**IN THE LABOUR COURT OF SOUTH AFRICA**

HELD AT JOHANNESBURG **CASE NO J4223/00**

In the matter between

**JACOB MODISELLE & LORDWICK MABOTE** Applicants

and

**RONG SHIN ENTERPRISES (PTY) LTD** Respondent

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**JUDGMENT**

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**JAMMY AJ**

1. The employment of both of the Applicants in this matter was terminated by the Respondent on 18 July 2000, purportedly in the context of a retrenchment for operational reasons. The Applicants contend that their dismissal was both substantively and procedurally unfair. If indeed they were retrenched, there was no good reason for this and, in the procedural context, the requirements of fair procedure as defined in Section 189 of the Labour Relations Act 1995, were in no respect whatsoever complied with by their employer.

2. Acknowledging the Respondent's onus to establish the fairness of its dismissal of the Applicants, Mr K Cronje, representing it, called as his first witness the

Managing Director of the Respondent, Mr W H Peng. Mr Peng gave his evidence in the Mandarin language, through a sworn interpreter.

3. The Respondent he testified, is a manufacturer of garden furniture, burglar bars etc, a business which is labour intensive and in 1999/2000, it employed approximately 120 persons, some skilled and some unskilled.

4. By that time, its turnover and profitability had radically decreased as a consequence of the importation by its competitors of items similar to those which it manufactured and which were being marketed at prices considerably lower than those prevailing in his own company and which it was impossible for him to match.

5. The balance sheet as at 29 February 2000, submitted in evidence, was accordingly prepared by the Respondent's accountants who, in a letter covering it, emphasised that it was "compiled for management purposes from information and explanations submitted to us by the directors. No audit was done". That analysis, for the record, indicated an accumulated loss for the financial year 1999 of R1,4 million, and that for the financial year 2000, of R2,1 million.

6. Faced with accumulating but static stock, the Respondent, Mr Peng said, attempted to address the situation by reducing its working week from five days to three over a period of time but although this resulted in a small improvement, it did not solve the acute financial problems which it was facing and it became apparent to him that a staff retrenchment was necessary. He personally involved himself in this process, he testified.

7. In that regard, said Mr Peng, he consulted with the two Applicants, who were employed as "stock counters", and requested to know whether they would agree to his transferring them to the manufacturing department. Both refused however and indicated that they wished to resign.

8. At that stage, the Respondent sought the assistance of its Labour Relations consultant, certain Johan Prinsloo, who was instructed to implement the retrenchment process. Mr Prinsloo proceeded to draft a letter which, dated 14 June 2000, was addressed for the attention of "All Employees". Headed "Notice of Intention to Rationalise Operations" the letter recorded "The poor economic circumstances being experienced in this country at present", its adverse effect on the operations of the business, resulting in "certain financial difficulties" and the necessity to take "certain measures" to address the situation. What was then stated was the following –

> "Various methods to cut costs have already been considered, but the stage has now been reached where other, more drastic measures have to be taken, and this means that some employees may be affected. A meeting will be held with representatives of and/or employees to discuss the following:

The reason for the rationalisation and to consider possible ways to avoid any retrenchments.

To discuss criteria for selection of employees to be retrenched, if retrenchments have to take place.

To discuss a timetable of the potential measures which may have to be taken.

If retrenchments are unavoidable, to discuss what benefits and assistance can be provided by the Business to the affected employees.

The meeting will be held on 21 June 2000/Time: 10:00 place: Rong Shin Enterprises (Pty) Ltd".

9. That letter, said Mr Peng, was distributed by his staff by hand to each individual employee. A copy was also placed on the notice board.

10. The trade union NUMSA had organised in the company but, to his knowledge, Mr Peng testified, the two Applicants were not members of that union. Meetings with employees and union representatives were held following the letter and in the end result, eleven employees, including the Applicants, were ultimately retrenched.

11. Questioned by Mr M P Mashaba, representing the Applicants, Mr Peng conceded that the decision to retrench had in fact been made before any process of consultation was embarked upon. His discussions with the Applicants had been held prior to the distribution of the letter of 14 June 2000 and no other alternative than a transfer to another department was discussed with or offered to them. They decided instead to resign, and, he added, in response to a specific question in that regard, they had in fact done so. Referred to a letter dated 11 July 2000, also tabled in these proceedings, and again drafted by Mr Prinsloo, in which each of the Applicants was purportedly given "Notice of Redundancy" and asked why, if they had resigned, this was necessary, Mr Peng replied that the department in which they had been employed no longer existed. He could not however recall the exact date of their resignation. The letter of 11 July 2000, he concluded, had been written on the advice on his consultant.

