IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO. J1541 / 98**

In the matter between :

THE SOUTH AFRICAN TYPOGRAPHICAL UNION **APPLICANT**

AND

THE PRESS CORPORATION OF SA LTD **RESPONDENT**

JUDGEMENT

JALI A.J.

[1] On Friday 3 July 1998 at 13h30 an application was brought before me on an urgent basis by the S.A. Typographical Union ("the Applicant") against the Press Corporation of S.A. Ltd, also known as Perskor, ("the Respondent") for an order against the Respondent ordering it to withdraw its "voluntary retrenchment package" by addressing an alternative letter which was annexed to the Notice of Motion, ordering the Respondent to enter into consultations with the Applicant in terms of Section 189 of the Labour Relations Act No.66 of 1995 ("the Act") and that any member of the Applicant who accepted the voluntary retrenchment package offered by the Respondent may withdraw such acceptance. Annexure "A" to the Notice of Motion, the alternative letter, was retracting

the voluntary retrenchment letter dated June 1998 and also giving an undertaking that the Respondent would consult with the Applicant in respect of employees employed by the businesses as listed as **nos 1-6** at **pp 1-2** of the said letter in terms of s189 of the **Labour Relations Act** and with the employees of subsidiaries of Perskor & CTP Caxton (Pty) Ltd and to whom Annexure MD1 was handed or sent.

[2] This dispute has arisen as a result of the proposed retrenchment of staff which has become necessary because of the merger which took place on 30 June 1998 between the Respondent and CTP Caxton (Pty) Ltd ("Caxton").

BACKGROUND :

[3] The Applicant is S.A. Typographical Union, a registered trade union which represents the majority of the newspaper, printing and packaging sector of the market and which enjoys majority representation in the companies which form part of the Respondent's group of companies. The Applicant's principal place of business within the jurisdiction of the Above Honourable Court is SATU HOUSE, PRETORIA. The Applicant is the majority Union at the Respondents Group of Companies.

[4] The Respondent is the PRESS CORPORATION OF SA LTD, with its principal place of business within the jurisdiction of the Above Honourable Court at DOORNFONTEIN, JOHANNESBURG. The Respondent, as a holding company, has, at all times, acted on behalf of its group of companies and has acted as their representative when conducting discussions with the Applicant. The Respondent was also authorised to act on behalf of its subsidiaries with regard to the application.

[5] On or about 13 February 1998 the Applicant and the Management of the Respondent had a discussion regarding the possible merger between the Respondent and Caxton. On or

about 24 February 1998 further discussions between the parties were held regarding the possibility of retrenchments within the Perskor Group.

[6] On 25 March 1998 the Respondent addressed a letter to Mr Martin Deysel, the Organiser and General Secretary of the Applicant in terms of which he confirmed that the possible retrenchment which the Managing Director had initiated in their discussion of 24 February 1998 had become a reality at, one of the subsidiaries of the Respondent, Republic Press(Pty) Ltd. In this letter the Applicant was being advised that the Respondent wished to enter into consultations with them in terms of "**Section 189 of the Labour Relations Act to reach a consensus**" on, the issues referred to in section 189(2)(a), (b) and (c) of the Act. The Respondent also confirmed that it wished **"To comply with Section 16 of the Labour Relations Act regarding the disclosure of information.**" Furthermore it was indicated in the said letter that the number of employees to be affected by the retrenchments was unknown, at that stage. Dates for a possible meeting were also suggested.

[7] On 14 April 1998 a memorandum setting out the framework for the information to be disclosed in terms of Section 189 (3) of the Act to the affected employees was sent by Messrs C van Heerden (Personnel Manager) and H Cornelius (Assistant Personnel Manager) to Mr W Eitler (General Manager of Republic Press) disclosing, inter alia, reasons for proposed dismissals, alternatives considered, number of employees likely to be affected by the retrenchments and their job categories, method of selection of employees to be retrenched, time or period during which retrenchments are likely, severance pay proposed, assistance to be given to retrenched employees and future re-employment. The reason for the proposed retrenchments was set out as the loss of market share by the Respondent at Republic Press. This information was submitted in preparation for the meeting on 29 April 1998.

[8] On 29 April 1998 a meeting was held in Durban. Those present were the executive management of the REPUBLIC PRESS, namely, Mr D Cochius, Mr W Eitler, Mr C van Heerden and Mr H Cornelius, three executive members of the Applicant and Mr Deysel, representatives of Paper Printing Wood and Allied Workers Union (PPWAWU), Media Workers Association of South Africa (MWASA), Mr R Wilson and Mr P Lafferty, both who represented non-unionised employees. Mr Cochius chaired the meeting. On 26 May 1998 Applicant sent a letter to Mr Cochius in which, inter alia, concern was raised about the meaning of retrenchment and redundancy which the Applicant stated that it needed to be clarified at the next meeting. On 4 June 1998 a follow up letter was sent to the Respondent by the Applicant requesting a reply to its letter of 26 May 1996.

