Air Products (Pty) Ltd v CWIU & another

Labour Appeal Court, Johannesburg

Judgment Date: 12/12/1997 *Case No:* JA37/97

Before: Myburgh JP, Froneman DJP at Conradie, Judges of Appeal

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Appeal in terms of section 17(21A)(a) of the 1956 Act

Dismissal – Operational reasons – Employer not obliged to consult with employee or his union before transferring him from one department to another, even if reason for transfer a redundancy in one department.

Misconduct – Insubordination – Refusal to obey instruction to transfer – Such amounting to gross insubordination where only reason is employee's desire to avoid night shifts.

Transfer – Transfer from one plant to another not amounting to unilateral amendment to terms of employment when job employee is required to do remains the same – That transfer entails working night shifts not done in first plant irrelevant.

Unilateral amendment of terms and conditions of employment – Internal transfer from one plant to another not amounting to unilateral change when work employee is required to do remains the same – That transfer entails working night shifts not done in first plant irrelevant.

Judgment

Myburgh JP: The second respondent, Mr. MJ Mmadi, was dismissed by the appellant ("the Company") on 23 May 1996 for gross insubordination for refusing to carry out an instruction.

Represented by the first respondent ("the union") Mmadi sought a determination from the Industrial Court that his dismissal was substantively and procedurally unfair. The Industrial Court found that the instruction was reasonable and valid; that Mmadi's refusal to obey the instruction constituted misconduct; that dismissal was not the appropriate sanction; and that the dismissal was procedurally unfair (in that the company failed to consider any mitigating factors before taking the decision to dismiss).

Mmadi commenced employment with the company as a temporary worker on 22 May 1989. On 4 September 1989 he was given permanent status. In July 1990 he was promoted from doing general duties to being an operator. Until June 1995 he was employed at the high pressure fill plant ("hp plant"). He worked day shift one week followed by night shift the following week. In July 1995 Mmadi was transferred to the cylinder test plant, which is situated about 80 metres from the hp plant on the same premises. He continued to work day and night shifts, alternating weekly. Commencing the week after 17 April 1996, the work load at the cylinder test plant decreased to such an extent that it was not necessary to have a night shift. The two employees on night shift joined the two employees on day shift.

After about two weeks the company formed the view that it did not need four employees on the day shift at the cylinder test plant but that the work load at the hp plant had increased sufficiently to justify the employment of an extra person at the hp plant. The company took the decision that as Mmadi was the longest serving grade four operator and because he had previous experience at the hp plant, he should be transferred to the hp plant. At the hp plant he would again be required to work day and night shifts.

On 9 May 1996 Mmadi was called to a meeting with Mr. MD Hellyer, the facilities manager, and Mr. IM de Waal, the production manager at the hp plant. Hellyer was the senior manager on site. Hellyer informed Mmadi of the decision to transfer him from the one plant to another and motivated the decision. A note of what transpired at the meeting reads, in part:

> "MH explain the reasons for the decision to transfer J Mmadi as an operator in the cylinder test facility to the hp plant as an hp fill operator as follows:
>
> 1. The back of log of cylinders out of test was dramatically reduced from 8 500 to approximately 1 000 cylinders.
> 2. As a result of the reduction of these cylinders it is no longer necessary to run two shifts. The night shift has been eliminated, and we are currently working the day shift consisting of four people. The current work load does not justify the amount of people in this plant. After calculating the number of cylinders coming out of test in the next three years, we are confident that three people on a normal day shift will be sufficient to cope with the work load.
> 3. We are currently experiencing various problems in the hp full plant due to the increased demand by our customers. There are currently two shifts in this operation, consisting of a senior operator, operator and two general duty men. We also have CO_2 operator that works day shift only. With all the problems in the hp plant, we have decided that it will be in the best interest of the company to transfer J Mmadi from cylinder testing where the work load does not justify the labour to the hp plant where the additional labour can be used more productively. This will also relieve a lot of pressure off the people currently working in the hp plant."

Mmadi informed management that he did not wish to take the transfer as he wanted to continue to work day shift only. He was asked to explain his problem with working night shift. He said that he had "… a problem in the location … it is a private matter". Hellyer and De Waal adopted the attitude that unless Mmadi was forthcoming with an acceptable explanation he would be required to commence work at the hp plant on 13 May, four days later. He failed to do so.

On the following day, 10 May, a meeting was held between management, represented by Hellyer and De Waal and the four hp plant employees, ie Mmadi, and Messrs M Mphela, G Makgati and S Moja. The company again motivated the transfer of Mmadi form the cylinder test plant to the hp plant. Moja informed management that Mmadi was not willing to work night shift and that he felt that he had been instructed to report to the hp plant whereas he should have been requested to do so. Hellyer indicated that Mmadi had still not given the company a valid reason for not carrying out the instruction. Mmadi then informed management that he wished to be retrenched rather than to work at the hp plant. Hellyer explained that the company was bound by a provision in the wage agreement not to effect any retrenchments. The meeting adjourned to enable Hellyer to consult with Mr. NE Quillam, the human resources manager. After consulting Quillam, Hellyer returned to the meeting with Quillam's advice that the company was bound to honour the terms of the wage agreement. Hellyer handed Mmadi a written instruction to report at the hp plant on 13 May. The document contained the company's motivation for the transfer.

