IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: CA 3/98

In the matter between:

JOHANN LINDENBERG KOTZE Appellant

and

REBEL DISCOUNT LIQUOR GROUP (PTY) LIMITED Respondent

JUDGMENT

MOGOENG AJA

[1] The Appellant was employed by the Respondent as the executive Director of National/Coastal Operations as at the time of his retrenchment.

[2] The Respondent and Gilbeys Distillers and Vintners (Pty) Ltd (AGDV@) are wholly owned subsidiaries of W & A Gilbeys South Africa (Pty) Ltd (AWAG@). GDV is engaged in the production and wholesale trading of liquor whereas the Respondent is engaged purely in the liquor retail trade, with retail liquor stores throughout the country.

[3] These companies (Athe Group@) are essentially run as a single economic entity with common directorship, financial inter-dependence and a centralized human resources directorate. Decisions regarding the day to day running of the group are taken by the executive committee (AExcom@) consisting of the top directors of these three companies.

[4] Towards the end of 1992 the Respondent was in serious financial difficulties and operated at a loss running into millions of rands. As a result, it embarked upon a cost-cutting exercise which included the retrenchment of sixty employees at the level of store manager and below with effect from 28 February 1993.

[5] A senior management meeting was held during the first two weeks of January 1993 at Craighall. At this meeting the Group Chief Executive Officer, Mr Peter Fleck, instructed each director to reduce the budgeted overhead costs for the 1992/93 trading year by a further 10%. Pursuant to this directive Mr Trevor Pearman, the Managing Director of the Respondent, and the Appellant identified and agreed on areas where the appropriate cuts would be made.

[6] Pearman and Mr Anton Erasmus, the Group Human Resources Director, also reviewed the Respondent=s head office structure and identified the need to phase out the Appellant=s position and divide his functions between Pearman and Mr Rob Naysmith, the Respondent=s Marketing Director. Consequently, Pearman and Erasmus sought and obtained approval for their proposal from Fleck and Excom.

[7] On 26 February 1993 a meeting took place between Pearman and the Appellant. The Appellant was reminded of the recessionary conditions under which the Respondent had been trading and the consequent enormous financial loss it had incurred. He was told that it had become necessary to retrench him. The Appellant was upset by his treatment and reacted by saying A *you're crazy*, *I'm the only productive director in the company*@. It was then that Pearman handed him two documents which the Appellant read immediately. The one informed him about his retrenchment (Aexhibit H@) and the other was a staff notice announcing the Appellant=s retrenchment (Aexhibit I@). Their discussion ended on that note.

[8] The factual dispute between the parties was whether the discussion was ended at the instance of Pearman or the Appellant.

[9] Pearman summoned Erasmus to his office soon after his discussion with the Appellant had ended. This sequence of events was pre-arranged. Erasmus=s role was to discuss the severance package with the Appellant. The Appellant asked Erasmus why he, and not Naysmith or Mr Corrie Maloney (the Inland Operations Director), was retrenched. Erasmus informed him that the last in first out (LIFO) principle was used as a criterion to select him for retrenchment. When the appellant pointed out that he became a director long before Naysmith and Maloney, Erasmus replied that they had a longer service as employees.

[10] Erasmus handed to the Appellant a document containing his proposed retrenchment

package (Aexhibit J@). The Appellant remarked that it was generous.

[11] It is common cause that the Appellant was unhappy with his retrenchment with the result that he decided to take the matter up with Fleck. He asked both Pearman and Erasmus to withhold the staff notice announcing his retrenchment pending the outcome of his meeting with Fleck.

[12] About a week later Appellant met with Fleck. He told Fleck that he was unhappy with his retrenchment and reiterated that he was the Respondent=s only productive director. Fleck made it clear that he did not want to talk about his retrenchment. He advised the Appellant to see it as a challenge. Appellant said he gave up hoping to avoid his retrenchment because it was clear from Fleck=s attitude that the Respondent was determined to retrench him.

