
SOUTH AFRICA / JUDGMENT

Motor Industry Staff Association and Another v Autozone Grahamstown (JS1/2015) [2016] ZALCJHB 204 (3 June 2016) [2016] ZALCJHB 204

COURT

Labour Court Johannesburg

BEFORE

Coetzee

CASE / FILE NUMBER

JS1/2015

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other Judges

Case no: JS 1/2015

In the matter between

MOTOR INDUSTRY STAFF ASSOCIATION

First Applicant

SOLOMON NM

Second Applicant

and

AUTOZONE GRAHAMSTOWN

Respondent

Heard: 25 and 26 April 2016

Delivered: 3 June 2016

Summary: Dismissal for operational requirements – failure to disclose information that an urgent application was pending to set aside the award of a tender – the loss of the previous tender triggered the retrenchment of the second applicant - relevance of this information – the information was material - non-disclosure rendered the dismissal procedurally unfair – compensation awarded.

COETZEE AJ

- [1] The first applicant is the Motor Industry Staff Association, a duly registered trade union known as MISA. In this matter, it acted on behalf of its member, Ms Solomon who is the second applicant.
- [2] The respondent is AutoZone Grahamstown. AutoZone Retail and Distribution (Pty) Limited trades amongst others as AutoZone Grahamstown. It has approximately 200 stores or branches nationwide and sells amongst others vehicle parts and accessories.
- [3] In terms of previous tenders and contracts awarded to the respondent, it had supplied and distributed motor vehicle parts and accessories to the South African Police Services ("SAPS") and the SAPS garages nationally for approximately 13 years. The supply and delivery of such parts to the SAPS formed a large part of the respondent's business.
- [4] The last contract awarded to the respondent was in 2011 for a period of two years. This contract was extended and came to an end on 30 June 2014.
- [5] Earlier, during November 2013, the SAPS again requested bids for the supply and delivery of vehicle parts to it for a period of two years. More than one bidder including respondent submitted tenders. The request for proposals indicated that a tender might be awarded to more than one successful bidder.
- [6] By 10 April 2014, three parties were informed that they were the only bidders remaining in the bidding process. They were requested to submit further information. Respondent was one of the parties.
- [7] On 30 June 2014, the respondent was informed that the tender had not been awarded to it. This came to the respondent as a shock.
- [8] The respondent proceeded to investigate the reasons why it was unsuccessful and instructed its attorneys to launch urgent review proceedings.
- [9] The respondent also as a result of losing the tender immediately investigated the possibility of having a more cost-effective structure due to the loss of the SAPS contract.
- [10] The respondent contended that the loss of the SAPS contract acted as a trigger to do a reassessment of its national business structure with a view to realign costs in order to secure a sustainable operation in the future. The respondent decided to proceed with the restructuring exercise irrespective as to whether it would again be awarded the tender.

[11] Respondent presented evidence in support of how it had pleaded the commercial rationale:
[1]

'... in amplification, the approach of the respondent was to create a different organisational structure irrespective of the SAPS contract even that the respondent was mindful that it was necessary for it to change its organisational structure to be more able to meet future operational exigencies.'

[12] Because of the termination of the contract, the respondent had to remove its stock and staff located at the SAPS garages. During the previous 13 years, it also had dedicated staff members at the SAPS garages. The employee was not a dedicated staff member. The respondent removed its dedicated staff members.

[13] The respondent identified approximately 123 employees nationally for redundancy. Of those, approximately half were redeployed in the business and the remaining employees, including the second applicant, were retrenched.

[14] Having investigated the awarding of the tender, the respondent instituted urgent proceedings against the SAPS during early July

2014. It initially merely sought an interim interdict suspending the award of the tender with a view to review the award. The application included a prayer that the tender be awarded to the respondent.

[15] When the matter was set down for hearing on 9 September 2014, it was ripe for hearing on the merits and the court in fact heard the review on its merits.

