166336IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: **J3085/99**

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA & OTHER
Applicants
And
DZIMA MANUFACTURING (PTY) LIMITED **Respondent**

JUDGMENT

STELZNER AJ

1. This is an application for final relief in respect of an urgent interdict. A *rule nisi* was issued by Landman J on 6 August 1999, the matter was argued before me on 11 August 1999 and on 13 August 1999 I gave the following order:

1.1 The failure of the applicant to comply with the time periods and the manner of service referred to in the rules for the conduct of proceedings in the Labour Court is condoned and this matter is dealt with as one of urgency in terms of rule 8.

1.2 The respondent has failed to give notice and to consult the union in terms of section 1(d) of annexure “A” to the Main

Agreement of the Metal & Engineering Industries Bargaining Council about the closure of the respondent's Seshego factory and the retrenchment of all its employees.

1.3 The respondent is interdicted and restrained from retrenching any of first applicant's members until it has complied with its obligations in terms of section 1(d) of annexure "A" of the Main Agreement.

1.4 Respondent is directed to pay the costs of this application.

2. The reasons for my decision are set out hereinbelow.

3. The applicant, the National Union of Metalworkers of South Africa, (hereinafter referred to as "the union") seeks an order restraining the respondent, Dzima Manufacturing (Pty) Limited, (hereinafter referred to as "the company"), from carrying out its decision to close its Seshego factory and from retrenching the union's members employed at that factory pending compliance by the company with the provisions of section 189 of the Labour Relations Act No 66 of 1995, as amended ("the Act") and / or pending compliance by the company with the provisions of section 1(d) of annexure "A" to the Main Agreement for the Metal & Engineering Industries Bargaining Council concerning the

closure of the factory and the retrenchment of all its employees on 6 August 1999.

4. It was common cause that the individual applicants were all members of the union and were employed by the company at its factory at Seshego. The respondent employs 103 employees of whom 93 are hourly paid, the majority of those hourly paid employees being members of the union.

5. The business of respondent was previously operated by Duro Industries (Seshego) (Pty) Limited. Respondent acquired the business from Duro Industries (Seshego) (Pty) Limited on or about 7 March 1998. The employees' contracts of employment were transferred to the respondent with no change to their terms and conditions of employment as envisaged by the provisions of s 197 of the Act. This much was common cause.

6. On or about 27 January 1998 a collective agreement was entered into between Duro Industries (Seshego) (Pty) Limited and the union. Due to the pivotal importance of this agreement to this case the contents of the agreement are quoted hereunder in full:

"*The parties agreed on the scope of the Engineering Main*

Agreement. That this agreement shall operate from June to gazettal of each year. In line with Main Agreement at industry level. Whilst agreeing to the condition of the Main Agreement, the company exclude (sic) itself from the following:-

1. *PART ONE OF THE MAIN AGREEMENT*

1.1 HOURS OF WORK

The hours of work shall remain at 45 hours ordinary hours per week till the company join the Employers Association (SEIFSA). But for now it will pay 45 hours per week (old status). Other condition (sic) in section 4 of the Engineering Agreement shall apply.

2. *PART TWO OF THE MAIN AGREEMENT*

The company subject (sic) the whole part two for negotiation.

Apart from the two exempted areas the company agree on:

2.1 SICK LEAVE

12 days sick leave per year.

2.2 WAGES

10% wage differentials.

2.3 LEAVE BONUS

Will be calculated at 10% not 8.33% of the agreement.

Outside the contents of this agreement, the company agreed to pay office bearers 18 days per year paid and a further 18 days per year unpaid and that this is a subject for the coming June 1998 negotiations to have these days paid. This comes as a result of the union demanding that the 18 + 18 days be fully paid."

Chronology of events

7. I have based my decision on the facts summarised below which are the facts which are either common cause or as set out by the respondent in its answering affidavit together with only those allegations of the applicant that the respondents could not deny, along the lines of the approach set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA623 (A) at 634E-G.

