178/2000

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

SACCAWU	APPLICANT
and	
NORTH WEST DEVELOPMENT CORPORATION (PTY) LTD (under final judicial management)	1ST RESPONDENT
BRIAN ST. CLAIR COOPER N.O.	2ND RESPONDENT
FERDINAND ZONDACH N.O.	3RD RESPONDENT
BLESSING G CABASHE N.O.	4TH RESPONDENT
THE GOVERNMENT OF THE PROVINCE OF THE NORTH WEST PROVINCE	5TH RESPONDENT
MASTER OF THE HIGH COURT, MMABATHO	6TH RESPONDENT
ABSA BANK LIMITED	7TH RESPONDENT
FIRST NATIONAL BANK	8TH RESPONDENT
NEDCOR BANK LIMITED	9TH RESPONDENT
STANDARD CORPORATE BANK	1OTH RESPONDENT
DEVELOPMENT BANK OF SOUTHERN AFRICA	11TH RESPONDENT
NEDCOR INVESTMENT BANK LIMITED	12TH RESPONDENT

JUDGMENT

MOGOENG J.

INTRODUCTION

[1] On 10 August 1999 the second, third and fourth Respondents ("the judicial managers") were appointed final judicial managers of the first Respondent ("the company") in terms of an order of this Court ("the Order"). This Court vested the management of the company in the judicial managers subject to the supervision of this Court and paragraph 2.10 of the Order.

[2] Paragraph 2.10 stipulated that the judicial managers should formulate a business plan and turnaround strategy ("the plan and strategy") in the form of a written report to be submitted to the creditors for their approval within thirty days of the Order. To date no business plan and turnaround strategy has at any stage been approved by the creditors of the company.

[3] On 31 March 2000 the first Respondent issued notices of retrenchment to some 230 of its employees. This number constitutes about 70% of the company's workforce.

[4] Applicant is opposed to the retrenchment since it affects the majority of its members. In pursuit of its understandable policy of doing everything within its power to prevent retrenchments, it brought an urgent application on 31 March 2000 for an order in the following terms:

"1. that this matter be heard as a matter of urgency and that the Court dispense with the forms and service provided for in the rules;

2. that the Court grant the Applicant leave to institute proceedings against First, Second, Third and Fourth Respondents for the relief set out in this notice of motion.

3. that a **rule nisi** do issue returnable at 10h00 on Thursday 20 April 2000 calling upon Respondents to show cause why an order should not be granted in the following terms:

3.1 declaring that Second, Third and Fourth Respondents have failed to comply with section 433 (c) of Act 61 of 1973;

3.2 declaring that Second, Third and Fourth Respondents have failed to comply with directions made in the final judicial management order of the above Honourable Court dated 10 August 1999 under case number 96/99 ("the final judicial management order") by failing to conduct the judicial management in terms of paragraphs 2.8 read with paragraph 2.10 of the final judicial management order;

3.3 interdicting and restraining First Respondent from interfering with the contracts of employment of Applicants' members who are employed by First Respondent by means of retrenchment or otherwise save than in accordance with and pursuant to the necessary approval of a business plan and turnaround strategy as contemplated in paragraph 2.10 of the final judicial management order;

3.4 alternatively to paragraph 3.3 above, that the above Honourable Court grant Applicant leave to approach the Labour Court by way of urgency for an order that First Respondent be interdicted from retrenching members of Applicant pending compliance by First Respondent with the provisions of section 189 of the Labour Relations Act no 66 of 1995; and

3.5 that the final judicial management order be varied such as to permit Applicant to launch proceedings in the CCMA and/or the Labour Court and/or in any other appropriate forum in respect of any matter arising out of the retrenchment of its members by the First Respondent without first approaching the above Honourable Court for leave to do so;

3.6 First, Second, Third and Fourth Respondents should not be ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved;

4. that the orders in paragraph 3, save for 3.5, do operate as interim orders pending the return day hereof;

5. that in the event of the Court granting an order in terms of paragraph 3 and the subparagraphs thereto, Respondents be ordered to deliver their answering affidavits, if any, by 10 April 2000 and that Applicant be ordered to deliver its replying affidavit by 17 April 2000.

6. that Applicant be granted leave to supplement its founding affidavit at any time prior to the final hearing of this application.

7. further and/or alternative relief."

I granted a *Rule Nisi* returnable on 20 April 2000. On the return date I only confirmed the Rule in respect of paragraph 2 and

3.4 as amended which are paragraphs 1 and 2.3 of the Rule and discharged the rest of the Rule with costs including costs occasioned by the employment of two counsel.

