
SOUTH AFRICA / JUDGMENT

Maseko v National Union of Mineworkers (JS22/2012) [2014] ZALCJHB 231 (8 July 2014)

[2014] ZALCJHB 231

COURT

Labour Court Johannesburg

BEFORE

AC Basson

CASE / FILE NUMBER

JS22/2012

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

NOT REPORTABLE

CASE NO: JS22/2012

In the matter between:

ALFRED MASEKO

Applicant

and

THE NATIONAL UNION OF MINEWORKERS Respondent

Heard: 20 and 21 February 2014; 24 and 25 March 2014.

Order: 01 July 2014

Judgment:

08 July 2014

Summary: Retrenchment substantively and procedurally fair. No order as to costs

AC BASSON J.

Introduction

- [1] In this matter the applicant (“Mr Maseko”) is claiming that his dismissal by the National Union of Mineworkers (“NUM”) was substantively and procedurally unfair. He seeks his retrospective reinstatement.
- [2] NUM claims that the applicant’s dismissal was based on operational requirements as contemplated by section 189 of the Labour Relations Act[1] (“the LRA”) and that the dismissal was substantively and procedurally fair.
- [3] Three witnesses were called on behalf of NUM. All three of them gave detailed evidence about the extensive restructuring project that NUM underwent in 2010 including the rationale thereof. It appears from the evidence that NUM had employed the services of an independent consultancy group (21 Century Pay Solutions Group (Pty) Ltd – “the Consultants”) to assess the organisational structure and to propose a more effective organisational structure which speaks to the strategic priorities of NUM. Extensive evidence was led to the effect that it was recognised that NUM had to build and maintain strong branches which can effectively operate in the various regions.
- [4] On 15 February 2010 a letter was sent to all staff members of NUM informing them of the process of re-designing the organisational structure of NUM. Staff members were informed that the process will commence on 22 February 2010 and were also advised of a schedule during which the restructuring would be discussed. The first meeting was to be held on 19 February 2010. In this letter the various challenges faced by the organisation as well as the objective of the re-assessment of the organisational structure are set out.
- [5] It is common cause that various meetings were held with employees of NUM. It is in dispute whether the applicant knew of the meetings and if he did what his attitude towards these meetings was. It should be pointed out that the applicant was included in an e-mail dated 10 June 2010 inviting him to an individual interview. According to the schedule attached to the e-mail the applicant’s interview was to have taken place on 15 June 2010. I will deal with the evidence and my conclusions in this regard herein below. Suffice to state at this stage that I am satisfied on the evidence that the applicant knew about the investigation conducted by the Consultants into the existing organisational structure of NUM. The investigation started early in 2010 and culminated in a section 189(3) notice only issued on 23 March 2011.
- [6] The evidence on behalf of NUM was that various workshops were conducted dealing with issues arising from the proposed organisational structure. Following extensive consultations the Consultants concluded that there were various aspects of the existing structure that were not linked to the core competencies or processes of NUM and that a more refined structure was required to ensure optimum service delivery. It was also concluded that in light of the fact that NUM’s primary focus is on service delivery and membership, any structure developed should talk to the core processes. In other words, there should be a direct relationship between the structure and the core processes. The following was also communicated to the applicant in the section 189(3) notice dated 23 March 2011:

“3. As a result of the above mentioned analysis [referring to the proposals of the consultants], it became apparent that there are

various aspects of the NUM’s existing organisational structure that are not linked to the core competencies or processes of the NUM and that a refined structure is required to ensure optimum service delivery.

4. The primary focus of the NUM is service delivery and membership development and, to facilitate a successful organisation, it is necessary for the organisational structure to talk directly to the core processes – there should be a direct relationship between the structure and the core processes. As a result, the NUM NEC has approved a new organisational structure which entails a streamlining of the existing structure, removing areas of duplications and redundancy and deploying duplicated resources to existing positions to achieve effectiveness and efficiency, including reducing costs where possible.
5. As a result of the above, the NUM’s new organisational structure which (sic) does not have a Media Research Officer. The NUM is accordingly proposing eliminating this position as we do not believe that there is sufficient work to justify this position and at this level and further, that this position does not form part of the core processes and functions as the NUM.”
- [7] The Consultants proposed a new organisational structure which was approved by the National Executive Committee (“NEC”) on 27 November 2010. I have already referred to the fact that this report was comprehensive and sets out the rationale for the changes and the processes followed.
- [8] The old structure consisted of various so-called “pillars”. If regard is had to the new proposed structure and the evidence, it appears that the organisational restructure affected many employees within the existing pillars. Some employees were downgraded, others were laterally transferred and three employees’ (including the applicant) positions were identified as potentially redundant.
- [9] On 23 March 2011 the applicant was provided with a section 189(3) notice in terms of which the applicant was invited to commence consultations with the respondent on 5 April 2011. Prior to this date the applicant wrote a letter to NUM confirming his attendance on 5 April 2011 but requested certain information. The meeting on 5 April 2011 did not take place. From this letter it is clear that the applicant was aware of the fact that consultations had to take place and that he was aware of the purpose thereof. He also states in this letter that he has been subjected to personal harassment because of his association with the Mkhonto We-Sizwe Military Veteran Association.
- [10] On 27 May 2011 NUM addressed a letter to the applicant in terms of which the applicant was advised that the meeting scheduled for 5 April 2011 had been postponed to 22 June