[9] On 12 June 1996 the Respondent sent a letter to the Applicant in which they referred to the Caxton merger, which had been discussed between them on 13th February 1998. The Respondent also indicated that the merger, which was to be finalised on 30th June 1998, could lead to retrenchments and invited the Applicant to consultations regarding all relevant issues at its Doornfontein premises on 17th June 1998. The issues to be discussed which were set out in this letter were more or less the same as those contained in the Respondents letter of 25 March 1998 above, namely :-

" **<u>appropriate measures to avoid dismissals</u>;**

to minimise the number of dismissals;

change the timing of the dismissals; and

to mitigate the adverse effects of the dismissals;

the method for selecting the employees which could possibly be dismissed;

as well as the severance pay which would be payable to such affected employees."

[10] Pursuant upon the above-mentioned letter on 17th June 1998 the representatives of the Applicant and the Respondent had a meeting at Respondent's Doornfontein premises. The meeting was attended by Messrs D Cochius (General Manager of Human Resources of Respondent), D.O Pretorius (Attorney for Caxton), D.S. Wes (Attorney for Caxton), B.J. van Wyk (Secretary), M.Deysel (General Secretary for the Applicant), K.F. Sebothoma (SATU Doornfontein), P.C. Manzini (SATU Doornfontein) and A. Vorster (Secretary SATU Doornfontein). The proposed merger between Caxton and the Respondent and retrenchments were discussed. (Further details on this meeting would be discussed later in this judgement).

[11] On 19th June 1998 Mr Deysel, on behalf of the Applicant, sent a letter to the Managing Director of the Respondent raising his concerns about the reasons for the retrenchments and also placed on record that the information at his disposal is that the company is targeting a monthly saving of R1m through these retrenchments. Furthermore Mr Deysel was of the view that the retrenchments were not necessary and made a number of suggestions to improve the financial position of the company, including, "**An immediate stop to the use of casual labour, restricting overtime work to the minimum, implementing proper control measures, engaging SATU in the management of the Company for a specified period of time, engaging an external auditor to investigate all these allegations.**"

[12] Following upon the agreement which was reached at the meeting of 17th June 1998 between the Respondent and the Applicant, on 18th June 1998 Mr Cochius addressed the workforce at the Respondent's Doornfontein Plant.

[13] On 23rd June 1998 the Respondent sent a letter to the Applicant in which the Respondent's rationale for the restructuring of the Respondent was contained. In this

letter the Applicant was also invited to a meeting of 2nd July 1998. The Applicant requested the Respondent to put this memorandum on the notice boards of all the affected subsidiary companies and branches. The said memorandum, contrary to the Applicant's suggestion, was put on the notice board of the Respondent's Doornfontein plant only.

[14] On 25th and 26th June 1998 "the voluntary retrenchment offer" letter was included in the Respondent's employees pay envelopes, including, Applicant's members. On 25th June 1998 the Applicant wrote to the Managing Director complaining about the above-mentioned voluntary retrenchment offer as an agreement had not been reached on the package, also demanding the withdrawal of the letters and Management to advise employees that the package was a unilateral offer by Management. It was also demanded that the company comply with Section 189 of the Act.

Subsequent to that, Management put up a notice on all notice boards to the effect that this was a unilateral offer by Management and that none of the Unions had been consulted on this issue.

[15] On 26th June 1998 the Applicant sent another letter to the Respondent's Managing Director complaining about their actions regarding the offer and also their failure to put the memorandum with the rationale for the restructuring following the merger at all the other affected companies as the Applicant had requested.

[16] On the same day, Attorneys Fluxman Robinowitz Raphaely - Weiner replied to Applicant's letter dated 25th June 1998 and refused to withdraw the voluntary retrenchment offer letter. They also contended that, in their view they don't have to consult with the Union on the voluntary package and that it was indicated at the meeting of 17th June 1998 that a retrenchment package would be reflected in the letter to be included in the individual employees pay packet. They also advised that Section 189

would be followed in future negotiations relating to retrenchments which are likely to follow.

[17] On 25th June 1998 Applicant wrote a circular which was put on all notice boards, explaining its position and suggesting to its members not to accept the package before they give them the advice to do so. In the interim various newspapers in the country carried articles regarding the retrenchments at the Respondent's businesses. Some of the press reports were speculating that 3 000 employees would lose their jobs as a result of the merger.

