

SOUTH AFRICA / JUDGMENT

GIWUSA obo Qenebe and Others v NAMPAK Wiegand Glass (Pty) Ltd (JS398/10) [2013] ZALCJHB 128 (3 June 2013)

[2013] ZALCJHB 128

COURT

Labour Court Johannesburg

BEFORE

A C Basson

CASE / FILE NUMBER

JS398/10

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS398/10

In the matter between

GIWUSA obo QENEBE, C AND FIVE OTHERSApplicant

and

NAMPAK WIEGAND GLASS (PTY) LTDRespondent

Heard: 25 to 27 February 2013

Delivered: 03 June 2013

Summary: Dismissal on the basis of operational requirements. Dismissal substantively fair.

AC BASSON, J

- [1] The applicant in this matter is GIWUSA (hereinafter referred to as “GIWUSA” or “the union”) a registered trade union acting on behalf of the individual applicants (Mr Cornelius Mosuoe; Mr Joseph Masilo, Mr Henry Nkosi, Mr Pule Mogorosi and Mr George Sebiloane). The respondent is Nampak Wiegand Glass (Pty) Ltd.

[2] The matter before this Court concerned the fairness of a large scale retrenchment. On 21 August 2009, the respondent issued a notice in terms of section 189A and 189(3) of the Labour Relations Act¹ (“the LRA”). In terms of the said notice, it is stated that the respondent is considering a restructuring with the potential for large scale retrenchments as a consequence of the need to restructure its operations and improve efficient levels. The notice further explains that certain roles will no longer be necessary to retain as a result of the re-organisation of certain roles. I will return to the relevant facts herein below in more detail.

Legislative framework

[3] In deciding the fairness of a retrenchment in terms of section 189(A) of the LRA (a large scale retrenchment), this Court is guided by the provisions of section 189(A)(19) of the LRA which reads as follows:

‘In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees

specified in subsection (1), the Labour Court must find that the employee was dismissed 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; and
- (d) selection criteria were fair and objective.’

Issue before the Court

At the outset, it should be pointed out that Mr Cartwright, on behalf of the applicants, conceded that the introduction of the mini-labs

satisfied the first requirement namely that the dismissal was to give effect to requirements based on the employer’s economic,

technological, structural or similar means. The first requirement for a fair dismissal was therefore, no longer at issue. For purposes of deciding this matter it is therefore accepted that the dismissal was operationally justifiable on rational grounds. A similar concession was also made in respect of the second requirement namely, that the dismissal was operationally justifiable on rational grounds.

The only issue remaining before this Court was whether there was a proper consideration of alternatives. The procedural fairness was not in issue before this Court.

Relevant facts

As already pointed out, this matter concerns six individual applicants. Five of the six applicants fall within one category. The sixth applicant, Mr Sebiloane, falls into a separate category. The five applicants' positions were directly affected by the introduction of minilabs. The introduction of the minilabs rendered their positions redundant. Sebiloane worked in Raw Materials. The Raw Material section closed down and Sebiloane and two others were retrenched. All applicants were grade 11 employees. For convenience sake I will deal with the two categories separately.

Because the economic rationale of the dismissal was conceded, I will suffice with a very brief summary of the operational reasons for the dismissal: After the notice was issued, the first facilitation meeting was held on 17 September 2009. During the meeting, the respondent explained the reasons for the retrenchment. The respondent commenced in 2006 and 2007 to introduce so-called mini-labs which are pieces of equipment designed to detect defects in the glass products being manufactured. It constitutes an automated process replacing the need for a physical inspection of the products during manufacturing. The effect was to enhance efficiency but had the potential to render certain tasks redundant as they could become a duplication. A further five facilitation meetings were held under the auspices of the CCMA. As a result of the introduction of the mini-labs, the Quality Assurance Department became redundant.

This brings me to the heart of the dispute namely, whether there was a proper consideration of alternatives. It was common cause that there were alternative positions available namely leer inspectors and batch control operators. The parties were in dispute as to whether these positions were in fact offered as alternatives.

