

SOUTH AFRICA / JUDGMENT

NUM obo Mashilane and Others v Micronized Product (Pty) Ltd and Another (JS935/20)

[2024] ZALCJHB 525 (24 January 2024)

[2024] ZALCJHB 525

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS935/20

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JS935/20

In

the matter between:

NUM
obo PATRICK MASHILANE AND OTHERS
Applicant
and
MICRONIZED
PRODUCTS (PTY) LTD
First
Respondent
PEGMIN
(PTY) LTD
Second
Respondent

Heard:

23 to 24 January 2023
Judgment
delivered: 24 January 2024
EX TEMPORE

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicants launch this referral in terms of section 191(5)(b)(ii) of the Labour Relations Act[1] (LRA) claiming that their dismissal from the employment of the respondents is both procedurally and substantively unfair. They seek reinstatement and 12 months' compensation.

Preliminary

issues

Locus standi

- [2] Once the proceedings had commenced, Mr. Seleka on behalf of the applicants submitted that there are no longer 36 applicants before this Court, as some are deceased and 16 others have been recalled to employment by the respondents subsequent to their retrenchment. On the second day of the proceedings, the applicant handed up a schedule of applicants as directed by the Court. The schedule records 19 applicants and two deceased applicants, namely the late Jonas Masole Seotlo and Daniel Mboyi Ramoshaba.
- [3] The respondents submit that the deceased are not properly before the Court, as the executors of their respective deceased estates are not parties before this Court.[2]
- [4] There is no opposition by the applicants to this challenge on locus standi as raised by the respondents, and correctly so.
- [5] In the premises, the preliminary point on locus standi is upheld.

Special plea: jurisdiction

- [6] The respondents raised a special plea that this Court lacks jurisdiction to adjudicate the applicants' claim of procedural unfairness; in the circumstances, the applicants' claim of procedural unfairness should be dismissed with costs.[3]
- [7] In an order by the late Mosam AJ dated 5 July 2022, this Court determined that the special plea be determined with the merits in the main dispute.
- [8] On the first day of the hearing, during the applicant's opening address, Mr. Seleka conceded on behalf of the applicants, that during 2020, the respondents embarked on a retrenchment process in terms of section 189A of the LRA. He submitted that the applicants abandon their claim on procedural unfairness and confirmed that the applicants will abide by the decision of the Court.

[9] The respondents persisted with their special plea on jurisdiction.

[10] The special plea on jurisdiction has merit.[4] In the circumstances, it is upheld.

Background

[11] The background facts are largely common cause and appear from the pre-trial minute concluded between the parties. In summary, they are that the applicants were employed by both the first and second respondent located in the Limpopo Province and that they were members of the National Union of Mineworkers (NUM). During January to March 2020, the parties engaged in a mutual interest dispute which culminated in a wage agreement being concluded between the parties.

[12] On 15 March 2020, a national state of disaster was declared by the South African Government in the wake of the Covid -19 pandemic in terms of the Disaster Management Act.[5] This resulted in the respondents closing their operations as national lockdown measures were implemented across the country.

[13] On 6 May 2020, a notice in terms of the provisions of section 189 of the LRA was issued by the respondents to the individual applicants and NUM, notifying them that it contemplated restructuring its operations and that this could result in retrenchment.

[14] On 20 May 2020, the first consultation meeting was held between NUM and the respondents, at which meeting, it was agreed that the retrenchment process would be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for facilitation as contemplated in section 189A of the LRA.

[15] The retrenchment process was facilitated by the CCMA over a duration of 72 days.

[16] On 18 July 2020, the respondent issued retrenchment notices to the applicants, in terms of which they were notified of their dismissal.

[17] It is also common cause that the parties concluded a retrenchment policy which has guided its retrenchment processes.

Evidence and evaluation

[18] Two witnesses gave oral evidence before this Court. The witness for the respondents was Mr. Brian Stanley Booth (Mr. Booth), the Group Chief Executive Officer of the respondents. The witness for the applicants was Mr. Witness Shai (Mr. Shai), one of the applicants before the Court.

