IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J190/97

In the matter between:

Workers Labour Consultants
on behalf of
Petros Khoza And Twenty Nine Others Applicants

and

Zero Appliances Cc Respondent

J U D G M E N T

Van Niekerk A.j.

1) The individual Applicants in this case, Petros Khoza and Twenty Nine Others, were formerly employed by the Respondent. They were retrenched by the Respondent on 6 December 1996 on operational grounds.

2) The individual Applicants contend that they were unfairly dismissed for both substantive and procedural reasons.

3) The Respondent raised a defence *in limine* concerning the Court's jurisdiction which I dismissed for reasons given. An application for leave to appeal against that decision was refused for the reasons that I have provided in a separate judgment.

THE BACKGROUND FACTS

4) The Respondent manufactures gas chest freezers for mainly the rural market. Due to the electrification of rural areas and the downturn in the economy, the Respondent embarked upon the production of electric freezers. Strong competition in this sector of the market caused this venture to fail. At the end of 1995 the Respondent decided to cease manufacturing electric freezers and to retrench most of its employees who worked on that project. This led to the retrenchment of sixty workers in January 1996. The remaining employees, numbering thirty, were then utilised in the manufacture of gas chest freezers.

5) The Respondent's fortunes did not improve. The utilisation of the thirty employees in the manufacturing of gas chest freezers resulted in an over supply of stock.

The accumulation of stock coupled with the cost of wages, caused the Respondent to become unprofitable.

THE RETRENCHMENT

6) The Respondent embarked upon the process of retrenching the individual Applicants on 28 November 1996. It did so by distributing to certain staff representatives a confidential memorandum in which they were informed that the company was experiencing financial difficulty and that management had identified the need to conduct an investigation into the problem. The representatives were invited to attend a meeting on 29 November 1996 to discuss the matter. Importantly, the notice contained the following:

> "The investigation should be finalised soon and it is foreseen that we will be able to inform everybody by 6 December 1996 of the results of the investigation and the recommended action to be taken under these circumstances."

7) On 29 November 1996 four representatives including Mr Elias Maphanga went to the meeting on behalf of the individual Applicants. There they encountered Mr A.W. Tuinder, a member of the Respondent, and two other persons unknown to the Applicants' representatives.

They were Mr Jordaan and Mrs Huyser from Gouws & Associates, labour consultants. Mr Maphanga testified that the Applicants' representatives were, for a number of reasons, uncomfortable with the presence of these two persons. It mainly boiled down to this. The Respondent had urged its employees to keep their problems "within the family" and not to involve outsiders with internal company affairs. The employees understood this to mean that the Respondent did not wish its employees to join a trade union. When they encountered Mr Jordaan and Mrs Huyser they saw this as a breach of the Respondent's own injunction.

8) The representatives met again on Monday, 2 December 1996, when no progress was made. The Applicants' representatives did not want to participate in the consultation process because they demanded that they be given the right to be represented by their own representative. As an alternative, they suggested that a mediator be appointed to assist in the conciliation of this dispute. In paragraph 4 of its memorandum to all employees dated 2 December 1996 management recorded the following:

> "DUE TO THE SEVERITY OF THE OPERATIONAL AND ECONOMIC LOSSES OF THE COMPANY AND THE SENSITIVITY OF THE ISSUE YOU WILL UNDERSTAND THAT MANAGEMENT ARE UNDER TREMENDOUS PRESSURE TO FINALISE THE CONCERNED CONSULTATIONS:
> CONCLUSION DATE: 6 DECEMBER 1996"

9) A final meeting took place on Tuesday, 3 December 1996, at which the dispute concerning representation remained unresolved. The Applicants' representatives refused to participate in the process of consultation until this problem was resolved. Management had a change of heart and during the course of this meeting tried to reach Mr C. Ndlovu from Workers Labour Consultants, the individual Applicants' chosen representative. He could not be contacted but during the telephone call one of his employees was questioned about the credentials of Workers Labour Consultants. After the telephone call was terminated, the Applicants' representatives were told that Workers Labour Consultants could not represent them.

