IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Braamfontein)

Case No J 949/98

In the matter between

SIPHIWE SIKHOSANA AND OTHERS Plaintiff

and

SASOL SYNTHETIC FUELS Defendant

BRASSEY AJ:

The applicants, erstwhile employees of the respondent, were dismissed on 31 January 1998 following a decision by the respondent to ‘outsource’ the work being done in their department. Their dismissal, which was plainly for operational reasons within the contemplation of the Act, is alleged by them to be unfair, and they now seek an order reinstating them in their employment with the respondent.

In their statement case they set out a number of complaints but in both the evidence they tendered and the argument they mounted through their representative, Mr Luthuli, they confined their attack on their dismissal to the following grounds.

The dismissal was in breach of their respective contracts of employment, which (they

say) gives them a contractual right to remain in employment until retirement age;

The defendant failed to consult over the dismissal with the union to which they belong, viz the United Peoples Union of South Africa (UPUSA);

The defendant took insufficient steps to place them with the outside firms that were taking over the outsourced work.

The first issue was not pleaded and is thus not one on which I am required to pronounce. For completeness, however, I shall say a few words about it. The defendant's witnesses accepted in evidence that the employment contracts under which the applicants were engaged contain a stipulation regulating the age on which they are to retire. Mr Luthuli argued that this provision gave them an absolute right to remain in employment until the arrival of the specified date. Such a conclusion, which is so obviously contrary to conventional practice, would be insupportable in the absence of contractual provisions of the clearest and most unambiguous sort. There is nothing to suggest that the present contracts contained such language, and I should be most surprised if they did. The point must be dismissed as baseless.

The defendant's answer on the second point (the failure to consult with UPUSA) is twofold: first, that its duty to consult was exhaustively delineated by a collective agreement by which the three recognized unions, which represent eighty percent of the non-managerial staff of the company, regard themselves as bound; and secondly, that the company in any event consulted with UPUSA over the retrenchments in a manner consistent with the dictates of fairness. I shall deal with each defence in turn.

The collective agreement upon which the defendant relies was formally concluded with the Chemical Workers' Industrial Union alone, but the company's evidence (which on this point was undisputed) makes it clear that this agreement was treated by the other two unions, the Mine Workers' Union and the South African Workers'

Union, as equally applicable to, and binding, upon them. The agreement commences by recording a general commitment to fairness, consistency, objectivity and honesty in dealing with ‘overstrength employees’ (by which is meant employees who are redundant). It then goes on to make detailed and specific provision on the manner in which the need to retrench or outsource is to be determined, the steps to be taken before dismissal is invoked, the criteria by which employees are to be selected for dismissal and the means by which the impact of dismissal will be cushioned. Judged by current standards, the terms are generous to employees: prospective retrenchees are, for instance, to be given two months’ notice of dismissal in order to allow for a thorough exploration of lesser alternatives, and severance pay comprises, in addition to certain other benefits, four months’ salary in lieu of further notice plus three weeks’ pay for every year of service.

Under the agreement no provision is made for consultation with unions other than the CWIU, but the company accepts that, since its terms apply *mutatis mutandis* to the two other recognized unions, it must consult with them as well. Consultation on outsourcing occurs in an outsourcing committee on which the unions are entitled to representation. During 1996 the committee met to consider the continuing viability of the department (reprographics) in which the applicants were employed and which, according to the unchallenged evidence of the company, was no longer cost-effective. Initially the committee refused to sanction the outsourcing of the work, but the matter was considered once again in 1997 and outsourcing was approved.

What happened thereafter was contested in evidence by the applicants’ witnesses (the first applicant and Sipho Mvubelo, the UPUSA worker representative in the company), but the issues they raised had actually been put out of contention by agreement at the pre-trial conference and so I must proceed as though they are undisputed. Moreover, since the agreement reflects the company’s version, I must

accept the elaboration upon them that the company proffered in evidence. What this evidentiary material reveals is that Eben Kok, a member of the company's labour relations department, spoke to Mvubelo on 29 October 1997 about the closure of the department and its implications for the employees within it. Mvubelo, after questioning Kok on various aspects, expressed himself to be satisfied with what he had been told. What emerges, in addition, is that Johan van Rooyen, the head of the reprographics department, called his subordinates together on 13 November 1997, told them of the impending closure, and explained the effect it would have on their employment.

