

SOUTH AFRICA / JUDGMENT

HLWELE and Others v Neopak (PTY) LTD (JS 1031/19) [2022] ZALCJHB 340 (25 November 2022)

[2022] ZALCJHB 340

COURT

Labour Court Johannesburg

BEFORE

Sethene

CASE / FILE NUMBER

JS 1031/19

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JS 1031/19

In

the matter between:

THULANI
HLWELE & 128
OTHERS
Applicants
and
neopak
(pty)
ltd
Respondent

Heard:

01-03/08/2022 and 18/08/2022

Delivered:

25/11/2022

Summary:

Whether or not the dismissal of the applicants in terms of sections 189A of the LRA was substantively fair. Held: (1) The application is dismissed. (2) Dismissal of the applicants due to operational requirements was substantively fair. (3) There is no order as to costs.

JUDGMENT

(“...thina sasikhuluma ngamantombazane nangebholi kuphela...asikaze sikhulume ngoku dilizwa emsebenzini...”)

SETHENE AJ

Introduction

- [1] More often than not, each time when natural persons meander into depression, various clinical interventions are prescribed by medical practitioners to manage their patients' state of health. In respect of juristic persons, and in particular, within the employment space, whenever an employer encounters economic depression and is unable to remain in the black, sections 189 and 189A of the Labour Relations Act 66 of 1995 (“the LRA”), as amended, become legislative prescriptions appropriate for the management of the employer's depression. Neopak (Pty) Ltd (“the Employer/Respondent/Neopak”), encountered economic depression and turbulence for some time before and during 2018 financial year and its captains had no choice but to navigate it to section 189A process.
- [2] Mr Thulani Hlwele and his one hundred and twenty-eight (128) colleagues (“the Applicants”) contend that Neopak's section 189A process was procedurally and substantively unfair. In the premise, the applicants seek an order directing Neopak to either reinstate or compensate them. Neopak opposes the order sought by the applicants. Instead, Neopak prays for the dismissal of this application on the basis that its dismissal of the applicants due to operational requirements was consistent with section 189A of the LRA.
- [3] It must be stated from the onset that Mr Khanyile for the applicants insisted that I should consider whether or not Neopak acted procedurally fair when it dismissed the applicants. Ms Tolmay for Neopak submitted that I should only consider whether or not Neopak's decision to dismiss the applicants was substantively fair. Having regard to this aspect, its resolution lies in paragraph 64 of the pre-trial minutes signed by the parties' representatives. The said paragraph makes it plain that the court should only consider substantive fairness of the dismissal. In *Numsa v Driveline Technologies (Pty) Ltd and Another*[1], the appeal court stated the following:
- “It is true, of course that a pre-trial minute is a consensual document which binds the parties thereto and obliges the court (in the same way as parties pleadings do) to decide the issues set out therein.”*
- [4] In the premise, I find no reason to deviate from the parties' pre-trial minutes which they voluntarily concluded following a due process.

Salient background facts

- [5] The applicants were initially employed by Adcorp Blu. Adcorp Blu was a labour broker. According to its business model, it would have on its database personnel to place in various companies where their services are sought. In this particular case, the applicants were placed at Neopak by Adcorp Blu.
- [6] During the currency of the applicants being placed at Neopak, there was a Constitutional Court judgment[2] which essentially nullified labour broking. Consequently, Neopak agreed to absorb the applicants as its employees effective from 1 July 2019. In this regard, all the applicants and others who were placed at Neopak by Adcorp Blu were deemed to be employees of Neopak. A contractual relationship between Adcorp Blu and Neopak was duly terminated.
- [7] According to Neopak, on or during 2018, it was forced to completely close some of its operations due to economic downturns. Further, Neopak stated that for its economic survival, it had to sell some of its non-core businesses. As the global economy was unfavourable, one of the major economic setbacks for Neopak was that the machinery it had in its factories were close to being obsolete. Neopak's competitors had modern machinery and their turn-around time and economic efficiency dictated that its staunch customers preferred taking their business to competitors. In this regard, Neopak's economic survival was placed at risk and was left with no alternative than to resort to the process set out in section 189A of the LRA.
- [8] The applicants see Neopak's reasons for their dismissal differently. They contend that Neopak was not encountering any economic turbulence to warrant it to seek refuge in section 189A of the LRA. They further content that when Neopak deemed them as employees, it did so solely for the purposes of retrenching them and the section 189 process was just a ploy.
- [9] To advance their respective cases, each party called two witnesses. As this case relates to dismissal due to operational requirements, the onus to begin vested with the employer, Neopak.