[18] On the 30th June 1998, the Applicant sent two letters to the Respondent relating to the proposed application to the Labour Court. On the 1st July 1998 the Respondent's Attorney of record replied to the Applicant's letters of the 30th June 1998 disputing the urgency of this matter, amongst other things. On 2nd July 1998 an official notice in terms of the Johannesburg Stock Exchange Rules appeared in the Citizen regarding the merger.

URGENCY :

[19] The Applicant brought this matter before Court on an urgent basis because it was of the view that the letter which was enclosed in the individual employees pay packets created panic and confusion amongst its members. This was caused by the fact that the letter had a deadline within which the package should be accepted failing which their members would not benefit from same. It also created an impression that those employees who did not accept would be retrenched on less favourable terms. Mr Sutherland, on behalf of the Respondent, argued that the matter was not urgent and the said letter was not meant to create confusion as alleged.

[20] The relevant paragraph in the said letter read "**the voluntary package needs to be applied for by the 7th July 1998. This is a once off offer, and will not be repeated**."

[21] I have read the letter and considered the context and the manner in which the letter was sent and I do accept that it may have caused confusion to the employees. The letter may create the impression that if you don't accept the offer there is a possibility that you may be retrenched on different terms. Those terms may not necessarily be favourable.

[22] The Respondent Attorneys in their letter to the Applicant of 1st July 1998 also raised the issue of the Urgency of the Application as they had already indicated that the offer would not be withdrawn. This was conveyed to the Applicant on 26th June 1998. The application papers were signed on 1st July 1998 and issued and served on 2nd July 1998. In my view there wasn't any lengthy delay so as to affect the urgency of the application. The Applicant acted diligently. The application was moved four (4) court days later after the Respondent had confirmed that they would not be withdrawing the offer letter and there was an intervening week-end in between.

[23] Furthermore if I consider the above-mentioned submissions together with the number of employees involved, and the possible consequences of the retrenchments upon them, the matter is serious enough for me to exercise my discretion in favour of hearing this matter.

APPLICATION :

[24] The parties (and especially Ms Jansen on behalf of the Applicant) agreed that, even though the relief sought was couched as set out above, the Applicant was, in fact, seeking a final interdict against the Respondent. It is trite that the three (3) requirements which need to be satisfied for final interdicts to be granted are, namely, : a clear right; a

reasonable apprehension of harm; and the absence of a satisfactory alternative remedy. Accordingly that will have to be satisfied in this matter. These requirements have been enunciated by the Appellate Division and later accepted by this Court. **See Setlogelo v Setlogelo 1914 AD 221 at 227, Malandah v SABC (1997) 5 BLLR 555 at 557 and FAWU v Premier Food Industries Ltd (Epic Food Division) (1997) 5 BLLR 753 at 756.**

[25] It is apparent that the Respondent started consulting with the Applicant and other Unions regarding restructuring during February 1998. The said consultations were originally confined to the proposed retrenchments at Republic Press but they were later extended to the other companies within the Respondents group of companies as set out in the Respondent's letter of 12th June 1998, namely; Vendiko Ink Factory, a division of Republican Press (Pty) Ltd, situated at Doornfontein and Durban; Aurora Newspaper Printers, a division of Promedia (Pty) Ltd, situated at Pretoria; Perskor Printers - the commercial, newspaper and book printing, sheetfed and Web Divisions, situated in Doornfontein, Johannesburg; Republican Press in Durban; Commercial and Newspaper Printing in Pietersburg, Kroonstad, Klerksdorp and Middelburg.

[26] The main issue which needs to be decided relates to the status of the Voluntary Retrenchment offer letter which was enclosed in the employees pay packets on 25th and 26th June 1998 i.e. Should the Voluntary Retrenchment Offer comply with the provisions of Section 189 of the Act and whether the Respondent contravened the provisions of the Act so as to warrant the granting of an interdict against it.

VOLUNTARY RETRENCHMENT OFFER

[27] It was common cause that the offer was "a unilateral offer" by the company and none of the Unions had been consulted on this issue. Mr Sutherland submitted that a company doesn't have to consult with the union or employees and doesn't have to comply with

section 189 when making a voluntary retrenchment offer to its employees. Ms Jansen disputed this.

[28] Section 189 of the Act provides that

"(I) **When an employer contemplates dismissing one or more employees for reasons based on employer's operational requirements, the employer must consult -**

(a) any person whom the employer is required to consult in terms of a collective agreement;

(b)

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;

(d) .....

(2) 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; and

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for the dismissed employees.

(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) .....

(d) .....

(e) .....

(f) the severance pay proposed

(g) .....

(h) .....

(4) .....

(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) 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.

(7) ....."

[29] Section 189 (1) states that "**when an employer contemplates dismissing one or more employees for reasons based on the employers operational requirements, the employer must consult**" with the parties referred to therein. Section 186 of the Act defines the various notions of dismissals. Voluntary retrenchments, are not referred to within that definition. Retrenchments are also not defined in section 213 of the Act.

