

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**

**HELD AT CAPE TOWN**

**Case Number: CA5/98**

In the matter between

**Imperial Transport Services (Pty) Ltd**

Appellant

and

**William Stirling**

Respondent

**JUDGMENT**

[1] Mr William Stirling, respondent herein, was employed by Imperial Transport Services (Pty) Ltd, appellant herein, as a national technical manager. His employment was terminated on 17 November 1996. The reason was that, as a result of the re-allocation of his functions, his services had become redundant to the needs of the company. His retrenchment was, as a consequence, considered necessary. Consequent thereon, Stirling challenged the termination of his employment in the Industrial Court. He alleged, inter alia, that it constituted an unfair labour practice and sought a determination to that effect

in terms of Section 46(9) of the Labour Relations Act, No 28 of 1956, as amended, ("the Act"). The relief he sought was reinstatement.

[2] The industrial court agreed with Stirling. It awarded Stirling compensation in the sum of R121 500.00 and ordered that the amount be paid by 2 February 1998, failing which, the said sum was to bear interest at the rate of 15% per annum. In addition, the company was ordered to pay costs as between party and party on the High Court scale.

[3] The company now appeals to this court against that determination and order.

[4] The central issue in this appeal is whether there was proper prior consultation by the appellant ("the company") with Stirling, in respect of his redundancy.

[5] The essential facts are not in dispute.

[6] The company is involved in the business of transportation. It provides, *inter alia*, tourism and coaching services. In 1995 the company was not doing well. It was experiencing difficulties in a number of areas. However, it had potential because its underlying business was sound, as it was well known in the

international tourist market. The company began to hire personnel with a view to addressing its problems.

[7] Stirling was hired during February 1995 as a national technical manager, with a view to addressing the technical side of the business which was also experiencing difficulties. His functions were advisory in nature. His responsibilities included, *inter alia*, giving technical advice to the various branches of the company and advising the company on the purchase of new motor vehicles. He enjoyed a considerable amount of autonomy on the technical side of the business.

[8] Andrew John Miles was hired in May 1995 as a managing director, in order to give the company a new direction. He has a degree in engineering and a Master of Business Administration. Stirling thereafter reported to Miles.

[9] After studying the business environment in which the company operated, Miles developed an essentially two-pronged business strategy for the company. The first aspect involved restructuring the company into two business units, the Charter and the Touring divisions. Each division was to be headed by a general manager. Richard Lendrum who had been the regional manager, was promoted to the position of the general manager to head the charter division. Under this new structure, Stirling

was required to report to Lendrum in regard to all of the five South African branches of the company, while he reported to Miles in respect of the Namibian branch.

[10] The other aspect of the strategy focused on, *inter alia*, improving performance and cost efficiency. This strategy involved, *inter alia*, upgrading the branches and giving them more autonomy on technical aspects. The responsibility of giving technical advice to branches was re-allocated to workshop managers who were capable of giving advice outside of their own immediate branches. Miles, with his engineering expertise, also became more and more involved in giving technical advice to the branches. Other technical functions were sub-contracted.

[11] The said business strategy was implemented as of January 1996. The implementation was an evolutionary process which occurred over a period of time. Miles and Lendrum had ongoing discussions about the implementation of this strategy, its impact on the staff across the board and, in particular, on the position occupied by Stirling. However, they did not involve Stirling in their discussions.

[12] As a consequence of the implementation of this business strategy, most, if not all, of the functions previously performed

by Stirling were re-allocated to the branch managers and their respective maintenance personnel. Others were either assumed by management, or sub-contracted.

[13] Prior to the decision to re-allocate some of his functions, Stirling was not consulted.

[14] The re-allocation of the functions which were the responsibility of Stirling resulted in him becoming redundant. This fact was communicated to Stirling for the first time at a meeting held on 16 October 1996.

[15] The meeting of 16 October came about as follows.

[16] The meeting had been called at the instance of Stirling. Over a period of time, he had become concerned that his experience and expertise were being under-utilised. In particular, Stirling was concerned about “the distinct lack of job description and areas of responsibilities” which had become apparent, and which had resulted “in inter-departmental meddling and interference”. This prompted Stirling to seek clarity on his job portfolio, and, in particular, where it fitted into the company.

[17] He had many discussions with Lendrum in this regard. In the course of those discussions, Stirling was afforded the

opportunity to relocate to Johannesburg. The idea of relocating to Johannesburg was acceptable to Stirling. In due course, the relocation of Stirling to Johannesburg became more than a mere possibility. Subsequently, Lendrum requested Stirling to furnish him with a proposed job description setting out the functions that he was performing at the time and what he perceived his future functions with the company to be. On 9 September Stirling duly prepared the proposed job description and submitted it to Lendrum, and urged him to comment thereon in writing. This job description was prepared on the basis that Stirling would be relocating to Johannesburg. When the comments were not forthcoming, on 8 October Stirling requested to meet with Lendrum in Johannesburg, in order to discuss his proposed job description. Lendrum agreed to meet with Stirling when he came to Cape Town. As Lendrum was due to be in Cape Town on 16 and 17 October, he subsequently arranged to meet with Stirling on 16 October. Hence the meeting of 16 October.

