IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Case No. JA 31/00

In the matter between:

NATIONAL UNION OF MINEWORKERS First
Appellant

F KHAUTE & OTHERS
Second and Further

Appellants

and

CROWN MINES LIMITED
Respondent

JUDGMENT DELIVERED ON 19 APRIL 2001

DAVIS AJA.

INTRODUCTION.

[1] Respondent retrenched a number of its employees on 31 December 1997. First appellant challenged the fairness of this retrenchment in a claim in the Labour Court on behalf of 35 of its members. Respondent raised a special defence that second and further appellants had compromised their claim. This defence was rejected by the court a quo. The main issue in dispute, however, was whether there had been a proper effort to engage in a meaningful process of consultation as mandated by section 189 of the Labour Relations Act 66 of 1995 ('LRA'). Revelas J dismissed the claim with costs. The appellants now appeal against this judgment.

BACKGROUND

[2] On 3 September 1997 respondent's general manager met with the shop stewards of appellant and explained that respondent's business was running at a loss. On 4 September 1997 Mr Symons wrote to the shop steward committee as follows:

'As you are aware the company's hedging policy will cease at the end of September. This will reduce our revenue because gold will be sold at spot price which at this stage is less than our working costs. The company will operate at a loss under these conditions. In order to rectify the situation, this means severe cost cut-backs including labour. It must be stressed that the pending labour instruction is purely as a consequence of economic factors and not as a result of the formulation of a new company.'

[3] First appellant held a meeting with members of respondent to discuss the commencement of wage negotiations. At this meeting first appellant made

it clear that it was not prepared to enter into consultations with regard to retrenchments or a rationalisation until the wage negotiation had been concluded.

[4] On 10 September 1997, during the course of a wage negotiation meeting, respondent's financial manager Mr V De Kok referred to the low gold price and stated that the company was no longer engaged in hedging transactions.

[5] On 12 September 1997 respondent issued a circular inviting applications for voluntary retrenchment. On 27 October applicants for such retrenchment were notified of the outcome of the applications. According to the testimony of Mr Swanepoel, the human resources manager of respondent, approximately 145 - 150 of the 200 applications were accepted.

[6] On 29 October 1997 Mr Swanepoel wrote to the branch committee of first appellant in which letter he set out the issues with which respondent proposed to consult the Union. These included the reasons for retrenchment, alternatives and the reasons for rejection, the number of employees and categories, selection method, termination date, severance pay, proposed assistance and possible future re-employment. As reasons for proposed retrenchments, Mr Swanepoel submitted "low gold price, the hedging policy no longer in place, and therefore have to sell gold at a spot price and, have to look at all operating costs including labour". Notwithstanding some difference in the evidence as to when this letter was telefaxed, it appears that a copy of the letter was sent to Mr Mjila who was employed by first appellant as an organiser in Gauteng.

[7] On 5 November 1997, a meeting was held between the parties. Mr Mjila took the attitude that he was not prepared to commence consultation with respondent until the latter had given a written undertaking that the contemplated retrenchments would not take place on the following day. Mr Swanepoel immediately gave a verbal undertaking to this effect in the presence of the shop steward committee. Mr Mjila insisted that the undertaking be given in writing. Although there was a difference between the evidence of Mr Swanepoel and that of Mr Mjila, it appears that respondents representatives did leave the meeting to have a letter typed in order to comply with Mr Mjila's request.

[8] A further meeting between the parties took place on 6 November 1997 which proved to be unproductive in that further demands made by Mr Mjila could not be agreed to by Mr Swanepoel. Accordingly Mr Swanepoel wrote to Mr Mjila on the 6 November 1997 in the following terms:
'The company once again wishes to express its commitment to the process of consultation with the Union, regarding the retrenchment of its members in the Security Department, Technical Services Department and Change House. From our lengthy meeting today it has however become clear to the company that the Union is hell-bent on frustrating any attempt of meaningful consultation, by setting trivial ultimatum after ultimatum and then only being prepared to enter into consultation once each ultimatum has been met. It is the company's belief that the Union is avoiding any attempt to enter into meaningful consultation. In a final attempt to enter into meaningful consultations with the Union with regard to these retrenchments

the company is proposing a meeting to be held on 8 November 1997.....Should this meeting again deteriorate into a futile exercise, the company have no option but to terminate consultations'.

