IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE TOWN

Case no: C104/07

In the matter between:

Tiger Food Brands Limited t/a
Albany Bakeries **Applicant**

And

L. Levy N.O. **1st Respondent**

Commission for Conciliation,
Mediation and Arbitration **2nd Respondent**

Food and Allied Worker's Union **3rd Respondent**

The Employees Listed in Annexure "A" **4th Respondent**

JUDGMENT

Ngcamu AJ

[1] This is an application to review and to set aside the ruling of the first respondent made on 28 February 2007 in which he found that the CCMA did not have jurisdiction to facilitate the referral under section 189 A of the Labour Relations Act. The written reasons were furnished on 8 March 2007. The third to further respondents oppose the application.

[2] The applicant operates two bakeries in the Western Cape, one at Maitland and one at Bellville, where it produces bread for distribution throughout the

region. The applicant's Western Cape operations suffered a loss of R12 million in the financial year that ended in September 2006. A new bakery Manager Mr. Erasmus was appointed with the responsibility of addressing the situation. The applicant further decided that Mr. Marais, the manufacturing Executive responsible for its bakeries nationally would spend more time in Cape Town to assist Mr. Erasmus. The two even identified a number of issues that needed to be addressed in order not restore the efficiency at the bakeries.

[3] At all the applicant's bakeries, the employees were contractually obliged to work on public holidays, when needed. The practice in the Western Cape was that only employees who had volunteered would work on public holidays. The applicant had to depend on temporary replacement labour. The result was that the through put and quality targets were not met on public holidays.

[4] The applicant needed the provisions of the recognition agreement to be adhered to. The access had to be improved. A finger print access control system needed to be implemented. Employees refused to complete the baking process on days where it continued after the end of their normal time. This led to the bread which was in the process of being baked at the time being damaged and wasted. Invocoms that had been instituted in order to improve communication between management and the workforce were not being attended by employees. The employees resisted the attempts by management to improve production and access control. The resistance took a violent nature at the Maitland Bakery.

[5] In November 2006, the shop steward told Mr. Marais that he would not tell them what to do. Another shop steward Mr. Ncinitwa threatened Mr. Marais and Erasmus that the bakery would be shaken as never before in the event Mr. C. Tyhali being dismissed. Mr. Tyhali was the chief shop

steward at Maitland who was dismissed for sexual harassment on female employee.

[6] The applicant's attempts to regularise the public holiday problem led to the strike on 24 December 2006. The applicant responded by locking out the employees. An application to interdict the lock out was dismissed on 11 January 2007. Following the CCMA facilitation on 12 January 2007, an agreement was reached that employees in the bargaining unit would work on public holidays.

[7] During the strike action and in particular on 28 December 2006 about 30 striking employees attacked the replacement labourers with knobkerries. On 2 January 2007 Mr. Stengile, a production supervisor simulated shooting Mr. Marais with a plank while picketing. On 24 January 2007 two shop stewards told Mr. Marais that they would not attend the shop steward meeting requested for 26 January 2007 where Mr. Marais wanted to discuss the implementation of the fingerprint access control system. On 25 January 2007 an attempt was made to assassinate Mr. Marais while he was with Mr. Stengile. This happened few minutes after 06h00 while Marais was assisting Stengile to prepare for an invocom. The shooting took place where the invocom was scheduled to take place.

[8] On 25 January about 21h45 the factory manager Mr. Windwaai received a message on his cell phone threatening him that he was the next. On 27 January 2007, a white bakkie followed the factory manager Mr. Gerhard Kleyn from the factory to his brother's residence and then to his house. On 2 February the controller-dispatch, Mr. Trevor Scholtz received a call. The caller told him to watch out. On 3 February, two shots were fired in the street in from of Mr. Kleyn's house.

[9] It was not possible for the applicant to identify the persons involved in the assassination attempt and the threats. This made it impossible to take disciplinary action. The applicant formed an opinion that it was no longer possible to manage the Maitland Bakery due to these incidents. The applicant feared for the safety of the managerial staff. Accordingly the applicant formed the view that its operational requirements required that the employment relationship between it and the group of employees who may have been involved or have known of the assassinations attempt or threats be terminated.

