

SOUTH AFRICA / JUDGMENT

Bayane and Another v Fischer Tube Technik SA (JS 415/17) [2023] ZALCJHB 12 (3 February 2023) [2023] ZALCJHB 12

COURT

Labour Court Johannesburg

BEFORE

Ntsoane

CASE / FILE NUMBER

JS 415/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No JS 415/17

The

matter between:

EDMORE
BAYANE First
Applicant
BEN
BOKABA Second
Applicant
and
FISCHER
TUBE TECHNIK SA
Respondent

Heard:

Various Dates

Delivered:

03 February 2023

JUDGMENT

NTSOANE, AJ

Introduction

- [1] This is a stated case where the individual applicants sought this Court to determine the fairness of their dismissal. They were both dismissed on account of the respondent's operational requirements in terms of section 189 of the Labour Relations Act[1] (LRA). The individual applicants' claim is that their dismissal was both procedurally and substantively unfair and seek to be retrospectively reinstated in the event that this Court find in their favour.

Background

of the issues

- [2] The respondent operates in the motor industry and conducts business of manufacturing steel tubes such as exhaust pipes. In so doing the respondent would have various departments such as calibrating, burning of tubes and welding would also be required. It goes without saying that the respondent has various machines which would enable its' business to progress and machine operators would obviously be required to operate such. It is common cause that the respondent operates a business that is project based thus whilst one minute the business is up the next it could be down as a result of lack of incoming projects.
- [3] It is common cause that the first applicant (Bayane) was employed on a permanent basis as a calibrator with effect from October 2010. The second applicant (Bokaba) on the other hand was also employed as a Cutter on a permanent basis from 16 December 2010.
- [4] Whilst it is in dispute how the applicants came to be in the welding department, it however became undeniable during the trial that few years into their employment, they were moved to the welding department in order to meet the welding demands of a certain client of the respondent who required specific parts C557, Tao114 and Tao155. One issue that raised some dust during the hearing of the matter was whether the applicants were permanently stationed at the welding department alternatively whether they moved around from one department to another. In their own terms the applicants presented evidence that whilst they were based in the welding department, not only were they capable of performing every other function within the respondent but they were actually regularly rotated. This is immaterial when considering the fact that there was bumping criterion at the end which will be tackled herein below.

- [5] Another issue that is in dispute is whether the applicants' salaries were increased as a result of the move to the welding department or whether they simply had their annual increases. Quite frankly this issue is neither here nor there as the signed pre-trial minutes reflects the applicants respective salaries at the time of their dismissals as an agreed fact which will be a driving factor should the case ultimately go in their favour.
- [6] It is also a matter of common cause that on or about 30 September 2016 the respondent issued letters to the applicants which sought to inform them of the respondent's intended restructuring process. The restructuring notices further sought to invite the applicants for consultation in accordance with section 189 of the LRA. In terms of the notices it is neither here nor there whether the applicants were selected for retrenchments as the consultative meetings held show that the criteria was arranged and agreed upon. In terms of the retrenchment notice the following pertinent paragraph is noted:

"The company has identified the need to consider restructuring and possible retrenchments. This step has been necessitated on account of the fact that the Welding division: part C557, Tao 115 and Tao 115 will no longer be manufactured by the company, with the resultant

effect that certain positions may become redundant.

...

The affected department has two employees and the company has retrenched (voluntary) 2 employees in the last 12 months. One of the employees who would be possibly affected is our Shop Steward Edmond Bayane"

- [7] During the consultation sessions NUMSA acting on behalf of the applicants proposed that LIFO and bumping be adopted as a fair selection criteria instead of a specific department approach. This was occasioned by the fact that the applicants were able to execute other functions and once again, in their own terms they continued executing different functions on rotational basis. This proposal was accepted by the respondent and an investigation in terms of LIFO was conducted in the other departments, especially the one that the applicants were initially placed. According to the respondent, this exercise yielded two employees being identified who were employees employed after the applicants. Whilst the union in essence accepted this, they however proposed that the applicants maintain their current salaries instead of the R5,000.00 that the identified employees were earning. The respondent did not accede to this request as it was of the view that bumping denotes that the applicants would

be stepping completely into the shoes of the persons they are bumping with the same benefits, duties, remuneration of the positions. In terms of the respondent's letter of 26 January 2017 "the company considered the proposal of the union regarding the salaries but this was unfortunately not a viable option for the company. The employees were thus offered the alternative positions which had been identified at the previous meeting as they were and in accordance with the principles of bumping".

[8] NUMSA addressed a letter to the respondent on 23 November 2016 and in terms of the letter, the following is noted:

“As the union representing the employees to be affected by the S189, we would like to propose the following regarding the employees who are to be moved from their current position to the lower positions;

- They are moved to the new positions with their current salaries as the positions that they will be moved to will have a huge decrease in their salaries or alternatively they remain in the same salary grade and not receive their increment for 2016 when gazetted by the Minister”

[9] In terms of the documentary evidence presented at the trial hearing one can easily deduct that there were consultation meetings held between the parties and such meetings were then followed or confirmed by various letters exchanged. One issue that became rather undeniable was the fact that at all material times the respondent’s letters reflected that the union suggested the selection criteria which there seems to be no documentary proof nor oral assertions that

the criteria was not acceptable. This naturally deals with the issue of procedure which I find it to be extensive and fair. Save for the simple raising of procedural unfairness there was no acceptable basis presented as why procedure was in fact in dispute. Ms Mojapelo, the applicants’ attorney, presented to this Court that process should have been dragged and explored more than it was. I disagree with this notion.

