IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: JS363\06

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
MKHIZE W & 3 OTHERS	**Second Applicant**
and	
GEFFENS DIAMONDS CUTTING WORKS (PTY) LTD	**Respondent**

JUDGMENT

HENDRICKS AJ

Introduction

[1] The Second to Fourth Applicants were all employees of the Respondent. Their services had been terminated on the 15th July 2005 due to operational requirements. The Applicants contend that their dismissals were substantively and procedurally unfair and claims reinstatement as well as compensation equivalent to 12 months remuneration.

Background

[2] Respondent conducts business as a diamond cutting and polishing firm and had in its employ 62 employees during 2005. It consisted of two sections namely a large diamond section and a small diamond section where diamonds were, according to its size, cut and polished. The diamonds were bought from De Beers Mining company. It was found that small diamonds were not cost effectively cut and polished in South Africa because of international competition. The supply of small diamonds from De Beers Mining company was stopped during 2005 which resulted in jobs in the small diamond section becoming redundant. A decision was taken to reduce the workforce by retrenching the employees in the small diamond section and to ultimately close it down. This decision affected the Second to the Fourth Applicants (the individual Applicants) because they were all working in the small diamond section.

[3] On 01 July 2005, the individual Applicants were informed that they were to be retrenched on 15 July 2005. They were told that there is no need to work for the period 01 July to 15 July 2005. They were then issued with certificates of service on 04 July 2005. Disgruntled about the decision to retrench them, the Applicants referred an unfair dismissal dispute (and also a dispute concerning the severance pay) to the Commissioner for the Conciliation Mediation and Arbitration (CCMA) on the 05th July 2005.

[4] Because of the nature of the dispute, the CCMA directed on the 08th July 2005 that the matter be referred to the Bargaining Council for the Diamond Cutting Industry, which

was duly done on the 13th July 2005.

[5] On 16 August 2005 the Bargaining Council invited the parties to attend conciliation on 31 August 2004 in respect of the dispute of severance pay.

[6] On 07 September 2005 the individual Applicants via their Union re-referred their dismissal dispute to the Bargaining Council.

[7] On 28 September 2005 the Bargaining Council wrote a telefax to the Union stating that the Respondent had complied with section 189 of the LRA and that the Bargaining Council had no obligation to conciliate this dispute as the matter has been settled.

[8] On 28 September 2005 the Union replied by telefax that it disputed such allegations.

[9] On 12 October 2005 the Bargaining Council telefaxed the Union stating that conciliation was to take place on Wednesday 19 October 2005.

[10] On 19 October 2005 the dispute was conciliated before the board of the Council comprising of three members, one from UASA, one from the employer's organisation and the secretary of the Bargaining Council. The Applicant's attorney was allowed to attend as an observer. A certificate of outcome was issued by the secretary of the Bargaining Council indicating that the dispute remained unresolved and indicating that the matter must be referred to the CCMA, the Bargaining Council not having the powers to arbitrate.

[11] On 25 October 2005, the First Applicant referred the individual Applicant's dispute to the CCMA for arbitration.

[12] On 04 January 2006, the CCMA set the matter down for arbitration on 17 February 2006 at the offices of the CCMA.

[13] Prior to such hearing a pre-arbitration minute was drafted, which was consequently signed on 17 February 2006 prior to arbitration.

[14] On 17 February 2006, both parties appeared at arbitration. Mr. Goldberg ("Goldberg"), an attorney, represented the Applicants, while Mr. Orton ("Orton") acted on behalf of the Respondent. The matter was presided over by commissioner Nsibanyoni (the commissioner).

[15] At arbitration, Orton raised a point *in limine* in respect of the jurisdiction of the CCMA. He stated that the CCMA lacked jurisdiction where the Applicants were stating that the Respondent's retrenchment had targeted the Union's members, this point having been raised by the Applicant in the pre-arbitration minutes. The Respondent contended that the issue of Freedom of Association was relevant to the matter and submitted that the CCMA lacked the necessary jurisdiction to decide the issue. The commissioner requested Heads of Argument on Freedom of Association from both parties by 24 February 2006.