On 13 May Mmadi refused to report to the hp plant.

A meeting was held between Hellyer, Quillam and De Waal, on the one hand, and Mmadi and Messrs H Matshela and O Huto. Matsehal was a shop steward of the union. Mmadi said he wanted a union organiser to be present. The company refused his request, taking the position that the company had the right to transfer an employee; that Mmadi would remain a grade 4 operator; and that the company did not intend to retrench Mmadi. Mmadi persisted in his refusal to wok at the hp plant. The meeting ended with an agreement that Mmadi could take off work to consult his union and that a meeting between management and the union would be arranged within a day or two (while Mmadi was "off site").

On the following day the union addressed a telefax to the company in which it was stated:

> "On the 13/5/96 [Mmadi] was forced by yourself to clock-out, without the prospect of payment, which to us amounts to a constructive dismissal. We accordingly demand that, and we shall inform him so, he return to his normal working station to perform his duties at the beginning on the 15/5/96. We further demand that he paid the wages lost a result of him being forced to clock-out on the 13/5/96.
>
> We propose to meet with yourselves on the 20/5/96 at 15h00 to try and resolve the matter and that until we have meant to discuss the matter and reach finality, he remain at cylinder testing where he is currently working."

On the same day, in a telefax prepared by Quillam, the response of the company was:

> "Mr. Mmadi refused to take up his new position without providing any reason, and demand to meet with you. I agreed to this, but it meant that he would have to leave the plant. It is ridiculous to expect the company to pay him while he visits your offices. The agreement that he would meet with you and arrange and urgent meeting between ourselves to discuss the serious matter of Mr. Mmadi refusing to obey instruction, and his subsequent, unilateral withdrawal of his service. He was to return to the plant once had met with you. This he did not do.
>
> You have no right to give Mr. Mmadi 'time off', until 15 May 1996 to return to the plant, and we demand that he returns to work immediately to take up his position at HP fill. Should he continue to refuse to take up his position he is in breach of contract, and he is accordingly, not entitled to payment. Only in the event of Mr. Mmadi taking up his position in HP fill will we be available to meet with you on 20 May 1996 at 15:00.
>
> Until such time as Mr. Mmadi takes up this position, we are faced with an urgent problem which needs to be addressed immediately.
>
> Accordingly, we look forward to your confirmation that Mr. Mmadi will take up his position of HP fill in which case we can meet on 20 May 1006, or alternatively, he does not take up his new position, in which case we should meet as soon as possible. We propose that you make yourself available as a matter of urgency."

On 15 May Mmadi reported to work at the cylinder test plant – not the hp plant – and was accordingly given written notification to attend a disciplinary enquiry on 17 may for "failure to carry out a lawful instruction". He was suspended on "full benefits".

On the same day Mmadi was informed in writing that if he changed his mind before 17 May and reported to the hp plant, he should contact Hellyer or De Waal.

On 18 May Mr. LL Sibidi, a union organiser, sent a telefax to the company in which he complained that the company "… did not discuss with ourselves that [Mmadi] will be transferred to another position". Sibidi repeated the request for a meeting with the company on 20 May.

On 20 May Mmadi arrived at the company's premises to attend the meeting, but Sibidi did not. The meeting did not take place. Matshela informed Mmadi that he disciplinary enquiry was to take place the next day.

On 21 May Mmadi did not attend the disciplinary enquiry. The enquiry was chaired by Mr. Kirkley. Kirkley reserved judgment until 23 May, when Mmadi was dismissed.

On appeal it was submitted by Mr. Bruinders, on behalf of the respondents, that the dismissal was substantively unfair for two reasons:

a) The transfer of Mmadi from the cylinder test plant to the hp plant constituted an amendment to the terms of the contract of employment which was effected unilaterally as the company failed to negotiate the amendment with Mmadi or his trade union (Mauchle (Pty) Ltd t/a Precision Tools v National Union of Metalworkers of South Africa (1995) 16 ILJ 349 (LAC) at 357 D).

b) The company failed to meet the obligation to consult with Mmadi's trade union, an obligation which existed, so it was submitted. "… where that union's member employed by such employer is declared redundant" (Chemical Workers Industrial Union ao v Sopelog CC (1994) 15 ILJ 90 (LAC); Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa (1994) 15 ILJ 1247 (A) at 1252 F-H).

