

SOUTH AFRICA / JUDGMENT

Wolmarans v Rio-Carb (Pty) Ltd (JS 212/21)

[2023] ZALCJHB 278 (17 October 2023)

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COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS 212/21

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FLYNOTES:

LABOUR – Retrenchment – Fixed-term contract offer – Applicant retrenched for operational reasons arising out of effects of Covid-19 pandemic – Genuine reason for retrenchment communicated to applicant – LIFO implemented as fair selection criterion – Applicant has himself to blame for rejecting fixed-term contract offer made to him in uncertain times in which not only the company but the entire country and the globe found itself in – Dismissal of applicant was procedurally and substantively fair.

IN
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not
Reportable
Case
No: JS 212/21
In

the matter between: ANDRIES
 DIEDERIK
 WOLMARANS
 Applicant
 and
 RIO-CARB
 (PTY)
 LTD
 Respondent

Heard: 7 & 8 September 2023

Delivered: 17 October 2023 (This
 judgment was handed down electronically by circulation to the
 parties' legal representatives by email, publication
 on the
 Labour Court website and release to SAFLII. The date and time for
 handing-down is deemed to be 10h00 on 17
 October 2023

JUDGMENT

PHEHANE, J

Introduction

[1] The global pandemic of Covid-19 saw an unprecedented response globally, which culminated in the following address by the President of the Republic of South Africa, Cyril Ramaphosa[1]:

‘...the National Coronavirus Command Council has decided to enforce a nation-wide lockdown for 21 days with effect from midnight on

Thursday 26 March. This is a decisive measure to save millions of South Africans from infection and save the lives of hundreds of thousands of people..The nation-wide lockdown will be enacted in terms of the Disaster Management Act and will entail the following:

- From midnight on Thursday 26 March until midnight on Thursday 16 April, all South Africans will have to stay at home.
- The categories of people who will be exempted from this lockdown are the following: health workers in the public and private sectors, emergency personnel, those in security services – such as the police, traffic officers, military medical personnel, soldiers –

and other persons necessary for our response to the pandemic.

It will also include those involved in the production, distribution and supply of food and basic goods, essential banking services, the maintenance of power, water and telecommunications services, laboratory services, and the provision of medical and hygiene

products. A full list of essential personnel will be published.

- Individuals will not be allowed to leave their homes except under strictly controlled circumstances, such as to seek medical care, buy food, medicine and other supplies or collect a social grant.
- All shops and businesses will be closed, except for pharmacies, laboratories, banks, essential financial and payment services, including the JSE, supermarkets, petrol stations and health care providers.
- Companies that are essential to the production and transportation of food, basic goods and medical supplies will remain open.

We will publish a full list of the categories of businesses that should remain open.

The nation-wide lockdown is necessary to fundamentally disrupt the chain of transmission across society.

Our country finds itself confronted not only by a virus that has infected more than a quarter of a million people across the globe, but also by the prospects of a very deep economic recession that will cause businesses to close and many people to lose their jobs.

We are in consultation on a proposal for a special dispensation for companies that are in distress because of COVID-19. Through this proposal employees will receive wage payment through the Temporary Employee Relief Scheme, which will enable companies to pay employees directly during this period and avoid retrenchment.

We will prioritise the lives and livelihoods of our people above all else, and will use all of the measures that are within our power to protect them from the economic consequences of this pandemic...'

[2] The facts of this referral play out against the backdrop of the unprecedented Covid-19 pandemic and the stringent national lockdown measures that were implemented by the South African Government commencing in March 2020. This was the 21 day national lockdown period, which earned the name: "hard lockdown". The effect of the Covid -19 pandemic and the hard lock down (and various lock down levels that followed) had far reaching effects on the survival of businesses and the sustenance of economic livelihood, against the race to save and preserve human life. A catastrophic time, when uncertainty gripped the globe with effects that continue to play out in current times.

[3] The respondent produces specialized products that are utilized in the mining industry and it operates solely in the Johannesburg region. The applicant was employed as a boilermaker by the respondent since 2016 and he held this position prior to his dismissal in 2020.