Neopak's case

- [10] Ms Gayathreedevi Soodiyal (Ms Soodiyal) was the first witness to testify for Neopak. In her testimony, Ms Soodiyal testified that at the time section 189 process was initiated by Neopak, she was Director: Human Resources. In her capacity as Director: Human Resources, she was central in the section 189 process and personally conducted consultations with the applicants and other employees who were affected.
- [11] Ms Soodiyal testified that Neopak deemed it appropriate to have its section 189A process facilitated by the CCMA[3]. In this regard, she attended the CCMA proceedings on behalf of Neopak to guide and assist its Human Resources Manager. She further

testified that all the applicants were placed by Adcorp Blu at Neopak and following a settlement agreement under the aegis of the CCMA, the applicants were deemed employees of Neopak. The conclusion of the settlement agreement also meant the commercial contract between Adcorp Blu and Neopak was duly terminated.

- [12] To ensure that the implementation of section 189A process was carefully executed, Ms Soodiyal invited all the applicants and other affected employees of Neopak to various consultation meetings. Notices for the consultation meetings were placed at various strategic positions within Neopak's premises. At times notices were placed in the canteen and transmitted electronically to affected employees via SMS[4].
- [13] Ms Soodiyal also testified that she prepared and personally issued personalised letters to applicants and other affected employees. The essence of the letters in issue stated that Neopak was to give notices to its employees that it would be implementing section 189A process. Each employee had to sign confirming receipt of the letters/notices in terms of section 189A process.
- [14] According to Ms Soodiyal, all the applicants and affected employees were encouraged to apply for new positions. Ms Soodiyal testified that within the human resources division, they kept a tracker for their records to track employees who applied for positions. According to Ms Soodiyal, the applicants, en masse, elected not to apply for any of the advertised positions for reasons unknown to her and Neopak.
- [15] Under cross-examination, Ms Soodiyal confirmed that she was intimately involved in the section 189A process. She further confirmed that the Manager Human Resources obtained instructions from her.
- [16] Ms Soodiyal testified that Neopak was encountering serious financial difficulties and had to sell its profitable businesses to stay afloat. Neopak had to restructure at the management level before it implemented section 189A process at the lower level. Ms Soodiyal also stated that she too, was affected by section 189 process. She was retrenched and currently not employed by Neopak. However, she deemed it necessary to come testify for Neopak as she was intimately involved in the applicants' retrenchment.
- [17] Ms Soodiyal testified that when the applicants were deemed employees of Neopak, they were paid their salaries including emoluments. She emphasised that all the applicants were on Neopak's payroll and were coming to work, albeit on rotational basis. She further elaborated that it was in terms of the settlement agreement that the applicants were to report for duty on rotational basis (short-time).
- [18] Mr Morne Elloff (Mr Elloff) was Neopak's second witness. Mr Elloff testified that he joined Neopak around September 2018, as its Financial Director. He testified that his duties involved assisting the executive team with costs related to business and its structure. He had to ensure that cost calculations were revised to ensure the structure was operating optimally.

