CASE NO. P86/98

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

DATE 14.6.1999

In the matter between:
B. Louw **Applicant**
and
Micor Shipping **Respondent**

J U D G M E N T

MLAMBO, J**:**

[1] The applicant was given notice of her dismissal on 18 September 1997 effective from 30September 1997. In papers before this court she challenges the fairness of her dismissal on substantive and procedural grounds. At the commencement of the trial the respondent argued a point in limine objecting to the jurisdiction of this court to adjudicate this dispute. After hearing argument the court dismissed the point in limine. The court's reasons are set out in the following paragraphs.

[2] The nature of the point in limine as articulated in the heads of argument provided by Dr van Zyl, appearing for the respondent, was briefly that this Court lacked jurisdiction to adjudicate the dismissal dispute as a result of the non-compliance by the Commission for Conciliation, Mediation and Arbitration,(the Commission)with section 135(2) and section 135(5)of the Labour Relations Act No. 66 of 1995 ("the Act"). Dr Van Zyl submitted that these sections are peremptory and that the Commission must comply with them. The

point made was that the Commission lacked jurisdiction to unilaterally extend the 30 day time period within which it could hold a conciliation meeting, and to conciliate the dispute. He argued further that the Commission could not issue avalid certificate in terms of Section 135(5)after holding a conciliation meeting after the thirty day period provided for in Section 135(2).

[3] Section 135(2) reads as follows:

"The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral. However, the parties may agree to extend the 30 day period."

[4] Section 135(5) reads as follows:

"When conciliation has failed or at the end of the 30 day period or any further period agreed between the parties -

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved."

[5] In this case there is no dispute that the referral by the applicant was received by the Commission on 16 October 1997. There is also no dispute that no conciliation meeting took place within the thirty day time period specified in section 135(2). It is also common cause that no certificate as envisaged in section 135(5) was issued when the thirty day time period expired.

[6] The Commission convened a conciliation meeting on 2 March 1998 which was attended only by the applicant. After this meeting (on the same date), a certificate envisaged in section 135(5) was issued, confirming that the dispute remained unresolved.

[7] Having considered those provisions the court agreed that section 135(2)is peremptory as regards the convening of a

conciliation meeting within the thirty day period from the date of receipt of the referral. That this provision is peremptory is confirmed by the requirement of the consent of the parties concerned to extend that period. The court agreed that the Commission could not unilaterally extend the thirty day period set out in section 135(2). Where there is no consent the Commission's hands are tied and it cannot extend that period. In the court's view therefore, the conciliation meeting held on 2 March 1998, was a nullity.

[8] Section 135(5) is also peremptory. If no resolution of a dispute is achieved within the thirty day period, a certificate must be issued. For purposes of this case the court was prepared to find that it is after the thirty days had expired that the section 135(5) certificate should be issued. Having looked at that provision again, it is also clear that no time period is provided within what period is the certificate to be issued. The only notable factor in this provision is that the certificate must be issued after the thirty day time period has expired. In line with the reasoning that a section 135(5) certificate can be issued at any time after the thirty day time period, it was the court's view that the certificate issued on 2 March 1998 confirmed the situation that existed at the end of the thirty day period i.e. that the dispute remained unresolved. The Commission was empowered to issue the certificate at any time after thirty days.

[9] In my view the fact that the Commission held a conciliation meeting on 2 March 1998 which it was not empowered to hold, has nothing to do with the jurisdiction of this Court. The court derives its jurisdiction in disputes of this nature only from certain factors and those factors are the referral of a dispute timeously i.e. within thirty days and the issuing of a certificate of non-resolution after the second thirty day period has elapsed. This Court does not derive its jurisdiction from the fact that a conciliation meeting was or was not held. Only those jurisdictional factors that the court has mentioned are necessary to found jurisdiction for this court to adjudicate disputes that come to it for adjudication.

[10] It is clear that the applicant desired to see progress in the resolution of her dispute which she had referred to the Commission. This appears from the correspondence

her legal representative, at the time, sent to the Commission. In the court's view, therefore the fact that the Commission held a conciliation meeting in March 1998 which it was not legally empowered to do, had nothing to do with the jurisdiction of this Court. Any conceivable challenge that could have been lodged or launched by the respondent, could only be launched at the Commission's holding of a conciliation meeting, not at the issuing of the certificate. This is so because the certificate could have been issued even before the conciliation meeting of 2 March 1998. As already stated, the issuing of the certificate in March 1998 confirmed the situation that already existed even before that conciliation meeting was held. The only conceivable consequence of the delay in the issuing of the certificate can only affect any compensatory award that the applicant might be awarded if she was successful in her unfair dismissal claim. In this regard the provisions of Section 194(1) are relevant.