[13] Subsequent to this meeting with Fleck, Appellant met with Pearman and Erasmus again. He made an unsuccessful attempt to negotiate a better severance package with them.

[14] The following possibilities , none of which materialized, were discussed in the meetings the Appellant held with Pearman, Erasmus and Fleck:-

(a) helping the Respondent on an *ad hoc* basis to negotiate its way out of certain leases and in disposing of some of the Respondent=s properties;

(b) acting as a consultant to the Respondent;

(c) the sale of the Claremont liquor store to the Appellant;
(d) coordinating franchising operations on the Respondent=s behalf.

[15] The Appellant=s services were effectively terminated on 31 March 1993.

[16] Thereafter he launched an application in the Industrial Court in terms of section 46(9) of the Labour Relations Act No. 28 of 1956 (Athe LRA@) on the basis that his retrenchment constituted an unfair labour practice. I will only mention those grounds on which the Appellant still relies:

(a) the respondent presented the Appellant=s retrenchment as an accomplished fact;

(b) there was no proper commercial rationale for the termination of the Appellant=s services.

[17] The application was dismissed by the Industrial Court. This appeal is against that determination and it is based on the above grounds. Those grounds require that the principles governing a fair retrenchment process be revisited.

Fair Retrenchment Process

[18] This process entails questions such as:

(i) how and when does retrenchment present itself as an option;

(ii) why is it imperative that an employer consults with employees and which employees have to be consulted;
(iii) what does the envisaged consultation entail;

(iv) when is retrenchment justified;

(v) what is the court=s approach to the determination of the fairness or otherwise of the retrenchment process?

(a) At some stage management may perceive or recognize that its business enterprise is ailing or failing, consider the causes and possible remedies, appreciate the need to take remedial steps and identify retrenchment as a possible remedial measure. See *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA (1994) 15 ILJ 1247 at 1252*F (Athe ADE case@)

(b) Having foreseen the need for retrenchment, and while still contemplating it, the duty to consult the employees or their union then arises. See *ADE case supra at1252G*.

(c) Such consultation becomes an integral part of the process leading to the final decision on whether or not retrenchment is inescapable. The need to consult before a final decision is taken has its rationale in pragmatism, in principle and now also in the Constitution.

(i) It is rooted in pragmatism because,

(aa) the main object must be to avoid retrenchments altogether, alternatively to reduce the number of dismissals and mitigate their consequences;

(bb) consultation provides employees or their union with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or if such need is

accepted, the extent and implementation of the retrenchment process.

(ii) It satisfies principle because it gives effect to the desire of employees, who may be affected, to be heard and helps to avoid or at least reduce industrial conflict. See *ADE* case at1253A.

(iii) Section 23(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996 provides that >everyone has the right to fair labour practices.= This entrenched fundamental right is a further basis for the need to consult. See *SA Clothing & Textile Workers Union & Others v Discreto- A Division of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC) at 1454G-H (the Discreto Case).*

(d) Implicit in the requirement of a fair opportunity to make meaningful proposals is the duty to give employees reasonable notice of the proposed retrenchment. Such notice must allow them time and space to absorb the shock brought about by the daunting prospect of losing their jobs. As a general proposition, no employee can reasonably be expected to constructively and effectively engage the employer on such a serious matter from the very minute the bad news is broken to him or her. He or she must be afforded the opportunity to come to terms with the situation, to reflect on the matter, to seek advice and prepare for consultation and only then can a fair and genuine consultation begin. What constitutes such reasonable time would depend on the circumstances of each case.

(e) A fair retrenchment process imposes an obligation on the employer to disclose to the employees all relevant information and that obligation has since been codified in the terms set out in section 189(3) of the Labour Relations Act No. 66 of 1995 (>the Act=).

(f) The duty to engage in meaningful and genuine consultations is owed to all employees from the lowest to the executive level.

(g) The process=s fairness to the employer finds expression in the recognition of its prerogative to make the final decision to retrench. (See *ADE* case at *1252H* and *Discreto at 1454H*).