- [19] Mr Elloff testified that the financial state of Neopak made a compelling case for the company to be restructured. To ensure that Neopak was financially viable whilst competing with competitors who were using modern paper machines, Neopak had to sell its profitable businesses to pay its debts. According to the financial spreadsheet prepared by Mr Elloff, Neopak's customer base adversely changed and that caused a significant financial loss to the company. Neopak's papermills which were profitable saw their profits directed to settling debts. Some of Neopak's competitors changed from producing boxes and went on to produce polypropylene. Such developments according to Mr Elloff meant that Neopak lost its major market share within the industry.
- [20] Mr Elloff further testified that to help Neopak out of the woods, it had to purchase modern machines. However, such commercial move was proved not viable for Neopak granted its parlous financial state. He further testified that the commercial hardships suffered by Neopak were evident in its financial records and that called for retrenchments.
- [21] However, to avoid retrenchment, Mr Elloff testified that Neopak had to put in place measures to avert invoking section 189A process. Neopak had to engage in procurement optimisation, reviewing its organisational structure, cost transformation tracker to find alternative savings within various businesses, chemical optimisation, operational efficiency, reducing working capital loan mainly related to finished stock, moving paying terms with suppliers from 30-60 days and re-negotiating prices quoted on tender documents with other suppliers to conserve costs, amongst others.
- [22] As a consequence of using old machines, according to the evidence tendered by Mr Elloff, Neopak lost 80% (percentage) of its business and had to retrench senior executives. Further, Neopak's Wadeville plant was completely shut down and all the assets were sold.
- [23] Mr Elloff also confirmed that the applicants were paid their salaries. He also emphasised that Neopak's retrenchment was across all its business units including employees who were initially not from Adcorp Blu.
- [24] Under cross-examination, Mr Elloff confirmed that retrenchment of employees by Neopak was a measure of last resort. According to Mr Elloff, Neopak did not simply retrench its employees including the applicants for no rational and lawful reasons. Neopak was facing serious financial difficulties and section 189A process was invoked only when Neopak could not bring itself in the black.

Applicants' case

- [25] Mr Bongumusa Simiso Mbatha (Mr Mbatha) and Mr Sipho Mbhem (Mr Mbhem) were the two witnesses called to testify in support of the applicants. They too are applicants.

- [26] Mr Mbatha testified that he worked for Adcorp Blu and was placed at Neopak in November 2017 as forklift driver within the department dealing with uncut boxes at shipboard. He testified that following being deemed an employee of Neopak, he was no longer attending to work on daily basis but on rotational basis due to settlement agreement signed between Neopak and the applicants under the auspices of the CCMA.
- [27] He testified that during his permanent employ at Neopak he used to receive his salary. He testified that he heard rumours of retrenchment as he missed about five meetings. He stated that the consultation meetings were held in the canteen and he was excused in one of the meetings as he did not belong to a trade union.
- [28] He further testified that he was told that he was also amongst the affected employees likely to be retrenched. He was also told of the notice to apply for new positions. However, he missed the closing date for applications. According to Mr Mbatha, after being deemed Neopak's employee, he did notice any significant change to his conditions of service.
- [29] Under cross-examination, Mr Mbatha conceded that he was called to Neopak's offices by his supervisor and was informed of section 189A process. At the same time, Mr Mbatha testified that he used to go to the canteen and he never noticed anything on the noticeboards. Further, Mr Mbatha testified that even his colleagues never shared any information about retrenchment and the notices to apply for new positions. According to Mr Mbatha, he and other applicants never spoke about looming retrenchments whenever they were together. They only spoke about soccer and ladies. In his words, Mr Mbatha said "...thina sasikhuluma ngamantombazane nangebhola kuphela...asikaze sikhulume ngoku dilizwa emsebenzini...").
- [30] Mr Mbhem as a second witness testified that he was employed by Adcorp Blu as a general worker in February 2014 and promoted to pre-feeder at Neopak. He testified that indeed there was a settlement agreement facilitated by the CCMA whereat it was confirmed that they are going to be permanent employees of Neopak. Adcorp Blu issued him with a letter informing him that effective from 1 July 2019, he would be a permanent employee of Neopak. However, after 1 July 2019, he noticed no change of conditions of service. He stated that he did not attend all meetings regarding retrenchments. He confirmed that he received a letter inviting him to apply for a

vacant position. However, he testified that he did not meet the requirements as the new positions required candidates to be in

possession of matric certificates and have computer literacy. He had none of the requirements set out in the notice he obtained. He further testified that to his knowledge, none of the applicants known to him had matric certificates or computer literacy. Mr Mbhem testified to the effect that the section 189A process was unfair and he and other applicants needed to be reinstated or compensated.

