IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
CASE NO. P22/97
P23/97

In the matter between:

PHILLIPS First Applicant

CARELSE Second Applicant

HUNTER Third Applicant

and

TEDELEX Respondent

J U D G M E N T

MLAMBO, J:

[1] From December 1995 the respondent, a wholly owned subsidiary of Malbak, started experiencing financial difficulties as a result of a number of factors. For the 1995/1996 financial year respondent suffered losses in the amount of R40 million. It tried to solve these problems in a number of ways, one of them the reduction of personnel. There was no measurable success however. Further attempts at solving the problems were initiated until July 1996 when respondent was put up for sale as part of the unbundling initiative encouraged by government. It appears that during

September 1996 the directors of the respondent called for ideas and plans from its branch managers to submit in order to give them an idea how they, as branch managers, saw the solution to the problem. These ideas and plans were submitted in around October 1996 and were discussed.

[2] The three applicants were all employed in the East London branch of the respondent. Their branch manager, Mr Kerr, also submitted his plans to head office. In management discussions it became apparent that its dilemma was momentous. It became clear that it should either close or do something drastic if it had to survive. However everything depended on the intentions of whoever eventually purchased the respondent. Management's thinking was that it should undergo a structural change. At that stage, during November/December 1996, two concerns had made a bid to purchase the respondent but no decision had yet been made.

[3] Due to a moral responsibility, as the Director of the respondent's main board responsible for human resources Mr Deetlefts put it, on 6 December 1996 a letter was sent out allegedly to all employees advising them of the problems besetting it and the uncertain future all and sundry faced. The letter spelt out its grim message as follows:
"The financial trading losses of Tedelex which exceeded R37 million during the past financial year sadly still continues to accumulate. In consequence hereof, it is anticipated that any new owner of Tedelex will embark on a significant restructuring programme in an effort to make the company a profitable asset. Retrenchments will

obviously follow from such an exercise.

At this point in time, it is unclear to Management what the impact of this restructuring and retrenchment will be, but retrenchments could be effective as early as January, 1997.

As mentioned above, names and numbers of future retrenchees are unknown at this stage. However as the Christmas spending season is approaching, Management feels morally obliged to highlight the imminent retrenchments as a cautionary measure to all employees, trusting that bonus and leave monies will be spent, taking into account the contents of this notice."

The letter was put in the pay packets of all monthly paid employees whose pay packages were prepared at Head Office in Johannesburg. Hunter, one of the applicants, a monthly paid employee, admitted in evidence that he received this letter. The other two applicants, Carelse and Phillips, who were both weekly paid employees denied receiving the letter or being aware of its contents at the time.

[4] The contents of the letter and the time when it was sent out were bound to evoke keen interest amongst employees. Danie Pretorius who was subpoenaed to give evidence by the applicants, confirmed that the letter indeed evoked excited discussion amongst employees. Though he conceded that, as a monthly paid employee, he could not confirm that weekly paid employees received this letter, he, however, stated that any employee in the East London branch who pleaded ignorance

of the letter and its contents would be lying. I have no reason to reject his evidence on this issue as the letter was the sort of letter that bore tidings of a grim future for all and sundry. I accept that employees spoke about the letter and even if weekly paid employees might not have received it, they certainly became aware of it and its contents.

[5] Be that as it may, on 20 December 1996 the respondent, was sold to the Cohen group led by Mr Cohen a former managing director of the respondent. About nine working days later, on 6 January 1997, a meeting of directors and the new owners was convened. The new owners gave the directors of the respondent two weeks to turn it around. It appears that as one of the efforts of turning the respondent around, the directors of the respondent made a number of decisions, one of them the out-sourcing the Service Division in East London where the applicants worked.

[6] On 20 January 1997, the respondent issued out a notice to all employees. The notice stated:

"As indicated to all employees in a special notice dated December 6, 1996 retrenchments are imminent.

The new owners of the company have now instructed that the accumulating financial losses of the company be addressed immediately. This action requires that the company operations be restructured significantly, which will result in redundancies.

Further discussions on these restructuring programmes will now take place as a matter

of urgency with the trade Union and other relevant parties before implementation. In the interim period, it has been decided to grant employees the option of voluntary retrenchment, where the company is able to accommodate such requests."

Despite this communication nothing else of substance was communicated to employees, e.g. that the directors of the company had taken a decision to invite bidders to take over the Service Department.