2011. The applicant was also advised that the information that he requested would be made available at the meeting.
- [11] The meeting of 22 June 2011 was again postponed to 1 July 2011. On 25 June 2011 the applicant addressed a letter in which he requested certain information. He also made it clear in this letter that he will not participate in consultation meetings unless he receives the information in writing. He, inter alia, requested the NUM HR Policy and insists that the one was given he was given should have been signed by the National Office Bearers. In respect of the Century Pay Solutions Group Report, the applicant stated that the document did not help him as the document was not signed by the National Office Bearers. The applicant ends the letter by stating that he will not attend any meetings prior to him receiving a written response to his queries.
- [12] On 1 July 2011 a consultation meeting took place between the applicant and Ms Martha Llale who is NUM's Employee Relations and Compliance Unit Head. According to the minutes of the meeting (although disputed by the applicant), he was given the restructuring report. He thereafter addressed a letter to Mr Frans Baleni (the current General Secretary of NUM) complaining of the fact that he did not receive all the information that he had requested. On 8 July 2011 the applicant addressed a further letter to Ms Llale stating that he did not agree with the minutes of the meeting, in this letter he further complained about the outstanding information. He, however, acknowledges that he did receive the September 2010 report compiled by the Consultants and that he did receive the HR policies.
- [13] NUM responded on 19 September 2011 with a letter providing other information required by the applicant. The letter, however, makes it clear that much of the information requested by the applicant had already been included in the section 189(3) notice. The letter also points out with regard to the vacant positions that all positions were advertised and that employees were invited to apply. More in particular it is pointed out in the letter that the Media Research Officer position was phased out in 2006 and that the position did not exist in the current organisational structure. In this letter the applicant is again invited to make suggestions to avoid his proposed retrenchment. The applicant was also specifically informed that the new organisational structure was approved by the NEC and that consultations could only commence after the new structure has been approved.
- [14] On 30 September 2011 the applicant responded to this letter. In his letter, he reiterated the fact that he was still not in a position to consult meaningfully. He insisted that he was not placed in possession of a document setting out the rationale for the restructuring. In this letter the applicant also stated that he noticed that since the letter of 23 March 2011 "a barrage of positions were advertised. Not one of those was offered to me. I wonder why such an obvious measure to void my dismissal was not considered. I am open to discussions with regard to offer of alternative employment as I always have been as the record will bear me out." In this letter the applicant also threatened NUM with a referral in terms of section 16 of the LRA. It is common cause that the applicant never referred such a dispute to the CCMA.

There is also no evidence before the Court that the applicant ever applied for these positions despite, on his own admission, having been aware of the positions that were advertised.

- [15] On 18 October 2011 - approximately 6 months after the section 189(3) notice was issued - the applicant received a letter informing him of his retrenchment.

What information was made available to the applicant?

- [16] It is not in dispute that the applicant was given the consultant's report which was approved by the NEC on 27 November 2010. The Project Reportt on Proposed Structure Options dated 20 September 2010 is a comprehensive report of 51 pages setting out in detail, inter alia, the rationale for the various options provided. The report also set out in detail why the existing organisational structure of NUM was no longer viable and also set out the process followed in identifying the core skills required by NUM.
- [17] On 29 June 2011 the applicant was given the minutes of the NEC meeting of 27 November 2010 wherein the organisational structure was approved. On 30 June 2010 the applicant was also given the HR policies of NUM. On 19 September 2011 the applicant was provided with additional information including, the number of employees transferred, promoted and recruited during the restructuring process; an explanation in relation to the request for the job description of the Media Research Officer; the number of employees dismissed for operational requirements in the preceding twelve months, the avoidance measures directed towards ensuring that all possible alternatives to dismissal are explored. The applicant was therefore placed in a position to consult. All the information he needed was contained in this report.
- [18] The applicant was again invited to attend a further consultation meeting on 30 September 2011. Prior to this meeting the applicant addressed a letter to NUM stating, inter alia, that he had still not yet been placed in a meaningful position to achieve joint consensus with NUM. He again sought further information. The applicant did not attend the meeting on 30 September 2011 as he submitted a sick note for that day and did not report for duty.
- [19] The applicant was informed on 18 October 2011 of the termination of his employment which would be effective as from 31 October 2011. At the time of this dismissal his gross monthly earnings were R 15 695.40.

