IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN CASE NO: C192/97

In the matter between:

J NYANGA AND TWO OTHERS Applicants

and

ACCOLADE TRADING COMPANY LTD Respondent

J U D G M E N T

ZONDO J:

Introduction

[1] This judgment relates to a claim of unfair dismissal which has been instituted in this Court by the three applicants against the respondent. The respondent defends the claim. At the commencement of the trial the parties reached an agreement, which the Court approved, to separate the trial into two stages for convenience. The first stage would deal with evidence and arguments

necessary for the Court to make a finding whether or not the applicants' dismissal by the respondent was unfair. The second stage would deal with such evidence as any one of the parties or both parties may decide to lead, plus argument, in relation to relief, if any, which the Court should grant, if, in the first stage, the Court made a finding that the dismissal of the applicants was unfair. There would be no need for the second stage if the Court found at the end of the first stage that the dismissal had been fair. This judgment relates to the first stage only.

[2] During argument the fairness of the dismissal of the applicants was challenged on two grounds. The first was that the respondent had dismissed the applicants without consultation in terms of sec 189 of the Labour Relations Act, 1995 (**"the Act"**). The second was that the respondent should have transferred the applicants to other alternative positions within itself where there was work for labourers being performed by workers with lesser service periods than the applicants. It appropriate to set out below those provisions of sec 189 which appear relevant in this matter before considering these arguments in the context of the evidence presented.

[3] Sec 189(2) says the following:

"The consulting parties must 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 bedismissed; and

(c) The severance pay for the dismissed employees."

[4] What is clear from sec 189(2) is that the Legislature has placed a clear obligation on both employers and employees or those representing them to make a serious attempt to reach consensus on the issues set out therein. That subsection is no doubt a product of, among others, the decision of the Supreme Court of Appeal (the

Appellate Division before the new dispensation) in **Atlantis Diesel Engines (Pty) Ltd v NUMSA** (1994)15 ILJ 1247 A; 1995 (3) SA 22 (A). There the Appellate Division made it quite clear that consultation in a retrenchment situation is a joint problem-solving process between employers and trade unions and when consultations take place with regard to retrenchments, what is expected is a serious attempt by all parties involved in the consultation to try and reach agreement on, among others, the issues which are now set out in sec 189(2) of the Act.

[5] Section 189(3), (4) and (5) say:-

"(3)The employer must disclose in writing to the other consulting party all relevant information including, but not limited to -

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when or the period during which the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees who are likely to be dismissed; and

(h) the possibility of the future re-employment of the employees who are dismissed.

(4) the provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting."

[6] It seems to me that there is a clear relationship between subsection (5) and subsection (2). Subsection (2) is the subsection which gives the list of issues the consulting parties are required to attempt to reach consensus on and subsection (5) is the subsection that says the employer must allow the other consulting party an opportunity during consultation to make representations about any matter upon which they are consulting.

Then subsection (6) says:

"The employer must consider and respond to the representations made by the other consulting party and if the employer does not agree with them the employer must state the reasons for disagreeing."

Finally subsection (7) says:

"The employer must select the employees to be dismissed according to selection criteria :-

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective."

[7] In order to determine whether the respondent discharged its consultation obligation under sec 189, it is important to carefully scrutinise what transpired at such meetings as were held between the parties which the respondent relied upon as consultation meetings. I propose taking one meeting at a time, consider what was discussed in it as revealed by the minutes of such meeting supplemented as it might be by Mr Sturdon's evidence and testing its contents against the consultation requirement of sec 189 as I go along.

[8] Only the respondent adduced oral evidence in the first stage of the trial. This was done through Mr Frans Sturdon, the general manager of the respondent. After the conclusion of Mr Sturdon's evidence, the respondent closed its case whereafter the applicants, without leading any oral evidence, closed their case as well. The applicants were content to argue their case on the basis of the evidence presented by the respondent's witness.

