IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURGCASE NO

In the matter between

MICHAEL FLETCHER Applicant

and

ELNA SEWING MACHINE CENTRES (PTY) LTD
Respondent

JUDGMENT

JAMMY AJ

1. Mr Michael Fletcher, the Applicant in this matter, was retrenched on 30 June 1998. At that time, he had served the Respondent company for some 21 years and held the position of National Sales Manager. He contends that his dismissal was unfair, substantively for the reason that the operational requirements which purportedly justified it had not been comprehensively established and procedurally, because the Respondent failed to comply with the requirements of Section 189 of the Labour Relations Act 1995 as amended ("the Act"), read with Schedule 8 thereto.

2. Both in his Statement of Claim and again in written Heads of Argument submitted in conclusion by his Counsel, the relief sought by the Applicant is stated to comprise reinstatement, alternatively compensation for retrenchment, damages and

costs. In the course of his evidence however, the Applicant indicated that having regard to the history of the matter and what he presumably perceived as an irretrievable breakdown in his relationship with the Respondent, reinstatement was no longer an option to be considered by this Court and that his claim is accordingly confined to monetary relief.

3.**THE EVIDENCE**

Comprehensive evidence from a Financial and Tax Consultant retained by the Respondent, Mr N V Clegg, and from its Chief Executive Officer, Mr M J Beverley, regarding the commercial rationale underlying the retrenchment in question was adduced by the Respondent. Mr Clegg testified that as at September 1999, the Respondent was in a critical financial situation. It carried a bank overdraft of R2.6m against which it was paying interest at prime rate plus 3%. It was indebted to the Commissioner for Inland Revenue for arrear taxes of R185 000,00. Its local creditors approximated R500 000,00 and overseas creditors were owed R6.6m. Four shipments of overseas products ordered by the Respondent for sale and distribution in the local market were being held in bond pending the payment of VAT thereon, which was due in the context that the items did not attract import duty. There were no funds available in the company with which to pay this value added tax. A net loss of approximately R489 000,00 at the end of the 1997 financial year had deteriorated to one in excess of R3m at the end of the 1998 financial year.

4.The deterioration in the company's fortunes, Mr Beverley testified, had commenced in 1993 and by 1995, it was under severe financial constraints as a consequence of a number of market-related phenomena beyond the Respondent's control. Its management team, which included the

Applicant, attempted to meet the situation by way of diversification in its activities but with no significant result. Retrenchment programmes were accordingly embarked upon and over the five year period from November 1993, the employee complement of the company was reduced by approximately one-half. Further attempts to stem the deteriorating tide were made in the form of reductions in salaries across the board, save for those of minimum wage earners. Retrenchments of technical staff were effected in September 1995, the employees concerned being offered trade dealerships in the Respondent's products, which included a servicing and repair facility. A number of them had accepted this offer which, Mr Beverley stated, had "worked out well for them and the company."

5. Further salary cuts were then introduced and applied to the lower echelon of employees to the extent of 10%, to the middle order, which included the Applicant, to the extent of 15%, with a reduction of 20% in the remuneration of directors and senior management. Dealer discounts were reduced, training costs were limited, the provision of company cars was withdrawn and substituted by a car allowance scheme, petty cash expenditure in branches was capped, the number of company owned dealerships was reduced from 35 to 22 and numerous other cost-saving exercises were introduced.

6. These measures notwithstanding however, losses continued and considerable store, in the context of inhibiting them further, was placed on the trading results which would emerge from the 1998 Rand Easter Show. In the face of adverse exchange rates and rising prices however, the hoped-for improvement did not materialise and the withering cash flow dictated that more radical steps were essential.