(h) The final decision to retrench must be informed by what transpired during consultation. That is why consultation must precede the final decision. The requirement of consultation is essentially a formal or procedural one, but it also has a substantive purpose. That purpose is to ensure that such a decision is properly and genuinely justifiable by the operational requirements or by a commercial or business rationale. (*Discreto at 1454I-J)*.

(i) The function of the court in scrutinising the consultation process is not to second-guess the commercial or business efficacy of the employer=s ultimate decision but to pass judgment on whether such a decision was genuine and not merely a sham. The court=s function is not to decide whether the employer made the best decision under the circumstances, but only whether it was a

rational commercial or operational decision, properly taking into account what emerged during the consultation process. (See *Disreto at 1454J-1455A-C*).

I turn now to consider the procedural and the substantive fairness of the Appellant=s retrenchment.

Procedural Fairness

[19] Mr Rogers, for the Appellant, submitted that the question before us is not whether the Respondent had made an immutable decision when its intention to retrench the Appellant was conveyed to him, but rather, whether the Respondent went further along the way in making the decision to retrench the Appellant than it was entitled to go before consulting with him. He further submitted that if this question is answered in the affirmative, then the Appellant=s dismissal is at least procedurally unfair. Mr Gamble on the other hand submitted that the retrenchment of the Appellant must be found to be procedurally fair because:-

(a) The Appellant never complained to any of the officials he held meetings with about the alleged unfairness of his retrenchment. He therefore acquiesced in the fairness of the process.

(b) He is an experienced businessman with a strong personality who could not have remained silent in the face of an injustice or unfairness.

(c) Having regard to the Appellant=s litigation with his previous employer, he would have approached an attorney for advice sooner, had he thought that the process was unfair.

(d) The Appellant was an executive director and he recognised that knocking out his position and LIFO made sense.

(e) The fact that the Appellant approached Fleck after his meeting with Pearman and Erasmus shows that he did not believe the decision to be immutable.

These submissions will be dealt with hereinafter without necessarily individualising them. I intend adopting a more general approach which will have the effect of addressing all of them.

[20] The Appellant was told about the Respondent=s intention to retrench him, for the first time, on 26 February 1993. A few minutes later, Pearman presented him with exhibit AH@ which is not dated but was signed by Pearman. This is an extract from it:

> AIt is with regret that I have to inform you of our intention to retrench the position of Operations/Coastal Director.
>
> .....
>
> Your retrenchment package will be discussed on Friday 26 February 1993 with Anton Erasmus and will, I trust, be to your best interests.
>
> Johann, I am sorry to have to give you such news and assure you that, should a suitable vacancy within the W&A Gilbeys Group occur, you will be considered.
>
> All the best with your future plans.@

[21] The first paragraph encapsulates the intention to retrench the Appellant. The second and third paragraphs, which I have omitted from the above quotation, deal with the Respondent=s trading and financial difficulties which made retrenchment necessary. The paragraphs following seem to be premised on the assumption that the retrenchment of the Appellant will be or would have been accepted when exhibit AH@ is presented to the Appellant. These paragraphs do not seem to leave room for

the decision to retrench the Appellant being changed. What remained to be discussed appeared to be the retrenchment package. This view finds support in the paragraph that assures him that he would be considered should a suitable vacancy become available within the group. It is also fortified by the statement wishing him all the best with his future plans. In other words, the Respondent was then considered, by the author, to be the Appellant=s past. The Appellant contended that exhibit AH@ proves not only that the Respondent had no intention to consult him about his retrenchment but also that his retrenchment was presented to him as an accomplished fact. On the other hand, Pearman and Erasmus testified that exhibit AH@ was only meant to initiate the consultation process and to confirm the discussion between the Appellant and Pearman. It is imperative, therefore, to examine this exhibit in its proper setting and context so that its true meaning and purpose can be established.

