IN THE LABOUR COURT IN DURBAN

CASE NUMBER: D258/2020

In the matter between:

SACTWU obo Members APPLICANT

and

FYVIE G *N.O* FIRST RESPONDENT

FYVIE I *N. O* SECOND RESPONDENT

CROOKES G *N.O* THIRD RESPONDENT

Heard: 19 – 21 February 2024

Delivered: 5 March 2024

Summary: The Respondents retrenched 15 employees pursuant to a S189A process. The Applicants claimed unfairness on the basis that the Respondents failed to apply LIFO, and particularly the practice of "bumping". The Respondents argued that the Applicants, employed on a vegetable farm, did not have the skills required of those employed on the employer's macadamia nut farm and therefore LIFO / bumping would not suit its operational interests. The Court found that the training requirements of employees from the vegetable farm would be onerous, and bumping as a proposal from SACTWU, to avoid the retrenchment of their members was unreasonable. The court found that the Respondents had proved that the dismissals were fair. The application was dismissed.

JUDGMENT

Norton AJ

Introduction

1. The Respondents farmed in the Kwa-Zulu Natal region near Camperdown. Pertinent to the dispute before this court were two different farming operations, one for vegetables and another for macadamia nuts. The Respondents ceased farming vegetables, and proceeded to retrench 23 workers on that farm, 15 of whom were SACTWU members (the Applicants).

2. SACTWU argues that the Respondents were unfair in the retrenchment process by not applying LIFO (Last In First Out), in particular a form called "bumping" in which long serving employees on the vegetable farm should have replaced employees on the macadamia farm who had less years of service. The Respondents defend their decision on the basis of the training which would be required of the vegetable workers, and their desire not to upset the operational arrangements on the macadamia farm which were efficient and profitable.

3. My task is to determine whether the Respondents' justification passes legal scrutiny.

4. The Applicants grew sweetcorn, broccoli, cabbages, butternut and peas. The nature of the work was relatively simple – planting, harvesting, sorting and packing vegetables for market. The situation with macadamia farming was different and more complex, requiring training in processes particular to the cultivation of macadamia nuts (irrigation style watering, grafting,[1] de suckering,[2] pruning and scouting.[3])

[1] Binding the top part of a tree with the root

[2] Removing shoots

[3] Pest control, especially for stink bugs and their eggs

5. The First Respondent (Gary Fyvie, the son) and the Second Respondent (Ian Fyvie, the father) established both farms, initially starting with the vegetable farm and then in 2001 the macadamia nut farm. The Second Respondent, suffered from a disability later on in his life, and the First Respondent took over the management of both farms. This proved too stressful and following a catastrophic season in 2019 with the vegetable farm, the Respondents decided to stop farming vegetables.

6. The choice to retain the macadamia farm was based on its economic viability, higher yields and less vulnerability to seasonal risks like frost and excessive heat.

7. The Respondent informed the Applicants in late 2019, that they were considering terminating the vegetable operation.

8. The Respondents began a retrenchment process in 2020. Around 17 March 2020 the Respondent issued S189(3) letters. The company referred to the fact that the vegetable farm was working at a loss, and the economy was in decline.[4]

9. On 1 June, employees were informed that their last working day would be 19 June 2020.

10. On the 19 June the Applicants launched an application to interdict the retrenchments and to compel the employer to adhere to the relevant time periods in section 189A. The court set aside the dismissals and ordered further consultations "*on the issue of alternatives and selection criteria*".

11. The court order also recorded the agreement struck between the parties that there was a rational operational requirement that 23 positions in the vegetable department be made redundant (in other words all the positions).

12. Consultations took place on 7 and 22 July 2020.

[4] Bundle B, pg 5

13. The dismissals were effective from 31 August 2020. The vegetable farming operations halted, and the farm was sold.

14. The Applicants claimed that they had been unfairly dismissed and referred a dispute to the CCMA. Conciliation failed, and the matter proceeded to trial in the Labour Court between 19 – 21 February 2024. Both parties were legally represented.

15. The focus on the trial for the Respondents, who bore the onus of proving that the dismissals were fair, was on the differences between vegetable farming and macadamia nut farming, to explain why the Applicant's proposal of LIFO and bumping was not feasible. The Applicants referred specifically to four employees who they claimed had a compelling case for bumping.

The Respondent's case

16. Mr Gary Fyvie gave evidence for the Respondents. He explained the background set out above.

17. He said after a disastrous Christmas period in 2019 for the vegetable business he thought "*it was time to call it a day*".