10) On the same day Mr Ndlovu sent a fax to the Respondent in which he *inter alia* stated the following:

> "We have been informed that you are busy with the negotiations of retrenching and you have your own representatives (Name of Company supplied

to us).

> We therefore strongly object that our clients negotiate without any representatives from outside. Our clients have therefore requested that we negotiate the retrenchment process on their behalf since you also have an external representative."

11) A response to this fax was addressed to Workers Labour Consultants on Friday, 6 December 1996. In its letter management confirmed its plan to retrench some of its employees and stated:

> "1.3 We further wish to place on record that we have tried since 29 november *(sic)* 1996 to consult with the employee's representatives on this matter, but that they have not made one constructive proposal and are obviously trying to delay the process.
>
> 1.4 In terms of section 189 of the Act, you and your organisation cannot represent the employees in this matter."

The reference to section 189 of the LRA probably intended to be to section 200.

12) On 6 December 1996 the Respondent issued a notice in which it recorded that management had not been presented with any proposals or co-operation from the employees regarding the proposed retrenchment and that the Respondent was left with no option but to

continue with the process. The notice further recorded that employees were well aware that the target date for finalisation of consultations was set for 6 December 1996.

13) The individual Applicants received with their wages a notice of termination with effect from 13 December 1996. They were told that they need not work for the period 6 to 13 December. In terms of the notice they were paid wages, leave pay, a week's notice, a *pro rata* bonus and a severance package of one week's pay for each completed year of service.

THE APPLICANTS' CASE

14) Although Mr Crots who represented the Respondent contended that the individual Applicants' claim was in respect of substantive unfairness only, I granted Mr Connell for the individual Applicants leave to amend prayer 1 of their Statement of Case to include relief based on both substantive and procedural grounds. I did so because, as I pointed out to Mr Crots, the body of the Statement of Case and particularly paragraphs 8.4 and 8.5 thereof foreshadowed relief based on unprocedural

fairness.

15) The Applicants pray for retrospective reinstatement, alternatively compensation in an amount to be determined by this Court.

THE CASE OF SUBSTANTIVE UNFAIRNESS

16) The evidence of Mr Maphanga was that at the time of his retrenchment he *inter alia* performed duties of a despatch supervisor and stock counter. He was, therefore, in a position to know to what extent the Respondent was able to produce, stockpile and sell its stock. His evidence was that the Respondent's business was doing well in the sense that towards the end of 1996 it was selling its stock faster than it could be produced.

17) Mr Tuinder testified that the company was heading for trouble. In support of this contention he produced the Respondent's work in progress figures for November and December 1996. He also produced a set of the Respondent's annual financial statements dated 28 February 1997.

18) According to the work in progress statements, the Respondent had 3,977 units in stock in November and 2,699 units in December 1996. According to Mr Tuinder this was unusual because in normal trading years most if not all of the stock is depleted by December. That is because the Christmas season is the Respondent's best business trading period. According to the financial statements the Respondent made an after tax profit of R264,471.00 in the 1996/97 financial year.

19) It is true, as Mr Connell pointed out, that the company improved its financial position in the 1996/97 financial year compared to the 1995/96 year. It must be borne in mind, however, that had the Respondent not retrenched thirty of its employees the salaries and wages bill of R6,548,482.00 for the year in question would have been even greater and that this would have affected the company's profitability.

20) I am inclined to accept the evidence of the Respondent that the company was heading for trouble. The evidence of Mr Tuinder is supported by the financial documents and the work in progress statements bears out his

testimony. The evidence of Mr Maphanga was not, in the very nature of this situation, as accurate as that of Mr Tuinder.

