IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J 2264/98

In the matter between :

SOUTH AFRICAN COMMERCIAL CATERING & ALLIED WORKERS UNION First Applicant

SHARIFA BENJAMIN Second Applicant

and

AMALGAMATED RETAILERS (PTY) LIMITED Respondent

JUDGMENT

CORAM : A VAN NIEKERK AJ

Introduction

The appointment of management consultants by a newly engaged Chief Executive Officer is almost always the harbinger of restructuring, rationalisation and retrenchments. For the Second Applicant, Ms Sharifa Benjamin, this was no exception.

Benjamin's employer, the Respondent in these proceedings, operated a number of what are referred to in the retail sector as "brands". including the Geen & Richards Furniture Stores. Benjamin was employed in May 1995 as a switchboard operator at the Market Street, Johannesburg branch of Geen & Richards.

In 1998, the Respondent appointed a new chief executive officer. His experience in the retail sector elsewhere, and in particular, his experience of credit control in that sector, led him to conclude that

things were not as they should be in the Respondent's business. The services of management consultants were engaged. The consultants recommended that the credit function, in its broadest terms, be restructured. The proposed restructuring included centralisation of credit management in two national centres, and the creation of "customer service advisers". These advisers were intended to be a new breed of multiskilled employees whose responsibilities would extend beyond those traditionally associated with credit control clerks and cashiers. The new centres assumed certain of the credit-related functions; others were assumed by the customer service advisers.

In the new regime, there was no room for a switchboard operator, certainly not one whose sole function was to operate a switchboard. Benjamin was retrenched on 30 June 1998. Although SACCAWU is the First Applicant in these proceedings, she was not a member of the union at the time of her retrenchment. She appears to have sought and benefited from the union's assistance after her dismissal. At the time of the restructuring that gave rise to these proceedings, the Respondent conducted a separate consultation process with the First Applicant in respect of the union members in the Respondent's employ. During that process, the First Applicant represented the interests of its members. The retrenchment of those employees is not in issue. The Respondent elected to conduct separate consultations with those employees who were not represented by a union, including Benjamin, and it is that process which the Applicants now challenge.

In terms of their pre-trial minute, the parties agreed to narrow the issues originally defined in the statement of case and reply. Benjamin admitted that the Respondent had a general need to restructure but placed in dispute the fact that the Respondent had a need to retrench her. She contended that her dismissal was substantively unfair, as her position was not redundant given that a temporary employee continued working at the Respondent's premises as a switchboard operator after she had been retrenched. She contended further that her dismissal was procedurally unfair in

that the Respondent had not consulted with her in regard to her retrenchment. Finally, Benjamin contended that the Respondent had failed to offer her training for an alternative position thereby also rendering her retrenchment procedurally unfair.

The last of these contentions can be disposed of at the outset. There is no provision in the Labour Relations Act nor is there any other basis to support the contention that the Respondent was substantively obliged to train Benjamin or offer her training to equip her for an alternative position either within its ranks or elsewhere. I did not understand Mr Maimane, who appeared for Benjamin, to persist with this element of the claim.

I am enjoined therefore to consider whether the Respondent had a commercial rationale to retrench Benjamin, and whether the Respondent complied with the requirements of procedural fairness.

The Respondent called two witnesses, Mr Kenneth Nosworthy and Mr Thomas Prinsloo.

Nosworthy, the Respondent's human resources manager, testified that during or about March 1998, the Respondent commenced a rationalisation program in terms of which, inter alia, the Respondent intended centralising its credit management and administration for three operating divisions known as Geen & Richards, Fairdeal and Lubners/Melody's. The chronology of events can be summarised as follows -

i) on 27 March 1998 all managing directors, human resource executives in each division were requested to investigate the possibility of any staff members who would consider early retirement, alternatively voluntary retrenchment;

ii) on 3 April 1998 a memorandum was addressed to the managing directors, human resource executives in each division in which management were briefed on the proposed rationalisation. Management was briefed regarding the steps to be taken in regard to communication of the intended rationalisation;

iii) on 7 April 1998 a notice to all staff members was placed on the notice board of each branch. The notice placed on the staff notice board set out in extensive detail the business rationalisation for the intended restructuring;

iv) during the period 7 April 1998 to 15 June 1998 consultations were held between Respondent's branch personnel and staff members employed in each branch regarding the proposed restructuring or rationalisation;

v) internal advertisements were made available to all employees to apply for the new vacancies and for the positions of customer service advisers;

vi) the closing date for all applications for positions advertised was 17 April 1998. The closing date was subsequently extended to 4 May 1998;

vii) on 9 April 1998, line management was furnished with extensive instructions in regard to interview guides, selection criteria and the consultation checklist and records;

viii) during the period 9 April 1998 to 29 April 1998 line management concluded the

