

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no. JA 95/97

In the matter between:

SOUTH AFRICAN CLOTHING AND

TEXTILE WORKERS UNION & OTHERS

Appellants

and

DISCRETO, a division of

TRUMP AND SPRINGBOK HOLDINGS

Respondent

—

JUDGMENT

FRONEMAN DJP.

- [1] This is an appeal against a determination made in the industrial court under the old Act (the **Labour Relations Act, 28 of 1956**), heard by this court by virtue of the transitional arrangements set out in **section 22(5)** and **(6)** of **schedule 7** to the new Act (the **Labour Relations Act, 66 of 1995**). The appellants, a trade union and its affected members, seek to overturn the decision of the industrial court, which was to

the effect that the termination of the services of the trade union's members by the respondent was not procedurally or substantively unfair.

- [2] The employees concerned worked at a factory of the respondent where the primary product was denim jeans, although cotton clothing was also produced there. The production of denim jeans, however, was what made the factory viable. Without it the factory would have had to close. Towards the end of 1995 the respondent decided to discontinue denim production at the factory, with the inevitable result of closure and the termination of employment of the people who worked there.
- [3] The manner in which this decision was taken and in which it was conveyed to the trade union representative and the employees at the factory is nothing short of remarkable.
- [4] On 22 November 1995 the respondent's human resources manager, Mr. Lingenfelder, travelled to Pietersburg to meet Mr Kutu, a trade union official, and shop stewards at the factory for wage negotiations. Neither Lingenfelder nor anyone else was aware and prepared for the portentous news the respondent's board had in store for them all on that day. When Lingenfelder arrived at Pietersburg in the morning he received a message to telephone head office as a matter of urgency. One of the directors, Mr. Mark Lubatsky, told him that the board had decided the previous evening to cease production at the factory on 15 December 1995. Lingenfelder duly conveyed this news to Kutu and the shop stewards, saying that wage negotiations were of no value under the circumstances. Both Kutu and Lingenfelder then addressed the employees

at the factory, informing them of the decision. Questions were asked, but eventually Lingenfelder left and the meeting later ended in some disarray.

[5] There is some dispute about exactly what was said at this meeting on 22 November 1995. The material disputes relate to whether Lingenfelder told Kutu and the others that the respondent's decision was not a final one, but one only made *in principle*, and to the extent to which information on the reason for the closure of the factory was asked for by Kutu and provided by Lingenfelder. The presiding officer in the industrial court, in an unreasoned judgment, found that the trade union representatives were told that a decision *in principle* only had been taken, and that no financial statements were sought from the respondent by Kutu.

[6] The importance of a proper resolution of these two material issues arise from the legal requirements for a fair retrenchment process, flowing from the unfair labour practice definition in the old Act. The requirements are, **inter alia**, that consultation with employees and, where applicable, a trade union, is required once the possible need for retrenchment is identified and *before* a final decision is taken on retrenchment (**Atlantis Diesel Engines (Pty) Ltd v National Union of Metal workers of South Africa** (1994) 15 ILJ 1247 (A) at 1252D-F; 1995 (3) SA 22 (A) at 28E-I), as well as that sufficient information be disclosed to the affected employees or their union to enable the consultative process to take place fairly (**Atlantis Diesel case** at 1253D and J (ILJ); 29E and J (SA)).

[7] The need to consult before a final decision on retrenchment is taken, is said to found

its rationale in both pragmatism (the need to avoid retrenchment altogether or at least to minimise dismissals and mitigate their consequences) and principle (to give employees a chance to be heard and to avoid or minimise industrial conflict) (at **1252I - 1253B (ILJ); 28J-29C (SA)**; of the **Atlantis Diesel case**). That case was decided prior to the constitutional entrenchment of the right to fair labour practices in both the Interim Constitution and the Final Constitution. The former was in operation at the time the present dispute arose. I would respectfully suggest that, in addition to the considerations mentioned in the **Atlantis Diesel** case, the constitutionally entrenched fundamental right to fair labour practices provides a further basis for these requirements.

- [8] Every person has the constitutional right to fair labour practices (**s. 27(1) of the Interim Constitution; s. 23(1) of the Final Constitution**). As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not (cf. the **Atlantis Diesel** case at **1252H (ILJ); 28I (SA)**). For the employee fairness is found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale. The function of a court in scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on

whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.

- [9] As already stated, one of the requirements of a proper consultation process is that consultation must precede a final decision on retrenchment. The reason for this requirement should be obvious: it is impossible to determine beforehand what might emerge from the consultation process and to what extent these results might influence a final decision (**Mohamedy's v Commercial Catering and Allied Workers Union of SA** (1992) 13 ILJ 1174 (LAC) at 1179F-H) and, conversely, once a decision is taken without consultation, any representation after the event will be met with the natural reaction to justify the original decision (**Attorney General, Eastern Cape v Blom and others** 1988 (4) SA 645(A) at 668D-E).

- [10] For these reasons it is crucial to determine whether the respondent's decision to close the factory on 15 December 1995 was a provisional one, subject to what might

emerge from the consultation process; or whether it was final in nature, in effect a **fait accompli** presented to the trade union and the employees at the factory. The appellants' case was that it was the latter. Lingenfelder informed them, unequivocally and without qualification, that the decision to close the factory had already been taken; he refused to consult with the union on that issue, or to divulge information relating thereto; and consequently it was futile for the union to further participate in a charade of consultation which would only deal with the details of how the employees will be retrenched and not with the decision on whether they should be retrenched. The respondent's case, in contrast, was that the decision communicated to the trade union and the employees on 22 November 1995 was indeed a provisional decision, one made only 'in principle'; that the respondent sought consultation on the very issue of whether the factory should be closed, but that appellants refused to engage in this consultation process. In the result the respondent's ultimate decision to close the factory and retrench the workers was not in conflict with the requirements of proper consultation process, and it was, furthermore, justifiable on commercial or operational grounds.

