



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 239/18

In the matter between:

PATRICK GEORGE HUTCHISON

Applicant

and

MERCHANTS SA (PTY) LTD

Respondent

Heard: 10-12 June 2019

Delivered: 16 July 2019

JUDGMENT

MAHOSI. J

[1] The applicant seeks an order to the effect that his dismissal due to operational requirements was both substantively and procedurally unfair and that he be compensated an amount that the Court deems fair and equitable in the circumstances.

[2] The applicant contends that there was no need for him to be retrenched as his position was not redundant, there was no meaningful and joint consensus-seeking consultation and that the respondent failed to consider him for alternative positions to avoid retrenchment.

Relevant material facts

[3] The applicant was employed as a Campaign Manager by Quest (Pty) Ltd, a temporary employment service provider and was placed at its client, Vodacom. He was then transferred to the respondent in terms of section 197 of the LRA. Subsequent to his transfer, on 20 March 2015, the applicant entered into a fixed term contract in terms of which he was employed in a position of EUB support.

[4] In October 2015, the applicant moved from his position to Projects and Communications Department. On 01 March 2017, he was seconded to the position of Business Improvement, Communications and Engagements and he worked in that position until 30 June 2017.

[5] On 02 June 2018, the respondent invited the applicant to an informal meeting in which he was informed that his position had become redundant and that he faced a possible retrenchment. The second meeting was held on 09 June 2018. It was during this meeting that the respondent served the applicant with a notice in terms of section 189 of the Labour Relations Act¹ (LRA).

[6] On 12 June 2017 the applicant and the respondent had another consultative meeting and the applicant was served with another notice in terms of section 189 of the LRA. On the 26 June 2017 the applicant addressed a letter to the respondent which contained two alternatives to retrenchment.

[7] On 30 June 2017 the respondent served the applicant with a notice of retrenchment in terms of which the applicant's employment was to be terminated with effect from 28 July 2017. Dissatisfied with the respondent

¹ Act 66 of 1995, as amended.

with effect from 28 July 2017. Dissatisfied with the respondent's decision, the applicant referred the unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA") which dispute was conciliated unsuccessfully. The applicant then referred the dispute to arbitration, but the respondent objected to the CCMA's jurisdiction to arbitrate the matter on the basis that more than one employee were retrenched. It was for that reason that the applicant filed this matter for adjudication.

Applicant's case

[8] In support of his contention that there was no need for the respondent to retrench him, the applicant submitted that his transfer in terms of section 197 of the LRA to the respondent created his position, that is Campaign Manager, within the respondent's structure. The applicant further contends that all the surveys conducted by the respondent show that the respondent had a communication challenge, which made his services relevant and needed.

[9] It was the applicant's further contention that he was not aware that his position had become redundant until the respondent embarked on the retrenchment process.

[10] Although the applicant confirmed that there were consultation meetings held with him, he testified that they were irregular and that the respondent failed to consider alternative positions to avoid retrenchment.

Respondent's case

[11] The respondent's led evidence through two witnesses who testified that the position that was held by the applicant prior to his transfer, namely campaign manager, did not exist within the respondent's business structure. Subsequent to being transferred, the applicant was employed on a fixed term contract in a position of EBU support. The role of EBU support was later absorbed into the Operations' Manager role. It was at this stage that the applicant was seconded

into various departments to undertake specific projects that were of a short-term duration.

- [12] Ms Ureshni Morisson testified that it was not commercially and operationally sustainable to continue with the applicant's secondments indefinitely. Hence, the respondent had to make a decision to merge the applicant's *ad hoc* functions to the Head Office Project Team and Marketing Department in which the function fits within its business structure.

Legal principles and analysis of evidence

- [13] The applicant's case is that when he was transferred from Quest (Pty) Ltd to the respondent in terms of section 197 of the LRA, his position as a Campaign Manager did not change. However, the evidence is that he entered into a fixed term contract with the respondent which contract clearly states his position to be EUB support. What makes things worse for the applicant is that his own testimony reveals that prior to his transfer, the Campaign Manager's role was undergoing constant changes because Vodacom froze it and then later outsourced it to the respondent. The respondent's witnesses corroborated his evidence and further testified that the Campaign Manager's position did not exist within the respondent's business structure. There is therefore, no evidence that the applicant was employed as a Campaign Manager.

- [14] The question is whether the respondent had a commercial reason to retrench the applicant and whether a fair procedure was followed to do so. Section 189(1) requires the employer to consult with affected employees prior to embarking on retrenchment and reads:

'(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult -

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b) if there is no collective agreement that requires

consultation –

- (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
 - (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
- (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
- (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.’