The Evidence

- [4] The evidence of Ms. Dlamini (the respondent's human resources and payroll manager) and Mr. Maine (the director of the respondent) is that the respondent was negatively impacted by the Covid-19 pandemic.
- [5] Ms. Dlamini stated that following the announcement of the 21 day national lockdown (an extract of which is quoted above), on 24 March 2020, the respondent dispatched a memorandum to all its staff, in essence, repeating the period of the lockdown and requiring all staff to return to work on 17 April 2020.[2]
- [6] On 15 April 2020, the respondent informed all its employees of the measures it had adopted to ease the financial difficulty it was in as a direct result of the pandemic and national lockdown, which had been extended by a further two weeks at this point in time. One such measure was to reduce all employees' salaries by 20% with effect from April 2020 and for a period of three months, in order to secure the future sustainability of the business. The respondent undertook to explore options by the Government to assist companies and their respective workforces as a consequence of the pandemic and lockdown measures.[3] Such measures were implemented, such as applying for the temporary employee relief scheme (TERS) benefits and paying these out. This was communicated to all employees by the respondent.[4]
- [7] The respondent continued to face financial challenges as a result of the Covid- 19 pandemic and the local and international market economic recession. Consequently, it was in a position where it had to consider possible retrenchments. In a memorandum dated 28 May 2020, with subject titled: 'Notice in terms of section 189 of the Labour Relations Act, 66 of 1995, as amended', the respondent communicated to all employees the reasons for the possible retrenchment as follows:
- 'Following the National Disaster [Management] Act announced by the President on 15 March 2020, related to the COVID 19 pandemic, trading conditions deteriorated significantly. Our business and revenue declined immediately, and it is our prediction that these conditions will prevail for some time. Unfortunately, the business will not be able to continue to pay salaries and other critical expenses, when limited revenue is collected. The business must react to the market conditions immediately and reduce costs urgently. The business will implement drastic cost saving measures immediately that include the reduction of staff. As a result, some jobs are directly affected.'[5]
- [8] The alternatives that were considered by the respondent as recorded in the said memorandum dated 28 May 2020, which it considered as impractical, was a reduction in individual working time which the

respondent indicated would not achieve the desired cost reduction. Further, transfers to other areas of responsibility or location was not feasible as there were no other suitable vacancies. The memorandum ends in advising that more details would be discussed with the affected employees during consultation meetings.

- [9] The content of the aforesaid memorandum by the respondent with its employees is not disputed.
- [10] Mr. Nzuzo, who is employed by the respondent a production supervisor, whose job entails quality checking the work of a boilermaker stated that the manner in which correspondence and in particular the memorandum of 28 May 2020 was communicated to employees, was that all employees gather together in an area termed a grinding bay, where the correspondence is read out to them and communicated to them, after which it is placed on notice boards. During the time when management communicates any communication to the employees in this manner, they are granted an opportunity to ask questions for clarity. He confirmed that this mode of communication was conducted by the respondent during the Covid-19 pandemic as employees were working on a rotational basis. He could not confirm whether the applicant was part of the group that he formed when this communication was made to the employees.
- [11] The uncontested evidence of Mr. Miller, who is the current financial manager of the respondent, is that according to an extract of the financial statements of the respondent comparing the periods of the financial years 2020 and 2021, in the financial year ending 2021, the respondent experienced a loss in revenue and profit before tax during the months March to June 2020 and that profits and revenue increased but then declined again towards the month of December 2020 and January 2021.[6] He stated that this was as a direct consequence of the impact of the Covid-19 pandemic and lockdown regulations. This evidence was corroborated by Mr Maine.
- [12] It is common cause that at the time of the retrenchment of the applicant, the respondent employed four boilermakers, the applicant being one of them. Further, at the time of his retrenchment, the applicant was the second last to be employed as a boilermaker. Two boilermakers were retrenched, that is Mr. Van Staden, who was the last to be employed as a boiler maker, and the applicant.
- [13] The applicant was served with a letter dated 2 June 2020, bearing the same subject title as the aforesaid memorandum of 28 May 2020.[7] This letter contained the same rationale for the possible retrenchment and the same alternatives considered by the respondent as is recorded in the memorandum of 28 May 2020.
- [14] It is common cause that the applicant was served with this letter on 2 June 2020 and was invited to and attended a consultation on 4 June 2020, together with two other affected employees, namely, Messrs. Cobus van Staden and Fabian Adams. It is also common cause that present at this consultation meeting on behalf of the respondent, were Ms Dlamini as

well as a representative from the respondent's employer organisation, namely, Mr. Adriaan van Rensburg, who chaired the consultation meeting and recorded the minute of this meeting in his own handwriting while the meeting was in progress.[8] The typed version of these minutes appear at pages 87 to 88 of the trial bundle. The applicant confirmed during his evidence, that his signature appears on the hand written minutes at pages 85 and 86 of the trial bundle.