[10] The legislative framework governing dismissals for operational requirements are expressed in two sections of the LRA, namely sections 185 and 189. The former confers on every employee, a general right not to be dismissed unfairly, while section 189 pointedly governs dismissals for operational requirements. In terms of section 189(1), the employer is required to engage employees or their representatives,

depending on the circumstances, in a consultation process when it contemplates dismissals based on its operational requirements.

Section 189(2)(a)(i) enjoins the employer and the employees or their representatives to attempt to reach consensus on appropriate measures to avoid the contemplated dismissals. Section 189(3)(b) requires the employer to disclose to the other consulting party in writing the reasons for the proposed dismissals and the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each one of those alternatives. In the case of *Blom v Goldfields Logistics (Pty) Ltd*[2], Honourable Judge Moshoana determined that:

‘The provisions of section 189 must be complied with in order to ensure that a dismissal for operational requirements is procedurally fair. Strict compliance as opposed to substantial compliance is required’.

- [11] Whilst the law forces the employer to consult with the affected employee in an attempt to reach consensus, reaching a deadlock cannot be construed as no consultation at all. In other words, deadlock is legally allowed and acceptable from consulting parties.
- [12] The Applicants sought to argue that there was never a rationale to retrench them in the first place and if this Court is inclined to find that there was then the Applicants should not have been

identified. I disagree.

Evaluation of the evidence

- [13] The parties raised and agreed on three issues in their pre-trial minutes, which they required this Court to determine. In my quest to tackling these three issues I'm inclined to deal with them simultaneously as in my opinion they are so intertwined that it would be difficult to divorce one from the other. In determining the substantive fairness of a dismissal on the grounds of the employer's operational requirements, the below approach has received attention by this Court and the Labour Appeal Court over time. In *Van Rooyen and others v Blue Financial Services (SA) (Pty) Ltd*[3], this Court made reference to the objective enquiry as enunciated in *BMD Knitting Mills (Pty) Ltd v SACTWU*[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'.

Were the Applicants employed as welders?

- [14] In my opinion this question does not make or break the Applicants' case and/or take it anywhere. This is so because the Respondent does not dispute that the Applicants are capacitated to perform other duties other than welding; in fact the Applicants were employed in the other division prior to being moved to the welding department and the Applicants could perform their duties on a rotational basis. This is the reason why the Respondent acceded to the LIFO and bumping

criteria proposed by the union in the first place and accordingly embarked on a process of establishing the employees that were

employed after the Applicants. The Labour Appeal Court in *Porter Motor Group v Karachi*[5] held that “fairness is not a one way street...the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative.”

[15] Further, whether the Applicants applied for the welding positions or not, it is immaterial and in fact also does not give the Applicants stance more weight that it has. I am thus persuaded that an agreement was concluded between the parties and accordingly came into effect regarding the retrenchment criteria which agreement seems to suggest that the respondent was appreciative of the fact that LIFO favoured the applicants. So whether the applicants applied for the welding positions or whether they were simply moved there in my unqualified opinion they ultimately settled in the welding department thus accepted their positions change, despite the fact that they could be moved to other departments from time to time.

Was the redundancy department specific?

[16] Central and pertinent to this case was whether the employer has established an operational requirement for the retrenchment. The respondent led evidence that indeed the retrenchment was occasioned by the loss of a client who required specific welding services. I accept this especially in view of the fact that the applicant could not dispute it. This issue however still goes back to the retrenchment criteria which the respondent ultimately acceded to the union's proposition of LIFO and bumping. If I were to find that the respondent managed to persuade this Court that there was a need to retrench due to the loss of a client that required welding services and that the identified employees were from that welding department, I determine that the matter does not only end there. There were in fact reasonable attempts to save the applicants from retrenchment.

[17] Persuasive evidence was led which evidence I accept that the applicants were members of the union and that the union was fully involved in the retrenchment process on behalf of the applicants. Following the agreement reached between the parties in terms of the criteria to be employed in the retrenchment process the union however sought to demand that the applicants must maintain their salaries. This then neatly brings me to the issue of bumping.

Bumping

[18] In terms of section 189 of the LRA, the employer is obliged to try and find alternative positions for the employees who are occupying positions that have become redundant and will be affected by retrenchments. If there is a reasonable and similar position to the one held by the employee affected, and this position is offered on reasonable grounds, then the refusal to accept same will negate the necessity to pay a severance payment to that employee and will ultimately absolve the employer from any unfair dismissal claim. With regard to the acceptance or not of alternative employment, it is trite in our law that when considering whether a reasonable alternative should have been accepted, the first criterion to be met by the employer is to prove that in general there was a need to dismiss due to

operational requirements. It follows from the above, that when an employer has alternative employment available which they indeed offer, the real question is whether the alternative offer is reasonable.