[7] On 25 January 1997 a meeting between the management of the respondent and Mr Gavin Taylor ("Taylor") took place in Johannesburg. Taylor was, at that time, employed as the service manager of the Service Department in East London and had apparently been earmarked, since December 1996, by the respondent to take over the Service Department. On that day agreement was reached that Taylor would take over the Service Department. The effective date of the agreement was 1 February 1997. The very next Monday, i.e. two days later, on 27 January 1997, Taylor spoke to all the employees in the service division. He had apparently prepared a list wherein he had listed those employees he would be taking along with him and those employees he was not interested in. He testified that he prepared this list in December 1996. Two of the applicants, Hunter and Phillips, were on the list of people Taylor did not want to take along with him. They are listed under the category: "Staff to be retrenched by Tedelex". Only Carelse, the other applicant was on the list of people who was to be taken over by Taylor in his new venture. Hunter was informed of his retrenchment on 27 January 1997 his last working day being 31 January 1997. Phillips and Carelse are

alleged to have applied for voluntary retrenchment packages. Their last working day was also 31 January 1997.

[8] The applicants come to this court alleging that they were all unfairly retrenched by the respondent and that the respondent failed to adhere to the requirements of section 189 of the Labour Relations Act, No. 66 of 1995, as amended. They seek compensation.

The respondent, for its part, argues that, Phillips, voluntarily accepted a retrenchment package, i.e. he signed a voluntary retrenchment form on 28 January 1998 as well as Carelse. The respondent, however, states that Carelse was offered a job by Taylor but declined it on the basis that he was too old, about 58 years old and that he wanted to rest. As far as Hunter is concerned, the respondent alleges that it complied with the provisions of section 189 and that his retrenchment was not effected in procedurally unfair manner.

[9] Section 189 provides for the timing when the employer should consult with the affected employees, the form the consultation should take and the substance of the consultation process. The consultation process envisaged in Section 189 is "an exhaustive joint problem-solving or consensus seeking process between the employer and the consulted parties. It is a process that is not sporadic or superficial." **Numsa a.o. vs Comark Holdings (Pty) Ltd** (1997) 5 BLLR 589 (LC) at 597 E-F.

[10] The obligation to consult placed on an employer was aptly described in **National Union of Metal Workers of SA vs Atlantis Diesel Engines (Pty) Ltd** (1993) 14 ILJ 642 LAC at 650 A-C as follows:

"It simply means that an employer, who senses that it might have to retrench employees in order to meet operational objectives, must consult with the employees likely to be affected (or their representatives) at the earliest opportunity in order to advise them of the possibility of retrenchment and the reasons for it. The employees or their representatives must then be invited to suggest ways of avoiding terminations of employment, and should be placed in a position in which they are able to participate meaningfully in such discussions. The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward."

This was approved by the Appellate Division in **Atlantis Diesel Engines (Pty) Ltd v National Union of Metal Workers of SA** (1994) 15 ILJ 1247. At P1252 E-S the Learned Judges of appeal said:

"It seems to me that the duty to consult arises, as a general rule, both in logic and in law, when an employer, having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; and appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure. Once that stage has been reached, consultation with employees or their union representatives becomes an integral part of the process leading to the final decision on whether or not retrenchment

is unavoidable. Consultation provides an opportunity, inter alia, to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchment (or softening its effect) and to discuss and consider alternative measures."

[11] The Labour Court has embraced these views as being what the legislature intended in Section 189. It means therefore that once an employer has recognized the need to retrench as a way of resolving its problems Section 189 makes it obligatory on the employer to formally informs its employees of the problems and that it is of the view that retrenchments will alleviate the situation. In this formal notification the employer is obliged to inform those employees it has identified and fully disclose to them its basis for having selected them.

[12] In doing so the employer must invite the employees it is consulting to come up with suggestions of alternative ways to resolve the problems other than retrenchments. The Act requires the employer to keep an open mind and to seriously consider any alternatives suggested. The same is equally applicable to alternative selection criteria suggested by the consulted employees. Throughout this process the employer is required by the Act to disclose relevant information including information requested by the consulted employees. It is clear that awareness by employees that their employer is undergoing financial or other operational problems is not the same as awareness of what the employer's thinking and/or intention is to solve those problems. One cannot therefore rely as a basis for retrenchment that employees were aware of the problems

if the employer omitted to inform the employees that retrenchment was the solution as well as invite them to come up with suggestions on alternatives.

