

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: JA76/99

In the matter between:

MICHAEL LANGA

1st Appellant

SOLOMON NDLANGAMANDLA

2nd Appellant

AND 32 OTHERS

3rd to 32nd Appellant

and

ACTIVE PACKAGING (PTY) LIMITED

Respondent

JUDGMENT : 3 NOVEMBER 2000

TRAVERSO, A.J.A. :

[1] This case involves the dismissal of the appellants for operational reasons.

[2] The appellants are former employees of the respondent and former members of the majority union in respondent's plant, namely, the Paper Printing Wood and Allied Workers Union.

[3] The appellants have pursued this matter on their own without the assistance of the union.

[4] The respondent is Active Packaging (Pty) Limited, a wholly owned subsidiary of Kohler Limited, and a manufacturer of corrugated boards and cartons.

[5] Before summarising the facts I will deal with two preliminary issues, namely:

5.1 the application for a postponement of the appeal on 29 August 2000;

5.2 the question of the costs of the postponement on 27 June 2000 which stood over for later determination.

THE APPLICATION FOR THE POSTPONEMENT ON 29 AUGUST 2000:

[6] 6.1 This appeal was initially enrolled for 27 June 2000. For reasons that will be discussed in more detail later, it was postponed and the costs of the postponement stood over for later determination.

6.2 The appeal was re-enrolled for 29 August.

6.3 On 28 August 2000 a facsimile transmission was transmitted to the Registrar of the Labour Appeal Court by Messrs. Roestof, Venter & Kruse, the respondent's attorneys, in which they informed the Registrar that the parties had agreed to postpone the appeal to the next available date in the fourth term. The only reason advanced for the postponement was the unavailability of the respondent's counsel.

6.4 Thereupon the Registrar, on the instructions of the Judge President, informed both parties' attorneys that, if either party wished to postpone the appeal, a substantive application for a postponement would have to be made on 29 August 2000.

6.5 At the hearing an affidavit deposed to by Mr. van Graan, the respondent's counsel, was handed up setting out the reasons for the application for a postponement.

6.6 From this affidavit it appears that the parties' attorneys had embarked on negotiations amongst themselves to arrange dates which suited them or their counsel without in any way acknowledging the fact that an Appeal Court had been constituted to hear the matter. In addition it seems that

these arrangements had been made with the Registrar only, without in any way consulting the Judge President, who is ultimately responsible for compiling the Roll.

6.7 It is apparent from Mr. van Graan's affidavit that he had been aware of his unavailability since 26 July 2000. While one appreciates that Mr. van Graan had been previously briefed to appear in the matter and that it would be desirable for him to remain on brief, that is not the only consideration. There are other considerations which, in my view, outweigh the non-availability of counsel.

6.8 If parties were to be free to postpone matters and to arrange dates amongst themselves as and when they wished without the concurrence of the Judge President, it would interfere with the smooth flow of the hearing of appeals by this Court. It is the duty not only of this Court, but also of counsel and attorneys to uphold the smooth flow of litigation. This is so, particularly, if one has regard to the nature of the cases with which this Court deals. If litigants were left to the mercy of the availability of busy counsel one of the primary objects of the Act, namely the effective

determination of cases, would never be achieved. By the same token, if counsel or attorneys were permitted to set down appeals at their convenience without reference to the Judge President, chaos would soon reign in this Court. The notion that justice delayed is justice denied is of equal application in this Court as labour cases (including appeals) can only be resolved effectively if they are resolved expeditiously. Accordingly we were of the view that there was no valid reason for the postponement and the application was accordingly refused.

THE COSTS OF THE POSTPONEMENT ON 27 JUNE

2000:

6.9 At the hearing on 27 June 2000 Mr. Memani, who was briefed to appear for the appellants, did not appear. It is common cause that prior to the hearing neither the appellants' attorney of record nor the respondent's counsel and attorney of record were informed that Mr. Memani would not appear at the hearing. Accordingly on the day of the hearing Mr. Memani's instructing attorney, who had by chance found out that Mr. Memani would not be appearing at the hearing, was obliged to apply for a postponement based on Mr. Memani's, at that time, unexplained absence.

