Not Reportable

Case No: JS1151/2014

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **First Applicant**

SEGABUTLE PR & 4 OTHERS **Second - Further Applicants**

and

LECTROPOWER (PTY) LTD **Respondent**

Heard: **27 February 2017**

Delivered: **6 July 2018**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] The second to further applicants are members of NUMSA whose services were terminated by the respondent on 3 September 2014 due to its operational requirements. NUMSA approached the Court with a statement of claim to contest the fairness of the dismissals.

[2] The respondent opposed the applicants' claim. At the commencement of the trial proceedings, it transpired that out of the five original individual applicants on whose behalf the claim was brought, Mr Hezekiel Segane is since

deceased, and Mr Sam Mathebula was subsequently reinstated. This matter therefore only pertains to Messrs Pieter Segabutle, Mamotedi Sekgathume and Ms ST Nkosi.

[3] In accordance with the parties' signed pre-trial minutes, it was common cause that a proper consultation process in terms of section 189 of the Labour Relations Act[1] (LRA) was followed by the respondent, and further that there was indeed a need to retrench. The only issue in dispute was whether the selection criteria used by the respondent to select the individual applicants was fair or not. The applicants contend that there was an agreement that LIFO would be used, whilst the respondent maintains that LIFO was to be used in certain instances, whilst in others, strategic/operational needs determined the selection.

The dispute:

[4] Of the remaining individual applicants in this case, the dispute was that Messers Segabutle and Sekgathume were selected for retrenchment in the boilermaker department because they were less qualified than Messrs Martin Kirton and Michael Orme, who were retained for their specific skills. Segabutle was employed on 24 May 2010 and Sekgathume on 23 January 2012. Orme was employed on 22 June 2012 whilst Kirton was employed on 18 June 2013.

[5] The respondent further contended that LIFO was in any event not applicable in the boilermaker department owing to the standard of work required to uphold contracts, and further that it was of strategic importance that Kirton and Orme be retained as they were more qualified. The applicants on the other hand contend that Segabutle and Sekgathume should have been retained as they had more service than both Kirton and Orme.

[6] In respect of the administration department, Ms Kubayi was employed on 14 November 2012, and Nkosi on 11 March 2010 as cleaners in the administration department. The respondent contended that LIFO was not applied in respect of cleaners in the administration department. Nkosi also

[1] Act 66 o 1995 as amended.

acted as a 'tea lady', whilst Kubayi was deemed to have other administration skills as she also underwent training in administration. The respondent contended that Kubayi was retained for strategic reasons and due to her administration skills, whilst Nkosi had limited use or no other skills. The applicants nonetheless maintain that Kubayi had lesser service than Nkosi and should therefore have been retrenched instead.

The evidence

[7] The respondent is in the business of supplying and repairing pumps, fabrications, and pump stations for mining clients. It was common cause as further testified by the respondent's Managing Director, Mr Irvin Lines, that the individual applicants were previously dismissed as a result of industrial action. Following litigation under case number JS119/13, they were then reinstated on 20 February 2014, and effectively reported for duty on 5 March 2014. Subsequent to their dismissal, the respondent had proceeded to replace them. This had caused an oversupply of labour, leading to the retrenchment exercise that led to this dispute. There is a further dispute as to whether the effect of the order of the court of 20 February 2014 was such that the reinstatement was with retrospective effect. This issue however as the facts of this case would reveal, is not material for the purposes of a final determination of this dispute.

[8] Significant with Lines' testimony was that it was emphasised during consultations with NUMSA that the selection criteria would be based on the employer's strategic requirements, and skills of employees, and that LIFO was not the only criteria to be applied. Lines testified that NUMSA never objected to the employer's approach in that regard during consultations, and that the referral of the dispute came as a surprise.

[9] According to Lines, subsequent to the retrenchment, vacancies arose in the boiler-making section, and when Segabutle and Sekgathume were contacted with an offer of re-employment in October 2014, their response was that the two had obtained alternative employment. An attempt by the respondent to produce an affidavit by its employee (William Vally) midstream the trial

proceedings that ostensibly confirmed that this offer of re-employment made was unsuccessful, following an objection raised on behalf of the applicants. The reasons for that ruling are on record.