What followed next is common cause between the parties. Letters in the same terms were written to the employees in the department confirming what they had been told and notifying them that their work would terminate on 1 December and their employment on 31 January 1998. The letters invited them to use the services of the Career Transition and Development Centre, a unit specifically established by the company to handle the consequences of its restructuring and downsizing, in order to explore the opportunities for redeployment within the company. The letters were dated 25 November but were apparently only distributed on the 28th.

In December the workers reported to the CTDC as suggested and efforts were made to find them alternative employment within the company. Some interviews were held with the employees but ultimately only one member of the department was placed elsewhere within the organization. The cudgels, meanwhile, were being taken up by UPUSA, which by now had recruited most members of the department. Its opening blow was a letter to the respondent of 26 November 1997, in which it complained that the proposed retrenchments were unfair and invited the company to suspend the process until a meeting could be held in an effort to resolve the problem. The parties

met on 11 December 1997 but were unable to achieve more than an exchange of viewpoint. The meeting ended with an undertaking by the union that it would suggest ways of avoiding retrenchment ‘in addition to the CTDC option of looking for placement options in other Divisions’ (the words are taken from the respondent’s letter to UPUSA of 11 February 1997 confirming what transpired at the meeting).

Nothing was volunteered by the union before the termination of the applicants’ employment; indeed, there were no further communications of consequence between the two sides until 11 February 1997, when a meeting was held which ended as inconclusively as its predecessor. By then the dismissals had been effected and the respondent, believing it had acted fairly, adamantly rejected UPUSA’s demand that they be reinstated. The correctness of the belief is what i must now consider.

Section 189 of the Labour Relations Act 66 of 1995 is normally regarded as the source of the law governing dismissal for retrenchment, but in fact it does no more than set out a a number of duties with which an employer must comply when she contemplates dismissing employees for operational reasons. None of its provisions deal expressly with dismissal, let alone with whether and when a dismissal will be fair. There is, for instance, no provision stating that non-compliance with the section makes a dismissal for operational requirements unfair nor any provision stating the converse – ie that compliance with the section makes the dismissal fair. For the provisions that have this effect, we must first look to s 185, which gives employees the right not to be unfairly dismissed, and then at s 188, which states (so far as is now relevant) that a dismissal is unfair unless it is actuated by a fair reason based on the employer’s operational requirements and is effected in accordance with a fair procedure. Section 189 has nothing expressly to say on matters of fairness.

What purpose, then, does s 189 serve?

First it provides a set of self-standing duties with which an employer must comply or run the risk of the retrenchment being declared invalid. A declaration of invalidity, which I accept is seldom made, is competent when the duty with which the employer fails to comply is held to be peremptory (as opposed to merely directory) and the facts of the case reveal good grounds for an exercise of discretion in favour of an order for specific performance. On these matters it is unnecessary to say more than that the remedial discretion is more likely to be exercised before the retrenchment has occurred than afterwards. This, I take it, provides one explanation why proposed retrenchments are sometimes interdicted on the grounds of non-compliance with the section but retrenchments that have been carried out in breach of the section are seldom condemned as invalid and reversed.

The second purpose served by s 189 is to shed light on what constitutes an unfair retrenchment. By setting down the processes to be followed before a retrenchment takes place, the legislature plainly reveals a belief that retrenchment without following those processes would be wrong, and the step from what it is wrong to what is unfair is but a small one. The relationship between the dictates of s 189 and those of fairness is not one to one, however. It cannot be assumed that every breach of s 189 necessarily makes the retrenchment unfair: every invalid dismissal will doubtless be unfair but, as I have tried to make clear, not every dismissal in conflict with the section will necessarily be - or be treated as - invalid. It would be even more dangerous to assume that every retrenchment in compliance with the section is necessarily fair. Section 189, which (with one exception of no relevance here) deals only with matters of consultation, is obviously not intended to be exhaustive. A court determining the fairness of a retrenchment must consider, in addition to the matters for which the section provides, whether the employer really needed to retrench, what steps she took to avoid retrenchment, and whether fair criteria were employed in

deciding whom to retrench. Compliance with s 189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment. The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as set of rules that conclusively disposes of the issue of fairness.

