

-IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D582/98

In the matter between

**JAYANTHEE DEVI SINGH
PRISCILLA PADAYACHEE
NATIONAL EMPLOYEES' TRADE UNION**

**First Applicant
Second Applicant
Third Applicant**

and

MONDI PAPER

Respondent

JUDGMENT

de VILLIERS A J

1. This is a referral in terms of section 191 (5) (b) (ii) of the Labour Relations Act of 1995 ("the Act") in which the First and Second Respondents (hereinafter referred to as "Singh" and "Padayachee" respectively alternatively collectively as "the Applicants") claim reinstatement, alternatively compensation, for their alleged unfair dismissal.

1. The background to the dispute is as follows.

1. Towards the end of 1996, the Respondent introduced an integrated business information system, Systems Applications Products (hereinafter referred to as "SAP") at its Merebank Mill where Singh and Padayachee were employed in the purchasing department, at that stage, in the positions of import buyer and typist/buying clerk respectively.

1. As at the end of 1996, Singh had 15 years service as a buyer in the Purchasing Department and Padayachee had 11 years service with the Respondent, having worked first as a packer (eight years) and then as a typist/buying clerk (three years).

1. During February 1997, Singh was "swopped" with Sylvia Basudew, taking over Basudew's job

as expeditor/buyer in the department while Basudew was moved to take over Singh's job as import buyer.

1. On 27 May 1997, the Respondent issued a special company brief to all employees and to the Third Applicant (hereinafter referred to as "the union") in which the employees and the union were advised, amongst other things, that the Respondent was in the process of implementing an integrated business information system, SAP, which will "replace many of the cumbersome manual data processing systems currently in place". It advised further that as a consequence, "certain jobs are likely to become redundant in due course" and that "certain employees" may be faced with retrenchment. In its brief to the union, it invited the union to "participate constructively in a process of consultation" and advised the union of the dates when meetings (two morning meetings a week between 10 June 1997 and 24 June 1997) would be held with the union and representatives from the Paper Printing Wood and Allied Workers Union (hereinafter referred to as "PPWAWU") and listed the issues for consultation as follows.

- Reasons for automation and work reorganisation
- Possible redundancy
- Numbers and categories of employees affected
- Possible alternatives should redundancy materialize
- Selection criteria should retrenchment result
- Severance packages
- Assistance to affected employees
- Timing

1. Meetings with these representatives from these unions were held.

1. During June 1997, the manager of the purchasing department, Grant Moxley ("Moxley"), produced four organograms of the departmental structure which indicated that the positions then held by the Applicants were to become (Respondent's version) or had become (Applicant's version) redundant.

1. In July 1997 the Applicants were called to a meeting with Moxley and the Respondent's Human Resources Manager, Stephen Glendinning to discuss their positions in the department. The substance of what was discussed at this meeting is in dispute.

1. On 9 October 1997, a notice in terms of the provisions of section 189 was sent to all

departments in the Respondents mill at Merebank. The purchasing department, being an administrative department, was not involved.

1. During the first quarter of 1998, Les Winkworth (hereinafter referred to as “Winkworth”), a union shop steward at the mill, was involved in restructuring and consultation exercises with the non-administrative departments.

1. On 1 March 1998, Singh obtained a National Diploma in Purchasing Management from Technikon SA.

1. On 2 March 1998, the Applicants received letters headed: **NOTIFICATION IN TERMS OF SECTION 189 LABOUR RELATIONS ACT OF 1995 IN RESPECT OF THE PURCHASING DEPARTMENT**. Copies of these letters were forwarded to Winkworth.

1. Thereafter nine meetings - between 3 March 1998 and 6 May 1998 - were held involving Moxley, members of the human resources department, Winkworth and the Applicants.

1. On 7 May 1998, the Applicants received letters confirming that their positions had become redundant and that their services would be terminated with effect from 31 May 1998.

1. On 6 August 1999 Padayachee was offered and accepted temporary employment as a packer in the coating plant. This position was made permanent on 1 October 1999.

1. On 12 July 1999, Singh was offered a temporary position as a data capture clerk in the Engineering Department.

1. Although I am mindful of Froneman DJP’s (as he then was) direction in **Johnson and Johnson (Pty) Ltd v CWIU** [1998] 12 BLLR 1209 (LAC) that when dealing with dismissals for operational requirements, an adjudicator should not employ a “checklist approach”, the issues in dispute and the evidence led in this matter are most conveniently dealt under the following headings.

- Whether there was a fair reason for the dismissals.