[11] For the aforegoing reasons the point in limine was dismissed with no order as to costs.

Background circumstances:

[12] The applicant was employed on 9 November 1995 as a sales executive. At the time of employment she was responsible for both East London and Port Elizabeth. According to her she was told and was aware that the East London branch, in particular, was in financial dire straits. At some stage she was removed from servicing the Port Elizabeth branch and only concentrated on East London. On 10 June 1997 a meeting took place at the East London branch attended by Garth Edwards, Lionel Kritchmann, Darren Nicholls, as well as the applicant. There is a dispute as to who called this meeting but that is neither here nor there. What is common cause about that meeting is that the performance of the East London branch and the applicant's performance in general was discussed. It was apparently mentioned that the deterioration of the financial situation of the branch continued unabated and the possibility of closure of that branch was mentioned. It is common cause that retrenchment was not mentioned by anyone at that meeting.

[13] There is no dispute that until then, the applicant as sales executive had met her targets. On 11 September 1997, i.e three months after the June meeting, Lionel Kritchmann, who it is common cause was the most senior employee at the East London branch, was flown to Johannesburg by the Respondent's senior management. Apparently the purpose of flying Mr Kritchmann to Johannesburg was

to discuss the overall performance of the East London branch. At these proceedings no-one who was at that meeting testified about what was discussed. Marianna Coetzee, the Human Resources Director, who was also not present at that meeting testified that after that meeting it was decided that nothing much could be done to reverse the downward trend in East London and the possibility of retrenchment had to be considered. The Court must approach her evidence as regards that meeting with caution in view of the fact that she was not present and she relied on hearsay as to what happened. It is common cause, however, that

Lionel Kritchmann came back from the said meeting and said nothing to the East London employees, including the applicant.

[14] On 17 September 1997 Marianna Coetzee and Garth Edwards flew to the East London branch and it is common cause that a meeting was convened in the afternoon at about three or three-thirty. It is common cause, that none of the East London employees, including the applicant had been given any warning that this meeting was going to take place. All the applicant knew about the coming down of Coetzee was that she was coming for some staff training. That meeting was attended by the applicant, and the driver, and Coetzee as well as Garth Edwards. The applicant and the driver were given a letter and it is proper to cite the contents of this letter in full. The letter dated 17 September 1997 states:

"**General Notice of Possible Retrenchment**.

Regrettably the company has to announce its intention to retrench approximately two employees in Micor Shipping, East London. The company intends implementing the retrenchments on or about 30 September 1997 at which date it will take effect. The substantive reasons for the retrenchment are as follows:

1. There has been a distinctive change in market the (sic) over the last 18 months which in turn has had a severe impact on revenue, resulting in the company incurring substantial losses.

2. The above has necessitated a complete change in the business strategy of the company whereby we will only maintain a presence in the region.

To counter the above:

(a) vacancies within the Group have been closely monitored to see whether any suitable positions arise. The company has already looked towards various ways of avoiding or minimising retrenchment and in this regard will be consulting

with yourselves during the course of this week to discuss the underlying reasons why the following alternatives are unsuitable:

- **limitations on hiring new employees;**
- **control of overtime work (where it exists);**
- **the transfer of employees to any vacancies within the establishment;**
- **the implementation of an early retirement scheme;**
- **the reduction of the workforce by natural attrition;**
- **the training or retraining of employees;**
- **granting extended unpaid leave or temporary lay-off.**

We will be advising you at the consultations during the course of the week which job categories/employees stand to be affected by the retrenchment. We will also be discussing the timetable of the retrenchment programme and proposed further consultations with the employees affected and will inter alia further consider:

- **preferential re-employment;**
- **severance pay;**
- **assistance with unemployment insurance.**

The purpose of these consultations is of the utmost importance in that the company would like to hear representations from individuals in this regard. <u>Should an individual not avail themselves of the opportunity to attend consultations the</u> retrenchment programme will continue not-<u>withstanding</u>.

Furthermore the objective of the consultations is to consider reasonable selection criteria for the employee who stands to be retrenched. The principle of last-in-first-out (LIFO) will not apply exclusively and it is the company's intention that the criteria should be reasonable enough to meet the demands of its operational requirements. The company accepts the duty to assist its employees and will consider inter alia the following:

- **time off to search for alternative employment; and**
- **preferential re-employment in the future; and**
- **unemployment insurance assistance; and**

. certificates of services; and

. severance benefits.