In brief, it was the respondent's case that alternative positions were offered provided that the employees would accept the packages attached to the alternative positions. The leer inspectors and the batch control operator positions were all on grade

12. Of the 20 identified positions, 12 jobs were saved. These employees were all employed as batch control operators or leer inspectors. According to the respondent, the applicants were not prepared to accept the alternative positions unless they were remunerated at the same level.

It was the applicants' position that the positions were never offered to them and that if they had been offered had they would have accepted them.

As already pointed out, the only issue before this Court was whether the alternative (grade 12) positions were offered to the applicants. Grade 11 positions are higher than grade 12 positions.

What does the evidence show? A meeting took place on 26 October 2009. During this meeting, the alternative positions were offered.

The applicants' first witness Mr Andile Nyembezi was also the deponent to a founding affidavit in an application prohibiting the respondent from retrenching the applicants pending the completion of the retrenchment consultations. He testified that no offer was made to them. In

cross examination, it was, however, put to him that he admitted, in the replying affidavit in the aforementioned application, that an offer was made to them but that the offer was made for a position on a lower grade and that if that position was accepted, the employee would then earn the rate of pay applicable to such lower grade job in order to avoid an unfair income differential. He also admitted that GIWUSA did not accept the proposal. Nyembezi's only response was that "he saw" that. Nyembezi admitted that he was aware of the alternative positions. If Nyembezi's version is accepted namely that the respondent did not make any proposals, the question then arises whether he as the representative of the individual applicants did not in light of his own evidence that he was aware of the alternative positions make any counter proposal regarding the alternative available positions?

Mr Khumalo for the respondent testified that the offer was made namely that the applicants accept the alternative positions but at a lower salary (commensurate with a grade 11 position) but that the union refused. The parties then deadlocked.

Can it then be said against this background of the evidence that there was not a proper consideration of alternatives as required in terms of section 189(A)(19)(c) of the LRA? Firstly, I am satisfied that the offer was indeed made and I am satisfied that GIWUSA rejected the offer. Although Nyembezi tried in his evidence to persuade me that the offer was not made, he admitted his own affidavit before this Court not only that the offer was made in the terms set out above, but that GIWUSA refused the offer. The union was only prepared to accept the alternative if the salaries remained the same. In this regard, I am in agreement with Mr van As that there is no obligation upon an employer to bump an employee into a lower grade position and thereafter to continue to pay him the upper grade salary. I am further in agreement with Mr van As that to pay employees different salaries for doing the same work is a recipe for disaster.

I am therefore satisfied having regard to the evidence that an offer in respect of alternative positions was made to the applicants and that the union rejected the offer. Even if the Court accepts the applicant's version, namely, that no offer was made, why did the union not take it upon themselves to put forward a proposal regarding the alternative positions. Nyembezi testified that he knew about the alternative positions so what stopped him from putting a proposal on the table? The consultation process during a retrenchment process is not a one sided process. It is also incumbent on a union to submit proposals during the consultation process: A union cannot simply sit back and wait for the employer to make all the proposals: See in this regard: *Bank of Lisbon International v Pinheiro*; *2 Greyvenstein v Flaming Silver Trading 62 (Pty) Ltd t/a Sunglass World* *3* and *SASBO v Standard Bank*.⁴

Moreover, if the union moved from their position, it was incumbent upon the union to inform the respondent that it had moved from its position. There is no evidence before this Court that the union had ever made a counter proposal. I am therefore satisfied that there was a proper consideration of alternatives before they were declared redundant. Furthermore, the evidence shows that other employees whose positions were also made redundant were in fact placed in alternative positions. Those employees who were prepared to accept a transfer were placed in the positions that had been made redundant as a result of the vacancies created by those employees

who had accepted the voluntary retrenchment option. I am therefore satisfied that these five employees were fairly retrenched as they were not prepared to be bumped into lower positions.

As far as Mr Sebiloane is concerned, I am equally satisfied that he was fairly retrenched. His evidence was that the vacant position that is reflected on the organogram was in fact his position. In other words, what he seems to be saying is that he should not have been retrenched in the first place because his position had not been made redundant. This version is simply absurd. Firstly, this version was never put to Khumalo. Secondly, this version was not pleaded and lastly, this version does not form part of the pre-trial practice directive. I am in agreement with Mr van As that if this was the case for Sebiloane surely this would have formed part of the pleadings.