- Whether consultations commenced when the Respondent “contemplated dismissal”.
- Whether the Respondent consulted with the correct parties in terms of section 189 (2) (b) of the Act.
- Whether the consulting parties attempted to reach consensus on appropriate measures to avoid the dismissals
- Whether the Respondent disclosed in writing all relevant information in terms of Section 189 (3) of the Act.
- Whether the consulting parties attempted to reach consensus on the methods for selecting the employees to be dismissed (Section 189 (2) (b) of the Act);
- Whether the Respondent selected the employees to be dismissed according to criteria that had been agreed upon by the consulting parties or, if no criteria were agreed upon, criteria that are fair and objective (Section 189 (7) of the Act).

Was there a fair reason to dismiss the Applicants

1. The reason why the Applicants were selected for dismissal was because, according to the Respondent, their positions as typist/buying clerk and expediter/buyer had become redundant as a result of the introduction and implementation of SAP.

1. There is no allegation in the Applicants’ statement of claim as to whether the positions had become factually redundant. The issue was not canvassed in any one of the nine consultation meetings and there is no evidence before me to suggest that it did not make business sense for the dedicated positions of expediter/buyer and typist/buying clerk to be removed from the department.

1. The totality of the evidence suggests that the SAP programme absorbed much of the manual work which had previously been done by the Applicants and that other aspects of their work were comfortably and logically absorbed into other functions where there was now spare capacity following the implementation of SAP.

1. I have thus no reason to contest the Respondent’s argument in closing that the decision to retrench the Applicants was based on the operational requirements of the Respondent. There was a commercially rational motive behind the decision to restructure the purchasing department in the way that it did as a result of which the positions of expediter/buyer and typist/buying clerk became

redundant.

1. One of the reasons why the Applicants felt aggrieved about their dismissals was the history that led to their being in the two positions which became redundant after the implementation of SAP.

1. While there may be some merit in their belief that they were unfairly treated prior to their positions becoming redundant and that had they been in different positions or received more training they would have been in positions which did not subsequently become redundant, or that they found themselves in these positions, as Winkworth tried to suggest in one of the consultation meetings, because of the laws which discriminated against them during apartheid, it is not for this Court, sitting to determine the fairness or otherwise of the dismissal, to go back in time and determine whether those earlier decisions were fair or not. If they felt they had been unfairly treated - that the changes made were unilateral or that they were the victims of an unfair demotion or that they were being victimized, they had their remedies at the time to deal with the problem.

1. It would be untenable for any employer to have to answer for decisions made some time prior to a restructuring exercise as to how those employees whose positions had become redundant came to be there. That is one of the reasons why employer's have to justify their selection criteria. Redundancy merely means that that an employer is faced with excess employees for the number of jobs required for the efficient running of a business or department. The determination of who should stay and who should go must be done in accordance with a fair procedure and according to either agreed or fair and objective criteria. If this were not so, then the retrenchment of those whose jobs became redundant would be automatic and an employer would not have to go any further than convincing a Court that he/she had a good business reason for making the jobs redundant. No consideration would have to be given selection criteria. The incorporation of section 189 (7) of the Act as a separate requirement indicates that that is not what the legislature intended.

Did consultations commence when the Respondent contemplated dismissing the Applicants

1. The Applicants are of the view that consultations should have commenced when their positions became redundant and that that moment occurred during or about July 1997 when the

Applicants were called to the meeting with Moxley and Glendinning to discuss their positions. In their evidence, the Applicants were adamant that they had been told then that their positions had become redundant; that the work they did after the discussion with Moxley and Glendinning was significantly different to the work they were doing before. Moxley's organograms drawn up at that time also showed that their positions had become or were to become redundant. This view was also supported by the evidence of Derek Naidoo. I am therefore inclined to accept that the positions became factually redundant sometime between June and July 1997.

1. The Respondent's representative argued that there is a difference between restructuring which leads to redundancy and the contemplation of dismissing those whose jobs have become redundant. He argued that a distinction needs to be drawn between the moment when an employer anticipates restructuring and the moment when, as a result of that restructuring, the employer contemplates dismissing employees affected by the restructuring.

1. The Applicant's representative argued that Moxley was bound to begin consultations in July 1997 because section 189, in the absence of a collective agreement which stipulates the party with whom an employer must consult, compels consultation with representatives of employees or employees "likely to be effected" and, as at July 1997 the Applicants were the ones in the purchasing department likely to be dismissed as a result of the redundancy. As I understand his argument, he submitted that any delay between a position becoming redundant and the beginning of consultation on alternatives to the work previously being done or possible dismissal as a result of the redundancy, would serve to prejudice the affected employee because that employee would effectively be "sidelined", placing him/her in the position of a temporary employee and he or she could therefore no longer lay claim to the permanent positions in their former departments.

