IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J 116/04

In the matter between

MISA / SAMWU O.B.O MEMBERS Applicant

and

MADIKOR DRIE (PTY) LTD Respondent

J U D G M E N T

REVELAS, J:

[1] At issue in this case, is the entitlement of an employer to unilaterally change certain policies in respect of the severance pay payable to its employees in a retrenchment exercise.

[2] The applicant trade union has brought this appreciation on behalf of four of its members (AS Grenfell-Dexter, W Lehman, MM Swart, and L Williams) who were retrenched by the respondent. They seek to be paid specific amounts as severance pay, calculated in terms of a Manpower Reduction Programme ("the reduction programme") issued by their former employer. The four individual employees mentioned above, had been in the employ of Hendred Fruehauf Trailers ("Hendred Fruehauf) when the business was sold as a going concern to the respondent in this case, with effect from 1 December 2001. There were several trade unions representing the workers of Hendred Fruehauf Trailers, such as the applicant, NUMSA, UMIAWUSA and the former SAMU. During the discussions held between the trade unions and the respondent, it was agreed that the provisions of

section 197 of the Labour Relations Act, 66 of 1995, as amended, ("the LRA") would apply. This is common cause on the papers. In terms of section 197(2) of the LRA, the respondent was deemed to be the employer of the individual employees and was automatically substituted in the place of Hendred Fruehauf Trailers in respect of all contracts of employment and all rights and obligations of the old employer. The aforesaid provisions of section 197 of the LRA were also incorporated in the agreement of sale (paragraphs 10.1 at page 15 of the record) which states : **" Madikor shall take over the existing rights of and obligations of Hendred as the 'old employer' of the employees of the Hendred Business. Such rights and obligations shall continue in force after the implementation date, retrospectively from the effective date as if they were rights and obligations between Madikor, as the 'new employer' and the said employees. Anything done before the transfer of the Hendred Business by, or in relation to the 'old employer' will be considered to have been done by or in relation to the new employer"**

[3] The applicant contended that the rights and obligations referred to, as aforesaid, the Manpower Reduction Programme issued by Hendred Fruehauf Trailers in 1996, whilst the four individual employees were still in its employ.

[4] The salient terms of the reduction programme were the following:

1. The selection criteria applicable would affect employees who had previous warnings, employees over sixty five years of age, employees who were eligible for early retirement and employees in respect of whom the "Last-in, - First-out" principle was applicable.
2. The option of voluntary retrenchment was only available to employees aged between fifty and fifty four years of age who have less than five years service and the employer had the right to agree or refuse to implement this option, based on operational reasons.

3. In respect of salaried staff (such as the four individual employees) retrenchment compensation" (severance pay) would be calculated according to the following directives.

3.1 Regardless of years of service each salaried employee ("employee(s)") will receive one month's pay in lieu of notice.

3.2 In addition to the notice of payment, employees with more than twelve months' service will receive additional compensation on the following basis:

3.2.1 1-11 months' completed service equals contractual (1 months') notice.

3.2.2 12-35 months completed service equals 12 days salary plus for every completed calendar month over twelve months.

3.2.3 36-59 months completed service equals 36 days salary plus 1,5 days salary for every completed calendar month over 36 months.

3.2.4 60 months completed service equals 70 days salary plus two days salary for every completed calendar month over 60 months.

[5] After this reduction programme was implemented by Hendred Fruehauf and accepted by its employees in 1996, all subsequent retrenchments were effected in accordance with the reduction programme. That is also common cause on the papers.

[6] It is of important significance that the severance pay payable in terms of the reduction programme in question ("the programme") is substantially more than the statutory minimum as provided for in section 41(2) of the Basic Conditions Act, 75 of 1997 ("the BCEA"). The four individual

employees are, in terms of the calculations provided for in the reduction programme, entitled to the following amounts as severance:

1.	AS Grenfell-Dexter	:	R 73 916.61
2.	W Lehman	:	R654 079.53
3.	MM Swart	:	R 98 146.48
4.	L Williams	:	R324 777.55

[7] The applicant claims these amounts in this application, in terms of section 77(3) of the BCEA.

[8] Even though the question of severance pay is the only issue between the parties in this matter, the Labour Court may determine such a dispute, as it related to specific performance concerning a contract of employment (section 77A of the BCEA; See also *Paper Printing Wood and Allied Workers Union & Others vs Nasou-Via Africa, A Division of the National Education Groups (Pty) Ltd 1999 ILJ 2101 (LC)* where the Labour Court held at 2103 F-H that **"Severance pay disputes, which in terms of section 190(1) of the Act [the LRA], need to be referred for arbitration , are those disputes which arise when the employer refuses to pay the statutory minimum severance pay of one weeks remuneration for each year of service. Severance pay itself, or the exact amount thereof, may still be the subject matter for adjudication by the Labour Court, notwithstanding that it may be the only issue remaining between two parties, after conciliation").**

[9] After the respondent had purchased the business of Hendred Fruehauf Trailers as a going concern with effect from 1 December 2001, it almost immediately began with a retrenchment process. Consulation began on 3 January 2002. On 8 January 2002, the respondent advised its employees and their trade unions that its proposed package for retrenchment (severance pay) was the statutory minimum. That was still the only offer on

the table at a consultation meeting held on 12 March 2002. On 18 March 2002, the respondent made another offer with regard to voluntary retrenchment packages which was in fact in accordance with the programme.