[13] Whilst Section 189 places such obligation on employers, it is implicit that the consulted parties also have certain obligations. It is clear that once an employer has invited employees to consult on possible retrenchments that the employees must participate meaningfully. Meaningful participation is when employees motivated alternative ways to solve the problem and avoid retrenchments. Meaningful participation is also where the consulted employees request the employer to disclose information which will assist them throughout the process. Meaningful participation is where the consulted employees point out flaws in the employers selection criteria and provide other selection criteria which in their view are fair.

[14] A consulted party who does not participate in the process as set out above sends a clear message to the employer that there is acquiescence with his reasons to retrench and his selection criteria. The consulted employee cannot be heard later to complain about the unfairness of the retrenchments. The process is such that the Labour Court seized with a retrenchment dispute will be primarily concerned with whether the employer adopted a fair procedure as required by Section 189 before retrenching. It is not the duty of the court to second guess the employer's reasons for retrenching if there was acquiescence with those reasons at the consultation stage. It is only where the employer's reasons were challenged and alternatives suggested, which were allegedly ignored, will the court enquire whether those alternatives were

considered and whether they were indeed, objectively viewed, a better option to retrenchment.

Did the respondent comply with Section 189:

[15] It is common cause that:

15.1 Respondent sent out a letter to its monthly paid employees on 6 December 1996 wherein the possibility of retrenchment was mentioned.

15.2 The respondent was purchased by the Cohen group on 20 December 1996.

15.3 There was a meeting of the new owners and respondent's directors on 6 January 1997 wherein respondent's directors were given 2 weeks to turn the financial situation of respondent around.

15.4 On 20 January 1997 respondent sent out a letter to all employees inviting those interested to apply for voluntary retrenchment packages.

15.5 On 25 January 1997 at a meeting in Johannesburg respondent selected Gavin Taylor to take over the Service Department (where all three applicants were employed) and reached agreement with him to take it over forthwith.

15.6 Mr Kerr met with 3 employees from the Service Department after the letter of 20 January 1997 was issued.

[16] The evidence reveals that the only formal discussions between respondent and its employees regarding the possibility of retrenchments were the following:

16.1 The meeting in Kerr's office between Kerr and two employees from the Service Department.

16.2 The meeting between Kerr and Phillip's when the latter came to enquire about a voluntary severance package, also after 20 January 1997.

16.3 The discussions between Hunter and White as well as between Kerr and Hunter.

[17] One inescapable fact established by the evidence is that right through the period until 25 January 1997 the respondent itself did not know who were likely retrenchees. This became clear at the meeting with Taylor in Johannesburg on 25 January 1997. On 20 January 1997 when respondent set out a notice to all employees and inviting them to apply for voluntary retrenchment packages it did not know who had been selected to be retrenched. In fact no selection had been done by anyone save by Taylor during December 1996 who kept this to himself.

[18] During the meeting between Kerr and Hunter where Hunter proposed to take over the Service Division Kerr told him that the respondent would not prefer him but Taylor for the deal. After telling Hunter this, Kerr did not also tell him that he (Hunter) had been selected for retrenchment. In fact he could not tell him this because he did not know at that stage that Taylor did not have Hunter in his future plans.

[19] The respondent's conduct of informing all its employees of the possibility of retrenchment is commendable. However throughout this information giving exercise no

retrenchment candidate had been identified. Consultations proper could only start once those identified as not forming part of Taylor's future plans became known.

[20] Kerr's evidence was that on numerous occasions after the letter of 6 December 1996 was issued, scores of employees approached him wanting to know how the situation would affect them. He testified that in response to these queries he told employees that he will be in a position to tell them how the situation would impact on them once there was certainty about new owners. I turn now to consider each applicant individually.

Phillips:

[21] The only formal contact between respondent, represented by Kerr, and Phillips occurred after 20 January 1997, after Phillips received the notice inviting employees to apply for voluntary retrenchment packages. Phillips approached Kerr and wanted to know more about the situation and the voluntary retrenchment packages. He in fact documented this request in a handwritten letter. The letter states:

"RE: RETRENCHMENT PAGAGE (SIC)

Please supply in detail as to what this retrenchment pagage (sic) hold. Eg.

How much will my Pro Rata bonus be.