1. The case law on which this Court has relied in order to determine when consultation should commence suggests that consultation must commence before a **final** decision to retrench (that is terminate the contract of employment of the employees) has been made. (See **Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers** 1995 (3) SA 22 (A); **South African Clothing and Textile Workers Union and others v Discreto, a division of Trump and Springbok Holdings** [1998] 12 BLLR 1228 (LAC); **Decision Surveys International (Pty) Ltd v Dlamini & others** [1999] 5 BLLR 413 (LAC))

1. Therefore an employer in the position of the Respondent, may be entitled to introduce new technology and re-organise the way in which work is done without resorting to the process described in section 189. If the reorganisation affects an employee's conditions of employment then any change to those conditions, the employer may have to negotiate the change for other reasons contemplated in the Act but not, at this stage, in terms of section 189. It does not necessarily follow (as Mlambo J appears to infer (in **Malcolm Sayles v Bartan Steel CC** J1384/97 unreported) that when an employee's position becomes redundant in a department, dismissal is *ipso facto* the next step. This must be so particularly in large organisations, like the employers where the opportunities for alternative employment exist.

1. There may well be instances where the proposed restructuring or re-organisation if implemented will inevitably lead to the retrenchment of the employees concerned. In such cases the employer is bound to consult on the proposed restructuring and re-organisation prior to implementation. But this is not one of them. There is nothing in the evidence to persuade me that as at July 1997, the Respondent had an intention, let alone had made up its mind, to retrench the Applicants despite the fact that their positions in the purchasing department had become factually redundant. The overall purpose of the consultation process (as Jammy AJ points out in **Michael Fletcher v Elna Sewing Machine Centres (Pty) Ltd** J 2430/98 unreported at paragraph 39) is not to assist employers to "make up their minds" but rather to "determine, by way of consensus, whether there is any practical and viable basis for changing them".

1. In the absence of evidence which persuades me as to when, exactly, the Respondent contemplated dismissing the Applicants, I must accept that that moment happened on or about 2 March 1999 when the letters were sent to them and that, as far as this aspect of the dispute is concerned, there was compliance with section 189.

Did the Respondent consult with the parties in terms of section 189 (2) (b) of the Act.

1. In terms of section 189 (2) (b), which requires the employer, in the absence of a collective agreement regulating the issue or a workplace forum, to consult with:

"any registered trade union whose members are likely to be affected by the proposed dismissals"

1. At the time that the Respondent engaged in consultations regarding the retrenchment of the

Applicants (3 March 1997), both Singh and Padayachee were members of NETU. (Although at the time, Singh's salary advice slip reflected stop order payments in favour of PPWAWU, in evidence she confirmed that she became a member of NETU in January 1997.) It is common cause that Winkworth was the elected shop steward for NETU members and that Winkworth engaged with Moxley as Singh and Padayachee's representative. Whether Moxley was prepared to **recognise** him as a NETU official for the purposes of consultation or merely as the Applicants' representative was immaterial as far as compliance with this provision was concerned. *De facto* Winkworth was a trade union official as defined in the Act endowed with all the necessary rights to enable him to perform his duties in the consultation process. If he was aggrieved about the Respondent's failure to recognize him as such or if the Respondent's attitude towards him prevented him from exercising his rights as defined in the Act, he had his remedies in terms of the Act and possibly in terms of the recognition agreement. If he believed consultation was necessary with a higher level of union representation (with full-time union officials, for example) he could have drawn them into the process and the Respondent would have had no basis in law for excluding them.

1. In passing, and only because it was raised in argument, I must point out that section 189 (1) (c) does not make reference to the level at which trade union representation in a consultation must occur. An employer is simply required to consult with "any registered trade union". The Applicants' representative suggested in argument that this section requires the involvement of full time union officials. As authority he cited my judgment in **MM Pretorius v Blyvooruitzicht Gold Mining Company Limited** (J4116/98 unreported). Not only is this matter distinguishable on the facts, while I am of the view that wherever possible full time officials ought to be involved in order, objectively, to protect all their members' interests in a retrenchment exercise and because they tend to have greater expertise and experience and must be involved where a collective agreement stipulates their intervention, representation at shop steward level will suffice to ensure compliance with this section unless there is an agreement to the contrary.

1. In any event, this was never the Applicants' complaint. It is clear from the transcripts of the consultation meetings that Winkworth wanted recognition as a trade union representative. The complaint was not that full-time NETU officials should be involved.

1. Even if I am wrong on this point, and the the reference to trade union in section 198 (1) (c) requires the attendance of full time union officials in the consultation process, the Respondent's failure to comply did not necessarily mean that the actual procedure which was followed was

unfair.

1. In considering this point I have been guided by the principles enunciated in **Johnson and Johnson** (supra) and in **Siphiwe Sikhosana and Others v Sasol Synthetic Fuels** (J949/98) both of which suggest that, in determining the fairness of a dismissal for operational requirements, a formalistic, “checklist” approach should not be adopted - non-compliance with one or more of the subsections will not necessarily render the dismissal unfair. Brassey AJ, in **Sikhosana** (supra) goes a step further than Froneman DJP (as he then was) and suggests that section 189 says nothing at all about fairness and that:

“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.”