[19] The evidence of Mr. Booth was that the respondents had, over a number of years, experienced a steady decline in sales volumes.[6] When the South African Government announced the nationwide lockdown in response to the Covid-19 pandemic in March 2020, the respondents

convened an urgent meeting of its Board of Directors to discuss and consider how these unprecedented circumstances were likely to affect the business. It was the view that the pandemic and lockdown would exacerbate the decline in sales volumes. The Respondents'

products are used in the production of discretionary products, and in consultation with their customers, the view was taken that

discretionary spending would be drastically reduced as a result and impact of the Covid-19 pandemic lockdown measures.

[20] The respondents accordingly issued a notice in terms of section 189(3) of the LRA dated 6 May 2020[7] to NUM, as well as to employees of both respondents. The notice sets out, inter alia, the operational rationale underlying the contemplated retrenchments.

[21] The respondents contacted Mr. Louis Ramokgano (Mr. Ramokgano), an official of NUM in order to arrange a consultation and a meeting that was held on 20 May 2020. The minute of that meeting was sent to NUM on 22 May 2020, together with the proposed post-retrenchment business structure (the proposed structure)[8] and a list of all affected employees.

[22] A consultation facilitated by the CCMA was held on 11 June 2020. At this meeting, the respondents once more, provided NUM with a copy of the proposed structure and a list of the affected employees. In addition, the respondents provided NUM with information relating to its sales figures that had been declining before the Covid -19 pandemic and were exacerbated by the pandemic. These declining sales figures were also sent to Mr. Ramokgano by email on 11 June 2020.

[23] NUM demanded that the respondents provide it with three years' annual financial statements. Mr. Booth had explained that these were not provided, as the respondents were of the view that the financial statements were irrelevant and would not assist the parties[9] as they were backward looking, while the declining sales figures and the impact of this on the operations of the respondents was forward looking.

[24] His evidence was that the financial statements pertained to the company, which comprises of a number of different operating

divisions, as a whole. Accordingly, they would not provide any useful information relating to the decreased sales volumes at the Limpopo operations. Further, the financial statements only provide very high level information, which would not reflect the sales volumes that informed the rationale for retrenchments.

[25] Mr. Booth stated that a second facilitated consultation was held on 26 June

2020. Graphs pertaining to the financial performance of the respondents' operations[10] were presented. NUM indicated that they were unwilling to participate in a process that they regarded as unfair.

- [26] Despite NUM's stance, the respondents arranged and paid for a venue for NUM to meet with its members to discuss the proposed retrenchments. The respondents also paid for employees' transport to the venue. This, it did on two occasions – 8 and 17 July 2020. On both occasions, the respondents ensured that its representatives were available at the venue to engage with NUM and the individual applicants. However, on both occasions, NUM was unwilling to engage with the respondents' representatives. This is not disputed by the applicants.
- [27] Various detailed correspondence authored by Mr. Booth was sent by the respondents to NUM throughout the consultation process, providing a comprehensive contemporaneous written account of events surrounding the consultation process. In his evidence, Mr. Booth referred to and read this correspondence. The content of the numerous letters demonstrate that the respondents repeatedly indicated its willingness to continue to consult with NUM and NUM was at various times, called upon to engage with the respondents to provide feedback on the information shared, but failed to do so. In particular, NUM failed to meaningfully engage on the proposed structure, the list of affected employees and the declining sales figures what necessitated the change in operational requirements.
- [28] In view of NUM's obstinate failure to consult meaningfully, the circumstances, the respondents called the consultation process to a close and issued notices of termination to the individual applicants.
- [29] Mr. Booth's further evidence is that during January 2021, despite the six month recall period having lapsed as provided in the retrenchment policy for the recall of retrenched employees, the respondents sent, to NUM by email and by SMS to retrenched employees, advertisements relating to 16 positions that had become available on account of a large customer in the glass industry having indicated its willingness to purchase the respondents' products again. Of 23 applications that were received, 16 retrenched employees were re-employed as of February 2021. The selection criteria used by the respondents was LIFO, skills and experience. This is in terms of the retrenchment policy.
- [30] Mr. Booth stated that the process of attempting to consult with NUM was frustrating in comparison to previous retrenchment processes. There was a lack of engagement from NUM in relation to the issues that the respondents tabled for consultation.
- [31] Mr. Booth's evidence was consistent. His evidence is undisputed.
- [32] Although it was put to Mr. Booth in cross-examination that the 2020 wage agreement was not implemented, which he denied, no testimony was led on behalf of the applicants to attest to this allegation. In the same vein, although it was put to Mr. Booth that the declining sale figures drafted by him were rejected, no evidence of this was placed before the Court. On the contrary, the evidence of Mr. Shai was consistently to the effect that the applicants did not dispute the declining sales figures presented by the respondents during the consultation process.