Substantive fairness

- [20] Detailed evidence was tendered on behalf of NUM regarding the retrenchment process. What is clear from the evidence is the fact that the process of restructuring NUM was a process undertaken with the assistance of a consultant and bearing in mind the objectives of the organisation. I am in agreement with the submission that on the whole, the applicant did not seriously gainsay the rationale for the restructuring project. The process of restructuring took months to complete and took place in consultation with employees of NUM and more in particular with the Pillar Heads who bear the responsibility of those employees falling within their pillars. The proposals contained in the final report were also

formally accepted by the NEC of NUM. In brief, there is nothing before this Court which warranted interference by the Court. Having said this, I am also mindful of the now well-established principle that it is not for this Court to second-guess the business or commercial efficacy of the rationale for the restructuring process. See in this regard: *SA Clothing and Textile Workers Union and Others v Discreto-A Division of Trump and Springbok Holdings* [2]

“The function of a court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer’s ultimate decision . . . but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham . . . It is important to note that when determining the rationality of the employer’s ultimate decision . . . it is not the court’s function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process”.

[21] At issue in this matter is whether the applicant’s position was redundant: There is a long history to this dispute. The applicant commenced employment with NUM on 1 March 1993 as a “Photographer/Journalist”. In 1996 he requested to be transferred to the Kimberly Region to work as an organizer. The request was denied. The applicant thereafter worked as an organiser from 1996 to 2006. He again requested to be transferred back to Head Office because of health reasons. He was then appointed as Media Research Officer with effect from 7 August 2006. According to NUM the applicant is not in a position to gainsay the redundancy of his position for the following reasons: Firstly, according to the applicant’s own evidence he did not perform the functions of a

Media Research Officer because he did not have a job description. He further testified that he did nothing from 2006 until his

retrenchment on 31 October 2011. The applicant’s own evidence is supported by the evidence of Ms Kekana (NUM’s Secretariat

Pillar Head) who testified that when she joined NUM in 2008 she also tried to understand what job the applicant actually did. She gave the applicant a job description which contained photography functions. The applicant was not interested and insisted that he had a letter of appointment stating that he was a Media Research Officer.

[22] Although the applicant was adamant that he never had a job description, the fact remains that, on his own version, he did not perform any functions whether as a Media Research Officer or as a photographer until his retrenchment. He was given an opportunity to discuss his job description / functions during the consultation process conducted by the consultants which culminated in the issuing of the section 189 retrenchment notice. As will be pointed out herein below, the applicant did not attend such a meeting thereby forfeiting a valuable opportunity to establish what he actually did at NUM (although his own evidence was that he did not do anything).

- [23] It is necessary to deal with the allegation made on behalf of the applicant to the effect that the position of the applicant could never have been part of the retrenchment exercise in light of the fact that his position (Media Research Officer) was made redundant as far back as 2006 and therefore the position did not exist. In essence it was submitted on behalf of the applicant that it was not possible to declare a position redundant if it never existed in the first place. This is nonsensical. The fact of the matter is that a so-called “warm body” was on the payroll and who, by his own admission, did not do any work. On what basis in law can it then be argued that NUM does not have the right to declare redundant a position which does not exist?
- [24] In light of the foregoing, I am satisfied that NUM had a valid economic rationale to retrench and furthermore that the applicant’s position was redundant even on his own version.

Was dismissal the fair in the circumstances Were there other alternatives available?