[22] Pearman, Erasmus, Fleck and Excom devised a three-stage strategy for the retrenchment of the Appellant. The first stage was an ice-breaker meeting between the Appellant and Pearman. The purpose of this meeting would be to break the bad news to the Appellant so that his frustration and state of shock would be at a low ebb when the second phase of the consultative process kicked in. The second stage was intended to assume the form of discussions after which exhibit AH@ would be handed to the Appellant. Mr Rogers, submitted that exhibit AH@ encapsulates the Respondent=s final position on the Appellant=s retrenchment. It is the purpose it was meant to serve when it was written and when it was presented to the Appellant notwithstanding the fact that the first meeting was never held.

[23] There is nothing in the exhibit which hints at the possibility of any further discussions on the merits of the Appellant=s retrenchment. This creates the impression that the door was closed to such discussions. The Appellant said that Pearman and Erasmus were not keen to consult on the merits of his retrenchment but were rather keen to discuss the severance package. Pearman, Erasmus and the Appellant said that some alternatives to retrenchment were discussed on 26 February. Those so-called alternatives were the possibility of the Appellant assisting in the sale of the Respondent=s unwanted property, negotiating the Respondent=s way out of some lease agreements on an *ad hoc* basis, pioneering the franchising of the Respondent=s operations at a commission and buying the Claremont liquor store from the Respondent as a franchise on a Asoft@ loan from the Respondent. These are, in my view, not alternatives to the Appellant=s retrenchment. On the contrary, they all have as a condition precedent, the Appellant=s retrenchment. They are measures intended to soften the blow of retrenchment and are package-related. Thus far, it appears that the Respondent had concentrated its efforts on discussing the package and was not keen to deal with the merits.

[24] Exhibit AI@ also helps to put exhibit AH@ and the meeting of 26 February in its proper perspective. It is a staff notice dated 26 February 1993 signed by Pearman and reads as follows:

> A The position of Operations/Coastal Director Rebel has been withdrawn with effect [from] 1 April 1993. Johann Kotze will accordingly be retrenched from that date.
>
> .....
>
> I trust you will wish Johann well with his future plans and give him and his family the support

that is needed at this time.@

[25] As I said, this staff notice bears the same date on which the Appellant was told, for the first time, that his job was on the line. It could not have been a draft because it was already signed by Pearman. This notice betrays the real purpose of the meeting of 26 February 1993. Staff members were about to be notified that the Appellant=s position >has been withdrawn with effect [from] 1 April 1993' and that he >will accordingly be retrenched.= But for the Appellant=s intervention it would in all likelihood have been pinned to the notice board on the same day. This exhibit, therefore, seems to support the Appellant=s allegation that his retrenchment was a foregone conclusion before he was told about it.

[26] According to both Pearman and Erasmus the Appellant was shocked by the possibility of his retrenchment. Appellant also said that he was devastated. It was in the heat of this frustration and extreme shock that exhibits AH@, AI@ and@J@ were presented to him. The nature of the news, the exhibits and the reaction of the Appellant to the above strongly suggest that he was incapable of rational thinking during the meeting of 26 February. Meaningful and constructive discussions could not reasonably be expected to take place in such an emotional and tense atmosphere.

[27] The Appellant contended that Pearman put an abrupt end to their discussion whereas Pearman blamed it on him. On the other hand Mr Gamble, for the Respondent, argued that on the probabilities it was the Appellant who did, regard being had to the fact that the Appellant:-

1. had little or no regard for Pearman and would rather discuss the matter with

Fleck;

2. saw himself as the heir-apparent to Pearman=s position and believed that Pearman was threatened by his capabilities and therefore wanted to get rid of him; and

3. believed that the decision to retrench him was immutable.

There is substance in this submission but only if one ignores the fact that Pearman was a bad witness who lied about the retrenchment of Schungh and Cook and the nature and contents of exhibits AH@, AI@ and AJ@. These exhibits suggest that the Respondent was not keen to discuss the merits of the retrenchment. The generous package was in all likelihood designed to cajole the Appellant into accepting his retrenchment without a murmur. But even if the consultation was stopped by the Appellant it would make no difference to the fairness of the process of consultation. It will take an employee with an extraordinary personality and resilience to consult effectively under similar circumstances and the Appellant=s frustration and shock suggests that he was not such an employee.