[10] On 20 February 2007, the applicant directed to the third respondent a Notice in terms of section 189 (3) of the LRA and made application in terms of section 189A (3) for the appointment of a facilitator. The facilitator was duly appointed . The employees were suspended pending the outcome of the facilitation process.

[11] At the commencement of the facilitation the third respondent objected to the jurisdiction of the CCMA to facilitate the dispute on the basis that the reason for the proposed dismissals did not fall within the definition of “operational requirements “as set out in the LRA. This objection was upheld by the commissioner. This is the ruling the applicant seeks to review and set aside.

[12] It was submitted that the first respondent failed to apply the Act in a manner which promotes orderly collective bargaining and employee participation in decision making in the workplace. The applicant’s case is that the fact that it feared for the safety of its managerial staff, is both a economic and structural requirement and therefore fall within the definition of the term operational requirements.

[13] What the court is in fact required to do is to decide whether in the circumstances set out by the applicant, the CCMA has jurisdiction to facilitate in terms of Section 189 A (3).

[14] Section 213 of the LRA defines the operational requirements as meaning requirements based on the economic, technological, structural or similar needs of an employer. The Code of Good Practice attempts to clear the meaning of economic, technological or structural needs of the employer. The Code acknowledges that it is difficult to define all the circumstances that might legitimately form the basis of a dismissal for that reason. The Code defines the economic reasons as those that relate to the financial management of the enterprise. The technological reasons are defined as those that refer to the introduction of a new technology which affects work relationships either by making jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. The structural reasons are those that relate to the redundancy of the posts consequent to a restructuring of the employer's enterprise. What the Code does not attempt to define is the all encompassing term being "similar needs of an employer."

[15] The applicant took a giant step to have the facilitation process based on the fact that it could no longer run its business as a result of the threats to the management and the resistance to change. The question that arises is whether this is an operational reason. The commissioner found that the request for facilitation fell outside the parameters envisaged by section 189 A of the Act and that, the CCMA for that reason had no jurisdiction. In coming to this conclusion, the commissioner reasoned that:

> "Indeed the guiding principle inherent in this type of job loss contemplated in the Act is that it is a 'no fault dismissal." How then can the definition of rationale be stretched to suit a situation in which 49 employees are named and already suspended for reasons relating to misconduct? Surely, the specific

> circumstances, which the legislators identified, were intended to clearly prevent the use of section 189A of the Act in cases such as this one? Would not the use of section 189 A (19) (b) in the circumstances of this case entirely negate the attempt to specifically identify the rationale laid down for a genuine dismissal for reasons of operational requirement."

[16] The third respondent in its Answering Affidavit stated that it also requires a final ruling on how the matter has to be dealt with. The respondent's case is that the applicant sought to deal with the misconduct and incapacity by recourse to measures designed for retrenchment. There is no question of incapacity in this matter. The case of misconduct may well be argued in the present case.

[17] Mr. Whyte for the respondent submitted that the applicant is free to proceed in terms of section 189 of the LRA. His argument is in line with the third respondent's Answering Affidavit. In paragraph 11.2, the third respondent stated the following:

> "11.2. The refusal by the first and second respondents to facilitate the dispute does not in any event prevent the applicant from consulting or otherwise adopting a fair procedure. In this regard, the applicant could attempt to proceed by way of section 189 rather than section 189 A. The third respondent would then need to make an election as to whether it chose to participate in those proceedings."

[18] The respondent's contentions are contradictory. It is not open to the respondent to submit that the retrenchment facilitation is not the legitimate process and then submit that the applicant could attempt to proceed by way of section 189. Section 189 can only kick in where there is an operational reason. To suggest that the applicant can proceed with section 189 but state that section 189A does not apply in this case has no merit.

The applicant plans to dismiss 49 employees. The applicant is obliged in the present matter to request facilitation due to the number of employees it wants to retrench. If section 189 applies, section 189A would automatically apply if the employer is the employer falling under section 189A. The applicant does fall under section 189A of the LRA.

