

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO : J1953/98

In the matter between :

ZAPHANIAH DHLAMINI

First Applicant

LAZERUS SEFALI

Second Applicant

JOSEPH HLATHSWAYO

Third Applicant

PHILLIP LANGA

Fourth Applicant

VICTOR ZWANE

Fifth Applicant

JOHANNES NGUKUZOLAK

Sixth Applicant

ELPHAS SITHEBE

Seventh Applicant

MICHAEL MPUNGOSE

Eight Applicant

and

FARADAY WHOLESALE MEAT SUPPLY

Respondent

JUDGMENT

JAJBHAY, A.J.

[1] In terms of a pre-trial conference held on the 8th day of September 1998, between the parties' legal representatives, the

following important points were agreed upon :

- "a. The Applicants were all employees of the Respondent company:
- b. The Respondent ceased to trade at the time of redundancy of Applicants."

[2] At the commencement of the proceedings it was conceded on the Applicants' behalf that the dismissal was substantively fair. The only issue that remains in dispute is consequently whether the Applicants' dismissal was effected in accordance with a fair procedure as required by Section 189 of the Labour Relations Act 66 of 1995 (the Act), and if not, the appropriate remedy to which the Applicants would be entitled.

[3] Mr G D Dos Reis and Mr L Van der Merwe testified on behalf of the Respondent.

[4] Mr Dos Reis stated that the Respondent was a partnership at all material times. According to Mr Dos Reis, the entire workforce consisting of approximately forty people, received notification of a retrenchment on the 24th of June 1997. In terms of the letter communicated, the following was stated :

"Retrenchment Notice

1. Due to the business not being profitable management has come to the unfortunate decision to close the business and retrench all staff as from 24th of June 1997.

2. You will receive the following severance package :

2.1 Two weeks notice pay;

2.2 All outstanding leave pay;

2.3 All outstanding wages;

2.4 One weeks pay for every completed year of service (maximum 10 years).

3. All cheques will be ready for collection on 25th June 1997 at 12h00, at Faraday, 197 Eloff Street Extension, Selby.

4. Your UIF (blue cards) can be collected at the abovementioned address on 30 June 1997.

Yours faithfully

GARY DOS REIS"

[5] It was common cause that at the time of the dismissal, the workers were neither organised nor belonged to any particular union.

[6] Mr Dos Reis stated that prior to the submission of the above letter, there were two meetings between himself and the workers, that lasted approximately between five and ten minutes each. He testified that it was at these meetings, that the closure of the business was discussed and consulted upon, and in respect of which agreement was eventually reached.

[7] According to Mr Dos Reis the Respondent was experiencing financial difficulty for a considerable period of time. The partners considered the possibility of transferring the business to a company to be incorporated in the near future. However this did not materialise.

[8] Previously the entire workforce was retrenched during June 1996. There was no dispute with regard to this particular retrenchment. At this point in time, all the workers belonged to the union referred to as UWUSA, who had negotiated and consulted on behalf of the membership which constituted of the workforce. All the workers were subsequently re-employed on a "*temporary*" basis.

[9] Mr Dos Reis emphasised that all his dealings with the Applicants and the other members of the workforce were conducted verbally. According to him "*nothing was in writing*". During or about June 1997, he called all his staff members, and explained to them that he could not carry on any further therefore the business has to close. On the 24th of July 1997, he provided each staff member with the letter that I have referred to hereinbefore. In Mr Dos Reis' words, "*Faraday was not a small business*". It was not disclosed during evidence what the turnover of the Respondent was.

[10] Mr Dos Reis denied that there were any counter proposals raised by the staff during the discussions that he conducted with them.

[11] It is important that during cross-examination Mr Dos Reis explained that during the discussions, *"I told them what they are going to get"*. He also conceded that he has other interests in the meat industry.

[12] Thereafter Mr Van der Merwe testified. According to this gentleman, he was informed by Mr Dos Reis that he will be having certain meetings with the workforce to discuss the retrenchment. He did not have any direct knowledge with regard to the discussion matter or the discussions. In direct contradiction to Dos Reis, this gentleman testified that the meetings had lasted for approximately one hour. That concluded the case for the Respondent.

[13] Mr Elphas Sithebe and Mr Zaphaniah Dhlamini testified on behalf of the Applicants.

[14] They testified that they were employed by Mr Dos Reis. During June 1997, Mr Sithebe was on leave. He was called by his co-workers at his home in Kwa-Zulu, Natal, and informed that he should return, because the workers were all retrenched, and *"He should fetch his things because the firm closed"*.

[15] When he arrived at the workplace, he was given his *"blue card"* by a woman called Fatima. He tried to speak to Mr Dos Reis, however Mr Dos Reis was abusive and referred him to Fatima. Since his dismissal, he was attending to certain work in an individual capacity, he has not been employed since the time of his retrenchment. Owing to the discrepancy on the *"blue card"*, and particularly an item that had been scratched out, he has not received any payments from the Unemployment Insurance Fund.

