IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J3069/00**

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SA First Applicant

P MALULEKE & 21 OTHERS Second Applicant

and

VENTER MANUFACTURING (PTY) LTD First Respondent

VENTURE LEISURE & COMMERCIAL TRAILERS LIMITED Second Respondent

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JUDGMENT

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JAMMY AJ

1. A major proportion of the disputes referred to this Court for adjudication is sourced in the requirements of Section 189 of the Labour Relations Act 1995 ("the Act"). It is that section which deals with dismissals based on operational requirements and what, in essence, it sets out are the duties

and obligations of an employer in the retrenchment context. The primary duty there defined is to consult, either with the affected employer/s, a workplace forum, a registered trade union representing individuals potentially to be affected by the retrenchment or with any other nominated representative if no such trade union exists.

2. What is of material importance in that regard is the legislated requirement in Section 189(1), that that consultation process must commence when –

"… an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements".

3. The section proceeds to define the issues upon which, in the process, "the consulting parties" must attempt to reach consensus. They relate variously to appropriate measures to avoid the dismissals, minimise their number, change their timing and mitigate their adverse effects. Selection criteria and severance pay and the disclosure by the employer to "the other consulting party" of all "relevant information" relating to the substantive reason for the proposed dismissals, must also be traversed in the consultation process.

4. It is the alleged failure of employers to comply with one or other aspect of the requirements of the section which invariably constitutes the basis of the plethora of claims brought before this Court for relief arising from alleged unfair retrenchment dismissals. Substantive operational reasons, it is frequently contended, have not been established for the implementation of the process. Alternatively or moreover, as the case may be, the employer was guilty of some form of dereliction of his prescribed duties.

5. The seemingly inflexible provisions of that section have, however, been the subject of comment by the Court in a number of cases. In -

Sikhosana and Others v Sasol Synthetic Fuels (2000) 1BLLR 101 (LC),

the Court commented thus –

"None of its provisions deal expressly with dismissal, let alone with whether and when a dismissal will be fair. There is, for instance, no provision stating that non-compliance with the section makes a dismissal for operational requirements unfair nor any provision stating the converse – i.e. that compliance with the section makes the dismissal fair …

The relationship between the dictates of Section 189 and those of fairness is not one to one, however. It cannot be assumed that every breach of Section 189 necessarily makes the retrenchment unfair: Every invalid dismissal will doubtless be unfair but, as I have tried to make clear, not every dismissal in conflict with the section will necessarily be – or be treated as – invalid. It would be even more dangerous to assume that every retrenchment in compliance with the section is necessarily fair. … Compliance with Section 189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment. The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes of the issue of fairness".

6. With regard to the stage at which the consultation process must

commence, as defined in the opening words of the section and endorsed by the Appellate Division (as it then was) in –

Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA 1995(3) SA 22

ing –

"… as a general rule, both in logic and in law, when an employer, having foreseen the need for it, contemplates retrenchment",

this Court in –

Fletcher v Elna Sewing Machines Centres (Pty) Ltd (2000) 3BLLR 280

recording that "the rationale underlying the equitable principle enunciated in the *Atlantis Diesel Engines* case is not open to question", qualified that endorsement:

"… but in a hard, realistic and uncompromising commercial environment, it will, in my opinion, more often than not prove to be a lofty ideal, acknowledged in principle but compromised in practice. In my perception, there can be few employers who, having identified, as they are fully entitled to do, the necessity for a valid and *bona fide* reason to reorganise, restructure or in some other manner, redefine their business operations, will not have decided in principle what they perceive is the optimum method of doing so."

7. The purpose of the consultation process therefore, the Court opined, was not to help employers make up their minds whether or not to retrench, but to examine whether a basis for changing that resolve might possibly exist.

8. The Court in this matter was not accorded the benefit of testimony either from any representative of the First Applicant or from any one of the Second and Further Applicants. The principal character representing the Applicants in the consultation cast list, was a union organiser, Mr Jack Chuene who was consistently involved in that capacity and on behalf of the Second and Further Applicants virtually throughout the sequence of discussions which, it is common cause, were held between management, the union and its shop stewards. Mr Chuene, the Court was informed, is no longer associated with the First Applicant, for reasons which are irrelevant to this adjudication. No reasons were submitted however as to why individual shop stewards, involved in the process, or even any of the Applicants themselves, were not called in *viva voce* rebuttal of evidence led on behalf of the Respondents in support of their contention that, to all intents and purposes, it complied in the process in all material respects, with the requirements of Section 189 of the Act. Save to the extent that it was sought, in the course of cross-examination, to identify inconsistencies, to challenge credibility and generally to undermine, through that medium, the submissions made on behalf of the Respondents, the testimony of their witnesses stands uncontroverted and unrebutted by any direct contrary evidence from, or submitted on behalf of, the Applicants.

9. The core issue for determination in this matter is whether, at the stage at which the Respondents considered themselves entitled, with due regard to all relevant legal requirements, to implement their retrenchment programme, the consultation process insofar as it related to the

consideration of alternatives to retrenchment, had been exhausted.

10. The statement of claim filed on behalf of the Applicants, lists eight respects in which the retrenchment exercise implemented by the Respondents was unfair. They had failed, it is alleged, to comply with the provisions of the main agreement for the industry, to consult in an attempt to reach consensus in regard to alternatives to retrenchments and they had failed to consult in an attempt to reach consensus regarding the reasons for the retrenchments. There were no, alternatively insufficient, operational requirements to justify the dismissals, the Respondent had failed to disclose relevant information regarding those reasons, they had failed to disclose information necessary to enable the First Applicant to propose suitable and feasible alternatives, they had failed to consult in good faith over selection criteria and finally, the criteria applied by them were unfair.