[5] Applicant's main contention is that the retrenchment of a large number of employees was, upon a proper construction of paragraph 2.10 of the Order, intended to be part of the plan and strategy. The approval of such a business plan and turnaround strategy by the creditors is, according to the Applicant, a prerequisite to the retrenchment of the many employees whom the company purported to retrench. Therefore, in the absence of such approval the first Respondent neither has the power nor the authority to retrench. I think that the aforegoing is the fundamental issue in this matter and that all other issues are ancillary. Every important facet of this case turns around retrenchment. Should the Applicant succeed to prove that the judicial managers did not have the authority to retrench, then it is bound to succeed in respect of its most important prayer, namely, to restrain the company from retrenching its employees. Similarly, its failure to show the lack of the requisite power and authority to retrench will have disastrous consequences for its case. I turn now to discuss the issues.

A DISCUSSIONOF THE ISSUES

Leave to approach the Labour Court

[6] Applicant approached this Court for leave to institute

proceedings in the Labour Court, which has the exclusive jurisdiction in respect of all labour disputes and issues (See section 157 of the Labour Relations Act 66 of 1995 ("the LRA")), so that it could decide on all issues arising from the retrenchment of the company's employees. The reason why this had to be done, lies in s 428 of the Companies Act No. 61 of 1973 ("the Act") and the following paragraph of the order:

> "2.7 that while the respondent is under judicial management all actions, proceedings, the execution of all writs, summonses and other processes against the respondent be stayed and be not proceeded with without the leave of this Court being had and obtained."

[7] It is common cause between the parties that the Applicant or its members required leave of this Court to bring any proceedings against the company in the Commission for Conciliation, Mediation and Arbitration ("CCMA") and the Labour Court.

[8] The Respondents did not oppose the granting of leave. I think that this concession was well made especially if regard is had to the provisions of section 34 of the Constitution of the Republic of South Africa Act No. 108 of 1996 which bestows everyone with a fundamental right to have any dispute decided before a Court or another independent and impartial tribunal or forum.

[9] I was satisfied that the Applicant had to be given leave to approach the CCMA and/or the Labour Court. For this reason I

granted it leave.

An order declaring that the judicial managers have failed to comply with the provisions of the Act and the Court Order

[10] This heading relates to the following prayers in the Notice of Motion:

> "3.1 declaring that Second, Third and Fourth Respondents have failed to comply with section 433 (c) of Act 61 of 1973;
>
> 3.2 declaring that Second, Third and Fourth Respondents have failed to comply with directions made in the final judicial management order of the above Honourable Court dated 10 August 1999 under case number 96/99 ("the final judicial management order") by failing to conduct the judicial management in terms of paragraphs 2.8 read with paragraph 2.10 of the final judicial management order;"

[11] An order in these terms does not affect the rights or obligations of any of the parties at all. It does not bring about any change to the position as it was before the granting of the order. No consequences flow from it and it cannot be given effect to in any manner whatsoever.

[12] Applicant does not intend to do anything about the judicial managers' alleged failure to do what they should have done in terms of section 433(c) of the Act and the aforementioned paragraphs of the Order. It neither intends to have them replaced with more efficient judicial managers nor does it intend to have the judicial management order varied in some

way as a result of an order in terms of paragraphs 3.1 and 3.2. Having regard to the nature of the dispute between the parties, such an order would not serve any purpose whatsoever. It is for this reason that I refused to grant an order in those terms.

Do the judicial managers have the authority to retrench?

[13] Three issues arise from the question whether the judicial managers have the power and authority to retrench. The first relates to who are the creditors within the context of the Order, the second is which creditors have to approve the plan and strategy, and the third is about whether or not paragraph 2.10 of the Order envisages that the retrenchment of first Respondent's employees should of necessity form part of the business plan and turnaround strategy which must first be approved by the creditors before any retrenchment could take place. In other words, do the judicial managers have the authority to retrench even if such retrenchment is not part of an approved business plan and turnaround strategy?

Who are the creditors?

[14] It is the Applicant's contention that the effect of the Order is that its members, who are employees of the company, are contingent creditors of the first Respondent. As a result of this capacity they have acquired the right to participate in the formation and approval of a business plan and turnaround strategy. It would thus, so the argument goes, be contrary to the terms of the Order to embark on a comprehensive

restructuring exercise affecting the job security of a large number of employees without the approval of the Applicant's members. The Respondents hold the view that the Applicant's members are not creditors at all, alternatively, if they are then they are not the kind of creditors envisaged by paragraph 2.10 of the Order.