[9] The first appellant replied positively on 7 November 1997. On its behalf Mr Mjila wrote, 'We now wish to concentrate on the consultations proposed in your letter dated 3 November 1997'. He then went on to set out a timetable for consultations. He annexed to the letter a request for an extensive list of documentation and information. This included a copy of the respondents gold hedging contract "which you say is expired", a copy of the contract of sale of Crown and City Deep Rand Gold, a copy of the contract of your taking over Knights Gold Mine and your edited financial statements for the past five years and your current financial statement'.

[10] On 10 November 1997 Mr Swanepoel wrote to Mr Mjila and provided him with a set of documentation including a "Gold Hedging Policy". Although Mr Mjila insisted that he had received none of the documentation, Revelas J correctly found that this insistence should be rejected.

[11] On 11 November 1997 first appellant took the view that it was not willing to enter into a negotiating consultation process because it had not been furnished with a complete list of documentation and information requested.

[12] At a meeting of 18 November 1997 first appellant again repeated its request for hedging contracts. According to the evidence of Mr Swanepoel, Mr Mjila was particularly angry at the inability of first appellant to acquire the relevant documentation regarding the hedging contracts. Mr Swanepoel testified that 'I'll make the information or attempt to supply you with the information, further proof, (sic) I'll do everything in my power please let us enter into the consultation process'. A further meeting was arranged for the 25 November 1997.

[13] On 20 November respondent sent a letter to first appellant inviting it to contact Mr Denzil Young of Standard Bank Ltd who would make available all necessary information concerning the cessation of the company's hedging transactions. A copy of the sale agreement was also enclosed. Mr Swanepoel concluded his letter as follows: 'Should no progress be made at this meeting (25 November) the company will have no alternative but to terminate further attempts of consultation.'

[14] The meeting held on 25 November 1997 ended in yet a further empasse. On 27 November 1997 Mr Swanepoel wrote a letter to Mr Mjila in which he set out the history of the consultation process to date and first respondent's dissatisfaction therewith. He concluded as follows: 'You are hereby informed that notices of termination will be given on 1 December 1997 to those employees who the Company proposes retrenchment. However, notwithstanding these notices the Company remains willing to continue with the consultation process during the period of notice that the employees will be serving. If agreement is reached during the consultation process the Company will naturally comply with this agreement. If this involves the withdrawal of the notice of termination of all or some of the employees it will do so'.

[15] On 1 December 1997 Mr Mjila became involved in an argument with respondent's managing director and Mr Swanepoel. It appeared that he requested "gold hedging contracts" and was again informed that these did not exist.

[16] Eventually respondent's attorneys wrote to the attorneys of appellants suggesting that the dispute concerning the "so-called hedging contracts" be referred as a matter of urgency to the CCMA for conciliation. A meeting took place at the offices of the CCMA on 17 December 1997. Although Mr Mjila was not present, appellants representatives informed respondent that they required a better understanding of the gold hedging arrangements and accordingly requested respondent to make someone available to explain how the system worked and to provide supporting documentation.

[17] An agreement was then entered into between the parties which read as follows:
1 "The employer will disclose the requested information relating to the Gold Hedging Contract/s by supplying the Union with the relevant documents relating to the period when the alleged "expiry" of such contracts took place and in addition instructing Johann Riddle, the financial manager to explain such information, particularly the terms of the contract and the time and reason for their expiry.
2 The employer undertakes further to explain the document furnished to the Union disclosing the numbers, names and costs of contracts to Crown Mines.
3 The above explanations and discussions will take place on a date agreed by the parties." (my emphasis)
[18] It was agreed that a meeting would take place at 10.00 a.m. on 22 December 1997 to implement the various provisions of this agreement. According to the evidence there was a misunderstanding as to the venue for the meeting. Finally at 12h00 on 22 December 1997 Mr Swanepoel and Mr Riddle met with shop stewards. At that meeting the shop stewards took the view that, before they were prepared to allow the presentation of Mr Riddle to take place and further embark on a consultation process, respondent should first reinstate all retrenched employees or extend the notice period to 31 December 1997. According to the evidence of Mr Swanepoel which was not contested he was not prepared to accede to this ultimatum. He explained why respondent was not prepared to accede to this ultimatum as follows: 'First of all I believe that we had, there is a cost factor involved in it. The second point was that if we entered into any consultations and we had reached agreement, we were more than willing to reverse the situation, rectify the situation'. He testified that he informed the shop stewards accordingly.