[10] The evidence led on behalf of the applicants by Mr Abram Mashula, a NUMSA local organiser was that the parties during consultations never agreed on the selection criteria, and that it was always the applicants' approach that LIFO should be applied.

The Boiler-making section:

[11] Lines and Hendrick Classens, the respondent's Branch Manager, testified that the boiler-making section at the time of the retrenchment exercise had four employees, viz, Kirton, Orme, Segabutle and Sekgathume.

[12] Kirton as a boilermaker was more qualified and skilled, and was able to lay out, and interpret drawings necessary for operations. Orme was the only employee who had qualifications in argon and stick welding, which is a specialised type of welding involving the joining of high pressure pumps. He was also qualified to perform other tasks such as the manufacturing of pipes, based plates, fabrication, stick and CO2 welding.

[13] According to Claasens, it takes four years to qualify as a boilermaker. Segabutle was only an aid/helper with certification in Welding I (stick welding) and Welding II, who could only perform basic tagging and welding duties. He could not perform argon welding duties, and his main function was to assist Kirton as the boilermaker.

[14] Under cross-examination, Claasens conceded that Orme had lesser service than Segabutle and Sekgathume, but that the latter had less skills in that when mining clients required high pressured pumps, it was only Orme who could perform those tasks. The other difference was that Orme did not do a trade test, and that a comparison could not be made between an ordinary welder with stick and CO2 training (Sekgathume) and an argon welder (Orme). Thus, Segabutle needed training in argon welding.

[15] Michael Orme's testimony on behalf of the respondent was that he is a qualified boilermaker with eight years of experience as a welder, having received training in apprenticeship in South Africa and the United Kingdom. He has qualifications in CO2 welding, stick and argon welding. He confirmed having been assisted by Segabutle and Sekgathume, who were involved in the basic welding of pipes and trollies. Orme also confirmed that Segabutle was a boilermaker assistant with whom he had only worked with for three months.

[16] Martin Kirton's testimony on behalf of the respondent was that he was a boilermaker by trade, having trained for three years. He also confirmed that Segabutle and Sekgathume were only assistant boiler-makers and could not perform argon welding. Under cross-examination, he conceded that Sekgathume might have been a welder, but did not have the necessary training of three years to perform argon welding duties

[17] Mashule, who was party to the consultation process throughout testified that both Segabutle and Sekgathume had longer service and skills and should have been retained based on their experience, rather than Orme and Kirton who had lesser service, irrespective of his qualifications.

[18] Segabutle was also part of the consultations, and his testimony was that, of the original 12 employees identified by the respondent, only 8 were ultimately retrenched after the consultation process. He testified that he performed boiler-making and welding functions, and that it was unfair to select him and Sekgathume for retrenchment as Orme and Kirton performed exactly the same tasks as they used to, and the two always asked them how to perform welding tasks. He nonetheless could not respond when it was put to him that the others had better qualifications.

[19] Under cross-examination, Segabutle confirmed that he had qualifications/certification as welder I, II which pertained to CO2 and stick welding, and also boiler-making. Notwithstanding the fact that he could not confirm that he was skilled to perform argon welding duties, he testified that

he had qualifications and skills, and was not merely an assistant to Orme and Kirton.

[20] Sekgathume's testimony was a repeat of Segabutle's in many respects. He also claimed that the four of them performed the same tasks even though he only did apprenticeship in welding, and that argon welding was part of that training. He further contended that he had in fact trained Orme in argon welding, as he had a certificate in argon/CO2 and stick welding, and that he had to show him all the time as to how to perform his welding duties.

[21] Under cross-examination, and upon being asked to produce any documentary evidence to prove that indeed he had done argon welding, his response was that he had disclosed in his interview for the post that he had done such welding and had further demonstrated to those in the interview that he could do argon welding. He denied that he only performed stick or CO2 welding, and insisted that he was also trained on argon welding.

