IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA49/2020

In the matter between:

REGENESYS MANAGEMENT (PTY) LTD t/a REGENESYS	**Appellant**
and	
SUSARA MARIA NORTJE	**First Respondent**
SIBONGILE CHARLOTTE ILUNGA	**Second Respondent**
MARIA ANTONIA OLIVEIRA DOS SANTOS	**Third Respondent**
BETH MANN	**Fourth Respondent**
MAPASEKA PATIENCE NKODI	**Fifth Respondent**
WENDY MARY MALLESON	**Sixth Respondent**
NOMPUMELELO MAHLANGU	**Seventh Respondent**
STACEY-LEIGH CHALKLEN	**Eighth Respondent**
ARAIDNE DAVID	**Ninth Respondent**

Heard: **15 November 2021 and 2 June 2022**

Delivered: **18 July 2022**

Coram: **Davis, Coppin JJA and Savage AJA**

LABOUR APPEAL COURT

JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of this Court, is against the judgment and orders of Prinsloo J delivered on 19 June 2019 and 27 February 2020 in which the appellant's application to adduce further evidence was dismissed, the dismissals of the respondents were found procedurally unfair and the dismissals of the second, third, fifth and seventh respondents found substantively unfair. The Labour Court ordered that the second, fifth and seventh respondents be retrospectively reinstated into their employment with the appellant, Regenesys Management (Pty) Ltd, trading as Regenesys, with severance payments made set off against back pay due. It was ordered that the third respondent be paid the sum of R766 378,08, being equivalent to 12 months' compensation; and the appellant was ordered to pay the respondents' costs.

[2] At the outset of this matter, a number of unopposed applications for condonation were granted and the appeal was reinstated.

Background

[3] On 17 June 2015, the appellant notified its staff, including the respondents, to attend a meeting at which staff were informed that the appellant was embarking on a restructuring process inter alia to improve the quality of academic delivery, reduce dropout rates, improve its financial performance and build sustainability. At the meeting, the respondents were informed that there was a need for retrenchments due to the appellant's financial position, including that its salary bill made up 43% of the appellant's expenses. The respondents were informed that group meetings would be held the following day with staff to discuss the possibility of retrenchment. The following day, on 18 June 2015 the affected departments were called to meetings and were provided with a proposed new structure. The eighth respondent, Ms Stacey-Leigh Chalklen, was informed that her department, being the marketing department, as well as the IT, operations and facilities departments would not be affected by the retrenchments.

LABOUR APPEAL COURT

[4] On 18 June 2015, meetings were convened with the affected departments, which included the first to seventh respondents, who were handed a proposed new structure for the appellant simultaneously with letters in terms of section 189(3) of the Labour Relations[1] (LRA). The respondents were invited to make written proposals regarding the proposed restructuring. The first and second respondents made written representations to the appellant. The first respondent and another employee requested that a facilitator from the Commission for Conciliation, Mediation and Arbitration (CCMA) be appointed to assist the parties with the consultation process. The appellant did not appoint a CCMA facilitator.

[5] On Monday 22 June 2015, the first to seventh respondents were presented with the final amended organisational structure, a list of vacancies and a brief description of these positions, and were invited to apply for available positions within this new structure by no later than 13h00 the following day, 23 June 2015. The respondents were informed that the selection criteria were knowledge, skills and behaviour. In its pleaded case, the appellant stated that the criteria were competence, including knowledge, skills, past performance and behaviour.

[6] The first to seventh respondents applied for various positions in the new organisational structure. The first respondent, Ms Susara Nortje, applied for the positions of Facilitator and Material Developer. The second respondent, Ms Sibongile Ilunga, applied for the positions of Personal Programme Manager: Postgraduate and Research, Publications and Accreditations Manager. The third respondent, Ms Maria dos Santos, applied for the position of Programme Head. The fourth respondent, Ms Beth Mann, applied for the positions of Project Manager, Marketing, Database Administrator/Coordinator, Business Development Executive and Recruitment Consultant. The fifth respondent, Ms Mapaseka Nkodi, applied for the positions of Project Manager and Personal Programme Manager. The sixth respondent, Ms Wendy Malleson, applied for the position of Project Manager and a position in Business Development. The seventh respondent, Nompumelelo Mahlangu, applied for the positions of Personal Programme Advisor, Personal Programme Manager, Assessment

[1] Act 66 of 1995, as amended.

LABOUR APPEAL COURT

Administrator, Investment Client Administrator, Research Publications and Accreditations and Marketing Database Coordinator.

[7] On 24 June 2015, the first, second, third, fifth and seventh respondents were informed that their applications were not successful and that they were being retrenched, with July 2015 being their notice month. With the exception of two respondents, they were not required to work during July 2015.

[8] The fourth respondent was offered the position of Marketing Database Coordinator but declined to accept the position. She was retrenched on 29 June 2015. The sixth respondent took ill on 23 June 2015 and was informed of her retrenchment on her return to work on 29 June 2015 in a letter dated 24 June 2015. The eighth respondent agreed to accept a 2.5% reduction in remuneration, which she was reimbursed on the termination of her employment.