[15] In support of his contention that employees are either contingent or prospective creditors, Mr Buirsky, for the Appellant, drew my attention to section 346(1)(b) read with section 345(2) of the Companies Act. He also relied on the following commentary on section 345(2) at page 594 of Henochsberg on the Companies Act 4th edition (Butterworths) vol. 2 by Meskin:

> " The requirement that the Court should take contingent and prospective liabilities into account was first introduced in England in 1907 in the light of judicial decisions to the effect that the Court could not wind up unless the debts which the company was proved to be unable to pay were absolutely due, an approach which ignored the interest in the assets of the company held by contingent and prospective creditors also (*Re Capital Annuities Ltd* [1978] 3 All ER 704 (Ch) at 715-716; *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) at 526-527).
>
> A contingent liability is one which, by reason of an existing *vinculum juris* between the creditor and the company, may become an enforceable liability on the happening of some future event; a prospective liability is one which, by reason of an existing *vinculum juris* between the creditor and the company, will become an enforceable liability on a future date or on a date determinable by reference to future events (*Du Plessis v Protea Inryteater (Edms) Bpk* 1965 (3) SA 319 (T) at 320; *Gillis-Mason* case *supra* at 528 and cases there cited; *Stonegate Securities Ltd v Gregory*

> [1980] 1 All ER 241 (CA) at 243). By "*vinculum juris*" is meant "a legal obligation which creates a right enforceable in a court of law. It can arise either from contract or delict" (*Holzman v Knights Engineering & Precision Works (Pty) Ltd* 1979 (2) SA 784 (W) at 787 per Nestadt J).
>
> In taking a contingent or prospective liability into account the Court should not treat it as if it were due and payable; it should treat it as it is and as one of the factors affecting its decision as to whether or not the company is unable to pay its debts (*Barclays Bank (D C & O) v Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C) at 949-950)."

From this commentary it appears that the Applicant's members are either contingent or prospective creditors. The wages or salaries due to the individual employees of the first Respondent are payable in terms of contracts of employment but the obligation to pay wages arises each day that the services are rendered during the subsistence of the contract of employment during the course of judicial management. Employees are therefore creditors referred to even in s 435(1)(a). This was decided by Melunsky J in CHEMICAL WORKERS INDUSTRIAL UNION AND OTHERS v THE MASTER 1997 (2) SA 442 (ECD) at 448 F-H as follows:

> " In my opinion, however, the question to be decided in this case does not depend on what Van Winsen AJP intended to convey by the phrase '*prima facie*'. Despite the use of those words it is necessary for me to decide whether s 435(1)(a) refers only to liabilities which arise out of contracts entered into by the judicial manager in the course of borrowing moneys or acquiring goods or services on credit. There are obviously many liabilities which are incurred by the judicial manager in the conduct of the company's business which arise out of contracts entered into before the judicial management. Examples of these include the rent

> for premises occupied by the company, instalments in respect of instalment sales agreements and hire charges in respect of plant and machinery. Wages or salaries due to employees fall into the same category. The wages due to the individual applicants in this case were payable in terms of contracts of employment concluded prior to the judicial management but the obligation to pay wages (as in the case of other employees who worked for the company and were paid) arose each day that the services were tendered while the contracts of employment remained in existence during the course of judicial management. The judicial manager's obligation to pay wages was an obligation to pay one of the ordinary running expenses of Plaschem's business. It does not differ in principle from Plaschem's obligation to pay rental or electricity charges or telephone expenses."

Having regard to sections 345(2), 346(b), 435(1) and the above authorities, I have no doubt that broadly speaking the Applicant's members are creditors. They do not only become creditors when the company is under liquidation. The criterion and principle are the same.

Which creditors have to approve the business plan and turnaround strategy?

[16] It is important that a purposive interpretation be given to the Order so that its underlying intention can be made out. It would not be enough to give the words used in the Order their ordinary meaning and conclude that whatever they say at face value is the true meaning of the Order. Instead of adopting such a simplistic approach, this Court needs to also have regard to the basis for bringing this application, as set out in the Affidavits, and arrive at the meaning of the Order which is consistent with the basis for the Order as well as the law.