I am in light of the evidence, satisfied that it was as a result of the intransigent stance of the union that the five individual employees were retrenched. Had they agreed to the alternative positions albeit at a lower salary, they would not have been retrenched. I have already referred to the fact that those employees who were prepared to accept vacant positions at the level where the vacant positions arose were accommodated.

As far as the fourth requirement is concerned (selection criteria), the evidence was that the department in which the five employees worked was closed down. In respect of Sebiloane, the fact that he was, according to Mr Cartwright confused, cannot be accepted as an excuse. Furthermore, there is also no evidence that Sebiloane had applied for any position.

I am therefore satisfied that the dismissal was substantively fair. Because it was a section 189(A) dismissal. The procedural fairness of the dismissal was not at issue.

In respect of costs, I have taken note of the submission that costs should follow the result in light of the conclusion that the union is in the end to blame for the fact that the employees (at least the five individuals) were retrenched. I have nonetheless decided not to award costs against GIWUSA in light of the on-going relationship between the parties.

In the event the following order is made:

The dismissal of the individual applicants on the basis of operational requirements was substantively fair.

There is no order as to costs.

A C Basson, J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr Cartwright of David Cartwright Attorneys

For the Respondent: Advocate Van As

Instructed by: Cliffe Dekker Hofmeyer Inc

1Act 66 of 1995.

2(1998) 19 ILJ 549 (LAC)1998 ILJ at para 42: '[41] The Industrial Court, however, correctly took the respondent to task for not raising alternatives to retrenchment at any meetings. The respondent deliberately ignored the appellant's written calls for suggestions for alternatives to retrenchment. He testified that at the meeting of 17 May he was not 'open for consultation' because he 'knew beforehand that there were no positions in the bank for [him] because the door was closed on 25 April'. While not raising alternatives to retrenchment - and he testified that he had one in mind - the respondent and Mrs Goodman were careful to reserve

his right to challenge the retrenchment if no settlement was reached. The respondent did not deal with the appellant in good

faith.'

3[2007] 28 ILJ 1081(LC) at paras 41-44: '[41] Consultation is a consensus-seeking process entailing a dual participatory role. Once the respondent had issued the formal offer of alternative employment, it remained open to the applicant to play her part by identifying issues of concern and to take the respondent up on its offer for further deliberations. No evidence of the applicant having done this was produced. In court, when the issue of the applicant having to serve probation was pointed out to Mr Smith, he said that a standard type of offer of employment was used for the applicant and that he was always willing to discuss any issues raised therein. That evidence was in agreement with his attitude in the consultative meeting of 6 October

2004. He was never shown to have been lying in that regard. I am, accordingly, bound to accept his version, namely that he was open to a discussion of any of the terms and conditions of employment of the applicant. In my view, the blame for the absence of such a further and an important discussion lies at the door of the applicant. [42] The respondent approached the consultative process with a predisposition towards placing the applicant at the Clearwater

store. That was a method of solving the problem of having to dismiss the applicant. The respondent was entitled to adopt such an approach

- see the decision in *NEHAWU and Others v University of Pretoria*(2006) 27 ILJ 117 (LAC); [2006] 5 BLLR 437 (LAC) at para 55.

[43] Mr Theron who represented the applicant in the consultations of 6 October 2004, took the respondent through various options other than to take the applicant to Clearwater. The respondent proffered an explanation as appears on the record, why each option was not appropriate for the company. In my view, the respondent was accordingly open to change its mind as persuasive argument was presented to it that the proposed method was wrong or was not the best. When it was suggested that there was another alternative of addressing the problem, such as moving the applicant to Clearwater without a demotion or to move her to

Pretoria or Sandton or Eastgate, the respondent did not just dismiss those alternatives out of hand but considered the long-term business implications against the interests of the applicant.

[44] I conclude therefore that, all the evidence considered, the dismissal of the applicant was in my view procedurally fair.’

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4[2011] 32 ILJ 1236 at para 25.

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