8. On 28 May 1999 representatives of the union met with

representatives of the company to discuss various issues. The company stated that it called this meeting as a result of its ongoing loss making situation and the steadily deteriorating relationship with the union. The agenda of the meeting which formed part of the papers before me indicated that there were 10 agenda items. Items 8 and 9 were headed *"Company losses/Production"* and appear to have constituted the penultimate subject of discussion at the meeting. The minutes reflect that "*Dzima management raised the issue of company losses and the manager made his intention clear that he was in the process of restructuring the business because the company is losing money*."

9. On 30 June 1999 the company wrote to the union by way of a letter entitled "*Notification of a perceived need to implement retrenchments*". The letter read as follows:

"It is with regret that this company finds itself in a position where a reduction in the workforce may be necessary due to the prevailing economic circumstances and its impact upon our work load.

Accordingly, notification is provided of this company's intention

to enter into a consultation process with yourselves and your representatives concerning this perceived need.

Since certain of your members employed at this company may be affected by this perceived need for retrenchment, it is requested that you meet with representatives of the company on 6 July 1999 at 10h00 or on 8 July 1999 at 10h00 in order that your views, thoughts and suggestions on the possible retrenchment be ascertained and a process of consultation take place.

Please contact the writer as soon as possible to confirm either of these dates or to make alternative mutually suitable meeting arrangements."

10. On the same day (30 June 1999) respondent issued a notice to its employees wherein the employees were advised that respondent was contemplating retrenchment. On the same day also the union sent a fax to the company in which it requested that the company comply with section 189 of the Act. At the same time the union confirmed a meeting for 8 July 1999.

11. In the meantime and on 5 July 1999 the company forwarded a

letter to the union wherein it was stated that respondent would comply with the provisions of section 189 of the Act. (It was common cause that the letter was not accompanied by written disclosure as envisaged by s 189). Thereafter and on 6 July 1999 respondent sent a fax to the union stating its intention to embark upon short time as from 13 July 1999, with working hours being confined to 07h00 to 12h00 until further notice, for all hourly paid employees with the exception of drivers and assistants.

12. On 8 July 1999 the parties met. There was some discussion and dispute at the meeting of 8 July 1999 about the issue of short time, the detail of which is not essential for the purposes of this application. The company advised the union at the meeting that approximately 60 people would be affected by the need to retrench. The union's response was that the company was required to comply with section 189(3) and had to disclose certain information. Respondent states that the union was requested to indicated specifically what information was required to be disclosed but that the union failed to be specific in this regard.

13. On 9 July 1999 the union wrote to the company confirming that it had asked for compliance with section 189 of the Act, this

fax being addressed to one of the directors of the company, Mr Alex Mzizi. The letter refers to Mr Mzizi's undertaking to assist in the matter and indicates that the union is awaiting a response. Thereafter ensued some discussions and correspondence on the issue of short time which it is not necessary to deal with in detail. On 12 July 1999 the company sent a fax to the union in which it undertook to provide financial information subject to the relevant union official signing a confidentiality agreement. The issue of short time continued to be a problem with the company maintaining that the lack of co-operation by union members was jeopardising the ability of the company to survive.

14. On 14 July 1999 Mr Mzizi responded to the earlier letter of the union. Once again the statement is made that the company will comply with section 189 of the Act and this is followed by a request that the union assist the company in a spirit of mutual co-operation.

15. On 19 July 1999 the company addressed the union in some detail, which letter purported for the first time to constitute compliance with the provisions of section 189 of the Act. In the letter the company specifically stated that it was suffering losses of approximately R100 000-00 per month, that it was in dire

financial straits and that it "*may have to close its operation and retrench all workers should the planned action not succeed in stemming losses*" (my underlining). The letter went on to state that all employees would be affected in the event of a closure and 40 in the event of a retrenchment and proposed that employees' employment be terminated on 31 July 1999. The union was invited to consult with the company at any time during the week commencing 19 July 1999 until 25 July 1999. It was furthermore stated that should the union sign a confidentiality agreement the company would disclose the financial information to the union. Finally, it was stated that if the union did not respond to the letter or take the opportunity to consult then the company would implement its proposals with effect from 31 July 1999.