[17] The Affidavit of Martin John Kuscus, the MEC for Finance and

Economic Affairs, which was used in support of the application for the final judicial management order does shed some light on which creditors were intended to approve the business plan and turnaround strategy. Paragraphs 34, 35 and 36 thereof read as follows:

> " 34. In anticipation of the launching of this application I have consulted with the **major creditors** and the representatives of the management **and staff** employed by the respondent.
>
> 35. On Monday, 8 February 1999, I travelled to Johannesburg to hold a further meeting with the representatives of the various **banks which are creditors of the respondent**. At the meeting a consensus emerged that it would indeed be in the best interests of the creditors and the respondent to move ahead with this application as a matter of urgency. All of the banks support the concept of a judicial management for the respondent.
>
> 36. Later on Monday, 8 February 1999 I met in Johannesburg with the representative of the **trade unions whose members form the majority of the staff** of the respondent.
>
> The purpose of this meeting was to inform the unions of the applicant's intentions and **to explain the ramifications and impact of the judicial management on the security of tenure of their members on the staff** of the respondent.
>
> This meeting likewise ended on the basis that the unions support this application and their representatives have requested that they be kept informed of all developments in this matter. The applicant is prepared to comply with this request in the interests of fostering good labour relations."
> (My emphasis)

[18] Kuscus draws a distinction between creditors (sometimes referred to as major creditors), management and staff. He makes it clear that the banks are the creditors of the first

Respondent whose support he needed for the purpose of the application for judicial management. He also refers to meetings he had with representatives of trade unions whose members form the majority of the staff of the first Respondent. At no stage does he refer to employees as creditors and there is therefore nothing in his affidavit to suggest that it was within his and other stakeholders or the Court's contemplation that employees were major creditors who were consulted in their capacity not just as staff but also as creditors. It appears, therefore, that unless otherwise expressly stated in the Order, the word creditors should be understood to mean the financial institutions who are the major creditors of the company.

[19] Mr Bredenkamp, for the Respondents, submitted that regard must be had to the issues listed under paragraph 2.10, which must be dealt with in the business plan and turnaround strategy, in order to establish whether or not firstly they are of such a nature that the Applicant's members would also be expected to approve them and secondly whether the general nature of the material information to be incorporated in the business plan and turnaround strategy leaves some room for the suggestion that retrenchment must of necessity be part of the plan and strategy. Paragraph 2.10 reads thus:

> " 2.10 that the final judicial managers formulate a proposed business plan and turnaround strategy in the form of a written report to be submitted to the applicant and the creditors for the approval within 30 (Thirty) days of this Order incorporating, *inter alia*, all material information regarding the following:
>
> 2.10.1 detailed cash flows, budgets and forecasts;

2.10.2 a detailed assessment of the asset base of the respondent, including but not limited to, proposals for the sale or other realisation of such assets, the timing thereof and the distribution of the proceeds amongst the creditors of the respondent;
2.10.3 a detailed enumeration of the creditors and the amount of their claims against the respondent and the security in respect thereof and the proposed settlement thereof;
2.10.4 proposals for senior and executive management;
2.10.5 proposals regarding the future role of the respondent, the proposed sources of funding for the respondent's continued operations and the anticipated profitability thereof;
2.10.6 proposals concerning any new debt to be raised or security to be offered;"

[20] I agree with Mr Bredenkamp that the overall tone and nature of paragraph 2.10 suggests that the material information to be incorporated in the business plan and turnaround strategy would be of relevance and direct interest to the financial institutions and the first Respondent's shareholders. They can reasonably be expected to have something to offer in the discussions relating to these issues. These issues are the primary area of interest of banks and shareholders and, therefore, must be discussed with such stakeholders and not employees of a company. Furthermore subparagraph 2.10.3 does give a hint as to who are the creditors, referred to in the first paragraph of 2.10, who have to approve the business plan and turnaround strategy.

[21] Paragraph 2.11 of the Order does allude to the type of creditors who are intended to have a say in the approval of the business plan and turnaround strategy. It in fact overlaps with subparagraph 2.10.3 mentioned above. Paragraph 2.11 reads thus:

"2.11 that in the event that the judicial managers

> are unable reasonably to comply with the provisions of 2.10 above in any way, they shall furnish detailed written reasons in the said report of the said non-compliance and stipulate a period within which they will be able to comply;
>
> if the applicant and/or creditors representing 75% in value of all proved claims advise the judicial managers in writing that they do not accept the said reasons or the said period, the judicial managers shall be obliged to apply to this Court for an Order extending the said period of 30 (Thirty) days to the extent which they consider to be necessary;"

Applicant's members are not on the list referred to in subparagraph 2.10.3 and they are, therefore, not in a position to say what the value of their proved claims is. Accordingly, they are not the kind of creditors who represent any percentage 'in value of all proved claims' who would be entitled to consider and decide on extending or not extending the period within which the judicial managers have to comply with 2.10 of the Order. If they are not creditors with proved claims then it follows, in terms of the language of the Order, that they have no say in the decision-making relating to the business plan and turnaround strategy. The Applicant's members therefore do not have a right to approve or disapprove of the business plan and turnaround strategy.