[15] Section 189(2)² of the LRA requires the parties to engage in a meaningful joint consensus-seeking process in an attempt to agree on appropriate measures *inter alia*, to avoid and minimise dismissals; to identify the employees to be retrenched; to change the timing of the dismissal; and to mitigate the adverse effects of the dismissal. The question is whether, subsequent to its decision to restructure its business, the third respondent complied with its obligations in terms of section 189 of the LRA.

² (2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on:

- (a) appropriate measures -
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals;
- (b) the method for selecting the employees to be dismissed; and
- (c) the severance pay for dismissed employees.’

[16] In terms of section 189(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.'

[17] The applicant's contention that the respondent's attitude was to conduct the consultations just for the purpose of compliance as his submissions were not objectively viewed is not supported by evidence. It is apparent from the pre-trial minute that subsequent to a discussion with the applicant in the informal meeting of 02 June 2017, the respondent invited him to another meeting on 09 June 2107 in which he was issued him with a notice as contemplated by section

189 of the LRA. On 12 June 2017, the parties held another meeting in which the applicant was issued with another notice, which reads:

‘Further to our consultation meetings between yourself and the company on 2 June 2017, the company is hereby inviting you to a consultation meeting on 14th June 2017, at Vodacom JHB, at 16h00 in order to further engage in a meaningful joint consensus-seeking process and attempt to avoid retrenchment.

As discussed in the aforementioned consultation meetings the Company has taken the principle decision to declare your position redundant arising from your current secondment ending on 31 May 2017.

It has been placed on record that you were appointed to Merchants on 1 April 2015 in the capacity of EBU Support as a result of s197 from Vodacom and fulfilled this role until September 2015. From October 2015 to date you have fulfilled various project roles under business improvement department across the Merchants Vodacom business unit and did not return to the original contract role. The EUB support role was not replace and absorbed as a function into the Operations Manager role.’

[18] The applicant testified that there was no meeting that took place on 14 June 2014. Instead, another meeting was held on 19 June 2017. This is supported by the applicant’s letter dated 20 June 2017 that reads:

‘After consideration of the reasons provided for the contemplated/possible retrenchment and unsupportive experience I endured yesterday, I have concluded that I am uncomfortable with the decision and reasons provided.’

[19] On 26 June 2017, the applicant addressed a letter to the respondent in terms of which he challenged the respondent’s reason to retrench him. In the same letter, he made two proposals as an alternative to retrenchment. The proposals read:

‘Option 1

I would like to be re-instated in my role and assignment to manage communications and change management within the operations team. As articulated in my meeting with Ureshni over the December and January periods,

I would need to follow KPIs and performance reviews to enable me to deliver greater value to the business and a clear position and support structure in the operations team to be successful.

Option 2

I would like to perform an additional alternative; that the role which I had originally fulfilled and the duties which had been absorbed into the operations manager role for EBU support has become available due to the positions recently having been vacated. The role originally advertised has been placed on hold, however the business still requires the support and therefore I would propose that I take up my old duties and the additional Operations Manager duties to support the business, until such time the role is re-advertised and people can re-apply for it.'

[20] In response to the applicant's proposals, the respondent addressed a letter to him dated 30 June 2017 in which it recorded that:

4. "Request made to be reinstated to manage communication and change management." There is no formal communication or change manager functions within the budgeted headcount structure, nor is there any intention or expectation that this role maybe considered by the business in the future. Communication is channelled through the centre Marketing Team and coordinated within the business area assistant function.
5. "Request to be considered to return to EBU support." The EBU support function has been absorbed as part of the operational function and does not require a dedicated resource to perform the function within the current structure.
6. "No rate increase during employment period." Historically Merchants has applied a consistent approach as stipulated in labour law and there is no contracted expectation of guaranteed annual increases.'

[21] The evidence is that the respondent had a commercial rational to retrench the applicant and consulted him properly and it considered alternatives he proposed. The fact that the applicant disagreed with the respondent's operational structure and the commercial reasons necessitating his

retrenchment does not entitle him to be retained. It is further undisputed that the respondent delayed the retrenchment date, took measures to assist the applicant to secure alternative employment within its business and further considered his job applications as an internal candidate for a further three months after his termination date. It can therefore not be said that the applicant's dismissal for operational reasons was unfair nor that the procedure followed was unfair. As such, it follows that the applicant's claim falls to be dismissed.

Costs

[22] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[23] Accordingly, I make the following order:

Order

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

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate S. Kunene

Instructed by: Charmain Gibbens Attorneys

For the Respondent: Mr M. Magawulana, Employee Relations Specialist