" " " Severance pay be.

" " " Leave pay be.

" " " Pension be.

“ ” “ Total amount be.

NB Also state in future if I will still be under Tedelex or new company.”

[22] The respondent seeks to argue that this meeting with Phillips was one of the consultations meetings it had with him. Kerr testified that in this meeting Phillips stated that he requested the information as he wanted the package having worked too long for the respondent. He allegedly further stated that he did not see himself working for a new company. Phillips, for his part, states that after he submitted his written request for the information, he never received a response. He, however, discussed the whole matter with his wife at home and his wife apparently told him the benefits of taking a retrenchment package. The respondent alleges that because of that meeting between him and his wife he then, on 28 January 1997, applied for a voluntary retrenchment package by singing a voluntary retrenchment application form. However, only Kerr seems to be the person who saw that signed form. No one else saw it, it was not produced in this court and no one can say what happened to it. Phillips denies that he ever signed a voluntary retrenchment application form. He says on 27 January 1997 he just came into Kerr’s office and said “I have just been told there is no work for me, I therefore want my money.” He also apparently spoke to someone, probably Mr Deetlefts at the head office of the respondent in Johannesburg. It was argued for respondent that this was a continuation of the consultation process where the severance package was discussed.

[23] Kerr’s evidence is that he spoke to Phillips again on Tuesday 28 January 1997

when Phillips allegedly signed a voluntary retrenchment application form. This must have been after he was told by Taylor that he would not offer him employment. Phillips denies that he signed a voluntary retrenchment application form.

[24] I find it very strange that the voluntary retrenchment form allegedly signed by Phillips cannot be accounted for. I find it strange that that document could be lost whilst other documents can be accounted for. Furthermore Kerr is the only person who is supposed to have witnessed the signing but he can't tell the court what happened to the document.

[25] I'm of the view that no such document ever existed. I do not believe Kerr on this issue. Phillips never applied for a voluntary retrenchment package. I accept that he was told by Taylor that there was no longer any work for him and thereafter he went and demanded his money. It is further strange that Kerr, having known on Saturday 25 January 1997, that Taylor would not take Phillips, that he would wait for Taylor to inform Phillips of this fact before offering him continued employment. It is clear that once Kerr knew that Phillips would not be going with Taylor, he had no further use of him. The voluntary retrenchment package story is an excuse aimed at justifying Phillip's dismissal. The fact of the matter is that Phillips was dismissed for operational requirements without compliance with Section 189 of the Act.

[26] The meeting between Kerr, Van Zyl and Pretorius can hardly amount to consultation as contemplated by Section 189. Phillips was adamant that he had

elected no one to represent him in those discussions with Kerr. Pretorius was equally adamant that he had been chosen by no one to meet with Kerr. In any way it is nonsensical that Kerr would rely on this meeting as a consultation meeting because at that stage he didn't know who was to be retrenched. He could therefore not consult on retrenchments if he wasn't aware who was to be retrenched.

Hunter:

[27] As far as Hunter is concerned I am equally not persuaded that respondent complied with Section 189. When Hunter suggested that he take over the Service Division he had not been told that he was to be retrenched. Hunter's suggestion was on the basis that if it came to outsourcing the Service Division he wished to be considered to take it over. At that stage nothing had been finalised with Taylor and, clearly, respondent was in favour of Taylor taking over the Service Division not Hunter.

[28] The discussions relating to the Transkei work as well as odd jobs for Taylor to be performed by Hunter, could only have taken place after Hunter was retrenched. These discussions are presupposed on Taylor having already taken over the Service Division. This occurred after 25 January 1997 i.e. after Taylor presented his list depicting Hunter as one of those not being taken over. Kerr has not testified what alternative position he had for Hunter and one can only conclude that there was no such alternative position. Clearly Hunter was retrenched without compliance of Section 189. No case of any urgency was made out justifying respondent's failure to comply

with Section 189.

Carelse:

[29] The respondent's case is that Carelse was offered continued employment by Taylor but declined and opted for a voluntary retrenchment package. This is denied by Carelse who insists that he was also retrenched. It is common cause that Carelse is one of the people who appear in Taylor's list of employees he was taking with him. Carelse's situation, as far as Taylor was concerned, was different to that of Phillips and Hunter. Taylor testified that he had decided sometime in December 1996 that he would offer Carelse employment.