[16] On 24 February 2006 the Applicant's attorneys duly submitted its Heads of Argument by way of telefax.

[17] On Thursday, 31 March 2006 the Applicant's attorney received the commissioner's ruling dated 15 March 2006 ordering that the dispute must be referred to the Labour Court because the dispute involves the issue of Freedom of Association and as a result therefore the CCMA did not have jurisdiction.

[18] The Applicants seek an order in the following terms:

18.1 "Declaring that the dismissal of the individual Applicants by the Respondent was both substantively and procedurally unfair;

18.2 Declaring that UASA is a sweetheart-union and that any

consultation between it and the Respondent relating to the proposed dismissal\retrenchment of any of the members of the Union are not to be considered as consultations in terms of the LRA, in particular section 189;

18.3 Directing the Respondent to recognise the Union in so far as it is a minority union as the duly elected representative of the individual Applicant's;

18.4 Directing the Respondent to enter into proper and meaningful consultation with the Union over any planned retrenchment the union's members who are part of the Respondent's workforce;

18.5 Directing the Respondent to reinstate the Applicants to their previous position of employment without loss of benefits and with any due increase and\or increments and\or due bonuses;

18.6 Directing the Respondent to involve its employee's duly appointed union and\or representative in retrenchment exercises;

18.7 Directing the Respondent to pay the Applicants an amount equivalent to twelve (12) months remuneration as compensation for the unfair dismissal, alternatively just and equitable compensation;

18.8 Directing the Respondent to pay the costs of suit".

Issues to be decided

[19] The court is required to determine whether the Applicant's retrenchment was substantively and procedurally fair. Incidental thereto the court has to determine the following, as stated in paragraph 3 of the pre-trial minute:

19.1 "Whether or not the Respondent employed somebody by the name of George in the place of Mkhize;

19.2 Whether or not the Respondent "consulted" with the UASA and whether such consultation and subsequent retrenchment of the individual Applicants was done in terms of the LRA;

19.3 Whether or not the Respondent had a legal duty to consult with the NUM and\or the individual Applicants individually;

19.4 Whether or not the Respondent reached consensus with the UASA about all the issues contemplated in section 189 of the LRA;

19.5 Whether or not the UASA had agreed that individual Applicants be retrenched;

19.6 Whether or not the Respondent was a need to retrench;

19.7 How many position were affected by the restructuring;

19.8 Whether or not other employee(s) of the Respondent, were retrenched. That is where the individual Applicants the ones meant to be retrenched and if so were they the only ones;

19.9 Whether or not fair selection criteria were used and whether the retrenchment targeted the individual Applicants;

19.10 Whether or not the retrenchment procedure adopted by the Respondent was formalistic and\or that it was a sham;

19.11 Whether or not the Respondent complied with the LRA in retrenching the individual Applicants".

Evidence tendered

[20] The Respondent, who bears the onus, called as witness Mr. P Robinson (the manager of the Respondent), Mr. S Burnstein

(the financial manager of the Respondent) and Darrell Thompson (a Human Resource Consultant from the firm Labournet). Here follows a short summary of their evidence:

Mr. P Robinson (Robinson)

Robinson testified that during June 2005, he was the manager of the Respondent. De Beers had stopped the supply of small diamonds in June 2005. As a result therefore, the Respondent took stock of the situation and it was decided that the staff of the small diamond section be retrenched.

[21] At that stage, there was a recognized union namely UASA, with whom a recognition agreement was concluded. UASA was aware of the problem of the supply of small diamonds in the diamonds industry. UASA represented the majority of the workers, to wit 75%, and was the only recognised union at that point in time. NUM as a minority unrecognised union, was not consulted as a result of the legal opinion that was obtained. All the affected employees (including the individual Applicants) were members of UASA.

