

SOUTH AFRICA / JUDGMENT

Bothma v SG Coal (Pty) Ltd (JS 662/21) [2024] ZALCJHB 354 (5 September 2024)

[2024] ZALCJHB 354**COURT**

Labour Court Johannesburg

BEFORE

Daniels

CASE / FILE NUMBER

JS 662/21

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case****no: JS****662/21****In****the matter between:**WOUTER
JACOBUS BOTHMA
Applicant
and
SG
COAL (PTY)
LTD
Respondent**Heard:**

22, 23 August 2024

Delivered:

5 September 2024

Summary: Dismissal

for operational reasons. Matter dismissed, no order as to costs.

JUDGMENT**DANIELS J****Introduction**

1. The applicant was dismissed by the respondent for operational reasons. Following an unsuccessful conciliation process, he referred a dispute to this court alleging that his dismissal was procedurally and substantively unfair.
2. It is appropriate to begin with a brief summary of the facts.

Material

facts

3. The respondent's business consists of coal haulage from various mines, mainly or entirely, to Eskom.
4. Mr Wouter Bothma (hereafter "Bothma") was employed as a safety officer by the respondent on 2 July 2018. As of February 2021, Bothma was engaged within the Middelburg cost centre. That cost centre covered sites including two coal mines known as Rietvlei and Welgelegen (the "affected sites").
5. During early late January 2021 or early February 2021, respondent was informed by these mines that the tonnage to be hauled from them would be dramatically reduced.
6. Respondent's witness testified that respondent had, unsuccessfully, approached ESKOM for assistance to avoid the reduction of tonnage at the affected sites. The applicant did not dispute this. When that failed, respondent decided that it may be necessary to reduce its operating costs through retrenchments.
7. On or about 15 February 2021, respondent issued a notice to all employees in terms of section 189(3) of the Labour Relations Act No. 66 of 1995 as amended (hereafter "the LRA").

Among other things, the section 189(3) notice stated that:

7.1. The respondent would "continue to explore other options to avert further negative financial performance and impact". The notice did not indicate what steps had been taken, or considered and rejected.

7.2. Fifty employees could be affected.

7.3. The selection criteria to be applied would be voluntary retrenchments, last in and first out, operational requirements, and disciplinary records. The language of the notice suggested that selection criteria had already been determined.

7.4. In the final paragraph, the notice stated: “You are welcome to contact the HR Department with any ideas on how to avert/reduce the retrenchment before 1 March 2021.”

8. When Bothma became aware of the section 189(3) notice, he believed he would not be affected because he was not based at the two affected sites. Bothma did not approach the human resources department with proposals to avert the retrenchment, or reduce its impact.
9. Bothma was invited to, and attended, a consultation meeting with the respondent, on 23 February 2021.[1] Management was represented by its human resources manager, Ms Lanette Fourie (hereafter “Fourie”). Fourie testified that, to reduce costs, the respondent targeted high earners particularly safety officers who were among the highest earners. Fourie testified that the only alternative the respondent considered, and implemented, was to offer (to all employees) voluntary severance packages. At the end of the meeting, Fourie handed to Bothma a letter of dismissal, and a proposed settlement agreement. Bothma refused to sign the settlement agreement and instead took the letter of dismissal.[2] Fourie testified that the respondent applied the selection criteria of last in first out.
10. Fourie testified that, through the retrenchment, the respondent cut an amount of R300 000, 00 from its salary bill. However, the loss of tonnage from the affected sites cost the respondent R47 million. Under cross examination, Bothma conceded that the respondent had a bona fide operational need to reduce its costs. Bothma did not testify that viable alternatives to retrenchment existed nor was that proposition put to respondent’s witnesses.

Legal principles and analysis

11. Though the applicant challenged the procedural fairness of his dismissal, and the substantive fairness of his dismissal, his pleaded case related primarily to procedural issues. The applicant contended that the single meeting (on either 16 or 23 February 2021) did not constitute bona fide consultation for the purposes of section 189 of the LRA. The applicant alleged that the decision to dismiss him was taken prior to the commencement of the “consultation process”. He alleged that there was no genuine attempt to reach consensus on critical issues, such as alternatives to retrenchment.
12. At the commencement of the trial, after argument, I ruled that the applicant could not pursue its procedural fairness challenge, because the retrenchment fell within the scope of section 189A of the LRA and any challenge should have been brought on application, as contemplated in the section 189A(13). Section 189A(18) states that procedural fairness cannot be adjudicated in any dispute referred to this Court in terms of section 191(5)(b)(ii) of the LRA.