The transfer of Mmadi from the cylinder test plant to the ph plant did not constitute an amendment to Mmadi's contract of employment. It was not an express, implied or tacit terms of the contract of employment that he would work only at the cylinder test plant. He was employed as an operator. He worked in that capacity at the hp plant for almost six years (from September 1989 to June 1995) before being transferred to the cylinder test plant. From July 1995 to May 1996, less than a year, he worked as an operator at the cylinder test plant, doing the same work he had done at the hp plant. The only difference between the one job and the other was that at the hp plant he was required to work night shift every second week, whereas at the cylinder test plant he was required to work day shift only. His job, however, did not change (see Manchie's case at 357 F – 358 B).

The submission that he company was obliged to consult with the union is based on the assumption of fact that Mauchle, the union's member, was declared redundant.

It is true that an employer is obliged to consult with a trade union before taking a decision to retrench its employees, who are members of the union. In the Atlantis Diesel Engines case, Smalberger JA stated at 1252E-G: "It seems to me that the duty to consult arises, as a general rule, both in logic and in law, when an employer, having foreseen the need for it, contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; and appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure. Once that stage has been reached, consultation with employees or their union representatives becomes an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable."

The need to consult before a final decision to retrench is taken was said by Smalberger JA at 1252I – 1253B to be rooted in pragmatism and principle:

> "It is rooted in pragmatism because the main objective must be to avoid retrenchments altogether, alternatively, to reduce the number of dismissal and mitigate their consequences. Consultation provides employees or their union(s) with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or, if such need is accepted, the extent and implementation of the retrenchment process. It satisfies principle because it gives effect to the desire of employees who may be affected to be heard, and helps serve the underlying policy of the Act – to avoid or at least minimise industrial conflict. Where retrenchment looms employees face the daunting prospect of losing their employment through no fault of their own. This can have

> serious consequences and threaten industrial peace. Proper consultation minimises resentment and promotes greater harmony in the workplace."

On the facts of this case the company never intended to retrench Mmadi. The unchallenged evidence of De Waal, the production manager of the hp plant, was that there was no need for retrenchment; he never considered retrenchment; by transferring Mmadi to the hp plant he would "… alleviate a lot of pressure [on] the other guys working there"; and there been no moratorium on retrenchments, he would not have considered retrenching Mmadi "… because we could accommodate him the hp fill plant."

De Waal's evidence was consistent with what Hellyer told Mmadi at the meeting of 9 May 1996, save that Hellyer in addition referred to the moratorium in these terms, as recorded in the note of the meeting: "There is currently a collective agreement whereby a moratorium is placed on retrenchment. The company has done everything in its power to accommodate J Mmadi by creating this new position in the hp plant".

It is, in my view, of no moment that the company regarded Mmadi's post at the cylinder testing plant to be redundant and that it created a post for him at the hp plant. The fact is that the company did not contemplate retrenching Mmadi: his services were no longer needed in one division of the company (the cylinder test plant) whereas they were needed at another division (the hp plant). Absent the foreseeablity of retrenchment, the company was under no obligation to consult the union prior to taking the decision to transfer Mmadi.

The transfer of Mmadi from the cylinder test plant to the hp plant did amount to a change in working conditions to his potential prejudice in the sense that he would be required to work night shift every second week at the hp plant whereas at the cylinder test plant he did not have to work night shift at all.

What was required of the company in those circumstances, as a matter of fairness and sound industrial relations practice, was to attempt to persuade Mmadi to co-operate and to accept the change in working conditions: of Mauchle's case at 359 C-D. The company did so after taking the decision to transfer Mmadi but before the instruction had to be carried out. At the meetings of 9 and 10 May the company gave Mmadi the opportunity to give a valid reason for not accepting the transfer. The company indicated that it would reconsider its decision if Mmadi provided a valid reason. This is what is recorded happened at the meeting of 9 May 1996:

> "JM: I do not wish to go there, as I have a problem in the location.
>
> MH: Please explain your problem to us, as we cannot take it into consideration if we do not know the cause of this problem you are experiencing.
>
> JM: It is a private matter and I have to go here and there in the location.
>
> MH: You are making it very difficult. It you do not inform us of the problem you are experiencing, we cannot take it into consideration……"
>
> (JM was Mmadi and MH was Hellyer.)

At the meeting of 10 May 1996 Hellyer again said that "J Mmadi could not give any valid reason for the company to reconsider their decision to relocate him to the hp plant."

The company did not issue the instruction on 9 May without attempting to persuade Mmadi to accept the transfer. What troubled the company, obliviously, was that until two weeks before Mmadi had worked day and night shift for about seven and a half years without objection and he was unable to motivate his refusal to revert to that shift system. Had he done so satisfactorily, the company would have reconsidered its decision to transfer. But at not time prior to his dismissal did Mmadi justify his refusal.