16. The letter dated 19 July 1999 was only faxed to the union offices on 20 July 1999. On 21 July 1999 the union responded indicating that it was not available during the week of 19 July to 25 July 1999 (part of which had already gone past by the time the union received the invitation) due to other commitments and that a meeting could in any event not proceed until information had been disclosed. The union reiterated that the meeting of 8 July

1999 had not been fruitful as the company had not complied with section 189 of the Act. In the same letter the union made the sweeping statement that it would expect that it would need 60 to 90 days to be in a position to be fully informed after receipt of the detailed information which was requested. At the same time the union sought agreement from the company to bear the costs of a financial adviser and other experts.

17. Despite the sweeping statements and demands made in the preceding letter, however, on 22 July 1999 the union sent a fax to the company requesting that it be informed whether the requested information was ready for collection, confirming at the same time that the union would then sign the confidentiality agreement. In the meantime there was an allegation by the company that union members were embarking upon a “go-slow”, which allegation was denied by the union. It is not possible or necessary for me to decide this dispute on the papers. Even if the company is correct and union members were on a go-slow there was no suggestion that this was being instigated or supported by the union nor could such action on the part of its members be said to constitute intransigence on the part of the union in regard to the retrenchment consultations.

18. On 23 July 1999 the company wrote to the union again. This letter commenced as follows:

"*We refer you to the collective agreement entered into between the parties in terms of which it was agreed that the scope of the Main Agreement for the Engineering Industry would be extended to cover the operations of the company and that the parties would comply with the Main Agreement in all respects except in a number of specific exceptions. In terms of clause 35 of the Main Agreement the company is required to give at least 21 days notice of any contemplated retrenchment. The provisions of the Main Agreement require the company to invite the union to enter into good faith consultations regarding the contemplated retrenchments.*"

The letter goes on to suggest that the company had advised the union on 30 June 1999 of the fact that it was contemplating retrenchments. It further suggests that a consultation had taken place on 8 July 1999 whereat the company disclosed "*all critical financial information*". It was alleged that in the circumstances the company had fully complied with the provisions of the Main Agreement and that the union's reference to section 189 of the Act was misplaced. Notwithstanding the above, however, the

company indicated that it was still prepared to indulge the union by disclosing specifically requested financial information provided that the union signed a confidentiality agreement. No such information had to date been disclosed, however, confirms the company, because the union has to date not signed the confidentiality agreement. The company then goes on to state that, subject to the signing of a confidentiality agreement, it is willing and prepared to furnish the following financial information to the union:

18.1 Detailed profit and loss account for period since commencement of trade.

18.2 Summarised profit and loss account for period since commencement of trade.

18.3 Balance sheet of Dzima Manufacturing (Pty) Limited as at end February 1999.

18.4 Interim statement for Dzima Manufacturing (Pty) Limited prepared 1 March to 30 May 1999.

18.5 Analysis of annual window production showing profitability per product.

18.6 Outstanding order report.

18.7 Outstanding work load.

18.8 List of all employees and rate of pay.

18.9 List of commencement dates of all employees.

Finally the union is requested to contact the company as soon as possible to arrange consultations for the week of 26 to 30 July 1999 failing which it is stated that the company will implement the retrenchment with effect from 30 July 1999, paying each affected employee one week's remuneration for each year of completed service and giving the affected employees one day's notice. The company then goes on to say that if it decided to close down the whole operation the issue of selection criteria would be of little consequence. However, in the event of it deciding to retrench only some of the employees then the criteria of last-in-first-out with the retention of necessary skills would apply.

19. On 26 July 1999 the local union organiser sent a telefax to the regional office requesting assistance on an urgent basis in regard to the forthcoming meetings with the company. On 27 July 1999 the regional secretary of the union wrote to the company

proposing a meeting on 28 July 1999 to consult further on the proposed retrenchments. A meeting duly took place on that date. When the union arrived for the meeting it received a letter dated 26 July 1999 attached to which were the documents specified in the letter of 23 July 1999. On receipt of the documents the union signed the required confidentiality undertaking. The meeting then proceeded. By no stretch of the imagination in my view can it be said that the union's conduct as set out above was dilatory or obstructive.

