LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA29/16

In the matter between:

KENCO ENGINEERING CC **Appellant**

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA (NUMSA) OBO MEMBERS **First Respondent**

Heard: **16 March 2017**

Delivered: **01 August 2017**

Summary: Selection criteria in terms of section 189 of the LRA – held that employer bears the *onus* to prove that the dismissal of the employees was fair. The employer must prove that it selected the employees to be dismissed according to the selection criteria that have been agreed to by the consulting parties, or if no criteria have been agreed, criteria that is fair and objective.

The Labour Appeal Court finding - that employer failed to place sufficient evidence before the Court *a quo* to enable the Court to assess whether or not it used and applied skills, work performance, attendance records and safety records in a fair and objective manner, thereby discharging the *onus* reposing on it. Further finding - that the employer failed to show that, in awarding the amount of compensation it did, the Court *a quo* did not pass a value judgment or that the discretion it exercised was capricious or founded on a wrong

principle. Further finding - that it could not interfere with the amount of compensation determined by the Labour Court.

Coram: Waglay JP, Kathree-Setiloane AJA and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

[1] This is an appeal against the whole of the judgment and order of the Labour Court (per Lagrange J) handed down on 11 November 2015 in having found that the retrenchment of the 19 individual respondents was substantively unfair in that Kenco Engineering CC (Kenco), the appellant, failed to prove that it fairly and objectively applied its selection criteria in identifying these respondents as candidates for retrenchment.

[2] The appeal is with leave of the Court *a quo*. The facts upon which the appeal fall for decision are common cause and lie within a narrow compass. Kenco is an engineering company that operated mainly in the mining industry, in particular at Foskor Mine. It was a subcontractor of an entity called Bateman, an industrial engineering company. The expiry of its subcontract with Bateman on 31 March 2011 heralded its financial woes. Following the expiry of this contract another company, Gauge Engineering (Pty) Ltd, stepped in and threw Kenco a lifeline by subcontracting some of its work to the embattled corporation. According to Mr Nicholas Van Pittius, the mediator/facilitator in respect of the agreement between Gauge and Kenco, Gauge had set certain conditions to Kenco as part of the agreement. These included, *inter alia*, that Kenco employs skilled employees who could manufacture and install mining instruments (pipelines and valves) according to Gauge's standards.

[3] On 05 April 2011 Kenco issued a Notice in terms of s189(3) of the Labour Relations Act, 66 of 1995 (the LRA), to all its employees notifying them that it contemplated dismissing some its employees based on its operational requirements. It is set out in the notice that the reason for the proposed retrenchment was that its "*contract with Bateman at Foskor had expired on 31 March 2011. There was a serious down-turn in contract work from major*

industries in the area." It proposed that skills, work performance, attendance records and safety records be used as the selection criteria. It further proposed to have a consultation with the workplace forum or the union on 11 April 2011 at 10h00.

[4] On 07 April 2011 Mr Fani Lebepe, the local organiser of National Union of Metalworkers of South Africa (NUMSA), acknowledged receipt of the Notice in terms of s 189(3) and explained that he was not available to attend the proposed consultation on the scheduled date due to other official commitments. He suggested that the consultation be held on 21 April 2011.

[5] On 08 April 2011 Kenco acknowledged receipt of the aforementioned correspondence from the NUMSA and furnished to NUMSA the contact details of its representative, Mr Leon Lourens (Mr Lourens) of Amalgamated Employers' Association. On 15 April 2011 Mr Lourens sensitised NUMSA to the fact that an information session or consultation had been held on 11 April 2011 and that the non-unionised employees of Kenco were requested to establish a workplace forum or to nominate at least two representatives for purposes of attending the consultation meeting which had been scheduled for 21 April 2011.

