THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 50/21

In the matter between:

MENDEL RAMOLOBANE LANGA **First Applicant**

JEFFREY BONGINKOSI DHLUDHLU **Second Applicant**

And

SMOLLAN SALES AND MARKETING (PTY) LTD **Respondent**

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed 3 March 2025.

JUDGMENT

NGWENYA, AJ

Introduction.

[1] The Applicants, referred an unfair dismissal claim to this Court, arising from their dismissal by the Respondent following a retrenchment process which was initiated in terms of section 189A of the Labour Relations Act, 66 of 1995 ("LRA").

[2] The Applicants contend that their dismissals were both substantively and procedurally unfair and seek reinstatement or compensation in the amount of 12 months.

[3] The Respondent, has defended the claim and contends that the dismissal was both procedurally and substantively fair. At the commencement of trial, the parties indicated that the issue of procedural fairness was no longer in dispute and the sole issue for determination was whether the dismissal was substantively fair.

[4] Before considering the fairness of the dismissal, it is appropriate to set out the evidence which was presented[1].

The Evidence

[5] The Respondent presented the evidence of Melissa Amy Fourie ("Fourie"), who is employed by the Respondent as the Human Resources Manager. The Respondents business provides sales and marketing services to various clients.

[6] The Respondent provides such sales and marketing services to its clients in various ways, which includes Merchandisers, who provide merchandising at various retail channels such as Pick n Pay stores.

[7] During 2020, a restructuring occurred, and the purpose was to *inter alia "remain relevant"* within the industry. Because the business of the Respondent involves responding to tenders by clients every three years, in order to remain relevant

[1] The summary presented is not a verbatim record of the evidence presented at trial.

and competitive, the Respondent engaged in a section 189A restructuring, because the contracts which employees were engaged on did not permit flexibility and did not provide for work on weekends.

[8] According to the contracts which the employees were engaged on, employees worked from Monday – Friday and Saturday was a half day. There was no *"Sunday coverage."*

[9] The Respondent, following research into the market, the nature and landscape of the FMCG sector and the economic pressures of COVID-19, considered the implementation of a 40-hour flexi contract.

[10] Ms Fourie testified that, given the need for full weekend coverage and the reduced need for service on other lower trade days, the Respondent commenced the Section 189A restructuring and those employees who were employed on the 45 hour contract would be impacted.

[11] Ms Fourie testified concerning the consultation process that was undertaken which required the Respondent to conduct over 500 consultations with employees who were placed across 3000 to 4000 stores across the country. The consultations, which took place in the *"heart of Covid"* took place remotely via MS Teams, where an HR representative joined such consultation virtually and the employee being consulted would be together with their Line Manager in person.

[12] Given that Ms Fourie was the Acting HR Manager at the time, she testified that she would be aware of who was consulting employees and also any issues of escalation that would be raised to HR to consider.

[13] During the consultations, Ms Fourie explained that the business case was presented and explained to the employee who was being consulted. The offer of the 40-hour flexi contract was discussed with the employees during the consultation and where an employee considered the 40-hour flexi contract, he or she would be presented with an example of the pay slip as well as the draft 40-hour contract.

[14] Ms Fourie was asked about the providing of financial statements during the consultation process and she explained that, the main motivation for the section 189A restructuring was to remain competitive. The flexi contract would increase services in order for the Respondent to remain competitive.

[15] Under cross-examination, Ms Fourie confirmed that the end of month salary to be paid to the Applicants would be different because they were working less hours under the 40 hour flexi contract. It was not viable to keep the salary the same, because then no cost savings could be passed on to the client and this would impact on the Respondent's intention to be competitive.

[16] Ms Fourie confirmed that there was no *"drop in sales"* but that there was no coverage, based on their research on the high sale days. The clients engaged the Respondent to ensure sales are made and the Sunday coverage is required to ensure sales are made.

[17] Ultimately Ms Fourie confirmed that the section 189A restructuring had the purpose of Cost saving and flexibility of the business.

[18] The Respondent closed its case.

[19] The Applicants presented the evidence of Mr Mendel Ramolobane Langa ("Langa"). Mr Langa testified that he was employed by the Respondent as a Field Marketer and was stationed at the Checkers Store in Waverly.

[20] Mr Langa testified that the role of a merchandiser includes packing stock, cleaning the stock and checking for expired stock. He testified that he worked 6 days a week and earned R 7800, gross, with his nett being R 7299.

[21] Mr Langa testified that during 2020, he became aware during consultations that the Respondent intended to introduce a 40 hour week contract. He indicated that he was not happy with a reduction in the work hours and informed his manager that such reduction will impact him negatively and as he "*has a lot to take care of*".

[22] In relation to the consultations held, Mr Langa confirmed that three consultations were held in his case and during the consultations the 40-hour

flexi-contract was explained to him. Mr Langa stated that the store he worked at was busy and as a consequence it was not clear to him how the hours would be reduced.

[23] Mr Langa testified that he did not believe that the cost saving measures were necessary and the company was *"greedy"*. He additionally indicated that he does not believe that he was meaningfully consulted by the Respondent. Mr Langa testified that he seeks reinstatement.

[24] Under cross-examination, Mr Langa confirmed that Sunday was busy and there was no cover and in relation to Sunday, there would be no way to replenish stock because there was no cover.

[25] Under cross-examination Mr Langa stated that he had no problem with the proposed working hours or the restructuring, his issue was the reduction in his salary.

[26] The next witness called by the Applicants was Mr Jeffrey Bonginkosi Dhludhlu ("Dhludhlu"). Mr Dhludhlu testified that he was employed by the Respondent as a Field Marketer and was placed at the Checkers Hyper in Montana.