[28] Appellant testified that he realized from his discussions with Pearman and Erasmus that they were not prepared to discuss the merits of his retrenchment, that they were only prepared to discuss his package and were hellbent on relieving him of his job. It was for this reason that he asked for a meeting with Fleck. Fleck also refused to discuss his selection and the merits of his retrenchment but confined their discussion to the package. Fleck did not testify and there is no evidence to contradict the Appellant=s version. Therefore, it must stand.

[29] It is common cause that the Respondent recruited the Appellant because of his special negotiating skills, his expertise in the liquor retail trade and his capacity to turn around the ailing Respondent. To this end, he acquitted himself well. It was admitted by both Pearman and Erasmus that he was a more experienced and better director than Maloney and that they did consider offering him Maloney=s position as an alternative to his retrenchment. However this was not disclosed to him and the merits and demerits of such a move were not discussed with him. They believed that he would reject this alternative. The correct legal position is that alternatives must still be disclosed even if the employer believes that they are likely to be rejected, (*see Eyre v Hough t/a Miller Eyre Travel (1999) 20 ILJ 1047 (LC) at 1052-3*).This position holds even if the employer believes that the employee=s fate is sealed and that such consultation would be fruitless. After all the no difference rule is not part of our law, (see *Whall v Brandadd Marketing (Pty) Ltd (1999) 20 ILJ 1314 (LC) at 1321A-B*). Had the Respondent approached the Appellant with an open mind, the alternative would have been raised and seriously considered.

[31] Instead of disclosing and consulting on the alternative to the Appellant=s retrenchment, the Respondent was over-zealous to reach an agreement on the retrenchment package. This is a wrong and undesirable procedure. (*Vickers v Aquahydro Projects (Pty) Ltd (1999) 20 ILJ 1308 (LC) at 1312A-C* ; *Bank of Lisbon International v Pinheiro (1998) 19 ILJ 549 (LAC) (APinheiro@) at 553E-F*). Logically, alternatives to retrenchment should be discussed before the terms of the retrenchment package (*Pinheiro at 554C*). Only when retrenchment is accepted or

when consultation has taken place but no agreement can be reached may the package be discussed.

[32] As Mr Rogers correctly pointed out, the fact that the Appellant was an executive employee does not exempt an employer from the duty to observe the *audi alteram* partem rule. After all, being an executive employee simply suggests that such an employee is privy to more information relevant to his or her retrenchment than is the case with a lowly placed employee. He or she is, therefore, enabled by that information to consult from a position of some power. The need to consult fairly on alternatives and all other issues which an employee is entitled to be consulted about extends to him or her. Furthermore, there should be consultation specifically about the need to retrench at a senior executive level even if the need to retrench in general is common cause. This position provides an answer to Mr Gamble's abovementioned submissions.

[33] The fact that the Appellant was not given the opportunity to recover from the shocking news before the consultation, that he was presented with the three exhibits almost simultaneously, that the exhibits were prepared at the same time, and that the respondent was not prepared to discuss any real alternatives to retrenchment, are consistent with the desire to steamroll the retrenchment process and irreconcilable with the intention to consult meaningfully and constructively.

[34] The savings arising from the Appellant=s retrenchment were reflected in the report to the holding company in London some time before the actual retrenchment of the

Appellant. This further reinforces Mr Rogers=s submission, with which I agree, that the Respondent went further on the way in making the decision to retrench the Appellant than it was entitled to go before consulting him. I am therefore satisfied that the Appellant=s retrenchment was procedurally unfair.

