IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: C825/02

Date 16-9-2002

In the matter between:

Applicants

and

Respondent

J U D G M E N T

LANDMAN, J:

1. Mr H Fouldien and 34 others, who were formerly employed by SA Road Tankers (Pty) Ltd, filed a statement of case in this court alleging that they had been unfairly retrenched. It is now common cause that their employer was the House of Trucks (Pty) Ltd t/a SA Road Tankers. The trial was conducted on this basis and the respondent is now the House of Trucks (Pty) Ltd.

2. On 1 June 2000 the employer notified all its employees of possible retrenchments. Notwithstanding the evidence of Mr Gericke, who was the regional manager responsible for the House of Trucks, that only a possibility of retrenchment was contemplated, it is abundantly clear that this company could not be saved. This was known to Mr Gericke when he issued the notice to the employees. The act of notifying the employees of the possible retrenchment was necessary to ensure that the company complied with the requirements of procedural fairness. At least, this is what I accept for the purposes of this case. On this supposition, it follows that this process must be adhered to even where, on an objective basis, the company is beyond saving.

3. What cannot be accepted is that the employees and their union

were asked to provide alternatives to employment without knowing the magnitude of the company's financial problems. And without knowing that the company believed that it would retrench all its employees, save for a number of hand-picked employees who would be transferred to another related company.

4. I do not suggest that the idea of transferring employees was defective. On the contrary, it was a step which preserved the livelihood of those employees. There is a dispute about their terms and conditions of employment in a new industry but that is of no concern in this matter.

5. It follows, that when the applicants were dismissed, their dismissals were substantively fair. Procedurally, the dismissals were defective. The failure to provide NUMSA and the employees with the bigger picture was an invitation to them to engage in a meaningless exercise. The union's response and that of the employees, would have been different had they known the number of employees involved and the company's plan for some of their colleagues. But they could not have saved the day.

6. The Labour Relations Amendment Act 11 of 2002 (LRAA), amended, *inter alia*, s 194 of the Labour Relations Act 66 of 1995. Prior to the

LRAA coming into operation on 1 August 2002, s 194 read as follows:

"*Limits on compensation*

(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be calculated, at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.

(2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not provide that the reason for dismissal was a fair reason related to an 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 sub-section (1), and not more than the equivalent of 12 months= remuneration calculated at the employee's rate of remuneration on the date of dismissal."

Paragraph 3 which deals with automatically unfair dismissals is

not presently relevant.

7. The amended s 194, which applies from 1 August 2002, reads as follows:

"(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements, or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

Sub-paragraph (2) of s 194 was deleted.

8. Mr Vasi of NUMSA submitted that the amended s 194 applies to this matter. Although the application had been instituted prior to the

amendment coming into operation, he submitted that it was applicable because the trial took place after 1 August 2002. Mr Buys, who appeared for the House of Trucks, in his capacity as an official of the National Employers' Forum, contended to the contrary.

9. The rules of interpretation of statutes regarding the operation, i.e. the retrospectivity or prospectivity of amendments to statutes, have been crystallised. These rules which are of particular importance to this matter, may be summarised as follows:

1. No statute is to be construed as having retrospective operation. See **Petersen v Cuthbert** 1945 AD 420 at 430.
2. The presumption against retrospectivity addresses Aelementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly@. Per Steven J in **Landgraf v USI Film Products *et al*** 511 US 244 (1994) at 265. This passage was cited with approval in **National Director of Public Prosecutions v Carolus & Others** 2000 (1) SA 1127 (SCA) at 1139C-D.

3. Even a statute, which is expressly stated to be retrospective, is not to be treated as affecting matters which are the subject of pending litigation, save in the absence of a clear indication to the contrary. See **Bellairs v Hodnett and Another** 1978 (1) SA 1109 (A) at 1148F.

4. A distinction is made between true retrospectivity i.e. where an Act provides that from a past date, the new Act or amendment is deemed to have been in operation and cases where the question is merely whether a new statute or an amendment of a statute interferes with or is applicable to existing rights. See Olivier JA in **Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines Chairman, National Transport Commission and Others; Transnet Ltd (Autonet) v Chairman, National Transport Commission and Others** 1999 (4) SA 1 (SCA). See also Elmer A Driedger 1978 56 Candanian Bar Review 246 at 168-269 who says:

"A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates

backwards. *A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event."* This passage was cited with approval in **National Director of Public Prosecutions v Carolus & Others** at 1138I-1139B.