[9] The parties also put up an agreed bundle of documents which was admitted as Exhibit A. That bundle contained certain relevant

correspondence which had passed between the Food and Allied Workers' Union, (**"the union"**), and the respondent as well as summaries of what transpired in certain meetings. For convenience I will refer to those summaries as minutes of those meetings, even though it may be inaccurate to refer to them as minutes.

Relevant Evidence

[10] The three applicants were employed by the respondent as part of a workforce totalling about, or just over, 100. They were dismissed with effect from 4 July 1997. They had been employed as security guards. In fact they were the only employees in the respondent's security department. Save for one issue which I will revert to shortly, the case was dealt with by both sides on the basis that the applicants were dismissed for operational requirements. That issue is that during argument the respondent's representative argued that the respondent was also influenced in its decision to dismiss the applicants by a suspicion that the applicants had involved themselves in a syndicate responsible for losses that the respondent had suffered as a result of

thefts.

[11] Mr Sturdon testified that in about December 1996 the management of the respondent began to notice that the respondent was suffering a reduction in its gross profit and this was cause for great concern to them. The management monitored the situation from then onwards. In February 1997 the situation reached unacceptable levels. As a result, auditors were appointed to conduct appropriate investigations. The report of the auditors was given to the management in June 1997. The report indicated that there were stocks missing. The auditors recommended, among other things, that the management should outsource its security function.

[12] A meeting was held between representatives of the respondent's management and the union on 11 June 1997. Nothing of significance turns on this meeting. Pursuant to the auditors' recommendation, the respondent concluded a contract with a security company, namely Coin Security, on the 13th June 1997 in terms of which Coin Security was going to provide security personnel to the respondent. A trial

period of three months commencing on 23 June 1997 for Coin Security was agreed upon. That agreement, inter alia, said **"after"** the trial period of three months it could be terminated within one month **"or to be confirmed"**.

[13] On the 19th June 1997 Mr Sturdon addressed a memorandum to the union and **"the employees concerned"**. In his evidence Mr Sturdon stated that, although the memorandum was addressed to **"the employees concerned"** as well, it had been sent only to the union and was never sent to the applicants. Accordingly the invitation was never conveyed to the applicants, and they did not attend the meeting. In that memorandum the respondent called a meeting for the 23rd June 1997 between itself, the union, the shop stewards and the employees who might be affected by the matter. The respondent said it was investigating a possible restructuring of its security division and one of the possibilities was the outsourcing of that department which, in turn, could lead to the retrenchment of all the staff in the security department. It was said also that the investigation of the possibility of outsourcing would be conducted

with employees being consulted as well. The memorandum said such meeting was the first consultative meeting.

[14] Mr Sturdon is reported as having explained at that meeting the enadequacy of the security arrangements that the respondent had and the losses that the respondent had suffered and referred to the meeting of 11th June. He said as a result of that meeting the union was aware of the problem. That is the first paragraph of the minutes. Save for the question of what prompted the meeting, the first paragraph does not, as yet, deal with any issues which are supposed to be the subject of consultation in terms of sec 189(2). The second paragraph says:

"Jeremiah expressed his understanding but said that nevertheless it was a serious situation when staff had to be retrenched and that therefore full details of the various options open to them must first be put on the table so that these could be evaluated to see which would give the best opportunity in the future."

From this it is quite clear that the union official wanted to see various

options being placed on the table for discussion. The minutes then proceed in these terms :-

"**Mr Sturdon told the union that CoinSecurity were presently doing an evaluation of the site and were operating side-by-side with the security personnel"** of the respondent. That marks the end of the first page of the minutes. The first page of the minutes does not contain much that can be said to deal with the issues listed in sec 189(2), save that at the bottom thereof Mr Sturdon is said to have told the union that Coin Security had agreed to take the security personnel into their training scheme and that this could offer them a future in the area in which they had some expertise. One could say that, to some extent, that issue relates to sec 189(2)(a)(iv), which is to mitigate the adverse effects of the dismissals. The minutes continue thus:

"It was agreed that the respondent would obtain details of the pay rates, the length of the training programme, the likelihood of placement etc. from Coin Security and also give consideration to what other alternative positions could be offered within the company." The matter relating to what otherpositions the company could offer in other departments internally would be a matter relating

to sec 189(2)(a)Ii), which is, to avoid the dismissals. The minutes go on thus :-

> **"It was pointed out, however, that in all likelihood any positions that the company might have would be positions where the workers would work as labourers."**

[16] The last paragraph of the minutes of that meeting says:**"It was agreed that due to the sensitive nature of the positions of these people, that they would not be told of their possible retrenchment or their reassignment until the next meeting on Thursday, 8am, by which time all the relevant information would be available. Mr Sturdon requested in particular that the shop stewards respect this agreement and not speak to the security people before Thursday."**

So at best for the respondent, if one looks at the meeting of the 23rd June, there was mention of a matter that related to sec 189(2)(a)(I) and mention of a matter relating to sec 189 (2)(a)(iv). None of

the other issues or subjects which section 189(2)(a) says the parties must consult about were discussed.

[17] In relation to that meeting, the provisions of sec 189 (3) would need to be looked at as well. They required the respondent to disclose in writing to the other consulting parties inter alia the reason for the proposed dismissal and the alternatives that the respondent had considered before proposing dismissals and the reasons for rejecting each one of such alternatives. As the idea of the respondent's security staff being taken over by Coin Security would only apply if the applicants were dismissed, it cannot be said that a discussion of that issue was a discussion of an alternative to dismissal.

[18] With regard to the respondent having been obliged to disclose to the applicants or their union in terms of sec 189(3) the number of employees likely to be affected and the categories in which they were employed, the respondent focused on the security personnel which had only the three applicants. Sec 189(3)(d) required the respondent to disclose the proposed method for selecting which

employees might be dismissed. Save to say that throughout the meetings the respondent focused its mind on the security personnel, it does not appear that at the meeting of the 23rd, the respondent placed the issue of the selection criteria on the table for discussion. It seems quite clear that the meeting of the 23rd cannot alone be said to have satisfied the requirements of section 189. But that was not the only meeting and, therefore, it is necessary that what transpired in the other meeting or meetings also be considered to see whether through those meetings the respondent did discharge its consultation obligations under section 189.

[19] The next meeting that took place between the parties was held on the 26th June 1997.This was the first meeting the applicants attended in regard to the matter. The union official was also present as well as the two shop stewards. The first paragraph of those minutes relates to the respondent's management explaining to the applicants that, because of losses suffered by the respondent due to thefts in the company, an outside professional security company was to be considered and that Coin Security was willing to consider

all three of them for training, provided they satisfied certain minimum requirements. The minimum requirement included the ability to read and write English, undergoing a training programme and passing some examination. That first paragraph ends with the respondent saying, once those requirements had been met, the three were guaranteed employment with Coin Security.

[20] If one looks at the issues which sec 189(2) says must be the subject of consultation by this stage of the meeting, it is clear that a number of those consultation issues had not yet been discussed. The second paragraph says:

"Jeremiah requested details of Coin's rates of pay and this was provided as follows ..." and rates of pay are then given in the minutes.

The last paragraph of the first page of those minutes says:

"The employees discussed the situation and advised that as going rates were worse they would be worse off with Coin and prefer to stay with the company and be placed in alternative positions."

So by the end of the first page of those minutes, there was not as yet

a consultation on all the issues mentioned in sec 189 (2) of the Act.

[21] The next page of the minutes needs to be considered. The first paragraph in that page consists of Mr Fick, one of the representatives of the respondent's management, responding to the applicants' suggestion, as it appears towards the end of the first page of the minutes, that they would prefer that alternative positions be investigated for them within the company in other departments. Mr Fick emphasised a point which had been mentioned at the meeting of the 23rd that such positions as might be available would be positions for labourers. The second paragraph consists of the applicants saying they had been loyal to the company and they would rather do whatever other work was available within the company.

[22] Next comes Mr Sturdon saying he would get a representative from Coin Security to come and explain to the applicants the set up at Coin and answer any questions they might have. Also he said the rates from Coin might be due for increase.

The last paragraph of the minutes reads thus :-

"The meeting was closed on the basis that no finality had yet been reached and that a further meeting would take place once the staff had met with a Coin representative."

So, once again, if one looks at the matters which section 189(2)(a) says the consulting parties must attempt to reach consensus on, it is clear that a number of issues set out there had not yet been discussed by the end of the meeting of the 26th.

[23] On the 27th June 1997 the owner of the company, one Mr Abrahams was consulted by Mr Sturdon about whether there could be any positions available within the company which the applicants could be transferred to. Mr Abrahams was overseas at that time. Mr Abrahams advised that there were no alternative position within the company. According to Mr Sturdon, a

decision was taken by the management of the respondent on the same day, namely 27 July, to retrench. It is clear from the evidence of Mr Sturdon and the documentation that the decision to retrench was the decision to retrench the applicants. So only two

meetings which were intended to be consultation meetings had taken place by the time the decision to retrench the applicants was taken. None of these meetings can be said to have been proper consultations as required by section 189.

[24] In his letter of the 3rd July 1997, Mr Sturdon called for a meeting to be held on the same day. In part Mr Sturdon said the following in that letter **"On Friday, the 27th, management spoke with Mr Abrahams, the owner of the company, who is presently overseas, and after consultation with him and consideration of the issue, it was decided that redeployment within the company was not possible for a number of reasons, amongst them (a) the company in its present unsure state, as a result of the thefts, should not make any additional employee appointments over its present levels in the remaining departments; (b) the positions which might have been available were very different to the positions and type of work presently performed; (c) the opportunity for alternative employment with Coin Security exists;**

(d) due to the nature of the stock losses and the resultant suspicions which inevitably occur in such situations, a breakdown of the trust relationship between the company and the security personnel has occurred and this uneasy relationship would be carried forward if the staff were redeployed into other positions. On Friday afternoon, 27 June, after the discussion and consultation referred to above with Mr Abrahams, FAWU was contacted and Mr Sturdon spoke to Jeremiah and advised him of the decisions of the company as above and was informed that the company should go ahead and inform the employees and shop stewards and deal with them directly. The company has therefore called this meeting on the 3rd July of the shop stewards and employees involved to discuss and finalise the retrenchments which it proposes will be on the following basis:

(a) date of retrenchment (immediate);

(b) notice of pay (two weeks commencing from the 4th July);

(c) severance pay (1 week pay completed year of service."

[25] As can be seen from the excerpt from the letter, Mr Sturdon said positions which might have been available were very different to the positions and type of work then performed by the applicants. This seems to be the respondent's reply to the applicants' request that alternative positions be investigated for them within the company. The use of **"might"** in Mr Sturdon's letter in this regard seems to suggest that no proper investigation was made as to whether there were or there were no alternative positions available. One would have thought that, if there had been a proper investigation to see whether, indeed, there were or were no positions, Mr Sturdon would state clearly that that had been done and there were no positions. He does, of course, indicate that Mr Abrahams said there were no positions available. But in this regard it must be remembered that the workers had indicated that they could perform any other job. If there were any positions involving work which the applicants could perform, they were willing to perform such work. For this reason that those positions might have been for labourers ought not to have been used as an excuse not to agree to the applicants' request.

