SUMMARY

The factual matrix from which this judgment arises concerns a retrenchment dispute. The matter pivoting on the consultation process adopted by Oyster Box Hotel (Pty) Ltd (the "Employer"), SACCAWU obo Bongumusa Mvuyana (the "Trade Union") disputing the Employer's compliance with the consultation process stipulated in S189(2) of the Labour Relations Act No. 66 of 1995 ("LRA").

Section 189(2) of the LRA reads:

"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. "

During or about 2007, the Employer (who is involved in the hotel industry) in Umhlanga Rocks (Durban) made the decision to upgrade the hotel in order to enhance it from a three to a five-star rating. In light of the above, it was foreseen the hotel would not be operative over the duration of the upgrade and refurbishments. The Employer, acting under the prospect of this reality made the decision to retrench a number of employees. This was duly effected by the employer and a number of employees were retrenched.

When the matter came to trial the employees (represented by the Trade Union) disputed the processes and decisions adopted by the Employer in respect of the retrenchment.

At the epicentre of the employee's contentions was that there were alternatives to the respective retrenchments. It was contended that the employer failed to consider the following:

- As the hotel was only going to close for the duration of the renovation and reopen thereafter, the Employer should have laid the employees off (with or without pay) for the duration of the renovation;
- The Employer should have considered transferring the employees to other outlet/s, viz Cape Town or London; and
- The employees could have been employed at the Employer's warehouse.

Pursuant to the aforesaid, the Employer bore the onus of proving that such dismissals were premised on fair reason. The Employer's defence was weakened by a lack of substantive evidence owing to a fire at one of the warehouses which housed documents pivotal to proceedings. Thus, evidence was led primarily by way of oral testimony at the trial.

HELD

In light of the meaningful consultation process envisaged by the LRA, the Court found that the Employer failed to host the comprehensive facilitation process required when embarking on retrenchment proceedings in terms of S189 of the LRA.

The court thus found that that the consultation process utilised by the Employer was unduly curtailed and that discussions had not run their course and viable options short of retrenchment had not been considered.

The Court granted the retrenched employees ten months' compensation, recognising the practical difficulties of reinstatement since the retrenchments were effected.

VALUE

This judgement highlights the protections afforded to employees, as well as the numerous hurdles an employer has to cross when contemplating retrenchment. The consultation process mandated by the LRA in S189, provides damage control conventions and seeks to alleviate the detrimental effect retrenchments have socially and economically. The judgment demonstrates the severity with which employers will be dealt with if they attempt to evade the stipulated parameters of S189 of the LRA.

Written by John Mackechnie and supervised by Heidi Barter, 30 August 2018

Share Article: