

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 31 AUGUSTUS 1999

CASE NO. J612/98

In the matter between:

S MATLAKALA AND OTHERS

Applicants

and

PLASTWRAP (PTY) LTD

Respondent

J U D G M E N T

—
BRASSEY, AJ:

[1] In this matter the first applicant applied on behalf of the second, third, fourth and fifth applicants for an order for the reinstatement of the second to fifth applicants in their employment, alternatively, for compensation, alternatively for both.

[2] At the hearing of this matter the applicant's legal representative, Mr Zibi, notified me that he was

not

proceeding with the application on behalf of the third applicant. Accordingly, it is the first, second, fourth and fifth applicants that are properly before this court.

[3] The application arises out of the retrenchment of the second, third, fourth and fifth applicants (who I shall henceforth when necessary refer to as "**the individual applicants**"), on 19 December 1997. The basis on which they were retrenched, so says the company, was that they were redundant, i.e. that there was no longer work for them to do. The applicants contend that the retrenchment was unfair and seek the relief that I have referred to.

[4] Most of the facts pertaining to this case were common cause. In so far as there is any dispute in relation to them I will indicate which of the versions I prefer.

[5] The company carries on business as a manufacturer in the plastics industry. It employs some 68 people, the number including its administrative staff. It runs

both a day shift and a night shift and on the night shift some 10 employees are employed, all of whom are male. It is not the company's policy to employ females on night shift.

[6] The union began recruiting amongst the employees of the

company at some period prior to 1997 and in early 1997 had acquired a majority such as to entitle it to recognition by the company. Shortly after it was recognised, in August 1997, a dispute arose between the

company and the union when the company unilaterally implemented short time. The reasons why the company did this were briefly canvassed in evidence, as was the standpoint of the union on the question. The dispute itself is of no consequence to the present proceedings; all that is necessary to note is that in August 1997, and having regard to the downturn in business that the company was experiencing, the company considered it necessary to embark upon this programme of short time. The programme, I should add, was short-lived, seemingly enduring for little more than a week.

[7] After this event the company considered its employment needs and on 21 November 1997 wrote a letter to the union in which it notified it of its intention to embark upon retrenchment. The letter is of some consequence to these proceedings and I will cite the salient portions in full:

"Notification of a perceived need to implement retrenchments."

The company is overstaffed in the packing department and in terms of sound business practice, the company wishes to retrench four employees on 19 December 1997. The company has considered other alternatives, i.e. short term and redeployment but these are not considered

feasible. It is intended to select these employees to be retrenched on a Lifo basis among the day shift packing department. It is intended to pay a retrenchment package in accordance with the main agreement. We will consider any proposals with regard to employees who may be affected. Accordingly, in terms of section 35 of the main agreement of the National Bargaining Council for the Iron, Steel, Engineering and Metallurgical

Industry, notification is provided of this company's intention to enter into a consultation process with yourselves and your representatives concerning this. It is requested that you meet with the representatives of the company on Tuesday, 25 November 1997, at 12:30 or on Wednesday, 26 November 1997, at 12:30 in order that your views, thoughts and suggestions on the possible retrenchments be ascertained and a process of consultation take place. Please contact the writer in writing as soon as possible to confirm either of these dates."

[8] The proposed dates were unsuitable to the union and it proposed a meeting on Tuesday, 2 December 1997 or Wednesday, 3 December 1997, the latter meeting to be at 09:00. The latter date was acceptable to the company

and the meeting was held. Present at the meeting were Mr Zaiden, who is the accountant of the company and the person charged with the management of its industrial relations, and Mr L Steenkamp. From the union's side Alfred Motana, the union organiser within whose province the company fell, was present, as were two shop stewards from the company listed in the minutes of

the meeting as Princess and Robert. The minutes are somewhat cryptic but give, none the less, a fair reflection of what happened at the meeting.

[9] At the outset the company explained its reasons for the proposed retrenchment. It harkened back to a meeting on 20 March 1997 in which the union had been told of the need for possible retrenchments and explained that the retrenchments now being effected constituted a business decision on its part. The company explained that, firstly, two persons were doing one person's job on some machines and, secondly, that some machines were staffed by an operator who was also able to do the packing, thereby making the packer assigned to that machine redundant. It was also explained by Mr Steenkamp that the company had been living with, as he

put it, this problem but was no longer willing to do so and could find no basis upon which it might redeploy the staff members sought to be retrenched since there were no vacancies within the company. Short time, he

explained, had been tried but had proved not to be feasible.

[10] The union's response was to ask for a list of the departments within the factory, which it was orally given, and a printout of all the employees per department showing the department in which the employee was employed, the name of the employee, the date upon which the employee had been employed and the position that he or she occupied. That printout was made available during the course of a caucus that commenced at 09:20 and continued until 10:00.

[11] Following the caucus and a further caucus to consider the list of employees, the union posed certain questions to the company. The first was whether there were any employees eligible for retirement, to which the company responded that there were none. The second was whether voluntary retrenchments were an option and the company responded by saying that it would consider such retrenchments provided that one skilled person could be replaced by another skilled person. There was then a discussion of the severance package that was proposed by the company and a request by the union that the company should be more generous than was stipulated by the industry agreement. The company rejected this suggestion and thereafter a discussion ensued about the

Provident Fund.

[12] The union then asked the company to consider last in/first out as a selection criterion on a basis that was not departmental but across the board. It motivated that suggestion by explaining that some packers had operated machines in the past and explained, when asked, that they included a certain Hessie, Selena (who is Selena Matlakala, the third applicant in this matter), and Princess, who I take to have been the shop steward present at the meeting.

[13] The company's response to that was that it would be impossible to assign the packers to the task of bag-making because, in the words of Mr Zaiden, bag-makers rotate shifts and it was not feasible to consider ladies to work night shift. The latter statement was a reiteration of a proposition that had earlier been made in which Mr Steenkamp had explained that the workers being selected for retrenchment were confined to the day shift because females were involved and it was not possible to take the night shift into account.

[14] In the course of his evidence the managing director of the company, Mr Copans, explained the problems the company would confront should it employ women on night shift. They included the fact that there might be, as

he put it, cohabitation between the males and the females on a shift that was unsupervised and, secondly, that the females' safety, presumably at the hands of the males on the shift, could not be guaranteed. No issue was made of the safety of the females coming on and leaving the shift since in both cases their travelling would be in daylight.

[15] In this meeting the point was also made that non-skilled workers on night shift were required to move large rolls of material weighing some 59 kilograms. Mr Copans explained in evidence that these rolls of material were altogether too heavy for a woman to handle.

[16] Further discussions ensued on the selection of employees for retrenchment that are not germane to this judgment and the meeting concluded with a request by

the union to consult with its constituency. That request was agreed to and the union did so consult. In consequence of the consultation and on 6 December 1997, the union official in question, Mr Motana, wrote a letter to the company in which it dealt with the standpoint of the union on the question of retrenchment. Since this letter is important I shall recite its contents fully.

"Implementation of retrenchments

We refer to the above matter and wish to respond as follows. The response is informed by your clarities given on the meeting on the 3rd December 1997 and consultation with our members.

First Option: Early retirement /voluntary retrenchments

We believe employees should be identified for early retirement or/and should be given an option to be retrenched voluntarily. Motivation for the above should be as follows:[and there is there a formula set out under which voluntary retrenchment would be made attractive.]

Second Option:

In case there are no employees for early retirement and/or voluntary retrenchment, Lifo should apply. Accordingly, Lifo is that it should be across the board, not departmental as you stated. We are prepared to deal with each and every affected employee by Lifo in terms of skills and potential. This can be discussed in more details. Each and every case or candidate will be dealt with on its own merit.