[16] When the respondent launched the application its counsel advised it that it had good prospects of success. At best for the respondent, all that it could have achieved was to have the tender set aside in order for the SAPS to commence a new bid process. It is quite rare for a court to substitute its own finding in the place of the tender committee.

[17] Judgment was delivered on 25 September

2014. The court concluded as follows:

'Having regard to the foregoing irregularities in the bid process, the decision to award the tender to ABE Midas and Pinnacle was unlawful and invalid. I have indicated in the analysis of the various grounds why each of those grounds is indeed material. The award of the tenders consequently falls to be reviewed and set aside.'

[18] The court set aside the award of the tenders. As a result, the SAPS had to commence with a fresh process to invite bids and to make an award.

[19] Pursuant to the review proceedings, SAPS again invited tenders. It experienced further difficulties and at the time of the trial, SAPS had not yet been successful in awarding a tender to a successful bidder.

[20] The tender if and when awarded would probably be to more than one successful bidder and will not be a contract with one service provider as in the past to service SAPS nationally. This was the basis upon which respondent had tendered for the new tender to commence 1 July 2014.

[21] It is against this background of having lost a contract of thirteen year's standing and an expectation at best to win the complete tender but probably to win only part of the tender with another service provider that the respondent embarked upon the restructuring process.

[22] The respondent, on 18 July 2014, issued a notice in terms of section 189 in respect of its Grahamstown branch. In the notice, the reason for the contemplated restructure was recorded as follows:

'Having lost a substantial part of our business due to SAPS not awarding the tender to AutoZone this time around, we have no option but to review our business structure nationally in order to realign our costs with that which would be sustainable in terms of the revised operational requirements.

Operational requirements have changed, and we envisage one person being able to do both the debtors as well as cashiering in the store'

[23] The respondent envisaged that the cashier position and a driver position would be affected. The respondent envisaged that one person would attend to both debtors as well as cashiering in the store. The proposal was that the debtor's clerk would be able to fulfil these functions.

[24] One of the two drivers was retrenched by applying LIFO.

[25] The second applicant ("the employee or Ms Solomon") commenced her employment with the respondent on 15 April 2004 as a cashier.

[26] According to the notice, the second applicant had been selected for retrenchment because her current role was limited to cashiering and she did not possess the necessary skill, expertise and experience to take over the debtors' role.

[27] In the event that no viable alternatives were found, the respondent proposed that the employees be retrenched on 15 August 2014 with a notice period of 15 September 2014.

[28] On 18 July 2014, Ms Solomon contacted Misa. On the same day, Misa faxed a letter to the respondent in which it placed on the record that Ms Solomon is a member. In the letter Misa rejected the reason for the proposed retrenchment and the timing thereof and requested respondent to refrain from entering into individual consultations with Ms Solomon in the absence of Misa.

[29] It is common cause that the respondent and the applicants held two consultation meetings on 24 July 2014 and 5 August 2014. Thereafter, the parties exchanged correspondence.

