IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J1374/97

In the matter between :

E A FORDHAM **Applicant**

and

OK BAZAARS (1929) LIMITED **Respondent**

CONSTITUTIO

N OF THE COURT

REVELAS J

On behalf of Applicant :

P Buirskii

instructed by Marko Viljoen

On behalf of Respondent :

Adv A Myburgh

instructed by Deneys Reitz

PLACE AND DATE OF PROCEEDINGS : Arbour Square Braamfontein 8 December 1997

[1] The applicant was one of the chief executive directors of the respondent who was sold to the Shoprite on or about November 1997. At the time the respondent was a wholly owned subsidiary of the South African Breweries. The applicant had

been in the employ of the respondent for some 40 years after which the respondent ran into grave financial difficulties. The Competitions Board found that it was indeed a distressed company.

[2] On 12 November 1997 the applicant was notified that he had been identified as a candidate for retrenchment which would take effect on 12 December 1997. No consultation as envisaged by section 189 of the Labour Relations Act 66 of 1995 (hereafter "the Act") took place, and on 9 December 1997 the applicant brought an application seeking to compel the respondent to consult with him. A rule nisi compelling the respondent to consult with the applicant in terms of section 189 of the Act returnable on 5 January 1998 was issued. On the return day a postponement was sought in order to give the applicant an opportunity to file his reply to the respondent's answering affidavit in which it was alleged that consultations were held with the applicant on 9 and 11 December respectively. The matter was then postponed to the 15th January 1998.

[3] In its reply the applicant denied that what took place on 9 and 11 December constituted consultations within the meaning of section 189 of the Act. The respondent alleged that it had consulted properly with the applicant and in fact retrenched him on 12 December 1997. He received a retrenchment package in excess of R1 million. The applicant's monthly income was R45 000 per month.

[4] The applicant brought a fresh application for a variation of the order granted on 9 December 1997. It was argued that the variation was to give effect to the intention behind the order, namely to reinstate the applicant.The variation application also sought reinstatement of the applicant.

[5] It was submitted on behalf of the respondent that the

variation application was not competent in that the interim order granted was not interlocutory by nature and vastly distinguishable from instances in other cases where such variation orders were granted.

[6] It was also argued that the matter was not urgent and that the applicant had an alternative remedy, namely to refer the matter to the CCMA for conciliation.

[7] I am not persuaded that I can vary the order I gave. In my view it was a final order in that the respondent was compelled to consult with the applicant. That means the parties had to consult once and for all in terms of the Act. The intention of the order was not to suspend, rescind or set aside a retrenchment or to reinstate the applicant. I am firmly of the view that this court cannot in any event make such an order because the applicant has an alternative remedy, namely the process of conciliation at the CCMA. The nature of relief sought by the applicant is a *status quo* order. In terms of section 43 of the previous Labour Relations Act,28 of 1956 ("the 1956 Act"), parties could

approach the Industrial Court on affidavit to obtain status quo orders pending adjudication of their disputes in respect of dismissals. The absence of this type of procedure under the 1995 Act, is in my view, not due to an oversight on the part of the drafters of the Act. I believe the exclusion to be deliberate. Parties to a labour dispute are obliged to follow a conciliation process and if they cannot resolve their differences in that process, their dispute is adjudicated or arbitrated depending on its nature. The applicant's counsel argued that there was a lacuna in the Act. It was argued that an alternative remedy should be effective and in this particular matter, conciliation and adjudication was not an effective alternative and therefore the applicant was entitled to an amended order which had the effect of reinstating the applicant.

[8] It was also contended on behalf of the applicant that policy considerations should not be considered in respect of the question of an effective alternative remedy. Whether or not there were policy considerations, in the minds of the drafters of the Act, is not necessary for me to decide. I am convinced that I cannot introduce a new procedure whereby status quo orders can be granted in urgent applications on affidavit under the guise of an application to compel an employer to consult.

[9] In my view the applicant is seeking a more comfortable remedy rather than a more effective one as argued. It suits the applicant better to be reinstated on an urgent basis, rather than to go through the procedures provided for by the Act. The respondent contends that it did consult. This is in dispute. This is not a matter which can be decided effectively on the papers. Whether or not the respondent was indeed high-handed as alleged and whether it did or did not consult properly can only be sufficiently established in a trial. I believe that it was also the intention of the drafters of the Act that the court should establish such facts during trial rather than on affidavit. Hence the absence of a *status quo* procedure on affidavit in the Act.

[10] In the circumstances I am not willing to vary the order and the application is dismissed with costs.

[11] It is ordered that :

1. The rule nisi granted on 9 December 1997 is discharged with the respondent to pay the costs.

2. The application for variation under case number J1347/97 is dismissed with the applicant to pay the costs.

3. No order as to costs is made in respect of the postponement granted on 5 January 1998.

E REVELAS