The precise impact of s 189 depends to an extent on the precision with which it regulates a specific topic. When a provision is comprehensive in its coverage and specific in its terms, it is easier to conclude that conduct which goes unregulated is permissible and so fair. This is well illustrated by an examination of subsection (1) of s 189. This is the provision which delineates the party whom the employer must consult when retrenching and so the provision that is most pertinent to the question now under consideration (which, lest we forget, is whether the respondent was obliged to consult with UPUSA). The provision reads as follows:

'1) When an employer contemplates dismissing one or more employees for reasons based on the 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*) if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;

(*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*) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.'

No one reading this section can fail to be struck by its comprehensiveness and the pains it takes to identify the body with whom the employer must consult. Four levels of consultation are set out but the section goes out of its way to stress that only one

can be applicable. It does this by making each duty except the first conditional on the inapplicability of its predecessors: para (*d*) can apply only if (*a*) (*b*) and (*c*) are not, (*c*) becomes applicable only if (*a*) and (*b*) are not, and so on.

It is impossible to believe that this hierarchy of obligations has anything but intentional: care has too obviously been taken in the choice of language to permit the conditional clauses to be dismissed as mere rhetorical flourishes. The interpreter is driven to the conclusion, therefore, that an employer, to satisfy her obligations under the subsection, need only consult the employees likely to be affected by the proposed dismissals (or their representatives) if there is no registered union whose members are likely to be affected by the dismissal, no workplace forum in the workplace in which the dismissal might occur and no collective agreement governing consultation. The union, in turn, need be consulted only if there is no such workplace forum and no such collective agreement, and so on up the ladder. Under the unfair labour practice jurisdiction of the previous Act, there were suggestions that the employer had a duty to consult at two levels: first with the collective bargaining representative of matters such as the need to retrench and the criteria for retrenchment, then with the prospective retrenchees over matters specific to their individual future and fate. Section 189(1) quite deliberately renounces dual consultation in favour of the single level of consultation for which it provides. The change evinces, I take it, more than just a concern to make the process of consultation simple and speedy: it embodies a desire, evident elsewhere in the Act too, that bargaining and consultation should be collective rather than individual and that the legitimacy of the representative with the best claim to be consulted should not be undermined by the claims to consult made by lesser interests. The effect of the section, thus, is to vest the appropriate collective representative with sole power of representation; if others claim the right

to be consulted, they must look beyond the section, indeed beyond the Act, and point to some juristic act – an agreement, undertaking or commitment of some sort – in terms of which the employer concedes that she will engage in such consultation.

Subsection (1) cannot, for reasons I have been at pains to stress, be treated as conclusively determining the scope of the employer's duty to consult. Cases can arise in which consultation, though strictly in terms of the hierarchy, nevertheless falls short of what fairness requires. I think, for example, of a case in which the collective representative that is entitled to consult under the section discriminates against non-members in its dealings with the employer or of the problems that can arise when the collective agreement contemplated in the first paragraph of the subsection is the product of collusion between the employer and a minority or 'sweetheart' union. But the present case is not of this ilk. Here it is plain, first, that the collective agreement has the support of unions representing the overwhelming majority of the company's blue-collar workforce and secondly, that it sets up structures within which consultation can conveniently and properly proceed. Agreements such as this are precisely the kind the drafters of s 189(1) must have had in mind when they placed unions who conclude them at the top of the hierarchy that the subsection creates. We can comfortably assume that they wanted these unions to say 'We and we alone will consult' and employers to have the right to echo this statement.

If this was their desire when they fashioned s 189(1), it must equally have been what they wished to see as informing the court's decisions on unfair retrenchment. Believing that the employer acts correctly when consulting in terms of the hierarchy, they must have considered that a dismissal will not normally be unfair if the employer declines to consult on some other basis.