[22] The management of the Respondent had 3 to 4 discussion meetings with UASA, whereupon consensus was reached. UASA had no problem with the reason for the retrenchment as a result of the situation in the diamond industry. During these retrenchment meetings, minutes were taken of the discussions by both UASA members and Respondent's Labour Consultant, Ms. Thompson of Labournet, all the minutes and notes have gone missing.

[23] According to him, the Respondent was not obliged to consult with the individual Applicants because they were represented

by their union UASA, who negotiated on their behalf. UASA was responsible to convey the information regarding the negotiations and agreement on retrenchment to the individual Applicants. During June 2006, another fourteen (14) of Respondent's employees were retrenched and the small diamond section was closed down. The reason for the 2006 retrenchments was the same as that of 2005. Both NUM and UASA was part of this process and they both agreed thereto.

[24] The selection criteria used during the 2005 retrenchments was last-in-first-out (LIFO) with retention of special skills. With regard to the individual Applicants he testified that they were not qualified to work with big diamonds and there were no vacancies in the big diamond section for them. The individual Applicants were offered alternative employment during May 2005. They had been offered to do the boiling of stones in order to cleanse it. In this respect, a notice was placed on the notice board. Furthermore, this proposition was discussed with Ngcobo and Maleka. Maleka tried to work in that position but due to chest problems she could not continue to do the boiling of stones.

[25] Mkhize was working on and repairing the piermatic machines as well as the cutting machines. After his retrenchment, he was called in, when needed, to repair the broken machines. There was a surplus of these machines as a result of the closing down of the small diamond section. Whenever a machine breaks, it is replaced by one of the surplus machines. George was called upon on an occasion to repair machines. However, George was not employed by the Respondent. He was paid per invoice for the repairs he had done. There was not enough work to keep Mkhize busy on a regular basis.

[26] Maleka had limited skills and could only work on the first tables with limited abilities. She did not have scares skills. Other people could do more than her. Dessantos too, had limited skills and she could do the top lap of a diamond in the small diamond section. She was employed at the same time as Phillipan who was not retrenched when Dessantos was retrenched. Phillipan in comparison to Dessantos could not only do top lap but could do the bottoms as well. This gave her the edge over Dessantos and she was more skilled.

Mr. Selwyn Burnstein (Burnstein)

[27] Burnstein testified that he is the financial manager at the Respondent since May 2000. Notice had been given to all the employees about the contemplated retrenchment as well as to the recognised trade union, UASA. He recalled at least two discussions between the management of the Respondent and UASA regarding the retrenchments during 2005. The agreed selection criteria was LIFO with the retention of skills. UASA accepted the need to retrench as well as the criteria. Phillipan and Jansen, though they were employed after some of the individual Applicants, were retained because of their special skills. Ms. Thompson of Labournet, who oversee the retrenchment process, kept minutes of the meeting held with UASA. He didn't keep notes of the meetings and he is not in a position to say what happened to the minutes. The individual Applicants did not have enough work. Some of them had been on short-time before being retrenched.

Ms. Darrell Thomson (Thompson)

[28] Thompson testified that she was employed by Labournet as a labour consultant. She was called upon by the Respondent to

give guidance and advice in respect of a contemplated retrenchment process. She believes that the retrenchment process was fair and complied with the provisions of section 189 of the LRA. She attended the meetings that were held between the management of the Respondent and UASA. UASA was the recognised union in the diamond industry. She took down minutes of these meetings and handed same to the offices of Labournet. She is not in a position to say what happened to these minutes and why it cannot be located.

[29] The reason for the retrenchment as well as the computation of the severance packages were communicated to UASA and they accepted it. UASA accepted the retrenchment process. The selection criteria was LIFO. Proof of the membership of the individual Applicants was also supplied by UASA at these meetings. All the correspondence had to go through UASA and that is why the individual Applicants were not consulted. This concluded the evidence on behalf of the Respondent.

