

SOUTH AFRICA / JUDGMENT

# SACCAWU and Others v Connect Financial Services (Pty) Ltd (JS 121 / 2021) [2023] ZALCJHB 32 (9 March 2023) [2023] ZALCJHB 32

## COURT

Labour Court Johannesburg

## BEFORE

Mthalane

## CASE / FILE NUMBER

JS 121 / 2021

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## Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

No: JS 121 / 2021

In

the matter between:

SOUTH AFRICAN COMMERCIAL  
CATERING  
AND ALLIED WORKERS UNION  
('SACCAWU')  
obo H THAGE AND 28  
OTHERS  
Applicant  
and  
CONNECT FINANCIAL  
SERVICES (PTY) LTD  
Respondent

Heard:

17 & 18 January  
2023

Delivered:

09 March 2023

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## JUDGMENT

MTHALANE AJ

### Introduction

- [1] The Applicant, the South African Commercial Catering and Allied Workers Union (SACCAWU) brought an application on behalf of its 29 members who all allege that their dismissals by the Respondent due to operational requirements were substantively unfair.
- [2] The relief sought by SACCAWU, on behalf of its members, is that all 29 members should be reinstated with full back pay retrospective to the dates of their dismissals.

The

### Issues

- [3] The issues for determination by this Court are:

*“2.1 Refusal on the part of the company to explore early retirement and to offer early retirement to the 11 qualifying*

employees (“the early retirement ground”);

2.2 Failure on the part of the company to disclose twenty-five (25) vacancies within its call centre, to advise the union of such posts, to consider such vacancies as an alternative to retrenchment and to offer the vacant posts to the union’s members as an alternative to retrenchment (“the vacancies alternative ground”); and

2.3 Diversion of workload by the company to CRC an entity within the JD Group (“the diversion of workload ground”)

- [4] The other issue that was raised was on the basis of section 189A (13) of the Labour Relations Act[1] (LRA), which I believe is a separate matter that should not be entertained by this Court.

### Background

- [5] The Applicant’s members were, before the retrenchment, employed by Connect Financial Services (the Respondent), a subsidiary company within JD Group. Notices in terms of sections 189 and 189A of the LRA were given to the Applicant’s members and facilitation consultation meetings were held on 24 July 2020 as well as 3, 6 and 17 August 2020.

- [6] The notices as required by section 189(3), set out inter alia-

6.1 that only the Respondent’s credit division was affected by the proposed restructuring, and that the restructuring process to follow would only apply to that division; and

6.2 alternatives to retrenchment, and in particular what is called “re-deployment elsewhere in the Group”, and records “this option is dependent on vacancies within the Group and is further dependent on the affected employee’s willingness to accept the alternative work opportunity”. The proposed selection criteria was indicated as being the retention of skills followed by LIFO.

- [7] The parties in dispute agreed during the consultations that where it came to the 50 available positions in the Respondent’s Credit Division, all the affected employees need not apply for these positions, but that they would each be assessed for the positions and would be placed based on the outcome of these assessments. It was agreed by the Applicant that the employees would fully participate in these assessments.
- [8] Subsequently, the employees were assessed, and 50 employees were placed accordingly. The Applicant was informed in writing of its members that were placed and were not placed, and the reasons for this. The placement of the 50 employees was not a dispute before this Court as far as the fairness is concerned.
- [9] Following that, the Respondent advertised 25 available positions in its Collection Call Centre, the employees were also informed of the advertisement.
- [10] On 4 September 2020, the Applicant sent a letter to the Respondent. In this letter, it was alleged that the Respondent had advertised vacancies on 14 August 2020, and then appointed employees that would start work on 7 September 2020. It was also said that the Respondent advertised further vacancies on 1 September 2020, and it was suspected that the Respondent intended employing employees from MBD (an external service provider) for these vacancies.
- [11] According to the Applicant, this was all done without it being informed and accordingly rendered the process unfair. The Applicant demanded that all the employees must be reinstated, and employees must be placed in the vacancies advertised.