In the present case, the respondent, in consulting with the majority unions, heeded the dictates of the section. The unions had the right to consult with the respondent in terms of a collective agreement with it and, as a result, were at the top of the hierarchy. Nothing in the agreement suggests that it is the processes for which it provides are discriminatory or oppressive; nor is there anything to suggest that the application of the agreement in the present instance was in some way unfair or improper. The applicants simply say that the company should in addition have consulted with UPUSA since it is the union to which they, the prospective retrenchees, mostly belong. UPUSA, however, has no status under the agreement and, having recruited only a handful of the company's employees as its members, cannot seriously suggest that in morality or equity it should have. All it can assert is its strong representation in the department being outsourced; but this claim, which ranks lowest in the hierarchy created by subsection (1), is trumped by the right of consultation given to the three majority unions by reason of the conclusion of the collective agreement. This right entitles these majority unions to speak on behalf of the company's employees, whatever their union affiliation, in matters of retrenchment. Respect for the legislative policy underlying the hierarchy of rights requires a court, in deciding an unfair dismissal case, to give effect to the terms of the collective agreement unless it is evident that to do so would be to perpetrate an unfairness going beyond any inequity stemming from the hierarchy itself. In the present case I can find nothing to justify such a conclusion. As a result, I find that the company was under no duty to consult with UPUSA over the dismissals and its failure to do so prior to dismissing them was not unfair.

If I am wrong and the respondent was indeed under some duty to consult UPUSA, the duty, I consider, would perforce been a very light one. Having consulted with the

three unions in the majority, there would have been little more for the respondent to consider in consultation with UPUSA. The majority unions had been invited to consider whether the outsourcing was justified and, after initially demurring, had agreed that it was. They had also agreed that retrenchment would be appropriate if no alternative work could be found for the members of the reprographics department. Armed with this agreement, the respondent would have been entitled to approach its discussions with UPUSA on the basis that these questions had been settled. All that would have been left to discuss was whether there was anything in the personal circumstances of the members of the department to which it should pay special attention. This, and more, was what the respondent did. It spoke to the UPUSA shop steward about the impact of the outsourcing on the people he represented and then spoke to the union itself, inviting it to make whatever representations it wished. I consider, therefore, that if the respondent bore a duty to consult with UPUSA, it fully discharged it.

I turn now to the applicants' final complaint – that is, that the retrenchments were unfair because the respondent failed to make efforts to place the applicants with the outside contractors. No provision in s 189 specifically covers this complaint, but s 189(2)(*a*)(iv) gives us some guidance on what is required. It states that an employer who contemplates retrenchment must, together with the applicable collective representative, attempt *inter alia* 'to reach consensus on … appropriate measures … to mitigate the adverse effects of the dismissals'. In the present case the respondent complied with this provision. It made the prescribed attempt and in fact succeeded in reaching consensus with the majority unions. They accepted the closure of the department, the outsourcing of its work and the retrenchment of its members upon a specified set of agreed terms. No charge can, therefore, be levelled against the respondent based on a breach of the subsection.

The agreement concluded with the majority contained no provision obliging the respondent to seek work for the members outside the company. Mr van As, who appeared on the respondent's behalf, refrained from arguing that the omission of such a provision constituted a waiver of the applicants' rights and correctly so. The agreement could operate to bind non-members of the unions only if it contained a provision specifically making it so (s 23(1)(*d*)), and it contained no such provision. It would, moreover, be extremely difficult to infer a waiver from the mere fact that the agreement was silent on the point. The applicants were, in consequence, entitled to stand on their rights under the Act.

What were those rights? By now it should be clear that I consider s 189 to be illustrative, but not exhaustive, of an employer's equitable obligations on matters concerning dismissal. I believe it is proper to deduce from s 189(2)(*a*)(iv) an equitable obligation actually to take the appropriate measures contemplated by the provision in order to mitigate the effects of retrenchment. The section, it is true, deals only with matters of process; but there would be little purpose in obliging an employer to seek consensus on mitigating measures unless the legislature considered it desirable that such measures should in fact be explored and implemented before retrenching. I consider, therefore, that employers are bound to take appropriate measures to mitigate the effects of retrenchment if the retrenchment is to escape condemnation as unfair.