7. Discussions between the Board of Directors and, in Mr Beverley's terminology, the "owner" of the company (presumably the sole shareholder), certain Joelson, determined that whilst a further reduction in the lower level staff complement was impractical, the number of persons involved in senior management and in particular, at sales management level, would of necessity have to be reduced. The introduction of a new computer system precluded the disposal of administrative executives and the ongoing necessity to maintain the advertising and show activities in the company necessitated the retention in its employ of its General Manager, in whose province these fell. Consideration would therefore of necessity have to be given to the retrenchment of the only two other executives whose functions could realistically be absorbed elsewhere and which would then become redundant. These were those of the Applicant as National Sales Manager and of the Direct Sales Manager, certain Mr R Schmidenberg. The Applicant did not have sufficient experience in any of the senior managerial positions to be retained, said Mr Beverley, and could not realistically be considered for alternative placement in that context.

8. Consultation with the Applicant on that basis was therefore indicated and in order to be in a position to deal realistically with the matter, Alexander Forbes, a firm of consultants and actuaries, was requested to assess the financial implications of the Applicant's retrenchment, both to him and to the company, should this become necessary. These were set out in a comprehensive report to the Respondent on 25 May 1998.

9. Mr Beverley, he testified, had enjoyed a good working relationship with the Applicant, whom he regarded as a colleague, for more than 20 years and he found himself now in a "difficult and soul-searching exercise." This in due

course took the form of a meeting which he had with the Applicant on 17 June 1998, and the purpose of which was, he stated, "to discuss the possibility of his retrenchment." In the course of that meeting he reviewed the company's dire financial situation, the unsuccessful attempts which had been made to remedy it and the necessity to find another solution. He explained to the Applicant the Board's perception in that context, that his position had become redundant. In response to the Applicant's enquiry as to why it was he who had been selected in that regard, he emphasised that it was in fact his position and function which had been identified as dispensable. Cost-saving at senior management level was imperative.

10. A discussion then ensued regarding other options, Mr Beverley testified, and he made three alternative proposals to the Applicant. The first was that he should become an Elna dealer. He was fully qualified for this and the company would "set him up in a dealership and finance it." Alternatively he might wish to "take over one of our retail shops." The Applicant however rejected this proposal out of hand. He was not interested, he responded, and wanted merely to know "what his money would be." Mr Beverley's response was that whilst his legal entitlement would be a minimum of one week's salary per completed year of service, no figures had as yet been worked out.

11. The second alternative proposed by him was that the Applicant should take over the direct sales management function, previously performed by Mr Schmidenberg, but in this instance on a commission only basis and with no fixed salary. Once again however, the Applicant was not interested. If Mr Schmidenberg had been unable "to get it together, how could he be expected to do so," he responded.

12. The third and last option discussed was the possible employment of the Applicant in a lower position, such as that by way of example, of Display Manager, but at a significantly reduced salary. This suggestion was similarly rejected out of hand, the Applicant repeating his request to be advised of the financial consequences of his retrenchment.

13. The discussion continued on that basis. He was told that he would be paid one week's salary for each of the 21 years of his service and which, as had been the case with all other retrenchments effected in the company, would be based on his basic salary. The Applicant however protested that the calculation should be made on his total package and Mr Beverley undertook, he said, to consult the Board on that issue and to prepare detailed calculations and revert to him.

14. He then asked the Applicant, Mr Beverley testified, whether he "had any other ideas" but he had none. The discussion had been entirely unconfrontational and all that the Applicant appeared to be interested in, was the financial implications of the termination of his employment.

15. A further meeting was held a few days later when he again proposed that the Respondent should set the Applicant up in a dealership in an identified underdeveloped area such as Port Elizabeth. This was again rejected and the discussion was directed to what should be included in the calculation, subject to the Board's approval.

16. At no time during the course of these discussions, said Mr Beverley, did the Applicant seek to contest or challenge the concept of his retrenchment. His sole concern was directed towards its financial implications. In response to a request as to how he would like his imminent withdrawal from the company to be announced, he suggested that it should be

stated that he was retiring. A farewell party was arranged and held on 29 June 1998 and a parting gift of a computerised sewing machine worth approximately R20 000,00 was given to and readily accepted by him.