consultation process and undertook a comprehensive skills audit;

ix) on 29 April 1998 management placed a second notice on the branch notice board addressed to all members of staff. In terms of the notice employees were notified that management intended to proceed with the process of restructuring, and urged employees to apply for vacant positions. The deadline for applying for vacant positions was extended until 4 May 1998;

x) on 2 June 1998 a further management briefing was distributed to line management in terms of which a notice to all employees potentially affected by the restructuring was to be distributed to the branch notice boards;

xi) the notice stated unequivocally that management had notified all members of staff who were successful in the applications for an alternative position;

xii) non-union members affected by the restructuring were invited to participate in the consultation process and to discuss any further proposals to the respective branch and/or regional managers;

xiii) on 15 June 1998 Benjamin was notified of her retrenchment in writing and the proposed severance package that would be paid.

0] Prinsloo testified that he was the Respondent's branch manager and that Benjamin was employed as a receptionist/telephonist in his branch. He stated that Mr Landman, the regional manager, was

responsible for giving effect to head office's instructions in regard to compliance with the necessary procedures for the proposed restructuring. Prinsloo also testified that he had attended a number of meetings regarding the intended restructuring/rationalisation where the process and procedure was explained to each of the employees employed in his branch.

1] At this point, I should note that the initial notice placed on all company notice boards on 7 April 1998, addressed the centralisation of the credit management and administration for the various businesses managed by the Respondent. The notice records that should the credit granting and credit management services be centralised, the skills required of branch office staff will assume a more "all round (sic) and general nature". The only mention made of telephone services is in relation to a restructuring at Amrel head office, where it was noted that the telephone exchange was under review and that the centralisation, outsourcing or closing down of that service and a number of others was being contemplated. The notice specifically drew a distinction between union and non-union members and in respect of the latter, stated the following :

"non-union members who are potentially affected will be notified on an individual bases (sic) in order that full consultation may be conducted in respect to their individual circumstances."

2] The notice to all staff members dated 29 April 1998 specifically refers to positions potentially affected by the proposed restructuring. The position of receptionist/switchboard operator is not listed among them.

3] The "consultation check list and record" that formed the basis of proposed meetings with "potentially affected non-union mebers off (sic) staff only" incorporates some 19 questions which presumably were to be posed to employees during the individual interviews that were to be conducted. These

range from confirmation that the notices placed on the notice board had been read to feedback on any proposals made by the employee concerned and any alternatives that were offered to the employee. The check list reflecting the interview conducted with Benjamin by Landman indicates that while Benjamin had read the

tices placed on the board, and that while the rationale for the proposed restructuring had been explained to her, she was not requested to submit alternative proposals to the rationalisation.

4] Benjamin's evidence in chief was remarkably brief. She confirmed that she was employed by the Respondent from 1995 until June 1998, and that she had worked as a switchboard operator. She admitted that she was aware of the restructuring process initiated in 1998, and that she had attended 4 or 5 meetings at which this was discussed. She acknowledged that she had applied for a position as a customer service adviser, but stated that she had completed the application forms at the instance of a member of the Respondent's management. Benjamin denied having seen the "consultation checklist" prior to the institution of these proceedings, although she stated that she had met with Landman. Benjamin testified that she was never advised of the purpose of the meeting, or that her position as switchboard operator was at risk. At the same time that she was advised that her application for appointment as a customer service adviser was unsuccessful, she received notice of her retrenchment.

5] The Applicants did not take issue with either Nosworthy or Prinsloo that the Respondent did not have a genuine commercial rationale for implementing the restructuring/rationalisation program. As I have noted above, her contention ultimately was that her position of switchboard operator/receptionist continued after she was retrenched, and for this reason her retrenchment was substantively unfair.

6] The rationale proffered by the Respondent for Benjamin's retrenchment was the centralisation of the credit management and administration, the simultaneous upgrading of skills and the provision of a superior service at branch level. The immediate consequence of the proposed restructuring was to

do away with the positions identified as credit managers, credit controllers, cashiers and other branch office staff and to create the position of customer service adviser. There is no dispute that the establishment of the customer service adviser position was fundamental to the restructuring and rationalisation process, or that the Respondent had a genuine rationale for implementing the restructuring and simultaneously with the foregoing, a genuine commercial rationale to multiskill its credit administration personnel to the role of credit service advisers as opposed to individual debtors' clerks, cashiers, stock clerks and credit controllers.