13. In applicant's written submissions, he contended that the section 189(3) notice was deceptive and male fide because respondent did not truly contemplate retrenching more than fifty employees. This was not applicant's pleaded case. In any event, that contention related to procedural fairness. Nor was that contention put to respondent's witnesses during cross examination. In the circumstances, it is a non-starter.
14. I need not rehash the trite principles relating to substantive fairness of retrenchments suffice to say that, in general, employers must explore all viable alternatives to dismissal, and only resort to dismissing employees for operational requirements as a measure of last resort.[3] This Court must consider whether the decision to retrench was bona fide and operationally justifiable on rational grounds.[4] Here, as previously mentioned, the applicant admitted that there was a general need to retrench. In addition, no viable alternatives

presented themselves. The applicant did not plead that any existed, nor was such a case made out at trial.

15. The applicant's challenge in relation to substantive fairness was limited to selection criteria:

- 15.1. The applicant alleged that he was identified for retrenchment because of his disciplinary record,[5]

- 15.2. The applicant alleged he was pre-selected for retrenchment because a letter confirming his dismissal had been prepared and signed before the only consultation meeting,

- 15.3. The applicant alleged that he should not have been selected because he was not working at the affected sites and each site operated independently,

- 15.4. The applicant alleged that he had longer service than others who were not retrenched. When he was asked to identify who should have been retrenched in his stead, he identified only Mr Cornelius Williams who was retrenched on the same day as the applicant.

16. The pleadings in this matter were drafted in accordance with the now repealed Labour Court Rules[6] and the Labour Court Practice Manual.[7] Clause 10.4.2.1(e) of the Practice Manual provides that where an applicant contends, in a retrenchment dispute, that someone else

should have been selected for retrenchment in his place, the name of such person or persons must be provided to the respondent together with the reason why such person or persons should have been selected. In this matter, the applicant provided the respondent with no names. The applicant stated only that safety officers on the affected sites should have been retrenched first.

17. At trial, the applicant did not persist with his allegation that he had been selected for retrenchment because of his disciplinary record. In my view, the applicant's case that he was "pre-selected" was inherently weak. On its own, the mere fact that the respondent attended the consultation with a pre-prepared letter of dismissal, and a signed settlement agreement, does prove that respondent acted in bad faith. In any event, it is hard to see how this related to substantive fairness.
18. Section 189(7)(b) stated that, where selection criteria have not been agreed between the employer and the employee, the selection criteria must be fair and objective.
19. The respondent produced a list of sixteen safety officers (including the applicant) across all its sites. Of the fifteen individuals (not including the applicant) on the list:
 - 19.1. Five (5) were engaged after the applicant was dismissed,
 - 19.2. Three (3) were dismissed before the applicant was dismissed,
 - 19.3. One (1) was dismissed on the same date as the applicant, and
 - 19.4. Six (6) who remain employed, have longer service than the applicant.
20. The applicant did not contest the accuracy of respondent's list. Accordingly, the uncontested evidence showed that there were no safety officers with shorter service who were retained in preference to the applicant. The respondent applied Last In and First Out ("LIFO") per job category across all sites. LIFO is considered to be the gold standard, and is broadly accepted as a fair and objective method to select those to be retrenched. Bumping, is located within LIFO, and considered fair.
21. In *Porter Motor Group v Karachi*[8] the LAC considered "bumping". Nicholson JA stated: "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." A short while later, Nicholson JA continued: "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." (Own emphasis)

22. The applicant was retrenched, together with Mr Williams, because they both had the shortest service of all the safety officers. In my view, the selection criteria were fair and objective, and were fairly implemented. In the result, the applicant's dismissal was substantively fair.

Conclusion

23. In the circumstances, the dismissal of the applicant was substantively fair. The dispute is dismissed. There is no order as to costs.

Reynaud Daniels

Judge of the Labour Court

Appearances:

For the Applicant:

Adv R Van der Westhuizen

Instructed by: KMG & Associates Inc

For the Respondent:

Adv W Bekker SC

Instructed by: De Wet Oosthuizen Inc

- [1] The applicant alleged that the consultation meeting was held on 16 February 2021. In my view little turns on this. On the probabilities, the meeting was held on 23 February 2021.
- [2] The applicant alleged that the letter of dismissal and settlement agreement were pre-signed by the respondent. In my view, this is only relevant to the procedural fairness of the dismissal.
- [3] Chemical Workers Industrial Union & others v Algorax (Pty) Ltd
(2003) 24 ILJ 1917 (LAC) at para 70
- [4] See SA Clothing & Textile Workers Union & others v Discreto—A Division of Trump & Springbok Holdings
(1998) 19 ILJ 1451 (LAC) at para 8
- [5] The use of disciplinary records is not necessarily subjective. See Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd
(2006) 27 ILJ 292 (LAC), where at para 90, Zondo JP (as he then was) stated: "I shall assume, without deciding, that the criteria of work performance and disciplinary record are objective."

- [6] Published under GN1665 in GG17495 on 14 October 1996
- [7] The old Rules and the Practice Manual were both repealed by the new Labour Court Rules, which was published on 3 May 2024 in GN50608 and came into effect on 17 July 2024.
- [8]
- (2002) 23 ILJ 348 (LAC)
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Prepared on 9 October 2026 · Esheria