Lastly:

We are further suggesting that given the timing of

the year and our availability, we won't be prepared to deal with the matter. For that matter retrenchment of any nature should not be implemented until the matter has been amicably resolved. In case you implement, prior to us discussing the matter, that in itself will be taken as a unilateral decision. We will therefore follow the relevant route in terms of the Act, including interdicting the company. [Details were then given as to the manner in which the union might be contacted, and the letter continues as follows]

We further believe you have nothing to lose to postpone

the matter until January 1998 since both negotiators won't be available.[Then, inserted in manuscript is the following:] "We further requesting that you supply us with a financial statement for the past three year by Friday, 12 December 1997. Your speedy response will be highly appreciated."

[17] The company's response to this letter was given on 8 December 1997 by letter to the union that states as follows:

"We respond thereto as follows:

First Option: Early retirement/voluntary retrenchments.

We clearly stated at our meeting on 3 December 1997 that the company had considered early retirement as a criteria but that there are no employees who qualify for early retirement. The company also stated that it was prepared to consider voluntary retrenchments and subject to the company approval of individuals to ensure [it should be ensure, I imagine] retention of skills and its operational requirements. The company also stated that it would not consider an enhanced package

as a carrot.

Second Option: We stated at the meeting that we were prepared to consider Lifo across the board provided that it did not impact on the skills and suitability of employees in other positions. Your proposal to retrench a driver was discussed as the redeployment of three packers as operators on bagging production. The company believes that you were given a satisfactory explanation why this is not feasible.

Lastly, the company has acted in accordance with the main agreement of the National Bargaining Council for the Iron and Steel Engineering and Metallurgical Industry in giving your union timeous notification on 21 November 1997 about its intention to retrench

employees on 19 December 1997. We are of the opinion

that we have in good faith consulted with yourselves

and believe that your wishing to postpone further discussions to 1998 is a delaying tactic. You have been given ample opportunity to consult. At our meeting you

seemingly accepted the company's reasons for intended retrenchments and we are further of the opinion that your belated request for financial statements is intended to lend credence to your proposal to postpone consultations."

[18] I pause here to mention that the question of when the

financial statements were first requested was a matter of dispute in the evidence before me. The company's evidence was to the effect that these statements had first been requested in the letter of 6 December to which I had referred. The union's evidence, given through Mr Motana, was that the request was actually made in the meeting of 3 December 1997. Ultimately, I suspect that little, if anything, turns on the dispute. But in so far as it may be germane I record that I accept the evidence of the company on this question and reject that of Mr Motana. The correspondence, it seems to me, plainly indicates that the request was first made on 6 December and first rejected on 8 December; moreover, the tenor of the union's request is such that

it is proper to conclude that no earlier discussion of the issue had been made; thirdly the company's response, in referring to the request as 'belated', supports the conclusion; and finally there is nothing in the minutes that bears out such a request. It seems to me that Mr Motana is mistaken on this issue.

[19] As I say, I do not consider that much turns on this dispute, since the financial statements were in the circumstances irrelevant to the retrenchment then being considered. The retrenchment was not the consequence of economic adversity within the company and Mr Bleazard, who appeared for the respondent, at no stage suggested that it was. The retrenchment was the consequence of redundancy, by which I mean that there was no or insufficient work for the four workers to do. That was the basis upon which the retrenchment was placed in the meetings and it was the consistent thrust of the evidence before me. Once that is accepted, it is of no consequence what the financial position of the company was at the time when it decided to lay these four workers off. It was under no obligation to retain the workers when it had no work for them to do, and was entitled to retrench them so as to reduce its costs or enhance its profits. Financial statements can be

relevant to a retrenchment but they generally are so only in circumstances where the company, to put it

loosely, pleads poverty. Such are not the circumstances of the present case.