[19] The third respondent's stance is maintained in paragraph 12 of the Answering Affidavit where the respondent states that:

> "I deny that the refusal by the first and second respondents to facilitate the dispute increases the risk of a procedurally unfair dismissal. As noted above, the applicant is quite capable of conducting a fair process under section 189, assuming that it is ultimately able to convince a court that dismissals are justified on the basis of operational requirements in any event."

[20] The third respondent denies any resistance to finger print control at the bakery and stated that it was always prepared to negotiate. With regard to the work left unfinished, it suggested negotiation on overtime. On the question of Invocom, it was submitted that the management used it as a form of dictating to the employees and have ceased to be an information sharing forum.

[21] The third respondent further admitted that the shop stewards refused to attend the meeting because it had not been called in accordance with the normal procedure. There is no suggestion what the normal procedure is except that Mr. Moselane indicated that he would have invited to attend the meeting.

[22] The third respondent has not suggested what led to the attack on Mr. Marais and the threats to other managers. The third respondent conceded that the shooting at Mr. Marais appears to be that of an assassination

attempt. The third respondent contends that this cannot lead to the retrenchment exercise.

[23] It was the respondent's case that the problem could have been dealt with by way of disciplinary or criminal proceedings. The applicant submitted that it is unable to proceed with individual disciplinary proceedings as it is unable to identify the culprits. The matter was however reported to the police.

[24] At paragraph 43 and 44 of the Answering Affidavit, the third respondent stated:

> "43 Furthermore the third respondent wishes to make it abundantly clear that it vigorously opposes such unlawful conduct and will assist the applicant in identifying the perpetrator if requested to do so.
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> 44. I must again stress that the event cannot be attribute to the employees as a group, and cannot be used as a means of jeopardising their ongoing employment."

[25] The third respondent has not suggested how they could help in identifying the perpetrator. There is no suggestion that he is known to the third respondent. In the event that such perpetrator for the attempted assassination and the threats to other managers is known and can be disclosed for possible disciplinary and criminal proceedings, that can be dealt with and can assist in avoiding any possible retrenchment.

[26] In paragraph 49, the respondent stated:

> "49. Having canvassed these matters with the employees, I am of the view that the route (sic) cause of the problem is the management style being adopted by the applicant's managers. Whilst I am in no way condone misconduct or unlawful activities, common sense requires that the parties meet in order to resolve their differences."

[27] The respondent admits that there is a problem but blames the management. The respondent's submission is that a meeting would resolve the differences. The meeting the third respondent has in mind is outside the provisions of section 189 A of the LRA.

[28] The applicant needs to be able to manage its business in order to be able to turn it around. It has to deal with the safety of the managers and be able to control access to the bakery. It is not able to do this if the managers are being assassinated and direct threats are made to them. How does the employer protect its own management team and also be in control of the business faced with violent resistance? The management needs the workforce, which will be able to work on public holiday, and be able to finish unfinished work before knocking off. With all these problems in mind, does the CCMA have jurisdiction to facilitate the dispute? The answer lies in the answering whether the problems the applicant is facing constitute the employer's operational requirements.

[29] On the information presented, the problems do not relate to technological reasons. This is so because no new technology has been introduced. This can safely be excluded. The Act requires that anyone interpreting the provisions of the Act should give effect to the primary objects. This being *inter alia,* the promotion of orderly Collective Bargaining, employee participation in decision-making in the workplace, and the effective resolution of labour disputes. As the Act does not give a definition of economic, technological and structural needs of the employer, a narrow approach to the definition cannot be appropriate.

[30] The inability of the employer to manage the business affects the economic viability of the enterprise. The threat to the management also affects its viability as the conditions under which the manager's work is unsafe.

These scenarios can be regarded as the employer's economic requirements.

[31] It was submitted on behalf of the applicant that if circumstances have drastically impaired the ability of management to effectively manage a particular business due to fear for their own safety, and this needs to be addressed by restructuring of that workplace, then this would constitute a structural requirement. I have no problem with this submission. However, the problem of the applicant is not with the structure of the business or the management team. The applicant does not want to shed jobs because of the redundancy of positions caused by the restructuring. In my view, the applicant's problem is not structural.