On 13 May and thereafter the company did not act precipitously. Mmadi was given time off to consult the union, to reconsider his position, and to arrange a meeting between the company and the union. He took time off. He consulted the union. He returned on 15 May but persisted in his refusal to carry out the instruction without justifying his refusal. The meeting which was proposed for 20 May, before the commencement of the disciplinary enquiry, did not take place as the union organiser did not arrive at the company's premises.

Thereafter Mmadi failed to co-operate in any way with the holding of the disciplinary enquiry.

Mmadi's attitude throughout the period 9 to 21 May was one of gross insubordination.

The company had a valid reason to dismiss him.

The Industrial Court found that the dismissal was procedurally unfair on the basis that the chairman of the disciplinary enquiry had not considered any mitigating factors. There was no evidence to justify the finding. The chairman of the disciplinary enquiry, Kirkley, had emigrated to New Zealand at the time of the Industrial Court hearing and was unavailable to the company. It does not follow that because Kirkley was not called that he did not consider factors in favour of Mmadi such as his long service and clean disciplinary record.

The appeal is dismissed. The determination of the Industrial Court is altered to read: "The application is dismissed". It is in accordance with the requirements of the law and fairness that no order as to costs be made.

(Conradie JA concurred in the judgment of Myburgh JP.)

Froneman DJP: This is a dissenting judgment. I have had the benefit of reading the majority judgment written by Myburgh JP, but, unfortunately, I am unable to agree with its reasoning and findings. Broadly speaking there are three areas where we differ. The first concerns a different emphasis on the significance of certain facts. The second is that in my respectful view the majority is inconsistent in the application of their own view of the law to the facts. Lastly, in my view of the law also differs from that expressed in the majority judgment. In what follows I shall attempt to set out my views on these matters in a succinct and understandable manner.

The facts

The second respondent ("Mmadi") was dismissed for his refusal to obey an instruction from the appellant ("the company") to move from on department where he was working to another, after a decision was taken that his post in the former department had become redundant. Both the decision to declare his post redundant and the decision to transfer him were taken by the company without prior consultation with him, his fellow employees or the first respondent ("the union"). These decisions detrimentally affected Mmadi in the sense that he, and not one of the other three employees at the cylinder test plant, had to move to the hp plant. In turn, this meant that he was required to work night shift at the hp plant, something not required at the cylinder test plant.

In my view this constituted a material change to not only his present working conditions but especially to his expectation of future working conditions. It should be kept in mind that it was envisaged that the day shift only system at the cylinder test plant would endure for a substantial period of time. Not having to work at night, even though one might have done so in the past, may indeed be a very powerful attraction in any working situation.

The company confronted Mmadi with its decisions to declare his post redundant and transfer him without any prior warning and at a stage when he was alone, unassisted by fellow employees or union officials. It is expecting too much from him in these circumstances to set out his case for overturning these decisions cogently and persuasively in the short passage of time afforded to him during the first meeting on 9 May 1996. He and his fellow employees at all times thereafter insisted that union assistance to him would be fair and equitable. I agree.

The reasons for not retrenching Mmadi upon his post being declared redundant was stated by the company to be the fact that the collective wage agreement precluded retrenchment. That agreement was negotiated by the union and the clause against retrenchment is clearly one primarily for the benefit of the employees. If one of the employees was prepared to forego that benefit and the parties who concluded the agreement, viz the company and the union, agreed thereto, retrenchment could follow. The agreement was not an absolute bar to retrenchment, as the company insisted it was. Consultation on its particular implementation in this present case with Mmadi and the union was not out of the question.

The purpose for which Mmadi was allowed to contact his union after the meeting on 13 May 1996 was to set up a meeting between Mmadi, Quillam and the union organiser to discuss the issues giving rise to the dispute. Such a meeting was never held: when Mmadi and the union organiser met Quillam on 29 May 1996 they were told by him that Mmadi had been dismissed.

What these facts show, in my view, is that the company had adopted and attitude, after taking the decisions already referred to, which not only initially gave Mmadi insufficient time to respond properly, but which also precluded the company from giving proper consideration to the question of the union's involvement and the case it might have presented on Mmadi's behalf. In doing so is acted prematurely, overhastily and, in my view, unfairly.

Discussion of the legal position

The competence of this Court (established by section 167 of the Labour Relations Act 66 of 1995, "the new Act"), to hear this appeal from the Industrial Court (established by the Labour Relations Act 28 of 1956, "the old Act') is derived from the provisions of sections 1, 2 and 5 of schedule 7 to the new Act. The effect of these provisions is that the case needs to be determined in accordance with the provisions of the old Act, despite the latter's repeal by the new Act. The new Act came into operation on 11 November 1996.

Under the provisions of the old Act the Industrial Court could determine unfair labour practice disputes and could make orders of, inter alia, reinstatement and compensation in respect of these disputes (section 46(9)(c) of the old Act). The Industrial Court's unfair labour practice jurisdiction was a statutory one and did not displace or oust the jurisdiction of the ordinary civil courts to determine disputes arising from the common law contract of employment. Employment relationships were thus governed by two distinct and formally autonomous legal regimes: the one statutory, the other in terms of the common law.