1. It is in this context that any failure by the Respondent to comply strictly with section 189 (1) (c) must be considered and I have relied on the following to conclude that the failure did not result in unfairness to the Applicants:

1.4. the Applicants were satisfied with Winkworth as their representative despite the fact that he was a shop steward and not a full time union official;

1.1. at no stage during the consultation process did the Applicants make any attempt to rectify the issue;

1.1. there is no evidence before me to suggest that the Applicants were prejudiced by the Respondent’s non-compliance with the section.

Did the consulting parties attempt to reach consensus on appropriate measures to avoid dismissals?

1. The transcripts of what transpired at the nine meetings and the correspondence which passed between Moxley and Winkworth during the course of the process run to some 458 pages and bear testimony to the contest of wills which took place between the two of them rather than a record of two people genuinely trying to find each other in a joint consensus seeking process.

1. While Winkworth's attitude was unnecessarily confrontational, Moxley and the human resources department must share the blame for failing to take account of Winkworth's concerns (even if they believed they were irrelevant to the process) and failing to make a genuine attempt to deal with them. For example, an outsider, with industrial relations training and some knowledge of section 189, reading the record of the first meeting, will understand Winkworth's concerns regarding the issue of representation immediately. He was merely trying to assert his union's rights in terms of section 189 (1) (c) and to get clarity on that point. Instead of trying to fudge the issue as he did, Moxley (who, from the transcripts at page 89 of the bundle, clearly did not understand the distinction between recognition of the union for the purposes of collective bargaining and union representation for the purposes of a retrenchment consultation) or the human resources personnel could have offered some reassurance that Winkworth was, indeed, there in his capacity as a trade union official entitled to all the benefits attaching thereto in terms of section 189 (4) regarding the disclosure of information.

1. What the Respondent also did not understand was that, the selection of only Singh and Padayachee to participate in the consultation process regarding the restructuring of the whole department, led to a reasonable perception on Winkworth's part that they were the only ones in the department likely to be dismissed. What he was looking for was an explanation as to why they have received the section 189 notices and not anyone else in the department. This, too, ought to have been addressed.

1. By the same token, if Winkworth was dissatisfied with Moxley's attitude to him, why didn't he seek assistance from the more experienced, full time officials? Why didn't he follow the dispute procedure to enable the process to move forward and to protect the interests of his two charges? As the Respondent rightly pointed out in argument, this was not a game. It affected the lives of two people at the most fundamental level - their ability to earn a living. Winkworth ought to have followed through on the numerous disputes he threatened to declare in order to move the process forward.

1. Winkworth behaved irresponsibly by failing to take his difficulties up at a higher, more experienced level in the union hierarchy. So, too, the Respondent's human resources department for failing to approach more senior union officials to assist when it found that its efforts to reach consensus were being frustrated by what they perceived as the irrational and "nit picking"

behaviour of Winkworth.

1. A joint problem solving approach requires that the consulting parties attempt to understand and deal with the other's needs and interests even if they believe those needs and interests to be ill-founded. Instead Winkworth approached the consultations in an adversarial, positional way and Moxley and the human resources department appeared to be more concerned about form rather than content. Between meetings, the human resources personnel did some damage control, by way of correspondence (signed by Moxley but drafted by the human resources personnel), to put things back on track. At times Winkworth attempted to understand where management was coming from. But, overall, their "attempt" left much to be desired and offers a learning to managers and trade union officials that an issue such as retrenchment should not be left in the hands of the inexperienced if this aspect of the process is to be respected. At the very least, training on joint problem solving should be given.

1. There is an equal responsibility on both parties to attempt to reach consensus on the issues outlined in section 189 (2). Where one party can be held accountable for not making a genuine attempt, the Court would be bound to take that into account when assessing the fairness of the process. But, when both share the blame, no account should be taken of the failure and neither side should benefit from the failure of the other. Regretably, Singh and Padayachee are the victims. Their fate may have been different had their representative been less adversarial and confrontational and if the human resources department had played a more active role in the process. But they chose their representation and must stand or fall with it. It would be unfair to penalize the Respondent for any failures on its part when the union representative is equally guilty of failing to make a genuine attempt to engage meaningfully with the Respondent on the material issues which came up for discussion and debate.

1. I must note, however, that I am satisfied that both sides explored alternatives to retrenchment. The fact that they did not agree does not take the matter any further.