## Respondent

- [12] The witness of the Respondent was Lulu De Beer (Ms De Beer), the HR and Operations Executive of the Respondent, and is directly responsible for the restructuring process. She submitted that the Respondent is part of the broader JD Group of companies, which consist of a large number of retail outlets distributed throughout the country, selling furniture, appliances, and related goods to customers, who are members of the public. The Respondent itself is however a distinct, separate entity and operation, and consists of two separate divisions. The one division was the Respondent’s credit division, and the other division was the Collections Call Centre.

- [13] The Respondent submitted that the Applicant's contention that the issue of the early retirement was not explored is simply just to mislead this Court, as this was part of the transcript of the consultations. Ms De Beer contends that such was part of the discussions and that the Respondent concluded that for early retirement to be considered on a group basis, will create operational difficulties.
- [14] It is the Respondent's evidence that the employees that were 55 years of age and older qualified for early retirement and in this case only 11 employees qualified for early retirement. However, their qualification was not automatic as they were required to make application thereof, however, the employees failed to do so. It was the Respondent's evidence that even if the application was made, approval thereof was discretionary.
- [15] It was submitted that the Respondent advised the Applicant that 50 employees would be placed in available vacancies and the remaining which could not be placed in other divisions would unfortunately be retrenched, and that should any future vacancies be available the employees may accordingly apply for the vacancies, and such was the selection criteria that was agreed upon.
- [16] On the issue of the 25 vacancies which were advertised shortly after the retrenchment consultations, Ms De Beer provided a reason why the employees did not apply for the vacancies in the Collections Call Centre. She explained that the positions were entirely different to the positions the Applicant's members held in the Respondent's Credit Division, the salaries were lower, the working hours were different, and the conditions were different. She explained that the Call Centre positions were target driven and employees spent all day on the telephone dealing with often irate customers. This was simply a completely different environment to the Respondent's Credit Division.
- [17] Furthermore, Ms De Beer and Mr Annandale testified that the Collections Call Centre was a division outside the CFS Credit Division. Ms De Beer explained that each of these divisions had their own general manager, that reported to her. It was also specifically explained, with reference to the correspondence between the parties, that the Collections Call Centre was not part of the restructuring or affected by it. In particular, Ms De Beer stated that the affected employees in the CFS Credit Division had to apply for vacancies in the Collections Call Centre. That is why the vacancies were advertised on 1 September 2020 and employees were informed that they could apply.
- [18] Ms De Beer fully explained what the differences were between the operations of CRC and the Respondent, and that it was impossible to divert workload from the Respondent to CRC. Ms De Beer specifically testified that no workload was ever diverted as suggested by the Applicant.

## Applicant

- [19] The Applicant's evidence is itemised as follows:

### Voluntary Early Retirement

- [20] The Applicant submitted that 11 of its members in the Respondent's Credit Division qualified for an early retirement, however, the Respondent refused to explore early retirement and did not offer early retirement to these affected employees which could have reduced the head count in the ultimate retrenchment that followed.

### The Alternative Positions

- [21] The Applicant submitted that there were 25 vacant positions that became vacant in the Collections Call Centre and which were advertised on 1 September 2020. The Applicant's contention is that, the Respondent had knowledge during the retrenchment facilitation consultations of the existence of these vacancies yet the Respondent did not advise the Applicant of the vacant posts as an alternative to retrenchment, which once again could have reduced the head count of the retrenchment.
- [22] The Applicant submitted that there was a duty for the Respondent, through Ms De Beer, to disclose that there are future vacancies in the Collection Centre of the Respondent which will require 25 call centre consultants.
- [23] The Applicant submitted that Ms de Beer played a critical role in the facilitation consultation meetings from both an HR and Respondent's Operations Executive perspective. She would have been required to give direct input as the Respondent's representative at the facilitation meetings on issues such as available vacancies.