7] It was also not seriously disputed that Benjamin applied for the position of customer service adviser and that her application was considered on its merits. I did not understand Mr Maimane seriously to pursue an argument to the effect that Benjamin's failure to qualify as a customer service adviser was either unfair or the consequence of a flawed process. Benjamin's grievance in essence was that she had been dismissed from her position as a switchboard operator in circumstances where a temporary employee was engaged to replace her. It was suggested by the Respondent that the temporary employee undertook various other tasks. The Applicants disputed this. Mr Godfrey Duma gave evidence to the effect that the switchboard was so busy that it was not possible that the temporary employee was able to attend to other tasks. I am unable on the sparse evidence before me to make a substantive finding on these competing contentions. It is common cause however that the store in which Benjamin worked closed on 31 October 1998, that the business relocated thereafter, and that the customer service advisers attended to their enhanced responsibilities, which included answering the telephone. Duma's evidence is insufficient in my view to establish any commercial irrationality in Respondent's decision to utilise the services of a temporary employee to operate the switchboard between 1 July and 31 October 1998.

8] In these circumstances, I am unable to find that Benjamin's dismissal was substantively unfair.

9] In so far as the requirement of fair procedure is concerned, Nosworthy's evidence as to the procedural steps implemented by the head office in conveying the elements of the intended restructuring process to the branch level and to all members of staff was not challenged. As I have noted, what is at issue is the consultation conducted with Benjamin, and whether that consultation was sufficiently adequate to meet the requirements of the LRA.

0] Regrettably, the Respondent was not able to lead the evidence of Landman, who implemented the retrenchment process at branch level. The Court was advised that Landman had suffered a stroke and that he was incapacitated to an extent that he was unable to give evidence.

1] Benjamin did however furnish evidence that she was aware of the commercial rationale of the intended restructuring, attended four to five meetings with the branch manager where the intended restructuring program was communicated to her, and that she had sight of at least one notice which was placed on the branch notice board dealing with the proposed restructuring and its consequences.

2] Benjamin's case, as Mr Maimane put it, was that she was never advised that "her job was on the line". Her understanding was that the intended restructuring or retrenchment was only applicable to staff in the credit department, and that she would not be affected. Mr Mills suggested that this evidence by Benjamin is belied by the fact that she applied for the position of a customer service adviser. Benjamin also testified that she had an opportunity of applying for the position of switchboard operator at the central facility opened in Benoni. She declined to apply for the position on the basis, as she testified, that all positions in Benoni had been taken.

3] Mr Mills submitted further that Benjamin's evidence was not credible in regard to her failure to appreciate she was not affected by the restructuring. He suggested that it was evident that from the outset (at least from 17 April 1998 when Benjamin applied for the position of customer service adviser) that she appreciated that her position was one identified for retrenchment.

4] While I accept Mr Mills' contention that Benjamin attended four to five meetings with co-employees from her branch in which the proposed rationalisation was discussed, that she applied for the position of customer service adviser on 17 April 1998 (some two months prior to the termination of her services), and that was aware of the vacancy which existed in Benoni but failed to apply for the position, I am not satisfied that the Respondent has discharged its obligation to establish the procedural fairness of Benjamin's dismissal.

5] Section 189 of the LRA requires consultation with a defined consulting partner. The hierarchy established by section 189(1) establishes the identity of that partner. It is entirely possible, in the discharge of an obligation under section 189, that an individual employee is never directly advised that his or her continued employment is in jeopardy. This is the consequence of a deliberate recognition by the Act of the primacy of the rights accorded to trade unions, workplace forums, and ad hoc employee representatives in the consultation process.

6] In *Baloyi v M and P Manufacturing* [2001] 4 BLLR 389 (LAC), the Labour Appeal Court held that section 189 represents a "detailed codification" and is definitive of an employer's obligations. In other words, there are no residual obligations of fairness that exist. Section 189 makes no reference to an obligation to consult with individual employees selected for retrenchment after the employer has exhausted consultation with a consulting partner that has a claim to be consulted by virtue of the hierarchy established in section 189(1). The industrial court, exercising its jurisdiction under the 1956

Labour Relations Act, recognised that such an obligation might exist. There are at least two instances where the Labour Courts under the new statutory dispensation have dismissed claims by would-be consulting partners. In *Sikosana and others v Sasol Synthetic Fuels* (200) 21 ILJ 649 (LC) the Court dismissed a claim to be consulted made by a minority union. In *Baloyi's* case, the Labour Appeal Court similarly rejected a claim made by an individual employee in circumstances where the union of which he was a member had been consulted. Neither of these cases deals with a situation where the consulting partner identified by the Act is not an authorised representative of the employees affected by a proposed retrenchment. If an employer discharges its obligation, for example, to consult with a party in terms of a collective agreement as required by section 189(1)(a), is that employer required to consult separately with non-union members, or at least with those employees on whom the collective agreement is not binding? In other words, are the requirements of section 189 satisfied when there is consultation with the consulting partner having first claim in terms of section 189(1) (a) to (c), or is the employer required, in addition to the obligation to consult with the partner so identified, to consult with affected employees or their representatives nominated for the purpose if the consulting party first identified has no mandate to represent those employees? Is it open to the Respondent in this instance to suggest that because it consulted with SACCAWU, that it had no obligation to consult separately with Benjamin, who appears to have been employed within the relevant bargaining unit? This point was not raised during the proceedings, but I would incline toward the view that having regard to the purpose of consultation as explained in *Johnson & Johnson v CWIU*, all affected employees should directly or indirectly be given an opportunity to influence the employer's decision making process. The identification of a consulting party by applying the criteria established in section 189 (1) (a), (b) and (c) might confer exclusive rights on the partner with first claim in relation to the other potential partners listed in those paragraphs, but it does not relieve the employer of an obligation to consult in terms of subsection (d) with affected employees or their representatives nominated for the purpose if those employees are not represented in some