1. It would not serve any purpose to burden this judgment with all the evidence in this regard. The various positions which were explored are a matter of record and are not in dispute. On the evidence I believe the Respondent gave adequate reasons as to why it could not accommodate the alternatives proposed by the Applicants. Equally, Winkworth gave adequate reasons as to why he was not prepared to explore the alternative offered to Padayachee by the Respondent (the

position of packer in the Finishing department), namely that it had to be advertised in order to be fair to those who had already been retrenched (this being a good example of why the legislature intended union officials to be involved in retrenchment exercises) and that it was a more menial job than Padayachee's position in the Purchasing Department.

Did the Respondent disclose, in writing, all relevant information to the other consulting party?

1. There is a vast amount of evidence relative to this issue contained in the transcripts of the nine meetings, correspondence between the parties and in the evidence led at the hearing. Again it would serve no purpose to burden the judgment with a summary of this evidence.

1. The question one has to ask in this regard is not (as the Applicants' representative suggested in argument) whether Winkworth was provided with the same information as had been provided in other departments but whether Winkworth had sufficient information to engage meaningfully in the consultation process concerning the likely retrenchment of the Applicants and whether he was provided with the necessary information on request.

1. Of significance is what transpired at the fourth meeting (pages 179 and 180 of the bundle) where Moxley confirmed that he had provided Winkworth with a list and some details of the employees in the purchasing department and he also confirmed that he provided Winkworth with the organogram. Moxley then asked Winkworth whether there was anything that he has "missed out" and Winkworth replied as follows:

"I'm not too sure at this point, but I'd have to come back and check on my list".

1. The only other information requested after this is contained in a letter from Winkworth to Moxley in which Winkworth requested information on temporary employees (bundle at page 278) - information which, according to Glendinning, was easy to obtain. It is common cause that this information was never given to Winkworth.

1. What this suggests is that, while there may have been bits and pieces of information requested along the way which were not provided, after the fourth meeting Winkworth, having been specifically asked to revert with anything that has been "missed out", appears to have

abandoned his request for any outstanding information as nothing further is requested in terms of his list.

1. As far as the Respondent's failure to provide a list of temporary employees is concerned, this was not pursued after the request was made. The focus of the consultation shifted from exploring alternatives to discussions on selection criteria and the selection process. There is an equal obligation on both sides to do what is necessary to explore alternatives. If this piece of information was important, one would have expected Winkworth to make a greater effort to obtain it. Instead, the matter was not mentioned again. To hold the Respondent alone responsible would not be fair.

Did the respondent select the Applicants for dismissal according to selection criteria that had been agreed alternatively selection criteria that were fair and objective?

1. It is self-evident from the transcripts that the parties were not in agreement with the criteria nor with the process in terms of which the Applicants were selected for retrenchment. I have reached this conclusion from the following.

1.1. Although there was a lot of discussion during the consultation process regarding the selection criteria and the weight to be attached to each criteria, during the course of the seventh meeting, Winkworth made it quite clear (at pages 396 and 397 of the bundle) that he was not prepared to accept the criteria. He then tentatively agreed to proceed with the assessment process by appointing a supervisor to assist with the assessment but made it quite clear that he intended to take up the issue of the criteria at another time (at the bottom of page 396 top of 397) saying that "we will cross that bridge when we come to it". At page 402 he once again confirmed that he did not agree with the form containing the criteria which was going to be used to assess the employees concerned but (at 405) agreed that he would approach a supervisor in the purchasing department to assist with the assessment.

1.1. At the eighth meeting Winkworth again confirmed that he had not agreed to the criteria in terms of which Moxley and Clive Gilham, the company buyer, had already assessed the Applicants and claimed that he had not approached a supervisor in the purchasing department for three reasons:

1.1.3. he had not had time;

- 1.1.3. he did not believe that only one supervisor should do the assessment; and
- 1.1.3. he was still in disagreement regarding the use of Moxley's assessment form.

1.1. During the course of this meeting Moxley suggested that Winkworth arrange for a supervisor to assess the employees concerned on both sets of criteria (his and Winkworth's). At one point Winkworth appears to agree with this proposal (at page 445 of the bundle) but later in the same meeting (at page 449) he described this proposal as "lunitis". Still later in the same meeting (at page 452), Winkworth suggested that one person assess the employees concerned on both sets of criteria. By the end of the meeting there was no agreement regarding the criteria. The lack of consensus was confirmed in a letter from Winkworth to Moxley on 24 April 1998 in which Winkworth suggested that an independent arbitrator be appointed to "resolve the matter of criteria".

1.1. At the end of the eighth meeting Winkworth agreed to revert to Moxley the next day (by 12h00) to advise him as to when he would be able to approach a supervisor in the department to do the assessment. However, in the same letter to Moxley Winkworth indicated that it would not be transparent or fair if he proceeded with the assessment process in accordance with the "restrictions" imposed by Moxley.