- [19] The legislative framework governing dismissals for operational requirements are expressed in two sections of the LRA, namely sections 185 and 189. The former confers on every employee, a general right not to be dismissed unfairly, while section 189 pointedly governs dismissals for operational requirements. In terms of section 189(1), the employer is required to engage employees or their representatives, depending on the circumstances, in a consultation process when it contemplates dismissals based on its operational requirements. Section 189(2)(a)(i) enjoins the employer and the employees or their representatives to attempt to reach consensus on appropriate measures to avoid the contemplated dismissals. Section 189(3)(b) requires the employer to disclose to the other consulting party in writing the reasons for the proposed dismissals and the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each one of those alternatives.
- [20] In the present case, the consultation process engaged by the parties was genuine and bona fide, geared to minimise the impact of the retrenchment on the individual applicants and in fact gave birth to an agreed retrenchment criteria or alternative solution which in my opinion was fair and objective. It is not in dispute that the alternative positions were offered and accepted only for the salaries condition to be presented at a later stage. The Labour Appeal Court in *Mtshali v Bell Equipment*[6] it was held that:

“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 is 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”

- [21] There are two forms of bumping, “horizontal bumping” – where an employee is transferred to a position of similar status, conditions of employment and remuneration and “vertical bumping” – where an employee is transferred to a position with less favourable status, conditions of employment and remuneration. It is trite in law that an employer must first apply horizontal “bumping” before vertical “bumping”. In the case of *Porter Motor Group v Karachi*[7] the Labour Appeal Court dealt extensively with “bumping” in dismissals for operational requirements. The Court laid down the following principles where “bumping” is to take place:

21.1 that an employer is required to consult over the possibility of “bumping”;

21.2 that the practice uses as its point of departure the LIFO principle;

21.3 that “horizontal” bumping should take place before “vertical bumping” is resorted to;

21.4 that “bumping” should be implemented in a way that creates the minimum possible disruption for the employer;

21.5 that geographical limits may be placed on the unit within which “bumping” is effected;

21.6 that the size of the unit will depend on the mobility and career paths of the employees concerned;

21.7 “bumping” must be effected with due regard for the retention of necessary skills;

21.8 downward “bumping” should take place where the employee is prepared to accept downgrading in work and status

[22] The principle laid out in Karachi case is simply that the employees may refuse the vertical bumping and if this is imposed on them then the dismissal becomes unfair. If this principle is anything to go by then the dismissal of the Applicants is unfair. It is common cause that the criteria for retrenchment being agreed upon as LIFO and bumping. This agreement however was not permanently fixed as it required the parties to further discuss and agree on which bumping to adopt. There is further no question that two employees were identified which employees would have been bumped with the applicants alternatively sacrificed. The issue however became the union demanding that horizontal bumping be applied whilst the Respondent opted and was steadfast on vertical bumping.

[23] I must indicate that during the hearing there was simply no persuasive evidence led by the respondent as to why horizontal bumping was not a viable option save to merely argue that it was not viable. Ultimately then I am inclined to find that the dismissal of the applicants was procedurally fair but substantively unfair. As far as procedure is concerned, I have already mentioned that the applicants were at all material times represented by the union and there is in fact no evidence presented that persuasively suggests that the procedure followed was flawed. I am accordingly inclined to dismiss this aspect of the claim.

[24] Having determined that the dismissal of the applicants is unfair, the next issue that requires this Court’s attention is the issue of salaries. It is a common cause fact that as at their dismissals, Bayane was earning a monthly salary of R9,853.00 whilst Bokaba was on R10,439.00 per month. I determine that the compensation must be in terms of these respective figures.

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

Order

1. The dismissal of the individual applicants on the basis of the respondent’s operational requirements was procedurally fair but substantively unfair;
2. The respondent is ordered to pay each applicant compensation

equivalent to ten months' salary;

3. There is no order as to costs.

MM Ntsoane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Ms Tshepo Mojapelo

Mojapelo Inc

For the Respondent: Adv Brandon Roode

Instructed by: JW Attorneys

[1] Act No. 66 of 1995.

[2] (JS 858/16) [2021] ZALCJHB 62 (18 May 2021) at para 14.

[3] (2010) 31 ILJ 2735 (LC) at para 15. See also Chemical Workers Industrial Union and others v Algorax (Pty) Ltd

(2003) 24 ILJ 1917 (LAC) at paras 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'.

[3] (2010) 31 ILJ 2735 (LC) at para 15. See also Chemical Workers Industrial Union and others v Algorax (Pty) Ltd

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[4] [2001] 7 BLLR 705 (LAC) at para. 19.

[5] [2002] 4 BLLR 357 (LAC)

[6] (DA16/12) [2014] ZALAC 37 (22 July 2014).

[7] [2002] 4 BLLR 357 (LAC).

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