[33] Mr. Shai confirmed that he was not present at the first consultation between NUM and the respondents, nor was he present at either of the consultations facilitated by the CCMA. This being the case, he was unable to dispute any of Mr. Booth's evidence in relation to what transpired at the consultation meetings. Further, Mr. Shai was not a party to any of the aforementioned correspondence that was exchanged throughout the consultation process as was the evidence of Mr. Booth and therefore, he was not in a position to dispute the evidence of Mr. Booth in relation to the correspondence and the content thereof.

[34] As stated above, Mr. Shai indicated at various times while under cross-examination, that the applicants did not dispute the declining sales figures that was presented by the Respondents. This is an important concession in the context of the issue that this Court is to determine. Crisply put, it pertains to the substantive fairness of the dispute - whether there was a genuine and fair reason for the retrenchment.

[35] Mr. Shai's evidence to a large degree, consisted of versions that were not put to Mr. Booth and were not pleaded[11] by the Applicant. For example:

35.1 that after the Covid-19 restrictions were uplifted, the respondents' operations were operating "as normal";

35.2 all of the specific versions regarding the alleged unfair/incorrect application of selection criteria to the Name List and/or that certain specific individuals would have been retained if the selection criteria had been applied "correctly";

35.3 that he had the same qualifications as Mr Venter, who was retained instead of himself;

35.4 that unspecified Individual Applicants would have been willing to accept a demotion in order to be retained;

35.5 that retrenched employees were "randomly" contacted by the Respondents and offered re-employment;

35.6 that he was not contacted by the Respondents to be offered re-employment – although he stated that he would not have applied for the advertised positions as he ought not to have been retrenched as his position was not redundant;

35.7 that an employee by the name of "Hans" was a new employee and was employed by the Respondents after the retrenchments;

35.8 that the position of driver still exists and that the same vehicle is used by someone else to perform the duties of the driver that replaced the relevant Individual Applicant;

35.9 that there were other positions he could have occupied if they had been offered to him as he had been employed as a general worker in the past;

35.10 Mr. Billy Marwele was denied a voluntary severance package because the respondents wanted to get rid of certain employees.

- [36] Mr. Kent on behalf of the respondents submits that although the applicants indicated that they intended to call more than one witness to give evidence before this Court and the respondents were not appraised of who they are, only one witness was called. Further, in the circumstances where Messrs. Patrick Mashilane and Moses Mhlongo, both of whom were shop stewards of NUM and were present at the consultation meetings and were both present in Court throughout the trial proceedings, the Court ought to draw a negative inference from the applicants' failure to call them to testify. In addition, the respondents submit that a negative inference ought to be drawn from the failure to call Mr. Ramokgano – a central figure representing the applicants throughout the section 189 process, to testify in these proceedings.
- [37] The applicants' version that was put to Mr. Booth that the retrenchment was for an ulterior purpose was not proved with any shred of evidence.
- [38] In *Mtembu v Safety and Security Sectoral Bargaining Council and Others*,^[12] this Court held as follows:
- '[39] On several occasions versions were put to witnesses which versions were not subsequently placed in evidence by the Applicant, as he failed to give evidence at all. As much as it is a well established rule in our law that a version should be put in cross-examination, as set out in the authorities cited above, there must similarly be consequences where a witness is put on notice that their evidence will be contradicted and, with no reason whatsoever being advanced, the relevant witness who was to contradict that evidence, in this case the Applicant, does not himself give evidence.' (Emphasis added)
- [39] It is trite that a version ought to be put to a witness while he or she is testifying, in order that he respond thereto.
- [40] In *Platinum Mile Resources (Pty) Ltd v CCMA and Others*,^[13] this Court held as follows regarding a failure to put versions during cross-examination:
- '[41] After a witness has given his or her evidence in chief, the other party is given the opportunity to cross-examine the witness. The intended purpose of cross-examination is inter alia to reveal weaknesses in the evidence adduced, to challenge the truth or accuracy of the witness's version, to bring to light facts reinforcing the cross-examiner's case, to elicit favourable facts, to place a defence on record and to put the version of the cross-examining party.
- [42] A party has a duty to cross-examine on aspects which he or she disputes. The rationale of the duty to cross-examine is that the witness should be cross-examined so as to afford him or her an opportunity of answering points supposedly unfavourable to him.
- [43] The failure to cross-examine a witness about an aspect of his or her evidence may have the result that the evidence may not be called

