IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO.

P159/98
In the matter between

FOOD AND GENERAL WORKERS UNION	1st Applicant
R NKOSI	2nd Applicant
K NOFEMELE	3rd Applicant
Y NKOZWANA	4th Applicant
E TOTANA	5th Applicant
E MTULU	6th Applicant

and

IRVIN AND JOHNSON LIMITED	Respondent

JUDGMENT

GON, AJ

1. This judgment was originally part of a larger matter in which an application was to be brought by the Food and Allied Workers' Union ("FAWU") and this application by the first applicant, both against the respondent.

2. With the agreement of both unions the respondent was to apply to consolidate the two actions. At the last minute FAWU withdrew its application. The parties to this matter then agreed to a pre-trial conference being held before me in order to narrow the issues further as the existing pre-trial minute did not so sufficiently.

3. It was agreed in the pre-trial conference that the first question in dispute was whether :-

(1) there was an obligation on the respondent to have consulted with the first applicant;
(2) consultation was done through the second applicant;
(3) there was a waiver of a right to consultation by the first applicant.

4. The parties agreed at the pre-trial conference that if I found in favour of the respondent in respect of the obligation to consult with the first applicant then the matter would be finally resolved and the issues regarding the retrenchment process need not be decided.

5. I heard evidence and argument on the question raised in paragraph 3 above and now give judgment.

6. The first applicant was the representative trade union at the respondent until March 1996 when it was de-recognised in favour of FAWU which was recognised in April 1996. This was common cause. Likewise, it was common cause that stop orders were not paid to the first applicant by the respondent after March 1996. It was also common cause that the respondent applies the principle of majoritarianism, namely, that when a union has 50% plus one membership it represents all employees contained in the bargaining unit.

7. The respondent denied that it had allowed exceptions to the aforementioned majoritarianism principle, in response to the allegation that when FAWU was the minority union it was allowed to represent its members in retrenchment discussions.

8. On 2 March 1998 the respondent advised its employees by letter that due to the magnitude of the losses at the Port Elizabeth and George branches and the results of a due diligenc exercise that had been conducted by the respondent, the respondent had taken over Pillsbury Brand Africa (the individual applicants' previous employer).

9. The letter went on to state that it would not be able to retain all employees in employment after March 1998, pending consultations, which had to be held "as a matter of urgency because it cannot sustain the present losses beyond 1 April 1998. We invite employees via representative bodies (where they exist) or in groups using elected representatives to take part in this process where details as contemplated in the Act, can be addressed and finalised."

In evidence it was revealed that the respondent was losing between R2 and R3 million per month with the PE and George plants operating.

10. The first applicant conceded that consultation meetings were held with FAWU on 2,4,18, and 20 March 1998.

11. On the 18 March 1998 the respondent received a letter from the first applicant (dated 17 March 1998) wherein it stated that it represented its members, the second to the sixth applicants, and referred to the letter given to all employees

on 2 March 1998 which invited employees to take part in the process of consultations with their representatives or in groups. The first applicant said that it was mandated to represent the individual applicants and asked the respondent to let them know " the date when said consultation will take place".

12. On 25 March 1998 the respondent replied to the first applicant's letter stating that:-

(1) FAWU is the representative majority union;
(2) the consultations had commenced with FAWU on 2 March 1998 and that three meetings had followed;
(3) consultations would continue with FAWU and the respondent had no record of the applicants' membership of the first applicant;
(4) at a meeting on 20 March 1998 Nkosi acknowledged that he was satisfied with FAWU representing him; and
(5) that the letter had been received two weeks after the 2 March 1998 letter had been distributed.

The letter from the respondent ends:-

"We trust that this satisfies any concerns you may have regarding the consultation process. The principle of majoritarianism, one-industry one-union, is acceptable by COSATU and endorsed by ourselves."

13. Mr. Japhet Hendricks, respondent's senior human resources officer ("Hendricks"), gave evidence to the effect that he met with the individual applicants after the respondent received the first applicant's letter of 18 March 1998 and expressed his surprise that they were still members of the first applicant.

14. Hendricks also said that the second applicant was then asked at a meting whether he was satisfied that FAWU had represented satisfactorily to which he replied in the affirmative.

15. In extraordinary evidence given by the second applicant he said that he remained a member of the first applicant after it was de-recognised. He said, however, that he was elected as a shop steward by the FAWU members of his department in late 1997 as a representative of FAWU. He said, which I find extremely hard to believe, that no one questioned his union membership prior to being elected. It is astonishing that FAWU should allow a member of the first applicant, who is also not their member, to represent FAWU at the respondent.

16. In any event, he conceded that he attended the consultations in March with FAWU as a FAWU representative. He further agreed with Hendricks, evidence that he had said, after receipt of the first applicant's letter of 18 March, that he was satisfied with FAWU's representations in the consultation.