17. The receipt by the company shortly thereafter, of a copy of the Applicant's reference of an alleged dispute with it to the Commission for Conciliation Mediation and Arbitration ("the CCMA") took him completely by surprise, said Mr Beverley, more particularly as the prescribed form in that regard was dated and signed by the Applicant on 28 June 1998, with an allegation that the dispute had arisen on 17 June, - the date of his initial discussion with the Applicant. The company then sought legal advice and on 8 July 1998 and in a letter to the Applicant in which that surprise was expressed, he recorded the substance of their discussions, the Applicant's historical and ongoing awareness of the company's financial difficulties, the circumstances leading to his identification for retrenchment and the alternative options offered to, but rejected by him. Pertinently, it was stated that- **"We feel that we have treated you fairly and honestly in all respects and have been, and still are, willing to discuss any submissions you may have in respect of your retrenchment. It is not our intention to become involved in acrimonious labour litigation with you and we therefore urge you to consider meeting with the company as soon as possible in order that we may attempt to reach a mutually acceptable arrangement."**

18. That invitation was rejected in a telephone conversation which he had with the Applicant on 14 July, said Mr Beverley, in which the Applicant reiterated his intention to pursue the matter with the CCMA. Accordingly, on 23 July 1998, a letter was addressed to the Applicant in which the company recorded its view that the reference of the matter

to the CCMA was premature in that the Applicant had "not used and exhausted the internal procedures available to settle the dispute on a retrenchment package with us" and together with which an offer in full and final settlement of all claims arising out of his employment with it and the termination thereof was recorded in an annexed separate document which, it was stated, had been formulated "with the *bona fide* intention of facilitating an amicable settlement of this dispute." In terms of that offer, an amount of R28 836,92 was calculated as payable to the Applicant in respect of notice pay "and related entitlements" as at the end of July 1998 and in addition thereto an offer of a "severance package in the sum of R50 061,00, based on one week's salary per completed year of service," was conveyed, this amount to be paid in five equal monthly instalments with effect from the end of August. The offer of settlement was stated to be open for acceptance until 16h00 on Friday 7 August 1998.

19. In a written response dated 27 July 1998, the Applicant recorded his intention to -

"..... refrain from replying thereto due to the fact that I am quite justified in claiming that I was unfairly dismissed and as a consequence have referred the matter to the CCMA for discussion and possible settlement by arbitration."

20. A lengthy exposition then followed of his perception of the financial situation of the company and of the discussions which he had held with Mr Beverley and which, he contended, had taken place "on the basis that the decision to get rid of me had already been made." The package offered was "nothing near what it should be," and his entitlement, he considered, would be in the region of two years salary, notice and leave pay, a substantial sum in

respect of commissions and deferred compensation in an amount of approximately R25 000,00. The Applicant was then told in a letter dated 3 August 1998 that the company did not intend to argue the merits of his case in correspondence and that, if its offer was not accepted as stipulated, it would follow the dispute resolution procedure prescribed in the CCMA.

21. The CCMA conciliation meeting on 7 August 1998 failed to resolve the dispute but in the course of the conciliation process, the Respondent undertook to review the original offer of settlement made to the Applicant. In that context a revised offer document was presented to him under cover of a letter dated 14 August in which the financial package now tendered was based on his gross annual remuneration and, in addition to the notice pay and other entitlements in the sum of R28 836,92 which was a component of the original offer, the severance package was increased to R88 903,00 - an improvement of nearly R40 000,00. The gross remuneration upon which it was calculated included the Applicant's basic salary, his car allowance, the company's contribution to the Pension Fund, the company's contribution to the Medical Aid Scheme and an average of commission earnings over the past five years. The offer was stated to remain open for acceptance until 20 August 1998 but it is not disputed that for some reason it was received by the Applicant only on the morning of 19 August.

22. The Applicant's response, in a letter dated 20 August 1998, was again to contest the basis of calculation of the package as well, in this instance, as the Respondent's contentions regarding its financial circumstances. The offer was refused and the letter concluded with a threat to pursue the matter in the Labour Court if "you do not come up with an acceptable offer or an offer which is considered reasonable in all the circumstances." The Respondent's reply was

concise and to the point. It was not in a financial position to reconsider the final offer made, it would not litigate with the Applicant by acrimonious correspondence and it would vigorously defend any legal action which might be instituted by him.