manner or form by a collective bargaining agent, workplace forum or registered trade union respectively. However, in this instance, the Respondent decided to initiate and conduct a separate consultation with non-union members, and to meet with these employees on an individual basis to discuss with matters relating to the proposed restructuring and their security of employment. Having elected to do so, it was incumbent on the Respondent to interact with each employee with a view to reaching consensus on his or her proposed retrenchment, and the fairness of the Respondent's actions must accordingly be determined on the basis of its stated intentions.

7] I wish to emphasise that I reach this conclusion on the facts of this case and in the light of the Respondent's stated intentions. It is not a general proposition concerning the rights of individual employees in a consultation process. Given the primacy accorded to collective engagement with a trade union, a workplace forum or the representatives of employees accorded by section 189(1) and to which I have referred above, it is entirely feasible that an employer may discharge its obligations in terms of that section without engaging in separate consultation with affected individual employees. *Baloyi's* case is an example of such an instance.

8] Having undertaken to consult with Benjamin in her individual capacity, I am not satisfied, on a conspectus of all the evidence, that the Respondent has discharged the onus of establishing that the consultation process complied with the requirements of section 189. The Labour Appeal Court has noted that a mechanical checklist approach to determine compliance with section 189 is inappropriate (see *Johnson & Johnson (Pty) Ltd v CWIU* [1999] 12 BLLR 1209 (LAC) at 1217A). The proper approach is to ascertain whether the purpose of that section (the occurrence of a joint consensus seeking process) has been achieved. There is no reason for me to disbelieve Benjamin's statement that she was never advised that her position was at risk, or that she was potentially or actually to be affected by the proposed retrenchment. The notices displayed on the board make no

reference to the vulnerability of her position, and none of the general discussions that were conducted gave any indication to that effect. Benjamin was entitled to be advised unequivocally that her employment security was at risk, and to participate in the process that the Respondent established to allow individual non-union members to influence the outcome of the anticipated consequences of the restructuring

ompensation

9] Benjamin seeks compensation for her unfair dismissal. Compensation is a discretionary remedy. If the Court's discretion is exercised in favour of Benjamin, she is entitled to the equivalent of twelve months remuneration.

0] Mr Mills submitted that in the event that the Court finds that the Respondent failed to achieve the purpose of section 189 of the Act and that Benjamin's dismissal was procedurally unfair, that I should decline to exercise my discretion to compensate Benjamin. He submitted that Benjamin was afforded an opportunity of obtaining adequate alternative employment that she refused, and that she unreasonably refused to accept the Respondent's offer of alternative employment, as envisaged by the provisions of section 196(3) of the Act.

1] This submission overlooks the fact that the offers of alternative employment were made to Benjamin in circumstances where she did not fully appreciate that her position was at risk. It also overlooks the fact that s 196(3) of the LRA (repealed by Act 75 of 1997 and reinstated as s 41 of that Act) provides its own penalty for an unreasonable refusal to accept an offer of alternative employment in the form

of a forfeiture of severance pay. In the present case, I do not think that Benjamin's refusal of the offer of a job in Benoni should deprive her of a compensatory award.

Finally, there is no reason to deprive the Applicants of the costs of these proceedings.

2] On balance, and having regard to all of the above factors and the relevant weight that should be accorded them in the circumstances make the following order:

1) that the dismissal of the Second Applicant was procedurally unfair.

2) that the Second Applicant should be compensated in an amount equivalent to twelve (12) months remuneration, calculated in accordance with the definition of "remuneration" in s 213 of the Labour Relations Act, 66 of 1995, and having regard to the remuneration earned by her on 30 June 1998; and

3) the Respondent is ordered to pay the costs of these proceedings.

_____

ANDRÉ VAN NIEKERK
Acting Judge of the Labour Court

Date of hearing: 4 June 2001, 9 - 10 July 2001

Date of judgment: 5 November 2001

For the Applicant: Mr K D Maimane
K D Maimane Inc.

ills

Cliffe Dekker Fuller Moore Inc.