- [15] The evidence by Ms. Dlamini is that the employees (including the applicant) who consulted on 4 June 2020 understood the rationale for the retrenchment and did not take issue with that. During the consultation proceedings, the employees, and the applicant in particular, enquired about and made proposals regarding their bonus payment and wanted clarity as to the amount of money that they would be paid. The meeting adjourned and she left the meeting to discuss the employees' proposal with the directors of the respondent. The directors enquired as to whether the employees were objecting to the retrenchment, to which she answered in the negative and stated that they had accepted the retrenchment. The directors agreed to the proposals of the employees regarding their bonus payments and they gave Ms Dlamini the go-ahead to retrench the employees. Ms Dlamini returned to the consultation meeting and relayed to the meeting, the feedback from the directors with the employees in attendance. The employees were happy with the retrenchment and they were dismissed at the conclusion of this meeting and were informed that they did not need to serve the notice period at work. Her evidence was that the employee stated that there was no need for further consultations, at which she informed them to attend at the respondent's premises on 30 June 2020 to collect the retrenchment documentation, as on that date, all payments due to them would have been affected.
- [16] Ms Dlamini confirmed (and it is not disputed), that the applicant was dismissed on 4 June 2020 for operational reasons and that Ms Dlamini required him to attend at the premises of the respondent to collect his retrenchment documentation on 30 June 2020.
- [17] It is in dispute as to whether the applicant collected his retrenchment documentation on 30 June 2020.
- [18] The applicant's pleaded case is that he was issued with a retrenchment notice and thereafter a dismissal letter.[9] The applicant's version before this Court, however, is that he was retrenched verbally and did not receive any retrenchment letter from the respondent - he received retrenchment documentation comprising only of the UIF 19 form and a letter dated 6 August 2020 confirming the payments that had been made out to him following his retrenchment by email and these documents were not received by him on 30 June 2020.
- [19] The applicant confirms that when he attended at the respondent's premises on 30 June 2020, it was for the purposes of collecting his retrenchment documents, but Ms Dlamini contacted him to tell him to attend the following day to collect them, but he was already at the respondent's premises when she contacted him. When he arrived at the respondent's premises on 30 June 2020, he saw that a certain Mr. van Wyk (who is now deceased), was

appointed in his former position as a boilermaker. The applicant proceeded to take photographs of Mr. van Wyk on his mobile phone, as he held the view that Mr. van Wyk was carrying out his former job regarding work for Sasol. The applicant was infuriated, as he had been retrenched a few weeks prior but somebody else was employed to do his job. He was approached by the production manager, Mr. Johan Marais, who demanded that he delete the photographs of Mr. van Wyk. The applicant refused to delete them, as he stated that he was going to use the photographs as evidence in subsequent proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA). The applicant's version is that the reason Ms. Dlamini attempted to avert him from attending at the respondent's premises on 30 June 2020, was to "hide" Mr. van Wyk.

- [20] Ms. Dlamini denied hiding Mr. van Wyk. Ms. Dlamini's evidence was that when the applicant attended at the respondent's premises on 30 June 2020, the retrenchment documentation was not ready for collection. She therefore contacted him on 30 June 2020 and required that he attend at the respondent's premises on the following day to collect the documentation, but the applicant was already on the respondent's premises on 30 June 2020. Ms. Dlamini could not recall whether she prepared his documentation on 30 June 2020 and handed it over to him, or whether

she handed it over to him on the following day.

- [21] The further evidence of Ms. Dlamini is that the applicant was a skilled employee and it is common cause that on 15 June 2020, the applicant was approached by Mr. Marais with an offer to accept a fixed term contract on a project that the respondent had received on Multotec. The applicant refused this offer, as he stated that it was not "worth his while". The respondent's version (evidence of Ms. Dlamini and Mr. Maine,) is that its offer to the applicant on 15 June 2020 to work on a fixed term contract as a boilermaker on the Multotec project was first offered to the applicant, as he was a skilled employee and that the respondent made this offer to the applicant in an attempt to ameliorate the effects of the retrenchment on him, but the applicant rejected this offer and thereafter, the respondent employed Mr. van Wyk on this project. It is common cause that Mr. van Wyk was employed on a permanent basis some few months after he was contractually engaged, as the respondent was receiving more work at that stage.
- [22] The evidence of Ms. Dlamini and Mr. Maine was that at the time this contract was offered to the applicant, the respondent had started to receive projects and jobs and its financial position was making a turn for the better although it was not out of financial difficulty. Further, that given the fact that the effects of the Covid -19 pandemic were still at play, the respondent was not in a position to make any permanent offers of employment, as it was uncertain as to the sustainability of its operations. Ms. Dlamini stated that had the applicant accepted this fixed-term contract, he would have been made a permanent employee.