20. At the outset of the meeting of 28 July 1999 the union official required clarification as to whether the company would be closing down or would only retrench a number of employees. The company had not made its position in this regard clear before that point and its response was then that initially it had contemplated retrenchments but as a result of deteriorating circumstances it had decided to close down the business with effect from 30 July 1999. In its papers before this court the respondent made the further statement that a cursory glance at the balance sheet read with the profit and loss account indicated that the business was insolvent and that respondent could only trade with the support of its shareholders who were no longer

prepared to afford such support. The union's proposal at the meeting was that the company look at the longer term rather than the short term option of closing the company. After an adjournment to canvass the views of the members the union proposed that the retrenchment date be extended until the end of August 1999 to enable the union to consider the financial and other information disclosed by the company.

21. On 30 July 1999 the company telefaxed the union in response stating that it was unable to extend the effective date to the end of August due to the extent of the losses being suffered, nor was it able to respond positively to the union's suggestion to extend the working of short time. The respondent was prepared to extend the closure date to 4 August 1999 and held itself available for consultations on 3 August 1999. Clearly, however, the decision to close which was communicated to the union on 28 July (at which date the union for the first time obtained any real disclosure of relevant information) remained immutable.

22. The union nevertheless confirmed its availability for the meeting on 3 August 1999, at which meeting the company was represented by its attorney. The union indicated that it had not been in a position to obtain financial advice in the short time

available and therefore confined itself to tabling proposals in regard to severance pay and assistance to retrenchees. In the circumstances I do not take this to mean that the union was accepting the position, but rather that it was simply trying to make the best of it in the face of the company's stated course of action. The attorney representing respondent confirmed that the company intended to close. On 4 August 1999 respondent's attorneys of record confirmed in writing the final decision of respondent in respect of the closure of the business and the retrenchment of the individual applicants. This was to take place on 6 August 1999.

23. There was some dispute as to the time at which the retrenchments would have taken effect on 6 August 1999 having particular regard to the fact that the individual applicants were on short time which meant that they would ordinarily have finished work at 12h00 on that day. It was common cause that the parties were in court arguing the urgent application before Judge Landman at 12h00 on 6 August 1999, Judge Landman's interim order having been issued at 12h25 on the aforesaid date on conclusion of argument and some oral evidence. Respondent's evidence was to the effect that the individual

applicants did not render services on 6 August 1999 but merely attended at the respondent's premises in order to collect their payslips, the last payslip having been collected by 09h30 that day. The letter of 4 August 1999 from respondent's attorneys simply confirmed "*the company will close with effect from Friday 6 August 1999*". The letter also, significantly, indicated that retrenched employees would be paid one week's severance pay per completed year of service, pro rata leave pay including pro rata long service leave pay and notice pay in accordance with the Main Agreement.

Argument and conclusions

24. The union's case before me was based on an alleged failure on the part of the company to comply with the provisions of section 189 of the Act prior to closure and retrenchment and, secondly, on the alleged failure by the company to comply with the provisions of section 1(d) of annexure "A" to the Main Agreement. It was common cause that annexure "A" to the Main Agreement is an annexure to Part One of the Main Agreement and, further, that section 1(d) thereof requires 21 days notice of an intention to retrench and 30 days notice of an intention to close. The section is not simply notice provision but, rather,

provides as follows:

"(i)An employer wishing to close or relocate any factory, company, enterprise, or part thereof, shall provide the Regional Council and the party trade unions representing the affected employees with the following written information at least 30 days prior to the intended closure of relocation:

The proposed date of relocation and / or closure;

(ab) the proposed number of employees to be affected by such relocation or closure;

(ac) the specific reason(s) for the relocation or closure.

The employer and party trade unions concerned shall hold themselves available at all reasonable times within such 30-day period to consult in good faith in an endeavour to reach agreement on matters related to the proposed relocation or closure:

Provided that the provisions of (I) and (ii) above shall not apply in respect of a factory, enterprise, business of company which is placed in liquidation in terms of the Insolvency Act."

25. It was common cause, further, that the company had at no stage given notice as contemplated by section 1(d) of annexure "A" to the Main Agreement of its intention to close the factory. (It is doubtful even whether there had been notice of intention to retrench as contemplated by section 1(d) of annexure "A" to the Main Agreement.) Accordingly, if the provisions as aforesaid are applicable then respondent is in breach thereof. Whether such breach is sufficient to justify the relief sought by the union is dealt with more fully below.

