IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J639/97

In the matter between:-

PAPER, PRINTING, WOOD AND ALLIED WORKERS UNION **1st Applicant**

PETER KHUMALO AND 57 OTHERS **2nd to further Applicants**

and

ELS BROTHERS (PTY) LIMITED **Respondent**

JUDGMENT

SEMENYA AJ

INTRODUCTION

1. The respondent ("the employer"), in a letter dated 26 May 1997 addressed to the representative union ("the union") of the second applicants ("the employees"), advised the latter, in a notice of retrenchment attached to the letter, that the services of the employees were terminated for operational reasons. It is the conduct of the employer that is challenged by the union and the employees, in this matter, on the grounds that the termination of the employees' services was both procedurally and substantively unfair.

2. The employer answers the complaint by stating that there was adequate compliance with the Labour Relations Act, No.66 of 1995 ("the LRA"). The employer points to meetings that were held with the union, where operational requirements of the business of the employer were discussed. The essence of the contention held by the employer is that the operational requirements of the business dictated a review of the terms and conditions of the employees' services, in order to address the losses that were suffered by the business. Failing agreement, the employer then terminated the services of the employees.

BACKGROUND

3. Mr Chris Els and his brother operated a partnership comprising, amongst others, a sawmill. The present application concerns this aspect of their business. The sawmill employed all the forty seven (47) applicants in this matter.

4. At the time leading up to the dispute in this matter, the sawmill section was experiencing some financial difficulties with losses ranging between R20 000.00 to R30 000.00 per month. Mr Els, given the nature of the losses and the strain those losses were bringing to the other businesses, as well as his relationship with his brother, considered closing down the sawmill section of the business. He considered the continued operation impossible in the light of the lack of returns on their capital investment and the gross subsidisation that was needed to maintain the business.

5. Mr Chris Els, given his limitations in industrial relations matters, procured the services and advice of Mrs Pearson – a human resources specialist. Flowing from this contact, it was established that the closure of the sawmill and the consequent loss of jobs could be avoided if the terms and conditions of service of the employees would be altered. At the time, the employees were earning R35.00 a day per employee regardless of output. It was then decided to engage the union to negotiate the change in the terms and conditions of service of the employees so that the remuneration of the employees could be linked to output.

6. Ms Pearson and Mr Wurst on the side of the employer engaged the union in a meeting that was held on 12 May 1997. The employer tabled proposals for discussion that the operational requirements of the business required the change in the terms and conditions of employment of the employees. These were: that the salaries of the employees must be linked to production; that the rate of remuneration be 80c per ton; that workers agree to do paid overtime; that annual leave be taken during the period in December of each year, and that the backlog be addressed by partial closure of the mill which would result in a reduction

of approximately ¾ of the employees working.

7. Following the discussion in the subsequent meeting, the union accepted the proposals tabled by the employer save for one. The union indicated that there would be difficulties with doing away with the fixed salaries. It indicated that it was amenable to a system of linking the salaries to production only if, where the tonnage fell below expected levels, an enquiry should be made to establish whether the problem was a result of fault on the part of the employer or that of the employees – that if the tonnage was less than expected due to the fault of the employer then the employer would take the consequences and conversely the employees take the consequence if the fault was theirs.

8. The two sides could not agree with each other on the aspect of linking the salary to the production. The employer did not want to enter into debate where tonnage was less than the target. It considered that process problematic and a potential source of future disputes. The employees considered it unfair that they should be prejudiced even where the problems of realising targeted tonnage was due to poor quality timber, non-timeous delivery of timber and machine malfunctioning.

9. The impasse could not be resolved at the end of both meetings. The employer insisted that the meeting culminated in a fruitless outcome and that further meetings were incapable of bridging the gap. The union insists that the end of the discussion left the question open with a view to invite the owners of the business to a further meeting. The employer does not

agree that there was an undertaking to hold further meetings and insists that at the end of the second meeting the position was made clear that absent an agreement, the services of the employees were to be terminated.

10. The parties went to the Commission for Conciliation, Mediation and Arbitration to conciliate the dispute. The conciliation was not fruitful, with both parties tabling drafts of settlement that maintained the conflicting views of either party on the issue of linking salary to output.

11. It was common cause that the employer engaged the services of new people in substitution of the employees within a period of approximately two weeks of terminating the employees services, albeit initially on a temporary basis and later on a permanent basis. Although contested, the employer insisted that it was not practical to retrench some of the employees and continue with the others because the business required a minimum number of workers in excess of forty (40).

ISSUES

12. The questions to be decided in this matter are:

12.1. whether the respondent complied with the requirements of section 189 of the LRA and if not,

12.2. what is the appropriate relief.

ANALYSIS

13. The evidence tendered on behalf of the parties was in broad terms similar. The facts set out in the background ties in summary with the evidence rendered on behalf of both parties. The cross examination on behalf of the applicants addressed itself in the main to seeking to establish that there were no operational requirements to justify the termination of the employees' services. Some time was spent in showing that the loss of approximately R14 000.00 for the year preceding was insufficient, given expenses of using the helicopters that were incurred, to terminate the services of the employees; that the summary dismissals were discriminatory and were a sham when the white employees were not told of the impending closure

14. Zilwa AJ summarises the legal position contemplated in section 189 of the LRA, which opinion I support, as follows:

"Sec*tion 189 of the Act sets out in detail procedures that should be followed by the employer before dismissing an employee on operational requirements. They provide that when an employer contemplates dismissing employees for operational reasons it is required to consult with them or their representatives over a range of issues. During the course of such consultations, the employer must disclose relevant information in order to make consultation effective. It is trite that the purpose of such consultations, is to enable affected employees to make representations as to whether retrenchment is necessary, whether it can be avoided or minimised, and if retrenchment*

is unavoidable, the methods by which employees will be selected and the severance pay they will receive.