- [30] Ms Solomon was represented during the consultation process by Ms Mocke, the national labour advisor of Misa.
- [31] It is common cause that from July 2014 to 15 August 2014, the respondent did not inform the applicants about the pending litigation between it and the SAPS.
- [32] The contract with SAPS has been extended on a temporary basis until SAPS has successfully issued a new tender.
- [33] From 1 July 2014, the respondent treated SAPS as a normal customer in terms of its revised strategy.
- [34] From 1 July 2014, SAPS was not obliged to buy only from the respondent. The branch manager testified that the Grahamstown branch has lost approximately half of its business with SAPS. In respect of the Cradock and Graaff-Reinet branches, the SAPS had to obtain three quotes if it wanted to buy vehicle parts at those branches.
- [35] The applicants complained about the fact that the respondent did not disclose the pending litigation to them during the consultation process. They submitted that this was relevant information. They also submitted that this failure renders Ms Solomon's retrenchment both procedurally and substantively unfair.
- [36] The second complaint is that Ms Solomon having had the longest service with the employer should have "bumped" the debtor's clerk or the merchandiser both with lesser service.
- [37] The respondent proposed LIFO and skills and experience as selection criteria. The applicants proposed only LIFO.
- [38] In applying LIFO as the only criterion, the employee should have been retained and the merchandiser with the shortest service should have been retrenched.
- [39] At the time, Mr Arnott was the merchandiser. He commenced employment 1 July 2014. The process of recruitment and appointment already commenced in April 2014 and resulted in Mr Arnott reporting for duty on 1 July 2014. His appointment was finalised before the respondent was informed that it was an unsuccessful bidder for the SAPS contract.
- [40] Mr Arnott had been in the motor trade prior to his appointment. He worked for a mechanic who purchased its spare parts and accessories from the respondent. He had a thorough knowledge and understanding of spare parts and accessories.
- [41] He knew how to reconcile the physical counting of stock in the storeroom and premises with that on the computer system for which knowledge of Excel was required. This is known in the industry as cycle counting.
- [42] The merchandiser does cashiering also. He is also required to do some driving to deliver and collect stock.

- [43] Mr Juries had been the merchandiser prior to Mr Arnott. Respondent maintained that the merchandiser position was suitable for a male with sufficient strength to carry heavy items such as batteries and oil drums from the store room to the showroom and to place those heavy items on the floor or the shelves.
- [44] Ms Solomon conceded that she was unable to carry those items but proposed that someone else could have assisted her in doing so. The evidence was that up to ten times a day, some of these heavy items had to be moved.
- [45] Prior to Mr Juries, the char also acted as the merchandiser. She was female. The branch manager testified that at the time, it was not a dedicated position and there were more people to help out. She did not attend to the heavy items.
- [46] The position of merchandiser is an existing position on the organisational structure. At the Grahamstown branch, the first dedicated merchandiser was appointed with effect 1 July 2014. It was felt that a dedicated merchandiser was needed in order to attract and service customers.
- [47] The evidence of the respondent was that the merchandiser also was involved in cycle counts involving paperwork. The merchandiser needed an in-depth knowledge of motor vehicle parts and accessories to ensure that the correct parts and accessories are displayed to attract maximum interest from customers.
- [48] The merchandiser also had to have a thorough knowledge of stock and part numbers for purposes of inventory control.
- [49] Some of the key duties of a merchandiser are listed in the advertisement and includes the duty to catalogue or label items with storage details, place goods in bins and on racks or stack bulky items on floors, obtain details of the location and quantity of items in stock, using visual display units or computers, conduct good record-keeping and having organisational and computer skills.
- [50] The respondent insisted that the merchandiser should have a driver's license. No such minimum requirement was mentioned in the advertisement for the position. The branch manager testified that it would have been a positive point for an applicant to be appointed to the position of merchandiser.
- [51] Ms Solomon did not possess the necessary computer skills. She could not work in Excel. She sought to blame management for the state of affairs. Her accusations were never put to the branch manager when he testified.
- [52] Ms Solomon testified that she would require training for both the alternative positions that she had her eye on. She would have required more training for the merchandiser position. She would have to rely on the branch manager to train her for that position.