6.10 It is common cause that Mr. Memani at no stage informed his instructing attorney that he would not be able to argue the appeal on 27 June 2000. Mr. Memani's explanation for this is that his father passed away on 12 June 2000. When granting the postponement on 27 June 2000 the Court ordered that Mr. Memani furnish an explanation for his conduct.

6.11 His explanation was the following:

“Firstly I wish to apologise to everyone concerned, including the parties and their legal representatives for any inconvenience which my absence caused.

As it has already been mentioned my absence was the result of my bereavement. My father passed away on 12 June 2000. On 13 June 2000 I telephoned the Group receptionist and informed her that I would be away and would return only after 24 June 2000, the funeral date. I asked her to inform anyone who phoned.

I anticipated that attorneys including, Mr. Maribana, would phone and would be informed. They would phone me and I would advise them that I would not be active for at least a week after the funeral because of psychological and traditional factors relating to mourning practices.

I have learned with surprise that the Group receptionist did not tell Mr. Maribana of my bereavement when he phoned on 23 June 2000. The situation was compounded by the fact that I lost my cell phone on 23 June 2000 while

I was travelling to the Eastern Cape. As a result attorneys including Mr. Maribana would not get hold of me over the phone. I only got a replacement phone on 30 June 2000.”

6.12 At the hearing of the appeal he was taxed on his explanation and it was indicated that we were considering an order directing Mr. Memani to pay the costs of the postponement *de bonis propriis*.

6.13 Mr. Memani requested an opportunity to have representations made on his behalf. A direction was issued after the hearing giving Mr. Memani leave to file written submissions by not later than 19 September 2000. Subsequently Mr. Memani was granted an extension until noon 21 September 2000. He filed his written submissions. These submissions take the matter no further. They do not detract from the fact that Mr. Memani adopted a passive attitude. Whether any of the parties concerned would become aware of his unavailability, depended on factors over which Mr. Memani had no control. In addition, the steps that he took were based on a mere assumption that his instructing attorney might phone his secretary. Mr. Memani did not even inform the secretary in which matters he was due to appear during his absence or who the instructing attorneys were in each case. The only person who was responsible for the appeal not proceeding on 27 June 2000 was Mr. Memani. Accordingly the appellants should not be burdened

with the costs incurred. This is accordingly an appropriate case for an order that Mr. Memani pay the costs of the postponement *de bonis propriis*.

FACTS:

[7] I turn to the merits of the appeal. The background facts which gave rise to the appellants' retrenchment are set out fully in the judgment of the Court *a quo*. I do not believe that it is necessary for me to give more than a brief summary of those facts.

[8] During 1997 the respondent experienced financial difficulties due to various factors that were prevalent in the market place. This resulted in the respondent having to investigate means whereby it could restructure its business to render it financially viable.

[9] This in turn gave rise to negotiations with the union which commenced during September 1997. During these negotiations the reasons for the restructuring and the rationalisation of the appellants' activities were explained in detail. In addition, it was indicated to the union that the process of rationalisation would result in approximately sixty employees becoming

redundant. In order to avoid retrenchments, early retirement and voluntary retrenchment packages were offered to those employees who were interested.

[10] On 11 November 1997 the respondent issued a notice to all employees in terms whereof the final date by which application for the voluntary retrenchment packages could be made was again stressed. In addition the notice contained the following warning:

“We regret to inform you that should the required number of employees not take this voluntary package, that we will have no other option but to go the redundancy route, which will be less than the voluntary package.”

[11] Thirty-six employees took the voluntary retrenchment package when the respondent closed for the Christmas recess.

[12] The respondent reopened on 18 January 1998. On 15 April 1998 the respondent received a report from its auditors from which it became apparent that it would not be viable for the respondent to continue its operations at the production unit.

