

# REFUSAL TO ACCEPT A DEMAND BY AN EMPLOYER OR LEGITIMATE OPERATIONAL REQUIREMENTS?

A LOOK AT THE JUDGEMENT IN *NUMSA VS AVENG TRIDENT STEEL (A DIVISION OF AVENG AFRICA (PTY) LTD)*<sup>[1]</sup>

By Alex Davies

## 1. INTRODUCTION:

- The recent judgement in *NUMSA* by the Labour Appeal Court (“LAC”) considers the line between automatically unfair dismissals of employees for refusing to accept demands of mutual interest and dismissals based on operational requirements.

## 1. OVERVIEW OF THE DISPUTE:

- The basic facts of the matter were that Aveng identified that in order to continue to be financially viable changes were required. An analysis was done which indicated a variety of aspects which should be addressed including but not limited to restructuring in the sense of redefining job categories and job functions.
- Aveng accordingly initiated consultation proceedings in accordance with section 189 of the Labour Relations Act<sup>[2]</sup> (“LRA”) and engaged NUMSA regarding the variety of aspects identified as needing attention.
- Early on in the consultation process NUMSA accepted that there was an operational need to redefining job categories and functions pursuant to which an interim agreement was reached to implement the suggested structure for an agreed period of time. This was duly done and the employees assumed their newly defined roles.
- Although the consultation process continued ultimately an impasse was reached at which point Aveng advised that it was possible for employees to remain in the newly defined and applied positions however should they decline to continue on this basis they would be subject to retrenchment as their previous positions, which they sought to revert to, were all redundant.
- Ultimately those employees that refused the offer were retrenched. They pursued an automatically unfair dismissal dispute wherein they claimed that they were dismissed for refusing to accede to a demand of mutual interest.
- It is important to note that the employees would suffer no financial detriment through accepting the alternative offered as the offer was made based on the existing terms and conditions that they had already been working for.

## 1. FINDINGS OF THE COURT:

- The Court stated that the true reason for the dismissal should be determined based on an evaluation of factual and legal causation. Applied to the facts at hand the Court found that the reason for dismissal was due to the operational requirements of Aveng.
- A detailed analysis was set out with specific focus on the option of retrenchment and the option of an offensive lock out to induce acceptance of a demand of mutual interest.
- The LAC accepted that there was no demand made by Aveng to employees to accept but rather an alternative offered to retrenchment due to operational requirements.
- The Court further found that the proposals were the only reasonable and sensible means of avoiding dismissals and that *the failure of the employees to accept the proposals engendered an insurmountable operational requirements problem that constituted a fair reason for dismissal*<sup>[3]</sup>.
- In this respect the Court reiterated that once an impasse in the consultation process is reached a managerial prerogative exists to decide how to proceed going forward.

## 1. CONCLUSION:

- In circumstances where an employer’s operational requirements dictate that there is a need to alter the existing job categories and roles which are then offered to employees as alternatives to retrenchment such a dismissal will not amount to an automatically unfair dismissal and may be fair.
- Employees who are offered alternatives, such as in the NUMSA case, should be careful not to accept the positions offered as it may lead to their retrenchment.

<sup>[1]</sup> Judgement of the Labour Appeal Court under case number JA25/18 dated 13 June 2019

<sup>[2]</sup> Act 66 of 1995

<sup>[3]</sup> At paragraph 74 of the judgement