IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

(REPORTABLE)

CASE NO: **D987/04**

In the matter between

T PERUMAL 1st Applicant

FOOD AND ALLIED WORKERS UNION 2nd Applicant

and

TIGER BRANDS Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 1 JUNE 2007

PILLAY D, J

[1] The first applicant employee was retrenched on 31 July 2004.

[2] At pre-trial the parties identified the following issues for determination:

> "Procedural fairness issues to be decided
>
> The respondent failed to consult with the second applicant in respect of the first applicant's retrenchment. The respondent alleges that the consultation process was inadequate and predetermined and failed to comply with provisions of section 189 of the LRA generally. The

respondent disputes this and will raise argument in terms of section 189A (18).

Substantively:

(1) The applicants record that there was a need to retrench.

(2) The applicants allege that the selection criteria and the interview process followed was unfair and that the applicant should not have been selected for retrenchment. The applicants contend that the principle of LIFO should have been followed, alternatively, that if the retrenchment was to be based on skills, that the method used by the respondent was unfair, unlawful and inappropriate.

(3) The respondent contends that the criteria and process used are fair.

The parties confirm that this agreement narrows the issues raised in the previous minutes."

[3] The facts surrounding the procedural complaint are the following. The employee was a member of the second applicant, the Food and Allied Workers Union ("FAWU") since she started working for the employer in 1990 as a general worker. She retained her membership after she was promoted to the position of supervisor.

[4] When the respondent employer identified the need to retrench, it

called a meeting of all the salaried workers. The management explained the need for the retrenchment and the process that would be followed. A further meeting was held of only the supervisors as they were the affected group.

[5] There is a dispute as to whether FAWU was invited to these meetings to participate on behalf of the salaried workers in the retrenchment process, or even notified that the supervisors were considered for retrenchment.

[6] Mr Peter Lyes, the Human Resources Manager of the employer, testified that he telephoned Derrick Dlamini, the chairman of the shop stewards committee, on the morning of 24 June 2004 to invite him to the meeting. Mr Dlamini attended the meeting with two other shop stewards. They sat alongside three shop stewards from a rival trade union. Mr Lyes recalled observing this at the time because it was unusual. Despite his invitation to the shop stewards to participate in the process, they did not do so, so he testified. Historically, FAWU did not represent salaried workers. Mr Lyes was not aware that the employee was a member of FAWU.

[7] Mr Dlamini denied receiving a telephone call from Mr Lyes inviting him to any meeting to discuss retrenchment for salaried workers or the supervisors. That would not have happened as FAWU was not recognised as a bargaining agent for supervisors. He could not

recall attending any such meeting. The employee did not see him at the meeting of supervisors. Mr Dlamini became aware during a previous retrenchment a few months earlier that the supervisors would be retrenched. However, neither he nor FAWU had been notified of the process in respect of the supervisors. Historically, the respondent had refused to recognise or bargain with FAWU in respect of salaried workers. Hence it did not do so in respect of the retrenchment of the supervisors.

[8] In the opinion of the Court the employer bears the *onus* of proving the procedural fairness of the dismissal. Whereas the employer addressed correspondence to FAWU's office when it wished to engage FAWU about wage-earners, it did not do so in respect of the supervisors.

[9] Mr Lyes' recollection of the trade union shop stewards sitting alongside each other has a ring of truth. However, almost three years after the incident both parties' memories have faded. They could be mistaken. Mr Lyes is also 64 years old.

[10] In any event the basis for inviting them and their attendance could not have been to engage them as representatives of the supervisors because FAWU was not recognised as the bargaining agent for supervisors. Supervisors were not considered part of the bargaining unit. If Mr Lyes notified the shop stewards it would have been, as he

testified, just so that they could know what was going on. Mr Lyes did not know that the employee was a member of FAWU. This also confirmed that he had not entertained the idea that supervisors could be trade union members and that the employer would have to bargain with the trade union.

[11] Employers have a statutory duty to ensure that the correct consulting party is notified of a retrenchment. The employer's failure to do so in respect of this employee is a procedural defect.

Section 189A (18) objection

[12] Mr *McGregor* submitted in closing argument that the provisions of section 189A(18) of the Labour Relations Act No 66 of 1995 ("the LRA") precluded the applicants from contesting the procedural fairness of the retrenchments in these proceedings in terms of section 191(5)(b)(ii), as sub-section (13) creates an opportunity to challenge procedural fairness by way of an application.

[13] Mr *Schumann* submitted for the employee that the purpose of sub-section (13) was to shift the procedural compliance to the realm of collective bargaining, and correction if necessary, through that process. It is not intended to deprive consulting parties of the right to challenge procedural fairness altogether.

[14] The proper construction of the provisions is that procedural

unfairness can be contested in a section 191(5)(b)(ii) referral if a sub-section (13) application had not been launched. Furthermore, there has to be proper notice, i.e. notice in terms of section 189(3) of the LRA to FAWU as the consulting party in order for a sub-section 13 application to be brought. So he submitted.