[27] Mr Dhludhlu confirmed the duties as testified by Mr Langa. Mr Dhludlu testified that he had a good working relationship at the Respondent until such time as the Respondent sought to change the hours of the contract from 45 hours to 40 hours.

[28] Mr Dhludhlu explained, as Mr Langa did, that the consultation took place with the Line Manager and it took place via virtual platform with HR. The HR explained that the Respondent intended to move from a 45 hour to 40 hour week contract. Mr Dhludhlu testified that during the second consultation he asked HR for the financials of the organisation, however, the Respondent indicated that it would not be disclosing such financials.

[29] Under cross-examination, Mr Dhludhlu testified that he could have worked the days proposed by the Respondent if his salary remained unchanged.

Analysis

[30] Before commencing the analysis, it is helpful to set out, what the parties agreed is common cause in the pre-trial minute.

[31] It was agreed as common cause that during 2020, the Respondent became alerted to the fact that retail stores in the FMCG sector had increased requirement for weekend services based on the high sales over this period (being weekend). It became apparent that busiest trading days were over Thursday, Friday, Saturday and Sunday.

[32] It was also common cause that it became apparent that the Respondent had to adapt and restructure its operations completely to have a operational workforce available over the weekends in order for the Respondent to remain sustainable within the evolving retail industry.

[33] That the Respondent was forced to review its structures due to economic pressures in the industry which had been severely affected by the Covid-19 pandemic and the resultant introduction of the COVID-19 regulations as per the Disaster Management Act.

[34] It was common cause that as a result of the above-mentioned circumstances, the Respondent was forced to review and analyse its operations within its organisation and branched. The Respondent estimated that should is not reduce costs by 18 million, this may ultimately result in the business being placed at financial risk.

[35] That as a result of the Applicants having refused all the alternatives offered by the Respondent, and subsequent discussions between the parties, the parties having reached consensus on certain issues in terms of section 189 of the LRA, the Respondent proceeded with terminating the Applicants' employment.

[36] The common cause facts are important because they assist in narrowing the issues in dispute and the determination of the main issue which is whether the dismissal of the Applicants for operational requirements was substantively fair.

[37] The LRA defines *"operational requirements"* to mean requirements based on economic, technological, structural or similar needs of an employer. This Court has explained that operational requirements typically, involves measures adopted to cut costs or improve profit or in order to restructure the business or alter the manner in which employees work to meet an operational imperative.[2]

[38] The approach to be adopted by the Court when considering the fairness of a dismissal for operational requirements was set out in the case of **Decision Surveys International (Pty) Ltd v Dlamini and Others**[3], where it held that:

"if the employer resorts to retrenchment when alternatives to retrenchment are available, it cannot be said that the ultimate decision to retrench was necessarily fair. The court will, therefore, examine the reasons advanced for retrenchment in order to determine whether the ultimate decision to retrench is genuine and not a sham. However, this is not to say courts are to second guess the commercial or business efficacy of the employer's decision. Nor is the enquiry whether the best decision was taken… The enquiry is whether the retrenchment is properly and genuinely justified by the operational requirements in the sense that it was a reasonable option in the circumstance."

[39] I referred to the pre-trial minute which is binding and signed between the parties. In the pre-trial minute the parties agree on key aspects concerning the business rationale for the restructuring. They agree that it became apparent that in the FMCG sector there was an increased requirement for weekend services based on high sales over the weekend period.

[40] The parties additionally agree that it is common cause that the Respondent had to adapt and restructure its operation completely to have an operational workforce available on the weekend in order for the Respondent to remain sustainable within the evolving retail industry.

[41] While the evidence of Mr Langa and Mr Dhludhlu attempted to dispute this aspect, there is no dispute between the parties that there was a genuine

[2] First National Bank, A Division of First Rand Bank Ltd v CCMA [2017] 11 BLLR 1117 (LC) para 79
[3] [1995] 5 BLLR 413 (LAC)

operational need for a restructuring of the Respondent's business to have weekend coverage, given that it was the busiest sales time. Not only was this agreed to in the pre-trial minute, but Mr Langa and Mr Dhludhlu confirmed under cross-examination that they have no issues with the proposed working structure nor do they contest that weekend cover was necessary, it was solely the reduction in the salaries that was an area of dispute.

[42] This agreement between the parties and the evidence is important, because the Court must find, in relation to the first enquiry that the reasons to retrench are genuine and not a sham. The parties are bound by their agreement and there was no application or evidence seeking to resile from such agreement.

[43] Even if I am wrong, the evidence presented by the Applicants and Respondent, accepts the changing nature of the retail industry and the need, for the purposes of sales, to have this weekend cover.

[44] I must consider the, the evidence of the Applicants, that even if there was a commercial rationale, that the salaries could be kept the same, ie paid a 45 hour week salary for having worked 40 hours. This is in my assessment a clearly unsuitable alternative, given that it was not disputed that the Respondent was to cut costs due to the economic pressure in the industry.

[45] Considering the evidence that was presented and the common cause facts between the parties, I find that the Respondent demonstrated a genuine operational reason for the dismissal, and the dismissal was accordingly substantively fair.

Costs

[46] Guided by section 162 of the LRA there is no basis to depart from the principle that costs do not follow the result in labour dispute.

[47] In the premise I make the following order:

Order:

[48] The applicants' unfair dismissal claim is dismissed and the dismissal for operational reasons of the applicants by the respondent was substantively fair.

[49] No order as to costs.

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Z NGWENYA

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mmolawa Ndumelo

For the Respondent: S Lancaster