[10] On 12 April 2002, the respondent increased in terms of severance pay offer for employees who did not take up voluntary retrenchments. It offered to payment of two weeks' salary for every year of completed service up to maximum of one hundred days, including notice pay. All the trade unions rejected the offer, insisting that the members to be compensated in accordance with the applicable reduction programme.

[11] The respondent argued that notice of the proposed severance pay was given in terms of Section 189 of the LRA. Its main argument was that the reduction programme was a policy and it was entitled to "table such policy and the issue of the quantum of severance pay" and to engage in a consensus seeking process with regard to the issue of severance pay. The proposal was then implemented, as consensus on this aspect could not be reached.

[12] After 16 April 2002, when the last consultation was held, the applicant referred a dispute to the Motor Industry Bargaining Council Dispute Resolution Centre ("the Centre") in terms of section 64 of the LRA, alternatively, section 41(6) and (8) of the BCEA. The subsequent award, which was in the applicant's favour was however set aside on review because arbitration was not provided for in the Centre's constitution. The respondent had all along contended that the Centre did not have the necessary jurisdiction to determine the issue.

[13] The applicant's case is that the respondent committed a breach of contract by unilaterally deviating from the terms of the programme. This argument was based on the following considerations proffered by the applicant: Since employment contracts as a rule do not provide for a retrenchment package, one of the purposes of section 189 of the LRA, is to consult thereon. *In casu,* the parties had specifically agreed upon issues surrounding severance pay in the event of a retrenchment, by means of the reduction programme. In particular, they had agreed on a certain specific calculations aimed at exceeding the statutory minimum in section 41(2) of the BCEA. To permit the respondent to avoid compliance with the programme as part of the contracts of employment, would render the terms of all policies governing severance pay null and void, and unenforceable.

[14] The respondent argued that the retrenchment exercise was motivated by the precarious financial position of Hendred Fruehuaf which as at 31 August 2001 had a loss just short of R18 million, and was on the brink of liquidation and when the sale became effective, its losses amounted to R38 million. It simply could not afford to abide by the severance packages prescribed by the reduction programme.

[15] Furthermore, the respondent argued that the reduction programme was a policy, and not a contract. It was unilaterally implemented by the respondent and could be varied from time to time. It was never incorporated into the contracts of employment of any of the applicants. In this regard, the respondent stressed that the employment contracts in question made provision the variation of policy and procedures. The relevant part of the employment contract reads as follows: **"However, it should be noted that your employment is subject not only to a much wider spectrum of company policy, rules and regulations, as may occur from time to**

time."

[16] Before dealing with the arguments presented on the merits, there is a procedural matter which requires determination.

[17] The applicant wished to hand in a supplementary affidavit. It refers to an arbitration award in a matter between NUMSA and Madikor Drie (Pty) Ltd t/a Hendred Fruehauf Trailers. The award is attached to the affidavit and the purpose thereof is to draw attention to the arbitrator's reference to a certain clause (10.5) in the agreement of sale between Hendred Fruehauf and the respondent which reads: "**R10 000 000,00 (ten million rands) had been set aside as a loan from hundred Fruehauf Trailers (Pty) Ltd to Madikor Drie, to assist in possible retrenchment costs including severance pay."**

[18] As a general rule, there are three sets of affidavits in motion court proceedings, namely the founding affidavit, the answering affidavit and the replying affidavit. Rule 7 of the Labour Court Rules incorporates this general rule. Under certain circumstances the filing of further affidavits are permitted. The principles followed and developed the High Court authorities are basically that a court has a discretion as to whether further affidavits will be permitted. This discretion must be exercised judicially, having considered whether a proper explanation for its belated filing exists, whether the material contained in the affidavits are relevant and whether the filing of such affidavits would be prejudicial to the other party *(See: Transvaal Racing Club v Jockey Club of South Africa 1958(3) SA 599 (w) at 604 A-E.)* Rule 6(5)(e) of the High Court Rules also provides for the filing of further affidavits subject to the Court's discretion.

[19] In my view, the explanation proffered by the applicant union is a proper

one. A new attorney took over the applicant's matter, after the attorney who had initially dealt with the matter, left the firm of attorneys in question. The new attorney, came across the award referred to, and the documents mentioned therein. These documents are no secret – or should not be - and it is not the respondent's case that it did not enter into such a sale agreement. The contents of the supplementary affidavit are relevant to the matter at hand. Therefore the supplementary affidavit may be accepted as part of the papers in this matter. The respondents answering affidavit thereto is also accepted. In it the respondent contends that the loan in question is an interest bearing loan and reiterated the onerous terms of the policy in question.