- [23] Ms Dlamini's evidence is that the respondent undertook during the consultation on 4 June 2020, that it would approach the employees if work became available – this is what the respondent did – contract work became available and this work was offered to the applicant. On Ms Dlamini's evidence, the applicant rejected this fixed-term contract because he wanted more money but the company was not out of financial difficulty at that point in time to meet the applicant's demand for more money.
- [24] It is common cause that in a transcribed WhatsApp communication between the applicant and Mr. Marais, that the applicant stated that the fixed-term offer that was made to him was not worth his while.[10] On a plain reading of this WhatsApp message, it transpires that the applicant wanted more money. He does not question the duration of the work; he does not complain that it is contract work and that the job entails the work he was performing when employed by the respondent on a permanent basis.
- [25] In questions posed by the Court, the applicant explained that when he stated that the contract was not worth his while, he meant that the amount of money that was offered to work on the project was not worthwhile to him given the amount of work that would be needed to be carried out and for this reason, he rejected the offer.
- [26] During cross-examination, the applicant stated that had it not been for Mr. van Wyk being employed in what he termed as his job, he would not have contested his retrenchment.
- [27] The applicant's version is that his dismissal is both procedurally and substantively unfair, as there was no need to retrench him as the respondent had, a few weeks after he had been retrenched, employed somebody else in his position. In the circumstances, there existed no reason to retrench him and therefore his retrenchment is substantively unfair.
- [28] In addition, the applicant's version is that his dismissal is procedurally unfair because the retrenchment was a *fait accompli*, in that during the meeting of 4 June 2020, at the start of the meeting, the employees were informed that a decision had already been taken to retrench them and they were not given any opportunity to make proposals to avoid the retrenchment. He stated during cross-examination that on receipt of his notice in terms of section 189 of the LRA, he had the intention of raising a proposal as an alternative to dismissal that he would be prepared to receive a reduction in salary. He stated that he did not make this proposal during the consultation on 4 June 2020, as the employees were not only not given the opportunity to make proposals, but that the content of the section 189 letter he received stated that the reduction of work which he equates to reduction of salary was already considered and found to be impractical and therefore, there was no need for him to make such a proposal.
- [29] The applicant did not dispute that the respondent had communicated to the employees in the wake of the announcement of the Covid-19 measures. His evidence was that he was aware of these notices that were placed on the notice board but he did not make any enquiries about them. Oddly, his evidence was that the respondent did not shut down for the

three week period of the hard lockdown. His evidence was that the respondent was closed for approximately one or two days after the first period of the national lockdown was announced, and thereafter, the respondent began to trade. This was disputed by Mr Maine.

- [30] The applicant denied that he had given any indication of being happy with the retrenchment. In his evidence-in-chief, he mentioned for the first time that he cried during the consultation on 4 June 2020, begging for his job. This evidence was not put to any of the respondent's witnesses. Further, the applicant's evidence was that at the start of the consultation meeting on 4 June 2020, the employees were informed that a decision had been made to retrench them. He further denied that Ms Dlamini left the meeting to go and consult with the directors of the respondent. This version was also

not put to Ms Dlamini.

- [31] Further, the applicant stated that Mr. van Wyk took over his job, in particular, work relating to Sasol. This evidence was not put to any of the respondent's witnesses. Mr. Maine specifically stated that the fixed-term contract that was ultimately awarded to Mr. van Wyk was on the Multotec project which had been awarded to the respondent before the Covid 19 pandemic, however, work on this project had been deferred owing to the pandemic and only commenced later, when the contractual work was first offered to the applicant. Mr. Maine was at pains to state that the work that was performed by Mr. van Wyk did not include the work that was performed by the applicant, and rather, that the work that was performed by Mr. van Wyk formed part of the work that was performed by the applicant.