[20] The letter of 8 December concluded by reiterating that the company was available to consult with the union up to 15 December 1997. The union, however, took no steps either through its union official or through the shop stewards within the company to pursue the consultation. In consequence, on 18 December 1997 Mr Zaiden wrote to the union stating that the company intended to go forward with the retrenchments, and that it duly did. It effected the retrenchments by a letter of 18 December 1997 in which it set out the basis of retrenchment; the circumstances in which the retrenchment was occurring; and the circumstances under which the employees might be re-employed.

[21] That letter, which was sent to each of the four retrenchees, (speaks of a severance package in the following terms) "**A severance package (in the case of Selena Selelo) in the form of seven weeks pay amounting**

to R2 576,70 will be paid to you on your last day's service with the company. This excludes your wages, leave pay and bonus which will be paid to you on the same date."

At the same time ,the applicants were invited to, and did, complete a form in which they furnished their

personal details for the purposes of potential re-employment. The form reads as follows (and I take the one applicable to the second applicant:)

"I, Selena Selelo, retrenched on the 19th December 1997 advise that the company may contact me during the next 24 months at the following address for the purposes of ascertaining my availability for employment as a packer or a lower related activity occupation should any vacancies in these positions arise in the immediate future."

[22] Subsequent to the retrenchment the company employed one Zulu who was qualified as, and engaged as, a printer. A dispute arose before me as to whether it was possible for the individual applicants to do the job of a printer. Mr Copans, in testifying on this issue,

explained that the printer's job is a skilled one requiring considerable expertise and knowledge of the job's requisites. He said that he needed a printer; he did not need somebody who could pass herself off as a printer; and the individual applicants, given their skills simply as packers, would not be suitable for the job. The second applicant who testified before me said that she would have been able to do the job of a printer and indeed on occasion had actually operated the printing machine. It seems to me that this is an incomplete answer to the position adopted in the

evidence by Mr Copans. The mere ability to operate the machine is not exhaustive of the requirements that a company may have from a printer. The job of a printer is considerably more complex than that. So much was evident from the testimony of Mr Copans and so much, it seems to me, it is proper for me to take judicial notice of. In the circumstances I can find nothing in the employment of Mr Zulu in the circumstances with which to take exception.

[23] Even if I were satisfied that the individual applicants were able to do the job as a printer, I would not have concluded that the company acted

unfairly in employing Mr Zulu. There is, counsel before me were agreed, no obligation imposed by the statute to re-employ workers who have been retrenched when vacancies arise for which their re-employment might be appropriate. There may be such an overriding obligation in equity but it is unnecessary for me to consider that issue because, as was accepted by Mr Zibi, the undertaking given by the company to re-employ at the level of packing or below was not unfair. It is plain that there was no obligation to employ any of the individual applicants as a printer since a printer's function is more skilled than, and superior to, a packer's.

[24] In the particulars of claim, which I shall refer to in

more detail later, the trade union took a broad brush approach to the fairness of the retrenchment. Before the matter came to trial, however, the parties held a pre-trial conference which carefully narrowed and delimited the issues and thereafter the issues were further delimited in argument and became narrower yet.

[25] Aside from the issue of the employment of the printer with which I have already dealt, the issues on which the applicants pertinently relied before me comprised two. The first was that notice should have been given to the employees concerned of the dismissal alternatively the intention to retrench. Mr Zibi pointed out that they received no advance notification of that sort, having simply been told on 19 December that their services would no longer be required.

[26] As I say, the matter seems to have been argued in the alternative either as a complaint of want of notice in the contractual sense or of want of notice of the fact of retrenchment. In so far as the complaint is of want of contractual notice, it is by no means clear on the evidence before me that such notice was not given. The letter of 18 December given to each of the retrenchees spoke of a severance package as a composite amount and explained that certain items were not included in the package, including such matters as leave pay and bonus.

On the evidence before me it is impossible for me to determine whether payment in lieu of contractual notice was properly made and I can make no finding against the

company in this respect. In so far as such payment was not made, I have little doubt that the company will remedy the shortcoming.