23. Detailed substantiation of and justification for the stance taken by him in the course of those exchanges, was submitted by the Applicant in his testimony. His meeting with Mr Beverley on 17 June, he stated, was nothing more than a formality. Contrary to the contention that it had been a comprehensive discussion, it had in fact lasted no more than half an hour. It was apparent to him that the decision to terminate his services by way of retrenchment was a *fait accompli* and there was little point in his contesting that decision or entering into a debate regarding its validity at that stage. He was told that a decision had been taken that retrenchments had to be effected at management level and that "you're it!" He was shocked and said nothing more. A number of alternatives were then offered to him - the appropriation of his retrenchment package towards setting him up in an Elna dealership, an offer to join the direct selling division and a third alternative of employment as a shopfitter and display manager in the design and fitting out of new shops. He rejected all of these, the first because it was not viable having regard to the amount of capital that would be required to implement it, the second because the joint selling division was a "failing" entity and the third, because he had no physical experience of the function involved.

24. He wanted to know, said Mr Fletcher, "what was on the table." The purpose of the meeting, in his perception, was not to consider alternatives to his retrenchment but to tell him that he was leaving. He could not have changed Mr Beverley's mind and it was in that context, when the form of

an announcement to staff was discussed, that he indicated that he would like to be thought well of by dealers and that it would be better if it was said that he had retired.

25. It was correct, Mr Fletcher conceded, that he did not question the concept of his retrenchment. This was his understanding of what had been decided but as far as he was concerned, the basis of calculation of the amount due to him as subsequently presented to him was incorrect.

26. The purpose of the initial meeting on 17 June 1998, he reiterated, was not an attempt by the Respondent to reach consensus with him regarding his retrenchment. That had already been decided and the purpose was to inform him of that fact and to present three alternative options to him. It might well have been possible for them to have reached some form of agreement had any of those options been appropriate but save for the shop-fitting and design offer at approximately half his salary, no alternative had been suggested to his leaving the company.

27. Asked under cross-examination why he had rejected the invitation to him in the company's letter of 8 July 1998 to meet with it in order to attempt to reach a mutually acceptable resolution of the issue, Mr Fletcher replied that this was because he had already referred the matter to the CCMA and did not wish to be prejudiced. He could not however define the nature of that potential prejudice. The meeting with Mr Beverley had been a clear indication of the company's intention to terminate his services and he had "no argument on my side." Asked why he believed that repeated invitations to meet with them had thereafter been extended to him, he could offer no explanation. As far as he was concerned, the matter was *fait accompli* and in truth, the company did not wish him to accept the offers that were

made. Questioned as to why, in those circumstances, he suggested that he had had no opportunity to present his own submissions, he replied that he had not taken legal advice and hoped for assistance from the CCMA. Once the reference to that Commission had been made, that was the only forum in which he was prepared to continue discussions.

28. He was not given the opportunity, he said, to make alternative proposals. He had not been prepared to enter into correspondence following the CCMA meeting because he felt that there was no possibility of his reinstatement or of a fair settlement of the dispute.

29. The revised offer which was made to him following the CCMA meeting, had been formulated on the recommendation of the Commissioner. He had rejected it, notwithstanding that he could not dispute that it was 75% more beneficial to him than any previous severance package offered to anyone else, because he felt that it was still incorrect and inadequate.

30. Whilst it was correct that he had been aware of the company's financial difficulties since 1994, the identification of his position as redundant had not been explained to him as a necessity in that context, he had merely been informed of that decision. It was correct however that he had not attempted to debate or contest that issue and he was not, he reiterated, prepared to accede to the company's invitations to enter into discussions with it in the face of what he perceived as a final decision and in the light of his subsequent referral of the matter to the CCMA.