[26] In the letter Mr Sturdon also stated that the opportunity for alternative employment with Coin Security existed. What is surprising is that, even at the time of giving evidence in this Court, Mr Sturdon still did not know the nature of, for example, the examination which the applicants were going to be required to pass as part of Coin's minimum requirements. One would have thought that all these matters would have been properly investigated before a final decision was taken so as to see the extent of such prejudice as the applicants might have had to suffer if they were taken over by Coin Security. Of course, Mr Sturdon said the applicants did not show interest or were not willing to go to Coin Security. The difficulty I have with this is that, although the applicants expressed their preference, they had asked that further details be obtained with regard to certain matters, and some of those matters were not investigated, for example, what examination they would have to pass and to what extent or what chance they had of passing that examination.

[27] Subsequent to the letter of the 3rd July, the management representatives, the shop stewards and the applicants held a meeting

on the same day. The meeting called on 3 July 1997 did not proceed into any discussion of any of the issues as the shop stewards and the applicants asked for the postponement of the meeting so that they could try and get hold of the union official, Mr Jeremiah Diniso, to attend a postponed meeting. The respondent's attitude was that it was prepared to agree to a postponement of the meeting on condition that the only matter that would to be discussed in the postponed meeting would be the severance terms of the retrenchment of the applicants. This implied that the respondent was not prepared in the event of a postponement to discuss any other issues which ought to be discussed at a retrenchment consultation held in terms of section 189 of the Act. The meeting was postponed to the 4th July 1997 though the shop stewards apparently never agreed to the condition which the respondent wanted to attach to the postponement.

[28] On the 4th July 1997 the postponed meeting resumed. Again the shop stewards and the applicants asked for a further postponement of the meeting. This time they asked that it be postponed to the 9th July which was the date the union official had said he would be

available on to attend such meeting. On this occasion the respondent was only prepared to postpone the meeting to the 9th on the basis that all that would be left to discuss would be the severance package and that its decision to retrench would no longer be the subject of discussion. The shop stewards and the applicants were dissatisfied with this and maintained that, as far as they were concerned, all issues had to be discussed. The applicants made it clear that they had never understood what the management said at the meeting of the 26th June 1997 to be that their the retrenchment was being considered. In this regard the management referred them to the memorandum of the 19th June and maintained otherwise. At this meeting the management handed the applicants a memorandum confirming that their retrenchment was with effect from 4 July 1997, a date that the management had indicated in its letter of 3 July as the date they were proposing would be the date for the terminations to take effect. The meeting ended up being postponed but the 4th remained as the date when the dismissal took effect.

[29] Whatever might have happened after the 4th July would not, in

my view, have assisted the respondent in its contention that it complied with sec 189 that section contemplates that the consultation which is required should take place before the decision to retrench workers is taken. This is clear from the opening words of sec 189(1) where the Act says:**"When an employer <u>contemplates</u> dismissing one or more employees for reasons based on the employer's operational requirements ..."** (My underlining). In those circumstances in dealing with the question whether the respondent discharged its duty to consult under sec 189 I do not propose considering what was discussed at any meetings that might have taken place after the 4th July 1997. It cannot be said that when an employer has already dismissed or has already decided to dismiss specific employees, he was still contemplating dismissing them. In this matter the respondent did not, in my view, discharge its obligation to consult as it was required to by section 189 of the Act.

[30] The other ground on which the dismissal was challenged was that the respondent had retrenched the applicants in circumstances

where there were other workers with lesser periods of service than themselves who were performing work which the applicants could perform. Mr Sturdon also gave evidence under cross-examination which was to the effect that, when the applicants were retrenched, there were employees in the employ of the respondent employed as labourers in other departments who had lesser service periods than the applicants. Owing to the age of one of the applicants, Mr Sturdon had doubts about whether he could perform the labourer's work. As to the other applicants he believed that they could do such work. In regard to this ground of challenge Mr Bagraim, who appeared for the respondent, argued that there was no requirement in section 189 that, when an employer has to close down a particular department, he is obliged to transfer employees with longer service from that department to other departments if there are workers in the other departments doing work which can be done by longer serving employees from the department which is being closed.