1.1. In response Moxley wrote to Winkworth giving him a "final opportunity (at page 461 of the bundle) to arrange for one supervisor to complete the assessment of the employees concerned. In turn, Winkworth responded by letter (at page 488 of the bundle) saying, once again, that because of the restrictions which Moxley had placed on the "way and manner in which my assessment is to be carried out, has made it impossible for me to carry out this assessment in a fair and defensible manner."

1.1. At the final meeting the assessments conducted by Moxley and Gilham were discussed and rejected by Winkworth.

1.1. At no stage during the consultation process (according to the transcripts) did Winkworth agree that only four employees in the purchasing department should fall into the group to be assessed for selection. His view **at the time** (and I believe this is the material time for determining whether the selection criteria were agreed or not) was that seven employees who appear on the same band as Singh and Padayachee in the organogram under discussion should

be in the group to be assessed (see page 448 of the bundle). There is nothing further in the transcripts or correspondence at the time to indicate that he changed his view on that point. Winkworth's evidence at the trial in this regard was unhelpful and confusing and I have therefore made my finding that the employees to be selected for assessment, on a balance of probability, was not agreed from the documentary evidence alone.

1. On this set of facts, at best for the Respondent, there may have been agreement, at one point, as to who would do the assessments. There may also have been agreement on some aspects of the selection criteria. But, there was sufficient disagreement to lead me to conclude that the criteria were not agreed. There was also no agreement, at the time, as to who should be assessed.

1. I must therefore determine whether the criteria and process in terms of which the Applicants were selected for retrenchment was fair and objective. Under this heading there are three considerations to be addressed:

- 1.1. whether the "band" of people chosen for assessment was fair;
- 1.4. whether the criteria used were fair and objective;
- 1.4. whether the process for assessing the Applicants was fair and objective.

1. *The band of people chosen for assessment*

1.1. Taking his evidence as a whole, it is clear that Winkworth had little if any knowledge as to what the various people in the department did or who should be included in the band. I doubt whether he engaged meaningfully with Singh or Padayachee on this issue. He appears to have approached the issue purely on the basis of the organogram (at page 16 of the bundle) and mechanically drawn a line to include various people. His evidence on this issue was confused and contradictory as to who should have been in the band and I have therefore placed no reliance on his evidence in this regard.

1.1. The group that was chosen for assessment included the Applicants, Yagan Moodley, the direct buyer in the stores department and Sylvia Basudew, the import buyer. In evidence Singh and Padayachee confirmed that this selection was fair but insisted that G G ("Stanley") Naidoo ("Naidoo"), the chemical buyer in the raw materials department, ought to have been

included as well.

1.1. It is common cause that Naidoo has an inferior scholastic qualification to both the Applicants. Moxley testified that he was left out of the band because he had years of experience and special skills relative to the purchase of chemicals. Derek Naidoo, who was senior buyer at the time and who was Padayachee and Naidoo's supervisor at the time testified that Naidoo was efficient and that it was not possible to make his position redundant. He also testified that it would not have made sense to put Padayachee in Naidoo's job because Naidoo had the experience and training in negotiating with suppliers and that Padayachee was "having difficulty in her position". He was unable to comment on whether she was "trainable".

1.1. On this evidence, I agree with Respondent's representative that there were fair and objective grounds for excluding Naidoo from the band and that an employer is entitled exclude certain employees for selection on the basis of their experience and expertise.

1. The criteria used for assessment

1.1. At the end of the process, Singh and Padayachee were selected on the basis of an assessment done by Moxley and Gilham according to the following criteria (they are listed in terms of the weighting given to them - from greatest weighting to least):

Performance

- Quality of Work
- Initiative/Energy//Self Motivation
- Contribution to team performance
- Communication (Process Speed)

Service and Time in Current Job

- Mondi Service
- Time in Current Job

SAP competence

- Level of competence

Disciplinary Record

- Willingness to co-operate
- Interpersonal relationships
- Disciplinary record

Education and Training Qualifications

Attendance

1.1. In order to assess the fairness and objectivity of the criteria, I have taken account of the form which Winkworth wanted to use as well as the evidence of Singh and Padayachee.

1.1. The form which Winkworth wanted to use contained the following criteria (and are ranked below in order of importance):

Performance

- Quality of Work
- Initiative/Energy/Self Motivation
- Contribution to Team Performance
- Communication

Education, Training Qualifications

Job Modules or Mondi Courses Completed

Years of Mondi Service

Attendance

1.1. Comparing the two forms, I must conclude that the parties accepted that performance, education, training and qualifications, years of Mondi service and attendance were fair and objective criteria. Singh testified that she was satisfied that the criteria which Moxley and Gilham had used to assess her were objective. She only disagreed with the scores she had received relative to Moodley and Basudew. All Padayachee had to say on the issue, when asked to comment on the form, was that she didn't know "how it works".