31. **THE ALLEGATION OF SUBSTANTIVE UNFAIRNESS**

I am left in no doubt, from the comprehensive evidence

presented in that regard, as to the straitened financial circumstances of the company as they developed during the five year period preceding the Applicant's retrenchment. Mr Beverley's evidence regarding the deterioration in its fortunes to that point and the varied efforts made to address it, was comprehensive and entirely credible. Mr Clegg's assessment of the parlous financial situation which obtained at the time of his retention in September 1999, was not disputed in any material respect.

32. I am also satisfied that, in the senior managerial position which he held, the Applicant was aware of the state of affairs. Mr Beverley testified that at all material times he had access to management accounts and was part of the management team attempting to deal with it and he did not seek seriously to challenge that testimony in the course of his own evidence. The commercial rationale underlying the Respondent's decision to introduce prospective cost-saving measures at management level, once other attempted methods to do so had failed, is also, in my view, unassailable. That was its prerogative and the necessity for it to do so is similarly not challenged. The only question raised by the Applicant in that context was, in his own words, "why me?" and the basis for his identification for retrenchment has, in my view, been adequately explained. Valid reasons, premised on experience and administrative ability, were advanced for the retention by the Respondent in its employ of other members of senior management who were not considered for retrenchment and I am prepared to accept that, save for the position of direct Sales Manager which, although at a status level equivalent to his own, could not be offered to the Applicant on the prevailing remuneration basis, there was no other managerial position in which he could realistically have been accommodated.

33. For those broad reasons, I have concluded that the

substantive challenge to the termination of the Applicant's employment is unfounded.

34.**THE PROCEDURAL ISSUE**

The attack on the procedural fairness of the Applicant's retrenchment is premised in its entirety on the Respondent's alleged disregard of the requirements of Section 189 of the Act. The Respondent, it is alleged, failed to consult with the Applicant and made no attempt to reach consensus with him regarding appropriate measures to avoid his retrenchment, the basis of his selection and the computation of the severance package payable to him. No adequate reasons, it is submitted, were furnished for his dismissal, no alternatives were considered and no opportunity during consultation was accorded to him to make any representations on the issue.

35.A definitive analysis of the substance and purpose of Section 189 was made in this Court by **Brassey AJ** in the unreported case of **-**

Siphiwe Sikhosana and others v Sasol Synthetic Fuels: Case No J949/98.

The following apposite extract appears at page 6 of the typescript.

"Section 189 of the Labour Relations Act 66 of 1995 is normally regarded as the source of the law governing dismissal for retrenchment, but in fact it does no more than set out a number of duties with which an employer must comply when she contemplates dismissing employees for operational reasons. None of its provisions deal expressly with dismissal, let alone with whether and when a dismissal will be fair. There is, for instance, no provision stating that non-compliance with the section makes a dismissal for operational requirements unfair nor any provision stating the converse - ie that compliance with the section makes the dismissal fair. For the provisions that have this effect, we must first look to s 185, which gives employees the right not to be

unfairly dismissed, and then at s 188, which states (so far as is now relevant) that a dismissal is unfair unless it is actuated by a fair reason based on the employer's operational requirements and is effected in accordance with a fair procedure. Section 189 has nothing expressly to say on matters of fairness."

36. At page 7 of the typed transcript of the Judgment, the following is said:

"The relationship between the dictates of s 189 and those of fairness is not one to one, however. It cannot be assumed that every breach of s 189 necessarily makes the retrenchment unfair: every invalid dismissal will doubtless be unfair but, as I have tried to make clear, not every dismissal in conflict with the section will necessarily be - or be treated as - invalid. It would be even more dangerous to assume that every retrenchment in compliance with the section is necessarily fair. Section 189, which (with one exception of no relevance here) deals only with matters of consultation, is obviously not intended to be exhaustive. A court determining the fairness of a retrenchment must consider, in addition to the matters for which the section provides, whether the employer really needed to retrench, what steps he took to avoid retrenchment, and whether fair criteria were employed in deciding whom to retrench. Compliance with s 189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment. The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes of the issue of fairness."