[30] **In National Union of Mineworkers and others v Free State Gold Mines (Operations) (Pty) Ltd (1994) 15 ILJ 1161 at 1165 G - 1166 J** a definition of retrenchments (the verb) as extracted from the Oxford Dictionary is given as meaning "**cut down, reduce an amount (especially expenses), economise, reduce expenses**." Voluntary Retrenchments can, as suggested by the Respondents counsel, be regarded as a mutual agreement between the employer and employee to terminate a contract of employment for operational requirements. If one were to regard voluntary retrenchments as a dismissal it would be categorised as a dismissal with mutual understanding or agreement between the employer and the retrenched employees. Therefore there would be no basis on which to challenge the dismissal. However, it is the reason for the termination of the contract of employment (whether mutual or not) which brings it within the ambit of the provisions of section 189 of the Act.

[31] Section 213 of the Act defines operational requirements as meaning " **requirements based on the economic, technological, structural or similar needs of an employer.**" In this matter at the time when the voluntary packages were discussed by the Respondent with the Applicant, the Respondent was already considering dismissals for operational reasons. The merger referred to earlier was based on both an economical and structural need of the employer, that is, to improve the Respondents profitability and to deal with the ailing printing production facilities of the Respondent. This is apparent from the Respondent memorandum on the merger. Section 189 states that the employer needs to consult when he ***contemplates dismissing*** for operational reasons, as indeed was the case with the Respondent.

[32] It follows then, that the consultation stage anticipated in section 189, is preceded by a recognition by the employer that, he needs to take certain steps to improve his financial

position and then retrenchments become one of, if not, the only solution to the problem. It is apparent in this matter that when the Respondent offered voluntary retrenchments to the employees on 25th June 1998 he had contemplated or thought about dismissing employees for operational reasons, but then chose to offer voluntary retrenchments, as an alternative to dismissals or to avoid dismissals. It is that contemplation or thought which triggers off the provisions of section 189 of the Act.

[33] In this matter the Voluntary Retrenchment offer, it is clear, was made after the retrenchment need had crystallised and was voiced out by Mr Cochius on behalf of the Respondent, firstly, in the letter of 12th June 1998 wherein he stated that "we envisage that should the merger become a reality on 30th June 1998, that certain of our businesses might be affected thereby which could possibly lead to retrenchments having to be considered." (This statement was also contained in the Voluntary Retrenchment Letter of 25th June 1998.) Secondly, this was also conveyed at the meeting of 17th June 1998. Obviously, once the thought or contemplation of retrenchments had crystallised, the Respondent was bound to consult in terms of section 189 before proceeding with the voluntary retrenchments. The provisions of Section 189 are pre-emptory once an employer contemplates retrenchments [see **CWIU v Johnson and Johnson (Pty) Ltd (1997) 9 BLLR 1186 at 1202 A-C**]. The consultations have got to be done in good faith and they should be meaningful, that is, with the intention of resolving the issues before the parties.

[34] Mr Sutherland, on behalf of the Respondent, also submitted that this offer was an invitation by the Respondent to employees to consider voluntary retrenchments and not a final offer. The employees were to put their names forward, if they wanted to be considered and thereafter they would be considered for same. Thus it can never be regarded as improper if the Respondents had not consulted the Unions on the offer. Mr

Sutherland also submitted that the offer was a fresh start by the Respondent and was not part of the original consultation process. It might be of assistance at this stage to refer to the relevant passages of the letter :

" PERSKOR

June 1998

Dear Employee

MERGER OF PERSKOR AND CTP

You might have noticed an advertisement in the newspapers regarding the terms of a merger of Perskor's Publishing and Printing Businesses with those of CTP.

After having carefully considered our position within our industry, the company has come to the conclusion that in order to maintain its viability and competitiveness and to continue adding value, that the proposed merger would ensure that it achieves all the aforesaid goals. The merged business would be in a far better position to compete within the industry and according to our *operational requirements*, the merger is viewed as in the interest not only to shareholders but also of employees of the company.

We envisage that should the merger become a reality as at 30 June 1998, that certain of our businesses might be affected thereby which could possibly lead to retrenchments having to be considered.

The merger would unfortunately necessitate some reduction in the number of employees as well as the streamlining of operations and in some instances even the closure of certain operations. To this end, consultation has commenced, with affected employees and their representatives (i.e. recognised trade unions), during which employees will be given a full an proper opportunity of consulting on all the relevant issues. We have written to the relevant trade unions informing them about the merger and invited them to consultations with us.

It seems to us that once the merger has taken place, that the following businesses might be affected thereby and that these businesses retrenchments might have to occur. The businesses are:.....