[20] I will now return to the merits of this case. A policy is not a contract. The policy in question was issued by the respondent and the employees of Hendred Fruehauf , not surprisingly, accepted its highly beneficial terms. It stands to reason that policies may be varied from time to time. Permission or consent to do so is not generally required. Policies are seldom inflexible. In a case such as this, where the severance packages were agreed upon in 1996 and the retrenchments were effected almost six years later, a strict adherence to such a policy could be, I agree, be very onerous for an employer to bear. Fairness however demands that such an employer would have to consult with its employees on the variation thereof, preferably before a retrenchment exercise or the transfer of the business itself.

[21] The acceptance by the employees of the reduction programme, the absence of any objection thereto and the implementation of the programme in retrenchments post 1996 (when the programme was issued) must have established an understanding between the parties that retrenchments will continue to be effected in accordance with the programme or policy. Trade

Unions, also must have had some input. Whereas policies may indeed be varied by the employer, the nature of the policy will determine in what circumstances it may be varied.

[22] There would be cases where the variation of a policy, albeit unilaterally , will not directly impact on the employees' work security or the employment relationship as such. However, in cases where such a variation of a policy has serious consequences for any employee, it would be unfair to the employee in question, if the employer could simply depart from the policy by merely advising the employee of its intention.

[23] The Manpower Reduction Programme was a retrenchment policy. It is highly unlikely that it would have been issued, as the respondent would have it, unilaterally and without any trade union input, since it deals with the no-fault termination of the services of union members. It was intended to regulate and facilitate retrenchment processes in the future. Hence my reference to an understanding that was established. Clearly certain obligations on the part of the employer towards possible retrenches came into being. These obligations may not be departed from at the will of the employer only. The policy created a legitimate expectation on the part of the employees, even if their contracts of employment foresaw the variation of such policies.

[24] In terms of its retrenchment policy, Hendred Fruehauf gave its employees an assurance as to what they might expect if they are retrenched. It followed this policy and acted as if it intended to continue with this policy. The respondent took over this obligation together with all the other obligations of Hendred Fruehauf, when it bought the latter company, in terms of the law (section 197 of the LRA) and the agreement of sake.

(Clause 10.1). If losses occurred, Henfred Fruehauf should have notified its employees much sooner that it could no longer afford their packages. Businesses do not incur such huge losses as alleged by the respondent, overnight. It takes time. I find it curious that the question of the affordability of the packages were left over until the business was sold.

[25] The agreement of sale reflects a clear understanding on the part of both the seller and the buyer that they were aware of the consequences of selling a business as a going concern. The two parties were no strangers to each other in business, on the contrary, they were closely connected. The respondent was fully appraised of the retrenchment policy when the business was bought as a going concern. It had to be. The transfer came into effect in December 2001. On 3 January 2003 the respondent announced its intention to retrench. Ten million rand was set aside for the purposes of severance packages.

[26] In the circumstances of this case, it should not be open to an employer, such as the respondent, to escape its obligations in respect of its employees' legitimate expectations, by simply invoking the provisions of section 189 of the LRA. That is not what was understood by the parties when the business was sold. Trade unions were involved in the discussions surrounding the sale. They would certainly have taken up the cudgels on this issue then, if they knew the policy would be varied.

[27] On the facts of this case, I am not persuaded that the respondent is entitled to escape the retrenchment policy it inherited, simply because it had financial difficulties. The conduct of the parties indicated that no departure from the policy was foreseen when the business was sold as a going concern. The four employees in this case had a legitimate expectation that

the severance packages they would receive in terms of the reduction programme, would be paid to them.

[28] Since the respondent is bound by its Manpower Reduction Programme as Hendred Fruehauf was, it should pay the individual employees retrenchment packages in accordance therewith. Interest thereon is also payable. The interest must however run from the date of this judgment, because the respondent should not be penalised because the matter was first arbitrated in an incorrect forum and then finally determined in this court.

[29] In the circumstances, I make the following order:

1. The respondent is to pay severance packages to the four individual employees in this matter as follows:

1.1	AS Grenfell-Dexter	:	R 73 916.61
1.2	W Lehman	:	R654 079.53
1.3	MM Swart	:	R 98 146.48
1.4	L Williams	:	R342 777.55

2. Interest on the above amounts shall be payable from date of judgment to date of payment.

3. The respondent is to pay the applicant's costs in this matter.

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E. REVELAS

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

REPORTABLE

DATE OF HEARING:	27 May 2005
DATE OF JUDGMENT:	14 October 2005
ON BEHALF OF THE APPLICANT:	Mr G Ebersöhn of Ebersöhn Attorneys.
ON BEHALF OF THE RESPONDENT:	Mr S Snyman of Snyman van der Heever Heyns.