5. Where the court is left in doubt it should favour an approach to the law which is conservative.

6. The distinction between amending statutes affecting substantive rights and those affecting procedural rights is no longer regarded as being decisive. See the **Unitrans** case at 7.

7. Where the existing procedure is altered after the action or claim was instituted, unless a contrary intention appears, the old procedure applies. See **Bell v Voorsitter van die Rasklassifikasieraad en Andere** 1968 (2) SA 678 (A).

8. Considerations of fairness and equity are to be taken into account in considering whether amending legislation is application to pending actions. See the **Unitrans** case at 9H.

10. I turn to consider whether s 194 (as amended) has retrospective or retroactive effect. No transitional provisions have been enacted in the LRAA as regards s 194. Transitional provisions were made as regards the residual unfair labour practice. See Item 30 of the LRA (as amended) by clause 55 of the LRAA. This points to a deliberate intention to have s 194 (as amended) apply to pending matters.

11. The following observations regarding the old and new section 194 should be noted. The right to be compensated (I leave the remedy of reinstatement or re-employment aside) rests on a finding that the employee or employees were unfairly dismissed. The limit on compensation for unfair dismissals owing to conduct, capacity or the operational requirements of the employer, remains pegged at maximum amount equivalent to 12 months' remuneration calculated at the employee's rate of remuneration on the date of

dismissal. The necessity to determine whether compensation is to be awarded as a *solatium* for unprocedural fairness (up to the limit), as a platform, has been collapsed into a general discretion to award compensation in an amount which is just and equitable in all the circumstances. The need to exercise a discretion to award all or nothing, as regards procedural irregularities, which were sanctioned in **Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union** (1999) 20 ILJ 89 (LAC) has happily been removed. So has a similar need as regards substantive fairness.

12.

13. These discretions has been replaced by a new general discretion which does not give priority to a *solatium* for procedural unfairness. In my view, the court has been given a discretion to decline to award compensation or to award compensation in any amount up to the equivalent of 12 months' remuneration. The result is that the risk of an employer being ordered to pay all or nothing as regards procedural unfairness (or for that matter substantive unfairness) has been tempered. The risk of an employee being similarly treated, has likewise been ameliorated. The new provisions have come about after strenuous complaints by judges, commissioners, academics and parties that the old s 194 gave rise to unjust and inequitable results. As Conradie JA put it in **Lorentzen v Sanachem (Pty) Ltd** (2000) 21 ILJ 1075 (LAC) at 1077I-1078A:

"*The all or nothing choice facing the learned judge a quo has once again thrown into sharp relief the dismal state of affairs to which s 194(2) as interpreted in Johnson & Johnson has given rise. I do not wish to be understood as saying that Froneman, DJP who gave the judgment for the court could have found a better solution to what has turned out to be a section with major unintended consequences. An award has nothing to do with the magnitude of the employer's industrial relations transgression. It is a factor of the employee's wage level and the case load at the CCMA or the Labour Court. It has little of a true solatium about it. If the tribunal is busy the solace is large; if it is not, it is small.*"

14. In **Natal Bank Ltd v Deputy Sheriff of Pretoria** 1904 TS 620, a deputy sheriff was held to have had no right to be paid for work done according to an old tariff which had been repealed. His fee for that work was to be paid according to the new tariff which was applicable when he claimed his remuneration, even though this tariff was not applicable when he did the work. A similar approach has been adopted as regards interest. See **Katzenellenbogen Ltd v Mullin** 1977 (4) SA 855 (A) at 885E-F where it was said:

15. *"If she had not claimed it at any particular rate the Court a quo would have been obliged to award it at the legally permissible rate, i.e. per cent per annum prior to 16 July 1976 and thereafter unless special circumstances were present, at 11 per cent per annum. By claiming it at 6% per annum, the rate then usually awarded in practice, she was merely indicating that she intended claiming the legally permissible rate and was not necessarily limiting her claim to that rate if the law permitted a higher rate. Consequently, the Court a quo when giving judgment on 26 August 1976, ought to have applied sec 1(1) of the Act even in the absence of an amendment of the kind now sought."*

16.

17. In **Community Development Board v Mohomed and Others** 1987 (2) SA 899 (A) at 915E-G, Botha, JA said:

"Counsel for the appellant pointed to the fact that under the common law no interest accrued on an as yet unliquidated

amount of compensation ***(Union Government v Jackson & O thers*** *1956 (2) SA 398 (A) at 410-16 and 437) and from*

*that base argued that the liability to pay interest which is imposed on the Minister by s 12(3) should not be extended beyond what was strictly necessary according to the language used. In my view there is no room for such an argument in the context of the issues to be decided in this case. By enacting the main provision of s 12(3) the Legislature clearly intended to bring about a radical departure from the common law position, and it is clear that it did so because of considerations of equity (****Die Suid-Afrikaanse Naturelletrust Trust v Kitchener en Andere*** *1964 (3) SA 417 (A) at 423E-F, and* ***Klipriviersoog Properties (Edms) Bpk v Gemeenskapsontwikkelingsraad*** *1984 (3) SA 768 (T) at 772F-G). That being so, there is no warrant for interpreting the proviso to the main provision in a manner that would produce what is in effect an arbitrary and inequitable limitation on the Minister's liability for interest."*

18. Finally, in **National Director of Public Prosecutions v Carolus & Others** at 1140C-E, refernce is made to a dictum by Staughton LJ in **Secretary of State for Social Security and Another v Tunnicliffe** 1991(2) All ER 712 (CA) at 724f-g:

> *"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable*
>
> *to past events and transactions in a manner which is unfair to those concerned in them, unless a concrete intention appears. It is not simply a question of classifying an enactment as retrospective or not retroactive, rather it may well be a matter of degree, the greater the unfairness, the more it is to be expected that Parliament will make it clear if that it is intended."*

19. The right to compensation is a contingent right which rests on the finding regarding the substantive and procedural fairness of a dismissal. It is a discretionary remedy, although it is hedged by limitations on the *quantum* which can be ordered. It is, of course, a

discretion which must be exercised judicially.

20. To sum up, considerations of fairness, the inference derived from the failure to provide a transitional measure, the unchanged limit on quantum, the contingent nature of the right, the element of discretion, fairness and equity, and the redress of the mischief all indicate that the provisions of s 194 (as amended) are applicable to pending disputes. The new s 194 does not remove rights. But it does remove the effect of an external happenstance linked to time and the workload of courts and tribunals. A litigant cannot fairly insist that these considerations confer a right on him or her to have a matter adjudicated, *inter alia*, with reference to them.

21. In considering whether to order compensation or to make no award, I am limited to the circumstances relating to an unfair procedure in this case. An award of compensation, as regards this leg, would still encompass, as one its purposes, a *solatium* for the harm suffered as a result of a procedural defect of some magnitude.

22. Turning to the facts of the case, I am of the view that about three weeks passed between the giving of the inadequate notice of retrenchment and the full disclosure to the union and employees of the magnitude of the intended retrenchment. I view this as a guide to the exercise of my discretion to remedy the wrong, that is the failure to follow a proper procedure prior to the dismissal of the applicants.

23. At the end of the trial, oral submissions were made. I allowed the parties to file further written closing arguments. Submissions were filed on behalf of the applicants and the House of Trucks. The parties were also required to settle which of the disputed individual applicants were parties to this dispute as provided for in clause 8.5 of the pre-trial minute. Mr Vasi, in his heads of argument, said that the following applicants were present in court or had signed the clause, namely Mr H Fouldien, Mr N Court, Mr M Fedodien, Mr P Booysen, Mr J Kemp, Mr L Kapp, Mr M Brand, Mr F Nel, Mr N Davids and Mr D Petersen. In the case of Mr Court he only seeks

severance pay he did not allege that he had been unfairly dismissed. He was joined merely in an attempt to attain an order regarding his severance pay. This court, unfortunately, has no jurisdiction to deal with a claim for severance pay where it is not linked to a pending claim for unfair retrenchment. With the exception of Mr Court, the House of Trucks, is agreed that these are the applicants who would be entitled to relief.

24. In the premises I make the following order:

1. The respondent (The House of Trucks (Pty) Ltd) is ordered to pay compensation in the amount of equivalent to three weeks' remuneration as at the date of dismissal to the applicants whose names appear above, with the exception of Mr M Court.
2. There is to be no order as to costs.

SIGNED AND DATED AT CAPE TOWN THIS 16th DAY OF SEPTEMBER 2002.

A A Landman

Judge of the Labour Court