Commercial Rationale

[35] It is common cause that the Respondent was trading under difficult and recessionary conditions as at the time of the Appellant=s retrenchment. This state of affairs is borne out by the profit losses which ran into millions of rands over a period of two successive financial/trading years. Having perceived this situation the Appellant identified and suggested the retrenchment of employees from the level of store manager and below as the appropriate remedial measure. His suggestion was endorsed by the top management of the Respondent. The Appellant was charged with the responsibility to identify thirty of the sixty employees to be retrenched at the beginning of 1993 and he carried out that responsibility. Furthermore, the Appellant admitted under cross-examination that retrenchment in general was a necessary and fair option as at January 1993. He also admitted that as a matter of business planning or commercial rationale retrenchment was a fair decision to make as at the beginning of 1993. He only had reservations about retrenchment in so far as it affected employees at the executive level.

[36] I have considered Mr Rogers=s submission that there should have been a moratorium

on salary raises, bonuses, promotions etc as an alternative cost-cutting measure to the Appellant=s retrenchment. This suggestion effectively ignores that the subject was previously raised with top management and rejected because of its potentially demoralizing effect on employees. The Appellant had also suggested that the GDV throughput policy, which required of the Respondent to give prominence to the GDV products in its trading, be abandoned. He believed that such a move would improve the Respondent=s trading and therefore its profitability. This suggestion was also

previously discussed with the top management and it was rejected. These so-called alternatives do not only fly in the face of the Appellant=s own admission that retrenchment was fair and necessary but also the correct approach that this Court has to adopt in scrutinizing the consultation process. The Appellant now wants this Court to second-guess the commercial and business efficacy of the employer=s decision to retrench. He also wants us to decide whether the employer made the best decision under the circumstances. This we cannot do. What we have to do is to decide whether the Respondent=s decision to retrench was informed and is justified by a proper and valid commercial or business rationale. If it is, then that is the end of the enquiry even if it might not have been the best under the circumstances. In the present case, I am satisfied that there was a genuine commercial rationale for a staff reduction.

The Effect of Failure to Consult on Existing Alternatives, on Compensation

[37] The failure to consult the Appellant on known alternatives does not affect or detract from the existence of a valid or genuine commercial rationale for retrenchment. It

only affects his selection. The selection of an employee for retrenchment does not only impact on the procedural purpose of consultation but also on its substantive purpose. This is so because failure to consult on known alternatives leaves open a possibility that the affected employee might, contrary to the employer's belief, have accepted the undisclosed alternative to his or her retrenchment. If he or she would have, then it follows that he or she would not have been retrenched and the decision to retrench him or her would therefore be both procedurally and substantively unfair notwithstanding the existence of a genuine business rationale therefor.

[38] Therefore, it is necessary to consider the impact on compensation of the Respondent=s failure to consult with the Appellant on the alternatives to his retrenchment. As I said above, the Respondent did consider the possibility of offering Maloney=s position to the Appellant. The only reason why it thought that this option was not viable , was that the Appellant had, some two years before, expressed his unwillingness to move to the Transvaal which is where he would have to go if he was to be transferred to that position. Otherwise it is an alternative that the Respondent would have seriously considered had it thought that the Appellant would accept it. A possibility exists that faced with the choice between losing his job or moving to the Transvaal, the Appellant may well have opted for a transfer. The Respondent should, therefore, have given the Appellant the opportunity to persuade it to retain his services as Inland Director and to retrench Maloney instead. (See Pinheiro at 555A-G). The fact that the Respondent was entitled to use the LIFO principle does not detract from the importance of consultation on the alternatives including those which are likely to be rejected.

[40] I am, therefore, of the view that had proper consultations been held, the Appellant might have remained in the employ of the Respondent at least until 3 March 1995 which is the effective date of Maloney=s retrenchment.(Pinheiro at 555G-H). This is one of the factors to be taken into account in dealing with the question of compensation.

In the result I make the following order:-

1. The appeal is upheld with costs;

2. The determination made by the Industrial Court is set aside and substituted with the following:

   A(i) The Applicant=s retrenchment was procedurally unfair and thereby constituted an unfair labour practice.

   (ii) There will be no order as to costs.@

3. The Respondent is to pay the costs of the preliminary application.

4. This matter is remitted to the Industrial Court to determine the issue of compensation.

_____

MOGOENG AJA

Date of Judgment: 8 November 1999