12. The Applicants' contention that they only received the letter of 11 July on 18 July 2000, the date of their dismissal, was not true, said Mr Peng. Letters were handed out immediately and in any event they were not dismissed. They had insisted on resigning themselves.

13. Asked what criteria he had applied in the retrenchments which had been effected, Mr Peng replied that he did not know labour law, was poor in his knowledge of English and relied entirely on his consultant. If the Applicants were to say that they

were dismissed for alleged loitering and playing on a forklift, this was not correct. It was also not correct that they were dismissed after they had laid complaints about unilateral reductions in their hourly rates of pay. This was not the case, they were monthly- paid employees.

14. Mr Johan Prinsloo, who described himself as a Labour Relations Practitioner, testified regarding his assistance to the Respondent in its labour problems. He was instructed in July 2000 to process a retrenchment, was given the economic reasons for its necessity in the form of a balance sheet from the Respondent's accountants and proceeded to explain the procedure to them.

15. More than 90% of the workforce in the Respondent's business was represented by the trade union NUMSA and in consultation with his client, he proceeded to draft the "Notice of Intention to Rationalise Operations" dated 14 June 2000 which he handed to the Respondent's sales manager, Mr Mervyn Pillay for distribution. On 21 June 2000 a meeting was held with the union representatives and shop stewards at which the retrenchment process was fully discussed, including possible alternatives to avoid it. Further negotiations and correspondence with the union ensued but he had no recollection of the two Applicants being involved in any aspect thereof. Ultimately, some eleven employees were retrenched. As far as he was concerned, said Mr Prinsloo, all the requisite procedural steps required by Section 189 of the Labour Relations Act had been followed. He had no knowledge of the purported resignations of the two Applicants, with whom he had no direct contact at any time. He was aware that they were stock controllers but was unaware which of the Respondent's departments had been declared redundant and had been closed.

16. The letter of 11 July 2000, the "Notice of Redundancy", had been drafted and signed by him following consultation with his clients. The company had given him a list of names based, he was told, on a LIFO principle, he inserted the names and

instructed that the letters were to be handed to the employees concerned personally. The Applicants were two of the identified retrenchees and the Respondent was advised by him of the formula for calculating the severance packages to be paid, - in each case – one week's pay for each completed year of service plus pro rata leave pay. On that basis, he concluded, the retrenchments were procedurally fair.

17. Cross-examined by Mr Mashaba, Mr Prinsloo stated that he accepted the financial information furnished to him as being correct. He had been assured by Mr Pillay that the notice of redundancy dated 11 July had been distributed to all employees but he could not comment on the date upon which this had occurred. Asked how he would deal with non-union members, he replied that in the normal course, they would be consulted individually. He could not say whether this had occurred as far as the two Applicants were concerned.

18. The final witness to testify for the Respondent was Mr Mervyn Pillay, its sales manager who, he said, is "involved with employees in labour issues". Confirming the financial constraints being experienced by the Respondent at the time, he stated that he had received the letter of 14 June 2000, advising employees of an intention to rationalise operations, from Mr Prinsloo but had not distributed it to individual employees. He had placed it on notice boards on the company's premises together with a "disclosure" notice setting out relevant and pertinent information relating to the proposed retrenchment exercise. He had attended negotiation meetings with the union representatives and shop stewards but the identification of the persons to be retrenched was left entirely to management, with no input in that regard either from the union or otherwise.

19. The letter of 11 July 2000, the formal notice of redundancy, was received by him from Mr Prinsloo and, in each case, he personally handed the letter to the employee named therein. He was not aware of any resignation by either of the Applicants prior to the 14th June, said Mr Pillay, but it was correct that Mr Peng had offered them alternative employment in another department, which they refused. When they were given the redundancy letters,

they requested to be paid out immediately.

20. Asked under cross-examination, in relation to his evidence that he had placed the initial notice on notice boards, whether all employees could read, he replied that he was not sure but that the shop stewards could. When it was put to him that certain employees were not union members and therefore not represented by shop stewards, he could not dispute this. To his knowledge however, the First Applicant could read.