[6] Mr Lourens stated that on 21 April 2011 he waited for NUMSA for about one and half hours but Mr Lebepe did not turn up as agreed. He decided to leave due to other commitments. Two and half hours later Mr Lebepe phoned and enquired where he was as he needed to consult. In light of their separate locations at the time, according to Mr Lourens, Mr Lebepe gave an undertaking to submit a written response to Kenco's Notice in terms of s189(3) on or before 25 April 2011, after NUMSA had had the opportunity to secure a mandate from the individual respondents. Save to admit that an undertaking was made by NUMSA to provide its response to the Notice in terms of s189(3) the turn of events of 21 April 2011, as testified to by Mr Lourens, were by and large disputed by Mr Lebepe.

[7] On 29 April 2011 NUMSA filed a response to Kenco's Notice in terms of s189(3). It proposed that the LIFO method be used as the appropriate

selection criteria. By quirk of coincidence, on that same day, Kenco issued notices terminating the services of 23 employees which included the 19 individual respondents. Mr Lourens testified that he became aware of the letter of 29 April from NUMSA after the individual respondents had already been given their notices of termination of services when he had already left Kenco's premises. The retrenched employees were paid their severance packages.

[8] Aggrieved by the retrenchments NUMSA, on behalf of the individual respondents, referred a dispute to the Centre for Dispute Resolution on 06 June 2011. On 22 July 2011 a certificate of non-resolution of the dispute was issued by the Centre which resulted in the dispute being referred to arbitration. On 01 September 2011 Commissioner J Moolman issued a ruling to the effect that the Bargaining Council did not have jurisdiction to entertain the dispute. On 10 November 2011 NUMSA filed its statement of case with the Labour Court claiming that the dismissals of the respondents, on account of Kenco's operational requirements, were procedurally and substantively unfair.

The proceedings before the Labour Court

[9] At the commencement of the trial Kenco took a point *in limine* contending *inter alia*, that the respondents ought to have applied to the Labour Court in terms of s189A(13) of the LRA[1] for an order either compelling Kenco to comply with a fair procedure; or interdicting Kenco from dismissing the individual respondents prior to compliance with a fair procedure; or directing Kenco to reinstate the individual respondents until it has complied with a fair procedure. Having heard the argument the Court *a quo* concluded that, in the absence of an application in terms of s189A(13) of the LRA, it did not have the power to

[1] Section 189A(13) provides: (13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-

(a) compelling the employer to comply with a fair procedure;
(b) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;
(c) directing the employer to reinstate an *employee* until it has complied with a fair procedure;
(d) make an award of compensation, if an order in terms of paragraphs *(a)* to *(c)* is not appropriate.

determine the procedural unfairness of the individual respondents' dismissal. The Court *a quo* upheld Kenco's objection. Some controversy followed relating to the verification of the number of the individual respondents. The Judge deferred this aspect to the parties to resolve during an adjournment and to report back. In the end Kenco accepted the list of the 19 individual respondents as set out in annexure SC1 to the statement of claim.

[10] During the trial Mr Lourens, called by Kenco as a witness, testified comprehensively on the procedure followed leading up to the termination of the individual respondents' contracts of employment and on the different topics as captured in the Notice in terms of s189(3) and further on the correspondence exchanged between Kenco and NUMSA. Mr Lourens had no knowledge of how the affected 23 employees were evaluated and selected for retrenchment in terms of the selection criteria set by Kenco. He went on to say *"the selection criteria were in a notice. There was a certain percentage attached to each criteria and how they did that and so forth, I was not involved in that."*

[11] Mr Van Pittius presented the method that was supposedly used in evaluating the employees likely to be retrenched to Mr Gary McNorton of Gauge, Mr Costa of Kenco and to one general manager of Kenco, whose name he could not recall. The selection criteria adopted by Kenco were based on skills, work performance, attendance records and safety records. Mr Van Pittius also suggested that someone, whose name he could not say, at Bateman[2] and "certain operational" employees of Kenco conduct the evaluation. When asked how he arrived at the evaluations his response was as follows:

> 'This is the reason why they made use of three evaluators who know the jobs done by those people. And then they give them a point between naught and ten on that specific score, skill or whatever. And they discuss; if there is a difference in the opinion, somebody, someone will give a 4 out of 5; someone will give 6. If the margin of difference is too big, it differs more than 20 percent, then the three evaluators must discuss it'".