Administration section:

[22] In respect of Nkosi, Lines' and Claasen's testimony was that she was employed as a cleaner/'tea-lady', and Kubayi was retained as she had administration skills which Nkosi did not have, such as filing, back-ups etc. Reference was made to Kubayi's certificates in respect of the administration training she undertook in July 2013. A further consideration in the selection between the two was that Nkosi had a break of service flowing from her dismissal for participation in a strike, and her use was limited to cleaning and tea-making.

[23] Nkosi's testimony was essentially that she was hired as a cleaner/'tea-lady', but was also required to pack files and perform other tasks as and when required by the respondent. Upon her reinstatement subsequent to the initial dismissal, she had found that Kubayi had taken over her position, and the respondent had disliked her and shown distrust towards her. Nkosi's contention was that her retrenchment was unfair as according to her, had LIFO been applied, Kubayi would have been selected, specifically since they had performed the same functions.

[24] Under cross-examination, she conceded that she was not trained to deal with invoices, even though a promise to take her for administration training never materialised. She further conceded that after her reinstatement, her tasks were limited to cleaning and making tea.

The legal principles and evaluation

[25] In terms of section 189(2)(b) of the Labour Relations Act (LRA), the employer and other consulting parties must engage in a meaningful joint consensus seeking process and attempt to reach consensus on the method for selecting the employees to be dismissed. Under section 189 (7) of the LRA, the employer must select the employees to be dismissed according to selection criteria (a) that have been agreed to by the consulting parties, and (b) if no criteria have been agreed, criteria that are fair and objective. The onus is upon the employer to demonstrate that the criteria it chose in the face of a disagreement is indeed fair and objective.

[26] In unpacking the provisions of section 189 (7) of the LRA, Van Niekerk J in *National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd*[2], held that;

> "This formulation gives primacy to criteria that have been agreed to by the consulting parties. Where no criteria are agreed, it requires the employer party to meet the dual or combined requirements of fairness and objectivity. To the extent that Numsa's position throughout the consultation process and indeed this litigation has been that the respondent ought to have applied LIFO to the exclusion of all other criteria, this court has recognised the objectivity of length of service but never endorsed LIFO as the only fair and objective criterion. On the contrary, there are numerous decisions in which the court has held that an employer is entitled to adopt selection criteria such as experience, competency efficiency and special skills. In *NUM and others v Anglo American Research Laboratories (Pty) Ltd* [2005) 2 BLLR 148 (LC), Murphy AJ considered an employer's deviation from LIFO and its selection criteria based on key skills retention and continued service delivery to its clients. In that instance, a skills matrix was developed but regard is also had

[2] (JS529/14) [2016] ZALCJHB 344 (30 March 2016) at paragraphs 10 – 11

> to performance appraisals. The court held that in the circumstances in which the company found itself, the criteria applied within objective as required by s 189 (7)(b). Similarly, in *Van Rooyen and others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC), the court held that an employer was entitled to have regard to competency , qualifications and experience as selection criteria."

And,

> "Following the influential article by Prof Alan Rycroft 'Corporate restructuring and 'applying for your own Job' (2002) 23 *ILJ* 678, the courts have held that criteria need to be clear and transparent and selection criteria and the application should ensure that the dismissal does not cross the line between a no-fault dismissal and one based on performance. John Grogan (see *Dismissal* at 245) has summarised the position as follows;
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> 'In summary, criteria for selection can be divided into those that are potentially fair, and those that are unacceptable in principle. Potentially fair criteria include length of service, balanced by the need to maintain history skills. In addition, criteria such as performance (whether individual or group performance) , conduct, experience, skill, adaptability, attitude, potential and the like - or a matrix or 'mix' of such criteria - are acceptable. When these criteria are adopted, however, the employer is required to ensure that a 'rating' system is used which can be applied fairly, consistently and objectively.'"

[27] The approach of the applicants in this case is no different from that adopted by the applicants in *National Union of Metalworkers of South Africa and Others v Columbus Stainless (Pty) Ltd,* which is that in the absence of adoption of LIFO in the strict sense, the selection of the individual applicants cannot be fair. Clearly based on the authorities referred to above, that approach is misguided and unsustainable.