- [53] The branch manager was of the view that it was not viable to train her either as merchandiser or debtor's clerk. He conceded that the newly appointed merchandiser required some training. It was, however, imperative that he had the background and knowledge in the industry of spare parts and accessories. The training was for the merchandiser to familiarise himself with the specific requirements in the shop. He testified that during two weeks training, he taught himself quickly and was good at the job.
- [54] The branch manager testified that over time, he tried to teach Ms Solomon some of the functions of the debtor's clerk. She, however, did not perform well and he had to do some of the functions and others assisted there. In his view, he taught her some of the functions and thought that further training could not help.
- [55] The debtor's clerk liaise with head office and must resolve queries and reconcile customer accounts. When Ms Solomon had the opportunity to work as debtor's clerk, she had to be assisted in liaising with head office or resolving queries.
- [56] The branch manager testified that in his absence the debtor's clerk was placed in charge as his second in charge. She would act as manager in his absence from the shop. She was successful in doing so. In his view, Ms Solomon would not be able to cope with running the shop in the absence of a manager.
- [57] According to the branch manager, retrenching the debtor's clerk and retaining Ms Solomon in that position would negatively affect the business. It was not a viable proposition.
- [58] The employee and her representative put forward the view that Ms Solomon could replace the debtor's clerk or the merchandiser provided she was given training. In the position of merchandiser, she would permanently require assistance with the moving of the heavy objects and in doing deliveries by vehicle or motorcycle or collecting stock from suppliers. She did not possess a driver's licence. The merchandiser had a driver's licence.

Analysis

and discussion:

- [59] The respondent submitted that the information concerning the pending review application was not relevant to the consultation process. This is so because once the SAPS contract was lost, the employer embarked upon a restructuring of its business irrespective as to whether it would be successful in being awarded the tender either in full or in part. The outcome of the application thus was immaterial to the process.
- [60] The respondent, when it was advised that it was unsuccessful in its bid, realised that it had to restructure its business. It embarked on the process. It intended to proceed with the process of restructuring irrespective as to whether its court application was successful or whether the tender was awarded to it.

- [61] The submission is that the information was not relevant as it had no impact upon the true issues. It did not impact upon the decision to restructure.
- [62] The applicants argue that the information was material. The Misa representative would have proposed that the consultations be delayed pending the outcome of the urgent application to assess the impact upon the respondent's business. Knowledge of the urgent application would have made it possible for the applicants to meaningfully consult on the substantive reason for the restructure or at least on the timing thereof.
- [63] The information was material. It was relevant information as to how things unfolded after the termination of the SAPS contract. It certainly impacted upon the need to immediately take action in retrenching employees.
- [64] The respondent failed to provide relevant information. This rendered the process unfair.
- [65] The applicants argue that the failure to furnish the information renders the retrenchment both substantively and procedurally unfair.
- [66] The authorities referred to by the applicants in this regard are concerned with sets of fact where so little information was furnished, if at all, that the other party could not consult at all. The facts of this matter are different. The respondent provided its motivation for the restructure. It made it clear in the required notice that it became necessary in view of the termination of the contract to restructure the business for future exigencies. It does not limit itself to the expiry or renewal of the contract.
- [67] The failure to disclose the information about the court case does not render the retrenchment substantively unfair.
- [68] The applicants rely upon the principle of "bumping" to argue that Ms Solomon should have "bumped" the debtor's clerk or the merchandiser because she had longer service than the branch.
- [69] The respondent submitted that having regard to the correspondence, the applicants abandoned the proposal that bumping should have involved the position of merchandiser. I am not persuaded that the fact that the position of merchandiser was not mentioned in the later correspondence necessarily mean that the position was taken off the table.
- [70] The principles of bumping have been formulated and stated in *Porter Motor Group v Karachi*. [2] The Court had the following to say:
- '(1) it should be reiterated once again that fairness is not a one-way street. It must accommodate both employer and employee. Section 189
- (2) of the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.