As a result of the merger, and once same has been implemented, it might be that the aforesaid businesses would become superfluous in the larger organisation which would come into existence. This could lead to the probable closure and or right sizing of some of some of these businesses with the consequent redundancy of employees.

Once the merged business has become fully operational, it might also be that other parts of the business may be affected, and we have to address that situation as and when it occurs. The businesses which we believe would be affected immediately are those set out above.

In *anticipation* of the above we have accordingly decided to first offer employees the option of taking a voluntary retrenchment package on the clear understanding that management reserves the right to decline any application due to operational requirements and skills retention.

The package offered is as follows :

Monthly paid staff **Weeklyy paid staff**

.....

The voluntary package *needs to be applied for by the 7th July 1998*.

This is a ***once off offer***, and will not be repeated.

Employees will be kept informed of developments .....

Yours sincerely

P G GREYLING

GROUP MANAGING DIRECTOR (own emphasis)

[35] It is apparent from the last three paragraphs of the above-mentioned letter that this was a final offer and not an open invitation as the Respondents submitted. If it was an open invitation there wouldn't have been a deadline with the threat it would not be repeated. Another veiled threat regarding the deadline was also contained in the Attorneys of Records letter of 26th June 1998 in which it was said :

" **we to advise that should the time limit for acceptance thereof expire, and should your members have allowed such time limit to expire as a result of your advice to them, we will consider our client's obligation to find alternatives to *minimise* the number of retrenchments *as having been satisfied in respect of the option of voluntary retrenchment*.**"

[36] I will now deal with the other submission of the Respondent that the Voluntary Retrenchment letter was initiating a fresh process and was not part of the original retrenchment process. Firstly, the seventh and eighth paragraphs (i.e. before the package which was offered) clearly show that the offer was being made "in anticipation" of the restructuring and retrenchments which might occur as a result of the merger. Accordingly this was being done as a result of operational requirements as defined in section 213 of the Act. Secondly, I would like to refer to the context in which this offer was made. The Respondent in its letter of 25th March 1998, invited the Applicant to consult with it regarding the proposed retrenchment (then at the Republic Press) in terms of "the requirements of Sec 189 of the Act to reach **consensus on**," inter alia, the issues

referred to in section 189 (2) (a) to (c) of the Act. The same issues were referred to in the Respondent's letter of 12th June 1998 when the retrenchments were to be discussed in respect of the rest of the Respondents group of companies. In the letter of 12th June 1998 the Respondent invited the Applicant to take part in consultations during which he would be given "**a full and proper** opportunity of consulting on all **relevant issues**."

[37] The Respondent and the Applicant had only the two meetings at which the retrenchments were discussed, namely, on 29th April 1998 in Durban and 17th June 1998 in Johannesburg. According to Mr Cochius (in paragraph 8 of his affidavit) he and the other Union Representatives regarded the Durban meeting as a first meeting in the consultation process in terms of section 189 of the Act. The Applicant regarded the consultation process as on going.

[38] According to the transcript of the meeting of the 29th April 1998 there was certain information which was outstanding and which was to be furnished by the company before the consultation process could be taken forward. That information was to be given by the Respondent to the Union and thereafter consensus was to be reached on the retrenchment package. Mr Cochius was also of the same view, at the meeting. At page 46 of the papers being the transcript of the said meeting Mr Deysel said :

" ***We need a consultation process with a view to reaching agreement*. I cannot go into consultation with you properly unless I have got all the *information* that we require to make decisions at our disposal."**

In response to that Mr Cochius agreed to furnish the information.

And later at pages 52 - 53 of the transcript it was stated :

"**D Cochius: Ya, *voluntary retrenchment* and things like that. You give a guy package and say to him, listen, this is what we are offering, voluntary retrenchees.....And those things *are options we need to talk about*. *But you see we could not sit down and do all this***

because then you accuse us of deciding unilaterally*. We want to *consult with you* and say to you lets look at it now. Lets try now work out a modis operandi here, I *don't think we can make much more progress, until you have got this information.

M Deysel : **This information is *crucial*.**

D Cochius : **What I am saying is that we can then possibly adjourn this meeting, ...** " (own emphasis).

[39] No decisions were reached at this meeting even on the package suggested in the memorandum 14th April 1998. The issue of the voluntary retrenchment packages was one of the issues which needed to be considered by the Respondent and thereafter to revert to the Unions. It is obvious from the above, even though the meeting related to Republic Press, that Mr Cochius appreciated the need for the sharing of information, to agree on the option of voluntary retrenchments and the need to agree on the package after consultation with the Union when they adjourned for the day. In the premises I agree with Ms.Jansen's submissions that, it is clear from the above quoted passage that the Respondent knew that there was a need to consult with the Union even in respect of voluntary retrenchment packages. As to what changed Mr Cochius' view; later, and to decided on the package unilaterally, is not clear to this Court.