It is also trite that the consultation process is a joint consensus seeking exercise between the employer and employee, and that compliance with requirements of section 189 of the Act should not be assessed on a mechanical "checklist" approach. (see Johnson and Johnson (Pty) v CWIU (1999) 20 ILJ 89 (LAC); [1998] 12 BLLR 1209 (LAC) 1216D-J; Whall v Brandadd Marketing (Pty) Ltd (1999) 20 ILJ 1314 (LC); [1999] 6 BLLR (LC) 629F-J)"

15. Froneman DJP, in SA Clothing and Textile Workers Union and Others v Discreto – A Division of Trump and Springbok Holdings (1998) 19 ILJ 1451 (LAC), at paragraph 8 makes the point, confirmed by Davis AJA, in BMD Knitting Mills (Pty) Ltd v SACTWU [2001] 7 BLLR 705 (LAC), at 709, with which I associate myself:

"*The function of a court in scrutinising the consultation process is not to second guess the commercial or business efficiency of the employer's ultimate decision (an issue on which it is generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do in different settings, everyday). The matter in which the courts adjudges the latter issue is to enquire whether the legal requirement for a proper consultation process had been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision*

under circumstances, but only whether it was a rational, commercial or operational decision, properly taking into account what emerged during the consultation process."

16. In Carephone (Pty) Marcus NO and Others (1998) 19 ILJ 1425 (LAC), Froneman DJP said:

"*As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her opinion on the correctness thereof but to determine whether the outcome is rationally justifiable, the process will be in order."*

17. In adjudicating the question of whether the consultation is bona fide and whether the decision is fair, I am enjoined by the authorities to look at the substance of the issues that informed the consultation, evaluate the conduct and approach of the parties to the issues and determine whether the decision by either party in relation to those issues is fair – by this I mean, I must be satisfied that the decision to terminate the services of the employees was a rational decision. In cases such as the present one, it is the substantive and not the procedural fairness that has to be the final arbiter. Where an employer contemplates restructuring, that would have the effect in form of changes to working conditions, the employer generally believes that the business survival is dependent on change to work conditions or practices and procedures.

18. In the light of the facts in the present case I am called upon to consider whether or not the conduct of the employer in ultimately dismissing the employees was justifiable, given the

operational requirements of the business. I am further to evaluate whether both parties bona fide applied themselves to finding a resolution that was in the circumstances fair.

19. The evidence shows that the union and the employees were amenable to accommodate most of the demands tabled by the employer, including using additional effort in clearing the backlog that had arisen, without having to partially close the mill. I invited Mr Leech, appearing on behalf of the employer, to point out why the solution proposed by the union to the salary/output question was unreasonable. Mr Leech conceded that the proposal may be reasonable but contended that the proposal by the employer was equally reasonable and submitted that since both proposals were reasonable the employer ought to be given the advantage to decide in those circumstances. Mr Leech, despite invitation, could not point to any authority that supports that contention. I am unable to agree that any party to a consultation process has a prerogative to insist on its own position without affording the other proposal a fair consideration. To my mind, the suggestion by the union that the employer should bear the consequences where the output falls short for reasons that have nothing to do with the employees is a reasonable position and ought not to have been rejected. Further, in the light of the fact that the union agreed to accommodate the other demands placed on the table by the employer, it was incumbent on the employer to demonstrate its good faith in giving the suggestion a fair chance, even if the suggestion entailed an enquiry at each stage of establishing where the fault lies in the event of the tonnage being less than the target.

20. I am also unable to find possible reasons why the employer could not invoke the remedy

envisaged in section 67 of the LRA. The LRA provides a comprehensive mechanism to address resolution of matters of mutual interest, which this was. I find it difficult to accept that the operational requirements of the business were such as to require the dismissal of all the employees and substituting those with new employees. In the circumstances, I find the dismissal of the employees substantively unfair and cannot avoid the conclusion that the consultation was a sham when it failed to accede to proposals that were inherently sound and operable.

RELIEF

21. Despite the relief for re-instatement as claimed in the papers Mr Spoor, appearing for the applicants, conceded that the relief of re-instatement was in the circumstances not appropriate. I agree that given the fact that the employer has engaged services of other employees who now have vested rights in respect of the work it would be inappropriate to award the re-instatement in the circumstances.

22. In terms of section 194(2) of the LRA the compensation awarded to an employee whose dismissal is found to be unfair because the employer could not prove that the reason for dismissal was a fair reasons related to the employee's conduct, capacity or based on the employer's operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in subsection 1 and not more than the equivalent of twelve (12) months remuneration calculated at the employee's rate of remuneration on the

date of dismissal.

23. In the light of the present circumstances, I believe that it would be just and equitable to award to each of the individual employees an amount equivalent to twelve (12) months remuneration calculated at their rate of remuneration on the date of dismissal.

24. The parties argued that costs should follow the result and I see no reason why this should not be the case in the exercise of my discretion in terms of section 162 of the LRA.

In the circumstances I make the following order:

1. The dismissal of the individual employees was substantively unfair;

2. The respondent is ordered to pay the individual employees, within fourteen (14) days of date of this judgment, the equivalent of twelve (12) months remuneration calculated on the basis of each employee's earning at the date of their dismissal;

3. The respondent is ordered to pay the applicants' costs.

DATED at JOHANNESBURG on this the 8th OCTOBER 2001.

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SEMENYA AJ