[22] Notwithstanding the above observations, it appears that the first Respondent does recognise that the Applicant's members are some sort of creditors as appears from paragraph 2.12 as set out hereunder:

> "2.12 that the final judicial managers hold fortnightly meetings with the applicant and the respondent's creditors (including SACCAWU in so far as it represents certain creditors) on Tuesdays at 15h00 at the respondent's premises in Sandton at which written reports of the final judicial managers will be tabled dealing with the matters and providing such detail as is agreed at the first of such meetings;"

However, there is a distinction between this meeting and the meeting envisaged by paragraph 2.10. The meeting referred to in paragraph 2.10 relates to the approval of a business plan and turnaround strategy which approval has to be given within thirty days of the Order. In the event of the approval not being secured within that period then paragraph 2.11 creates a mechanism and procedure for the extension of the thirty day period. As soon as the business plan and turnaround strategy have been approved, then there would be nothing further to discuss about paragraph 2.10. There would therefore be no further meetings about the approval or otherwise of a business plan and turnaround strategy since such approval would have been obtained already. All that would be left for the judicial managers to do would be to manage the affairs of the first Respondent subject to the approved business plan and turnaround strategy.

[23] In view of the aforegoing, paragraph 2.13 must have been intended to serve a purpose which is altogether different from that served by 2.10 read with 2.11. Paragraph 36 of Martin Kuscus's affidavit does shed light on the purpose intended to be served by paragraph 2.12. When the MEC consulted with

the unions they supported the application for final judicial management and 'their representatives . . . requested that they be kept informed of all developments in this matter.' He went on to say that Government was prepared to comply with that request 'in the interests of fostering good labour relations.' Paragraph 2.12 relates to a meeting which has to be held fortnightly where reports would be tabled for discussion. The order does not stipulate what kind of issues have to be discussed in such meetings let alone that some approval would be sought within some stringent time frames. These meetings are more in the nature of briefing and discussion sessions. It is in respect of these meetings that the Applicant is mentioned for the first time. This paragraph accords with the substance of paragraph 36 of Martin Kuscus's affidavit. It relates to meetings which would be convened, not for the purpose of addressing a particular issue, but for the purpose of keeping all the stakeholders abreast of the developments. The Applicant is expressly mentioned not because it is a creditor who has a right to approve the business plan and turnaround strategy, but because a request was made on its behalf that it be kept informed of all developments and Government, the sole shareholder, agreed to do so in the interests of good labour relations.

[24] Paragraph 2.13 puts it beyond doubt that the process and meetings envisaged by paragraphs 2.10 and 2.11 are completely different from those contemplated by 2.12 and 2.13. It serves the same purpose for 2.12 as does 2.11 for 2.10. The procedure it sets out for disagreements in respect of

meetings and issues envisaged by 2.12 is different from the that set out in 2.11. Paragraph 2.13 reads thus:

> "2.13 if agreement cannot be reached with regard to any aspect of the fortnightly report referred to in 2.12 above, all interested parties are given leave to approach this Court for further directions."

The procedure provided for in paragraph 2.13 is far less stringent than that set out in paragraph 2.11. In fact, leave to approach this Court for directions regarding the stakeholders' disagreements relating to the meeting envisaged in 2.12 is granted in advance. This, in my view, suggests that the issues to be discussed in fortnightly meetings are not as taxing, complex and important as those in 2.10 in respect of which creditors with proven substantial claims would have to disagree with the extension of time to make compliance with provisions of paragraph 2.10 possible before this Court may be approached. The fortnightly meetings are in my view open to a myriad of stakeholders with conflicting interests who are, by the nature of the interests they represent and possibly their number, likely to disagree. In sum paragraph 2.10 read with paragraph 2.11 are intended for a special group of creditors and to serve a specific purpose which must be accomplished within predetermined time-frames. On the other hand paragraphs 2.12 and 2.13 relate to meetings which will continue to be held to discuss such operational matters as may affect the interests of all kinds of stakeholders to keep them informed of the latest developments and progress made, for as long as the company is under judicial management. It is an

ongoing process. There is express reference to 2.10 in 2.11. Similarly 2.13 refers to 2.12 but none of them mentions 2.10 at all. The Court Order has clearly drawn a distinction between the approval of a business plan and turnaround strategy where the Applicant is not mentioned at all and fortnightly meetings to which the Applicant must be invited.