[15] Sub-section (13) provides:

> "If an employer does not comply with a fair procedure a consulting party may approach the Labour Court by way of an application for an order –
>
> (a) compelling the employer to comply with the fair procedure;"

[16] Sub-section (18) provides:

> "The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 189(5)(b)(ii)."

[17] A sub-section 13 application is also timed to take place not later than 30 days after notice of dismissal or the date of dismissal.

[18] Sub-section 13 hives off procedural defects from substantive flaws by permitting a consulting party to launch a challenge by way of an application. These provisions address the special hardships endured by both parties to bargaining in big retrenchments. The costs of undoing a bad retrenchment are huge. Undoing any

restructuring could have a domino effect on people and processes. The differentiation in process between big and small retrenchments is therefore justified. The provisions also shift the responsibility of correcting a flawed process onto the consulting party Thus a consulting party who fails to bring procedural flaws to the attention of the employer by way of a sub-section (13) application forfeits the right to do so altogether.

[19] Sub-section (18) expressly bars procedural challenges being raised in section 191(5)(b)(ii) disputes. Furthermore, contrary to Mr *Schumann's* submission the sub-section (13) application is not time-bound to the section 189(3) notice but to a dismissal notice.

[20] The applicant is accordingly barred from contesting the procedural flaws. This Court is, consequently, precluded from adjudicating about the procedural fairness of the dismissal.

[21] The interpretation of sub-sections (13) and (18) was raised after the parties led evidence on procedural and substantive fairness. Whereas in some cases the procedural unfairness can be neatly severed from the substantive fairness, that is not so here. Furthermore, the credibility of the witnesses has to be assessed on all the evidence, including that relating to procedural unfairness.

[22] The employer's failure to engage FAWU contributed directly to it

choosing the selection criteria that it did. It lost the opportunity of testing its criteria for fairness with FAWU. FAWU's participation in the application of the criteria would also have moderated the scope for unfairness. To that extent the Court takes into account the influence of the procedural unfairness in assessing the substantive fairness of the applicant's dismissal.

Substantive fairness

[23] The selection criteria applied was the following:

> "Voluntary retrenchment; placement of employees into equivalent positions within the unit structures, dependent on retention of skills and knowledge. It is proposed to include the transfer of employees across units in order to ensure an even distribution of skills, knowledge and abilities; a competency based interview process in order to recruit suitable candidates for remaining vacancies; early retirement; LIFO (coupled with the retention of skills and knowledge). These selection criteria will be applied with due consideration to the Company's commitment to the issue of employment equity."

[24] At the heart of the controversy is the competency test to which the supervisors were subjected. Mr Lyes designed a questionnaire to assess the supervisors' knowledge about products and processes, quality, costs and team management. The supervisors were rated

on a scale of “no evidence” to 5, with scores of 3 to 5 being positive indicators. Each question had a table of core competencies, as determined by Mr Lyes. The table was used as a checklist to grade the supervisors. Summaries of the supervisors’ responses were noted alongside the table. A panel of three interviewers assessed each supervisor. Members of the panel varied for each supervisor.

[25] With regard to meeting its employment equity commitments, the selection was influenced by the employer’s desire to retain newly-employed staff because they were better educated and qualified. They were also Africans. Retaining them would balance out the predominance of Indian workers. Better-educated employees would also be more knowledgeable about handling modern technology. Long-serving employees had experience but low levels of education. One employee was functionally illiterate. Experienced employees could do the job but they did not understand technical terms. Consequently, the better-educated new employees were more suitable. So the argument went. Against these objectives Mr Lyes testified that LIFO subject to skills was not appropriate. The oral interview was preferred to accommodate those with literacy problems. If employees did not understand the question the panel could explain it to them, so it was submitted for the employer.

[26] The employee contested the fairness of the selection criteria and the way in which it was applied to her. When she learnt about the

interviews she enquired from her managers, Palm Naidoo and Rajen Gounden, about what was expected of her. Mr Gounden told her that she simply had to talk about the work she did. Mr Naidoo reassured her that she had nothing to worry about, given her track record.

[27] Her track record was that she started working for the employer in 1990. It was her first job after matriculating. She was 24 years old. Having started as a general worker she progressed to the positions of plant operator (mallow), senior operator (cocoa-bean roasting), laboratory analyst, technical assistant (process of new product), supervisor: chocolate, supervisor: sweet and supervisor: chocolate (speciality). A year after she was engaged she started work on the commissioning of a new plant. Having worked closely with the people installing the plant, she became more knowledgeable about some issues than the engineer Cathy Morris, who was assigned to oversee the work. When the employee returned to work in May 2004 after being absent for more than two months, she was assigned the task of documenting the entire plant's safety operation procedures. She had to observe every process for every product, question the operators, document her observations and make recommendations to the safety auditors. All her recommendations were accepted.

[28] The employee alleged that she ranked at least in the top five in a written test that she undertook. Mr Lyes disputed this. For reasons

that will become obvious, Mr Lyes was less than generous in his assessment of the employee. Given her experience and knowledge, the employee was confident that she would fare well in the interview. However, she was not happy to be interviewed because she was undergoing the stresses of a divorce, a court application to restrain her husband from abusing her and recovering from bi-polar depression at the time of the interview. She also had two children to consider. The employee was also unhappy about the persons who comprised the interviewing panel. They were Mr Lyes, Miss Cathy Morris and Mr Itzik Levy.