[2] He possibly meant from Gauge.

[12] Mr Van Pittius explained that his work, insofar as this dispute is concerned, ended after he had explained the process of evaluation to Kenco and Gauge. He does not know who the evaluators were because he did not take part in the process of evaluating employees likely to be retrenched. He also had not had sight of the results of the evaluation process.

[13] At the end of the trial the Court narrowed down the issues as follows:

> '..(T)he thrust of the case, subject to what the applicants (the individual respondents) say, as I understand it, is that the applicants attack the objectivity of the selection process and also associated with the attack why they were selected in particular, rather than other people and in particular those people who had been, according to them, working temporarily or had been specifically employed for Bateman contract, who they felt should have gone first'.

[14] The Court *a quo* held that the individual respondents were unable to provide any cogent challenge to the general need to retrench and focused their main attack on the selection criteria. Insofar as the selection criteria are concerned, they were also unable to meaningfully challenge the need for adopting them in light of the joint-venture[3] commitments which offered some meaningful prospects of alternative work to Kenco at the time.

[15] The Court found that there was no evidence led by Kenco demonstrating that the individual respondents had been evaluated and found to be wanting in terms of the chosen criteria. The Court was satisfied that Kenco did establish a general need to retrench and that there were no viable alternatives to retrenchment of staff. The Judge *a quo* was of the view that even if the criteria might be considered fair and could have been applied in a sufficiently fair and objective manner, Kenco did not demonstrate that the selection of the individual respondents for retrenchment, using those criteria, was done in a fair and objective manner. However, on the evidence available, the judge remarked, he could not go so far as to say that the individual respondents

[3] The joint-venture referred to by the Court a *quo* was in respect of the work subcontracted to Kenco by Gauge.

would not have been retrenched if the criteria had been fairly and objectively applied.

[16] In respect of the relief sought the Court *a quo* held:

> '[26] The applicants have asked for reinstatement or alternatively compensation. The basis on which the retrenchment of the individual applicants is found to be substantively unfair is confined to a finding that the respondent (Kenco) did not prove that it applied its selection criteria fairly and objectively in choosing the individual applicants for retrenchment.
>
> [27] There was no evidence that the business conditions which had led to the retrenchment had improved. Nor was there reliable evidence that the applicants' skills could be utilised in the restructured business, in line with its changed operational requirement. In view of the unresolved issue of whether the applicants would still have been selected for retrenchment if the criteria had been fairly and objectively applied, the Court would just be assuming they would have been selected and that their skills did meet the requirements of the new business, if it ordered their reinstatement. In the circumstances, I do not think it would be practicable to reinstate them.
>
> [28] Consequently, bearing in mind the length of service of most of the applicants, the failure of the union to engage meaningfully with the respondent on the selection issue and the limited basis on which I find the retrenchment was substantively unfair, I believe eight months' remuneration is a fair measure of compensation.'

[17] As already alluded to, the Court found that the retrenchment of the 19 individual respondents was substantively unfair solely because the respondent failed to prove that it had fairly and objectively applied its selection criteria in identifying them as candidates for retrenchment. It ordered Kenco to pay each of the individual respondents eight months' remuneration, within 14 days from date of the order.

The grounds of appeal

[18] Kenco raised two grounds of appeal. In summary:

18.1 The first ground is predicated on the Court *a quo*'s having found that the retrenchment of the 19 individual respondents was substantively unfair solely because Kenco failed to prove that it had fairly and objectively applied its selection criteria in identifying the respondents as candidates for retrenchment.

