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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J1038/97

2002-12-02

In the matter between

SOUTH AFRICAN BREWERIES Applicant

and

FOOD ALLIED WORKER'S UNION Respondent

J U D G M E N T

LANDMAN J: South African Breweries (SAB) and the Food and Allied Worker's Union (FAWU) had concluded a National Recognition Agreement (the NAR). The agreement provides for a detailed procedure in Annexure E. It reads:

1. Where it is in the opinion of the company necessary to reduce its manning levels as a result of economic, financial, technological and operational considerations that may affect the jobs of workers, the company shall give at least three months' notice to the union, or

1.1. The reasons for the proposed reduction of manning levels

1.2 The number of workers to be affected by the proposed reduction of manning levels

1.3 The proposed date on which the contemplated reduction of manning levels is scheduled to take place and

1.4 The proposed dates for consultation between the union and the company.

2. As soon thereafter as reasonably possible the company and the union should meet to consult on the proposed reduction of manning levels.

3. The purpose of the consultation would be to

3.1 Discuss the reasons for and supply information regarding the proposed reduction of manning levels

3.2 Consider ways to avoid or minimize retrenchment which may include where it is set out a number of steps which was taken.

4. Where the parties agree on sufficient and feasible alternatives, retrenchments will not be considered.

5. Where no sufficient alternatives to retrenchment are found the company and the union should consult on the following issues

5.1 The number of employees to be affected by the retrenchment

5.2 The criteria for the selection of employees to be affected by the retrenchment

5.2.1 The criteria for the selection of employees should, as far as possible be lifo coupled with the retention of skills.

5.2.2 Where lifo coupled with the retention of skills is not conclusive, efficiency at the job and attendance records may be used as additional criteria for selection.

5.3 The time-table for retrenchment and the notice pay applicable to retrenchees.

There are further provisions but I think it is unnecessary to quote them. SAB is an international company and in order to maintain its position in the market and to ensure its long-term viability, it continually addresses productivity issues.

One of SAB's branches is Rosslyn Brewery, the respondent, is Rosslyn Brewery. It is a so-called flexi brewery. This was described as a brewery which has the capacity to increase the production of beer on short notice. ...(mechanical interruption) this would take place in December and April of each year.

The management of the Rosslyn Brewery decided to embark on a productivity related exercise which they termed "organisational re-design". The witnesses were unable to say precisely when this decision was taken. They explained that the question of productivity was addressed on a continual basis and that they had, at the beginning of 1997 adopted the view that they had to look at organisational re-design.

This process was aligned to another programme known as the best operating process. On 24 February 1997 Rosslyn's human resources consultant Miss A Botha, sent a letter to FAWU, this letter reads as follows:

"Having closely studied the organisational design of Rosslyn Brewery, management has come to the view that changes are necessary. The proposed changes have implications for manning levels and restructuring at the brewery. In the light of the above, this letter serves to advise you that the company wishes to commence consultations with you as contemplated in Annexure E of the NRA. As a first step in the process, management have provided shop stewards with relevant information and meetings which took place this morning, Monday 24 February 1997 at 11h00. Thereafter a time-table for consultation meetings will be developed in liaison with

yourself. We will be making further contact with you in this regard soon. In the meantime, should you have any queries, please do not hesitate to contact the writer."

The four departments affected by the organisational re-design were brewery, engineering, packaging and operations. The company insisted that the consultation meetings had to be held on level 3. There were essentially departmental meetings where the shop stewards, departmental manager and other management representatives working in the department were present. The shop stewards of FAWU insisted that the consultation meetings had to be held on level 4. On that level the managers of each department and the shop stewards would be present.

A number of meetings on both levels 3 and 4 were held after 24 February 1997. Eventually and with effect from 30 June 1997, some 64 employees were retrenched. Initially at some time 129 employees were at risk of losing their jobs. The applicant employees initially contested their dismissal on both substantive and procedural grounds. Their legal representatives have since informed this court that they do not persist in the complaint that the dismissals were substantively unfair. I accordingly only have to determine

whether the dismissals were procedurally fair.

Mr Pretorius SC who appeared for SAB, argued that the introductory part of Annexure E to the NRA which provides that where it is in the opinion of the SAB necessary to reduce its manning levels as a result of economic, financial, technological and operational considerations that may affect the jobs of workers, SAB shall give at least three month's notice to the union, was complied with. He submitted that NRA does not describe how notice should be given and that it should necessarily be given in by document. It also does not state, so he submitted in express terms that notice should be given to the officials of the union and not to the shop stewards.

It is clear that notice of the proposed retrenchment had to be given to the union. The collective agreement, the NRA may supplement Section 189 of the Labour Relations Law, but it may not detract from this Section. Section 189 requires notice to be given to the union in the circumstances such as those which are present in this case.

I have no doubt that a sophisticated employer like SAB knew this and that it deliberately did not comply with this part of the retrenchment procedure. Secondly, it does not avail SAB to lead the evidence of witnesses who are unable to state

when, even approximately, retrenchments were contemplated. At the most it said that retrenchments were contemplated or at least the re-design was contemplated early in 1997.