Do these measures include the taking of steps to place retrenchees in employment outside the firm? Past decisions on the question are by no means harmonious. In no case that I can trace has a retrenchment positively been condemned as unfair merely because the employer failed to take these steps; all I can find are a few stray *dicta*

suggesting that the employer must indeed take them. Of these the most emphatic seems to be contained in the judgment in *Hlongwane & another v Plastix (Pty) Ltd* (1990) 11 *ILJ* 171 (IC) at 171C-D, where the presiding officer stated that 'the employer can consider the following alternatives: … (*d*) to find alternative employment for the employee with another enterprise.' By way of contrast, one can cite the case of *Building Construction & Allied Workers Union & others v Masterbilt CC* (1987) 8 *ILJ* 670 (IC) in which the industrial court held (at 680E) that an employer did more than was required of it by seeking to place the retrenchees in employment with another firm within the area. The presiding officer, it is true, was interpreting the provisions of a procedural agreement with the union when he made this statement, but he would, I imagine, have framed his point rather differently if he had believed in the existence of a residual duty covering the matter. Between the two is a range of cases in which the *dicta* are inconclusive: some decisions, for instance, say that the employer is obliged to seek out alternative employment for retrenchees but fail to indicate whether the duty extends to outside as well as internal employment (see, most notably, *Imperial Cold Storage & Supply Co Ltd v Field* (1993) 14 *ILJ* 1221 (LAC) at 1226E; see too *United African Motor & Allied Workers Union & others v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC) at 230E); other decisions suggest that the employer's duty goes no further than to give the employee time off to approach outside employers himself (see, for instance, *General Workers Union & another v Dorbyl Marine (Pty) Ltd* (1985) 6 *ILJ* 52 (IC) at 58A-B, C-D, *Food & Allied Workers Union & Others v Ameens Food Products & Butchery* (1988) 9 *ILJ* 659 (IC) at 668G, *Commercial Catering & Allied Workers Union of SA & others v Status Hotel* (1990) 11 *ILJ* 167 (IC) at 171G). Further see *Liebenbergh & Others v Franz Falke Textiles (Pty) Ltd* (1986) 7 *ILJ* 513 (IC) at 519A-D. They derive support from Edward Yemin, who writes under the auspices of the International

Labour Organization. In his authoritative work 'Workforce Reductions in Undertakings', he says:

'When anticipated workforce reductions cannot be avoided, attention turns to how and to what extent the adverse effects of these reductions on the workers concerned can be attenuated. Certain rights often afforded to such workers are relevant in this connection. These include rights regarding selection for redundancy …, advance notice of dismissal or lay-off so as to enable the workers concerned to seek alternative employment, time off from work during the notice period for this purpose, provision of compensation or income protection to workers dismissed or laid off and entitlement to re-employment by the employer when he again recruits workers with the same qualifications.' (The quote is taken from *Engineering Industrial & Mining Workers Union & another v Starpak (Pty) Ltd* (1992) 13 *ILJ* 655 (IC).)

When the authority on the point is so equivocal, there is no option but to return to a consideration of the matter on first principles. This requires an examination of the purpose of the unfair dismissal jurisdiction and, since this is nowhere set out, a broader enquiry into the objects of the Act as a whole. These objects can be found in s 2 of the Act and need not be recited in full in this judgment. It is their spirit that is important here, and this is best divined from the following salient provisions: '(*a*) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution' and '(*d*) to promote … (iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.' (The Constitution referred to is the interim Constitution, which was in force when the LRA was enacted. The successor to s 27 is s 23 of the final Constitution, which confers on every worker a right to fair labour practices.)

Strikingly, the preservation of industrial peace is omitted from the list. This omission cannot be accidental, for everyone with some knowledge of labour is aware that the preservation of industrial peace was the main, and arguably the sole, objective of the Act's predecessors. It is idle to speculate on the reasons why the drafters decided to omit this object; it is enough to say that they were right to do so. The rubric

‘preservation of industrial peace’ is broad enough to justify legal intervention to placate and mollify interest groups who have no better claim to it than is implicit in their ability to cause unrest and create havoc. Employers and unions should, no doubt, have scope to flex their muscles; by doing so they promote the proper redistribution of scarce resources within the market. Within a constitutional dispensation, however, there can be little reason for the law to take sides with the powerful simply because of their power; ‘might above right’ is, I take it, inimical to the culture of human rights enshrined in our Constitution. There are, besides the ethical, also good consequentialist reasons for declining to favour the powerful: a system built on justice and fair play produces solutions that foster a form of workplace peace and harmony, not merely more just, but altogether more solid than the ‘peace’ meretriciously pursued by the previous statutes.