1.1. In his evidence Winkworth complained about the way in which the criteria were weighted and indicated that the criteria relating to discipline (willingness to co-operate and personal relationships) could not be assessed objectively. Otherwise he agreed with the criteria used.

1.1. While the collective wisdom of labour law tends to shun performance as a selection criteria for retrenchment, unless there is a measurable yardstick against which the performance of the employees in the band can be measured (such as quotas, pre-identified targets etc), it seems the parties in this dispute had little difficulty accepting this criteria as fair and objective. Singh and Winkworth's concern was not the inclusion of this as a criterion but rather the manner in which it was used to assess the employees in the band. Even in argument the Applicants'

representative focussed on the identity of the assessors and the manner in which they were assessed and did not attack performance *per se* as a criterion. If the parties were prepared to accept performance as a fair and objective criterion, then so must I. The manner in which the Applicant's performance was assessed is another matter and is dealt with extensively below.

1.1. As far as Winkworth's problems with the inclusion of discipline as a criterion are concerned, particularly willingness to co-operate and personal relationships. I tend to agree with him. There is no way that "willingness to co-operate" and "personal relationships" can be established objectively. These are both highly subjective criterion and, unless agreed to, ought not to have been included.

1. The process used to assess the Applicants

1. It seems to me that this is the cornerstone of the Applicants' difficulties with their retrenchment. If one analyses the evidence in its totality, one must accept that:

- 1.1. the Applicant's positions had become redundant;
- 1.4. they were satisfied with their representation in the consultation process;
- 1.4. most of the information they required to engage meaningfully in the consultation process was given to them;
- 1.4. alternatives to dismissal were explored;
- 1.4. they accepted (if not at the time but certainly in evidence) that most of the criteria used were acceptable.

1. Winkworth's major concern was the manner in which the assessment was done - the weighting given to each of the criteria, the fact that they were assessed only by Moxley and Gilham "behind closed doors", that all the supervisors were not involved and that some training was required before the assessment could be done.

1. As far as the weighting is concerned, the evidence tendered by Winkworth at the hearing of this matter made no sense and I am satisfied that, if the parties accept the hierarchy (which they largely did), then I have no difficulty with the weighting which the Respondent attached to each of the criteria.

1. What is of concern to me is that the Respondent allowed the Applicants to be dismissed on the basis of the assessments done by Moxley and Gilham, despite Winkworth's protestations in the eighth meeting, simply because at some point during the seventh meeting Winkworth had agreed to this process. As I have already pointed out, using performance as a criterion is problematic. If an employer chooses to do so, he/she must be extremely careful about the way in which they assess an employee's performance, even if the criterion itself has been agreed.

1. Any industrial relations practitioner worth their salt would agree with many of the concerns expressed by Winkworth during the eighth meeting and in his letters to Moxley (at pages 459 and 488). During the course of the eighth meeting he raised the following concerning his failure to approach one supervisor to do the assessment (apart from the issue of getting time off work to attend to the process).

1.1. The fact that the criteria had not been agreed. In this regard he makes an extremely valid point (at page 424 of the bundle):

"How is it possible for me to go and explain a person how to use the criteria with a measuring stick on which we don't even agree? So I will go and explain to him my way of doing it, which is not the same criteria that you want to use, and how is it possibly (sic) for him to implement it?"

1.1. He then goes on to make another valid point about Moxley's suggestion that both sets of criteria are used, namely:

"..to have two sets of criteria, what does it mean at the end of the day? We, we just taking it from one room to another room."

He later calls this "lunitis".

1.1. He believes all the supervisors, not only Gilham, should be involved because the employees in the band report to different supervisors.

1.1. After a long and rambling discussion involving the choice of people to be involved in the process (both in the band and as assessors) which is not resolved, Winkworth made another suggestion (at page 452) that one, independent person do the assessment with both sets of criteria. He was concerned Moxley was not independent because he was the manager with

“vested interests”. While Moxley may not have agreed with this, the fact that he was perceived as not being impartial ought to have alerted the Respondent, if it was going to use performance as a criteria, to find another process to assess the candidates likely to be retrenched.

1. The following day Winkworth wrote to Moxley with a copy to Glendinning (page 460) voicing his concerns about the process and suggesting that an independent arbitrator be called in to “resolve the matter of criteria”. Given the state of play at this point, it was an excellent suggestion. Moxley’s response was dismissive and he merely placed reliance on the fact that Winkworth, at the seventh meeting, agreed to get one supervisor to do the assessment.