The Industrial Court's unfair labour practice jurisdiction was introduced as a result of the perception that the common law contract of employment could not adequately deal with problems arising from present day employment relationships (of Brassey, Cameron, Cheadle and Olivier The New Labour Law, at 2-9). The co-existence of two systems governing employment relationships, each with it own set of rules and adjudication structures, created its own problems.

What was required in the labour field was the creation and development of a coherent jurisprudence by the Industrial Court under its unfair labour practice jurisdiction that would give employers and employees fairly certain legal guidelines to apply in the employment relationship (of Thompson and Benjamin South African Labour Law, vol 1, A1-52 note 6, A1-62 et seq). Unfortunately a number of factors emerged which made this enterprise rather difficult and, in the view of some, impossible. For the purposes of this discussion it is only necessary to deal with one of those factors, viz the view that the Industrial Court does not determine unfair labour practice disputes according to the dictates of legal principles, but according to a moral assessment of what is fair or not.

The genesis of this rigid distinction between law on the one hand, and fairness on the other, is the decision in Media Worker Association of South Africa and other v Press Corporation of South African Ltd (Perskor) 1992 (4) SA 791 (A); (1992) 13 ILJ 1391 (A) at 798J – 802A (SA)). In that case effect was given to the obvious need to allow expert assessors to take part in the determination of whether a particular labour practice was fair or not in labour appeals under the old Act. This could only be done if such a determination did not amount to a question of law, the determining of which the assessors could not take part in under the old Act. It was held that this determination was not a decision on a question of law:

> "The position then is that the definition of an unfair labour practice entails a determination of the effect or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly enjoined to have regard not only to the law but also o fairness. In my view a decision of the court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions. It follows that the Chairman's prerogative of deciding questions of law … need not stand in the way of the conclusion … that assessors should participate in answering the ultimate question." (at 798H-J (SA)).

The conclusion to be drawn from this approach is that each unfair labour practice case can only be determined on an ad hoc basis and cannot form the basis for developing general legal principles or guidelines.

In National Union of Metalworkers of South Africa v Vetsak Co-op Ltd and others (1996) 17 ILJ 455 (A) at 459D-459A [1] Nienaber JA stated the following:

> "We were invited by counsel to formulate guidelines as to the circumstances in which the dismissal of workers participating in a lawful strike would constitute an unfair labour practice in terms of the Labour Relations Act 28 of 1956 (the LRA). In finding an unfair labour practice the tribunal concerned is expressing a moral or value judgment as to what is fair in all the circumstances … The test is too flexible to be reduced to a fixed set of sub-rules; which is why one is somewhat sceptical of recent attempts by the Labour Appeal Court (the LAC) and academic writers to typify and rank the considerations which are to be factored into a finding of fairness …
>
> The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The first aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them – and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair – and that would depend on the facts of the case. There is no sure correspondence between lawfulness and fairness …"

The logical consequence of this approach is that it is a futile exercise, when determining fairness, to seek guidance from decided cases on matters of principle. For the reasons that I will set out later I do not, with respect, agree that the approach apparent from the excerpts quoted above should still be followed. I am unsure, however, where exactly the majority stands in this regard, because the judgment does refer to and rely on the decisions in Mauchle (Pty) Ld t/a Precision

Tools v National Union of Metalworkers of South Africa (1995) 16 ILJ 349 (LAC); [1995] 4 BLLR 11 (LAC) and Atlantis Diesel Engines v National Union of Metalworkers of South Africa (1994) 15 ILJ 1247 (A); [1995] 1 BLLR 1 (A). In terms of the Vetsak decision these cases did not lay down binding legal principles, or even guidelines. They cannot, therefore, be regarded as binding authority.

Nevertheless, even if they are regarded as such, they do not, in my respectful view, offer support for the majority's conclusion that the company was under no obligation to consult Mmadi or the union prior to taking the decision to declare Mmadi's post redundant and to transfer him.

The Atlantis Diesel Engines case (supra) held that prior consultation with a trade union is necessary on redundancy leading to retrenchment. It did not deal with the situation where the redundancy did not lead to retrenchment, as in the present case. The judgment did not purport to deal with such a situation, nor did it expressly or impliedly restrict the necessity of consultation only to retrenchment cases. Its rationale for requiring consultation, viz that "(p)roper consultation minimizes resentment and promotes greater harmony in the workplace" (at 1253B (ILJ)) would apply not only to operational decisions leading to retrenchment, but also to those decisions which materially affect changes in working conditions, the very stuff that concerns employees and trade unions most intimately.

[1] Also reported at [1996] 6 BLLR 697 (AD) – Ed

In my view the reasoning in the Atlantis Diesel Engines case supports the extension of the requirement of consultation to this kind of situation, rather than the opposite.