[32] I have mentioned that there is no attempt to define the term "or similar needs of an employer in the Act or the Code." This in my view relates to the needs of the employer that have some resemblance of economic, technological or structural. The applicant seeks solutions to the problems it has.

[33] The respondent submitted that the applicant could have proceeded with the disciplinary proceedings either individually or collectively. The applicant has conceded that this was one of the options. The individual disciplinary hearings were not practically possible because the applicant would need to identify the individuals involved in the misconduct. The collective disciplinary hearing would have been possible. The disadvantage of such process is that employees may be dismissed with loss of benefits, those in particular who have been in the company for a number of years would lose the severance pay.

[34] The collective disciplinary hearings have been accepted by the Industrial Court in SACCAWU & Others v Cashbuild Ltd (1996) 4 BLLR 457(IC). In that case, the employees were dismissed for failure to control shrinkage.

[35] This involves the dismissal of an innocent employee. Although the dismissal is targeted to the perpetrators of the misconduct but the innocent ones come him because of their silence in not disclosing the perpetrators. The worker in the group is under a duty to assist management in bringing the guilty to book (*Chauke & Others* v *Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ (LAC) at para 31.

[36] In *SA Chemical Workers Union* v *Afrox Ltd* (1998) 19 ILJ 62 (LC), the court found that there was a good reason for dismissal where there was a need for the company to reduce overtime and had decided to restructure in order to combat potential loss of custom to competitors. The appeal to the Labour Appeal Court did not succeed.

[37] Landman J in *SA Commercial Catering & Allied Workers Union & Others* v *Pep Stores* (1998) 19 ILJ 1226 (LC) confirmed the dismissal where the employees were retrenched because of their failure to control shrinkage. The shrinkage resulted in the company deciding to shut down. The closure as a result of shrinkage was regarded as sufficient reason to close the store for operational requirements.

[38] The need to get the business of the applicant going again on a permanent basis and in a stable environment is the prime consideration. When the managers are being threatened with death, the applicant cannot operate its business. It has a duty to protect its managers. At the same time, the employees have to be fairly treated. The need for the stability cannot be dismissed as not an operational reason or economic reason for the retrenchment.

[39] This does not mean that for any misconduct, the employer may decide not to have the employee dismissed for operational reasons. It will depend on

the facts of the case. In the present case, the employer is faced with problem of having to turn around the business because of losses. It is met with violent resistance in which the managers are at a risk of being killed and the perpetrators cannot be identified.

[40] I am satisfied that it was proper and legitimate for the applicant to request the facilitation. There is an economic reason or reason similar to that for the anticipated retrenchment. If there is a solution or suggestion that can assist in the avoidance of the dismissal, that is an issue to be dealt with at the facilitation hearing. The disclosure of the perpetrators may assist the applicant in stopping the retrenchments and commencing the disciplinary proceedings. The ultimate result required by the employer is the protection of its business and its management from the criminal actions.

[41] The third respondent loses nothing by their participation in the facilitation. At stake at present is the trust relationship. I am of the view that the commissioner appointed to facilitate gave a narrow approach to the meaning of operational requirement of the employer. He further failed to consider “reasons similar to” the economic, technological and structural. Had the commissioner considered this, he would have realised that even if it was said that the reasons for the proposed retrenchment did not fit into the basket of economic reasons, they had resemblance of economic reasons. That would therefore give jurisdiction to the CCMA.

[42] In the result I find that the reasons advanced by the applicant were economic or similar reasons. Accordingly, the CCMA had jurisdiction.

[43] The order is therefore the following:

(a) The ruling made by the commissioner is reviewed and set aside. It is substituted with the order that “the CCMA has jurisdiction to facilitate the dispute between the parties.”

(b) The dispute is referred to the second respondent for facilitation by the first respondent.

(c) The first and second respondent are directed to give the facilitation process some preference.

(d) There is no order for costs.

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NGCAMU AJ

Date of Hearing: 22 March 2007

Date of Judgment: 10 April 2007

For the applicant: Adv. A.C. Oosthuizen S.C instructed by Deneys Reitz Inc.

For the third and fourth respondents: Mr. J. Whyte of Cheadle Thompson & Haysom