Evaluation

- [32] It trite that a party is bound to its pleaded case. It is impermissible for a party to veer off at trial and put forward a version that differs from its pleaded case.
- [33] In *Imprefed (Pty) Ltd v National Transport Commission*[11] the Court stated as follows, with reference to the words of Milner J in *Kali v Incorporated General Insurances Ltd*[12] with regard to pleadings and the evidence at trial:

'A pleader cannot be allowed to direct the attention of another party to one issue and then at the trial attempt to canvass another.'

- [34] In an attempt to deal with the applicant's conflicting versions regarding whether or not he received his dismissal or retrenchment letter, the representative of the applicant introduced into evidence, the founding affidavit in the condonation application that was launched by the applicant for an order granting condonation for the late filing of the statement of claim. This application was unopposed and was granted per order of Court before the trial hearing. In paragraph 9.1.2 of the founding affidavit, the applicant avers that he was not "specifically" issued with a retrenchment letter by the respondent on 30 June 2020 and that therefore he was retrenched verbally. His version before this Court as pleaded in paragraph 31 of his statement of claim is that he was issued with notices of retrenchment and thereafter a dismissal letter. The applicant conceded that on these two pleadings, his version is

contradictory. He explained this by stating that he might have made a mistake in paragraph 31 of the statement of claim and confirmed that all the documents that he received from the respondent was furnished by him to his legal representative. This explanation by the applicant, does not assist his case as litigants are bound by their pleadings and there is no application before this Court to amend paragraph 31 of the statement of claim.

- [35] In the circumstances, the applicant is bound by his case as pleaded. In any event, in my view the existence or non-existence of a dismissal letter does not take the point any further in challenging the fairness of the applicant's dismissal. This is because it is common cause that the applicant was retrenched on 4 June 2020 for operational reasons arising out of the effects of the Covid 19 pandemic on the business operations of the respondent - the applicant admitted during cross-examination that he accepts that this was the rationale for his retrenchment. The applicant confirmed that

he received written correspondence detailing his retrenchment package in a letter dated 6 August 2020 and was subsequently paid his severance package.

- [36] The applicant made a desperate attempt and put to Ms. Dlamini that the reason, and later, as it was submitted on his behalf by his representative that what "might" be the reason for his dismissal is that he reported the respondent to the bargaining Council for claiming TERS monies but not paying the monies received over to the employees. This allegation was not pleaded by the applicant and it comprises a new cause of action leading to an alleged automatically unfair dismissal, which is not pleaded.

- [37] In view of the concession by the applicant that there was a rationale for his retrenchment, his challenge on the substantive fairness of his dismissal cannot succeed.

- [38] The applicant received, following initial correspondence by the respondent regarding its financial challenges in light of the Covid-19 pandemic and economic recession, a letter in terms of section 189 (3) of the LRA setting out the rationale for the retrenchment, the alternatives that were considered, the proposed date of the dismissal as well as an invitation to attend a consultation meeting on 4 June 2020. The evidence before this Court is that the applicant attended the consultation meeting.

- [39] What transpired at that meeting is in dispute.

- [40] The well-known case of Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie SA and others^[13] sets out the credibility test that the Court should utilize when confronted with two mutually destructive versions. This test is followed in casu in making a determination on the credibility of the witnesses.

- [41] The applicant is not a reliable and credible witness, as his evidence contains several inconsistencies and contradictions. The applicant agrees that there was a rationale for the retrenchment. He contradicts himself in stating that there was no fair reason for his dismissal owing to the employment of Mr van Wyk shortly after his dismissal. He agrees that he made proposals in the consultation meeting regarding the bonus payments, but in the

same vain, states that the employees were not afforded the opportunity to make proposals during the meeting. He further stated that he was prepared to make a proposal on the reduction of his salary as an alternative to dismissal, but did not, as this was already considered and rejected by the respondent.