- [25] It is accepted that an employer has an obligation to avoid dismissal on the basis of operational requirement. This much was confirmed by the Labour Appeal Court in *South African Airways v Bogopa and Others*[3]. The highlight of the applicant’s version was the fact that there were positions available and that he ought to have been appointed to these newly created and/or vacant positions. Firstly, in respect of the vacant positions, the applicant for the first time in re-examination made reference to such positions. This was not put to any of the witnesses of NUM. What is, however clear from the evidence is the fact that some employees were laterally transferred and some employees were downgraded. This was as a result of the proposals made by the consultants. Three positions (including that of the applicant) were identified as being redundant. When the section 189 notice was issued to the applicant he was alerted to the fact that there were no vacancies and that he should come up with alternatives. The applicant, as will be indicated hereinbelow, did not participate gainfully in the consultation process.
- [26] Six new positions were created: (i) Marketing and Product Development; (ii) Health and Safety Legal Advisor; (iii) Branding and Website Maintenance; (iv) Wellness Practitioner; (v) Membership Helpdesk; and (vi) Women and Youth Coordinator. The applicant conceded in his evidence that he did not have the competency to fulfil any of these positions. Moreover, Ms Morodi also explained in her evidence that the restructuring process included the compilation of a competency framework which looked into the competencies of all employees at NUM and that the applicant was included in this process. She explained that the new positions required specific competencies which the applicant did not have. It was conceded on behalf of NUM that Ms Morodi was not aware of the fact that the applicant had certain Trade Union Development Program qualifications. However, as will be pointed out herein below, the applicant never brought this to the attention of NUM. Moreover, it is clear that the applicant was aware of the fact that there were positions advertised. He complains that these positions were not offered to him. However, he conceded that in terms of NUM’s policies, positions were not offered to employees and that when positions were advertised

he was at liberty to apply. Moreover, it should also be pointed out that the applicant conceded that he did not have the necessary qualifications to fulfil

any of these positions. The Applicant testified that he had the following qualifications: (a) Standard 10; (b) a Trade Union Development Program: Leading and Managing; (c) a Trade Union Development Program: Organizing; (d) a Trade Union Development Program: Labour Law. The evidence was that the new positions were all specialized positions which required specific competencies and skills set: for example: the Health and Safety Legal Advisor position required a person with legal background and the Wellness Practitioner position required a person with a social worker and EAP

background.

[27] In the event I am in agreement that there were no suitable alternatives to the applicant's retrenchment and that the retrenchment was accordingly fair.

Procedural fairness

[28] It is accepted that the duties created by section 189 of the LRA is reciprocal: The employer's duty to consult has the correlative duty on the employee to co-operate in an attempt to reach consensus before the employer takes a final decision on whether to retrench or whether it is in a position to take a decision which will result in the avoidance of retrenchment.

[29] In all retrenchment cases it is important to consider whether the employer has fulfilled its obligations in terms of section 189 of the LRA. In this particular matter it is also necessary to consider whether the employee had fulfilled his obligations in terms of the consultation process as it was submitted on behalf of NUM that the applicant frustrated the process by refusing to consult in the spirit of the LRA and by deliberately delaying the process.

[30] It was submitted on behalf of NUM that the applicant had failed in his correlative duty to co-operate with NUM in an attempt to reach consensus before NUM took a decision to retrench. It was also submitted that the applicant had by his actions deliberately delayed and frustrated the process and that NUM was therefore not solely to blame in not achieving the kind of consultation required by section 189 of the LRA. The facts relied upon are the following: The applicant tried his best to convince this Court that he was totally oblivious to the entire restructuring project until he received the Consultant's Report (which would have been in June 2011). This cannot be true in light of the following: On 9 and 10 June 2010 the applicant was invited by e-mail (addressed to him) to an individual meeting with the consultant with the aim of aligning his job description to the organisational strategy. This much is clear from the fact that an e-mail was addressed to the applicant. Yet it was the applicant's evidence that he did not receive the e-mail. Then the applicant conceded that he was aware of the individual interview but that he decided not to participate because he did not have a job description. Yet he did not attend the interview with the consultant which would have clarified what his job description was. On the next day of his cross-examination, the applicant, clearly having thought of an explanation as to why he did not receive the e-

mail inviting him to the meeting on 9 and 10 June, suddenly came up with the bizarre version that his computer was seized from him in 2010 and therefore he was without a computer for a whole year. Apart from the fact that it is inconceivable that this would have happened without the applicant complaining (of which there is no evidence),

this version was never put to any of NUM's witnesses and only emerged in cross-examination. The applicant's explanation

was that he had forgotten about this yet he was able to recall events as far back as 2009.