[19] In short Mr Swanepoel adopted the approach that, although respondent was not prepared to accede to appellants' demand, if consultation took place and agreement was reached that retrenchments should not take place, respondent would give effect to such an agreement. First appellant refused to accept this approach and the presentation regarding the hedging contracts did not take place.

[20] According to the evidence of Ms Chegwidden, a senior human resources

officer, employed by respondent further attempts were made to convene a meeting for the presentation regarding the hedging contracts. On 30 December 1997 Ms Chegwidden wrote to appellants stating: 'I have taken the liberty to request that Natalie Dagnal, the commissioner who chaired the referal, attend to facilitate the presentation'. The meeting was postponed to 5 January 1998 at which time representatives of first appellant queried the purpose of the meeting. Ms Dagnal then excused herself because she had been under the impression that the terms of reference of the meeting had already been agreed by the parties. The minutes of the meeting reflect that first appellant again took the approach that there was no point in a process of consultation until respondent acceded to a demand to reinstate the retrenched employees.

[21] With effect from the 31 December 1997 the contracts of employment of the second and further appellants were terminated.

THE ALLEGED COMPROMISE

[22] It was common cause that each of the retrenched employees received a letter on the 28 November 1997 in which they were informed that they were to be retrenched for operational reasons. They were also informed that they would receive a lump sum in respect of retrenchment, leave pay and bonus less any deductions deemed necessary by the Receiver of Revenue. They were then informed: 'Please note that acceptance of the above terms and benefits will be regarded as a full and final settlement of all claims you may have against the company which arise or may arise out of our employment relationship with the company or the termination of this relationship.'

[23] It was common cause that each of the second and further appellants received a cheque following upon this letter and each had deposited the cheque. Revelas J held: 'there was no reason why an employer at the end of a retrenchment exercise, should be precluded from finalising matters by making an offer of compromise in unequivocal terms, explaining it to its employees. If such an offer is then accepted by its employees, there is no reason why the ordinary principles of contract should not apply. If matters had ended on 1 December 1997, with the depositing of the cheque, I would have had no hesitation to uphold the point in limine.'

[24] Revelas J went on to find that because several meetings were convened after 1 December 1997 and because respondent expressed a need to explain the nature of the hedging contracts at such meetings, absent of any indications from the respondent to the contrary, it could not be found that respondent had engaged in an offer of compromise.

[25] Mr Freund, who appeared on behalf of respondent, submitted that the retrenched employees claims were compromised when they accepted payment tendered to them in full and final settlement. He submitted that by depositing the cheques the second and further appellants indicated their acceptance of the terms offered to them as set out in the letter of 28 November 1997. The fact that respondent had been willing to continue with the consultation process during the notice period did not detract from the binding character of the condition that acceptance of the terms and benefits offered which compromised all claims that the employees might have had against the company arising out of the retrenchment decision.

[26] The onus is on the party alleging that a compromise has been effected to so prove. See in general R H Christie, The Law of Contract in South Africa (1996) at 506 where the relevant authorities are collected. Thus if a debtor cannot prove that a creditor ought reasonably to have interpreted a letter and attached cheque as an offer of compromise, the creditor is entitled to cash the cheque as a payment on account and to sue for the balance. See Karson v Minister of Public Works 1996(1) SA 887 (E) at 896 C - D.

[27] In the present case, even if the contents of the letter of 28 November had been clear, the conduct of the parties during the month of December was indicative of an intention to continue a process of consultation which affected the very parties which it claimed had compromised their claims. In my view, the conduct of respondent, in participating in this process, was indicative that the letter of 27 November could not be considered to be an offer of compromise in circumstances where the claims of the retrenched employees had been finally settled. Had this been the case it would have been raised by respondent during the deliberations during the month of December which was not the case. Alternatively there would have been no purpose served in engaging in a process of consultation to resolve matters which on the basis of a compromise would have already been settled.

