

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No: J1384/97

In the matter between:

Applicant

and

Respondent

JUDGMENT

(COMPENSATION)

MLAMBO J,

[1] The purpose of this judgment relates to the entitlement or not to compensation by the applicant. It is so that in my judgment regarding the

merits I found that the applicant was dismissed and importantly, that the respondent did not comply with the provisions of section 189 of the Labour Relations Act no 66. of 1995.

[2] The position regarding entitlement to compensation is to be found in **Johnson & Johnson (Pty) Ltd v Chemical and Industrial Workers Union** case no PA15/97 (LAC). In terms of this judgment the Court has a discretion whether to grant compensation or not. Any compensation awarded is in the nature of a solatium for the loss of the right to a fair procedure. In that judgment Froneman DJP confirmed that an important purpose of section 189 is the achievement of a joint consensus seeking process.

[3] In paragraph 30 of the judgment the point is made that if that purpose is achieved then there was compliance with section 189. The judgment goes further to make the point that if the purpose is not achieved the reason for not achieving it must be sought. This is important as once the reason for the non compliance with section 189 is found then the Court is placed in a position where it is able to decide on the entitlement to compensation.

[4] In the matter before me the respondent's case is that it never contemplated dismissing the applicant as a result of the closure of the

slitting division. The respondent's case is further that on 24 July 1997 a discussion took place between Mr Gardner the respondent's managing member, and the applicant. In his testimony Gardner stated that on the 24th July 1997 the grim financial situation of the respondent was discussed and the applicant was told that he would not be dismissed but would be utilized at the other division with no loss of income. Gardner testified that the applicant understood the situation and accepted the offer of working in the other divisions. The applicant denies that any meeting took place on 24 July 1997 and that he accepted the offer.

- [5] If I uphold the respondent's version I cannot grant the applicant any compensation. In order to resolve this dispute I need to revisit the situation when the respondent first contemplated the closure of the slitting division. It is common cause that the respondent, at that stage, sent a letter to the Bargaining Council for the Iron, Steel, Engineering and Metallurgical Industry. The notice advised the Council that the respondent intended to close its slitting division and that four employees would be retrenched as a result. A similar notice was sent to the National Union of Metalworkers of South Africa (NUMSA) which represented the four employees mentioned in the notice. Notice of Numsa also invited it to a consultation meeting on 12 August 1997.

- [6] The fact that the respondent invited Numsa to a consultation meeting must mean that it was aware of the provisions of section 189. It is also clear that the fact that the applicant was not one of the employees mentioned in the notice and the fact that he received no similar notice confirms the respondent's version that it never contemplated dismissing him as a result of the closure of his division.
- [7] There is no mention of any discussion between the applicant and the respondent other than the disputed one of 24 July 1997 and the one on 18 September 1997 mentioned by the applicant. According to the applicant it was at this discussion (18 September 1997) that he was formally informed of the closure of his division and his redeployment elsewhere. He testified that he had heard of the closure from other employees before 18 September 1997. He had however not done anything in that regard by way of clarifying his own situation.
- [8] In considering which version to accept I have to consider the probabilities in each version. If as the applicant states, he was aware of consultations with other employees, he did not appear to me as a person who would simply sit back and do nothing. After all he was the manager of the employees who were being consulted. In my view he could sit back and do nothing if some discussions had already taken place with him about the same matter.

[9] In my view probabilities appear to favour the respondent's version. This is based on the following factors: no notice was given to the applicant, the fact that there was compliance with section 189 regarding other employees and the fact that the notices to the Council and to NUMSA were sent at the same time span as the disputed meeting of 24 July 1997. Further the manner in which the respondent dealt with other employees militates against the respondent simply taking things for granted about the applicant's situation without having discussions with him. Another important fact is to be found in the letter sent to the applicant on 19 September 1997 where the respondent says:

"I informed you of the inevitable retrenchment of the four slitter employees and as you know, this took place on 18th September 1997.

I also informed you that your services could be utilized in the two other divisions of the company with no adjustment to your remuneration. This you accepted and understood."

When one reads the letter in context one gets the sense that it refers to a discussion which took place long before 18 September 1997.

[10] In my view therefore the reason for the failure of the respondent is that as far as it was concerned it had discussed the matter with the applicant in July 1997 and he accepted the alternative offered. Once there was acceptance of the alternative position it is inconceivable that the

respondent could still be expected to consult with the applicant.

[11] I am therefore of the view that the respondent's failure to comply with section 189 was as a direct result of the applicant's acceptance of the alternative position in July 1997. Under the circumstances I am not persuaded that the applicant is entitled to any compensation.

[12] In relation to the issue of costs it is so that the parties are ad idem that costs should follow the event. It is also correct that applicant was able to prove that he was dismissed and that there was no compliance with section 189. However in view of my decision regarding compensation I am of the view that no costs order should be made.

I therefore make the following order:

1. The applicant is not entitled to compensation.
2. There is no order as to costs.

Mlambo J

Date of judgment: 22 January 1999

For the applicant: Mr Jackson instructed by Gillian Lieberman Katz Attorneys.

For the respondent: Mr Beaton instructed by Yusuf Nagdee Attorneys.