In terms of the retrenchment programme it is the company's intention to confirm retrenchment with the employee that stands to be retrenched by letter by no later than 22 September 1997. Thereafter the individual employee may avail him/herself of the opportunity to approach the company's Human Resources Manager at Head Office for an individual consultation and to raise difficulties which he/she might have which require assistance. The retrenchee may not be required to work until the end of his/her notice period. It must be stressed that during the period 19 September 1997 to 30 September 1997 the company is not closing the door on the retrenchee and it remains open to him/her to avail him/herself of our offer to consult with our Human Resources Manager at Head Office in the event of his/her requiring assistance of whatever kind."

[15] It is common cause that the applicant and the driver were requested at the conclusion of that meeting to

think and come up with any suggestions during the next morning. It is also common cause that the applicant did not dispute or challenge anything during the meeting on 17 September 1997 and that she never requested a postponement or an opportunity to seek legal advice. Her statement that she could not say much at that meeting because she was shocked is also unchallenged. It is also common cause that the discussions at the meeting of 17 September 1997 revolved around the letter with each particular item being discussed in detail by Marianna Coetzee.

[16] The next day, 18 September 1997, a meeting took place between the applicant, Marianna Coetzee and Garth Edwards at nine o' clock in the morning. They went through the letter again and no suggestions were forthcoming from the applicant. The only issue she raised was a query regarding the details of the severance package she would receive if she was dismissed. The details about her severance package were telefaxed from head office and a printout was given to her. At the conclusion of that meeting the applicant was given notification of her dismissal which reads as follows:

"Subject: <u>Advance of Termination of Employment as a Result of Retrenchment.</u>

Previous communications to you and discussions in the abovementioned respect refer. It has become necessary for the company, due to reorganisation of the business, to consider retrenchment as a consequence. The company has attempted to avoid the situation but unfortunately, no other alternatives exist. This decision was, as you know, also arrived at after an extremely thorough investigation and after all possibilities to avoid it had been explored.

You are hereby notified that your employment will be terminated on 30 September 1997. You may discuss your situation with the undersigned, who will endeavour to accommodate you as far as practically possible regarding any requests or advice that you may seek.

You will not be required to be at your work station after 18 September 1997. You will be given the necessary time off to search for alternative employment and to attend to your personal affairs. It must be repeated that the above decision has not been lightly taken.

Should re-employment opportunities arise within the next six months you will be given first option of tendering your services with the company. You can be assured that the selection criteria adopted in choosing you were pursuant to a thorough consideration by the company of all applicable criteria in your favour.

May we take this opportunity of thanking you for the services you have rendered to the company and wish you the best of luck for the future."

[17] It is correct that on the same day, that is 18 September 1997, the applicant sought legal counsel and went to attorneys Marshall & Kaplan in East London. A letter on her behalf was addressed to the respondent, challenging the fairness of her dismissal. Correspondence was thereafter exchanged between the applicant's attorneys as well as the respondent's attorneys. A dominant feature of the correspondence from the applicant's

attorneys contained a settlement proposal of six months.

[18] On the suggestion of the applicant's attorneys a settlement meeting was arranged for the 2 March 1997 at the Respondent's premises. It was agreed that no lawyers were to be present at that meeting. The applicant testified that in her mind she was attending a settlement meeting whereas the Respondent's view was that it was a further consultation meeting. At that meeting the applicant secretly recorded the entire meeting, a fact unknown to the other people in attendance. The retrenchment of the applicant was again discussed and the applicant made a number of concessions about her understanding of the situation that necessitated her retrenchment. It is common cause that at the end of the meeting the applicant had agreed to revert to the respondent regarding how the matter was to be taken further. The applicant in her evidence states that she reverted to the respondent who denies this. What is clear, however, is that no agreement could be reached in terms of which the matter could be settled. The applicant then referred the dispute to the Commission for conciliation and when there was no resolution in that forum she referred it to this Court for adjudication.

[19] The respondent's case is that it complied with section 189 of the Act and that the applicant's dismissal was fair, substantively and procedurally. The applicant's case is that her dismissal was procedurally unfair. Although she challenged the substantive fairness of her dismissal in her pleadings she subsequently abandoned this stance during the proceedings. I am therefore satisfied that I only have to look at the procedural fairness of her dismissal.