[31] I am therefore satisfied on the evidence, and on a balance of probabilities that the applicant must have known about the restructuring processes throughout 2010. It is inconceivable that the applicant did not know as this was clearly a major event in the offices of NUM. Outside consultants were employed who conducted interviews over a number of months. Furthermore, the applicant was, on his own version, always at the offices from 8H00 – 17H00 (except when he was ill). Various communications were sent to the staff – including the applicant. On 15 February 2014 for example, a communiqué was sent to all NUM Staff advising them of the “organizational re-design process”. Issues such as existing processes within the Pillars are addressed. There was also a discussion around job profiles and to which the applicant was invited but did not attend.

[32] Also damning is the evidence of Ms Kekana who testified that she had various meetings with employees within her Pillars and that the applicant was also invited. During these meetings she gave feedback and information regarding the process.

[33] Against this background it is inexplicable why the applicant insisted that he was not placed in a meaningful position to consult because he was provided with sufficient information. He even threatened NUM with a section 16 of the LRA referral, which never materialised. According to NUM all the information needed to consult was provided to the applicant, yet he still maintained his stance that he could not consult. Most importantly he was provided with the consultant's report in June 2011. He was already provided with the section 189(3) notice and the project report which was approved by the NEC on 27 November 2010. The selection criteria and the avoidance measures and the pre-termination consultations are dealt with in the section 189(3) letter and in the letter to the applicant on 19 September

2011. The applicant was also furnished with the HR Policies of NUM.

[34] Yet, despite the foregoing the applicant was still alleging on 30 September 2011 – six months into the consultation process – that he was not placed in a position to meaningfully consult with NUM.

[35] I am therefore in agreement with the submission on behalf of NUM that the applicant was the one who frustrated the process and that he was intent on prolonging the consultation process. This fixation on constantly obtaining additional information also explains why the consultation meeting on 1 July 2011 (with Ms Llale) was unsuccessful. It was her evidence that the applicant was not interested in discussing the proposals set out in the section 189(3)

notice but was still insisting on being furnished with additional information notwithstanding the fact that the applicant was, at that stage already in possession of the consultant's report, the HR policies, the minutes of the NEC's approval of the organisational structure, the rationale for the restructuring and the proposed avoidance measures. I am therefore in agreement with the submission that, at the very least on 1 July 2011, the applicant was in a position to meaningfully consult but that he, by persisting with his demands for further information, intently delayed the process.

[36] I am in agreement that the applicant's constant insistence on requesting further information must also be seen against the background of his evidence which revealed a deep seated distrust of the leadership of NUM. He for example testified that Mr Gwede Mantashe (the former General Secretary of NUM) struggled for years to get rid of him. He also alleged that Mr Baleni said that he will get rid of the him – a further version never put to any of NUM's witnesses. He also said that he cannot trust Mr Baleni and others at NUM. In this regard the applicant explained that he was harassed because he was a member of Mkhonto We-Sizwe Military Veterans Association.

[37] In light of the foregoing I am therefore in agreement that the dismissal of the applicant was procedurally fair. NUM, in my view, endeavoured to consult with the applicant but was hampered by the dilatory tactics of the applicant. In fact, if regard is had to the evidence it is clear that the applicant had no intention to engage with NUM in an effort to reach consensus over the need to retrench.

[38] In the event the dismissal of the applicant was substantively and procedurally fair. I have in the interest of fairness decided not to make an order as to costs.

Order:

[39] I make the following order:

39.1 The dismissal of the applicant was substantively and procedurally fair.

39.2 There is no order as to costs.

AC BASSON J

Judge of the Labour Court

Appearances

For the applicant : Mr Moshoana of Mohlaba & Moshoana Incorporated

For the respondent: Mr Itayi Gwaunza of Edward Nathan Sonnenbergs Attorneys

[1] Act 66 of 1996.

[2] [1998] 19 ILJ 1451 (LAC) at 1452 E.

[3] (2007) 28 ILJ 2718 (LAC): “[60] The question which arises is what the obligation of an employer is in relation to the dismissal of employees for operational

requirements when it does away with an old structure and adopts a new structure (for operational requirements). An employer has an obligation to try to avoid the dismissal of an employee for operational requirements. This obligation entails that an employer

may not dismiss an employee for operational requirements when such employer has a vacant position the duties of which the employee

concerned can perform with or without at least minimal training. This court affirmed this principle in its decision in *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU and others*(2004) 25 ILJ 1655 (LAC) and in *Oosthuizen v Telkom SA Ltd*(2007) 28 ILJ 2531 (LAC) handed down on 29 June 2007. Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such a position and the ensuing dismissal would be without a fair reason. Where, however, the employer offers the employee such a vacant position and the employee, having accepted the offer, fails to perform the duties attached to that position satisfactorily, the employer can deal with the case as a case of poor performance.”

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