[25] I must assume that Hendler J knew that the decision to retrench lies with management. Therefore, when he made the Order, he must have known that it would be contrary to established labour law principles to order expressly or by implication that the company's employees had to approve their own retrenchment.

[26] A proper reading of the Order as a whole suggests that the Applicant's members are creditors but not the kind of creditors who have the right to approve the business plan and turnaround strategy. This conclusion does not, however, end the discussion. It still leaves the question open whether retrenchment must of necessity be part of the business plan and turnaround strategy.

Does retrenchment necessarily have to be part of the business plan and turnaround strategy?

[27] Mr Buirsky submitted that paragraph 2.10 is a material obligation which the judicial managers have. As a result, so goes the argument, anything that is meant to fundamentally turn the company around should of necessity be part of the

business plan and turnaround strategy envisaged by paragraph 2.10. Applicant's further contention is that the judicial managers' authority and power to retrench derives from an approved business plan and turnaround strategy. Since no such approval was ever obtained, they did not have the requisite authority and power as at 31 March 2000 when they purported to retrench the 230 employees. I understood this submission to also mean that the fact that I have found that the employees are not the sort of creditors who have to approve the business plan and turnaround strategy does not preclude the Applicant from raising this issue. Being a creditor of the nature intended by 2.10 is not a prerequisite to being entitled to rely on this point. The Applicant's members have a right not to be adversely affected by a decision taken by someone who does not have the authority to take that decision.

[28] Broadly speaking, a retrenchment would be the result of an effort to either restructure a business with a view to enhancing its profitability or a cost-cutting exercise designed to reduce the overhead expenses in order to gear the company towards a more profitable position. The underlying reason for the retrenchment of employees would invariably be to turn the company around. Therefore, there is substance in Mr Buirsky's submission that generally a large scale retrenchment ought to be part of a business plan and turnaround strategy. It is therefore not surprising that retrenchment was part of the draft business plan and turnaround strategy which was submitted to the creditors for discussion although it was not approved. On the other hand there is also merit in Mr Bredenkamp's

submission that the terms of the Order, in particular the material information to be incorporated in the business plan and turnaround strategy, must be closely examined in order to establish whether the material information set out in paragraph 2.10 is so similar in nature to retrenchment that retrenchment was by analogy intended to be part of the material information and therefore part of the business plan and turnaround strategy. Be that as it may, we must examine the terms of the Order itself in order to establish whether it provides some basis for the Applicant's contention. It would be improper to decide this question on the basis of these considerations in disregard of the terms of the Order.

[29] Paragraph 2.10 sets out the material information which must be contained in the business plan and turnaround strategy. The material information to be incorporated relate to (i) 2.10.1 - detailed cash flows, budgets and forecasts; (ii) 2.10.2 - assessment of the asset base and proposal for the sale and distribution of the assets to creditors; (iii) 2.10.3 - enumeration of creditors and their claims; (iv) 2.10.4 - proposals for management; (v) 2.10.5 - proposals on the future role of the company, funding and anticipated profitability; and (vi) 2.10.5 - proposals on any new debt to be raised or security to be offered. Retrenchment is neither expressly included nor excluded. The nature of the material information required to be incorporated does not necessarily suggest that retrenchment be included in the plan and strategy. It relates more to assets, debts, funding and profitability. All these issues are fundamental to the judicial management position in

which the first Respondent finds itself. They are patently of interest to the banks in that they have a direct and obvious impact on the major creditors' interests. They are essentially all about money.

[30] The nature of the issues intended to be incorporated in the plan and strategy and the fact that retrenchment is not even remotely suggested in paragraph 2.10, have led me to the conclusion that retrenchment does not have to be part of the business plan and turnaround strategy.

If retrenchment has to be part of the plan and strategy, are they severable?