21) I am, therefore, satisfied that the Respondent was justified in embarking upon the retrenchment of the individual Applicants. It was entitled to restructure the company to avoid suffering a loss. See SACTWU and Others v Discreto (a Division of Trump and Springbok Holdings) [1998] 12 BLLR 1228 (LAC) and Imperial Transport Services (Pty) Ltd v Stirling [1999] 3 BLLR 201 (LAC) at paragraph 25.

THE CASE OF PROCEDURAL UNFAIRNESS

22) The case that the individual Applicants sought to make out is set out in paragraphs 8.4 and 8.5 of the Statement of Case. In summary it is this:

22.1 the Respondent refused to allow the individual Applicants to be represented;

22.2 the Respondent failed to give sufficient notice of its intention to retrench or to allow sufficient time during the retrenchment procedure for proper consultation to take place;

22.3 the Respondent failed to supply the individual Applicants with all relevant information;

22.4 the Respondent failed to use fair and objective selection criteria.

23) I am satisfied that the Respondent behaved in a manifestly unfair manner towards the individual Applicants. Not only did management impose an unreasonably short time frame within which consultations were to be completed but management also decided to embark on the retrenchment before consulting with the individual Applicants. This became clear from the evidence of Mr Errol Saunders, the Respondent's marketing director, who testified that before consultations took place;

> "We considered how to solve the problem and decided to retrench (the remaining employees who had not been retrenched in January 1996)"

24) He further testified that management decided to consult with Gouws & Associates and that their advice was to retrench the employees concerned. Although Mr Tuinder sought to deny these allegations, I am satisfied that Mr Saunders should be believed. The evidence of Mr Saunders struck me as being candid and sincere

whereas Mr Tuinder after an overnight break tendered evidence to the contrary. This evidence cannot be reconciled with the documents circulated by the Respondent such as the general notice of 28 November 1996.

25) The Respondent made no attempt to disclose to the individual Applicants the information that is required in terms of section 189(3) of the LRA. It also made no real attempt to reach consensus on those issues set out in section 189(2). The Respondent's version was that it attempted to consult with the individual Applicants but that they refused to participate in the consultation process. Once it became clear that the individual Applicants were not going to change their minds about consulting without their own representative, the Respondent went ahead with the retrenchments on 6 December 1996.

26) This was unreasonable in a number of respects. There was, firstly, undue haste in wanting to complete the consultation process. The reason for this haste I was told by Mr Tuinder was that the Respondent wished to complete the retrenchment exercise before the

Christmas shutdown which was due to commence on 15 December 1996. This undue haste by necessity not only reflects on the Respondent's *bona fides* as far as the consultation process is concerned but also on the efficacy of the consultation process. It is unfair for an employer to unreasonably curtail the consultation process. Chemical Workers Industrial Union and Others v Sopelog CC (1994) 15 ILJ 90 (LAC) at 105.

27) I also consider that in the circumstances of this case, the Respondent's refusal to allow the Applicants their own representative or at the very least, a mediator to facilitate the resolution of the dispute, as unfair. The evidence of Mr Maphanga rang true when he said that the Respondent had exhorted its employees to keep and resolve disputes "within the family". This was not disputed by any of the Respondent's witnesses. For the Respondent to refuse the individual Applicants the representative of their choice on the grounds that he was not a person entitled to represent them when Gouws & Associates itself was not registered as an employer's organisation is, in my view, unreasonable. That much was conceded by Mr Tuinder when I asked him why management had changed its mind and tried

to contact Mr Ndlovu from Workers Labour Consultants. His reply was that management did so, "so as to be more fair to them (the employees)".

28) Mr Crots argued with reference to Secunda Supermarket CC t/a Secunda Spar and Another v Dreyer NO and Others (1998) 19 ILJ 1584 (LC) at 1588-1590 and the cases referred to in that judgment that Gouws & Associates was, because it was awaiting registration as an employer's organisation, entitled to represent the Respondent. This submission misses the point. It is not a question of construing the LRA with reference to the right to representation in the CCMA or Labour Court but what fairness in the circumstances demanded.