APPELLANTS' CASE REGARDING S 189.
[28] Mr Kennedy, who appeared on behalf of appellants, referred to the dictum of Froneman DJP in Johnson & Johnson (Pty) Ltd v C W I U 1998 [12] BLLR 1209 (LAC) at para 27: 'But all these primary formal obligations of an employer are geared to a specific purpose, namely to attempt to reach consensus on the objects listed in s 189(2). The ultimate purpose of s 189 is thus to achieve a joint consensus seeking process. In this manner the section implicitly recognised the employer's right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed.'

[29] Mr Kennedy submitted that the failure of respondent to disclose the hedging contracts was of crucial significance to the present dispute. Ultimately this led to a breakdown in the consultation process. S 189 required a proper disclosure of information from respondent which would have allowed appellants to engage meaningfully in the consultation process on an informed basis. This was never achieved because the documentation which appellants required and demanded was never provided. The various meetings which were convened by the parties and which proved to be fruitless did not assist appellants because respondent failed to supply vital information requested by appellants and which information had in fact been promised both by Mr Young and by respondent in terms of the CCMA agreement.

[30] In support of appellants' contention that respondent had made representations regarding the existence of hedging contracts, Mr Kennedy referred to a letter which Mr Mjila had written to Mr Young on 4 December 1997 in which he stated:
'We confirm Mr Young's advice that he needs copies of all the hedging contracts we have requested from the Crown Mine. We also

confirm Mr Mjila's advice that Mr Young furnishes the copies of the said contracts to Mr Swanepoel of the Crown Mines so that same can be furnished to our attorneys.' When Mr Swanepoel responded to Mr Mjila on the 5 December 1997 and stated, 'It pleases me that you finally discussed the matter (with Mr Young)', he did not dispute Mr Mjila's statement that Mr Young had advised him that he possessed the hedging contracts.

[31] Mr Kennedy placed heavy reliance upon the CCMA agreement in which the parties agreed that respondent "disclosed the requested information relating to the gold hedging contract's by supplying the Union with the relevant documents .....". Accordingly he submitted that the CCMA agreement specifically referred to hedging contracts, yet none of the relevant documentation had been provided to appellants. In further support of this argument Mr Kennedy relied upon the evidence of Mr Swanepoel in which the latter said: 'As I have explained to the Court there is an over-arching hedging contract which is the relationship which governs the overall relationship between the financial institution and the company...there is an over-arching contract. I said to you, it exists... it is an over-arching facility...I seem to disagree with you in writing, reduced to writing, an over-arching facility.'

[32] On this basis Mr Kennedy submitted that the disclosure of the hedging contracts was relevant, that respondent had relied on the contracts in the reasons proferred for the retrenchments. Undertakings had been given on behalf of respondent by Mr Young and in terms of the CCMA agreement to furnish the relevant documents and these had been breached. Thus respondent had not complied with its obligations under section 189 to provide appellants with all relevant information which would place appellants in a position where a meaningful process of consultation could have taken place.

RESPONDENT'S CASE.

[33] Mr Freund submitted that first appellant had acted throughout in bad faith. For this reason there could be no question that any fault on the part of respondent could outweigh appellant's culpability in the lack of success achieved in the consultation process. Mr Freund submitted that from the time that retrenchments were first mooted, respondent had attempted to provide appellants with all documentation necessary to facilitate a meaningful process of consultation. An examination of the minutes of the meeting held with appellant on 15 October 1997 and the letter written by Mr Swanepoel to Mr Mjila on the 29 October 1997 which set out the reasons for the proposed retrenchments made it clear that there were a number of reasons for retrenchment of which one was that "Hedging policy no longer in place, therefore have to sell gold at spot price". Mr Freund contended that in order to delay the process of retrenchment, first appellant had latched on to the reference to hedging contracts and had sought to exploit this issue in order to delay the inevitable decision to retrench. By contrast Mr Swanepoel had taken the attitude from the outset that he was prepared to provide appellants with all relevant information in order to facilitate a meaningful process of consultation. Whenever a demand had been made by appellants, he acted thereon in order to ensure that the latter were provided with all documentation requested.