into question later. The cross-examiner who disputes what the witness says has a duty to give the witness an opportunity to explain his or her evidence, to qualify it or to reveal its basis. Failure to do so has been dubbed extremely unfair and improper. Apart from the injustice to the witness, failure to cross-examine may indicate acceptance, comparable with an admission by silence. From this point of view, such evidence will carry more weight than evidence disputed by means of cross-examination and the failure to cross-examine, will be a factor increasing evidential value.

[44] A failure to cross-examine a witness on any aspect is generally considered to be an indication that the party who had the opportunity to cross-examine, did not wish to dispute the version or aspects of the version of the particular witness who was available for cross-examination. A cross-examiner is duty bound to put his or her defence or version on each and every aspect he or she wishes to place in issue, to the witness.

[45] In *Masilela v Leonard Dingler (Pty) Ltd*, the Court was faced with a scenario where a version was not put to a witness in cross-examination and held that:

‘The problem that I have with the applicant's version where it differs from that of Masina is that none of it was put to Masina while he was testifying. This court has been denied the benefit of Masina's response. It is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the

facts

that he intends to prove in contradiction, to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters that it will be alleged make his evidence unworthy of credit.’

In *Small v Smith* 1954 (3) SA 434 (SWA) Claassen J said at 438:

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. 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.”

[41] In view of the afore-going, the version of the applicants that was not put to Mr. Booth is rejected.

[42] In *South African Municipal Workers Union Obo Madlala and Others v UGU South Coast Tourism (Pty) Ltd*[14] the facts of which are similar to the present case, this Court held as follows:

“[124] In my view, it is clear from the evidence that SAMWU had an incorrect understanding of the law and the process, made unrealistic demands and was instrumental in derailing the process and preventing consultation on the issues it was required to consult on.

- [125] At no point did SAMWU or the Applicants suggest any alternatives or provide any proposals on how to avoid or minimise dismissals. SAMWU was stuck on its view that the Respondent’s decision was already taken and that the process was predetermined and that because it demanded so, for the entire process to start de novo. That was the true reason for SAMWU’s failure to engage with the Respondent in a meaningful joint consensus-seeking process.
- [126] SAMWU was invited more than once to engage in a section 189 process and to make representations. In fact, SAMWU had a duty to engage and participate in the section 189 process and the Respondent made all reasonable attempts to engage the Applicants in consultation, but SAMWU failed to do so.
- [127] Consultation may be terminated by the employer if a deadlock is reached and in my view, that was the position which was clearly conveyed in the wording, tone and content of SAMWU’s attorneys’ letter of 5 August 2020.
- [128] The Respondent had indeed reached the point where it could have proceeded unilaterally. The conduct displayed by SAMWU was not the conduct of a party who was willing and prepared to engage and negotiate, but rather of a party who was not interested to comply with the agreement of 4 June 2020, but who wanted to dictate a different process on its own terms.
- [129] SAMWU’s incorrect understanding of the law and the applicable principles informed the approach that was adopted, which in turn motivated SAMWU not to participate in the consultation process.
- [130] SAMWU did not engage in a meaningful joint consensus-seeking process, despite the fact that it was not only invited to do so on more than one occasion, with the intention to have further engagement, after the information was provided and SAMWU had submitted its submissions and proposals, but it also had an obligation to consult.” (emphasis added)
- [43] There is no evidence before this Court of any genuine willingness or attempt by NUM to engage with the respondents, despite being called upon to do so. On the contrary, the evidence before this Court shows repeated attempts by the respondents to engage with NUM, and NUM’s unwillingness to do so.
- [44] In *NEHAWU and others v University of Pretoria*[15] the Labour Appeal Court held:
- “The fact that the union participated in the process that took place between February and November 1997 and that it was free to suggest or to propose whatever it wanted to suggest or propose means that, since the union did not suggest at the time that the process be conducted any differently, it cannot now be heard to complain that the process should have been dealt with differently.”*

[45] In the same way, given that NUM was free to make any submissions or raise any concerns regarding, inter alia, the list of employees, the financial information provided and the proposed structure, and given that it failed to do so, it cannot now complain that the respondents ought to have acted differently.