26. Respondent's argument was that a reading of the collective agreement (quoted in full above) suggested ambiguity as to the application and/or interpretation thereof. Where there is ambiguity as to the application or interpretation of a collective agreement this court has held that such a dispute must, in accordance with the provisions of section 24(2) of the Act, be determined by the CCMA by way of arbitration proceedings. (See *Food & Allied Workers Union v Premier Foods Industries Ltd (Epic Foods division)* (1997) 18 ILJ 1082 (LC)). I was referred to further authority for the proposition that this court does not have the jurisdiction to consider the interpretation and/or application of a Main Agreement. (See *Denel Informatics Staff Association &*

another v Denel Informatics (Pty) Ltd 1999 (20) ILJ 137 in particular 139I-J; and *SA Commercial Catering & Allied Workers Union v Woolworths (Pty) Ltd* 1998 (19) ILJ 57 (LC) which deals with the same principle in relation to a different section of the Act). I accept these decisions as being correct.

27. Mr Bruinders, who appeared for the applicant, argued, however, that on the facts of the matter before me there was not in truth any real dispute about the interpretation or application of the provisions of a collective agreement or the provisions of the Main Agreement such as contemplated in the aforementioned authorities and which would thus deprive this court of jurisdiction. If Mr Bruinders is correct in this submission then it would appear that the facts of this case are distinguishable from those quoted above. The alleged dispute arises when respondent's general manager, Mr Dickerson, deposes to his affidavit in the answering papers filed by the respondent. In his affidavit Dickerson states as follows: *"I was under the mistaken belief that the respondent agreed to comply with the provisions of the Main Agreement. I have ascertained that the respondent had only agreed with the applicant to comply with the Main Agreement insofar as certain aspects are concerned and then*

only as a guideline." This averment is made against the background of the clear and overt prior statement by the same Mr Dickerson in which he confirms that respondent regards itself as bound to comply with the provisions of annexure "A" to the Main Agreement and in which he seeks to justify compliance by respondent with those provisions as a matter of fact (see the letter of 23 July 1999 referred to and quoted above). When one reads Dickerson's letter of 23 July 1999 together with the terms of the agreement quoted in full above it is quite clear that apart from one exception in regard to hours of work, Part One of the Main Agreement was incorporated into the provisions of the collective agreement between the parties and, thus, by reference into the employment contracts of the individual applicants. Nowhere in the collective agreement is the word "guideline" used. The agreement may not be a model of grammatical correctness but that does not in itself render the terms of the agreement ambiguous. Particularly when Mr Dickerson himself, and while in the throes of a retrenchment exercise in respect of which the applicability of these provisionsn was highly relevant, states that he regards the company as bound thereby to follow the terms of annexure "A" to the Main Agreement.

28. Moreover, even respondent's attorneys, writing on respondent's behalf on 4 August 1999 confirming the closure and the terms of the retrenchments, confirm that notice pay will be in accordance with the Main Agreement. Nowhere in his answering affidavit does Mr Dickerson explain the basis of his so-called mistake. In the circumstances his bare denial of the applicability of the provisions of the Main Agreement cannot be regarded as sufficient to create a real dispute about the interpretation or application of the agreement. (See the approach of the court in *Soffiantini v Mould* 1956 (4) SA [EDLD] at 154F ff.)

29. It is common cause that the provisions of the Main Agreement would not, but for their incorporation into the collective agreement between the parties, be applicable as respondent does not fall within the scope of application of the Bargaining Council for the Metal & Engineering Industries. The agreement was also not extended to cover respondent's operations statutorily. Rather, the agreement has been extended by private agreement. The fact, therefore, that the parties do not ordinarily process their disputes through the dispute resolution mechanisms provided for by the Bargaining Council and did not do so in this instance either is not conclusive of an intention not

to be bound by the provisions or certain provisions of the Main Agreement. Moreover, the parties could not by private agreement bind a third party in the form of the Bargaining Council, to preside over their disputes. In agreeing to incorporate the terms of the Main Agreement into their collective agreement one would obviously have to read in the changes dictated to by the context (such as reference to party trade unions being taken to mean references to the union which was party to the collective agreement.) In my view, therefore, this court is not in the circumstances of this case interpreting or applying the provisions of the Main Agreement but is, rather, holding the parties to their private agreement.