18. He explained that macadamia farming is different to vegetable farming. Macadamias are a tree crop, which can produce for 60 years. They begin producing 5 years after planting. It is a long term crop. Nuts have a shelf life of 1 year. Harvest happens once a year.

19. With vegetable farming, there are usually 3 crops in a year. The vegetables are perishable. Planting and harvesting happens on a weekly basis.

20. Technically speaking farming macadamias is a more complex project. Irrigation takes place above and below ground, with microjets at each tree. Soil moisture is measured with particular probes. The roots need to be "de suckered" (removing the suckers from the trees). Macadamia farming also requires "scouting" which means scanning the trees for stinkbugs, eggs and insects that can harm the trees, and looking for beneficials (earthworms, lady bugs and healthy insects). He organised "scouting" courses in Zulu for his

workers. The trees also benefit from mulching (woodchips around the base of the trees to preserve moisture), and from pruning.

21. With respect to the farming of vegetables, the irrigation system is simpler, and no de-suckering, scouting, mulching or pruning is required.

22. The court enquired about the duration of training and how that compared and Mr Fyvie testified that it takes between 3 – 6 months on the job training for a worker on the vegetable farm; and 1 – 2 years on the job training for a worker on the macadamia farm. The court also enquired about the level of discretion or judgment that applied, and Mr Fyvie responded that there are higher degrees of judgment required from workers on the macadamia farm, because of the sophistication of the systems, and the long-term growth of the trees.

23. The Applicants, represented by Advocate Seery put to him bumping comparators – in other words he compared a vegetable farm employee of long standing with a macadamia nut employee of short standing to suggest that the vegetable farm employee should have replaced the employee on the macadamia farm. The Applicants claim that a Mr Ngcobo (10 years) from the vegetable farm should have replaced Mr Mluleki (2 years) on the macadamia farm because Mr Ngcobo had longer service and understood irrigation systems. Mr Fyvie replied that whilst Mr Ngcobo installed and fixed pipes on the vegetable farm, he had no experience with irrigation systems on the macadamia farm, and in any event Mr Mluleki "*was doing a good job*".

24. Similar comparisons were made with two[5] other applicants who had more years' experience working at the vegetable farm than two workers[6] at the macadamia farm who had less. Sometimes the submissions made were factually questionable. Adv Seery put the case of an employee "Umfundo" who apparently was certified to drive a tractor (and by implication could thus do so on the macadamia farm). Mr Fyvie corrected him, saying, "*I'm not aware of that – he drove into my fence at home*".

[5] VF Nene and Mr Shange

[6] P Gxalabani and S Mfunda

25. Mr Fyvie explained that the macadamia workers, had specific training that the vegetable workers did not have, and that they could not simply replace them. He emphasized that the macadamia farm was a successful venture and he did not want to upset the operations and staffing that had been set in place. He said, "*Interfering with the macadamia farming was not on the cards".* He did say though that, "*if there was a position available I would have trained a worker from the vegetable farm*" (but there was no such position).

The Applicant's evidence

26. The Applicants led one witness, Ms Promise Mkhize, a SACTWU organiser for the Midlands branch. Her evidence was brief.

27. Ms Mkhize attended two consultation meetings on the 7 and 23 July. The union denied that these were genuine consultations. She motivated for LIFO and bumping, but there was resistance from management.[7]

28. She said that every time she mentioned the long service of members working in the vegetable farm, and that they should be considered over workers on the macadamia farm, "*temperatures would rise*".

29. She said that the company "*put nothing on the table, they had made their decision, workers from the veg farm were going to be retrenched*."

The law – S 189A, and jurisprudence with respect to bumping

30. Every employee has the right not to be unfairly dismissed.[8]

31. The Labour Relations Act, 1995 (the "LRA") envisages four fair reasons for dismissal – misconduct, poor work performance, incapacity and operational requirements. Dismissals must be procedurally and substantively fair to withstand a claim of an unfair dismissal.

[7] Bundle B, pg 35

[8] Section 185(a) of the LRA

32. According to section 191(5)(b)(ii) of the LRA a dispute about an operational requirement dismissal (ie retrenchment) of more than one employee is adjudicated in the Labour Court.