[16] During cross-examination, he was questioned at length as to who the proper employer was. It was suggested that Faraday Retail Meat Supply was his true employer. However in light of the fact that the parties had agreed at the pre-trial stage and this agreement is complemented with the pleadings, as to who the real employer was, I believe that this line of cross-evidence or evidence extracted did not assist the Respondent in its case. In addition, there was no application made at the end of the case to amend either the pleadings or any of the agreements entered into.

[17] Mr Dhlamini emphatically denied that there were any

consultations prior to the 24th of June 1997. He was driver, and he was very seldom present at the workplace. However if there was such a meeting, he would have been informed by his colleagues. This simply did not happen.

[18] Both the above gentlemen stated that they had never been to school. They did not have any formal education. Mr Hlathswayo was unemployed since June 1997, and despite his best efforts to procure employment, he has been unsuccessful.

[19] It is trite that the provisions of the Labour Relations Act must be read in a constitutional context. The provisions in this respect are clear.

Business South Africa v Congress of South African Trade Unions and Another (1997) 5 BLLR 511 (LAC) at 512-18;
Johnson & Johnson (Pty) Limited v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC);
Carephone (Pty) Limited v Marcus N.O. and Others (1998) 19 ILJ 1425 (LAC).)

[20] In terms of the Constitution of the Republic of South Africa, every person has a fundamental right to fair labour practices (**Section 23(1)(a)**). In the context of the present matter, the expression is given to this in the Labour Relations Act by ensuring that an employee has the right not to be unfairly dismissed (**Section 185**) and an employer has the right to dismiss an employee for a fair reason based on the employer's operational requirements and in accordance with a fair procedure (**Section 188(1)(a)(ii) and (b)**).

[21] In the **Johnson & Johnson** case *supra*, at paragraph 24 Froneman D.J.P. states the following :

"Section 189 regulates the exercise of the competing fundamental rights of an employee not to be unfairly dismissed and that of an employer to dismiss for operational reasons. It is a provision that is inextricably linked to the fairness or otherwise of a dismissal based on operational requirements. Apart from that it serves no other purpose."

[22] Section 189(1)(d) sets out where there is no trade union at the workplace, the employer when contemplating dismissal for reasons based on the employer's operational requirements, must consult with the employee's likely to be affected by the proposed dismissals or

their representatives nominated for that purpose. Thereafter in terms of Section 189(2) :

"(2) The consulting parties must attempt to reach consensus on -

(a) appropriate measures -

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effect of the dismissals."

[23] In terms of Section 189(3) :

"(3) The employer must disclose in writing to the other consulting party all relevant information, including, but not limited to -

(a) the reasons for the proposed dismissals;

(b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting those alternatives;

(c) the number of employees likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which employees to dismiss;

(e) the time when, or period during which, the dismissals are likely to take effect;

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

(i) *the possibility of future re-employment of the employees who are dismissed."*

[24] There are clear obligations in terms of this section that would dissuade an employer not to dismiss an employee unfairly. The employer must initiate the consultation process when it contemplates dismissal for operational reasons (**FAWU and Another v National Sorghum Breweries** (1997) 11 BLLR 1410 LC). The employer must disclose relevant information to the other consulting party, it must allow the other consulting party an opportunity during the consultation to make representations about any matter on which the parties are consulting, the employer must consider those representations and, if the employer does not agree with them, the employer must give reasons.

[25] Froneman D.J.P. in the **Johnson & Johnson** matter *supra*, at paragraph 27 explains :

"All these primary formal obligations of an employer are geared to a specific purpose, namely to attempt to reach consensus on the objects listed in Section 189(2). The ultimate purpose of Section 189 is thus to achieve a joint consensus seeking process."

[26] In this matter the section implicitly recognises the employer's right to dismiss for operational reasons, but then only if a fair process aimed at achieving consensus has failed. This is also apparent from Section 189(7) which provides that the employer must select the employees to be dismissed on criteria either agreed to, or if that is not possible, criteria that are fair and objective.

[27] The pragmatic rationale for the need to consult before a final decision on retrenchment is taken, has been affirmed by the Labour Appeal Court. In its application, one cannot rely on a mechanical approach of interpreting whether Section 189 has been complied with. In my view, the correct approach is to establish whether the purpose of the section has been achieved. If such purpose has not been achieved, the reason must thereafter be established and then the Court must determine whether there is any fault to be attributed to the parties.

(Johnson & Johnson, *supra*, at 1216).