30. In this case what we have is a collective agreement which also regulates the terms and conditions of employment and the conduct of employers in relation to their employees, by virtue of the provisions of section 23(1)(c) of the Act. The provisions of section 1(d) of annexure "A" to the Main Agreement place specific obligations on an employer wishing to close a factory, as set out in the section quoted in full above. Thereafter both parties are required to hold themselves available at all reasonable times within such 30-day period to consult in good

faith and in an endeavour to reach agreement on matters related to the proposed relocation or closure. It is further provided, as can be seen from the section quoted above, that the aforementioned provisions do not apply in respect of a business which is placed in liquidation in terms of the Insolvency Act. An order in terms of which the business was placed under provisional liquidation in terms of the provisions of the Insolvency Act would have had the effect of immediately terminating the contracts of employment of all the individual applicants by operation of the law. In the absence thereof the employer was required to comply with the notice and consultation provisions as contained in section 1(d) of Annexure "A" to the Main Agreement and as outlined above.

31. In my view the facts in this matter are also distinguishable from the facts in the *Premier Foods* case referred to above in that the provisions of section 1(d) of annexure "A" to the Main Agreement do not constitute a simple requirement that employees to be retrenched and/or the union be given a specified period of notice. The 30-day notice requirement is coupled with a substantive obligation to consult with a view to reaching agreement. In such circumstances it would not be

correct to say that the applicants have an adequate alternative remedy in that a dispute about non-compliance with the provisions of the collective agreement could be referred to the CCMA for conciliation and thereafter adjudication. If respondent is not interdicted and restrained from implementing the retrenchments until such time as the notice and consultation provisions have been complied with then proper consultation with a view to reaching agreement will not take place. The individual applicants may in due course be compensated for the notice which they did not receive but such a compensation order would not be able to replace the fact that they were not afforded a proper opportunity, through their representatives, of consulting properly with the company concerning the proposed closure and retrenchments, which consultation has at least the prospect of culminating in consensus on some means other than closure of addressing the company's concerns.

32. Mr Redding, who appeared on behalf of the respondent, sought to argue that I could not, alternatively ought not to, issue an order effectively reinstating employees whose services had already been terminated. He argued that this court has generally been reluctant to grant reinstatement orders on an urgent basis

where employees have been dismissed and is inclined only to do so in exceptional circumstances. In this regard I was referred to the decision in *SA Chemical Workers Union & others v Sentrachem* (1999) 20 ILJ 1590 (LC).

33. In the first place I am not persuaded that as at the time this matter came before me the individual applicants had already been dismissed in the sense that their employment contracts and/or the employment relationship between them and the respondent had been terminated. Respondent had given notice that it was to close its factory on 6 August 1999. I accept Mr Bruinders' argument to the effect that this, unless the contrary is stated, should be taken to mean that the business would have closed and the contracts would have terminated at the earliest at the close of business on 6 August 1999. In the circumstances, at the earliest for respondent, the employment contracts would have terminated at 12h00 on 6 August 1999. They could well have terminated some time later as it was common cause on the evidence that some employees were not on short time and would have worked (or could have been required to work) until 15h30 on that day. It would certainly seem, in the circumstances, that the business would not have closed before 15h30 on 6 August

1999. In any event, the fact that the working day of the individual applicants was shortened at respondent's instance or that they were not required to tender their services or work out the normal working day cannot be taken to mean that their employment contracts terminated earlier than provided for in the notice given by respondent. They may have even terminated later by virtue of the payment in lieu of notice. Even if the employment contracts would have terminated at 12h00 on 6 August 1999 both parties were at that stage in court arguing an application on an opposed basis in terms of which the applicants were seeking to restrain the respondent from effecting such a termination. At the conclusion of those proceedings Landman J issued an interim order in terms of which the respondent was interdicted and restrained from proceeding with such terminations. In the circumstances I am of the view that it would be artificial and possibly even contemptuous of respondent to suggest that as at the time the matter came before me the employment contracts of the individual applicants were no longer in existence.