The decision on the facts in the Mauchle case in my respectful view also supports a finding that consultation prior to making the decision to declare Mmadi's post redundant and to transfer him was called for. In the matter a decision was made to change the working conditions of employees only after consultation with the union. The change in working conditions did not amount to an amendment or change of the contractual terms of employment, but nevertheless Myburgh J (as he then was) stated the following (at 20D-E (BLLR); 359C-D (ILJ)):

> "As it was not a term of the contracts of employment that an operator was obliged to operate one machine only, there was no requirement in law or fairness for the company to negotiate with the union. What was required of the company, as a matter of fairness and sound industrial relations practice, was to attempt to persuade the applicants to co-operate and to accept the change in practice … When that process failed, the company was entitled to issue the instruction: an instruction which was lawful and reasonable."

On the facts it was found that this had indeed been done. The employer had stated its proposals for the change in working conditions on 3 September 1992. Consultations then took place over a number of days before a decision was made to introduce the change in working conditions on 8 September 1992 (at 14G – 16 C (BLLR); 353B – 355C (ILJ)).

The majority judgment interprets the Mauchle decision as only requiring some form of consultation after the decision to change working conditions is made. With respect, this does not accord, firstly, with the facts of the Mauchle case (where consultation preceded the taking of the decision) and, secondly, it flies in the face of the fairly generally accepted principle that hearing a person's representations before making a decision is, for many reasons, to be preferred to hearing representations only after a decision had already been made (see Atlantis Diesel Engines case (supra) at 1252F-J (ILJ); Mohamedy's v Commercial Catering and Allied Workers Union of SA (1992) 13 (ILJ) 1174 (LAC) at 1179F-H; Attorney-General, Eastern Cape v Blom and others 1988 (4) SA 645 (A) at 668D-E).

Insofar as the majority judgment therefore relies on the existing case law to justify its conclusion, my respectful view is that the case law does not offer the necessary support.

As indicated earlier, however, I do not agree that the approach, based on a strict distinction between law and fairness and the characterization of the finding on fairness as a "moral" or "value" judgment, still needs to be followed.

The historical origin of the need to characterize unfair labour practice determinations as "moral" or "value" judgments, as distinct from issues of fact and law, lay, as mentioned earlier, in the need to allow expert assessors to take part in the determination of whether a particular labour practice was fair or not in labour appeals under the old Act. That particular problem no longer exists, as this Court is a different creature from the labour appeal court under the old Act and assessors take no part in its decisions (see section 167 of the new Act).

Insofar as peculiarities under the old Act necessitated the creation of a third kind issue, viz a "moral" or "value" issue in respect of fairness, in addition to issue in respect of fairness, in addition to issues of fact and of law, they are no longer relevant.

Without the need to accommodate assessors in appeals under the old Act, the case for a threefold distinction between issues of law, issues of fact, and "moral" or "value" issues, becomes less compelling.

The premise underlying the threefold classification of issues into those of fact, those of law and the third category of value or moral issues, is that the nature of determining the first two. This conclusion was reached in the Perskor case (supra) with reliance on jurisprudential analyses of the concepts of questions of law and questions of fact in Salmond on Jurisprudence 12 edition at 65-75 and an article by WA Wilson, A Note on Fact and Law (1963) 26 MLR 609. These analyses seem to proceed from the assumption that issues of fact and of law are determined by the mechanical "finding" of facts and the law, a process which involves no interpretation or discretion on the part of the judge; whilst determining fairness does involve subjective interpretation and the exercise of a subjective discretion.

There is a considerable body of literature which challenges that assumption (cf eg Friedman Legal Theory (1960) at 402; Georgia Warnke Justice and Interpretation (1992) at 4; AJ van der Walt Tradition on Trial: A Critical Analysis of the Civil Law Tradition in South Africa Property Law (1995) 11 South African Journal on Human Rights 169; Ph J Thomas Fin de siecle of Funksionele Romeinse reg? (1997) 60 Tydskrif vir Hedendaagse Romeinshollandse Reg 202). It is, however, unnecessary to enter that jurisdictional debate in order to illustrate that "moral" or "value" judgments are part and parcel of the determination of matters of fact and law as well. Sufficient examples are to be found in our common law.

In delictual matters it is virtually an everyday occurrence that judicial officers make findings on the requirements of unlawfulness and negligence on the basis of assessments, respectively, of reasonableness, according to the boni mores of the community (see Minister van Polisie v Ewels 1975 (3) SA 590 (A)), and of the standard of the reasonable man. These are also imprecise, flexible standards. They also involve "value" judgments on the part of the judicial officers in deciding what is reasonable, or what the standard or conduct of a reasonable man in the particular circumstances of the case would be, and whether the conduct of a party in the case measures up to that standard. That fact has, however, never prevented the acceptance of those decisions as laying down legally binding principles of law on the basis of precedent.

