of employers, fairness requires that fewer employees should move."

[37] There is no evidence that had bumping been applied it could have been disruptive and led to unworkable consequences. It is therefore my view that the respondent did not consider other alternatives to retrenchment and therefore the retrenchment was not a last resort.

Re-employement

[38] It is an established principle of our law that whenever the situation that led to the retrenchment improves, resulting in the need for additional personnel, the employer is obliged to give preference to the re-employment of the retrenched employees should they be suitably qualified.

[39] The respondent did not dispute that the employment of the new recruits after the retrenchments but sought to explain their employment on the basis of the BEE agreement. However, aside the BEE agreement, the facts of this case reveal that the respondent did employ new recruits without notifying or inviting the applicants to apply for those positions.

[40] I now proceed to deal with the contention of the respondent that the applicants did not plead the issue of failure to re-employ them in their statement of case. In

my view this point is unsustainable because an allegation is made in the statement of case that the retrenchment was both procedurally and substantively unfair and therefore the failure to re-employ the applicants would fall under this allegation. And the same applies in the pre-trial minutes wherein the parties agreed that the Court is required to determine whether the retrenchment of the applicants was substantively and procedurally fair. The pre-trial minutes further record that the applicants dispute "*whether the retrench employees were recalled and whether it was done in terms of a fair process.*"

[41] It is also important to note that section 189(3)(h) of the LRA, in addition to consulting and disclosing relevant information, an employer in a retrenchment exercise is obliged to disclose the possibility of future re-employment of the employee who were dismissed. Thus in addition to the points that have already been made the issue of failure to re-employ or invite the applicants to apply is also covered under paragraph 72 of the pre-trial minutes which requires the Court to determine whether or not the respondent has complied with the provisions of section 189 of the LRA.

[42] I now proceed to deal with the issue of the agreement to accept the retrenchment by Motaung whose record was also not positive but scored better than the others and was not to be retrenched for this reason. As stated earlier Motaung accepted the retrenchment in order to save Mahlaba's employment. The agreement to accept retrenchment by Motaung was precariously based on the criteria which I have already found to have been unfair. In other words but for the unfair criteria, Mahlaba would not have been faced with the possibility of a

retrenchment. The need for the agreement would accordingly not have arisen. In the circumstances the agreement stands to be set aside and declared null and void.

[43] In terms of Section 193 of the Act the primary remedy in instances where the Court found the dismissal to be unfair is reinstatement or re-employment. The Court may not grant reinstatement where the employee does not wish to be reinstated, or where continued employment is intolerable, or it is not reasonably practicable for the employer to reinstate or the dismissal is unfair only because the employer did not follow a fair procedure.

[44] In the circumstances of this case and totality of its evidence I see no reason why the applicants should not be reinstated. It is also just and equitable that the applicants should receive the maximum compensation.

[45] Although the respondent indicated that the cause of the retrenchment was due to the loss of the tender to supply bearings to Spoornet, it has not been shown that such a loss had affected 30% of production of bearings in South Africa through OEM. Conversely, the respondent's own witness testified that OEM is consistently under pressure to improve and increase production. It was for this reason that new recruits were engaged after the retrenchment.

[46] In light of the above discussion I find the dismissals of the applicants including Motaung to have been unfair. I see no reason why costs should not follow the results. In the premises, I make the following order:

(i) The respondent, Timken SA (Pty) Ltd is ordered to reinstate the applicants, Julius Jiki, Quintin Mbatha, Ben Motaung, Thulani Mdluli and Norman More.

(ii) The respondent is to pay compensation to all the above applicants including the estate of the deceased Mr Dlamini, in the amount equivalent to 12 (twelve) months salary.

(iii) The respondent is to pay the costs of the first applicant, NUMSA.

Molahlehi J

Date of Hearing : 12th May 2008

Date of Judgment : 15th January 2009

Appearances

For the Applicant : Advocate H W Sibuyi

Instructed by : Ranamane Phungo Inc

For the Respondent: Advocate G A Fourie

Instructed by : Edward Nathan Sonnenbergs Inc