[40] I now turn to deal with the meeting of 17th June 1998. At the meeting, Mr Cochius advised the people present of the branches or subsidiaries which would be affected by the proposed retrenchment exercise. The rationale / reasons for the retrenchment were discussed and when Mr Deysel inquired about the time scales for the process, Mr Cochius' response (at page 129- 130 of the Court papers) was that he would come to the time scales and later said :

> **"Now in time to come we would like to have this whole thing implemented by 31 July 1998, but as I say that is *negotiable*, depending on the progress that we can make**.
>
> **The strategy that we are going to recommend and we *would like your views***

***on this is*, we want to immediately work out a moratoria *retrenchment package* and offer that to every single individual, depending *on operational* requirements and retention of certain skill. So management reserves the right not to accept an application if that skill is critical to the success of the company.**

In addition to voluntary retrenchments, we are obviously going to look at the time and early retirement and offer people that option and we are very hopeful that this may bring quite a few applications..... It depends on how many people accept the voluntary retrenchment package and apply for early retirement etc.etc. Only once that exercise has taken place, we will get an idea."

[41] At page 160-162 of the Applicant Replying Affidavit which contained the pages of the transcript of the meeting of 17th June 1998 which were omitted from the Respondents Answering Affidavit Mr D Pretorius (of the Respondent's Attorneys of record) confirmed that the meeting was called in terms of the Labour Relations Act to try and discuss with the Unions those areas which CTP and Caxton had identified as needing to be addressed sooner. Subsequent to the aforementioned discussion, they went on to discuss the voluntary package letter which the Respondent wanted to include in the workers pay packets that Friday. The intention of the Respondent to offer retrenchment packages on the following Thursday was also disclosed for the first time.

[42] Clearly it was within the parties' understanding that this consultation process was in terms of the Act and that even the deadlines were subject to negotiations between the parties. It is apparent that the retrenchment packages were discussed in the context of terminating jobs for operational requirements. What the Respondent envisaged was offering the package, and thereafter proceeding with compulsory retrenchments and all of this for operational requirements. The voluntary retrenchment offer could never have been a fresh start as was argued by the Respondent. It was part of the on going consultations or at least the one which was initiated in terms of the letter dated 12th June 1998.

[43] In light of the afore going, I also agree with Mr Deysel's view that the consultation process was on going, because there was no evidence to indicate that, at the time of the offer, the consultations regarding retrenchments had been finalised for the voluntary retrenchments offer to be regarded as not having to be part of the consultation process, so as to justify the making of the offer unilaterally by the Respondent. Accordingly, I cannot accept Mr Sutherland's argument that the letter offer was initiating a fresh process, extending an invitation by the Respondent to the employees, which should not be governed by the provisions of Section 189.

[44] Mr Sutherland submitted that the Voluntary Retrenchment offer should be regarded as the Respondents alternative to retrenchments. Accordingly there is nothing improper for the alternatives to be initiated by the employer in our law. I do agree with this submission. However, if the voluntary retrenchment offer is one of the alternatives to dismissals, obviously, it is one of the issues on which the Respondent needs to consult with the Applicant in terms of section 189(2)(a)(I) and (ii). This then means the parties have to comply with the section. The parties have to consult about the offer and all the elements of the proposal on alternatives, including the amount, which didn't happen in this case.

[45] It is common cause that the Respondent unilaterally decided on the Voluntary Retrenchment Package. The contents of the letter were never discussed. What I have found to be very disturbing about the letter, which borders on bad faith consultation or negotiation, is that, firstly, at the meeting which was held to discuss the retrenchments the question of the Actual amount of the Package was never discussed with the Union. Secondly, "Kagiso Publishers" was not included as an affected Division in the letter of 12th June 1998. However, in the Voluntary Package letter Kagiso was included. The one question which this Court had was whether this development, that Kagiso Publishers employees would be affected by the merger as well, was brought to the attention of the

Unions prior to the 25th June 1998.

[46] The amount of the Voluntary Package, like the issue of wages or their increase, is an issue of conflicting economic interests between the employer and employees. It is also an issue to be negotiated between the employer and employee like the wages. This was obviously another breach of section 189 by the Respondent. Section 189(2) clearly states that the consulting parties must attempt to reach consensus on, amongst others, the very severance pay for dismissed employees. The package which was included in the letter was not discussed with the Union and accordingly the Union's rights to negotiate on behalf of its employees as a representative Union were violated. Consultation as anticipated in the Act, does not necessarily mean that the consulting parties must agree. However there must be a serious attempt on both sides to reach consensus. The very fact which was acknowledged by the Respondent in his letters to the Applicant.

[47] The need to consult with the Union or employees by the employer as soon as he has contemplated retrenchments has been the integral part of our law even prior to the enactment of the 1995 Act. The legislature has incorporated most of the guidelines emanating from the judgements decided before 1995 in section 189 of the Act. In **Atlantis Diesel (Pty) Ltd v National Union of Metalworkers of S.A. (1994) 15 ILJ 1247at 1252 D-E** the Appellate Division (as it was known) said :

> " **The latter approach requires consultation once the possible need for retrenchment is identified and before a final decision to retrench is reached. It proceeds on the premise that consultation requires more than merely affording an employee an opportunity to comment or express an opinion on a decision already made. It envisages a final decision being taken by management only after there has been consultation in good faith."**

And at E and G the Court also stated :

" **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..... 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."**

[48] A similar view has been expressed by this Court when it was called upon to interpret and apply the provisions of section 189 of the Act. In **Ellias v Germiston Uitgewers (Pty) Ltd (1998) 19 ILJ 314 and National Union of Metalworkers of SA and others v Comark Holdings (Pty) Ltd (1997) 18 ILJ 516**, the cases to which I was referred by Ms Jansen, the Court embarked on a similar exercise. I agree with the views enunciated in these judgements.

[49] The only party, who normally benefits from retrenchments which are implemented on the basis of the commercial rationale, is the employer. In this case the Respondent as the employer stands to gain from retrenchments, whether voluntary or compulsory, there is every reason for a consultation with the Union at all stages of the process. Accordingly it would be inconceivable for any employer to be in a position to finalise a retrenchment package having not discussed the amount of same with the representative Union or the employees. Fairness dictates that there must be consultation in this regard.

[50] Another matter which the Court wishes to address concerns the consultation between the parties in respect of the rest of the issues referred to in section 189 of the Act.

[51] Consultations in Labour Relations have the object of avoiding or minimising industrial

conflict. See Halton Cheadle : The New Labour Law at 291. This is the same purpose / object which the Labour Relations Act of 1995 seeks to achieve. See The Explanatory Memorandum to the Labour Relations Bill and Section 1 (d) (iv) of the Act.

[52] In **National Union of Metalworkers of SA and others v Comark Holdings (Pty) Ltd at 524D** - Mlambo J said that "the nature of consultation as required by section 189 is an exhaustive joint problem solving or consensus seeking process between the employer and consulted parties. It is a process which is not sporadic or superficial. Furthermore, because the employer is always privy to all necessary and relevant information it should not only disclose information which it deems relevant. It should disclose all information requested by the consulted party subject to the limitations already enunciated."

[53] At the meeting of the 17th June 1998 when the Respondent advised the meeting that a letter was to be included in the pay packets of the employees that Thursday, the Applicant objected to this. Mr Deysel felt there was a need to call meetings with the affected employees. To this suggestion Mr Cochius responded by saying that it was a good suggestion and it would be followed up. Mr Cochius later undertook to talk to the staff before Thursday, that is, before they get the letters. He went on to state "we will call everybody together and we will have a half an hour meeting where we explain what is happening here at Doornfontein" and later stated "yes we will have to do it at Vendiko in Durban and here at Aurora in Pretoria and also Kroonstad and Klerksdorp and I don't think there will be any problems in Pietersburg."

[54] It is clear, from the above, that the Respondent undertook to call the meetings at the various branches. There was undisputed evidence that, notwithstanding the undertaking or agreement, the meetings to address the workforce were not called at all branches or subsidiaries as it was agreed. Instead the offer letter was sent off. In making that

undertaking, reasonable expectations were created by the Respondent to the Applicant.

[55] The Respondent's counsel argued that there was no hint at the meeting of 17th June 1998 that Mr Deysel thought that the letter of 25th June 1998 would be unacceptable. I disagree with Mr Sutherland's submission in this regard, as Mr Deysel clearly indicated his unhappiness with the letter being sent out without prior consultation with employees. Obviously,when the company made the undertaking there was no reason for him to be concerned any further.

[56] Even if I was to be persuaded by the Respondent's argument that the provisions of section 189 don't apply to voluntary retrenchment packages, which I am not, I have two other problems with the manner in which the offer was put to the employees by the Respondent. Firstly it seeks to undermine the Unions Collective Bargaining role in the Respondent's group of companies. The role of representative unions in companies, with regard to collective bargaining, is recognised in chapters two and three of the Act. This can't be encouraged as it is contrary to the objectives of the Act which are to try and achieve industrial peace. Such action may lead to unnecessary industrial action.

Secondly the Respondents failure to honour its undertaking to address the employees before giving them the voluntary retrenchment letters. It is in the nature of good labour relations that agreements between the parties be upheld. The Respondent did not give a plausible explanation for such an omission.

[57] The Applicant also challenged the very need for retrenchments at the Republic Press, in terms of its letter of 19th June 1998. The representations which the Applicant made with regard to the necessity of retrenchments, were ignored by the Respondent. Notwithstanding that challenge, the company went ahead to announce voluntary retrenchments, which were to affect all employees including the Republic Press employees, when it had not consulted with the Applicant in this regard, let alone to

respond to the proposals the Applicant had put forward in terms of letter dated 19th June 1998 making proposals on how the retrenchments could be avoided. This letter was clearly in accordance with section 189 (2)(a)(I) read together with section 189 (5). The Respondent's failure was clearly in contravention of section 189(6) which directs the employer to consider and respond to representations made by the other consulting party. Furthermore if the employer disagrees the employer is expected to state his reasons. One of the tests to ascertain the fairness of retrenchments, is the bona fides of the decision or the real need to retrench employees.

[58] This failure by the Respondent to respond makes the Respondent's argument that it did not consult in respect of the offer because it was not made in terms of section 189 seriously flawed because,even proposals made to it by the Respondent in terms of section 189 (2)(a)(I) and section 189 (5) did not lead to any consultations. It actually does lead one to the belief that it was never the Respondent's intention to consult in a meaningful and serious manner with the Applicant. The need to give the employees an opportunity to persuade the employer about the necessity of retrenchments cannot be underplayed. See the judgement of Myburgh J (as he then was) in **Mahomedy's v Commercial Catering and Allied Workers Union of S.A.(1992) 13 ILJ 1174 at 1179 A-C (LAC).**

[59] In the circumstances the Respondent's failure to consult with Applicant regarding the severance pay, alternatives to retrenchments and to follow the suggestion which had been made at the meetings regarding consultations with staff, made the entire consultation process in terms of section 189 of the Act to be fatally flawed.

CONCLUSION :

[60] I am convinced that the Applicant has shown a clear right for the purpose of obtaining a final interdict. The Applicant's right to be consulted, as set out in section 189 of the Act, is the one right which was violated.

[61] Mr Sutherland also argued that the Applicants should not be granted the order they sought because they had another remedy in dealing with the Voluntary Retrenchment letter. The remedies he referred to were going to the Commissioner for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation or asking its members not to accept the offer. I have considered these two points raised by Mr Sutherland and come to the conclusion that they are not "adequate remedies" as anticipated in Setlogelo v Setlogelo above. The CCMA cannot grant an interdict. Whatever remedy which might have been obtained would have been after the event and the damage might have been done by the deadline of Tuesday 7th July 1998. On the other hand advising its members not to accept the offer is also inadequate because there is no guarantee that, once they had declined the offer, they could be reconsidered if after the consultations with the Respondent it transpired to the Applicant, after considering all the relevant information which may be put before it, that the package was in fact fair.

[62] Lastly, the two suggested remedies would not have ensured that the Respondent consults with the Applicant in terms of section 189 on all the relevant issues as set out in the Act. The issue of compliance with section 189 is a matter for this Court. See also **FAWU v Premier Food Industries Ltd (Epic Food Division)** above at pages **757 I - 758 B**. It might even turn out after the consultations that the retrenchments are not necessary. The Applicant can't know that because the Respondent did not respond to its correspondence in this regard. The question then is what would happen to those who have accepted without proper consultation ? Accordingly a bona fide consultative process even if it does not lead to a job retention, would be the best security which could be provided by any union to its members. The second part of the order, in any event, sought to ensure that there is a consultative process.

[63] Furthermore whenever an employer consider retrenchment of employees that is likely to create tension as employees are likely to be overcome by the fear of losing their jobs. In their letter dated 26th June 1998 the Respondent's Attorneys of record in the paragraph quoted above, in which they stated that their clients obligation to minimise retrenchments, whether the Applicant's members accepted the voluntary retrenchment offer or not, would be regarded as having been satisfied.

[64] The said statement by the Respondent's Attorneys of Record also did not assist the situation. In my view this statement confirmed that there was a reasonable apprehension of irreparable harm on the members of the Applicant. Accordingly there was a need to deal with the matter on an urgent basis as well.

[65] Accordingly, I find that the Applicant has satisfied the three requirements for the order to be granted in its favour.

[66] For reasons set out above I am also persuaded that the application should be granted.

COSTS :

[67] Both parties sought an order of costs in this matter. Section 162 of the Act directs that this Court may make an order for payment of costs according to the requirements of law and fairness. I am of the view that this is one case in which costs should follow the result. Accordingly the application succeeds and the Respondent is ordered to pay the costs of this application.

JALI A.J.

DATE OF HEARING : **3rd JULY 1998**

DATE OF JUDGEMENT : **7th JULY 1998**

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