[27] The more trenchant point raised by Mr Zibi was whether the employees should have been notified in advance of the fact of their retrenchment. Such notification can be desirable but it seems to me that it is always open to a company to make payment of such amount as would otherwise be earned during the period of notification in lieu of allowing the employee to work the period itself.

[28] In any event, I can see no obligation either in law or in equity for notifying employees ahead of time of the intention to retrench them. The duty under the current Act is to notify the trade union of an intention generally to retrench. Under the previous Act there may have been some duty to consult not merely with the recognised trade union but also with the prospective retrenchees individually. That obligation no longer exists it seems, when a trade union is being consulted over the retrenchment; it seems it has deliberately been dropped in recognition of the

important role that

the collective representative is expected to play in the process of consultation. What the Act seems to conceive is that the collective bargaining representative should solicit the information pertaining to the respective retrenchees from the employer and then deal with them, directly and timeously, in order to apprise them of what is happening. In the present case the trade union did not avail itself of the invitation to consult further with the company on matters such as this. I do not by making comment mean to suggest that the trade union was remiss in not consulting further - I am alive to the obligations that typically burden a trade union official - but there seems no reason why the consultations should not have proceeded through the agency of the shop steward or shop stewards within the enterprise. This was not done and in consequence discussions that otherwise may have been fruitful went by default.

[29] The next point made by the union was that options should have been considered to avert retrenchment

going beyond those that the company in fact considered. Those options included, said Mr Zibi, such matters as the abolition of overtime and recourse to short time. However, the correspondence makes it clear that the options that the company was asked to consider by the

trade union were confined to voluntary retrenchment and to early retirement. The company dealt with those options in its response by explaining that early retirement was impossible (since there was nobody eligible for the purpose) and that voluntary retrenchments had been considered and rejected. The trade union did not pursue the other options that it now seeks to rely upon before me, and in the circumstances I cannot fault the company for the stance that it adopted.

[30] I now turn to what I take to be the most significant point in issue, and that is the question of selection for retrenchment. I proceed to consider this issue on the basis that the four packers were in fact redundant. If one of the four packers were going to be retained, therefore, it would have been necessary to create a vacancy for her by dismissing another

employee. This process is commonly known as bumping.

[31] The company in its letter of 8 December made it clear

that it was willing to embark upon such a process. It stated, and the paragraph bears repeating, that

"we were prepared to consider Lifo across the board provided that it did not impact on the skills and suitability of employees in other positions".Its stance

therefore was that it was willing to countenance

bumping - and bumping across the board - subject to considerations of special skill and ability.

[32] Mr Bleazard argued that there could be no obligation in law or equity to countenance bumping across the board. To require such bumping, he said, would place an intolerable burden on an employer, forcing it to consider each prospective retrenchee for every other job within the company. If that was indeed the burden that bumping entailed, I would agree with Mr Bleazard's conclusion but it seems to me that his submission overstates the case. I take it that there is, in relation to bumping, an obligation on the

prospective retrenchee to indicate, either directly or through the union, what positions he or she might be willing to take and be suitable to fill. The issue of whether the employee should be employed in the position can then be made the subject of specific consideration in deliberations between the parties. In the process the employee's suitability for the job can be investigated; his or her qualifications and aptitude can be considered; and his or her ability to work in the conditions that the job entails can be examined.

[33] Be that as it may, the company in fact accepted the duty to consider bumping across the board. It considered the proposals that had been made on 3

December 1997 and it rejected them. It invited further proposals on the question of who else might be bumped and no further proposals were forthcoming. In the circumstances it seems to me that the duty to apply the principle of bumping was satisfied.

[34] In evidence before me the question arose as to whether one or other of the individual applicants

should not have been offered the job of a packer on the night shift. Two people were identified by the union as being packers' the first was Abel Maboane and the second was William Mota. Selena Matlakalala, the second applicant, said that she had seen both of them performing the task of packer when the night shift gave way to the day

shift. She could not, however, testify to what precisely was occurring during the night shift and the only direct evidence I have of that is the evidence of the managing director. He said that neither of the two individuals was doing the work of packer during the night shift.