11. The Minute of the pre-trial conference between the parties however is distinctly more succinct. The issue which this Court is required to decide is stated thus –

"Whether or not the dismissal of the individual Applicants was procedurally and substantively unfair. The central issue in this regard was whether or not the consultation process regarding *alternatives to retrenchment* (my emphasis) had properly been exhausted at the time when Respondent adopted the view that the process had been exhausted and that the retrenchment should be effected".

12. It will be apparent that in the end result therefore, and despite a formidable list of facts in dispute between the parties, the issue between them is significantly narrowed by consensus.

13. That an extended programme of consultation and debate took place over a period of two months, comprising meetings between management, the union representative, Mr Chuene, and shop stewards, and that various issues were traversed in the course of correspondence exchanged between management and the union, is not in dispute. Those exchanges in fact are listed not only in the Applicants' statement of case but in the pre-trial minute referred to, where they are recorded as issues of common cause. I do not intend to review in any detail the substance of those meetings or the content of that correspondence. The meetings are minuted and as I have stated, save in the course of cross-examination from time to time, the import and substance of those minutes is not challenged or questioned by any direct rebutting evidence adduced by or on behalf of the Applicants. A perusal of those minutes however and contentions embodied in correspondence addressed by management to the First Applicant, present an overall picture of what I consider to be broad good faith in the Respondents' attempts responsibly to meet their consultation requirements and the concerns raised by and on behalf of the Applicants, and on the contrary, a generally obstructive attitude on the part of the union organiser Mr Chuene, with occasions when, contrary to specific arrangements made in that regard, he personally failed to appear at meetings scheduled for specific dates.

14. I am satisfied, from the minutes filed, that in the course of the numerous meetings held between the parties, the commercial rationale for the decisions taken by the Respondents to restructure their operations was fully and comprehensively conveyed to the Applicants' representatives.

15. I reiterate with emphasis that this dispute can be adjudicated and determined by this Court solely on the basis of the unrebutted evidence

adduced by the Respondents' witnesses. The lengthy and commendably comprehensive cross-examination of those witnesses by the Applicants' attorney has not served, in any material respect in my view, to impugn the credibility of any of them or to discredit, on any particular aspect, the substance of their testimony which, to my mind, and in the context of specific references thereto in the course of their evidence, is substantiated by the documentary evidence, and particularly the minutes of the various meetings concerned, which has been filed of record.

16. Numerous issues are raised by the advocate's attorney in her closing argument. The fact that the First Applicant was only invited to consult with the Respondents at the beginning of August 1999 whereas the possibility of retrenchment had been contemplated as early as May or June and an initial meeting had been held with the shop stewards towards the end of July, is critically emphasised. I have already alluded to that issue in the context of commercial reality and it does not seem to me that the period of approximately one month that might have elapsed between contemplation and implementation, could constitute prejudice to the Applicants of any nature whatsoever. The right of an employer, in the absence of a union representative, to deal with duly nominated and constituted shop stewards has been endorsed by this Court, for example in -

Singh and Others v Mondi Paper (2000) 4BLLR 446(LC)

and more particularly so, in the face of perceived non-co-operation from the union itself.

17. The evidence of meetings and consultations during the period 29 July 1999 to 15 September 1999 is, I repeat, uncontested. The commercial

reasons for the retrenchment, namely the merger of two factories and the resultant duplication of certain functions and positions within them, is unchallenged and insofar as the Respondents' *bona fides* are concerned, it is common cause that as a consequence of an upturn in business, sourced in an unforeseen order received in October 1999, a significant number of the retrenched Applicants were re-employed either on a full time basis or on temporary contracts.

18. The minutes of meetings and particularly that of the meeting of 2 September 1999, indicate the confirmation by Mr Chuene of the basis of selection of the Applicants for retrenchment and that, for the reasons and in the circumstances stated, is similarly not contested.

19. Although the manner of presentation of its case to this Court is unarguably the prerogative of the party concerned, some comment is, in my opinion, appropriate with regard to the failure of the Applicants or any one their behalf, to testify in this matter. The union organiser, Mr Chuene, a key participant in the whole process and the main protagonist of the unfairness contended for on the part of the Respondents, appears to have withdrawn from the union on less than amicable terms. Had he been subpoenaed, the Court was informed, he would in all likelihood have proved to have been a hostile witness. It does not seem to me that that perception would necessarily have negated the probative value of his evidence, on the assumption that, under oath, he would tell the truth. Either therefore there was concern on the part of the Applicants that he might distort the truth, - a situation which could then, if he was declared hostile, be dealt with by effective cross-examination, or the Applicants harboured reservations about the merits of their case which they were concerned might have been highlighted had Mr Chuene testified. This is of course speculation, but

there was no apparent reason and nor was any such advanced, as to why the shop stewards who were present and participated in the sequence of meetings and who were available and, it was indicated, were in fact in Court, were not called in their own cause.

20. Whatever that reason might have been, the challenge to the fairness of the retrenchment exercise in question, is, in my view, to the extent to which substance might otherwise have been established with regard to specific aspects thereof, in consequence without evidential support. I am left in no doubt, on the conspectus of the evidence before the Court that the Respondents have adequately discharged the onus upon them to satisfy all relevant elements of fair retrenchment procedure required by the legislation and that for that reason, this application must fail.

21. The order that I make is accordingly the following:

21.1 the application is dismissed;

21.2 the First and Further Applicants are ordered jointly and severally to pay the Respondents' costs.

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B M JAMMY
Acting Judge of the Labour Court

27 March 2002

Representation:

For the Applicants:

Attorney R Edmonds

For the Respondents

Mr A Hinds: Silver & Warren