[30] Two of the individual Applicants namely Ms. Purity Dessantos and Mr. Wiseman Mkhize testified on behalf of the Applicants. Their evidence can be summarised as follows:

Ms. Purity Dessantos (Dessantos)

[31] Dessantos testified that she had been employed by the Respondent for a period of one (1) year and seven (7) months at the time of the retrenchment. On Friday 24 June 2005 a Memorandum was placed on the notice board. The notice was about the contemplated retrenchment. Because the Memorandum stated that the affected employees and their union would be consulted, she thought that she or her chosen union NUM would be contacted if she happens to be one of the

affected employees.

[32] On 01 June 2007, after working for the whole day, she was called to Mr. Robinson's office and informed that she was one of those chosen to be retrenched. Upon asking why she was not contacted, Mr Robinson said that UASA was aware of it and she can take it up with UASA. According to her, she was no longer a member of UASA and she belief that the manner in which she had been retrenched, the correct procedure was not followed. She stated that LIFO was not implemented seeing that one Phillipan, who was employed after her continued to work whereas she was retrenched. She had more skills than Phillipan and was also more productive.

[33] She testified that she was not personally consulted. NUM, her chosen union, was also not consulted. According to Mr. Robinson she was still a member of UASA. She went to UASA but they refused to entertain the matter or to hold discussions with her. According to her, there was no short supply or stoppage of the supply of small diamonds. Had it been the situation, UASA would have told the employees. They were not informed. UASA failed to give them feedback of the agreement. She said that seeing that Mr Robinson knew that they (individual Applicants) were members of NUM and that they had resigned from UASA, he should have consulted with NUM. She was unaware of the window period after resignation from UASA. It could be either a month or three months.

Mr. Wiseman Mkhize (Mkhize)

[34] Mkhize had been employed by the Respondent to repair machines and to assist in the small diamond section. He repaired piermatic and cutting machines. He could also polish

diamonds. In the small diamond section, he worked with Maleka, Basi and Thoko. He was on a different level then they and he could do everything in that section.

[34] He conceded that if LIFO was applied, there were others who had been employed prior to him but he was more skilled then some of them. He was the only one who could repair the machines. These machines needed to be repair almost once a week and needed to be constantly monitored.

[35] On 21 June 2005 he was informed that he should lay-off and stay at home. He returned to work on 29 June 2005 and he saw a notice on the notice board about the contemplated retrenchments.

[36] On 01 July 2005 he was called to Mr. Robinson's office and informed that he is retrenched. He was not informed beforehand. He was also informed that UASA had agreed to the retrenchment and he could not dispute that. He had no knowledge of any discussions that was held between the management of the Respondent and UASA. He was surprised about the manner in which he was retrenched though he was aware of the possibility of retrenchment according to the notice he saw on the notice board. He had however not taken it up with UASA.

Issues to be determined:

Whether or not George was employed in the place of Mkhize

[37] Firstly, and in terms of the pre-trial minute, the Applicants raise an issue that someone by the name of George was employed in the place of individual Applicant Mkhize. The Respondent in this regard led evidence to the effect that

nobody by the name of George, whose surname the Applicants stated was "Newton", was employed by the company in 2005 subsequent to the retrenchment and even as at date of this hearing. The Respondent also produced documented evidence in the form of a list of all current employees in the employ of the Respondent, as well as those that were employed in 2005. This evidence could not be challenged by the Applicants.

[38] During his examination in chief as well as under cross-examination, Wiseman Mkhize in fact conceded that George did not replace him and that George is not and was never employed by the Respondent, thus resolving and bringing this issue to the rest.

Whether the Respondent consulted with UASA and whether such consultation and subsequent retrenchments were done in terms of the LRA.

[39] It need to be emphasized that UASA is not a party to these proceedings. As to why they were not cited as a party one can only but wonder seeing that the Applicants want to question whether proper retrenchment procedures were followed. However, it is common cause in terms of the pre-trial minutes that the four individual Applicants were members of UASA at the time of their retrenchments and as such, was UASA authorised and mandated to act on their behalf.