### Diversion Of Work

- [24] The Applicant submitted that before the commencement of the retrenchment process, the Respondent diverted work that would ordinarily be done by it, to the CRC, which meant that the Respondent itself was the cause of the reduced workload.
- [25] The Applicant further submitted that Ms De Beer in her evidence accepted that some work done by customer care could have been done by the CRC, but that this did not apply in respect of the central credit team.
- [26] The Applicant further submitted that Ms De Beer accepted that they had consulted extensively on the CRC but maintained that it was a separate entity.
- [27] Ms De Beer, in her evidence, accepted that some of work done by customer care could have been done by the CRC, but that this did not apply in respect of the central credit customer care which was one of the departments and/or division listed section 189.

### Analysis

- [28] For the sake of convenience my analysis will each be itemised as per the issues before the Court.

## Early retirement

- [29] The Respondent has discharged its onus on the basis that early retirement option for the employees who were qualifying had been explored during the consultation and it was the Respondent's response that the qualifying employees should make an application for the Respondent to consider it as an alternative to retrenchment to those that qualified, however, despite that, none of the employees had endeavoured to apply for early retirement.
- [30] Therefore, the Applicant's case in this premise seems not to have substance to stand as this issue was explored and it was a result of the failure of the Applicant's members to take reasonable steps to apply. This may not be construed as a failure by the Respondent to explore the early retirement as an alternative option for retrenchment.
- [31] The Respondent's retrenchment notice is specific that should any opportunity arise, the employees may be redeployed to the group for alternative positions. However, that does not mean that the employees will automatically qualify to be appointed. Even if the employees had to apply for the vacancies that became available, appointment was at the discretion of the company after considering the skills and qualities required by the position.
- [32] In MTN Group Management Services (Pty) Ltd v Mveli and Another[2], it was held that the fact that any vacancy existed in the company does not mean that such vacancies were suitable for the employees, and it did not in itself provide a viable alternative to retrenchment. For the Applicant to rely on the fact that the employees should have been redeployed to another division is tampering with the restructuring decisions of the operation.
- [33] The conduct of the of the employees in this case is not different from the case in which the court had to deal with employees who had failed to apply to the vacant positions when they were obliged to in GE Security (Africa) v Airey and Others[3] where it was held:

*"In these circumstances, I find that the appellant, in terms of the agreed selection criteria, had no obligation to consider the*

respondents for positions for which they did not apply. In the circumstances the dismissal of the respondents was neither substantively nor procedurally unfair"

- [34] It is clear that the positions of the employees became redundant, and the Respondent's vacancies did not automatically qualify them to fill the vacancies merely because they were retrenched and considering that the new vacancies included a different scope of work from their initial positions.
- [35] The Applicant's members' failure to apply for the position suggests that they knew that the positions advertised were not positions that they could have considered to avoid their retrenchment, as they were lower positions with lower salary, and that alone is a clear indication that there were by no means an alternative to avoid their retrenchment.

[36] In any event this issue is res judicata, as it has found its way to the Court on the procedural issue, which was determined by my learned friend Mahosi J, who correctly held in *South African Commercial Catering and Allied Workers Union v Connect Financial Solutions (Pty) Ltd*[4] :

*“The record before this Court shows that the parties agreed, in the consultation meeting of 6 August 2020, to draw a distinction between the vacancies in the CFS Credit Division, which were 50 positions available, arising in the course of restructuring, on the one hand, and vacancies in other divisions. It was further agreed that there can be no automatic placement in vacancies outside CFS Credit Division and that employees must first apply for these vacancies after which they will be assessed for possible placement. In relation to vacancies in the CFS credit Division, employees did not have to apply. Instead, all employees would be assessed against the available vacancies to determine who gets placed ...”*

[37] The Respondent has shown that retrenchment was the last resort as it made an effort to place 50 employees with the remaining parties failing to be placed which resulted in their retrenchment.