Outside the sphere of statute law, the previous Labour Relations Act in particular, the law declines to pander to power simply for the sake of peace. So much is clear from the decision of *Gründling v Beyers & others* 1967 (2) SA 131 (W), which went off on the common law. It concerned an application for an interdict to restrain the general secretary of the Mine Workers’ Union from continuing in office after his occupancy of it had, as the court found, lawfully been terminated by a resolution of the executive committee. On his behalf it was argued that the granting of the interdict ‘would probably cause further unrest within the Union and might have serious consequences to the national economy’. Trollip J emphatically rejected the submission: considerations of this sort, he said (at 155B-F), could not properly be taken into account in the exercise by the court of its discretion to refuse an interdict. The judge’s sole concern was with the rights created by law and it was by the law that he must be ruled.

Since then the rights conferred by the law have been much developed: the Bill of Rights simultaneously elaborates upon them and expands their scope. The underlying principle, however, remains unchanged, and it is one that the drafters of the LRA must surely have understood when they crafted the statute's terms. It is that power and might, important as they might be in daily life, deserve no recognition in a constitutional state by reason of their potency alone. It is justice that is the proper object of the law, however imperfectly that noble aim might be realized in practice.

Justice is what the Act aims at - much seems to be clear from an examination of the objects I have cited above – and justice is likewise the object of the unfair dismissal regime. Here as in other branches of law, however, its attainment entails the striking of balances. Employees have rights but they must be weighed against the rights of others, who include, in this context, not merely employers but also work-seeker who compete within the labour market for their jobs. The competition exists but is latent for so long as the employee remains in the job; when he leaves the job and enters the labour market it becomes overt and then he vies head-on with existing work-seekers for new employment. As between an ex-employee and a work-seeker, I can discover nothing that, in justice, entitles the former to better treatment than the latter. There are, no doubt, some important reasons of social policy why ex-employees should be re-employed quickly: they have skills which the economy can exploit and are, as consumers, still participants in a market that depends for its viability on them and others like them; they have, moreover, developed aspirations and expectations that, when frustrated, quickly turn to bitterness and rebellion. I am just as sure that some unions see nothing wrong in using their power to secure better access to jobs for their members. But these are considerations of expediency, not justice, and the court, interpreting the LRA, should decline to recognize them unless satisfied that the

statute plainly directs it to do so, and then only if satisfied that, unconstitutional though their recognition seems to be, they nevertheless warrant recognition under the limitations clause in the Bill of Rights.

This analysis, it might be thought, strikes at the very foundations of the law of unfair dismissal. Does the unfair dismissal regime not give employees protection from dismissal and thereby place them in a position of privilege when they are compared to the work-seekers who are in competition with them? To a question so stated, the answer cannot but be yes, but the real question is whether this is the object, rather than simply an inevitable consequence, of the regime. In my view it is not.

One object of the provisions protecting workers from retrenchment is to keep up levels of employment. A few, somewhat banal, observations are necessary to explain what I mean. Employees are in competition not only with work-seekers but also with machines and it is a competition that, in certain segments of the labour market, they are losing. The inexorable process of mechanization produces the restructuring and down-scaling to which employers resort to extract greater productivity from fewer employees and more and more workers are being relegated to the ranks of the unemployed, where they increase the demands on the public purse by their claims on welfare. By making retrenchment costly and difficult, the legislature encourages employers to keep workers on their books if they can and so puts a brake on the process of job-shedding. Its effectiveness is immaterial to this judgment; what is material is the fact that it self-evidently provides a justification for at least that segment of the unfair dismissal that relates to redundancy.

The regulation of dismissal for reasons of misconduct or incapacity is less easily explained and dispatched. In cases of this sort no jobs are saved by the unfair

dismissal regime; the job vacated by reason of the dismissal must still be done and will be filled by someone else in the labour market. If it is so, as I have suggested, that job incumbents have no legitimate claim over work-seekers to preference within the job market, why are they sheltered by the Act against dismissal based on their misconduct or incapacity? The answer, I consider, lies in a recognition of a second object of the unfair dismissal regime (which, as we shall see, applies equally to cases of retrenchment): it is the pursuit of acceptable standards of conduct in the workplace in order to forestall potential abuse, oppression and undue exploitation of employees. Underlying this object is a belief that employees should be treated as more than just instruments of the employer's will: they are people who, by reason of that and that alone, are entitled to be treated with dignity and humanity. 'Labour is not a commodity' is a well-known slogan and this, I consider, is the spirit in which the protection against dismissal for misconduct and incompetence has been enacted.