[40] If there is any dispute of a procedural nature, the individual Applicants were suppose to take it up with UASA. Mkhize also conceded to this during cross-examination. I find the following statement by Ngcamu AJ in **Mhlongo & Others v Food and Allied Workers Union & Another (2007) 28 ILJ 397 (LC)**

quite apposite:

"The Act does not specify what can be included in a collective agreement or what types of agreements qualify to be regarded as collective agreements. The settlement agreement signed was a product of negotiation dealing with the settlement of disputes pending in various courts. The document dealt with the employment of the Applicants. A collective agreement binds every person who was a member of the union at the time it became binding, whether that person continues to be a member of the trade or employers' organization. In my view, a settlement agreement qualifies to be a collective agreement. The argument that the Respondents acted in bad faith by concluding the agreement cannot stand because the Applicants were still members of the union and the union was entitled to act on behalf of its members. In ***Mzeku & Others v Volkswagen SA (Pty) LTD & Others (2001) 22 ILJ 1575 (LAC); [2001] 8 BLLR 857 (LAC)*** *para 55, the court stated:*

'It seems to us that, until an employee has resigned as a member of a trade union and such resignation has taken effect and the employer is aware of it, the employer is, generally speaking, entitled, and obliged, to regard the union as the representative of the employee and to deal with it on that basis…even if an employee has resigned as a member of a union, such union remains entitled to in effect represent such employee and the employer remains obliged to deal with such union as representing, among others, such employee.…'

In the light of what I have said, there was no bad faith on the part of the Respondents in concluding the agreement. There is no merit in the argument that the agreement is not binding. If the agreement is binding on the union which was a representative bargaining unit of the employees, it is also binding on the Applicants. There was no obligation to consult

with the Applicants in addition to the union.

See: ***Baloyi v M & P Manufacturing (2001) 22 ILJ 391 (LAC); [2001] 4 BLLR 389 (LAC)****.*

The union is entitled to decide how best to protect the interest of its members in general without excluding the others. The union therefore decided that in the circumstances of the matter the best solution was to negotiate compensation and not reinstatement. It seems to me that to the union, in the best interest of its members, there was no point in insisting on reinstatement. The union cannot be faulted for taking this attitude.

[41] The fact is that an agreement was reached between UASA and the Respondent with regard to the substantive and procedural aspects of the retrenchment in question and should there have been any defects, surely UASA should then declare a dispute and not the Applicants as represented by the First Respondent. Further it is submitted that, should there be any irregularity that took place detrimental to the individual Applicants' interest, then the only recourse in this regard would be against UASA. The Applicants' relationship with UASA has nothing to do with the Respondent. Evidence was led on this aspect also and no concrete answer could be furnished by either Mkhize or Ms Dessantos in contradiction of this.

[42] Further, there is nothing from the evidence led during the trial suggesting that there were irregularities on procedure or that a proper and fair retrenchment procedure was not followed notwithstanding the misplacement of the minutes by Labournet.

Whether the Respondent had a legal duty to consult with NUM or the individual Applicants

[43] Whether the Respondent had a legal duty to consult with NUM or individual Applicants individually was another issue in dispute between the parties. There is simply no basis in law why the Applicant should consult NUM as a minority union or with the individual Applicants individually despite the individual Applicants being members of UASA and the latter being the majority union at the time. The Respondent correctly and legally consulted with UASA which was a majority, recognized union and of which the four Applicants were members. The Respondent is in any case not obliged in law to consult with a minority union. Reference is made to the case of **Baloyi v M & P Manufacturing (2001) 22 ILJ 391 (LAC)**, where it was held as follows:

"A further question was raised as to whether section 185 which provides that every employee has a right not to be unfairly dismissed imports a concept of fairness similar to an unfair labour practice into the LRA. This submission needs to be considered within the context of section 189 of the LRA, subsection (1) which provides inter alia, as follows:

1) when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-…

c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;

d) if there is no such trade union, the employee likely to be affected by the proposed dismissals or their

representatives nominated for that purpose'

Section 189 (2) provides that:

'*[T]he consulting parties must attempt to reach consensus on-*

a) appropriate measures-

(i) to avoid dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

b) the method for selecting the employees to be dismissed; and

c) the severance pay for the dismissed employees'.

