THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS49/12

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION **First Applicant**

DININDZA AND 29 OTHERS **Second and Further Applicants**

and

G4S AVIATION SECURE SOLUTIONS **Respondent**

Delivered: 13 January 2016

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] This matter was presented before the court as a stated case. The second to further applicants were all employed in the respondent's Specialised Cargo Handling Unit (The 'SCH') at the OR Tambo International Airport. They were dismissed on account of the respondent's operational requirements. They

however disputed the substantive fairness of the retrenchments and seek retrospective reinstatement in the event that a finding is made in their favour.

Background to the dispute:

[2] The individual applicants each earned an amount of R6 000.00 per month in terms of a collective agreement (*SCH Employment Conditions; Funeral Benefits and Rostering*) concluded on 20 August 2009 between SATAWU and the respondent. If they did not fall within the Bargaining Council, they would have earned R3 400.00 per month. The respondent was of the view that as a result of the remuneration costs, it was unable to be competitive with other role players in the market as the rates that it was paying to its employees were far higher than what its competitors were paying in the industry. On 22 September 2011, it issued a notice to SATAWU, indicating its intention to cancel the collective agreement in terms of section 23 (4) of the Labour Relations Act[1] (The LRA).

[3] On 30 September 2011, the respondent had issued notices of contemplation of dismissal based on its operational requirements. The notice complied with the provisions of section 189 (3) of the LRA. Initially it was expected that approximately 60 employees would be affected by the retrenchment process. However, only 26 were ultimately retrenched. A process of facilitation through the CCMA was initiated. Several meetings were held with the facilitator between October 2011 and 21 November 2011.

[4] A number of alternatives to retrenchment were considered, including a reduction of monthly employee remuneration and alternative employment within G4S Cash Services (the respondent's sister company) if the employees met the requirement for the posts, which included recognition of prior service at G4S, and a Firearm Competency Certificate. Any alternative appointment in G4S would have followed upon successful job interview.

[5] A meeting was held between the parties on 19 October 2011 to discuss the cancellation of the agreement. On 20 October 2011 the respondent had

[1] Act 66 of 1995

confirmed that clause 1 of the agreement (which dealt with employment conditions of employees in the SCH) was cancelled with immediate effect.

[6] On 19 December 2011 SATAWU referred a dispute to the CCMA alleging the unfair dismissal of its members. A conciliation meeting held on 11 January 2012 failed to resolve the dispute.

[7] It was further common cause in accordance with the pre-trial minutes that not all of the individual applicants were retrenched. In in this regard, the third and twenty-ninth applicants still remain employed. The twelfth applicant was retrenched and subsequently re-employed by the respondent. The twenty-fifth and twenty-eight individual applicants were transferred to G4S Cash Solutions, and the twenty-sixth individual applicant accepted an alternative position.

[8] The issue for determination is whether or not the respondent had a fair reason to dismiss the remaining individual applicants by reason of its operational requirements.

Respondent's submissions:

[9] The submissions made on behalf of the respondent can be summarised as follows;

9.1 The make-up of the SCH business had altered since 2009 with many of its clients electing to arrange their own transportation and only requiring security services.

9.2 The rates being paid to the SCH staff were significantly in excess of what its competitors were paying, and the SCH Unit was unable to successfully compete for business because of its staff costs.

9.3 In essence, the agreement with SATAWU had resulted in the respondent not being as competitive as it would have otherwise been. This had also resulted in a lack of profitability for the business unit.

9.4 Reliance was placed on the Labour Appeal Court's decision in *General Food Industries Ltd v Food and Allied Workers Union*[2] for the

[2] (CA11/2002) [2004] ZALAC 4 (11 May 2004) at para [62]

proposition that a company was entitled to retrench in order to maximise its profits and be competitive in the industry it operated in. To this end, it was contended that the dismissal of the individual applicants based on its operational requirements was substantively fair and was to give effect to a requirement based on its economic needs, and was also operationally justifiable on rational grounds.

Applicants' submissions:

[10] The submissions made on behalf of the applicants are summarised as follows:

10.1 The individual applicants were not employed as security officers but rather in the positions that were reflected in their payslips. Most of them performed the work of controllers.