How does the protection serve this goal? The answer is, by policing the exit the law is able to police what happens within. The point can be illustrated by likening employment to a lecture room in which students are vocal enough to irritate the lecturer; by acting as door-keeper and seeing to it that only those who deserve it are ordered out, the University authorities do much to ensure that the lecturer treats them properly. Likewise, it is by regulating and redressing the exit of dismissal that the Act endeavours to create a climate in which employees can work without fear of unjust treatment and freely exercise their legitimate rights. They include trade union rights – a fair dismissal regime is a powerful antidote to dismissal – but they embrace other human rights as well.

Neither of these two objects is promoted by obliging employers to seek positions for

ex-employees in other enterprises. The sphere within which the objects operate is the employment relationship, whose existence and continuance is pre-supposed, whereas the suggested obligation has no purchase until the relationship is over. At this pont there is nothing to be gained by continuing to give him preferential treatment: he must now takes his place in the ranks of work-seekers and compete with them for a new job on his merits. To give him a preference without a sound reason for doings so would be an act of discrimination and I can see no basis for inferring, from the Act's objects or otherwise, that such discrimination is legitimated by the statute, still less that it is positively mandated. As a result, I hold that employers, in retrenching employees, have no duty to seek positions for them with outside employers.

In the remarks I make, I refrain from considering whether a company within a group must seek positions for its retrenchees within its corporate affiliates. The answer to this may depend upon how close the affiliates are, but this is a matter on which I prefer to say no more than that. I likewise say nothing about the effect of s 197 of the Act, which deals with the extent to which employment continues when a business is sold: the rights given by the section were not relied upon by the applicants in their pleadings or argument and I have in no way considered their relevance to the present case.

If I am wrong and the Act does indeed oblige employers to seek work for retrenchees outside the firm, I would still find for the respondent on this point. The applicants appointed UPUSA to represent them generally and clearly contemplated that it would act on their behalf in the discussions concerning their retrenchment. At its meeting with the union in December, the employer invited representations on the manner in which the retrenchment might be avoided or its effect ameliorated. The union made

no response to the invitation and the respondent was, as a result, entitled to conclude that it had nothing to proffer. The work previously being done by the retrenchees was not handed over holus bolus to a single enterprise but was given out piecemeal to whichever suppliers could most effectively do the job. Without a guaranteed stream of orders, the suppliers would by no means necessarily be looking for new staff. The respondent was, I consider, justified in believing that they would make appropriate enquiries if they were looking for staff and believed the retrenchees could supply the need. If UPUSA knew, or even suspected, otherwise, it should have alerted the respondent by responding to the invitation it had received to make representations. The respondent's duty, assuming its existence, was to do no more than take reasonable steps to place the retrenchees elsewhere; it was not obliged to pursue a course that, in view of the silence of the contractors and UPUSA, could not but have appeared futile.

Accordingly, I conclude that the applicants have made out no case against the respondents and their application must be dismissed. I can see no reason why costs should not follow the event. Mr van As argued that UPUSA should be ordered to pay the costs jointly and severally with the applicants as it had acted on their behalf in the litigation. The submission is made even though UPUSA was not a party to the litigation, having dropped out of the case when the CCMA proceedings were over.

To make such an order I have to find, first, that the court can exercise a costs jurisdiction over a non-party; secondly, that the order would be justified on the merits of this case; and thirdly, that the non-party has been given a proper hearing on the issue. I shall deal with each in turn.

The jurisdictional question is complex. At common law it is clear that orders for costs

can be given against persons who are not parties to the litigation. The subjects of such orders are, typically, legal practitioners who act improperly in conducting the case; but costs are sometimes given against other non-parties who have support the litigation or have some other connection with it. See, for an example of such a case, *Francarmen Delicatessen (Pty) Ltd v Gulmini And Another* 1982 (2) SA 485 (W). In the absence of some contrary stipulation in the Act, there is no reason why the Labour Court should not have the same power. It is a court that, within its province, is of equal status to the High Court and is expressly vested with the power to make orders for costs in the exercise of its discretion (see, in addition to s 162(1), s 158(1)(*a*)(vii)).