21. The Applicants had not been present at the negotiation meeting on 21 June between management, union representatives and shop stewards but at that stage it was not yet known who was to be retrenched. He could not recall any further meeting thereafter however. Ultimately, Mr Pillay conceded, there had been no direct discussions between management and the two individual Applicants relating to their retrenchment. The offer of alternative employment which had been made to them by Mr Peng, was conveyed after they had received the Notice of Redundancy of 11 July.

22. The company's version of these events as conveyed in the evidence which I have reviewed, was emphatically rejected in their testimony by each of the Applicants. Mr Jacob Modiselle testified that, having been employed by the company in 1988, he was dismissed on 18 July 2000 as a consequence of a complaint which he had lodged regarding a unilateral reduction in his pay. Suggesting in these circumstances that he had not been retrenched, he explained, after consultation with his representative, that he was not aware of the difference between dismissal and retrenchment and had been confused in that context. It did appear, he said, as if the reason for his dismissal was a purported operational necessity.

23. He had never, before being confronted with it in Court now for the first time,

seen the letter of 14 June 2000 and as far as the Notice of Redundancy of 11 July was concerned, he saw this for the first time on 18 July, the date of his dismissal. He had never at any time been involved in discussions with management regarding his purported retrenchment. During the first week of July he noticed that his pay had been reduced – he was paid for only two of the five days that he had worked that week. Enquiries made by him elicited no response and when he attempted, through various sources, to have the matter rectified, he found that he was "getting nowhere". He had refused to sign an agreement to accept reduced pay which had been submitted to him by Mr Pillay, he said, and was threatened with dismissal "as with the other ten" if he persisted in that refusal.

24. On 18 July 2000, in accordance with an arrangement to discuss "redundancy pay in those circumstances", he attended at the Director's office, was told that he "no longer had a job" was referred to the paymaster who told him that he might have a chance to continue working if he would "ask for forgiveness" and when he queried this, received his pay, signed a receipt and left.

25. He has never met Mr Johan Prinsloo, and whilst he had heard about other retrenchments, had not been involved in that process.

26. Questioned by Mr Cronje, Mr Modiselle stated that he had never been told the reasons for his retrenchment. As far as he was concerned business in the store section where he worked remained normal. He had not attended and knew nothing about a dispute meeting on 21 June 2000. At one stage Mr Peng, the director, requested him to assist with work in the aluminium store and he had done so until the end of June, he said. Returning to his normal post in the first week of July, he was paid for only two days of that week at a lower rate. His complaints in that regard, he repeated, were

unheeded and when he was eventually called to the director's office on 18 July at 08h00, Mr Pillay already had a "retrenchment paper", apparently from Mr Prinsloo and which he and Mr Mabote, who was with him, were informed had emanated from the director.

27. The director, Mr Peng, eventually entered the office, sat down, and speaking in Taiwanese, which was apparently translated for them, informed them that "we were finished with work and were to go outside". Mr Pillay came out and informed them that he was to meet Mr Prinsloo in order to finalise the amounts to be paid to them and eventually, some time later, and following the "apology" exchange with the paymaster to which he had referred, he was paid his money, asked to sign for it and told to go as he was being retrenched.

28. He had never been offered alternative employment by Mr Peng, he testified. What he was asked to do was to work temporarily in the aluminium store but he had returned to his ordinary post towards the end of June. He had signed a receipt for the amount paid to him because he was asked to do so. He was told that it was his severance pay but did not understand this. In any event, he had still not received the short payment which was due to him but his main concern was that, for no apparent reason, he had lost his job.

29. Finally, said Mr Modiselle, neither he nor Mr Mabote had at any time resigned or indicated any intention or wish to do so. Mr Peng's evidence to the contrary was not true.

30. Mr Modiselle's evidence was corroborated in all its material respects by the Second Applicant Mr Lordwick Mabote, both Applicants having manifestly been dealt with together by the Respondent. He too, he said, had been short paid for the first week in July and when he had attempted to complain

about that fact, Mr Pillay "gave me a document and told me I was finished working for the company". This had occurred on 18 July 2000 and the document which he as given was the "Notice of Redundancy" dated 11 July 2000. He did not read it, he said, and it was not explained to him. When he went into the pay office, he was told "not to worry about it, to go away and come back later to fetch his money". He duly did so later that day.