[20] Section 189 in context provides for a three stage process. The first stage is that notice must be given by the employer of the

possibility of retrenchment and the reasons thereof. The second stage is that there should be a discussion which takes place between the employer and those likely to be affected and their representatives. Thereafter a decision must be taken taking into account the discussions that took place and the input from those likely to be affected.

[21] It is common cause that the respondent gave the applicant no notice whatsoever of her pending retrenchment. The respondent simply convened a meeting without informing the applicant what the purpose of the meeting was. It is common cause that it was only at that meeting that she was told for the first time that her job was on the line. It is also correct that the respondent has not provided this Court with any reason why it had to adopt that approach. Marianna Coetzee testified that she thought it was humane that she inform the people face to face without either telephoning them or giving them prior notice by way of a letter. It is correct that the applicant did not ask for a postponement to seek advice or request an opportunity to consider further suggestions. In my view her failure cannot cure what the respondent should itself have done. Section 189 does not envisage a process where the employer is absolved if the employee consulted fails to point out the employer's omissions.

[22] A dismissal based on operational requirements is a no-fault dismissal in the sense that it does not come about as a result of anything committed by the employee. Therefore the courts have emphasised in many decisions that the decision to dismiss must be taken with utmost care in that it must be fair in all respects. As the decision originates from the employer who runs and has the prerogative to manage the enterprise the

employer therefore has an obligation to provide appropriate and proper information to the employee and must follow the elaborate steps set out in Section 189. There is a good reason for this. It is to ensure that unnecessary dismissals are prevented. A dismissal has elsewhere been likened to a sentence of death. This is as a result of the disastrous consequences to the individual and his immediate family as well as the serious impact on the economy of the country. Dismissals also create a further burden on unemployment insurance funds. Dismissals always, if they are disputed, give rise to unfair dismissal claims which have to be adjudicated in courts involving time and expense. All the above can be avoided if the decision to dismiss, especially if it is as a result of no fault on the part of the employee are not lightly taken.

[23] In my view, the failure to give timeous notice to enable the applicant time to ponder her situation and to come up with suggestions on alternatives, was a fatal one. The whole structure of section 189 is that there should be a notification period which enables those to be consulted to prepare and be ready to meaningfully take part in the discussions envisaged in that section. The section envisages meaningful participation. There can only be meaningful participation if those consulted have had enough time to ponder on the reasons provided as well as to prepare themselves to ask for information and to make informed suggestions. An employee who does not get the benefit of a notification period is in no position to meaningfully take part in a proper consultation process as he or she is given no notice and he attends that meeting unprepared. In my view, therefore, the dismissal of the applicant was procedurally unfair.

[24] In terms of the judgment in **JOHNSON AND JOHNSON v CHEMICAL WORKERS INDUSTRIAL UNION AND OTHERS (1998) 12 BLLR 1209 (LAC),** this court is empowered to consider whether it should award the applicant compensation. Dr van Zyl

urged the court that should it find the dismissal procedurally unfair it should award the applicant no compensation. The reasons set out in the **JOHNSON AND JOHNSON** case are very clear and they, in a sense, can be ascribed to something or some conduct on the part of the employee. In that case the court found that the employees had prevented or taken steps that prevented the respondent from complying with section 189 or from remedying its failure to comply with section 189.

[25] In this case, the failure to afford the applicant a proper and enough opportunity to prepare herself and to ponder possible suggestions cannot be ascribed to anything done by her. It cannot also be argued that the respondent was lulled into a false sense of security by the responses of the applicant in stating that she understood why she had to be retrenched and in not challenging anything. If at all, the applicant's unchallenged evidence that she was shocked should be taken seriously. If a person was shocked, as she says she was, which this Court accepts, then it is conceivable that she was in no position to say anything. In my view, the applicant has made out a case for her to be awarded compensation. This Court, however, will not award her compensation for the period from the expiry of the thirty day period that the Commission had to resolve her dispute to the time when she referred the dispute to this Court.

[26] The order of the court is therefore:

1. The dismissal of the applicant was procedurally unfair.

2. The Respondent is ordered to pay the applicant compensation amounting to 14 months salary calculated at the applicant’s rate of pay at the time of her dismissal.
3. The Respondent is ordered to pay the applicant’s legal costs.

MLAMBO J

Date of judgment: 05 August1999.

For the applicant: Mr R.K Jardine of Mathie Meyer & Granett Attorneys, East London.

For the respondent: Dr Van Zyl instructed by Van Zyl’s Incorporated.