The Act contains no express stipulation excluding the court's power to make such an order and an implication to this effect can only be based on s 162. The section reads as follows:

'(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-

(*a*) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(*b*) the conduct of the parties-

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.'

Subsection (1), it will be observed, is in the most general terms. Standing alone, it justifies no inference that the Labour Court cannot exercise the same jurisdiction over non-parties as the High Court; quite the contrary. To come to this conclusion, it is

necessary to treat subs (3) as limiting its scope by exhaustively delineating the third parties against whom a costs order can be made. If this interpretation is correct, then no order can by made against UPUSA. Non-parties only fall within the compass of the subsection if they appear on behalf of a party in the proceedings, that is, if they act as her spokesperson in court. Rights of appearance, which are determined by s 161, are extended to union officials and office bearers under subs 161(*c*), but when they act as such, they discharge their duties *eo nomine* and not as agents of their organization.

The argument for treating subs (3) as exhaustive draws its strength from the comprehensiveness of its language and the fact that it is framed in more limited terms than its predecessor in the 1956 Act, which sanctioned an order against 'a trade union, employer's organization, office bearer or official acting on behalf of or in any manner assisting' a litigant in the proceedings (see s 17(12(*a*)). It derives extra support from the fact that the Labour Appeal Court in *Moloi & another v Euijen NO & another* (LAC 12/8/99, unreported) seemed to assume, without deciding, that subs (3) does exhaustively determine the reach of the power to order costs against non-parties. I am, nevertheless, impressed by the breadth of the language of subs (1), which empowers the court, without any express limitation, to make an order for costs according to the requirements of law and fairness. Language so sweeping and general should not be cut down unless there is good reason to do so and I can find none. Moreover, I regard it as significant that subs (3) contains no such word as 'only' or 'exclusively', which would, if employed, have made its exhaustiveness plain. If the drafters wished to cut back on the wide wording previously employed and intended orders for costs to be awarded only against the people referred to in subs (3), I feel sure some words as these would have been used for the purpose. In my view, the

legislature's intention in inserting subs (3) was simply to place the issues it covers beyond doubt. It is, like subs (2), simply explicatory and enabling. I find therefore that this court does have the power to make orders for costs, not merely against legal representatives and other spokesman appearing on a litigant's behalf in the court, but also against other third parties who support or are otherwise connected with the litigation.

In the present case Mr Luthuli candidly acknowledged, in his submissions from the bar, that UPUSA had given the applicants both moral and financial support in the bringing of this litigation. This, it seems to me, provides a sufficient ground for granting an order for costs against it if fairness so dictates: by supporting litigation, the union creates the circumstances by which the respondent is brought before court and, in the process, forced to incur the attendant legal costs. Supporting indigent people who seek to vindicate their rights is, however, highly laudable conduct, even when actuated by less than completely altruistic motives, and deserves no discouragement when honestly undertaken. In most cases, therefore, it would be wrong to mulct a union that takes up the cudgels for the benefit of its members unless it acted frivolously, vexatiously or for some indirect and improper purpose in bringing or pursuing the action. This principle, it seems to me, applies irrespective of whether the union makes itself a party to the litigation or not. Its status as litigant bears on the question of whether the court can, as a matter of jurisdiction, order costs against it, a matter on which I have already pronounced. It is of no consequence when considering the present question – that is, the manner in which the court should exercise its jurisdiction. (Of course, the position becomes quite different if the union, in its capacity as a joint applicant, itself presses for costs against the respondent: then it would normally be right to make costs follow the event, for the union cannot

claim costs without running the risk of an equivalent order being made against it.)

In the present case, Mr van As rightly conceded that this action was not improperly brought by UPUSA. There is, therefore, no basis for making an order for costs against it. For completeness, however, I should say that I would have been satisfied that the union had been given enough of a hearing to entitle me to make an order against it had one been warranted. Mr Luthuli was here as the official of the union deputed to deal with the case; he could therefore speak on its behalf on matters concerning its liability for costs.

In the circumstances I make the following order:

The application is dismissed.

The applicants must pay the respondent’s costs jointly and severally.

There will be no order for costs against UPUSA.

M S M Brassey AJ

9-Oct-99