29) Had the Respondent not imposed the unreasonably short time frame within which to complete consultations and had it not behaved unreasonably towards the individual Applicants insofar as a representative was concerned, the individual Applicants may well have consulted with the Respondent in regard to the matters set out in section 189 of the LRA. The fact that they did not consult with Respondent was a situation of its own making.

30) The Respondent, while contending that the criterion that it applied in selecting the individual Applicants was "last in first out", conceded during the course of the trial that in respect of Applicants number 4, 7, 10, 12, 13 and 18 on Exhibit "F" it did not apply LIFO as a criterion but retrenched these individual Applicants because of their poor attendance at work. It was common cause that none of these Applicants had been disciplined for such poor attendance. It goes without saying that this is unacceptable as a criterion for retrenchment.

THE INDIVIDUAL APPLICANTS' REMEDY

31) Mr Connell submitted that the individual Applicants ought to be reinstated in their employment with the Respondent. Because of the finding that I have made in regard to the substantive fairness of the retrenchment, this is not a remedy available to the individual Applicants.

32) In the alternative, Mr Connell submitted that I should order the Respondent to pay the individual Applicants compensation from the date of their retrenchment to

the last day of the hearing. Because of the long delay that occurred before the matter came to trial, this would in effect mean compensation for a period of two and a half years. It was not argued that there was any unreasonable period of delay caused by the individual Applicants in initiating or prosecuting their claim.

33) I consider that the individual Applicants are entitled to compensation for a period of twelve months. I say so because I consider that section 194(1) should be interpreted in such a fashion that the limit of twelve months' remuneration referred to in sub-section (2) is equally applicable to sub-section (1). Were this not to be the case it would lead to the anomalous interpretation that for dismissals which are substantively unfair, compensation is limited to twelve months' remuneration but in cases of procedural unfairness there is no limit apart from the fact that compensation may not be awarded beyond the last day of the hearing of the adjudication. This result could not have been intended by the legislature. See Whall v BrandAdd Marketing (Pty) Ltd [1999] 6 BLLR 626 (LC) at paragraph 37 and Vickers v Aquahydro Projects (Pty) Ltd [1999] 6 BLLR 620 (LC) at paragraph 26. This anomaly is demonstrated by the

case in point. Some of the individual Applicants elected not to claim reinstatement. Had they been entitled to reinstatement their compensation would have been limited to twelve months' remuneration as opposed to remuneration for a period of some thirty months.

34) I do not consider this to be a case in which I should exercise my discretion against an award for compensation. Johnson & Johnson (Pty) Ltd v Chemical Workers' Industrial Union (1999) 20 ILJ 89 LC at paragraph 40.

35) I say so for the following reasons. Firstly, a number of the individual Applicants had a substantial number of years of service with the Respondent. Some had been employed for a period of some six years or more. Secondly, I consider it unlikely that the individual Applicants will easily find alternative employment. Most of them elected to be reinstated. This is indicative of the fact that these Applicants have not been able to find employment or employment at the same level at which they were remunerated by the Respondent. Thirdly, I take into consideration that the Respondent could not justify the hasty manner in which it performed the

retrenchment.

36) Compensation must accordingly be awarded in accordance with the formula set out in section 194(1). Johnson & Johnson (Pty) Ltd v Chemical Workers' Industrial Union (*loc.cit*).

THE ORDER

37) The order that I make is that each the individual Applicants whose names and details appear on the agreed schedule, Exhibit "F", are entitled to be paid at their weekly rate from 14 December 1996 for a period of twelve months. I also order the Respondent to pay the costs of suit.

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G.O. VAN NIEKERK SC
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:
7TH, 8TH, 9TH AND 25TH JUNE 1999

DATE OF JUDGMENT:

FOR THE APPLICANTS:

ATTORNEY L.F. CONNELL

FOR THE RESPONDENT:
ADV E.S. CROTS instructed by PHILIP VAN STADEN
ATTORNEYS