[46] The undisputed evidence before this Court establishes that a genuine operational rationale was put up by the respondents. With the rationale not being in dispute, the nebulous allegations regarding some ulterior motive fall away.

[47] Despite numerous opportunities to engage with the respondents meaningfully regarding the rationale, name list and financial

information pertaining to the decline in sales figures, NUM failed to do so. There is accordingly no basis for the applicant's claim that there was any substantive unfairness in their dismissal.

[48] In the premises, I find that the respondents have discharged the onus to prove that the retrenchment of the individual applicants was substantively fair.

Costs

[49] The respondents raised a special plea on jurisdiction. Only at the commencement of these proceedings did the applicants abandon their procedural challenge to their dismissal.

[50] The evidence led by the applicants, ostensibly aimed at proving its claim regarding substantive fairness, is entirely devoid of substance, effectively rendering this referral a hopeless case, in circumstances where it is clear that the retrenchment of the individual applicants was fair. Put differently, this referral is still born.

[51] In light of the applicants' conduct in proceeding with this hopeless case and during the conduct of these proceedings bearing in mind several concessions by Mr. Seleka that the applicants did not put their version to Mr. Booth on several aspects, which is tantamount to the applicants fabricating their case or "making up their case as they go along", I exercise my discretion in terms of the provisions of section 162 (2) of the LRA to order the applicant union, NUM, to pay the costs of this referral.

[52] In view of the afore-going, the following order is made:

Order

1. The preliminary point on locus standi is upheld.
2. The special plea on jurisdiction is upheld.
3. The applicants' claim is dismissed.
4. The applicant union (National Union of Mineworkers) is to pay the costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. M. Seleka of Seleka Attorneys Inc.

For the Respondents: Mr. J. Kent of Solomon Holmes Attorneys.

[1] Act 66 of 1995, as amended.

[2] See: *July and Others v Mbuqe and Others* [2017] ZAECMHC (9 February 2017); *Booyesen and Others v Booyesen and Others* 2012

(2) SA (GSJ) (25 March 2011).

[3] See: respondents' special plea at paras 1 to 4. The respondents raised a second special plea, being its incorrect citation as a party to this dispute. This was subsequently cured by the applicants in their amended statement of claim.

[4] See: Section 189(A)(13) read with section 189(17) and (18) of the LRA. See also: *Edcon Ltd v Steenkamp and others*

[2018] 3 BLLR 230 (LAC).

[5] No. 57 of 2002.

[6] Bundle A, page 69A.

[7] Bundle A, page 3 to 5.

[8] Bundle A, page 103A.

[9] Bundle A, page 27.

[10] Bundle A, page 79.

[11] It is trite that parties are bound to their pleadings. In *Minister of Safety and Security v Slabbert*

[2010] 2 All SA 474 (SCA), the SCA in holding that a party is not to raise issues not in its pleadings and come with a different version at trial stated that: "A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial." See also: *South African Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC) at para 4 where the Labour Appeal Court stated that pleadings are to be clear to enable the opposing party to know the case it is to meet and the Court to know the question that is to be decided and '[m]aking up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a court'.

[12] (JR2870/10) [2013] ZALCJHB 95 (29 May 2013) at para 39.

[13] (JR 427/20) [2023] ZALCJHB 52 (1 March 2023) at paras 41 onwards. (Footnotes omitted).

[14]

[2023] JOL 59794 (LC) at paras 124 onwards.

[15]

[2006] 5 BLLR 437 (LAC) at para 60.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2024/525.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/num-obo-mashilane-and-others-v-micronized-unknown-topic-alcjhb-2024--6a3ea5123b1caa9129809efe>

Prepared on 13 October 2026 · Esheria