In the concurring judgment of Olivier JA in Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO 1997 (4) SA 302 (A)[2] the concept of bona fides in the law of contract is, with respect, illuminatingly discussed to show that its function was "om gemeenskapsopvattings ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik" (at 319B; see also at 321J – 322E, 323H – 324A and 326G).

[2] Also reported at [1997] 3 AJL SA 391 (A) – Ed.

In critically discussing a dictum of Kotze JA in Weinerlein v Goch Buildings Ltd 1925 AD 282 at 295 Olivier JA states (at 319J – 320A):

> "Die probleem met hierdie stelling is dat dit skyn uit te gaan van 'n statiese, afgeslote sisteem: as billikheid nie reeds as 'n regsreel gepositiveer is nie, cadit quaestio. Beteken dit dat die bona fide beginsel erens in die verlede uitgewerk is en nie in die toekoms tot nuwe regsreels of verwere aanleiding kan gee nie? Hierdie dictum staan vernuwing en aanpassing in die weg en reflekteer dat dit slegs die taak van die howe is om die reg te vind en nie te skep nie, 'n siening wat nie by die gees van ons reg of die behoeftes van ons gemeenskap pas nie."

A rigid distinction between law and fairness is therefore not only perhaps jurisprudentially unsound, or at least disputed, but it does also not accord with the acceptance, in other areas of our common law, that fairness and reasonableness indeed form an inherent part of those areas of the law. When the old Act therefore enjoins the Industrial Court to determine whether a labour practice is fair or not, the criterion of fairness is the only legal criterion, demanded by the statute itself. The inquiry is thus a legal one only. If there was any uncertainty about this previously, the fundamental right to fair labour practices in the Constitution should dispose of any lingering doubts in that regard. The new constitutional dispensation ushered in by, first, the interim Constitution Act 200 of 1993, and now the Constitution of the Republic of South Africa Act 108 of 1996, offers a different background and context within which the provisions of the old Act are to be interpreted and applied. The right of everyone to fair labour practices is now entrenched as a fundamental legal right in the Constitution (sections 23(1) and 27(1) of the final and interim Constitutions respectively) and not only as a function of non-legal considerations of fairness promote the spirit, purport and objects of the fundamental rights in the Constitution (cf Du Plessis v De Klerk 1996 (5) BCLR 658 (CC). Fairness is indeed a flexible and imprecise criterion, but so are many other legal criteria. That in itself does not make it impossible to lay down legal principles or guidelines, it only makes it more difficult than in cases where there are more precise and certain requirements.

An unfair labour practice is defined in section 1 of the old Act as:

> "Any act or omission, other than a strike or lock-out, which has or may have the effect that-
>
> (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudices or jeopardised thereby;
> (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
> (iii) labour unrest is or may be created or promoted thereby;
> (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby".

The factors mentioned in the definition show that fairness should be assessed by having regard to the interests of both employer and employee. These interests are often of a conflicting nature. Nevertheless it is the duty of the courts to balance these competing interests and arrive at a conclusion based on fairness. How is that to be done without falling into the "trap of undue subjectivity" (words used by Didcott J in his concurring judgment in S v Makwanyane and another 1995 (6) BCLR 655 (CC) at 734A)?

I think it should be recognised at the outset that an entirely objective and neutral answer to the problem is not possible. The best one can strive for is to arrive at a conclusion in a rationale and reasoned manner by having regard to the wording of the section itself and the objectives of the old Act, read in the context of our society's transformation to a more egalitarian constitutional democracy. In doing so one should always be wary of clothing one's own preconceptions and prejudices in a supposedly neutral and objective garb.
It has been suggested that the unfair labour practice jurisprudence should be developed in such a manner as to advance the objects of the old Act, viz industrial peace, social justice, individual equity and economic development (Thompson and Benjamin (supra) at A1 – 67 to A1 – 70). The provisions of the Constitution seem to reinforce these objectives. The definition of an unfair labour practice in the old Act also expressly or impliedly supports these objectives.

As far as individual labour matters are concerned the definition embraces two apparently opposing interests: business efficiency and individual equity. It is the weighing up of these two interests which, in practice makes for the hardest cases. This is one of those cases.

The definition in the old Act does not expressly state that the common law contract of employment is to be used as the only starting point for the determination of fairness under the Act. There are sound reasons for being cautious in allowing the terms of the common law contract of employment to dominate the determination of an unfair labour practice issue. Such kind of thinking easily leads to a rigid distinction between law and fairness, which is unjustified where fairness is part and parcel of, or inherent in, in the law itself. Where express contractual terms are agreed upon by the employer and employee it is, generally, fair to insist on compliance with those terms. Where it comes to terms implied by law as naturalia of the contract, however, the same considerations do not always apply.

