CONSTITUTIONAL COURT OF SOUTH AFRICA

South African Commercial Catering and Allied Workers Union and Another v Woolworths (Pty) Ltd

CCT 275/17

Date of hearing: 29 May 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 29 May 2018 at10h00 the Constitutional Court will hear an application by the South African Commercial Catering and Allied Workers Union (SACCAWU) against Woolworths (Pty) Ltd. The applicants seek leave to appeal against relevant parts of the judgment and orders of the Labour Appeal Court (LAC) which relate to the substitution by the LAC of the remedy of retrospective reinstatement granted by the Labour Court, (LC) for a remedy of 12 months' compensation.

Until 2002, Woolworths' employees were engaged on full-time contracts with fixed hours totalling 46 hours per week. In 2002, Woolworths decided that it would in future only employ workers on a flexible working hour basis, which was limited to 40 hours per week. In order to cater for the current market, Woolworths decided that it needed to operate with an entire workforce consisting only of flexi-timers. It thus decided to convert all full-time employees to flexi-timers on terms and conditions applicable to flexi-timers. Woolworths first initiated a voluntary conversion process without the involvement of SACCAWU. During this voluntary conversion process all of the fulltime employees, save 144 employees, opted for early retirement, voluntary severance or actual conversion to flexi-time. At the end of the voluntary process, Woolworths issued a prescribed notice of intention to retrench the 144 full time employees who had decided not to participate in the voluntary conversion process. This resulted in a consultation process with SACCAWU facilitated by the CCMA where the number of full time employees who did not accept the conversion, early retirement or voluntary severance was reduced to 92 employees, of which 44 were members of SACCAWU. SACCAWU and its 44 members had during the consultation process eventually appreciated the need to work flexi-time and accepted that the full time employees should indeed be converted

to flexi-time. SACCAWU initially suggested that the full-timers should retain their existing full-time wages and benefits but had towards the end of the process varied its stance. In terms of SACCAWU's second proposal, the employees would work flexi-time for 40 hours and be paid for those hours but at a lower rate, however, Woolworths did not understand this to be a different proposal from the initial one and thus rejected it. Woolworths subsequently proceeded with the retrenchment of the 92 full time employees.

Aggrieved by the retrenchment procedure adopted by Woolworths, SACCAWU, on behalf of its 44 members launched an application in the Labour Court. The LC held that Woolworths had failed to prove, on a balance of probabilities, that the dismissal of the affected employees was operationally justifiable. The LC held further that Woolworths had also failed to appropriately consider the alternatives to dismissal. In addition, Woolworths did not meaningfully consult with SACCAWU. Accordingly, the dismissal of the 44 full-timers was also held to be procedurally and substantively unfair. Woolworths was ordered to reinstate the 44 dismissed workers retrospectively from date of their dismissal without loss of pay.

Dissatisfied with the outcome, Woolworths approached the LAC wherein the decision turned on whether the retrenchments were substantively fair. The LAC held that the decisive factor in this instance was that the employer had failed to show the Court that it had properly considered the alternatives to retrenchment, given that it had construed SACCAWU's last proposal to be no different to the previous one. The LAC confirmed that the dismissal was indeed unfair, however, it did not agree with the LC's remedy that the employees should be reinstated, given that the full-time posts were redundant. Instead, the LAC awarded the payment of 12 months' compensation.

Before the Constitutional Court, the applicants submit that the substantive fairness of the dismissal should be assessed in terms of section 189A(19) of the LRA. Thus, the essential question is whether there were other reasonable alternatives that were available which could have avoided job losses. If so, then the retrenchment was unfair. As to remedy, the applicants argue that, upon finding the dismissal was substantively unfair, the appropriate relief should be reinstatement. The applicants contend that the assertion that the positions have become redundant is not warranted on the facts nor has Woolworths provided justifiable reasons in this regard. Lastly, in respect of procedural fairness, the applicants submit that the process followed by Woolworths violated the requirements set out in the LRA and was therefore procedurally unfair.

Woolworths submits that the LAC was correct in finding that it had complied with section 189A(19)(b), but erred in concluding that it did not adequately consider the alternatives available instead of retrenchment. Regarding procedural fairness, Woolworths argues that this ought to be an issue only if this Court finds that the dismissal was not substantively fair. As to remedy, Woolworths argues that the LAC was correct not to order reinstatement as the full-time positions no longer exist and thus reinstatement is not reasonably practical in terms of section 193(2)(c) of the LRA.