- [42] However, it transpires that he refused a contract position which offered a similar rate of salary, simply because he wanted to be paid more than his basic salary at the time of his dismissal. It is odd that an employee who begged not to be dismissed because of family and financial responsibilities refused employment in the face of the challenges brought about by the Covid-19 pandemic in tough economic conditions in the country and around the globe.
- [43] The applicant's demeanour was wholly theatrical. He cried in court when he stated that he begged for his job. He further stated that he suffered a heart attack after he was dismissed and that the cause of his heart attack was stress due to his dismissal. When challenged during cross-examination that he has not produced any evidence to prove that his dismissal was the cause of his heart attack and stress, at a whim, he stated that his bundle of documentation contain photographs taken by his daughter of him having a heart attack. This version was not put to any of the respondent's witnesses.
- [44] The evidence of the respondent's witnesses was consistent and corroborative. The respondent's witnesses were credible. The respondent's witnesses demonstrated that the Covid-19 pandemic lockdown measures as a consequence thereof put the respondent in financial difficulties. Measures such as the reduction of working hours and application for TERS benefits were put in place in order to keep the business of the respondent afloat and provide its employees with income. When the respondent was not receiving contracts and it contemplated dismissal, the employees were informed and the affected employees were consulted. This included the four boiler makers.
- [45] In view of the afore-going, I find that on a balance of probabilities, the version of the respondent is more probable.
- [46] In relation to the failure by a litigant to put material aspects of his or her case and testimony to the other party's witness under cross examination, the court in *President of the Republic of South Africa and others v South African Rugby Football Union and others*[14] stated as follows:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct'.

[47] In *ABSA Brokers v Moshoana NO and others*,^[15] the Labour Appeal Court applied the aforesaid principle and held as follows:

‘It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns

that witness (see *Van Tonder v Killian NO & another* (1992) 1 SA 67 (T) at 721). He not only has a right to cross-examination, but, indeed, also a responsibility to cross-examine a witness if it is

intended to argue later that the evidence of the witness should be rejected. The witnesses’ attention must first be drawn to a particular

point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter to be afforded an opportunity of providing an explanation (see *Zwart & Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH 19 (A)). A failure to cross-examine may, in general, imply an acceptance of the witnesses’ testimony.’

[48] The applicant failed to put various aspects of his version to the respondent’s witnesses, for example, that he cried during the consultation meeting of 4 June 2020 when he begged for his job; that he was prevented from making proposals at the consultation meeting and that Ms Dlamini at no stage left the consultation meeting. He did not put his version to Ms Dlamini that when he signed the handwritten minute of 4 June 2020, he signed it without reading it, as he could not decipher the handwriting of Mr. van Rensburg. The applicant did not put his version to the respondent’s witnesses that Mr. van Wyk took over the Sasol work that he had been performing. When asked during cross examination why he failed to put his version to the witnesses of the respondent, the applicant answered that he was “waiting for his turn” (to lead evidence). As the applicant failed to put material versions of his evidence to the respondent’s witnesses, this is demonstrable in my view, that his version is fabricated and his version is accordingly rejected.

[49] I find that the applicant accepted the rationale for his retrenchment. He was not the only employee retrenched following consultation processes held by the respondent with the affected employees. Ms. Dlamini’s uncontested evidence is that some employees opted for voluntary severance packages during the retrenchment process.

[50] The applicant made much about Mr. van Wyk ultimately being offered a permanent position at the respondent. Mr. Maine stated that Mr. van Wyk was placed on a permanent position in approximately September or October 2020. Ms. Dlamini stated that had the applicant accepted the fixed term contract that was offered to him on 15 June 2020, the applicant would in all probability have been placed in a permanent position.

[51] The applicant confirmed that had he not seen Mr. van Wyk doing his job on 30 June 2020, he would have accepted his retrenchment. He did not challenge his retrenchment on 15 June 2020 when the fixed-term contract offer was made to him. Instead, he wanted more money and declined the offer as not being worthwhile to him, this, despite his version that he begged for his job on 4 June 2020, wanted to propose a salary reduction as an alternative to dismissal and was unhappy at

being unemployed as he had financial responsibilities.

[52] In my view, the applicant having accepted the rationale for the retrenchment was premised on the impact of the Covid-19 pandemic on the operations of the respondent, having been well aware of the effect that the pandemic and the national lockdown regulations had on the respondent, given the 20% cut in salaries and TERS payments as measures to keep employees in employment, I find that the applicant has himself to blame for rejecting the fixed-term contract of employment offer that was made to him in the uncertain times in which not only the respondent but the entire country and the globe found itself in. The evidence of Mr Maine is that the fixed term employment contract that Mr. van Wyk concluded on 23 June 2020 with the respondent comprised of a portion of the applicant's previous job and that Mr. van Wyk did not occupy the previous position in which the applicant was employed.