34. That being the case what I am asked to do in this matter is simply to extend the life of these employment contracts until

such time as respondent has complied with its obligations in terms of section 1(d) of annexure "A" to the Main Agreement. Mr Bruinders did not persist with his prayer for relief in the form of an interdict restraining respondent from closing its factory and the order which I made was thus deliberately couched in terms which only interdicted respondent from retrenching any of the first applicant's members until it had complied with its obligations in terms of section 1(d) of annexure "A" of the Main Agreement. As such the facts of this case are clearly distinguishable from those of the *Sentrachem* case where this court was being asked to reinstate employees who had already been retrenched, pending the outcome of an application based on the alleged unfair dismissal of the employees. In the *Sentrachem* case it was quite correctly pointed out that the legislature saw fit in relation to the 1995 Act not to perpetuate the status quo relief which was available to applicants under the provisions of section 43 of the 1956 Act.

35. In the circumstances I was persuaded that the applicants had made out a case for relief in the form of a final interdict, in that they had in my view established a clear right and the absence of an adequate alternative remedy. As far as the reasonable

apprehension of harm is concerned that harm was manifest as a result of respondent's stated intention to close the business and retrench all its employees. It was on that basis that I gave the order which I did on 13 August 1999.

36. As far as the further and alternative allegation by the union is concerned, namely, the company's alleged failure to comply with the provisions of section 189 of the LRA, I do not believe that it is necessary for me to decide this aspect given my ruling on the first argument.

37. It may well be, however, that the respondent in this matter is guilty of a failure to comply properly with the provisions of section 189 of the Act particularly in the sense contemplated by the Labour Appeal Court in *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC). On the facts before me (as outlined above) I have formed the view that respondent's conduct falls short of the requirements of section 189 which, in my view (and according to the Labour Appeal Court in the *Johnson* decision), places the primary obligation on the employer. I do not think that the union's conduct can be said to have been obstructive in the sense that it can be said that it is the union's fault that joint consensus-seeking was not achieved. I

am aware that this court has expressed a reluctance to sanction an attempt on the part of an applicant to conduct a trial by way of urgent application. (See *Vela & others v Savo & others* (1998) 19 ILJ 916 (LC)). I might add that I do not think that this is what the applicant was seeking to do in this matter.

38. I did not make an order interdicting or restraining the respondent from effecting the retrenchment of applicant's members pending compliance with the provisions of section 189 of the Act in this case as it was not necessary to do so given the order which I made concerning compliance with section 1(d) of annexure "A" to the Main Agreement. There might well be circumstances, in my view, however, where an applicant could adequately show a failure on the part of a respondent to comply with the provisions of s 189 and the absence of a adequate alternative remedy to the extent that relief in the form of an interdict pending compliance with the provisions of s 189 would be appropriate. Otherwise, in my view, the ratio in the *Johnson* decision has no teeth and respondents (employers) can simply avoid entering into meaningful joint consensus-seeking on retrenchment related issues, particularly in a closure situation, by suggesting that the applicants seek their remedy at a trial in due

course into the fairness or otherwise of their dismissals. The only likely penalty in the end in such circumstances would be an order of compensation which at such stage might afford the applicants cold comfort if the business has in the meantime been liquidated or has disposed of its assets. Certainly the employer would have avoided the obligation of genuinely seeking to achieve consensus on alternatives to closure and / or retrenchments.

39. Both parties were *ad idem* that this was a matter in which costs should follow the result. It is also apparent that an ongoing relationship between the parties appears unlikely. There seems no reason therefore, either on the basis of law or fairness, not to award costs in favour of the successful party.

40. In the event, the court granted the order set out in paragraph 1 above on 13 August 1999.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING:	11 August 1999
DATE ON WHICH ORDER GIVEN:	13 August 1999
DATE ON WHICH REASONS FOR THE ORDER SUPPLIED:	18 August 1999
APPEARANCE FOR APPLICANT:	Mr T Bruinders
INSTRUCTED BY:	Cheadle Thompson & Haysom
APPEARANCE FOR RESPONDENT:	Mr A Redding
INSTRUCTED BY:	