37. That analysis, in my respectful view, is unarguable and when the Applicant's contentions and submissions are assessed in relation to its components, their validity becomes seriously open to question.

38. In its definitive judgment on the concept of consultation in

the context of retrenchment, the Appellate Division, as it then was, in -

Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers 1995(3) SA 22

determined that an employer's duty to consult with employees or their unions in the case of possible retrenchment, arises, as a general rule, both in logic and in law, when an employer, having foreseen the need for it, contemplates retrenchment. The Applicant's contention that that duty was not observed in his case and that at the stage of his initial discussion with Mr Beverley on 17 June 1998, the decision to retrench him had already been taken and was *fait accompli,* was not disputed by Mr Beverley, who acknowledged that in the face of the dire necessity to cut costs, that appeared to the Board to be the only practical option if none of the three proposals presented to the Applicant was accepted.

39. To what extent then, if at all, was this apparent dereliction inimical to the fairness of the process which followed? I do not consider that to be the case. The rationale underlying the equitable principle enunciated in the **Atlantis Diesel Engines** case (*supra*) is not open to question, but in a hard, realistic and uncompromising commercial environment, it will in my opinion more often than not prove to be a lofty ideal, acknowledged in principle but compromised in practice. In my perception, there can be few employers who, having identified, as they are fully entitled to do, the necessity for a valid and *bona fide* reason to reorganise, restructure or in some other manner, redefine their business operations, will not have decided in principle what they perceive is the optimum method of doing so. What I consider to be the legitimate purpose of consultation with employees who might thereby be affected therefore, is not to assist them in making up their minds, but to determine, by way of consensus, whether there is any practical and

viable basis for changing them. There is, to my mind, nothing unfair in that concept. In its broad context, it is a realistic and prevailing phenomenon of commercial life.

40. That is precisely the position in which the Respondent found itself on 17 June 1998. The need to retrench, when all other attempted avenues to redress its deteriorating situation had failed, was clearly identified and the evidence of both parties to this dispute points unarguably to the fact that that necessity, insofar as it was applicable to him, was acknowledged and accepted by the Applicant whose only concern thereafter related to the financial consequences to him of the process. No attempt, he conceded, was made by him to debate the issue or to formulate and present alternative proposals of his own. He remained intransigent in that regard notwithstanding repeated invitations made by the Respondent, in the context of its offers of settlement both before and after the reference of the dispute to the CCMA, to meet with it in an attempt to reach a mutually acceptable arrangement.

41. The situation then prevailing is analogous to that found by the Labour Appeal Court to have occurred in -

Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC)

It was there held that although the dismissal of the employees concerned had been procedurally unfair for want of compliance with Section 189 regarding selection criteria for retrenchment, the employer had made good its failure properly to discuss selection criteria soon after its final decision to retrench, but that the union and the employees had been unreasonably obstinate in refusing to discuss these criteria. For those reasons, compensation in terms of Section 194(1) of the Act was refused.

42. The Respondent's final and significantly improved offer of settlement, made to and rejected by the Applicant following the abortive CCMA conciliation meeting, was a comprehensive one, incorporating as it did all the elements of remuneration contended by the Applicant to have been omitted from earlier proposals. The Applicant's response, in rejecting it and the reiterated invitation to continue discussions, was to inform the Respondent that if it was not revised to his satisfaction, he would pursue the matter in the Labour Court. In that context, he remained consistent in his intransigence.

43. **CONCLUSION**

As in the **Johnson & Johnson (Pty) Ltd** case to which I have referred, it is that stubborn and unjustified refusal on the part of the Applicant which disentitles him to any form of compensation over and above the amounts legitimately due to him and the statutory minimum computation of which is significantly exceeded by the Respondent's last offer, which does not appear to have been at any stage withdrawn. I am satisfied, for the reasons set out above, that the Respondent has adequately discharged the onus upon it to establish both the substantive and procedural fairness of its termination of the Applicant's employment and in the circumstances, I make the following order:

The application is dismissed with costs.

For the Applicant:
Attorney I McLaren

For the Respondent: