IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J1440/98

In the matter between:

K. RAJU	First Applicant
B. MAHADO	Second Applicant
V. GOVENDER	Third Applicant
S. REDDY	Fourth Applicant
M. MOODLEY	Fifth Applicant
D. MOODLEY	Sixth Applicant
K. MOODLEY	Seventh Applicant
K. PILLAY	Eighth Applicant

and

SCOTTS / SELECT-A-SHOE
a division of SOUTH AFRICAN

BREWERIES LIMITED Respondent

J U D G M E N T

VAN NIEKERK A.J.

(38)The Applicants were all formerly employed as dedicated stocktakers by Scotts. They were retrenched on 22 April 1997. Their Union, Distributive, Catering, Hotels and Allied Workers' Union (DICHAWU), declared a dispute with the Respondent and referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. That dispute was certified as unresolved by the Conciliator on 9 June 1997.

(38)Proceedings were instituted in accordance with Rule 6 in terms of which the Applicants claim that the retrenchment occurred in contravention of section 189 of the Labour Relations Act of 1995. It is alleged that the Respondent -

3.1failed to disclose in writing the matters referred to in section 189(3);

3.2failed to consult with DICHAWU on matters referred to in section 189(2);

3.3it failed to utilise fair and objective selection criteria.

(38)The Applicants also contend that the retrenchment was substantively unfair but did not during the trial seriously contest the substantive fairness of the retrenchment. At the commencement of the trial the Applicants' attorney filed a notice in which he amended the relief that they sought in their Statement of Case to claim compensation only.

THE BACKGROUND FACTS

(38)Scotts and Select-a-Shoe are run as two separate chains of stores, and they form a division of South African Breweries. Scotts has a bargaining relationship with DICHAWU with whom it from time to time bargains for wages and other working conditions. DICHAWU has shop stewards in both chains of stores.

(38)Select-a-Shoe performs its stock taking in store whereas prior to the retrenchment Scotts employed dedicated stocktakers who visited stores in the region where they worked and performed stock taking for them. Difficulty was encountered with this method of stock taking. Although the staff at each store were held accountable for the loss of stock, they were not performing their own stock take. The result is that staff complained about the accuracy of stock taking and did not accept the results of the dedicated stocktakers.

(38)Because Scotts and Select-a-Shoe had suffered a R35 million loss at the end of 1996 and a R17 million loss at the end of the 1997 financial year, the Board of South African Breweries put pressure on the two chains of stores to turn

their trading results around.

(38)One of the ways in which it was decided a saving could be achieved was to retrench the dedicated stocktakers. It was envisaged that stock taking would then be performed, like Select-a-Shoe, in the stores themselves. Retrenchment of the dedicated stocktakers would save money not only on salaries and vehicles but also on the expenses of accommodation and travelling when they travelled away from home.

(38)The fact that their positions were vulnerable must have come to the ears of the stocktakers because in February 1997 one of them telephoned Mrs C.A. Atkinson who was, at the time of the retrenchment, the Human Resources Manageress for Scotts and Select-a-Shoe. This person expressed fears that the stocktakers were going to be retrenched. Mrs Atkinson testified that she was not aware of this possibility and as a result of this telephone call arranged an informal meeting with the stocktakers in the regional office. The stocktakers expressed their concern to Mrs Atkinson at this meeting. She telephoned the managing director and he informed her that no decision had been made regarding retrenchment but that ways were being looked at to achieve savings. Mrs Atkinson ended the meeting by assuring the stocktakers that if their positions were identified for retrenchment, they would be consulted with.

(38)At about the same time that this meeting took place a substantive agreement was concluded between Scotts and DICHAWU for the year 1 April 1997 to March 1998. That agreement was concluded on 18 March 1997. It provided for a 10.5% across the board increase in salaries and also set minimum wages for stocktakers at R1,550.00 per month. The agreement also included the following clause;

"The Company and Union agreed that it is the Company's intention not to close any stores within the 1998 financial year for any reason other than those outside the Company's control."

(38)On 1 April 1997 Mrs Atkinson wrote to DICHAWU when she suggested that a meeting be arranged,

"regarding the various rumours and concerns that the stocktakers have expressed..."

Attached to the letter was a list of names of the stocktakers. A meeting was duly arranged for 21 April. Mrs Atkinson again wrote to DICHAWU on 10 April 1997 in which she advised that the matters which would be discussed at the meeting were the stocktakers in Scotts and the possible closure of three stores.

(38)A meeting duly took place on 21 April 1997. Mrs Atkinson represented Scotts and DICHAWU was represented by Mr Oscar Malgas. There were also a number of shop stewards present. At this meeting, the minutes of which were kept by Mrs Atkinson, discussion centred largely on the closure of the three stores. After that subject had been dealt with, Mrs Atkinson raised the possible retrenchment of the stocktakers. After she had given the Union the reasons for the possible retrenchments she asked Mr Malgas for his response. According to Mrs Atkinson the Union's response was the following:

"The union have nothing to say in regard to the stocktakers."

(38)According to Mrs Atkinson this response was unusual for Mr Malgas because he is normally extremely defensive and sensitive about the closure of stores and the retrenchment of employees. For this reason she again asked him what DICHAWU's position was on this question. According to her he again responded by saying that the Union had nothing to say in regard to the stocktakers.

(38)Mr Malgas' version of what was said differed to that of Mrs Atkinson. According to him he told her that DICHAWU needed time to consider what had

been said.

(38)The retrenchment was effected on the next day, 22 April 1997.

(38)Although Mrs Atkinson's version appears to be improbable, I am satisfied that what she says happened is correct. This is what is reflected in the contemporaneous minute which Mrs Atkinson kept and words to the same effect are echoed in a letter from Mr Malgas reacting to the retrenchment which he wrote on 23 April 1997.

(38)Mr Malgas did not in that letter state that he had told Mrs Atkinson that DICHAWU needed time to consider what had been said. The letter does, however, reflect DICHAWU's indignation at the retrenchment. Although it is, as Mr Maeso who appeared for the Respondent submitted, a difficult letter to understand, it is clear that what Mr Malgas alleges is that the consultation held on 21 April 1997 was a sham. He further suggested that the parties should engage themselves in *bona fide* consultations and that what should be considered is whether the principle of LIFO had been fairly applied.

(38)In a further letter to Respondent dated 25 April 1997 DICHAWU revealed the reason for its unusual response at the meeting of 21 April. Mr Malgas in that letter stated that the Union did not take seriously the proposal to retrench stocktakers because that would have been in breach of the wage agreement. DICHAWU further demanded the reinstatement of the retrenched stocktakers and proposed that negotiations start afresh. This was rejected by the Respondent.

THE CASE OF PROCEDURAL UNFAIRNESS

(38)The case against the Respondent is essentially that no proper consultation took place with the Applicants' representative prior to the implementation of

the retrenchment.

(38)Much was made of the fact that the meeting of 21 April was the first indication that DICHAWU had that the Respondent was contemplating the retrenchment of the stocktakers. Mrs Atkinson countered this allegation by referring to the letter of 1 April 1997 in which she recorded that there had been telephone conversations regarding rumours concerning the stocktakers and in which she expressed the need for a meeting in regard to those rumours. She furthermore pointed out that a list of the stocktakers that were members of DICHAWU was attached to that letter.

(38)I am satisfied that DICHAWU must have been aware that the retrenchment of the stocktakers was being contemplated. Evidence by Mr Malgas to the contrary does not withstand scrutiny. That does not, however, mean that any consultations took place before 21 April. That was not the Respondent's case. Indeed, it was common cause that the first meeting at which the Respondent's proposals were to be discussed took place on 21 April. It was, however, the Respondent's case that DICHAWU not only knew that the retrenchment of the stocktakers was being contemplated but that it should have prepared itself properly for the meeting so that it could meaningfully consult with the Respondent.

(38)No doubt the Respondent is correct that DICHAWU ought to have taken a more active interest in the fate of the stocktakers. That does not, however, mean that the Union was obliged to prepare itself in such a way that consultation could have been completed on or shortly after the 21st. That would be unreasonable. The Respondent had not prior to 21 April given any indication of the reasons for the stocktakers' retrenchment, the criteria that would be applied and the retrenchment package that the company proposed. It must also be borne in mind that no information required to be provided in writing in terms of section 189 of the LRA was provided either prior to or during

the meeting of 21 April.

(38)It stands to reason that DICHAWU would have been entitled to consult its members after the meeting of 21 April and to revert to the Respondent on a later agreed date. This did not happen for two reasons. Firstly, Mr Malgas did not ask for time and adopted the curious attitude that he had nothing to say in regard to the stocktakers. This was because he, in my view, misunderstood the agreement that had been reached on 18 March 1997. From the quote in paragraph 9 above it is clear that the Respondent was not contractually precluded from retrenching employees. Secondly, Mrs Atkinson testified that she understood Mr Malgas' statement that he had nothing to say as constituting consent to the retrenchment of the stocktakers.

(38)Both persons must be criticised for their behaviour. Mr Malgas behaved irresponsibly by not taking the Respondent seriously and participating in the consultation process. Had he taken the trouble of explaining to Mrs Atkinson that he considered the wage agreement to preclude retrenchments, the matter could have been debated and, no doubt, cleared up. Mrs Atkinson, on the other hand, should have realised that something was amiss and should not have proceeded with the retrenchment of the stocktakers without clarifying matters and warning Mr Malgas that she intended proceeding with the retrenchments on the following day. An over hasty approach to the retrenchment and the grasping of an opportunity in circumstances where something was clearly wrong led to the retrenchment of twelve employees who all had long service with the Respondent.

(38)That there was something amiss was conceded by Mrs Atkinson. I asked her why she did not at least telephone Mr Malgas to again discuss the matter with him to try to get to the bottom of his peculiar response. She responded that she was under pressure from management to bring finality to the retrenchment.

(38)This also explains why the Respondent did not, when DICHAWU complained about the retrenchments on 23 April 1997, withdraw the retrenchment notices and continue the consultation process.

(38)Mr Maeso argued that the Respondent ought not to bear the brunt of the blame for what occurred. He argued that had Mr Malgas not adopted the attitude that he did, proper consultations would have taken place.

(38)I do not agree with this submission. In terms of section 189 the Respondent bore an *onus* to consult with DICHAWU in such a manner that a joint consensus seeking process occurred. See Johnson & Johnson (Pty) Ltd v Chemical Workers' Industrial Union (1999) 20 ILJ 89 (LAC) at paragraph 27.

(38)Mr Malgas' lack of comment to the Respondent's proposals did not, in my view, amount to consent to proceed with the retrenchment. I say so because consent in such circumstances must constitute a waiver of the Applicants' rights in terms of section 189. Clear evidence of a waiver is required and when assessing the probabilities, it must be borne in mind that a party is not lightly deemed to have waived his rights. Feinstein v Niggli 1981 (2) SA 684 (A).

(38)On the evidence before me, I am not satisfied that DICHAWU either consented to the retrenchment or that it waived the Applicants' rights in terms of section 189.

THE RELIEF PRAYED

(38)The claimants (excluding the Third Applicant) seek compensation from the date of their dismissal to the last day of the hearing of this matter.

(38)Mr Maeso argued that because the Applicants did not apply to the

Respondent for alternative employment when it became available, I should exercise my discretion against the Applicants and not award them any compensation.

(38)Mrs Atkinson testified that positions with the Respondent did, from time to time, become available after the retrenchment of the stocktakers. It was common cause that none of the Applicants were directly offered any positions but that the Applicants could have enquired from any Scotts store or from DICHAWU shop stewards what positions were available. Mrs Atkinson further testified that at the conciliation hearing in June 1998 she encouraged the Applicants to apply for vacant positions. When asked whether the Applicants would have been given vacant positions, Mrs Atkinson replied that they possibly could have. She stated that age would not have been a decisive factor but that re-employment would have been important to the Respondent.

(38)The First Applicant testified that at the time of his retrenchment he was told that if any positions became vacant he would be given preference. He was not contacted and offered any position. He did not enquire about any position with the Respondent because he assumed that the Respondent would be hostile to him after he and the other Applicants had instituted proceedings against it.

(38)In my view, the Applicants cannot be criticised for not having applied for vacant positions. Apart from the fact that no offers of re-employment were made to them and no vacancies were directly communicated to them, I consider it unreasonable to have expected the Applicants to apply for re-employment in circumstances in which they were unfairly retrenched and were in dispute with their former employer. To exercise my discretion against the Applicants in these circumstances would, in my view, be wrong.

(38)In exercising my discretion to award the Applicants compensation I also take into consideration the following factors. Firstly, the Applicants all had long

service with the Respondent. Secondly, I consider it unlikely that the Applicants will easily find alternative employment. It was the evidence of the First Respondent that he had tried to find other employment but because of his age he was unsuccessful in doing so. Thirdly, the Applicants were all paid a severance package less than the statutory minimum provided for in section 196(1).

(38)Mr Maeso also argued that the Applicants should not be awarded any compensation in respect of the period in which there was an unreasonable delay in the initiating of proceedings against the Respondent. He submitted that this period was approximately one year. The Applicants instructed an attorney in September 1997, some three months after the conciliation process, but that attorney inexplicably did nothing until the matter was taken on by Mr Koekemoer in May 1998. I agree that there was an unreasonable delay in instituting these proceedings. One of the objects of the LRA is to promote the effective resolution of labour disputes. There cannot be effective resolution of disputes unless litigants are encouraged to avoid unreasonable delays. In my view, it would be fair if the compensation the Applicants are entitled to is reduced by six months.

(38)The Applicants are, in any event, only entitled to compensation for a maximum period of twelve months. In this regard I consider that section 194(1) should be interpreted in such a fashion that the limit of twelve months' remuneration referred to in sub-section (2) is equally applicable to sub-section (1). Were this not to be the case it would lead to the anomalous interpretation that for dismissals which are substantively unfair compensation is limited to twelve months' remuneration but in cases of procedural unfairness there is no limit apart from the fact that compensation may not be awarded beyond the last day of the hearing of the adjudication. This could not have been intended by the legislature. See Whall v BrandAdd Marketing (Pty) Ltd [1999] 6 BLLR 626 (LC) at paragraph 37 and Vickers v Aquahydro Projects (Pty) Ltd [1999] 6

BLLR 620 (LC) at paragraph 26.

(38)The order that I make is that each of the Applicants (excluding the Third Applicant) are entitled to be paid their monthly salaries as at the time of their dismissal for a period of six months. I also order that the Respondent pays the Applicants' costs of suit.

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G.O. VAN NIEKERK SC
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:
10TH, 11TH AND 25TH JUNE 1999

DATE OF JUDGMENT:
7 JULY 1999

FOR THE APPLICANTS:
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