[38] The fact that there was an effort on the part of the Respondent to place the employees, which unfortunately resulted in only 50 employees being placed, itself suggest that there was fairness in the selection criteria during the consultations. The Labour Appeal Court has confirmed that the non-placement of an employee pursuant to a placement process is a valid selection criterion for retrenchment,

provided the placement process itself is fair and objective.[5]

[39] Accordingly, the Applicant’s contention regarding the Respondent’s failure to disclose and appoint the employees on the vacancies that later became open is far-fetched.

[40] Ms De Beer has articulately explained the divisions of the JD Group and that the Respondent is a separate entity which is distinct from CRC. It will be impossible to divert the work to a company that is operating differently from the Respondent its daily operations.

[41] In the evidence of the Applicant, nowhere did the Applicant’s witness mention a diversion of workload, instead the Applicant relied on the fact that there is an overlap of work that is done by the Respondent and CRC, following his concession that the two divisions are two separate entities.

[42] The fact that the evidence of the Applicant’s fails to provide proof of similarity between the two divisions, indicates that the divisions are two different entities that operate as each operation objective is distinct from each other.

[43] The Respondent has articulately stated in its submission that even if the business may have diverted work to CRC, that is a call that the Respondent was entitled to make, and there is simply no legitimate basis, in the context of challenging the substantive fairness of any retrenchment that may result from such decision, to demand that such decision be reversed. Such a decision always remains part of the operational prerogative of the

Respondent, as long as it makes business sense. There is no suggestion or pleaded case, or even evidence presented, that any such decision was not founded on a sound business rationale.

[44] The Labour Appeal Court has correctly in *Forecourt Express (Pty) Ltd v SA Transport and Allied Workers Union and Another*[6] held:

*“the appellant was entitled to choose the manner in which it would run its business provided that it did not change the terms and conditions of employment of the employees without their consent, and provided that, if it contemplated the dismissal of the employees, it complied with its obligations provided for in s 189 of the Act.”*

[45] Accordingly, there is no evidence from the Applicant that suggests the diversion of work from the Respondent to the CRC was indeed possible.

#### Substantiveness test

[46] It is conspicuous before this Court that all the facilitation consultations were conducted and that the issues before this Court were also part of the discussions during the consultations. The Respondent had duly participated in facilitation consultations in good faith and all that was agreed into by the parties, the Respondent ensured that the agreement was executed.

[47] In *General Foods Industries Ltd v FAWU*[7] the Labour Appeal Court said:

*“After consultations have been exhausted the employer must decide whether to proceed with retrenchment or not. The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that, even though reasons to retrench employees may exist – they will only be accepted as valid if the employer can show that all viable alternatives have been considered and taken to prevent the retrenchment or to limit these to a minimum.”*

[48] From the evidence provided by the Respondent, the Respondent has in terms of section 192 (2) of the LRA discharged the onus that the retrenchment was substantively fair.

[49] In the premises the following order is made:

#### Order

1. The dismissal of the applicants was procedurally and substantively fair.
2. There is no order as to costs.

G. Mthlane

Acting Judge of the Labour Court of South Africa

Appearances:

For The Applicant: Adv

ZM Navsa

Instructed by: Dockrat

Incorporated

For The Respondent: Mr S Snyman of Snyman Attorneys

- [1] No. 66 of 1995, as amended.
- [2] (2021) 42 ILJ 775 (LAC) at para 25.
- [3] [2011] ZALCCT 81 (8 April 2011) at para 22
- [4] Unreported decision. Case no: J1004/20. Delievered on: 22 October 2020 at para 26.
- [5] Telkom SA SOC Limited v Staden and Others [2020] JOL 49323 at para 43.
- [6] (2006) 27 ILJ 2537 (LAC) at para 39
- [7] [2004] 7 BLLR 667 (LAC) at para 55.

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Prepared on 13 October 2026 · Esheria