In short, section 189 (1) provides for the identity of the parties to be involved in the process to be adopted by an employer when the latter contemplates dismissing employees for reasons based upon operational requirements.

Read together, the two subsections represent the codification of the standards which had previously been developed by way of the principle of fairness as contained in the concept of an unfair labour practice. Section 185 may well require that an employer must comply with both the substance and the form of the requirements as contained in section 189, but it adds nothing to the content of the process to be followed.

Given the nature of the detailed codification of the procedure to be adopted for such dismissals, it cannot be said that some residual test remains, notwithstanding that the employer has complied meticulously with the requirements as laid out in section 189 (1) and (2).

It was not contended that the Respondent did not follow the proper procedures in dealing with NUMSA nor, in the light of the meetings to which reference has already been made, could such an argument have been justified. The argument that the appellant should have been afforded a hearing in person in circumstances where there union which G represented him had properly been consulted runs counter to

the express terms of the section. ***CF Benjamin & Others v Plessey Tellumat SA LTD (1998) 19 ILJ 595 (LC)*** *at paragraph 31.*

In keeping with the premise of the Act, section 189 (1) envisages that the collectiveness of management and labour represented by trade unions should engage in an appropriate process of consultation, save where the affected employees are not so represented. To interpret the section so as to allow an employee represented by a union to engage in a parallel process of consultation would undermine the very purpose of the section.

[44] The arbitration award in **Profal (Pty) LTD v National Entitled Workers Union (2003 24 ILJ 2416 (BCA)** is apposite. It was held as follows:

"It is clear that one of the primary objectives of the legislature in crafting the LRA, was to promote the principle of majoritarianism in preference to the 'all comers principle that would encourage the proliferation of unions. The idea was to create an orderly system of collective bargaining. Majoritarianism finds its expression most vividly in the system of centralized bargaining at industry level in which a union or a group of unions, that collectively represent the majority of employees above a pre-determined threshold in the industry, win the right to bargaining with employers on substantive conditions of employment.

Conclusion

[45] In the end, there is no doubt from the oral and documented evidence led that:

(a) The individual Applicants were members of UASA;
(b) UASA acted on behalf of its members as per their mandate and constitution;
(c) An agreement was reached between the Respondent and UASA with regard all aspects of the retrenchment, including that there was a rational and financial reason to retrench and that a correct and fair procedure was followed by the parties;
(d) The retrenchment of the individual Applicants was executed in terms of the said agreement and thus by agreement with UASA;
(e) The Respondent was not obligated in law to consult with NUM and\or individual Applicants;
(f) NUM and\or the individual Applicants did not challenge UASA on the agreement entered into between the Respondent and UASA.

[46] Finally, and from the evidence, there can be no doubt that the retrenchment of the individual Applicants was necessitated by the lack of supply of small diamonds, and the ultimate closure of the small diamond department, where the individual Applicants were employed. It is also clear from the evidence that the individual Applicants were in fact selected for retrenchment based upon LIFO. Therefore, irrespective of all the issues relating to the agreement with UASA, there is simply no doubt that the retrenchment of the individual Applicants was substantively justified and procedurally fair.

Costs

[47] Ms. Ntsoane submitted that costs should follow the result. From the evidence of Mkhize it is clear that all the individual Applicants were members of UASA. They were aware of the retrenchment process. They did not take issue with UASA about the retrenchment process. They were aware of the fact that the small diamonds section was closed down more than a year ago (2006), yet they persisted with their claims. Having regard to the aforementioned, I am of the view that the Applicants should be ordered to pay the costs.

Order

[48] Consequently, the following order is made:

1. The Applicants claims are dismissed.
2. Applicants are ordered to pay the costs jointly and severally, the one paying the other to be absolved.

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R D HENDRICKS AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Mr. Goldberg
For the Respondent	: Ms. Ntsoane
Date of hearing	: 25 October 2007
Date of Judgment	: 22 November 2007