18.2 The second ground is founded on the relief granted by the Court *a quo*.

The analysis

[19] Mr Meyer, for Kenco, argued that the fairness of the application of the selection criteria was never raised prior to 12 June 2014, the date of the trial; nor was the issue raised in NUMSA's statement of case. He further contended that the first and second pre-trial minutes do not show the existence of an agreement between the parties to widen the issues in dispute and/or to vary NUMSA's statement of case. He further argued that the only issue properly before the Court *a quo* concerned the procedural fairness of the dismissal. Insofar as the Court *a quo* concluded that s189A of the LRA applied and that the individual respondents had failed to bring an application in terms of s189A(13), they were accordingly barred from pursuing the aspect of procedural fairness.

[20] Mr Meyer further contended that the Court *a quo* was not entitled to widen the dispute between the parties where same had not been properly raised in the statement of case. He urged that, in light of the unchallenged evidence with regard to the commercial rationale for the retrenchments and the uncontested evidence relating to the fairness and objectiveness of the criteria selected by Kenco, the Court *a quo* ought to have accepted Kenco's version given the reasonableness thereof and the absence of any *mala fides.*

[21] Concerning the relief granted, Mr Meyer argued that the Court *a quo* did not consider the fact that the individual respondents were paid severance packages, calculated in accordance with the Metal and Engineering Industries Bargaining Council (MEIBC) collective agreement, as a consequence of their dismissal for operational requirements, which payments they unconditionally and voluntarily accepted.

[22] The question arising for determination in this appeal is whether the Court *a quo* erred in finding that the retrenchment of the individual respondents was substantively unfair as a result of Kenco's stated failure to present evidence demonstrating that the application of the selection criteria it set was conducted in a fair and objective manner.

[23] The argument that the individual respondents did not make out their case in the statement of case is unmeritorious. Apparent from the statement of case and minutes of the pre-trial conferences held is that NUMSA placed the substantive fairness of the dismissals in dispute. It painstakingly detailed the unfairness of the selection criteria applied. The union went as far as naming the employees whom, in their view, ought to have been selected for retrenchment. To mention a few examples where the selection criteria were placed in dispute:

23.1 At para 4.10 of the statement of case NUMSA stated that Kenco did not apply LIFO in selecting the employees likely to be retrenched. On the legal issues arising from the facts NUMSA contended the following in its statement of case:

> '5.1.4 [Unfair] selection criteria were used to determine which employees to retrench and LIFO was not implemented.
>
> 5.1.5 The respondent dismissed permanent workers and retained some of the workers that were employed for the Bateman contract that had allegedly expired. Therefore selection criteria were not objective.'

23.2 In the minutes of the pre-trial conference dated 16 August 2012, ad para 3.6 thereof, under issues to be decided by the Court, it is recorded, *inter alia*:

> 'Whether the respondent applied any selection criteria in selecting the applicants for retrenchment and, if so, whether this was fair.'

Ad para 11.3 the individual respondents further state:

> 'The applicants state that the selection criteria were unfair since the respondent retrenched workers with long service and retained workers with

shorter service. The employer also retained workers who were employed strictly for the duration of the contract that expired and retrenched permanent employees.

The selection criteria targeted the union.'

[24] Section 189A(19)(d) of the LRA provides:

'In any dispute referred to the Labour Court in terms of section 191(5)(b)(ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if –

…

(d) selection criteria were fair and objective.'

[25] In *Super Group Supply Chain Partners v Dlamini and Another,*[4] this Court pronounced:

'It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do so successfully, it is obliged to have a bona fide economic rationale for the dismissal and to comply with the provisions of s 189 as well as s 189A of the Act where applicable. Section 189 imposes an obligation on the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimize the effect of the dismissal. The consultation envisaged by the Act is a "meaningful joint consensus-seeking process" in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and where not possible to ameliorate the effects of the dismissal for operational requirements.'

[26] The employer bears the *onus* to prove that the dismissal of the individual respondents was fair. The duty to show that the criteria used was both objective and fair in its application rests on the employer. The employer must prove that it selected the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties, or if no criteria

[4] (2013) 34 ILJ 108 (LAC) at 116 para 24.

have been agreed, criteria that are fair and objective. Kenco was required to place sufficient evidence before the Court *a quo* to enable the court to assess whether or not it used and applied skills, work performance, attendance records and safety records in a fair and objective manner, thereby discharging the *onus* reposing on it. It did not do so.