17. The second applicant consistently denied that he ever became a member of FAWU and submitted as evidence that his pay slip showed deductions still being made to "F.G.W.Union". Hendricks said that it was an administrative error that the pay slips still reflected the first applicant as all deductions made were for FAWU and all FAWU's dues were sent out to FAWU with a list of names and clock card numbers of its members. As mentioned earlier the first applicant admitted in the pre-trial conference that it received no stop orders from the respondent after March 1996. Hendricks also said that the respondent never received a complaint from FAWU that it was not receiving stop orders on behalf of the second applicant. He also said that the respondent only deducted stop orders from signed FAWU stop orders. I do not find, therefore, the second applicants'evidence credible in general, but least of all, on the issue of sole membership of the first applicant.

18. Hendricks stated that until the letter of 18 March 1998 he had no knowledge that employees still retained membership of the first applicant. I have no reason to disbelieve him. The issue of membership of the first applicant was first raised with Hendricks after the 18 March 1998 letter and this was conceded by the second applicant although he initially tried to intimate that it was shortly after 2 or 3 March 1998. In evidence he said that he approached Hendricks with the third and fifth applicants. In cross-examination he said that they were with him when he telephoned Hendricks.

19. Mr. Loxton argued for the respondent that notwithstanding the requirement in section 189(1)(c)of the Labour Relations Act, 1995 ("the Act"), that when dismissing employees for operational reasons an employer must consult with any registered trade union whose members are likely to be affected, one of the principle aims of the Act is to promote collective bargaining and that its thrust is majoritarianism. Consequently it would be unreasonable to expect the respondent to embark on separate consultations with majority and minority unions.

20. While this threat exists, I agree with Mr. Nduzulwana, for the applicants, that section 189(1)(c) requires consultation with any registered trade union whose members are likely to be affected by retrenchment and the invitation of 2 March was not exclusive to the majority union only. The problem of separate consultations with a majority union and minority union respectively could be resolved by requiring the two unions to consult jointly.

21. However, the above suggestion presupposes that the two unions came to the

table at roughly the same time. I do not believe that the applicants could have expected the respondent to know that they were still members of the first applicant. In the circumstances it could be expected of those employees who felt they were not represented by the majority union to alert the respondent to their membership of the first applicant as soon as possible.

22. FAWU was recognised to represent the interests of all the members of the bargaining unit, which included the individuals applicants. More specifically representation was additionally found in the form of the second applicant who represented employees as a FAWU shop steward and who expressed his satisfaction at FAWU's representation. I do not believe that section 189(1)(c) is unwavering and immutable. I agree with Mr. Loxton that in the circumstances of urgency communicated in the letter of 2 March 1998, the first applicant was tardy in its intervention.

23. By the time it made its presence felt, most of the consultation had been completed union recognised to represent the interests of all the employees within the bargaining unit. At all stages up to the letter of 18 March 1998 the second applicant together with other FAWU officials, had represented the individual applicants.

24. Mr. Loxton raised the point that although the "no difference" principle had been rejected, many judgments rejecting it in fact endorsed it. Most judgments in rejecting the "no difference" principle consider scenarios in which no consultation took place at all and the employer tried to argue that it would make no difference if it had. In this sense it is correctly rejected.

25. Mr. Nduzulwana quoted the case of *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 6412 (LAC) @ 648F-G to the effect that the need for procedural fairness was all the more accurate in the case of retrenchment. I agree. I do not believe, however, that it has to be absolutely formalistic if met in substance.

26. Mr. Loxton argued that the first applicant was the author of its own misfortunes due to its tardiness. He quoted *Johnson and Johnson v CWIU (Pty)Ltd [1998*] 12 BLLR 1209 [LAC] @ 1216E-H28 to the effect that the joint consensus seeking process may be foiled by either one of the consulting parties, including, the deliberate delaying of the process. I do not believe the delay was intentional but rather negligent for which I do not believe the respondent ought to bear the responsibility.

27. Mr. Loxton also referred to *NEHAWU v University of Fort Hare* (1998) 19 ILJ 122 [LC], in which Zondo AJ (as he then was) found the union applicant was to blame for the fact that its members had been retrenched without any meaningful input by it into the consultation process which the respondent had warned it about.

The circumstances of that retrenchment were different but to the extent that the respondent issued a warning in this case it was contained in the letter of 2 March 1998 and was responded to tardily.

28. I agree that in the circumstances it was unreasonable to consult so late in the process for four employees, who had otherwise been represented by FAWU, where losses of R2 -R3 million were being made a month.

29. Mr Loxton reluctantly argued that the individual applicants waived their rights to the first applicant's representation. I am equally reluctant to accept this argument. The applicants had knowledge of their rights but one cannot accept with certainty that it was full knowledge at all relevant times. The respondent did not prove that the individual applicants with full knowledge of their rights decided to abandon those rights. They clearly did not. They acted on their rights belatedly.

30. In light of the above, my decision is that the respondent was not obliged to consult with the first applicant in the circumstances and that consultation was effected by FAWU, *inter alia,* through the second applicant in his capacity as a FAWU shop steward.

31. The application is dismissed and the costs are to follow the result.

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GON, AJ
ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 8 March 1999

Date of judgment: 9 March 1999

For the applicant: Mr. Loxton of Findlay and Tait Inc.

For the respondent: Mr. Nduzulwana of the First Applicant