[11] I have little hesitation in rejecting the respondent's version.

[12] At the outset there is the fundamental problem that only one witness, Lingenfelder, was called to testify on behalf of the respondent at the industrial court hearing. He was the respondent's human resources manager and, by his own admission, had no direct or personal knowledge of the board's decision to close the factory (he did not serve on the board), nor of the reasons for the decision (he was not involved in the

financial or commercial dealings of the respondent). There was thus simply no admissible evidence led in the industrial court to substantiate the respondent's case that it had a commercial rationale for the retrenchments. It did not get past the first base. It is simply not good enough in this regard to rely on the hearsay evidence of the human resources manager of the respondent. As a minimum evidence should have been presented by someone with personal knowledge of the respondent's financial position and, more specifically, its relationship with its bankers; as well as evidence of the board's decision to close, by someone who attended the meeting where the decision was taken. Lingenfelder was, in any event, as taken aback as the trade union officials and employees were, when he was told of the respondent's decision by telephone on the morning of 22 November 1995.

- [13] Even if it is permissible to rely on Lingenfelder's evidence, his assertion that he told Kutu and the employees on 22 November 1995 that the decision was only made 'in principle' simply does not withstand scrutiny. On 23 November 1995 he wrote a letter confirming the events of the previous day, stating that the respondent "has *decided*" (my emphasis) to discontinue production of denim jeans and that "(t)he *closure of Discreto will be the first step* in this process"(my emphasis again), for which he invited discussions on the "logistics of this operation". When the trade union had the temerity, a few days later, to request clarity on the extent of the decision to close, protesting that such a decision was made without notice and asking for information on when the respondent started to look into the possibility of closure, it invoked the indignant reply from Lingenfelder that he told Kutu and the workers on 22 November 1995 "exactly why and when the factory will be closing (the

underlining is Lingenfelder's), and that the request amounted to "delaying tactics". It is difficult to be restrained in one's comment on this reply. Firstly, it totally contradicts the assertion of a decision to close only 'in principle'. Secondly, given the unseemly haste in closing the factory and depriving approximately 400 people of their livelihood the reference to delaying tactics is breathtaking in its arrogance. Thirdly, insofar as it states that the full reasons for the closure was given on 22 November 1995, it is, at the very least, misleading . It is clear that the real reason for the sudden decision to close Discreto was a threat from the respondent's bankers to withdraw its credit facilities if steps were not taken to satisfy the banker's requirements. It is common cause that Lingenfelder did not disclose this on 22 November 1995. Perhaps Lingenfelder was still not yet aware of this when he wrote the letter on 28 November 1995.

[14] There was therefore no consultation with the union or employees prior to the final decision to close the factory. Retrenchment inevitably had to follow closure of the factory, on the respondent's own version. In view of this, and the failure to convey the true reason for the closure of the factory to the union and the employees (viz the threatened withdrawal of credit facilities), it is unnecessary to go into any detail on whether Kutu in fact requested sight of the respondent's financial statements on 22 November 1995 or not. The failure to consult before the final decision to close the factory and retrench the workers was taken, was a flaw which fatally tainted any subsequent attempt at consultation. Humpty Dumpty could not be put together again.

[15] It follows, for the reasons emphasized in paragraphs 6 to 9 above, that the decision to

retrench was unfair for want of compliance with the legal requirements of the consultation process. For the same reasons it is impossible to argue that the retrenchment was substantively fair.

[16] What remains is the question of what remedy should follow upon this finding. The factory has been closed since December 1995, so reinstatement will probably only mean further discussions on a retrenchment package, as well as retrospective pay to the employees from the date of reinstatement, which would be the date of the industrial court judgment, 8 September 1997, until now, a period of some nine months. The individual employees have already received a retrenchment package. If not reinstated they should be awarded compensation for the unfair labour practice to which they were subjected. A practical (and flexible) yardstick to determine the amount of compensation would be the employees' salary for the length of time a normal process of consultation would have taken. Mr. Bruinders, for the appellants, suggested a period of six months for this purpose, which appears to be reasonable.

[17] At the start of the industrial court hearing the respondent took the point **in limine** that the dispute was not properly referred to the conciliation board. The objection was dismissed, but costs were not ordered to follow the result. The objection was based on a legal point and there is no equitable reason why the respondent should not have been ordered to pay the costs.

[18] The appeal succeeds with costs. The determination in the industrial court is set aside and replaced with the following:

- “1. The termination of the second and further applicants’ employment by the respondent is declared an unfair labour practice.
2. The respondent is ordered to pay compensation equal to six months’ salary to each of those applicants whose affidavits are contained in exhibit “B” to the proceedings.
3. Interest is payable on the said compensation at the legal rate from date hereof.
4. The respondent is ordered to pay the applicants’ costs relating to the dismissal of respondent’s point **in limine.**”

J FRONEMAN DJP.

I agree

J MYBURGH JP.

I agree

C NICHOLSON JA.

Date of hearing: 15 June 1998.

Date of Judgment: 22 June 1998.

Appearances

For Appellant: Adv. T. Bruinders instructed by Cheadle Thompson & Hayson

For Respondent: Adv. M E D. Moyses instructed by Raymond Tucker.

This judgment is available on the internet on website: <http://www.law.wits.ac.za/labourcrt>.