REVISED / REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN **CASE NO: J5739/2000**

2001-09-19

In the matter between

CHEMICAL ENERGY PAPER PRINTING

WOOD AND ALLIED WORKERS' UNION 1st Applicant

THEODORA DLABANTU

AND 16 OTHERS Individual Applicants

and

HERBER PLASTICS (PTY) LTD 1st Respondent

VAN RIE ENGINEERING CC 2nd Respondent

J U D G M E N T

PILLAY, J:

1. The first respondent had become a sole share holding company in about March 2000. Mr Schober, the director of the first respondent, had contemplated selling a part of the business so as to ease his workload. About mid July 2000 he had discussions with one Mr Van Rie of the second respondent about the sale of the department to him. On 23 July 2001 Mr Van Rie informed Mr Schober that he wanted to buy the department. They met the following day and concluded the deal.

2. Mr Schober testified that a couple of days before the sale was concluded he had met with Mr Van Rie to discuss the sale. He then summoned Mr Steven Mandau and instructed him to inform the rest of the workforce in the department of the possibility of the sale. Mr Schober was not corroborated by Mr Van Rie in this regard. Mr Van Rie testified that Mr Mandau was instructed to inform the workers after the deal have been concluded. This is also the version of Mr Mandau himself. The probabilities are therefore that the applicants learned of the sale

after the decision had been taken.

3. Mr Schober addressed the workforce in the department on 24 July 2001. He testified that he did so in English as he usually did and without the assistance of an interpreter. This is disputed by the applicants who, it was submitted, did not understand English well enough.

4. He introduced Mr Van Rie as the buyer of the deponent and informed the applicants that they would be transferred to Industria on the West Rand. The first respondent's business had been situated in Germiston in the East Rand. The individual applicants became rowdy. Clearly they were unhappy with the news that they had received. According to Mr Van Rie and Mr Schober they were concerned about the transport to the new workplace. It would have meant an extra 30 kilometres of travelling for them. Mr Van Rie conceded, however, that he had assumed from the questions and answers that their concern was about transport.

5. Precisely what was said by the respondents at that meeting is unclear. I put this down to the loss of recollection as a result of the passage of time.

6. The exchange about which there is no dispute is this: Mr Mbeku, an applicant, had inquired about whether the plugs were being sold together with the workers. By this he intended to inquire whether the individual applicants were being transferred along with the business. This was perceived by the respondent to mean whether the individual applicants were to be sold like slaves. It was not the respondent's intention to sell them like slaves. From this exchange alone, it is quite obvious that there was a serious misunderstanding between the parties.

7. The respondents had an obligation to communicate the transfer of the business as a going concern in clear terms. The discussion about the transfer lasted about 10 minutes. Included in the 10 minutes for the announcement of the sale of the business was the first respondent's announcement that it would pay severance pay to all employees without acknowledging any legal obligation to do so. The severance pay was tendered when the individual applicants were still voicing concerns about the future of their employment. Quite obviously the respondents were not listening to the individual applicants.

8. The first respondent's relationship, if one can call it that, with the first applicant union was one of avoidance rather than co-operation. The first applicant had sought recognition of certain organisational rights. The first respondent avoided having to deal with the request for recognition. About the same time the first respondent distributed copies of a draft agreement in terms of which the individual applicants were required to become independent contractors. They would then cease to be employees and consequently loose recognition of their right to belong to the first applicant.

9. The applicants were opposed to the conversion to independent contractors. The first applicant intervened and tried to engage the first respondent about organisational rights and issues such as productivity which might have triggered the first respondent's initiation of the conversion. The first respondent then abandoned the idea of the conversion shortly before it sold the department.

10. On the very day after the department was sold to the second respondent, Mr Schober had a meeting with the organiser of the first applicant, Mr Mlangeni, on an issue unrelated to the sale of the business. He mentioned nothing of the sale to the first applicant.

11. The first respondent had meticulously recorded its attempts to convert its relationship with the individual applicants to independent contractors in writing. However, nothing about the sale of the business, including the sale itself, was written.

12. The only written communication about the dismissal of the individual applicants was their letters of dismissal which also did not record that the business had in fact been sold and that section 197 ought to apply insofar as their transfer was concerned. Nothing was put in writing, either between the respondents or between respondents and the applicants, about the sale of the business in terms of section 197. No discussions were conducted prior to the dismissals with the first applicant.

13. The first respondent had elected to label the dismissal as if it were for operational reasons

arising from the business being "discontinued on 27/07/2000." The dismissal letters do not mention the second respondent at all. Instead the individual applicants are informed that their refusal to take up alternative employment resulted in their redundancy. The individual applicants were not informed that their refusal to accept transfer was unlawful or not in compliance with section 197.

14. Having adopted the operational dismissal route, the first respondent failed to comply with any of its statutory obligations in terms of section 189 of the Labour Relations Act no 66 of 1995. If it had begun a dialogue with the applicants, the dismissals could have been averted. The individual applicants were understandably unhappy about the sale of the business when the announcement was made. The implications for them was a legitimate concern. Notwithstanding what the legislation said about consultation, common sense dictated that there should have been open and honest dialogue between the parties. This is a classic no fault dismissal of the individual applicants which could have been avoided by the first respondent if it had implemented fair procedure before effecting their dismissals.

15. The second respondent had jobs for the applicants. In terms of the sale agreement with the first respondent it had to employ the individual applicants. The second respondent failed to communicate its obligation and undertaking to abide thereby clearly to the applicants. Its failure to do so results in the dismissals being procedurally unfair. Although it is not necessary for me to make any finding as to whether the dismissal is also substantively unfair it would seem that this would be the case. The procedural non-compliance is so gross that it is difficult to discern a valid reason for the dismissals. The applicants could have been employed if information about their new employment with the second respondent had been properly conveyed to them. In that event there would have been no need for their dismissal whatsoever. That being the case the dismissals would also be substantively unfair. The concern I have is that in the absence of any information as to how the individual applicants might have reacted to the transfer and whether they would actually have taken up the transfer is not before me. If there had been procedural compliance by the respondents that information might have been elicited. As I have said it is not necessary for me to make any findings in that regard in view of the relief I am about to grant.

16. In refusing to reinstate the individual applicants I take into account that there is no evidence that all the individual applicants would have desired reinstatement. Mr Mandau testified that he might not have taken up employment with the second respondent. Furthermore, it would be unfair to the second respondent to saddle him with the obligation of employing the applicants having regard to the minimal role that he played in effecting the dismissals. The reinstatement to the first respondent is also not practical, it being common cause that the department no longer exists.

17. In the circumstances I award compensation to the individual applicants amounting to 12 months pay with costs. The parties are given leave to approach this court on the same papers in the event that there is any discrepancy or dispute about the computation of the compensation awarded.

Pillay, J

FOR THE APPLICANTS: CHEADLE, THOMPSON & HAYSOM

FOR THE RESPONDENTS: DIRK COETSEE ATTORNEYS