[18] There is a dispute between Stirling and Lendrum as to what transpired at the meeting of 16 October. This meeting was also attended by Mr Paddy Vella, the financial manager of the company. However, it is common cause that Stirling was shocked when he was told that the purpose of the meeting was not to discuss his proposed job description but to discuss the

fact that he had become redundant. The company saw this meeting as the commencement of the consultation in respect of Stirling's redundancy. Stirling insisted on discussing his job description as proposed by him. Nothing came out of this meeting and it was postponed to the following day, that is, 17 October. No progress was made on 17 October either. These two meetings were characterised by emotional outbursts and heated arguments. It was quite apparent that Stirling was very upset at being told that he had become redundant. At the request of Stirling, the meeting on 17 October was adjourned to 18 October.

[19] On 18 October Lendrum was not present as he had apparently returned to Johannesburg. Vella was left to finalise the discussions with Stirling. By this stage, Stirling accepted the reality that he must go. Vella informed Stirling of the package he would receive. He also informed him that his last date of employment would be 17 November. On the same day, Vella addressed a letter to Stirling setting out the package as well as advising Stirling that:

As indicated to you during our discussions, the relocation of responsibilities within the division to branch managers and their respective maintenance personnel, increasing their autonomy and the expertise within management itself, has resulted in the above position becoming redundant.

[20] So much for the facts.

[21] The unfair labour practice definition in the Act imposed on the employer a duty of prior consultation with employees and, where applicable, a trade union, before termination of employment on non-disciplinary grounds. (*Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers* 1995 (3) SA 22 (A) at 28B; *South African Clothing and Textile Workers Union and Others v Discreto, a Division of Trump and Springbok Holdings*, an unreported decision of the Labour Appeal Court, Case No. JA95/97, delivered on 22 June 1998, para 6). As a general matter, this duty arises when the employer, having foreseen a need for, contemplates retrenchment. (*Atlantis Diesel, supra*, at 28F-G; *SACTWU v Discreto, supra*, at para 6). The duty to consult requires the employer to consult in good faith. For the consultation process to be fair, the employer is required to make a full disclosure of relevant information to the affected employees where circumstances permit. In addition, the consultation should endeavour to avoid retrenchment or minimise its effects by engaging in a joint problem solving exercise aimed at achieving consensus. (*Atlantis Diesel, supra*, at 29F-G). I should add here that employers or their representatives should be given reasonable notice of the date, time and place of consultation so as to prepare for the consultation.

[22] The question which arises in this appeal is when does the duty to consult arise where termination of employment is brought about by the deliberate conduct of the employer, such as

restructuring of the business or introduction of changes in its operation. It seems to me that in such a case, the duty arises when the employer, having foreseen the need for it, contemplates changes which might affect the job positions of certain employees. When an employer contemplates changes in its business, fairness dictates that the employer should, before implementing those changes, ask the question: "Are there any job positions which might be affected by the contemplated change?". If there are job positions which might be affected by the contemplated changes, the employees whose jobs might be affected are, as a matter of fairness, entitled to be consulted before such changes are implemented.

[23] The need to consult before changes are implemented is obvious. Consultation provides an opportunity, *inter alia*, to explain the reasons for the proposed changes, to hear representations on possible ways and means of avoiding the loss of jobs, or minimising the effects of the changes and to discuss and consider alternatives. Any representations made after the implementation of changes are more likely to be met with the natural reaction to justify the changes. (*SACTWU v Discreto*, ***supra***, at para 9).

[24] The requirement of consultation prior to the implementation of the changes is not likely to prejudice the employer. A distinction

ought to be made between the loss of jobs, which is brought about by external factors such as a downturn in the economy, on the one hand, and the loss of jobs by reason of internal factors, such as the restructuring or the introduction of new technology, on the other hand. Although both these factors result in the retrenchment of employees, there is an important distinction which is relevant when one considers the stage at which the duty to consult arises. In general, in the case of a loss of jobs brought about by internal changes, the employer is in control of the situation and need not make hasty decisions. Time is not as critical as it is when retrenchment is due to an economic downturn, and where any delay might severely prejudice the employer (*Hlongwane and Another v Plastics (Pty) Ltd* (1990) 11 ILJ 191 (IC) at 176D).

[25] The ultimate decision whether to implement the change falls squarely within the competence and responsibility of management. It is not for the court to tell the employer what changes may or may not be made in its business. Suffice it if the changes are informed by commercial or business rationale (*South African Clothing and Textile Workers Union and Others v Discreto, a Division of Trump and Springbok Holdings*, para 5).

[26] Here the company did not consult with Stirling prior to the re-allocation of his functions. Stirling became redundant as a direct

consequence of this re-allocation. When the company purported to consult with Stirling on 16 October, it had already re-allocated his functions and he had become redundant. The company should have consulted with Stirling prior to the re-allocation of his functions. The company, therefore, failed in its duty of prior consultation.