31. Management had never at any stage discussed his retrenchment with him, he said. He had not been consulted by Mr Peng the director and had never been offered an alternative position in the company. It was only now, in Court, that he had seen, for the first time, the letter dated 14 June 2000, the "Notice of Intention to Rationalise Operations". There is no notice board on the company's premises and if there had been one and the letter had been displayed, he would have "recognised it".

32. Mr Peng, although not fluent, can speak English and make himself understood in that language but at no stage prior to his dismissal, had either he or anyone else on behalf of the company, conveyed any reason for it to him or consulted with him in any other respect. As far as he was concerned, said Mr Mabote, there were no apparent changes in the production levels in the company during June and July.

33. Although he was not happy with the money that he was receiving, he had nevertheless signed a receipt therefor on 18 July because he was requested to do so. He was not a member of the trade union and was not involved and knew nothing about the negotiations between the company and NUMSA regarding retrenchments.

**Conclusion**

34. What emerges clearly from the *conspectus* of this evidence is that whilst Mr Prinsloo, in his capacity as the labour relations consultant to the company, was directly involved in the retrenchment exercise implemented by it in the context of having prepared the initial notice of 14 June, having represented it in its negotiations with the shop stewards and the trade union and having drafted and signed the final Notice of Redundancy issued to retrenchees, he was not, by his own admission, a participant at any time or on any basis in consultations or discussions with the two individual Applicants who, it is not disputed, were not members of the trade union.

35. Mr Peng's evidence in that regard is so vague and unsatisfactory as to raise serious doubts as to its credibility. His knowledge of and fluency in English is manifestly limited and his contention that, prior to the issue of the notice of 14 June, he had meaningful discussions with the Applicants, allegedly apprising them clearly of the problems which the company was facing and offering them other positions in the company as an alternative to their retrenchment, is, in my view, improbable in the extreme. This conclusion is fortified by his adamant evidence that the two Applicants had insisted, at that stage, on resigning – an allegation strenuously denied by them and of which no one else, including Mr Pillay, the sales manager directly involved in the process, or Mr Prinsloo, had any knowledge. It is inconceivable that had this in fact occurred, this would not have been conveyed by Mr Peng to his management, colleagues and staff. The unacceptability of that contention is endorsed by his inability to his explain why, if they had resigned, the Applicants had in fact continued working until the 18 July.

36. Mr Pillay's evidence, apart from his acknowledgement that the notice of 14 June had not been distributed directly to employees, is of no assistance. There was nothing in his testimony which directly controverts the version of events submitted by the two Applicants in their evidence, other than his bland statement that, as far as he was concerned, proper procedures had been followed.

37. The Applicants, for their part, clearly unschooled in the niceties of Labour Relations and the statutory requirements governing fair retrenchment, presented their evidence confidently and unambiguously. Aggrieved by an undisputed unilateral reduction in their pay for the first week of July, their attempts at obtaining an explanation from management not only proved futile but emerged from the evidence as a convenient avenue for management to process a purported retrenchment which, to all intents and purposes, could not otherwise have been justified. Manifestly, no semblance of prior consultation with them occurred. The criteria for their selection, the timing of their retrenchment and the calculation of their severance packages was never discussed with them. The whole exercise was presented to them on 18 July 2000 as a *fait accompli* with no opportunity to them to query it. When explanations were sought by them as to the meaning and consequence of the notices given to them on 18 July, both of them, independently, testified that they were simply told by the paymaster "not to worry about it", but merely to accept their pay, sign for it and leave.

38. In these circumstances, I am left in no doubt and have no hesitation in finding, that the retrenchment of each of the two Applicants was devoid of any semblance of procedural fairness and that, whilst they do not seek reinstatement in their former employment, they are entitled to the compensation for which the Labour Relations Act provides in a proper case.

39. The order that I make is accordingly the following –

39.1 The Respondent is ordered to pay to **each** of the Applicants, Mr Jacob Modiselle and Mr Lordwick Mabote, as compensation for their unfair dismissal, an amount equivalent to twelve months remuneration calculated at his rate of remuneration on the date of his dismissal, 18 July 2000.

39.2 The amounts referred to in 39.1 above are to be paid to each of the Applicants within thirty days of the date of this order.

39.3 The Respondent is in addition, to pay to the Applicants such costs as

they have incurred in these proceedings.

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**B M JAMMY**

**Acting Judge of the Labour Court**

Date of hearing: 14 August 2003

Date of Judgment: 28 August 2003

Representation:

**For the Applicants:** Mr M P Mashaba: Attorney

**For the Respondent: K Cronje**