Terms implied by law are essentially judge-made rules that were made in a different era and which have now solidified into immutable law:

> "The dearth of express terms in employment contracts has given the courts full rein to fashion by means of the implied terms of 'status' of their own choosing for employees. Although the court has frequently stated that the basis of implying terms is the unstated intention of the parties, it is clear that they have manipulated the test in order to create rights and duties that the courts themselves have judged to be appropriate for the 'right' kind of employment relationship." (Christie, England, Cotter, Employment Law in Canada 2 edition at 175.)

Similar comments can be made on the naturalia of our common law contract of employment, fashioned as law by our courts in earlier times.

When the fairness of a particular labour practice is therefore defended on the basis that it is the common law prerogative of the employer, care should be taken to avoid characterising the debate as one of "law" against non-legal considerations of fairness. It is not. The law, in the form of the old Act, requires a legal assessment based on fairness. What therefore needs to be weighed up is the fairness of terms implied by law into the common law contract of employment in a different era and context, as against contemporary notions of fairness in the employment field.

The obligation of an employee to obey the instructions of the employer is seldom an express terms of any contract of employment. It is, in most cases, a term implied by law, said to be fundamental to the employment relationship (see Le Roux and Van Niekerk The South African Law of Unfair Dismissal at 140). Generally speaking, having regard to the considerations under the old Act and Constitution mentioned earlier, however, it cannot be said that the existence of such an obligation is unfair according to contemporary notions.

In Mauchle's case (supra) the fairness of such a general obligation was assumed, but it was qualified in two ways, viz that it had to be "lawful" as well as "reasonable".

> "The second question which must be decided is the broad one whether the instruction … was lawful. If that instruction constituted a unilateral amendment to the terms of employment of the applicants, the instruction would have been unlawful. The narrower inquiry, consequently, is whether the instruction did constitute a unilateral amendment to the terms of employment of the applicants" (at 18E – F (BLLR); 357D (ILJ)).

And further (at 19E (BLLR); 358D (ILJ)):

> "The third question is whether the instruction was reasonable."

I would respectfully venture to suggest that for the purposes of determining an unfair labour practice dispute under the old Act it is unnecessary to have separate requirements of "lawfulness" and "reasonableness", and that it would suffice simply to ask whether the instruction was fair. If fair, it is lawful. If unfair, it is unlawful. Fairness equates to lawfulness under the old Act. This approach would also avoid the confusion generated by the distinction between contractual "lawfulness" and statutory "fairness".

In order to determine whether the instruction was fair (or "reasonable" in the terms used in the Mauchle case) in the present case one has to decide whether it was necessary for the company to consult Mmadi or the union before the decision was taken to make the post redundant and transfer Mmadi to the new post.

The effect of the decision by the company in the present case was that Mmadi's previous position was made redundant and he was moved to a new department. Had he remained in his old position he would not, in future, have had to work night shifts. The company was entitled to take these decision, provided that it involved Mmadi in the consultation process prior to the decisions being taken, and provided, further, that such a decision was rationally justified on operational grounds. Its decision affected Mmadi, but it would not have unfairly affected him in terms of the definition of an unfair labour practice in the old Act had he been given the opportunity to state his case in regard thereto prior to the decision being taken.

It is common cause that Mmadi was never consulted before the decision was made. The decision may be rationally defensible on operational grounds, but that is beside the point. The failure to consult was unfair and the resulting instruction was thus not reasonable.

In my view it is necessary to formulate a rational and coherent approach to give expression to the requirements set out in the definition of an unfair labour practice in the old Act. Due regard must be paid to the needs and interests of employer and employee alike. The best way, in my view, is to accept that in modern day employment neither employer nor employee benefits from a static employment concept where their respective rights and obligations are case in stone at the commencement of the employment relationship. What the employer needs is the flexibility to make decisions in a dynamic work environment in order to meet the demands of business. What the employee seeks is not only a wage, but a continuing obligation of fairness on the part of the employer, also when h or she makes business decisions affecting the employee's work. That obligation of fairness should manifest itself in both a formal and a substantive manner. Formally consultation is necessary before decisions are to be taken that materially affect employees in their working relationship. Substantively those decisions must be justifiable by genuine operational requirements. This case concerned only the formal requirement. The particular conclusion I have come to favours the employee, but different facts may lead to a finding in favour of the employer (cf WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen 1997 (2) BLLR 124 (LAC)).

Conclusion

It follows that I am of the view that Mmadi's dismissal was unfair. Both he and his union should have been consulted prior to the company taking the decision to declare his post redundant and to transfer him. The instruction to report for work at the other department was unfair.

The fact that Mmadi's transfer may have been sound for operational reasons does not justify a decision not to reinstate him. Upon proper consultation after reinstatement the same result, viz a transfer, may eventually have resulted. On the other hand, it may not have. It is impossible to imagine what solution proper consultation may have provided.

I would therefore dismiss the appeal with costs.

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