10.2 They were also not paid as security officers in terms of the Road Freight Bargaining Council Regulations, but that were paid in terms of other regulations under the Bargaining Council.

10.3 The dismissals were unfair in that at the time that the respondent decided to embark on the retrenchment route, positions were still available to the individual applicants *albeit* at a lower salary.

10.4 The initial intention of the respondent was to cancel the collective agreement so that the individual applicants could be paid at a lower rate, and that when it could not do so, it had then decided to effect the retrenchments in circumstances that were not justifiable or fair.

10.5 The applicants had conceded that the respondent had conveyed its reasons for the retrenchments. They nevertheless contended that the reasons, i.e. the need to be competitive, were not reasonable nor fair, as this had more to do with the respondent's competitors than its own need to restructure. To this end, it was contended that the retrenchments were pre-determined, as the respondent's main intention was to pay the same lower salaries as its competitors.

The legal framework and evaluation:

[11] To the extent that the Applicants have referred a dispute about substantive fairness of the retrenchments, this Court, in terms of section 189A (19) of the LRA will be obliged to find that the dismissal was for a fair reason if-

(a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
(b) the dismissal was operationally justifiable on rational grounds;
(c) there was a proper consideration of alternatives;
(d) selection criteria were fair and objective.

[12] Under section 213 of the LRA, *'operational requirements'* is defined to mean *'requirements based on the economic, technological, structural or similar needs of an employer*.' The Code of Good Practice: Dismissal based on Operational Requirements as contained in the LRA further states in Item 1 that;

> *"…As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology that affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise."*

[13] As to what constitutes 'similar needs' is not defined in the LRA or the Code. It is however accepted that this concept is broad enough to include factors that generally have economic consequences for the enterprise. For the purposes of the definition in section 213 of the LRA, these factors will ordinarily be determined by circumstances of each case.

[14] The issues surrounding whether the respondent had considered alternatives to retrenchments or whether a fair selection criteria was utilised are not for consideration before this court in view of these factors not having being placed in dispute by the applicants. In this case, it is also accepted that the reasons for the retrenchment (i.e. the need to be competitive) does not appear to be in dispute. The only issue is whether these reasons were fair and acceptable, or constituted a sound commercial rationale.

[15] The approach in determining the substantive fairness of a dismissal on the grounds of the employer's operational requirements has received attention by this Court and the Labour Appeal Court over time. In *Van Rooyen and Others v Blue Financial Services (South Africa) (Pty) Ltd*[3], this court made reference to the objective enquiry as enunciated in *BMD Knitting Mills (Pty) Ltd*[4] wherein Davis AJA (as he was then) had formulated the applicable principles as follows;

> 'The starting point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is required to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential 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'

[16] Central to the enquiry is whether the employer has established that an operational requirement existed for retrenchment, it being trite that the onus is placed on it to do so as contemplated in section 192 (2) of the LRA. In this case, the primary reason for the retrenchments was that the respondent was not being competitive. To this end, its contention was that the business unit concerned had altered its make-up, resulting in its clients only requiring security services. Furthermore, and as already indicated, the rates being paid to the individual applicants were significantly in excess of what its competitors were paying, leading to the unit being unprofitable and not being competitive.

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[3] (2010) 31 ILJ 2735 (LC) at para 15. See also *CWIU v Algorax Ltd* [2003] 24 ILJ 1917 (LAC) at para [69] – [70] where the court held:

> *"The question whether the dismissal was fair or not must be answered by the court. The court must not defer to the employer for the purpose of answering that question. In other words, it cannot say that the employer thinks it is fair, and therefore, it is or should be fair…… Furthermore, the court should not hesitate to deal with an issue which requires no special expertise, skills or knowledge that it does not have but simply requires common sense or logic"*

[4] [2001] 7 BLLR 705 (LAC)

The applicants' contention on the other hand was that the respondent's inability to compete could never have been a justification for retrenchments.

[17] The question whether a restructuring was necessary in order to increase the business' competitiveness or to increase efficiencies by cutting labour costs was considered in *General Food Industries Ltd v FAWU*[5]. The Labour Appeal Court, per Nicholson JA, held that the Act (LRA) recognises the right of an employer to dismiss employees for a reason based on its operational requirements without distinguishing between a business struggling to survive and a profitable business wanting to increase its profits.