However, if the 24th of February 1997 is taken to be the first time that it was contemplated and the notice was issued on that day, the three month period which is referred to in paragraph 1 of the retrenchment procedure would run from this date. Mr Strydom ...(inaudible) I believe he appeared on behalf of the remaining individual applicants, submitted that SAB's contention that he had given notice to the union via the shop stewards does not hold water. Apart from pointing out that the retrenchment procedure is clear about who should obtain notice, Mr Strydom pointed out that the shop stewards who are not officials of the union are not in the same position to consult with SAB. The reason for this is because shop stewards are also employees of SAB and may be retrenched, as in fact happened to some of them and he submitted situations may occur and a conflict of interest may arise between their positions and that of their co-workers.

I do not find that this was necessarily the case in this retrenchment exercise but it points to substantive and sound reasons why notice should be given to the union and not to the

shop stewards. Mr Pretorius submitted that the obligation to consult on the proposed reduction of manning levels which is found in clause 2 of the retrenchment procedure, envisaged various meetings to consult with those issues. He submits that they were held in the various departments at the so-called level 3 meetings and he points out that it is not co-incidental that where the shop stewards approached the consultation process pro-actively and participated in them, the process resulted in substantial agreement and he refers specifically to the engineering department and to a lesser degree in the brewing department.

His contention which is also SAB's contention is that the NRA does not require level 4 meetings and this he said, was a pretext which the shop stewards and FAWU used to delay and frustrate the process. Once again, it must be accepted that there are many situations where the tactics of a union and its members involve the, involve attempts to delay the final implementation of a retrenchment decision, but there is no evidence which shows that this was the intention in this case.

In my opinion SAB's response is an attempt to build on the foundation which is not laid. It leaves the impression that SAB purposely adopted procedures which ran contrary to its

agreement with the union and this is clearly unacceptable and it was unacceptable to the union.

The concept of the organisational re-design was a deliberate process which in itself is not illegitimate for SAB Rosslyn to shed its unskilled and less skilled or addaptive workers in the interest of increasing productivity. It has been suggested that the NAR was not designed to deal with this project and if this is so, in my opinion it should have been stated openly and partly should have embarked on an exercise to agree the way forward or to fall back on the Labour Relations Law taking into account Annexure E.

It is significant that on 10 March when SAB met with FAWU, Mr Kutu, the union organiser, summed up FAWU's impression of SAB's strategy as follows.

"We have found that your nice sounding word, (re-designing) is in fact a nice way of retrenching our members".

He said that SAB unfortunately forgot to supply FAWU with the necessary information. He proposed that the relevant information be furnished with regard to all of the departments which also were to be re-designed and he proposed a meeting be held at level 4 on the 18th or 19th of March to consult on the matter.

Mr Strydom has submitted that in failing to provide the union with adequate information as contemplated in the retrenchment procedure, after repeated requests that SAB is seeking to undermine the union and the employees, because the union was not placed in a position where it could meaningfully consult. He says the conclusion to be drawn from this is that the retrenchees were never properly represented as a result of this failure and he contends that SAB has not shown, the requisite information has never been furnished to the union despite the complaints including a complaint made on the 6th of June 1997.

I find that FAWU was justified in making this complaint. By 7 April 1997, although still complaining about information, indeed it was still to complain about not receiving sufficient information, FAWU seem to accept the need and inevitability of retrenchments. Mr Kutu stated:

"In the meetings we have had so far with yourselves it became quite apparent that your re-designing process will ultimately end with retrenchments. It is for this reason that we hereby present our proposals of severance packages which we believe that negotiations thereof should run concurrently with the re-design process."

And indeed those parallel negotiations or consultations took place.

Mr Strydom has pointed out deficiencies in the way in which SAB approached its obligations and treated the other requirements provided for in the NRA. There is some merit in his proposals, but on the broad conspectus, I am unable to find serious fault with the way SAB conducted itself, but SAB's approach conduct was flawed because the necessary mandatory steps to prepare the ground for meaningful attempt to reach consensus about retrenchment of the largely vulnerable workers had been deliberately side-stepped. I am of the opinion that SAB has not acquitted the *onus* resting upon itself to show the dismissal of the applicants was procedurally fair.

I now turn to the issue of compensation. I previously held in *H ...(inaudible) and 43 Others v The House of Cutts (Pty) Ltd* (C825/02), that the provisions of Section 194 as amended by the Labour Relations Amendment Act of 2002 are applicable to pending disputes. Subject to the limit of compensation and award for compensation must be just and equitable.

In arriving in the compensation which I intend awarding, I

take the following into account.

a) Failure to follow a fair procedure was a deliberate one.

b) The exercise started three months too early.

c) The union realised at a later stage that the game was lost, that retrenchments were inevitable.

d) SAB attempted to mitigate the effects of retrenchment and those attempts were fair and reasonable.

e) A solatium is required for the failure to comply with the agreed process.

In the result I am of the view that compensation in an amount equivalent to three and a half months' remuneration for each applicant properly on record would be fair. I would have been prepared to order interest to run from the date that the application was served, but this would run contrary to the applicant's prayer. Therefore I shall award the applicants no more than they have asked for. No submissions were made regarding the costs which were reserved. In the circumstances they should lie, they should lie where they fell. In the result:

1. The respondent is ordered to pay compensation in an amount equivalent to three and a half months' remuneration to each of the applicants properly on record.

2. Interest is to run at the prescribed rate from the date of judgment until date of pay.

3. The respondent is to pay the cost of the application excluding the reserved costs.

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