[35] There are, its true, suggestions in the documentation that they did perform this function. But if one looks at the most recent and most relevant employment list, i.e. the list that was printed on 3 December 1997, it is clear that William Mota was in fact a bag-maker, and not a packer. Abel Maboane is still recorded as a

packer, but Mr Copens, whose evidence on this point I accept, says he was principally doing the work of a

common labourer, moving the heavy rolls to which I have referred.

[36] Under proper circumstances the company might have been obliged to dismiss Maboane and offer the job to one or other of the individual applicants since he had a shorter length of service than each of them. However, the company was at no stage, either in the meeting or subsequently in the correspondence, requested to take this step. In the absence of such request, it seems to me that the company cannot be faulted for declining to dismiss Maboane and putting one or other of the individual applicants in his place. In coming to this conclusion I find it unnecessary for present purposes to consider whether the applicants would have been suitable for the job. To enter upon that question would be to embark upon precisely the fallacious line of reasoning that has previously been identified as the "no difference rule". It would have been for the company, had it been requested to consider such bumping, to take reasonable steps to ascertain to what extent one of the applicants could do Maboane's job. No such request was made.

[37] So far as the retrenchments are concerned that concludes the matter. There is one further aspect, however, that has taxed my mind and on which I feel I should pronounce. That is the impact of the company's policy of refusing to appoint women on night shift. Neither of the reasons given for this stance is satisfactory. The company has neither the duty nor the right to protect employees from the consequences of their own immoral impulses. Its duty is to take reasonable steps to prevent those impulses from causing others hurt or harm. It must endeavour to prevent sexual assault in precisely the way it must prevent physical assault. In the discharge of this duty it has no right to make distinctions between men and women that unfairly prejudice either group, even though the distinction might have some rational basis to it. Such discrimination is now unlawful under the Constitution and, closer to home, under the Labour Relations Act itself. Women must be given at least the same opportunity to do work as men and, however gallant it may once have seemed, it is now antiquated to prevent them from doing certain jobs in a paternalistic desire to protect their interests and safety. It was,

therefore, incumbent on the company to consider women for appointment to night shift no less favourably than men. It is clear from the evidence that the company did not do so.

[38] The findings I have made, however, indicate that this element of the policy had no bearing on the retrenchments. Those retrenchments would still have occurred even if the company had not applied this policy since they were the consequence of the workers' failure to make clear their interest in doing the job of Mr Matoane. The policy, therefore, bears no causal relationship with the outcome of the process. It operates, as it were, in the air.

[39] The policy could itself have been the subject of a complaint under the Labour Relations Act -I think specifically of a complaint under schedule VII- but such a complaint was not mounted in that form before me, nor was it mounted at any stage during the proceedings. The reference to the Commission for Conciliation, Mediation and Arbitration, which is a pre-condition to the exercise by me of my jurisdiction, contains no challenge to the discriminatory policy;

neither do the particulars of claim ;and neither does the statement of issues that was so carefully and comprehensively compiled in the pre-trial conference.

[40] In the circumstances, and having regard to the issues that have been ventilated before me, I can see no basis on which to fault the retrenchments that were carried

out by the company. The points of complaint that were

raised by the union in argument before me reveal no acts of unfairness and in the circumstances I dismiss the application. The company does not press for costs.

[41] Thus my order is:

(a) This application is dismissed.

(b) There shall be no order as to costs.

BRASSEY, AJ

LABOUR COURT OF SOUTH AFRICA

ON BEHALF OF APPLICANTS : **MR V ZIBI**

Instructed b : **SACCAWU**

ON BEHALF OF RESPONDENTS : **MR B BLEAZARD**

Instructed by : **Brian Bleazard Attorneys**
DATE OF HEARING : **30,31 AUGUST 1999**
DATE OF JUDGMENT : **31 AUGUST 1999**