[31] This is an alternative approach based on the possibility that I may be wrong in my conclusion that retrenchment does not of necessity have to be part of the business plan and turnaround strategy. As I said above, a business plan and a turnaround strategy are jointly a master plan for the revitalisation of an ailing company in order to turn it into a viable and sustainable concern on a short and long term basis. I do not think that such a plan and strategy is necessarily intended to cater for every significant development which falls within the purview of the judicial managers' powers. However, the retrenchment of about 70% of the workforce is not just an insignificant operational matter which happens daily. It is an important process which does have a bearing on the interests of the creditors which the judicial managers may not implement if the major creditors are opposed to it. The major creditors and shareholders must at least be informed and their attitude must

be taken seriously.

[32] A proper starting point would, in my view, be to recognise that as a general principle and subject to consultations with the employees, the decision to retrench is a managerial prerogative. (See ATLANTIS DIESEL ENGINES (PTY) LTD v NATIONAL UNION OF METAL WORKERS OF SA (1994) 15 ILJ 1247 (A)). Management always have the power to retrench whenever circumstances so demand. Mr Buirsky, however, submitted that such a principle would not apply as is to a company which is under judicial management since judicial management is a special kind of management to which a number of conditions are attached such as paragraphs 2.8 and 2.10 of the Order.

[33] It is advisable that retrenchment be part of the plan and the strategy. However, I do not think that the plan and strategy depend on the inclusion of retrenchment for their existence. Therefore, even if I have wrongly concluded that retrenchment does not of necessity have to be part of the plan the two are severable. Retrenchment would be only one of the many important facets of the plan and strategy. Furthermore, it is important to remember that the judicial managers are charged with the management of the first Respondent and that they are vested with the powers of the directors of the first Respondent. Paragraph 2.8 of the Order reads that:

> ". . . the final judicial managers conduct such management subject to the orders of the Court and paragraph 2.10 below, in such a manner as they may deem most economic and most promotive of

> the interests of the members and creditors of the respondent;"

A proper interpretation of this paragraph reveals that to the extent that conditions are imposed on the judicial managers by the Order and paragraph 2.10, the judicial managers are bound to have regard to them in their management of the first Respondent. In other words the observance of the terms and conditions of the Order and paragraph 2.10 is not optional but obligatory. Be that as it may, the judicial managers' managerial powers were not suspended from the time of the Order pending the approval of the business plan and turnaround strategy. They have always had the power to retrench redundant employees for as long as they believe that circumstances dictate that such a step be taken. This means that even if retrenchment may have been intended to be dealt with as part of the business plan and turnaround strategy, retrenchment would not be kept in abeyance until a much broader plan and strategy about the future of the first Respondent has been approved even if it has become extremely necessary and urgent that employees be retrenched. In my view, it would still be open to the judicial managers to kick-start a retrenchment process for as long as it does no violence to the terms of the Order and they deem retrenchment to be most economic and most promotive of the interests of the members and creditors of the first Respondent.

[34] As I said above, there is nothing in paragraph 2.10 to suggest that retrenchment must of necessity be part of the business plan and turnaround strategy. However, it is clearly desirable

that in the absence of any emergency or an unexpected turn of events necessitating urgent retrenchment, retrenchment ought to be discussed and approved by the major creditors before it is implemented. I am satisfied that there is nothing in the Order to suggest that neither retrenchment nor any of the issues expressly listed in paragraph 2.10 may be dealt with individually, even under exceptional circumstances, in a situation where they all have to be part of the plan and strategy. The implementation of retrenchment would, in such circumstances, depend on whether the creditors are opposed to it or not.

[35] Even if I am wrong in my finding that retrenchment does not of necessity have to be part of the plan and strategy, and that in any event they are severable there is nothing preventing the judicial managers from retrenching employees if the major creditors and the sole shareholder either support retrenchment or are not opposed to it as in this case. Ms B.E.E. Molewa, now the MEC responsible for Economic Affairs in this Province, has indicated at least twice that the creditors and the sole shareholder are not opposed to retrenchment in principle. Reservations were only expressed about the way the process was conducted.

The major creditors were all cited but they did not oppose the retrenchment. Surely if the Applicants knew of any major creditor who is opposed to the process they would have obtained its/her/his affidavit. It is safe to accept that they all approve of it. I do not think that parties have to be so technical

as to insist on the niceties of a formal and written approval at one meeting of the creditors.

At the risk of repeating myself unduly, there is nothing to suggest that, for example, the judicial managers cannot finalise the list of creditors and the nature and extent of their claims and submit it to the creditors or ask the creditors to deal with the debt they seek to create and table it before the creditors if an urgent need has arisen, just because a business plan and turnaround strategy have not yet been finalised. Management was never put on hold pending the approval of the plan and strategy. Therefore the judicial managers were perfectly within their rights in retrenching the employees.