[34] Mr Freund referred to the evidence of Mr R G Rainey, a former

director of respondent, who explained the nature of hedging transactions. Mr Rainey testified that a bank would examine the creditworthiness of a relevant company such as respondent and then determine the extent of the hedging facility it would be willing to grant. According to him there were no definite rules but generally a facility would be confirmed in the form of a letter or of a contract which did not contain details of specific hedging transactions. Such transactions would be concluded telephonically and subsequently confirmed by fax. Accordingly a hedging facility letter or agreement may indicate the period during which a company could enter into specific hedging agreements but it would not indicate what hedging, if any, had been taken out during that period. When asked whether the existence of hedging could be determined by a contract, he said: 'I can pick up the phone and cancel the hedging in one telephone call, or within the terms of the facility letter, place hedging on the strength of a telephone call. This is a business that works by the minute because of the gold price fluctuations. There is no way other than confirming with the banks themselves what exists.'

[35] Mr Freund submitted that Mr Swanepoel might have said to appellants regarding hedging that he was no expert in such transactions. On the strength of Mr Rainey's uncontested evidence, it was clear that there was no holy contractual grail, that is one over-arching written contract which appellants could examine to determine the details of all hedging transactions undertaken by respondent prior to the cessation of the policy

[36] Mr Freund contended that, to the extent that Mr Young had referred to hedging contracts and that the proper interpretation of the CCMA agreement, was that hedging contracts were promised to appellants, these were to be found in the various "hedging slips" which reflected each individual hedging transaction. However it was not appellants' case that they wished to be provided with piles of "hedging slips". But Mr Freund argued, that to the extent that there were individual contracts, the only written documentation would have been these "hedging slips".

[37] Accordingly, the CCMA agreement provided an undertaking on behalf of respondent to furnish examples of the hedging slips, relevant schedules and a cogent explanation as to how the whole hedging process worked. All of this had been provided by respondent. Furthermore when respondent proposed to implement the CCMA agreement, appellants raised a further obstacle, namely a written undertaking that all the retrenchments should be stopped pending the consultation process. Notwithstanding that this was a demand which had not been included in the CCMA agreement entered into by the parties, Mr Swanepoel had given a verbal undertaking that, were the consultation process to continue, respondent had an open mind as to the eventual fate of employees who had been retrenched.

ANALYSIS.

[38] Mr Kennedy correctly conceded that section 189 imposes obligations upon both parties. As Froneman DJP noted in Johnson & Johnson (supra) at para 26, the section places 'some primary obligations on an employer in order to ensure that an employee is not unfairly dismissed'. In short the employer initiates the consultation process when it contemplates dismissals for operational requirements and it provides relevant documentation to the

other consulting party in order to make the process meaningful. However there are obligations upon the other consulting party to enter into the process in good faith and to ensure that the process is not a sham. In the present dispute, based upon an analysis of the amount of documentation provided by respondent over the period of the dispute to first appellant, Mr Swanepoel was sincere in his claim that "My whole approach was to disclose as much information that I could lay my hands on to enter into the consultation phase."

[39] Whatever the merits of the arguments advanced by Mr Kennedy concerning a possible ambiguity in the manner in which Mr Young had conversed with Mr Mjila, the parties had entered into a CCMA agreement on the 17 December. No mention had been made in that agreement of retrenchment being stayed pending a consultation process. When the issue of retrenchments was raised by first appellant, Mr Swanepoel had given a verbal undertaking that, in the event that the consultation process was successful, respondent had an open mind as to retrenchments. Yet, the representatives of first appellant were not prepared to allow the presentation to take place which would have afforded them further information regarding hedging contracts. When this conduct is viewed within the context of the entire process which commenced on 3 September 1997, it would appear that appellant had employed yet another dilatory tactic to further postpone the retrenchments.

[40] The constant delays and the development of further demands even after the conclusion of the agreement are indicative that first appellant was not prepared to fulfil its obligations in terms of the CCMA consultation process read within the context of section 189. Had it been prepared to do so, it would have obtained the information which it considered to be crucial regarding the hedging contracts and taken the consultation process further, if it considered it necessary.

[41] In my view there is no justification for finding that respondent acted in breach of its obligations in terms of section 189. To the contrary it would appear that it made a considerable effort to provide first appellants with the necessary information to enable the latter to engage in a meaningful process of consultation.

[42] For the reasons given, the appeal is dismissed with costs.

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DAVIS AJA

I agree

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ZONDO JP

I agree

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DU PLESSIS AJA5