[28] In the unreported matter of **Malcolm Sayles v Tartan Steel CC**, case number J1384/97, Mlambo, J. stated the following :

"In my view if the employer does not contemplate dismissing particular employees but it says the redundancy will affect them in any way the employer must consult with them. ... One of the main purposes of the Act is to advance economic development and social justice. Dismissal is a drastic step that should not be adopted lightly. Dismissal has in the past been likened to a sentence of death. Where through no fault of the employee his services are to be terminated, an alternative which would have the effect of avoiding the dismissal should not be likely written off. This applies equally to all employers and employees."

[29] In the present matter, I do not believe that the Respondent has proved on a balance of probabilities that it consulted with the employees at the time that it had contemplated dismissing the employees for reasons based on its operational requirements. Mr Dos Reis' attempt to stipulate that he had "*consulted*" with the staff members on two occasions is flawed on two counts. Firstly, it is totally inconceivable to consult in any meaningful fashion with approximately forty people in time span that ranges between five and ten minutes. Secondly, his evidence is directly contradicted by Van der Merwe who stated that the consultation process lasted for approximately one hour on each occasion.

[30] On the evidence of Dos Reis, there was no compliance of the provisions of Section 189 of the Labour Relations Act. In my view, there was no attempt to reach consensus on the appropriate measures envisaged in Section 189(2)(a) of the Act. Further, there was no opportunity during the consultation afforded to the workers to make representations about any matter on which the parties intended to consult. Mr Dos Reis' attempt to explain that all his negotiations were conducted verbally, and nothing was reduced to writing, can only be described as being a poor attempt to explain the difficulties inherent in his case.

[31] The need to consult with the employees in this particular case, by the Respondent as soon as it had contemplated the retrenchments has not been shown. The importance of consultations in industrial relations is that a proper measure thereof, will have the object of avoiding or minimising industrial conflict. In the present matter, there

is nothing to show that the nature of the purported consultation was either an exhaustive joint problem solving measure, or a consensus seeking process between the employer and the employees. In the present matter, the attempt to consult by the employer can be described as superficial.

[32] In the above circumstances, my determination is that the dismissal of the Applicants by the Respondent was not effected in accordance with a fair procedure as required by Section 189 of the Act.

[33] The issue that remains to be determined is the appropriate remedy. The Applicants stated that they seek an award of compensation. The principles regulating an award of compensation are extensively dealt with in the **Johnson & Johnson** judgment *supra*.

[34] In the **Johnson & Johnson** decision *supra*, the Labour Appeal Court summarised the legal position as follows :

"If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court, or an Arbitrator appointed under the Labour Relations Act, thus has a discretion whether to award compensation or not. If compensation is awarded it must be in accordance with the formula set out in Section 194(1); nothing more, nothing less. The discretion not to award compensation in particular cases must, of course be exercised judicially."

[35] Section 194 of the Labour Relations Act provides :

"(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or the adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim.

(2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not

prove that the reason for the dismissal was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in sub-section (1), and not more than the equivalent of twelve months remuneration calculated at the employee's rate of remuneration on the date of dismissal."

[36] In the present matter, the Applicants were dismissed on the 25th of June 1997. The dispute was referred to the CCMA timeously, and a certificate setting out that the dispute remains unresolved was issued on the 13th of August 1997. It was explained to me from the Bar that the matter was then referred to the CCMA on the 2nd of September 1997 for arbitration. The reason for a referral to the CCMA was to enable the Applicants the opportunity of not incurring unnecessary costs. However the Respondent did not consent to the matter being arbitrated at the CCMA. Thereafter, the matter was referred to this Court on the 3rd of July 1998. Save for the above admissions that were presented by the legal representatives of the respective parties, I did not have the benefit of listening to any additional relevant evidence. In the circumstances, and in my judgment, it cannot be stated with any certainty that there was an unreasonable period of delay that was caused by the Applicants in initiating or prosecuting a claim. In the **Johnson & Johnson** matter, at paragraph 42 Froneman D.J.P. states :

"If one has regard to the rationale for compensation under Section 194(1), namely to compensate an employee for not receiving a procedurally proper hearing or consultation process prior to dismissal, it seems that the intention was to recompense an employee for the period up to the point where he or she receives a proper hearing in the Labour Court or on arbitration."

[37] On a proper construction of the authorities stated, the Applicants are entitled to the equivalent of twelve months remuneration.

[38] I accordingly make the following order.

- a. The dismissal of the Applicants was procedurally unfair.
- b. The Respondent is ordered to pay each of the Applicants an amount equal to twelve (12) months remuneration, to be calculated on the basis of the remuneration paid to each of the Applicants on the date of his dismissal.
- c. The Respondent is ordered to pay the Applicants' costs.

M JAJBHAY

Acting Judge of the Labour Court
of South Africa

DATE OF HEARING : 30th of April 1999

DATE OF JUDGMENT : 7th of May 1999

FOR THE APPLICANTS : Clifford Levin Attorney

FOR THE RESPONDENT : P Assenmacher Attorney

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