[27] The following *dictum* in the judgment of this Court in *General Food Industries Ltd t/a Blue Ribbon Bakeries v Food & Allied Workers Union and Others*[5] is apposite and instructive:

> '[37] Another reason which the court a quo gave for its finding that the dismissal was substantively unfair was that the appellant had failed to discharge the onus of proving that in selecting the second and further respondents for dismissal, it had applied selection criteria that are fair and objective as required by s 189(7)*(b)* of the Act which applies when no agreement has been reached on the selection criteria to be used. The appellant did not lead any evidence at the trial as to the skills which the employees had who had shorter service periods than the second and further respondents but were retained. The appellant bore the onus to prove that the selection criteria that were applied to select the second and further respondents for dismissal were objective and fair. Both during the consultation and at trial the respondents challenged the appellant to say what skills it was relying upon and the appellant's witnesses never explained these. In these circumstances one finds oneself in a position where one looks at the list of employees who were selected for retrenchment, namely, the second and further respondents and looks at the list of those employees in exhibit B who were retained and who had shorter service periods than the second and further respondents and asks the question: what skills did those who were retained and who had shorter service periods than the second and further respondents have which the second and further respondents did not have? The answer is that on the evidence in this case one simply does not know. In the light of this can it be said that the appellant discharged the onus to prove that the selection criteria applied to select the second and further respondents were fair and objective? The answer is, in my judgment, a clear and

[5] (2004) 25 ILJ 1655 (LAC) at 1668 para 37.

> unequivocal no. In that event was the court a quo's finding that the dismissal was substantively unfair right? In my judgment, without any doubt!'

[28] Without knowing what skills or special skills the employees who remained behind had; what skills the individual respondents had compared them to; what years of service they all had; what performance records, safety records and attendance records all the employees including the individual respondents had; the Court *a quo* was left unable to conclude on the basis of Kenco's mere *ipse dixit* that there was a fair reason for the selection of the individual respondents for retrenchment. The selection criteria were simply not demonstrated to have been fairly and objectively applied.

[29] On the second ground of appeal. A challenge to an order of the Labour Court awarding or refusing an employee compensation in terms of s193(1)(c) of the Act is not limited to the grounds applicable where an order is made pursuant to the exercise of a true discretion or narrow discretion. It is only in regard to the determination of the amount of compensation that the Labour Court or arbitrator exercises a true or narrow discretion. It is in regard to that decision that the powers of this Court is circumscribed and can only be exercised on the limited grounds. These grounds include the following: That the Labour Court or arbitrator (a) did not exercise a judicial discretion; or (b) exercised its discretion capriciously; or (c) exercised its discretion upon a wrong principle; or (d) has not brought its unbiased judgment to bear on the question; or (e) has not acted for substantial reason; or (f) has misdirected itself on the facts; or (g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. In the absence of one of those grounds this court has no power to interfere with the amount of compensation determined by the Labour Court.[6]

[30] Kenco's argument concerning the relief granted by the Court *a quo* is ill conceived. It failed to show that the Court *a quo* did not pass a value judgment or that the discretion it exercised was capricious or founded on a wrong principle.

[6] See *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC) at 2688-2690 paras 21-23.

[31] On the above conspectus, I am satisfied that the Court *a quo* correctly concluded that the dismissal of the individual respondents was substantively unfair. It follows that this appeal should fail. Having had regard to the requirement of law and fairness I can conceive of no reason why costs should not follow the result of this appeal. In the result, I make the following order.

Order

1. The appeal is dismissed with costs.

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MV Phatshoane

Acting Judge of the Labour Appeal Court

Waglay JP and Kathree-Setiloane AJA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:	Adv M Meyer
	Instructed by Basie Gey Van Pittius
FOR THE FIRST RESPONDENT:	Adv L Malan
	Instructed by Finger Phukubje Inc