[53] The applicant submits that this Court should draw a negative inference against the respondent for its failure to call Mr. van Rensburg (who chaired the consultation proceedings and recorded the minute of the proceedings in his own writing) to clarify what transpired in the consultation meeting.[16]

[54] Both the applicant and Ms Dlamini were present in the consultation meeting. In my view, there was no need to call Mr. van Rensburg to give oral evidence before this Court, particularly considering that he was to be called to clarify why his minutes did not record the decision of the alternatives to dismissal. I have already made a credibility finding insofar as the evidence of the applicant and Ms. Dlamini are mutually destructive and on this finding, I find on a balance of probabilities, that the alternatives were discussed at the consultation meeting and LIFO was the selection criteria for the employees who were ultimately dismissed. I find that in view of the signed minute of the meeting, the employees were content with the dismissal, the quantification of their retrenchment packages and not having to work their notice period.

[55] The applicant complains that the respondent considered and rejected the alternatives to dismissal prior to the consultation and therefore, the consultation was a *fait accompli*. The respondent contends that it complied with the provisions of section 189(3) of the LRA to the letter, as the alternatives were considered prior to the dismissal. Further, the evidence of Ms Dlamini is that

these alternatives were discussed in the consultation meeting – she confirmed during cross-examination that all the 10 points in the section 189(3) letter were discussed.

[56] Section 189(3) of the LRA provides:

‘(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to –

- (a) the reasons for the proposed dismissals;
- (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
- (c) the number of employees likely to be affected and the job categories in which they are employed;
- (d) the proposed method for selecting which employees to dismiss;
- (e) the time when, or the period during which, the dismissals are likely to take effect;
- (f) the severance pay proposed;
- (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (h) the possibility of the future re-employment of the employees who are dismissed;
- (i) the number of employees employed by the employer; and
- (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.’

[57] The letter in terms of section 189(3) of the LRA that was served on the applicant on 2 June 2020 complies with the provisions of this section. The version by Ms. Dlamini that the alternatives were considered prior to the dismissal and during the consultation is more probable. The version that the respondent once more, confirmed the rationale of the retrenchment during the consultation, using the same wording as the memorandum of 28 May 2020 and that the employees, in this case, the applicant confirmed that he understood the rationale, is more probable.

[58] In light of the afore-going, I find that the respondent had a genuine reason for the retrenchment. The reason for the retrenchment was communicated to the applicant and it was understood by him, as it took place against the backdrop of the economic challenges posed by the Covid-19 pandemic to the business of the respondent. LIFO was proposed and was implemented as a fair selection criterion for retrenchment.[17] The date of the retrenchment was moved back to 30 July 2020, from the initial date of 15 June 2020. There were no prospects of future employment as the sustainability of the respondent’s business was uncertain as a result of the Covid-19 pandemic. The applicant was paid his severance package and bonus.

[59] In view of the foregoing, I find that the respondent has discharged its onus and has demonstrated that the dismissal of the applicant is both procedurally and substantively fair .

[60] In the premises, the following order is made:

Order

1. The applicants' claim is dismissed.
2. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Adv. MV Sehunane of Sehunane Inc. Attorneys

For the Respondent : Adv. VD Van der Westhuizen

Instructed by

: Waldick Jansen Van Rensburg Attorneys

[1] Statement by President Cyril Ramaphosa on escalation of measures to combat the Covid-19 epidemic, Union Buildings, Tshwane, 24 March 2020, <https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-escalation-measures-combat-covid-19-epidemic>.

[1] Statement by President Cyril Ramaphosa on escalation of measures to combat the Covid-19 epidemic, Union Buildings, Tshwane, 24 March 2020,

<https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-escalation-measures-combat-covid-19-epidemic>.

[2] Trial bundle, p 23.

[3] Trial bundle, p 24.

[4] Trial bundle, p 26.

[5] Trial bundle, p 27.

[6] Trail bundle, pp 121 to 122.

[7] Trial bundle, pp 28 to 29.

[8] Trial bundle, pp 85 and 86.

[9] Statement of case at para 31, pleadings bundle, p 7.

[10] Trail bundle, p 151.

[11]

[1993] 2 All SA 179 (A) at p 189.

[12] 1976 (2) SA 179 (D) at 182A

[13] 2003 (1) SA 11 (SCA).

[14] 2000 (1) SA 1 (CC) at para 61.

[15]

(2005) 26 ILJ 1652 (LAC) at para 39.

[16] See: applicant's heads of argument at para 5 and the authority cited therein.

[17] See: respondent's heads of argument at para 4.10.

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