- [31] Under cross-examination, Mr Mbhem did not dispute that he was frequently called to work and duly paid his salary. He confirmed his signature on the attendance register of employees who were consulted and duly issued with letters concerning section 189A process.

Evaluation, Analysis and Law

- [32] Ms Soodiyal's evidence that there were consultation meetings called for all affected employees and applicants was not challenged under cross-examination. Neither was Ms Soodiyal's evidence contradicted by the applicants. Instead, when Mr Mbem, witness for the applicants was asked to contradict Ms Soodiyal's evidence, he simply retorted: "No comment"!
- [33] Mr Elloff's evidence on the financial constraints Neopak was experiencing resulting in it closing down Wadeville plant and selling off all its assets was not challenged under-cross examination. Instead, both witnesses for the applicants confirmed that Wadeville plant was closed down and to date it is not operational.
- [34] The financial statement produced by Neopak illustrated in clear terms that the company was under parlous financial situation. Mr Elloff testified in clear terms, measures Neopak implemented and considered before it resorted to section 189A process. Ms Soodiyal and Mr Elloff's evidence stood unchallenged. In *Small v Smith*[5], the court said the following when dealing with unchallenged evidence:

"It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever."

- [35] The Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*[6] when dealing with unchallenged evidence under cross-examination had this to say:

*"If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts."*

- [36] In the circumstances, the evidence tendered on behalf of Neopak is accepted by the court as credible to justify section 189A process. The applicants' evidence is wholly insufficient to warrant the relief sought.
- [37] Both the applicants' witnesses sought to deny that in the settlement agreement signed under the consultation process facilitated by the CCMA, rotational work arrangements or short-time was never agreed upon. The settlement agreement in issue categorically mentioned (at

paragraph 4.5) that short-time work arrangement for applicants even before they were deemed employees of Neopak. It appears the applicants were not aware of the implication of the signatures they appended on the settlement agreement. Our courts have explained the implications of appending one's signature to a document as per the exposition of Innes CJ when he said in *Burger v Central South African Railways*[7]

"It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."

[38] In the premise, the applicants are bound by the contents of the settlement agreement they signed with Neopak. They cannot resile from the settlement agreement.

[39] Neopak has proved that there was a fair reason to dismiss the applicants due to operational requirements and as such, Neopak complied with the principles enunciated in *Oosthuizen v Telkom*[8].

Conclusion

[40] Neopak has proved that its dismissal of applications due to operational requirements was premised in law and supported by documentary evidence. The financial records tendered by Neopak were not even interrogated by the applicants' legal representative during cross-examination of Mr Elloff.

[41] In the result the following order is made:

Order

1. The application is dismissed;
2. The dismissal of the applications due to operational reason was substantively fair; and
3. There is no order as to costs.

SMANGA SETHENE

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr MB Khanyile from Khanyile MB Attorneys Inc

For the Respondent: Adv E Tolmay

Instructed by:

Webber Wentzel

[1]

[2007] ZALC 66; [2000] 1 BLLR 20 (LAC) at para 16

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- [2] Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others [2018] 9 BLLR 837 (CC); (2018) ILJ 1911 (CC); 2018 (5) SA 323 (CC)
- [3] Commission for Conciliation Mediation and Arbitration is established in terms of section 112 of the LRA to primarily resolve labour disputes that fall within its jurisdiction.
- [4] Short Message Service which in common parlance denotes texting by way of mobile telephones and/or through other technological gadgets. In *Jafta v Ezemvelo KZN Wildlife* [2008] ZALC 84; [2008] 10 BLLR 954 (LC) the principles of electronic communication were dealt with and duly accepted. In *CMC Woodworking Machinery v Pieter Odendaal Kitchens* 2012 (5)SA 604(KZD) the court allowed service of notices by electronic means
- [5] 1954 (3) SA 434 (SWA) at 438 E-H
- [6] 2000 (1) SA 1 (CC) at para 61
- [7] 1903 TS 571 at 578. See further in *George v Fairmead (Pty) Ltd* 1958
- (2) SA 465 (A) and 472A-it was held as follows: “When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature.”
- [8] [2007] 11 BLLR 1013 (LAC)
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