[18] A similar approach had been adopted in *Fry's Metals (Pty) Ltd v National Union of Metal Workers of SA & Others*[6] where Zondo JP (as he then was) stated that the dismissal for a profit oriented reason within the context of operational requirement was fair as it fell squarely within the financial reason as contemplated in section 213 of the LRA. The LAC had equally found that there was no legal basis for the proposition that an employer could not dismiss employees for operational reasons purely for the purpose of making profits as opposed to resorting to dismissal in order to ensure the survival of the business or undertaking.

[19] In applying the above principles to the facts of this case, the first issue to be dealt with pertains to the submissions made in regards to the employees that were identified for retrenchments. In this regard, it was submitted during arguments that the individual applicants were controllers, whilst the respondent had intended to retrench security officers. The response to this contention was that the employees identified for retrenchments were *de facto* employed as security guards, irrespective of what they were initially employed as or, what was reflected in their payslips or certificates of service.

[20] It is my view and also as correctly pointed out on behalf of the respondent that nothing turns on these submissions in view of the fact that the selection criteria used to identify the individual applicants was not placed in dispute.

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[5] [2004] 7 BLLR 667 (LAC)at para 52.
[6] (2003) 2 BLLR 140 (LAC) at para [33]

Furthermore, I did not understand it to be in dispute, that the employees were *de facto,* employed as security guards, irrespective of what they were initially employed as, or what was reflected in their payslips or certificates of service.

[21] In regards to the rationale for the retrenchments, when regard is had to the principles set out in the authorities cited in this judgment, the particular reasons for the retrenchment in my view falls squarely within the realm of economic reasons contemplated within the meaning of 'operational requirements'. These reasons related to the financial management and competitiveness of the enterprise (within the meaning of *'similar reasons'*), and the LRA allows an employer to restructure an enterprise in order to ensure its competitiveness and survival, let alone maximise its profits as espoused in *General Food Industries Ltd v FAWU*.

[22] I am thus satisfied that there was indeed a fair reason for the dismissal, and that the retrenchments, which were based on the respondent's need to remain competitive and profitable, were a rational and logical decision. Other than contending that it was not permissible for an employer simply to retrench in order to remain competitive, the applicants have not advanced any cogent argument that indicated that the decision was not in any manner commercially rational. There was no evidence adduced nor arguments advanced to demonstrate that the respondent had acted in bad faith when effecting the retrenchments, or that it had sought to serve an ulterior motive.

[23] The contention that the retrenchments were in response to the respondent's failure to get an agreement on the cancellation of the relevant clause of the collective agreement cannot be sustainable in the light of the acknowledgement by the applicants that the primary reason for the retrenchments was that the respondent needed to reduce its labour costs in order to remain competitive. Whether or not it had obtained an agreement on the cancellation of the clause was immaterial as it had acted within its rights in cancelling the clause under the provisions of section 23 (4) of the LRA.

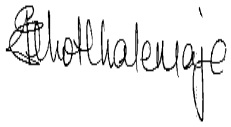
[24] I am further satisfied that the decision to retrench was not only aimed ensuring the respondent's survival but also at preserving jobs in the light of

the initial number of potential retrenchees identified as opposed to employees ultimately retrenched. I am also satisfied that to the extent that the individual applicants were retrenched in order for the respondent to remain competitive in the industry it operated in, such a decision was fair, as it was informed and justified by a proper and valid commercial or business rationale.

[25] In the light of the above conclusions, I am satisfied that the respondent has on the balance of probabilities, discharged the onus placed on it in proving that there was indeed a commercial rationale to invoke the provisions of section 189, read together with section 189A of the LRA. It therefore follows that the applicants' claim should be dismissed. I have further had regard to considerations of law and fairness, and I am satisfied that there is no basis for a cost order to be made in this case.

Order:

I. The dismissal of the second to further applicants on account of the respondent's operational requirements was substantively fair.
II. There is no order as to costs.



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Tlhotlhalemaje, J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Mr V Shongwe of SATAWU
On behalf of the Respondent:	Mr C Beckenstrater of Moodie & Robertson Attorneys