[28] In his closing arguments, Mr Masutha had nonetheless conceded that LIFO was agreed upon, inclusive of other considerations such as strategic skills and experience. Mashula on behalf of the applicants equally conceded under cross-examination that other criteria other than LIFO were also discussed

during consultations. It therefore follows that the applicants' contention that there was an agreement that only LIFO would be applied is misleading and unsupported by the evidence. What therefore remains to be determined is whether the criteria as applied by the respondent was fair, objective and transparent.

[29] The respondent's contention was that LIFO was one of the criteria used, together with strategic/operational requirements. In respect of the boiler-making section, it cannot be doubted that due to the nature of the respondent's clients' requirements and the products produced or to be serviced, it made sense to retain employees with the necessary skills, technical know-how, qualifications and experience.

[30] On the evidence presented before the Court, Kirton had vast experience as a boilermaker, and there was nothing suggested by the applicants' evidence that indicated that as compared to Segabutle and Sekgathume, he was less qualified or skilled, or could not perform basic functions such as lay outs or interpret drawings necessary for operations and requirements of clients, which the latter could not perform.

[31] Orme on the other hand was a qualified argon welder amongst his other qualifications. Any dispute raised on behalf of the applicants as to whether Orme was the only employee with qualifications in argon and stick welding, which is a specialised type of welding, is clearly without merit. Other than those specialised skills, it was further not seriously placed in dispute that Orme could perform other tasks such as manufacturing of pipes, based plates, fabrication, stick and CO2 welding.

[32] In a sense both Orme and Kirton had more skills, experience and qualifications than Segabutle and Sekgathume. As to how the latter two could therefore claim to have either trained or shown Kirton and Orme how to perform argon welding duties, when on the facts they were clearly not qualified in that field is beyond comprehension. The fact that Segabutle and Sekgathume could have acquired some of the welding skills on the job, or could have obtained certificates in welding at some stage, does not place

them on par with Orme and Kirton, in terms of skills, experience and qualifications.

[33] I am therefore satisfied that based on the facts, and comparisons between Kirton and Orme on the one hand, and Segabutle and Sekgathume on the other, there is no reason to believe that the respondent's decision to dismiss the latter two upon a consideration of skills, experience and its strategic/operational requirements rather than purely on the basis of LIFO, cannot be said to be lacking in transparency, fairness or objectivity.

[34] The same conclusions are equally applicable in the administration department when it came to the selection of Kubayi or Nkosi. In respect of Nkosi, I struggled throughout her evidence to appreciate the basis of her complaint. Other than being employed as a cleaner and 'tea-lady' there is nothing in her evidence that suggested that she had any other particular skills that would have made her to be retained. The high watermark of Nkosi's case was that Kubayi had less years of service. Other than that, there was no basis upon which any other comparison could be made with Kubayi.

[35] I am satisfied that based on the evidence of Lines and Claasen, Kubayi had to be retained based on her other skills in administration, having gone through some form of training in that regard. Nkosi on the other hand could not offer more, and whatever extra tasks she alleged to have had performed did not make her any more skilled than Kubayi. In the end, the fact that she had more years of service counted for nothing in the light of her limited skills in the affected department.

[36] In the light of the above conclusions, I am satisfied that the respondent had discharged the onus placed on it to demonstrate that the selection criteria adopted in dismissing the individual applicants was fair and objective. In considering an award of costs, the court takes into account the requirements of law and fairness. The respondent sought a punitive cost order against NUMSA as it was of the firm view that this claim was frivolous and vexatious.

[37] Having had regard to the basis of the applicants' claim, I am satisfied that it had no merit from the beginning and should never have been before the

Court. I accept that there is an on-going relationship between NUMSA and the respondent. I have however always held the view that such a relationship is not a bar to a cost order, especially in circumstances where a party should have had serious introspection prior to pursuing a claim such as in this case. In the circumstances, the requirements of law and fairness dictate that NUMSA should be burdened with the costs of this claim.

Order:

1. The applicants' claim is dismissed.

2. The first respondent (NUMSA), is ordered to pay the respondent's costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:	Mr. MJ Masutha - NUMSA Official
For the Respondent:	Advocate. E Myhill
Instructed by:	Trevor Bailey Attorneys