[29] Mr Lyes, she testified, was biased because he was unhappy about her long periods of absence between 2002 and 2004 on account of illness. He convened a meeting with her on 20 October 2003 to inform her that her continued absence could result in her dismissal for incapacity. He also accused her of negligence when a mishap occurred on her production line during her sick leave. Nothing came of the allegation. Mr Lyes had been a production manager a while ago. As the HR manager he was not suitable to assess the employees' competence in production. Miss Morris was also biased. The applicant interacted with her in 1991 when the new plant was being commissioned. The employee had become more knowledgeable about the machinery. Miss Morris being more senior and more academically qualified, did not respond well to being advised by the employee, a subordinate. Although that interaction

was about 13 years ago, the employee maintained a formal relationship with Miss Morris. Mr Levy worked on the toffee line. He had no experience in the sweet and chocolate line in which the applicant had worked previously before her current position as supervisor in the speciality line. The employee would have preferred to have been interviewed by her immediate managers, Naidoo and Gounden, as they knew the production process for which she was responsible and her capabilities.

[30] Turning to the content of the interview, the employee found that she was not questioned about the work she was doing in the speciality line. She was questioned about sweet and chocolate production which she had done previously. That was not what she was told she would be tested on. On team-building she was asked a question, the answer to which Mr Levy said she should have known as she had undergone the exercise. It transpired that the team-building exercise was conducted about 1996 and no notes were issued to the participants. The employee had no idea what weighting was attached to each question or how long her answers should be. She had not been given any material she could use in order to prepare for the interview. When she stopped speaking, the panel asked her the next question. Contrary to Mr Lyes' evidence, she was not encouraged to respond further. Given their lack of experience and knowledge of the sweet and chocolate line, it was likely that the panel did not understand some of her responses.

[31] Mr *McGregor* submitted that at least in respect of the three questions to which all three panellists recorded "no response from the employee" the Court should hold that the competence assessment was valid and that the employee was less suitable than someone who scored higher.

[32] Stepping back from the details of the interview, the Court is struck by the startling difference between the employee's performance on the job and her performance in the interview. She enjoyed her work. She had no work-related problems. Her performance was not questioned. Her difficulties only arose when her domestic life was in disarray. Even though she was advised by the provident fund doctor to take longer sick leave, she insisted on returning to work in May 2004.

[33] Mr Lyes was manifestly biased against her. This emerges from the minutes of the meeting on 20 October 2003 and his evidence. For instance, in an unguarded moment during cross-examination, he alleged with undue robustness that the employee said during the interview that the managers hated her. What the employee in fact said was that the managers should communicate with her. Mr Lyes admitted that the method used to assess competence was subjective.

[34] In *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd* [2006] 27 ILJ 292 (LAC) 293H-J, 320B-G, the Labour Appeal Court considered the selection criteria used by the company in that case and made the following observations:

> "Section 189(7) contemplates two types of selection criteria that may be used in the selection of employees to be dismissed. The one is the agreed selection criteria, section 189(7)(a), where the consulting parties have agreed to the criteria. The other is the fair and objective selection criteria, section 189(7)(b), where the consulting parties have not agreed upon the criteria to be adopted. In this matter the parties had not agreed upon the selection criteria, therefore it was not permissible for the company to use any selection criteria other than those that were 'fair and objective', as required by section 189(7)(b). The Court analysed the criteria used by the company, and concluded that some of the criteria had been subjective. They had accordingly not been demonstrated to be fair and objective and this rendered the dismissal substantively unfair."

One of the selection criteria in that case that accounted for 10% of the rating was an interview of the employee.

[35] On this authority the employer must fail based on Mr Lyes' admission alone. Nothing in the evidence prevents the Court from awarding the employee reinstatement with 12 months' compensation. In making this award, the Court also takes special note of the failure by Mr Lyes

to recognise the peculiar hardship to which the employee was subjected as a result of being in an abusive relationship, her success in overcoming this adversity and to weigh them against the significant progress that she made in developing herself over almost 14 years of service with the same and only employer.

[36] With regard to the costs reserved when the matter was set down for a pre-trial conference, FAWU should be held responsible as it failed to respond to several requests to attend a pre-trial conference before the matter could be enrolled for that purpose.

[37] The order that I grant therefore is in the following terms:

(1) The dismissal of the employee was substantively unfair.

(2) The employer is ordered to reinstate the employee and pay her compensation equivalent to twelve months' remuneration.

(3) The employer shall pay the costs of the action.

(4) FAWU shall pay the costs reserved on 19 August 2005.

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PILLAY D, J

DATE OF HEARING: 30/05/07 – 01/06/07

DATE OF JUDGMENT: 01/06/07

FOR THE APPLICANT: ADVOCATE P. SCHUMANN INSTRUCTED BY BRET PURDON & ASSOCIATES.

FOR THE RESPONDENT: MR. B. MACGREGOR OF DENYES REITZ ATTORNEYS.