Government, the sole shareholder, had suddenly stopped funding the first Respondent and that fact spurred the judicial managers into action. They had to retrench and they did because they considered such a step to be most economic and most promotive of the interests of the creditors. Such consideration is paramount in so far as a company either under liquidation or judicial management is concerned.

INTERDICT

[36] Paragraph 3.3 of the Notice of Motion would, if granted, have the effect of finally restraining the first to fourth Respondents from proceeding with the current retrenchment process. The requirements for a final interdict are the following:

[36.1] A clear right;

[36.2] An injury committed or reasonably apprehended;

[36.3] The absence of similar protection by any other ordinary remedy.

[37] In order for the Applicant to be granted the final interdict it must satisfy all of the above requisites. It is thus necessary to examine them in order to determine whether they have been met.

[37.1] I understood Mr Buirsky's submission in this connection to be that (i) the Applicant's members have a right, in their capacity as creditors of the first Respondent, to approve the business plan and turnaround strategy; and (ii) a large scale retrenchment ought to have been incorporated in the plan and strategy and since the plan and the strategy have not been approved, the judicial managers do not have the power to retrench its members since such authority would only derive from an approved business plan and turnaround strategy. Therefore, said Mr Buirsky, the retrenchment of the Applicant's members by the judicial managers constitutes an injury to a clear right which the Applicant's members have to approve the plan and strategy. In other words, the implementation of the retrenchment would forever

take away the employees' right to approve of the plan and the strategy.

[37.2] I have already expressed my views on the question whether employees are the creditors referred to in paragraph 2.10. My conclusion was that they are not. I have also concluded that it would have been desirable to have retrenchment as part of the business plan and turnaround strategy but that it was not obligatory. The only remaining right of the employees which is affected by their retrenchment is the right to their jobs. However, that right is not absolute. It may be lawfully interfered with by way of dismissal or retrenchment. In the exercise of their managerial powers and prerogatives, the judicial managers have decided to retrench.

[37.3] To the extent that the judicial managers may have retrenched the employees in circumstances where they were not entitled to do so in terms of the labour laws, the Applicant is free to approach the relevant labour fora (CCMA, Labour Court, Labour Appeal Court) to protect its members' rights. It is not for this Court to pronounce on the fairness or otherwise of the retrenchment. That is an issue in respect of which the Labour Court has exclusive jurisdiction. The Applicant was granted leave to pursue its options in the labour fora and it, therefore, has another adequate remedy.

[37.4] I am therefore satisfied that the Applicant has not made out a case for a final interdict to be granted.

COSTS

[38] Applicant has been partially successful to the extent that it was granted leave to approach the relevant labour dispute resolution fora. On the other hand the Respondents have also been successful in that they successfully opposed the granting of the most important prayers. The question then arises as to what is the appropriate order for costs to make.

[39] Section 428 of the Act enjoins the Applicant to approach this Court for leave to bring any proceedings or action against the first Respondent. This section must be read with paragraph 2.7 of the Order. Therefore, the Applicant did not have any choice but to approach this Court for leave to approach the CCMA and the Labour Court. The question is, why then should the Applicant have to pay costs for doing something that it had no choice about? The Respondents' submission in this connection was that they would have given the Applicant their consent to approach this Court had the Applicant confined its case to leave to approach the CCMA and the Labour Court. The Applicant would still have to approach this Court, so say the Respondents, but the Respondents would not have opposed that application. The result would have been that the Respondents would not have incurred any costs at all. The reason why the Respondents decided to oppose this application

is that the Applicant also asks for more than just leave to approach those fora. It is common cause that the Applicant never approached the Respondents to find out what their attitude to an application for leave to approach the CCMA and the Labour Court would be. The fact that the Respondents were warned of this application sometime before it was launched did not relieve the Applicant of the responsibility to pertinently ask the Respondents if they would appose the application for leave. There was, therefore, no duty on the Respondents to volunteer their attitude to the application for leave. Besides the Applicant wants a lot more than just leave.

[40] Applicant did not, therefore, achieve any real success in this matter. It obtained an order which was not opposed and would not have been opposed had it not been coupled with objectionable prayers. The successful litigants in the true sense are the Respondents. It is for this reason that I ordered costs against the Applicants.

M.T.R. MOGOENG

JUDGE OF THE HIGH COURT

DATE OF HEARING : 20 MAY 2000
DATE OF JUDGMENT : 05 JUNE 2000

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