

SOUTH AFRICA / JUDGMENT

Mathebese v Jabeth (Pty) Ltd (JS558/2022) [2022] ZALCJHB 347 (5 December 2022)

[2022] ZALCJHB 347**COURT**

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JS558/2022

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****no: JS 558/2022****In****the matter between:**JACOB
MATHEBESE Applicant
and
JABETH
(PTY)
LTD Respondent**Heard:**

24 November 2022

Delivered:

5 December 2022

Summary:Default judgment – unfair retrenchment – no
rationale for retrenchment and not preceded by meaningful
consultation.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant in this matter, Mr Jacob Mathebese (Mr Mathebese), is challenging the substantive and procedural fairness of his dismissal

by the respondent, Jabeth (Pty) Ltd (Jabeth) due to operational requirements in terms of section 189 Labour Relations Act[1] (LRA) on 17 May 2019.

[2] Jabeth had initially shown an interest in opposing the matter and accordingly filed opposing papers. However, its attorneys withdrew from the matter, citing the fact that it was no longer trading as the reason. Clearly, Jabeth was aware that the matter was set down for trial but still there was no appearance on its behalf. As a result, the matter proceeded on default basis.

Factual matrix

[3] Mr Mathebese was employed by Jabeth in June 2016. Jabeth operates a commercial farming business and Mr Mathebese held a position of a general worker. On 10 May 2019, Jabeth commenced a retrenchment process. There was only one consultation meeting and it was held on 17 May 2019. According to Mr Mathebese, the meeting took only 45 minutes. At the end of the meeting, he was presented with a retrenchment letter.

[4] Mr Mathebese testified he was not convinced that there was a genuine reason for his retrenchment as there was sufficient work available. The true reason for his dismissal was the fact that he could no longer perform his duties maximally due to the injury he sustained while at work. It would seem that he was bitten by a dog while at work and sustained serious injuries which led to his hospitalisation. Consequently, he was incapacitated and could not perform his duties as before. In essence, Jabeth failed to reasonably accommodate him after he had been injured on duty and used retrenchment as a façade.

[5] Mr Mathebese also impugns the fairness of the procedure that was followed by Jabeth. He testified that Jabeth did not comply with section 189 of the LRA. The process was rushed through and he was not meaningfully consulted on the alternatives to retrenchment, selection criterion and timing.

Legal principles and analysis

[6] The legal principles are trite and succinctly spelt out in *SA Clothing and Textile Workers Union and Others v Discreto - A Division of Trump and Springbok Holdings*)[2] the Labour Appeal Court (LAC), where it was stated that:

‘For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. 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 (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process.’ (Own emphasis)

- [7] In the present case, Mr Mathebese testified that the retrenchment was a facade as the real reason for his dismissal was his incapacity. The challenge with this evidence is that it is not supported by Mr Mathebese’s pleaded case. Thus, it is not sustainable.
- [8] Mr Mathebese’s main claim is that there was no commercial rationale for the retrenchment as there was still work he could have performed but was not offered. In my view, since there were other means available to Jabeth to avoid the retrenchment, it was substantively unfair to dismiss Mr Mathebese.[3]
- [9] As well, the consultation was not meaningful. Firstly, Mr Mathebese’s seniority was not considered as employees who were employed after him were retained. It is well accepted that in instances where LIFO is not used as the selection criterion, it is incumbent upon the employer to show that the criteria it adopted are fair and objective and have been applied rationally and objectively.
- [10] In the present case, it is mind-boggling that skill retention was used as a criterion when, it would seem, the affected employees were mere general farm workers. In any event, the threshold is high when it comes to justifying the use of the criteria adopted by the employer without the affected employee’s census, especially if it has an element of subjectivity.[4] If skills retention is used as a criterion, the employer must clearly show the skills it desired to retain and where the retrenched

employee fell short.

- [11] Secondly, the timing of the retrenchment was not discussed with Mr Mathebese. On 17 May 2019, he was issued with the retrenchment letter soon after the only consultation meeting. This, to my mind, is a classical case where the employee was presented with a fait accompli[5] (something already decided or irreversible). Obviously, Jabeth singularly and resolutely decided to retrench Mr Mathebese on 17 May 2019 without even an attempt to engage in a meaningful joint consensus-seeking process as contemplated in terms of section 189(2) of the LRA.

Conclusion

[12] In all the circumstances, Mr Mathebese's undisputed version must prevail. As such, I find that his dismissal was both substantively and procedurally unfair.

Remedy

[13] Mr Mathebese had initially prayed for reinstatement. However, he testified that the working relationship had soured over the years and particularly after his injury. Thus, he opted for a compensatory relief.

[14] In awarding compensation, I have taken into account, inter alia, the circumstances of this matter; Mr Mathebese's length of service; and the fact that reinstatement is a primary remedy. I am satisfied that a compensation equivalent to 12 months' salary is just and equitable. Mr Mathebese was earning R 3 509.73 per month and, therefore, the total amount of compensation is R 42 116,76.

Costs

[15] Mr Mathebese was unrepresented and thus the issue of costs did not arise. In any event, this Court is slow in granting costs in keeping with the dictates of law and fairness.

[16] In the circumstances, I make the following order:

Order

1. The dismissal of Mr Mathebese is substantively and procedurally unfair.
2. Jabeth shall pay Mr Mathebese a compensation of R42 116,76.
3. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr

J Mathebese (self)

For the Respondent: None

[1] Act 66 of 1995, as amended.

[2] (1998) 19 ILJ 1451 (LAC) at para [8].

[3] See: SAA v Bogopa and others [2007] 11 BLLR 1065 (LAC), and Oosthuizen v Telkom SA Ltd [2007] 11 BLLR 1013 (LAC); NUMSA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC).

[4] Gijima Ast (Pty) Ltd v Hopely

(2014) 35 ILJ 2115 (LAC) at paras [35] and [36].

[5] SASBO v Standard Bank of SA unreported judgment under case no J2298/10 delivered on 12 November 2010 at para [36].

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Prepared on 14 October 2026 · Esheria