[9] On 5 August 2015, the then Chief Executive Officer of the appellant and Dr Penny Law met with the eighth respondent and informed her that her performance and role was not commensurate with her salary. She was handed a mutual separation agreement for signature, in terms of which she would leave the same day. On her return from sick leave on 11 August 2015, the eighth respondent informed the appellant that she would not accept a voluntary separation. Thereafter, on 12 August 2015, she received a notice in terms of section 189(3) and was retrenched in a subsequent follow-up meeting on 17 August 2015.

[10] The ninth respondent, Ms Araidne David, lodged an application in terms of section 189A(13) with the Labour Court on 28 September 2015 seeking the reinstatement of employees pending the appellant's compliance with a fair procedure in terms of section 189A, alternatively the award of compensation.

[11] Only the first to eighth respondents challenged the fairness of their dismissals. On 8 October 2015, Gush J ordered that the respondents' application in terms of section 189A(13) be consolidated with the claim that the dismissals of the respondents had been substantively unfair and that the trial court determines both the procedural and substantive fairness of such dismissals.

LABOUR APPEAL COURT

[12] At the trial, the respondents closed their case without leading any evidence in the trial before the Labour Court. After the appellant closed its case, it applied on 24 May 2019 to adduce further evidence. That application was dismissed by Prinsloo J on 20 June 2019.

Section 189A(18)

[13] The first issue in this appeal is whether the Labour Court had jurisdiction to determine the procedural fairness together with the substantive fairness of a dismissal of the respondents. Section 189A(13) of the LRA provides that:

> '(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;
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> *(b)* interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
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> *(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.'

[14] Section 189A(18) provides that:

> '(18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191 (5) (b) (ii).'

[15] In *Steenkamp & others v Edcon Ltd*[2] (*Edcon*), the Constitutional Court noted that the primary purpose of section 189A(13) is thus to allow for early corrective action to get the retrenchment process back on track.[3] Section 189A regulates dismissals for operational requirements by employers with more than 50 employees, with it found that section 189A(18) expressly deprives the Labour

[2] (2019) 40 ILJ 1731 (CC).
[3] *Edcon (supra)* at para 60.

LABOUR APPEAL COURT

Court of jurisdiction to determine procedural fairness in such cases. As a result, it was found that the Labour Court erred in consolidating the application for compensation in respect of procedural unfairness under section 189A with the main action and refer it to trial, on the basis that:

> 'The jurisdiction of the Labour Court to adjudicate on the procedural fairness of a dismissal based on the employer's operational requirements has been ousted by section 189A(18) of the LRA. As the Labour Appeal Court correctly stated, the Labour Court's jurisdictional competence "cannot be read disjunctively from s 191(5)(b)(ii) of the LRA and s 189A(18) of the LRA".'[4]

[16] In *The Master of the High Court (Northern Gauteng High Court, Pretoria) v Motala NO and Others*[5], it was found that where it was incompetent for a judge to have issued the order that he did, in doing so the judge usurped a power for himself that he did not have which made the order a nullity.[6] This was echoed by the Constitutional Court in *Department of Transport and Others v Tasima (Pty) Ltd*[7], in which the Court recognised that another court may refuse to enforce an order made without jurisdiction.[8]

[17] It was incompetent for Gush J to issue the order that he did in that section 189A(18) expressly provides that the Labour Court may not adjudicate a dispute concerned with the procedural fairness of a dismissal based on the employer's operational requirements. In such circumstances, Prinsloo J ought properly to have refused to conduct the trial in accordance with the terms of that order. The Labour Court erred in adjudicating the procedural fairness of the respondents' retrenchment given that its jurisdiction to do so has been ousted by section 189A(18). It follows that the finding that the dismissals of the respondents were procedurally unfair must consequently be set aside.

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[4] *Edcon* (*supra*) at para 70.
[5] 2012 (3) SA 325 (SCA).
[6] *Id* at para 14.
[7] 2017 (2) SA 622 (CC) at para 197.
[8] *Ibid* at para 197 per fn 156.

LABOUR APPEAL COURT

Substantive fairness of dismissals

[18] The Labour Court found the dismissals of the second, third, fifth and the seventh respondents to be substantively unfair. The second respondent was employed by the appellant in June 2012 and held the position of Personal Programme Manager (PPM) Post Graduate: MBA and PDM earning R29 758,00 per month. It was found that in not offering her the restructured PPM position, albeit at a lower salary, so as to avoid her retrenchment, her dismissal had been substantively unfair. This, when the criteria used were not fair and objective since the person appointed to the position was employed in 2015, with it stated that the reason for her appointment was that she was younger, more dynamic and had a relationship with students.

[19] The Labour Court similarly found the dismissal of the third and fifth respondents to be substantively unfair in that the appellant had failed to apply fair and objective selection criteria. The third respondent, on the appellant's own version, met the qualifications and experience required for appointment. Yet, she was not appointed in that the appellant had considered other factors such as how she came across to students and colleagues. In relation to the fifth respondent, a junior employee was appointed despite such position being a suitable alternative for the fifth respondent. Again, the court found that fair and objective criteria were not applied, with no effort made by the appellant to seek alternatives to the retrenchment of the fifth respondent.