- (2) 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 is, an invaluable asset. Their long service is an objective tribute to their skills and industry and the avoidance of misconduct. In the absence of other factors, to be numerator during after, their service alone is sufficient reason for them to remain and others to be retrenched. Fairness requires that the loyalty be awarded.
- (3) The nature of bumping depends on the circumstances of the case. A useful distinction is that of providing bumping into horizontal and vertical displacement. The former assumes similar status, conditions of service and pay and the latter any diminution in them.
- (4) 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. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping. Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.
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- (7) The pool off possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of a company within the parameters of its activities, national or international; fairness requires that the same circumference should define the limits of potential candidates to be bumped. The career path of the employee in the company will often be a useful indication of scale of mobility.
- (9) Bumping does not apply to employees in a different grade if the longest serving employee cannot do the work of the employee with shorter service in that grade. This limitation applies most frequently where competence, technical or professional knowledge or experience and specialised skills are involved. Where the necessity arises of retraining those, what transferred, this should be carried out, unless it places an unreasonable burden on the employer.
- (10) The status of the post into which an employee is bumped is relevant, as the employer's prerogative to choose someone of managerial/supervisory level should be respected.'^[3]
- ^[71] In applying the above principles and being fair to the employer and the employee, regard must be had to the selection criteria. The employer proposed, apart from LIFO, also skills and experience.

- [72] The respondent motivated the selection criteria on the basis that the team of employees in the branch needed to multi-skill. This is necessary for the smooth running of the business operations. In addition, there was a need for someone to stand in as branch manager when the branch manager went on leave or had to leave the branch for shorter periods.
- [73] There certainly was a need for retention of skills and experience.
- [74] The debtor's clerk was capable of standing in for him in his absence. Ms Solomon was good at what she did as cashier but did not have the capability of running the shop in the absence of the branch manager.
- [75] The evidence of the branch manager that in the past she had training in the position of debtor's clerk but that he was of the view that further training would not assist to make of her a good replacement of the debtor's clerk is bona fides and probable.
- [76] Apart from not being able to do the functions of debtor's clerk, she would not be able to fulfil the additional requirement of standing in for the branch manager.
- [77] In the past, the vacant role of merchandiser was filled on a part-time basis by stand in staff members. Once the position was identified as an important one and that a dedicated merchandiser had to be appointed, it would be a step backwards for the employer to attempt to train Ms Solomon for that position.
- [78] The business would lose a qualified person with the necessary background and skills and a driver's licence. Ms Solomon would on a permanent basis required assistance with some of the functions. It would take her some time to acquire a driver's licence. She did not possess the knowledge of spare parts and accessories and their codes or the skills to do cycle counting.
- [79] This is a case where it would be unfair to the employer in a small set up such as the branch to deplete the existing skills by bumping the debtor's clerk or the merchandiser.
- [80] The conduct of the employer in not bumping one or the other of the two employees was fair. It applied the selection criteria in a fair manner.
- [81] The retrenchment of the employee was procedurally unfair. The retrenchment was substantively fair.
- [82] I have considered the question of compensation. The information not disclosed to the applicants was material. The duty to disclose material information is a serious one. It does not matter whether the employer may think that the information may not be material for purposes of consultation. The non-disclosure affected the fairness of the procedure.
- [83] The employee had ten years' service. She did not find alternative employment. The information not disclosed was relevant information. The award should be fair to both parties. Having regard to the facts and circumstances of this matter, it is fair to compensate the employee with an amount equal to six month's remuneration. This amounts to R26988.

[84] The respondent, at the commencement of the trial, made an open tender of payment of an amount equal to six month's remuneration. The tender is relevant with regard to a cost order.

[85] In law and fairness, costs should follow the result. Having regard to the tender, it is fair not to award the applicants their cost.

[86] I make the following order:

86.1 The dismissal of the second applicant was substantively fair but procedurally unfair.

86.2 The respondent is ordered within seven days of the date of this judgment to pay the second applicant compensation in an amount of R26988.

86.3 There is no order as to costs.

Coetzee, AJ

Acting judge of the Labour Court

Appearances:

For the applicants:

Dr G Ebersohn of Ebersohn Attorneys

For the Respondent:

Advocate W J Hutchinson

Instructed by:

Fluxmans Incorporated

[1] Pleadings bundle 27 at para 9.

[2]

[2002] 4 BLLR 357 (LAC).

[3] Ibid at para 16.

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