[31] In the view of this Court the requirement that the selection criteria must be fair and objective envisages that, if an employer

selects employees with longer service periods for retrenchment in one department when there are workers with lesser periods of service in other departments performing work which the first mentioned workers can perform, that selection for dismissal is prima facie unfair. It would then be up to the employer to place before the Court any circumstances or evidence justifying the application of the LIFO selection criteria in such a manner (See SACCAWU & Others v Game Discount World [1994] BLLR 108 (IC) at 114 C-D). It may be argued in a particular case that to do this would cause severe disruption to the operations of the employer but, in this case, no evidence was led to show what disruptions, if any, would have been caused if the respondent had transferred the applicants to those departments or to those jobs where there were workers with shorter service periods than themselves who were performing work that the applicants could do.

[32] If an employer is able to do as the respondent did in this case, this may open room for employers to dismiss workers under the guise of retrenchment for reasons other than retrenchment. Once

an employer knows that a particular department will soon have to close down, he may transfer to that department employees from other departments whom he would like to get rid of when he has no lawful and fair reason to base their dismissal on. Indeed, in this case, the respondent did not want to transfer the applicants to other departments because, by its own admission, it suspected them to have been involved in the thefts which were causing the respondent enormous losses.

[33] Indeed, Mr Bagraim submitted that the respondent was influenced at least in part by the suspicion about the possible involvement of the applicants in the syndicate which was responsible for the thefts of the respondent's goods in deciding to retrench the applicants or in deciding not to retain them. In fact the letter of 3 July 1997 from Mr Sturdon to the union supports Mr Bagraim's argument because in that letter Mr Sturdon mentioned this as one of the factors which had been considered in regard to the decision to retrench. The relevant paragraph in the second page of that letter says :-

"Due to the nature of the stock losses and the resultant suspicions which inevitably occur in such situations, a breakdown of the trust relationship between the company and the security personnel has occurred and this uneasy relationship would be carried forward if the staff were re-deployed into other operations."

It seems to me that this may well be a case where the employer uses dismissal for operational reasons to get rid of workers whom he is unable to get rid of on grounds of misconduct because there is no evidence to justify a finding that the employees are guilty. Dismissals for operational requirements should never be used to bypass normal disciplinary procedures.

[34] It is clear that the respondent refrained from what would have been a fair application of the LIFO selection criteria because of the suspicion that the applicants were involved in the theft of its goods. This being the case, I find it very strange that this is mentioned as the attitude of the respondent in the quoted paragraph when elsewhere in the documentation placed before the Court and, this also emerged from the evidence of Mr Sturdon, the respondent was saying to the

applicants they would be re-employed if vacancies arose. The question arises: if the attitude of the respondent as at the 3rd July 1997 or as at the time of their dismissal was that they could not be transferred to other positions within the company because they were suspected of having been involved in theft, how genuine was the respondent's offer to them that, if there were vacancies which arose in the future, they would be re-employed? When one deals with that aspect of the matter questions arise also with regard to the evidence which emerged that about six weeks ago the respondent employed about 12 workers and none of the applicants were employed. I am, however, not going to go into that as that may be relevant for purposes of the second stage of the trial.

[35] In conclusion I am satisfied that the respondent has failed to discharge its obligation in terms of section 189 and that the dismissal of the applicants was unfair. Accordingly the finding I make is that the respondent's conduct in dismissing the applicants, as it did, was unfair. Costs will stand over until the conclusion of the second stage of the trial. The Registrar is to enrol the

matter for the hearing of evidence in relation to the issue of relief as agreed between the parties.

R. M. M. ZONDO

Judge : Labour Court of South Africa

Date of Trial	:	01 June 1998
Date of Argument	:	01 June 1998
Date of Judgement	:	05 June 1998
For the Applicants	:	Mr C. Kahanovitz
Instructed by	:	Cheadle Thompson & Haysom
For the Respondent	:	Mr M. Bagraim
Instructed by	:	Michael Bagraim & Associates CC