[20] The dismissal of the seventh respondent was also found to be substantively unfair in that selection criteria were not fairly and objectively applied and when a suitable alternative position was available, in relation to the Marketing Database Coordinator position, no reason was advanced by the appellant why the seventh respondent was not appointed to this position; and although it was claimed that the seventh respondent lacked the qualifications required for the Assessment Administrator post, there was no dispute that other employees appointed into the same position also did not meet such minimum qualification requirement. The Labour Court consequently found that the appellant had made no attempt to save the seventh respondent's job through the application of fair and objective selection criteria.

LABOUR APPEAL COURT

[21] It was contended for the appellant that the Labour Court had erred in finding that the dismissals of the four respondents were substantively unfair on the basis of the decision of this Court in *South African Breweries (Pty) Ltd v Louw*[9] (*Louw*). It was contended for the appellant that where the employer elects to appoint dislocated employees after a restructuring process, the assessment criteria used in doing so do not amount to "selection criteria" within the contemplation of section 189 of the LRA and that a competitive process undertaken to appoint employees into the new structure is not unfair.

[22] The reliance on *Louw* is misplaced. In that matter, the employee did not apply for a post, despite an invitation to do so, as a result of which he was retrenched. This Court made it clear that a competitive process to seek to avoid retrenchment is not unfair. However, this does not remove the obligation on an employer to ensure that any resultant retrenchment meets the requirements of substantive fairness, with fair and objective selection criteria used to select those employees to be retrenched and alternatives to retrenchment properly canvassed and carefully considered.

[23] No basis has been advanced by the appellant to justify a finding that the Labour Court erred in its conclusion that the dismissals of the four respondents were substantively unfair. The Labour Court carefully considered the material before it and motivated its findings having regard to both the facts and the law. Its finding that the dismissals of the four respondents were substantively unfair is beyond reproach and must stand. In argument, I understood counsel for the appellant to accept as much. It follows that the appeal against the finding that the dismissals of the second, third, fifth, sixth and seventh respondents were substantively unfair must fail.

Application to adduce new evidence

[24] As to the third appeal ground, namely the refusal of the Labour Court to allow the appellant to adduce further evidence related to the remedy of reinstatement as inappropriate relief, I am not persuaded that the Labour Court erred in refusing to allow such further evidence to be adduced. The appellant brought the

[9] [2018] 1 BLLR 26 (LAC).

LABOUR APPEAL COURT

application after it had closed its case. The Labour Court, placing reliance on *Coetzee v Zeitz Mocaa Foundation Trust and others*[10] and *Mkwanazi v Van der Merwe and another,*[11] had regard to the considerations relevant to the determination of such an application. These included the reason why the evidence was not led timeously, the degree of materiality of the evidence, the possibility that it may have been shaped to 'relieve the pinch of the shoe', issues of prejudice, the stage that the litigation has reached, the 'healing balm' of an appropriate costs order, the general need for finality in judicial proceedings and the appropriateness of making the order sought.

[25] The Court had regard to the fact that evidence had already been tendered by the appellant with regards to the issue of reinstatement and that the new evidence which the appellant sought to introduce was not relevant or material to a determination of the issue of competent and appropriate relief. Having regard to the facts and the reasons advanced for the decision made, the Labour Court cannot be faulted in its approach to the application made or the conclusions it reached. Since the Labour Court did not err in dismissing the application, the appeal against the order made in this regard must fail.

[26] Having regard to considerations of law and fairness, the view I take is that it would be inappropriate to order costs in this matter.

Order

[27] For these reasons, the following order is made:

1. The appeal succeeds.
2. The orders of the Labour Court are set aside and replaced as follows:

"1. The dismissals of the second, third, fifth and seventh applicants are found to be substantively unfair;

2. The respondent is to retrospectively reinstate the second, fifth and seventh applicants, with effect from the date of dismissal, into the same

[10] (2018) 39 ILJ 2529 (LC).
[11] 1970 (1) SA 609 (A) at 626A-G.

LABOUR APPEAL COURT

or similar positions held by them at the time of their dismissal, with no loss of benefits;

3. The second, fifth and seventh applicants are to repay any amount received from the respondent as severance pay, or set off any such amount paid to them by the respondent in respect of severance pay against the back pay due to them;

4. The respondent is within fourteen (14) days of this order to pay to the third applicant compensation in the sum of R766 378,08, being equivalent to 12 months' remuneration calculated at the rate of remuneration which applied on the date of dismissal;

5. There is no order as to costs."

3. The appeal against the order of the Labour Court dismissing the appellant's application to adduce further evidence is dismissed.

4. There is no order as to costs.

SAVAGE AJA

Davis JA and Coppin JA agree.

APPEARANCES:

For the appellant:	G A Fourie SC and D J Groenewald Instructed by Higgs Attorneys
For the respondents (excluding sixth and ninth respondents):	L Erasmus Instructed by Du Randt Du Toit Pesler Attorneys

LABOUR APPEAL COURT

For the sixth respondent:	L P de Necker Instructed by Graeme Vickers Attorneys

LABOUR APPEAL COURT