[30] When Taylor listed Hunter and Phillips as employees to be retrenched by the respondent their fate was sealed. All the persons who Taylor had listed as going with him, went with him save for Carelse. Other than denying that he was offered a job Carelse did not give any evidence why he was retrenched if in fact in Taylor's list he was to continue employment. On a balance of probabilities Carelse must have been offered employment by Taylor and in turn he must have declined the offer. In this regard I believe Kerr's evidence that on 28 January 1997 Carelse told him that he was old, was not interested in working anymore and wanted his money.

[31] Mr Matthee, for the applicants, argued that, even if Carelse was offered work by Taylor, the respondent was obliged to consult with Carelse regarding this transfer. Mr

Matthee relied on Section 197 for this proposition.

Section 197(1) provides that:

"A contract of employment may not be transferred from one employer to another employer without the consent of the employee unless:

(a) the whole or any part of the business is transferred by the old employer as a going concern; or

(b) the whole or part of the business is being transferred as a going concern -

(i) if the old employer is insolvent and being wound up or is being sequestrated; or

(ii) because a scheme of arrangement or compromise is being entered into to avoid winding up or sequestration for reasons of insolvency."

[32] Clearly, as the section implies, the consent of Carelse to be transferred to Taylor's undertaking was not required under the circumstances that prevailed then.

Section 197(2)(a) provides that:

"If a business, trade or undertaking is transferred in the circumstances referred to in subsection 1(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer."

[33] Mr Matthee, who appeared for the applicants, has argued that the phrase "unless otherwise agreed" in subsection (2)(a) implies that a consultation is necessary. He states that section 197(3) provides that an agreement, as contemplated in Section 197(2) must be concluded with the appropriate person or body referred to in Section 189(1). Mr Matthee argued that persons not contemplated for retrenchment must be consulted about the transfer of their employment contracts. He submitted that consultation is necessary in the sense that employees have to be told what the conditions of employment will be with the new employer. If, as in this case, the conditions are going to be different, there should be agreement on those conditions.

[34] The provisions of Section 197 are very clear. Consultation is obligatory where the situation in 197(1)(a) and (b) is not applicable. The phrase "unless otherwise agreed" in Section 197(2) only applies where the terms and conditions with the new employer will be different. In a situation where the old employer transfer his business as a going concern without consulting the employees affected then the Act protects and maintains the same conditions of employment of those employees.

[35] While it is correct that some conditions were altered by Taylor it is clear that this was not done unilaterally. Taylor negotiated this change of conditions and obtained consent from those affected after the transfer. This cannot provide justification for Carelse's refusal to have his contract transferred. No evidence was led suggesting that Carelse was offered different conditions of employment hence his declination of the offer.

Compensation:

[36] Mr Matthee has argued that this court is empowered to award damages as well as compensation should it find that a dismissal was an unfair one. The relevant section here is Section 193. Section 194 deals with the limits on compensation. Throughout Sections 193 and 194 the term used is "compensation". Sections 193 and 194 empower the Labour Court to award compensation not damages. For purposes of the compensation to awarded to Phillips and Hunter I have taken into account that the applicants have failed to make out a case that their dismissal was effected for a substantively unfair reason. They are therefore entitled to compensation in terms of Section 194(1). I have also taken into account that this matter could have been finalised during September 1997 but for the error by the Registrar. It is equally correct that the matter could also have been finalised during February 1998 but for Mr Matthee's unavailability then, to continue with the matter. I therefore exclude the months of October, November, December 1997 and January 1998 as well as March and April 1998 from the calculation of compensation.

Costs:

[37] The applicants have largely been successful and on that basis I do not deem it just to order Carelse to pay any costs.

[38] I therefore make the following order:

1. The dismissal of Phillips and Hunter for operational reasons was procedurally unfair and not in compliance with Section 189.

2. The respondent is ordered to pay Phillips and Hunter compensation equivalent to 10 month's salary each.

3. The respondent is ordered to pay the applicants' legal costs except the costs of the first day of the proceedings.

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Mlambo J

Appearing for the applicants: Mr Matthee instructed by Linde & Doringtong Inc.

Appearing for the respondent: Mr P Kroon of Chris Baker & Associates.

Date of Hearing: 9, 10, 20 February and 1 April 1998.

Date of judgment: 11 June 1998.

This judgment is available on the Internet at Website: