IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

CASE NO

J2249/99

DATE

2003/01/31

In the matter between:

SACCAWU (Applicant)

and

WELKOM HOTEL (Respondent)

JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE NGCAMU

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

JUDGMENT

NGCAMU AJ

[1] The dispute before the Court relates to the dismissal of the applicants for operational reasons.

[2] The applicants contend that SACCAWU was not given an opportunity to take part in the consultation process. The core issue in dispute is whether the dismissal was procedurally fair.

[3] The respondent contends that it was fair and that there was a fair reason for the dismissal.

[4] The respondent led evidence through its witnesses. The applicants also gave evidence.

[5] The first witness for the respondent was Mr J Hartman. He testified that he was a shareholder and the director

of the respondent. The business of the respondent was the operation of hotels and inns. He stated that since 1998 the hotel occupancy deteriorated as people were moving out of Welkom. There was a loss in 1998 and it was decided to take measures to achieve savings. These included cutting of menus, stop serving lunches and other steps.

[6] Some of these measures taken did work. The business was kept going in the hope that business would improve.

[7] The MBA Consultants were employed to advise on retrenchment. The MBA addressed a letter to the union on the 15th April 1999 and suggested that the union should provide three consecutive dates for consultation. The union proposed a meeting on 5th May 1999. The union responded on the 4th May 1999 and requested certain information as set out in the list.

[8] Mr Hartman thought the union wanted to postpone the discussion on retrenchment. At a meeting held on the 5th May 1999 it was agreed that the list of the affected

members of the union would be submitted. It was further agreed that the process would be finalised on the 14th May 1999.

[9] He further testified that although he did not understand some of the information requested, it was agreed that financial information required would be submitted to the auditors. The auditors were informed to provide the information requested by SACCAWU. He was of the view that the union did not care about the business and that the union was delaying.

[10] Under cross-examination, he testified that the two hotels are operated separately and two financial statements are drawn. For the purposes of the SARS, only a combined statement is furnished. At the time of the consultations what was available was the internal statements. The audited statements only became available during August. The internal financial statements are prepared by the bookkeeper.

[11] He further testified that MBA was requested to assist

with the possible retrenchment and informed them that the hotel was in financial difficulties.

[12] On 15 April 1999 a decision was taken that there was no alternative to retrenchment. Seven people were accordingly retrenched from Welkom Hotel. There were no further meetings with the union after the 5th May 1999.

[13] The next witness was Mr Meuller, the general manager of the respondent. He testified that the respondent had financial problems, and cost-cutting measures started three years before the retrenchment. He was involved in the retrenchment process and liaised with the labour consultants.

[14] The union was advised of the problem. No date was set by the union for consultation. The union later proposed a date for the meeting. A day before the proposed meeting, the union sent a letter requesting certain information. He did not understand some parts of the letter. Mr Meuller confirmed that it was agreed that

the list of the affected employees would be sent to the union and that for further information the union had to go to the respondents' auditors.

[15] He testified further that a decision to retrench was made on 19 May 1999. The date of the retrenchment was set as the 31st May 1999. He described the current position of the respondent as worse.

[16] Under cross-examination, he stated that a decision to retrench came from Mr Hartman. He was part of the decision-making measures to cut costs. These measures did not give the desired effect. The MBA was approached to assist. They were given a mandate to implement a retrenchment process. They did not ask for financial statements but they had an insight into the financial position of the respondent. As the figures showing losses were given to them, the losses were about R1,25 million.

[17] Mr Hartman set dates for the finalisation of the process. The MBA was not told what to write in the letters to the union. He further testified that job

sharing was not discussed with the employees. The alternatives were, however, considered. Retrenchment was a last resort.

[18] Mr Meuller, however, conceded that the consultant, Mr Bronkhorst, accused the union of delaying the process but added that the union could have come up with something that could have avoided retrenchment. He conceded that the respondent did not offer the union the financial statements but referred the union to the auditors because they had the financial statements. He denied that the Welkom Inn was not in financial difficulties. He conceded that it was not accurate that the financial problems of Welkom Inn was the reason for retrenchment. He further conceded that he did not tell the union that the income statement was available. He was under the impression that the union wanted all or nothing.

[19] In answer to a question put by the Court, Mr Meuller testified that the minutes of the meeting of the 5th May 1999 were prepared by MBA. He had no idea why it

was not recorded that an agreement was reached to the effect that the union would go to the auditors for financial statements.

[20] The last witness for the respondent was Mr Bronkhorst. He testified that he was a consultant with MBA. He was approached by Mr Hartman to institute a retrenchment rationale. He was informed of the financial difficulties of the respondent. He was instructed to proceed with fair process to deal with the issue. He obtained the information he required.

[21] He then wrote a letter to the union on the 15th April 1999 to furnish three dates. The employees were told that the respondent intended to initiate a retrenchment rationale. A memorandum was sent to the employees and the union. He explained to Mr Hartman that they had to try to avoid retrenchment.

[22] The union did not submit the dates. On 24 April 1999 the union proposed 5 May 1999 for the meeting. There were no proposals by the union nor any request for documents. He only saw the request for the documents

on the 5th May 1999, that is the date for the meeting.

[23] Mr Bronkhorst further testified that he was the spokesperson for the respondent. It was agreed that the names of the affected employees would be given to the union. He had a direct discussion with Mr Dlephu, who was acting on behalf of the union. Mr Dlephu was embarrassed by the request in the letter from the union as the letter contained information which he himself did not understand. The atmosphere during the discussions was fair. An honest attempt to reach consensus was made.

[24] Consensus was reached that the union had to nominate auditors to obtain financial statements. There was no other request from the union except that contained in the letter of the 4th May 1999. The information required by the union was not available at the time. He confirmed that he drafted the minutes and distributed them to the respondent and the employees.

[25] The respondent complied with the agreement but the

union did not. He further testified that the rationale for the retrenchment was the losses the respondent was incurring.

[26] The union did not make any submissions. A decision had to be taken by the 19th May 1999. The notices were issued to the affected employees. After the notices had been issued, he received letters from the attorneys acting for the union, denying the agreement to exchange information. When it came to retrenchment, LIFO was used as a criterion.

[27] Under cross-examination he stated that he had learnt that the unions were not constructive, they delay process, there was confrontation. He could not recall any of the retrenchment involving SACCAWU. He had no experience with SACCAWU at all. He denied that his approach to the unions was aggressive. He was aware that the Welkom Inn had no losses but the two hotels taken together were making a loss.

[28] He was unable to explain why eight people were retrenched from the Welkom Inn when it was making a

profit. He testified that at the time the memo was sent out no decision had been made. There was only one meeting with the union, SACCAWU.

[29] The applicants called on witness, Mr Colin Dlephu, who was the union organizer for SACCAWU. He was involved in the retrenchment process of the respondent. He had prior consultations with the respondent but the relationship was not good. The representatives of the respondent were a problem.

[30] He admitted receiving a notice dealing with the retrenchment and the rationale. He wrote the letter proposing the meeting on the 5th May 1999. His letter was written on the 24th April. At the time he was committed somewhere. He sent the letter listing information required by the union but he was not the author of that letter. The letter was written by the Deputy President of SACCAWU, who is now deceased. He attended the meeting on the 5th May 1999, representing SACCAWU.

[31] The letter listing the required information was discussed at the meeting on the 5th May. The respondents' representative found the request irrelevant. He indicated to the company representative it was going to be difficult to proceed if the information is not furnished.

[32] Mr Dlephu conceded that the letter of the 4th May from SACCAWU contained a request for some information he also did not know. What was of importance was the income statement. The company proposed that the union approach the auditors but his response was that there were people in the union who were able to deal with the income statement.

[33] There was no agreement that the auditors had to be approached. He conceded that the union did not submit any recommendations as information had not been received. He denied that the union was delaying the process, but saw the respondent as the party delaying.

[34] When answering questions under cross-examination, he stated that he was a shop steward before he became a union organizer. He attended workshops. He received the training through the union. He was trained in handling cases and negotiations. He also received training on retrenchments. He denied that he had no experience in handling retrenchments but was unable to say how many retrenchment negotiations he had attended before the present one. He denied that some of the people the union was acting for were not union members and stated that he did not think it would have been possible to take cases of these people.

[35] At this stage I must also indicate that the respondent did not indicate direct to the Court or to Mr Dlephu which of the employees were not members of the union.