33. The LRA distinguishes between small scale and large scale retrenchments, with more onerous provisions in large scale retrenchments as envisaged in section 189A of the Act. The retrenchment of the Applicants took place in the context of a section 189A process as 23 employees out of a workforce of 142 were vulnerable to retrenchment, and the threshold in section 189A (1)(a) was passed.[9]

34. Only the substantive fairness of a retrenchment may be interrogated by the Labour Court (and not procedural fairness) in a large-scale retrenchment dispute, as any complaint about procedure must be approached on an urgent basis during the retrenchment process.[10]

35. During a retrenchment process, the consulting parties (in this case SACTWU representing the employees, and Gary Fyvie) are required to attempt to avoid the possibility of retrenchment, and to agree on selection criteria if retrenchments become inevitable.

36. The union proposed LIFO and in particular "bumping". The seminal case on Bumping is *Porter Motor Group v Karachi*.[11] The Labour Appeal Court ("LAC") explained the principles underpinning the practice as follows,

> *"Bumping is situated in within the "last in-first out" (LIFO) principle which is itself rooted in fairness for well established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise is an invaluable asset. Their long service is an objective tribute to their skills*

[9] This section applies to employers employing more than 50 employees if the employer contemplates dismissing by reason of the employer's operational requirements at lease 10 employees if the employer employs up to 200 employees.

[10] Refer to section 189(A)(13) read with 189(A)(18) of the LRA

[11] [2002] JOL 9370 (LAC). See too *Bayane and another v Fischer Tube Technik SA* [2023] JOL 57760

and industry and their avoidance of misconduct… Fairness requires that their loyalty be rewarded."[12]

37. The LAC cautioned though that:

> "*Bumping does not apply to employees in a different grade if the longer-serving employee cannot do the work of the employee with shorter service in that grade. This limitation applies more frequently where competence, technical or professional knowledge or experience and technical skills are involved. Where the necessity arises of retraining those who are transferred, this should be carried out, unless it places an unreasonable burden on the employer."*[13]

Applying the law to the facts

38. I start by dispensing with the issue of procedural fairness. That is not a concern before me because the procedural challenge by SACTWU to the retrenchment process was disposed of in June 2020 and the parties were directed to consult on alternatives to retrenchment and selection criteria. In any event as per section 189A(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)*".

39. I turn now to the issue of substantive fairness of the retrenchment. The Respondent's point to economic constraints, and the demise of the vegetable farming operations over time. This was accepted by the Applicants, and certainly never challenged. The farm was eventually sold in late 2020.

40. What was challenged was the identity of those selected for retrenchment. The Respondents chose all the employees who had worked on the vegetable farm – all 23 employees.

[12] Page 9 para 2

[13] Page 10, para 9

41. The Applicants argue that because of their longer service the Respondents should have applied LIFO and in particular bumping, essentially to retrench macadamia farm workers and replace them with the vegetable farm workers. The Applicants also argue that their skills were comparable, and many had spent time on occasions working at the macadamia farm.

42. Mr Fyvie was at pains to point out, that the skills were not interchangeable and that it would be unduly onerous to begin training vegetable farm employees on the intricacies of macadamia nut farming. Granted some employees had worked at the macadamia farm, but in low level capacities (eg sorting nuts), and not in capacities requiring training such as scouting, irrigation maintenance and pruning. The macadamia farm was working well, they had a full staff complement, and there was no reason to tamper with the operations.

43. The LAC in *Karachi* whilst promoting the practice of bumping, draws the line in circumstances in which the skill sets of the employees are not compatible, and the training requirements would be unduly burdensome for the employer.

44. In my view the decision of the Applicants to retrench only the vegetable farm workers was unassailable. Only those employees were impacted by the closure of the farm, generally speaking they did not have the skill set to take over the positions of macadamia nut workers, and finally it would be unduly onerous for the employer to train those workers in the particular craft of growing macadamia nut trees. In short SACTWU's case was unconvincing, and I am not persuaded that the Applicants have been unfairly dismissed.

Conclusion

45. The Respondent's actions in retrenching only the vegetable farm workers was reasonable and economically sensible. Whilst bumping is a valid practice to reward long standing employees, it cannot be applied in circumstances in which those employees do not have the skills of others, and where it would be unduly burdensome on the employer to upskill the employees. In this case the Applicants have failed to persuade the court that the selection criteria was

unfair. They did not make out a compelling case for LIFO or bumping – far from it.

46. In the circumstances I make the following order:

Order

47. The Applicant's unfair dismissal claim is dismissed.

48. No order as to costs.

D Norton
Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Adv Seery
Instructed by: Purdon and Munsamy Attorneys

For the Respondents: G Kirby-Hirst
McGregor Erasmus Attorneys