[13] During the period 18 January 1998 to 15 April 1998 there were ongoing informal discussions between the respondent and the union. It is common cause that, pending the auditor’s report, it would not have been possible to

conduct formal negotiations as that would have been a self-defeating process.

[14] Upon receipt of the auditor's report the respondent immediately scheduled a meeting with the union for 20 April 1998. At this meeting the union was informed of the anticipated closure of the respondent's production unit at the end of April 1998. The critical financial position in which the respondent found itself was outlined.

[15] Subsequent to the meeting the respondent wrote a letter to the union stating, *inter alia*, the following:

"... for a period of some nine months, we have been sharing information regarding the critical nature of the competitive situation and the financial situation that the company finds itself in, as well as the need to reduce employees. Part of this process to find solutions, the company embarked on voluntary retrenchments during 1997. Since this period, as you are aware, the economic situation has deteriorated necessitating further restructuring.

...

As the financial situation of the company is critical, the closure of Active's production unit will take place at the end of April 1998. We are available on a daily basis to meet regarding suggestions or alternatives that you may propose.

The package for the employees affected is two weeks per completed year of service capped at a maximum of 10 years or 20 weeks. In addition, pro rata leave pay and bonuses will be paid out. In terms of the current legislation R30 000,00 of such retrenchment will be tax free.

...

Furthermore, we undertake that should any vacancies arise at Kohler Corrugated in Brakpan in the future, first option will be given to our

retrenched Active employees, who possess the necessary skills. Our personnel department will assist affected employees to find alternative skills and will be available to counsel individuals on an ongoing basis.”

[16] This letter was followed by several meetings at which attempts were made to resolve the dispute between the parties. Various proposals and counter proposals were put forward including an invitation by the respondent that the union appoint its own financial expert to verify the financial information which the respondent had made available, and to examine the financial statements once the financial statements of the Kohler Group had been published. In my view it is not necessary to go into these negotiations in any detail. Suffice it to say that these negotiations were unsuccessful and the employees were dismissed. On 14 May 1998 the union referred the question of the fairness of these dismissals to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) on behalf of sixty-seven of its members. Attempts at conciliation failed and on 30 June 1998 a certificate was issued by the CCMA to the effect that the matter remained unresolved.

[17] On or about 18 August 1998 the thirty-two appellants resigned from the union. Three days later they referred the dispute to the Labour Court. The

matter came before Jali, A.J. who found that the consultative process had commenced as early as September 1997 and not on 20 April 1998 as contended by the appellants. He also found that adequate financial information had been made available to the appellants and that the respondent's refusal to make available financial statements prior to the publication of the Kohler Group's results was in the circumstances justified.

[18] This appeal, in essence, lies against the abovementioned findings.

[19] Mr. Memani, who appeared for the appellants, confined his argument to the following:

19.1 that the consultative process should be divided into two separate stages, the one unrelated to the other. He argued that the negotiations which took place between September 1997 to December 1997 were separate and distinct from the negotiations which commenced at the meeting of 20 April 1998. Accordingly he argued that inasmuch as the respondent gave notice on 20 April 1998 that it intended closing its production plant at the end of April

1998, a mere ten days were allowed for consultations. Accordingly he argued that there had not been adequate compliance with section 189 of the Act.

19.2 that the respondent failed to disclose sufficient information to the union about its financial affairs.

I will deal with these two points under separate headings.

WHEN DID CONSULTATIONS COMMENCE:

[20] In my view Mr. Memani's submission that the consultative process should be viewed as two separate and distinct processes is artificial and based on a mistaken understanding of the evidence and of the provisions of section 189 of the Act. The wording of section 189 makes it plain that the section will take effect as soon as an employer contemplates the dismissal of one or more employees. This, self-evidently, means that the consultative process will begin before the final decision to retrench has been taken. This principle has now become trite.