[36] Mr Dlephu conceded that the first and second respondents are separate. He conceded that at the time he received a notice from the MBA the respondent envisaged to implement a retrenchment process and

that no finality had been reached. He, however, stated that he responded late to the letter from MBA because he had other work to do and he was working alone in Welkom office. He was, however, unable to say he was doing anything between the 15th April and 24 April.

[37] He stated that he consulted with the workers and they told him they did not see any reason for retrenchment. The workers did not say that the rooms were closed. They also did not say the menus had been stopped. When it was put to him that the agreed procedure was that the union would go to its auditors, he replied that he told the representatives of the company that it was unnecessary to incur costs on the auditors.

[38] It was further put to him that he was trying to mislead the Court in raising this version. He then replied that it was the first time he had appeared in court. It was then put to him that it was not suggested to the respondents' witnesses that they said everything that was requested was irrelevant. His response was that, "That is what happened on the 5th May". He denied that his tardiness resulted in the retrenchment. That

concluded the evidence of the applicants.

[39] The question that remains to be answered is whether this retrenchment was fair. It has been accepted that the parties are required to act in good faith during the consultation. This is so because the process of consultation that is envisaged in section 189(2) involves a bilateral process. (See *Visser v Sanlam* (2001) 3 BLLR 313 (LAC) at 319 paragraph 24.)

[40] The achievement of a joint consensus-seeking process maybe foiled by either of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligation under section 189(1), (3), (5), (6) and (7). The other consulting party may do so by refusing to take part in any of the stages of the consultation process or by deliberately delaying the whole process. (See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 LAC, page 96 at paragraph 28.)

[41] Applying this principle to the present case, the position

is that the respondent, through its consultants, advised the union of the intention to implement a retrenchment process. The union was given an opportunity to suggest three days for the consultation. There was no immediate response from the union. The explanation for this is that Mr Dlephu was engaged in other matters. I have no evidence before me to suggest that this was not the case.

[42] The letter with a request for information was prepared by another person, although signed by Mr Dlephu. In the light of this I accept that Mr Dlephu was busy during that period within which the union was expected to respond.

[43] The request for information a day before the intended meeting may be viewed as a ploy to delay the process of consultation. The question I have is whether this was deliberately done for the purpose of delaying the process.

[44] The proper disclosure of relevant information is essential for adequate consultation. (See *Chothia v*

Hall Longmore & Company (Pty) Ltd **(1997) 6 BLLR 739 LAC.)**

[45] Mr Dlephu conceded that he did not understand some of the information requested in the letter. It is, however, not in dispute that some of the information was relevant. Why was this information not supplied to the union?

[46] The respondent contends that an agreement was reached that the union would appoint auditors to approach the respondents' auditors for this information. This is denied by the union. The minutes of the meeting prepared by the respondents' consultant do not indicate any agreement but a proposal. If there was an agreement on this, I would have expected it to be in the minutes, as this is an important issue.

[47] On the other hand, the respondent knew that the audited financial statements were not available at that stage, even with the auditors. The statements prepared by the bookkeeper were available at that

stage but they were not given to the union.

[48] I do not have sufficient evidence to explain why the available information was not supplied at the meeting. I cannot accept the suggestion that the union wanted all or nothing. That is not borne out by the evidence that has been presented.

[49] I also reject that there was an agreement to have the information obtained through the auditors. I do so because the evidence of the applicants is that they pointed out that they had people who could deal with the financial statements. The respondent made no attempts to find out from the union if they had approached the auditors and why, if they had not. The respondent had the statements in their possession and these were not handed over to the union. At that stage the respondent was aware that the audited financial statements were only going to be available in August and this was in May.

[50] I am not satisfied, on the evidence presented, that there was any deliberate attempt by the union to delay

the process. Instead, I find that the respondent did not act reasonably in its approach to the consultation process. If the union frustrates attempts to reach consensus the employer cannot be blamed. Consultation must, however, be adequate. (See *Langa & Others v Active Packaging (Pty) Ltd* (2001) 1 BLLR 37 LAC.)

[51] There is only one meeting between the respondent and the union. There has been no suggestion by any of the parties that another meeting was ever held. In fact, it has been conceded that only one meeting was held with SACCAWU. At this meeting the information requested was not supplied. I accept that there was no follow-up on the information by both parties. This, however, does not entitle the employer to proceed without further consultation.

[52] This brings me to the conclusion that no genuine desire for proper consultation existed on the part of the employer. The employer wanted to rush issues in order to meet the deadline. One meeting which does not

result in any agreement for retrenchment is not adequate for a proper consultation.

[53] The alternatives considered by the respondent were not discussed with the union. These had to be disclosed even if they were likely to be rejected. (See *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 2 BLLR 138 LAC.) Both parties are obliged to debate over alternatives. (See *Fletcher v Elna Sewing Machine Centres (Pty) Ltd* (2000) 3 BLLR 280 LC.)

[54] If, however, the employees decline to formulate alternatives to retrenchment, the retrenchment will be fair. It is accepted in the present case that no alternatives were formulated by the union. This must, however, be seen in the light of the fact that no information was furnished to the union in order for them to prepare their case and present what they wanted to present to the respondent.

[55] The bilateral process envisaged in section 189 did not adequately take place and, in my view, this was as a

result of the respondent not furnishing the information requested.

[56] I have come to the conclusion that the respondent approached the process with undue haste. Mr Bronkhorst approached the union with the settled impression that the unions were not constructive but confrontational, as a result of his experience with other unions. SACCAWU in the present case cannot be said to have been non-constructive or confrontational. This attitude held by Mr Bronkhorst caused the respondent to ignore the union's request and to proceed with the retrenchment without even indicating or inviting the union to a second meeting.

[57] In my view, it does not matter whether Mr Dlephu had any prior sufficient experience with regard to the retrenchment. The test is whether the respondent had no alternative to the retrenchment. The union did not decline to formulate the alternatives. The time had not come for it to do so because the information had not been furnished.

[58] On the evidence presented, the respondent is to blame for the failure of the process. The dismissal, therefore, cannot be fair. It has been accepted that the respondents are separate entities. I have no doubt that this is correct. What, however, appears is that only Welkom Hotel had financial problems and not Welkom Inn. Welkom Inn was not making any losses and yet eight employees were retrenched. There has been no adequate explanation for this retrenchment. The fact that the two hotels are taken together for the purposes of the SAR Services does not, in my view, entitle the respondent to dismiss employees from the entity which was not experiencing any problems simply because another entity connected with it was experiencing financial problems. Such retrenchments, therefore, cannot be said to be fair.

[59] On the evidence I therefore conclude that the dismissal of the individual applicants was unfair for the reason that the process was handled with undue haste. No sufficient time was given to the union. The union was not furnished with the information required to conduct

a proper consultation with the respondent and to formulate the proposals. Only one meeting was held, which did not yield any fruits. No explanation has been given why another meeting could not be arranged.

[60] The respondent has failed to demonstrate why employees from the entity which was making profit were retrenched. On the whole, I find the respondents have failed to comply with section 189.

[61] The applicants have requested reinstatement in their employment on the same condition and terms as those that governed their employment at the date of dismissal. As an alterative, they have asked for compensation equal to twelve months. I have considered the question of making an order for reinstatement in the light of the evidence presented. There was no direct dispute that the Welkom Hotel had losses. There is also sufficient evidence to show that the two hotels are sisters and for the purposes of the SARS they are treated as one. There was evidence by the respondent as to what was done to save the hotel

from the losses it was incurring. Although this was not discussed with SACCAWU, I have no reason to reject that steps were taken by the respondents to save the business.

[62] The undisputed evidence is that the status of the respondents is worse than it was at the time of the retrenchment and for that reason, to reinstate the applicants will place the respondents in a worse position. I therefore do not believe that reinstatement will be proper in the circumstances.

[63] The relief I find suitable and reasonable in the circumstances is that the applicants be granted compensation.

[64] The order that I therefore make is the following:

(a) The dismissal of the individual applicants was unfair.

(b) The respondents are ordered to pay the applicants compensation equal to twelve months based on the monthly salaries they were each receiving at the time of the dismissal.

(c) The respondent is ordered to pay the applicants' costs.

LEGAL REPRESENTATION:

CANTS: **ADV D G GROBLER,**
instructed by Kramer, Weihmann & Joubert.

ONDENTS: **ADV J BREYTENBACH,**
instructed by DBS Attorney.

EARING: **14/8/2002**

UDGMENT: **31/01/2003**