[27] Apart from the foregoing, the manner in which the company treated Stirling leaves much to be desired. Lendrum knew that Stirling was concerned about his position, yet he and Miles were busy effecting changes which were to affect Stirling's position. Lendrum pretended to Stirling that the meeting of 16 October was to discuss Stirling's proposed job description and his possible relocation to Johannesburg. Yet Lendrum knew that what was going to be discussed at that meeting was the fact that Stirling had become redundant. Stirling was not given any prior notice to prepare for the meeting. Stirling's attitude at the meeting was, in these circumstances, understandable. Indeed to expect otherwise would have been too much to expect of human nature.

[28] Prior to the meeting of 16 October Lendrum and Miles had already considered alternative options. They had found none. At the meeting they expected Stirling to come up with substantive proposals, yet they had not given him notice of what was to be discussed at the meeting. He, therefore, came to the meeting

unprepared for what was to be discussed. The proposals that he advanced were rejected without any detailed discussions. He was not provided with any detailed information as to why these proposals were being rejected. It is difficult to fathom what purpose the consultation could have achieved in these circumstances. The conclusion that Stirling was presented with a *fait accompli* at the meeting, is irresistible.

[29] However, it cannot be said that the decision to make Stirling redundant was devoid of a commercial rationale. It is common cause that the company had difficulties. The changes that were implemented by the company were reasonable to improve performance and efficiency.

[30] In the result, the decision to terminate the employment of Stirling was unfair for want of compliance with the requirements of prior consultation.

[31] It now remains to consider whether this court should interfere with the amount of compensation awarded to Stirling.

[32] The industrial court found that had the company consulted with Stirling during the period from January to October, Stirling would not have been subjected to unfair labour practice. It, therefore, found "it fair and equitable to compensate him for that period of

time.”

[33] Mr Oosthuizen, who appeared on behalf of the company, criticised the approach of the industrial court on the grounds that there was no basis for the finding that consultation with Stirling should have commenced in January, and that the consultation process would have taken 9 months.

[34] This criticism is not without merit. There is no evidence that the charges, which ultimately led to Stirling becoming redundant, were contemplated as early as January. The evidence of Lendrum and Vella on this aspect was very vague. Lendrum denied that Stirling’s redundancy could have been contemplated as early as January. He pointed out the fact that “towards the beginning of 1996” he had issued a memorandum urging the personnel to utilize Stirling’s skills.

[35] There is, therefore, no basis for finding that consultation should have commenced in January. Nor is there any basis for the finding that the consultation process would have lasted for 9 months. Consequently, the industrial court committed a misdirection in approaching the question of compensation on the basis that the consultation should have commenced in January and that it would have taken 9 months. In view of this misdirection, this court is free to determine the amount of

compensation. (*Bank of Lisbon International v Pinheiro* [1998] 19 ILJ 549 (LAC) at para 43)

[36] The Act gives no guidance on the principles applicable in determining compensation when, as here, there was a commercial rationale for the redundancy but the employer did not follow a fair procedure before deciding on retrenchment. (*Bank of Lisbon International v Pinheiro, supra, para 43*) As Myburgh J P observed in the *Bank of Lisbon* case, what complicates the determination of the appropriate compensation in a case such as the one before us, is that the employee is compensated for being retrenched.

[37] In determining what an appropriate award of compensation is, there are, generally speaking, factors which the court is entitled to take into account. These include: the nature of the breach of duty; the possibility that the employee might have remained in the employment in a lesser position had proper consultation taken place; the adequacy of the retrenchment package; failure to accommodate the employee in the new structure; the employee's period of service; the age of the employee. (*Bank of Lisbon, supra, paras 45 and 46; Hoogenoeg Andolusita (Pty) Ltd v National Union of Mineworkers & Others, (1992) 13 ILJ 17 (LAC) at 96G-97D.*)

[38] Stirling had been head hunted to come and work for the company. He had to relocate from Johannesburg to Cape Town. He was 55 years old at the time. He only remained with the company for 18 months. At his age finding employment is not going to be easy. Indeed, he had made numerous attempts to secure employment, without success. He was badly treated by the company. Without any form of consultation, his functions were re-allocated to others. Thereafter he was misled into believing that he was attending a meeting to discuss his possible relocation to Johannesburg when, in fact, what was to be discussed was his redundancy. He attended a meeting which was to discuss his fate without being afforded an opportunity to prepare for the meeting. Yet at the meeting, he was expected to come up with substantive proposals. His proposals were rejected out of hand.

[39] Having regard to the foregoing, a reasonable amount of compensation is the amount of R 121 500.00.

[40] In the event, the appeal is dismissed with costs.

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Ngcobo J A

I agree

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Myburgh J P

I agree

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Froneman D J P

DATE OF HEARING:

17 November 1998

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24 November 1998

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