[21] Applying this principle to the present facts it is in my view clear that the consultative process started in September 1997 when the respondent first realised that it was facing a financial predicament. This fact is demonstrated in

clear and unequivocal terms by not only the oral evidence which was presented in the Court *a quo*, and which remained largely unchallenged, but also by the documentation. The correspondence indicates that the meeting of 20 April 1997 was called on the premise that it was part of the ongoing consultative process. It is clear that all attempts to make the respondent financially viable again and thereby to limit and/or avoid further retrenchments had failed, and that this fact culminated in the decision to close the production unit with the consequential retrenchment of the appellants.

[22] Mr. Memani's submission that because "*nothing happened*" between the reopening of the factory in January 1998 and the meeting on 20 April 1998, and that therefore the employees were entitled to assume that all was well, flies in the face of the evidence that there were ongoing informal discussions between the respondent and the union throughout this period, during which meetings the union representatives were kept abreast of the respondent's position. It was never disputed that the continued operation of the production unit was not brought about by an improvement in the market conditions, but by a lifeline which was extended by the respondent's holding company - a lifeline which it was not prepared to extend once the preliminary auditors report

became available.

[23] In view of the foregoing, the finding of the Court *a quo* that the ongoing consultative process commenced in September 1997 can, in my view, not be faulted and should be upheld.

**WAS SUFFICIENT INFORMATION ABOUT RESPONDENT'S
FINANCIAL AFFAIRS DISCLOSED:**

[24] The Court *a quo* found that sufficient financial information had been made available to the appellants. It is common cause that the union was given an opportunity to appoint their own auditor to verify financial information. In addition an offer was extended to the union to have their expert examine the financial statements after 7 June 1998, the date upon which the results of the Kohler Group were due to be published. The respondent was of the view that, as it was a wholly owned subsidiary of a public company, it was incumbent on management not to release information to individuals prior to the publication of the Kohler Group's results. Pursuant to this invitation the appellants appointed a certain Mr. Maurice Wainwright of the Logistics Bureau (Pty) Limited to investigate the respondent's financial situation.

[25] The Court *a quo* found that the respondent was justified in not making available copies of the financial statements prior to the publication of the Kohler Group's results. This finding cannot, in my view, be faulted. It was not disputed that financial statements of public companies are, for obvious reasons,

confidential until their publication. The Act recognises the notion that confidential information need not be disclosed. (See section 16(5)(c) of the Act.) Confidential information should be disclosed only if such information is necessary to enable effective consultation to take place. Mr. Wainwright reported back to the union on completion of his investigation. It is apparent that he had sufficient information to satisfy himself that there was an economic rationale for the closure of the respondent's operation.

[26] It is therefore self-evident that no additional information was required for effective consultation.

[27] In the premises I agree with the finding of the Court *a quo* that the provisions of section 189(3), read with section 16 of the Act, had been substantially complied with, and the appeal must accordingly fail.

THE REMAINDER OF THE COSTS OF APPEAL:

[28] The only outstanding issue is that of the remainder of the costs of the appeal. This aspect was not addressed by Mr. Memani in his heads of argument, but he made oral submissions in this regard. In my view there is

nothing to suggest that the Court *a quo* did not exercise its discretion fairly, judicially and properly in considering the question of costs. In any event Mr. Memani was not able to properly motivate his submission that the costs order of the Court *a quo* should be set aside. He was unable to direct our attention to any misdirection on the part of the Court *a quo*, and I am satisfied that there is no basis in law for this Court to interfere with the costs order.

[29] In view of the foregoing, the following order is made:

- a) The appeal is dismissed with costs;
- b) The costs of the postponement on 27 June 2000 are to be paid by Mr. Memani *de bonis propriis*.

JHM TRAVERSO
Acting Judge of Appeal

I agree:

RMM ZONDO
Judge President

I agree:

MM JOFFE
Acting Judge of Appeal

- Counsel for Appellants : Advocate Memani**
- Attorneys for Appeallants : Mabunda Maribana & Partners**
- Counsel for Respondent : Advocate Heystek**
- Attorneys for Respondent : Roestoff, Venter & Kruse**
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- Date of Hearing : 29 August 2000**
- Date of Judgment : 3 November 2000**