1. Winkworth’s responded by indicating that, in his opinion:

“...the whole exercise of assessment done by you was biased and amounts to nothing but a ‘kangaroo’ effort. I must therefore seriously pose the question whether you have any intention of going forward in a fair and meaningful manner”.

1. From the evidence of Mandy Pillay, Moxley was less than satisfied with Singh’s performance as the import buyer. Pillay described told that court that he was “furious” with Singh. But Singh’s performance was never subjected to a fair and proper performance management process. His perception of her performance was based on the say so of Mandy Pillay even though, as Moxley himself conceded, there could have been competition between Pillay and Singh. In addition, Singh testified that, at the time when the section 189 notification were issued, she was in the process of trying to resolve two disputes with Moxley - one concerning her move from import buyer to expediter and the other concerning her increase. There was evidence that Moxley had also had difficulties with Padayachee as a result of her demand for a proper job description and an acting allowance. Padayachee described him as being “nasty” to her.

1. For these reasons there was good reason to suspect that Moxley may have been biased and partial in his assessment of the Applicants. Again, because of the sensitivity and problems with using performance and subjective criteria such as “willingness to co-operate” as criteria for selection in a retrenchment exercise, the Respondent ought to have taken this accusation seriously and done something about it to ensure that the process in terms of which the Applicants were ultimately selected for retrenchment was fair.

1. At the final meeting, Winkworth was particularly concerned that the Applicants’ performance

and particularly their “willingness to co-operate” had been assessed on purely subjective grounds. At page 519 of the bundle, Padayachee made a telling point when she said:

“I didn’t work with Clive so how can Clive assess me, and the other question I need to know is, when a boss assesses an Employee, isn’t he or she supposed to be present there , in order to know what’s going on?”

1. Winkworth also made a good point when he said that, if there were instances when an employee’s performance was assessed in the absence of the employee concerned, “it must be defensible”. He once again expressed his concern regarding Moxley’s involvement and made the point, too, that Gilham had not been in the department very long. His plea to have all the supervisors involved was repeated.

1. The remarks made by the Applicants’ representative in closing are apposite and are worth repeating:

“The questions remain, were (sic) actual performance measured or was team performance measured, was performance in actual work done measured or was performance in the Purchasing Department before July 1997 measured? What was measured and did Moxley and Gilham go about it in the same way?”

1. Thus, for these reasons, while Singh and Padayachee’s performance, relative to Moodley and Basudew (the other two employees who were subjected to the assessment process) **may** have been poorer (and there is no hard evidence suggesting that it was because neither had ever been subjected to a proper and fair performance management process in terms of which their performance could be objectively assessed), the **way** in which their performance was assessed was unfair and subjective.

1. In essence the Applicants were dismissed because their manager and one supervisor (who had no direct knowledge of Padayachee’s performance and limited knowledge of Singh’s performance) regarded them as poor performers without ever having given them an opportunity to prove themselves competent in a properly structured performance management process.

1. At the very least, once Moxley and Gilham had made their assessments, the Applicants ought to have been given a proper opportunity to make representations on the low scores they received regarding their performance, if necessary, to a higher authority. (In this regard see **De Vries and others v Lanzerac Hotel and others** (1993) 14 ILJ 1460 (LAC))

1. The question I have to ask myself in this regard is whether the failure of the Respondent to find a process in which the Applicants' performance could be assessed on a fair and objective basis (whether through training or the identification of the appropriate persons to do the assessment) rendered the dismissal of the Applicant's unfair, given the findings I have made in favour of the Respondent with regard to most of the other issues which required determination in this dispute and Respondent's argument that there was substantial compliance with section 189.

1. Selection is dealt with twice in section 189 (in section 189 (1) (2) (b) and in section 189 (7)). This indicates the importance of the selection process in a retrenchment exercise. Apart from attempting to seek alternatives to dismissal or measures to avoid dismissal, when only some of a group of employees are equally likely to be retrenched, the selection process must rank as the most fundamental issue for scrutiny in order to determine whether the dismissal was fair or not. An employer can get everything else right but if the selection process, during which the employees who were ultimately dismissed is found to be unfair and subjective, the entire process is flawed thereby. Even if Winkworth had proceeded, as he initially agreed to, and found another supervisor in the department to assess the Applicants' performance, the process would still have been tainted with subjectivity and unfairness, unless that supervisor could show that his/her assessment could be objectively justified which, in the absence of a proper performance management system in place in that department, he/she would have not been able to do.

1. As Brassey points out in **Siphiwe Sikhosana and Others v Sasol Synthetic Fuels** (supra) compliance with section 189 does not necessarily make the dismissal for operational requirements fair. This dispute, I believe, is one of those instances where, although the Respondent has substantially complied with section 189, for the reasons stated above, the dismissal was nevertheless procedurally unfair.

1. For these reasons, I find that, while the dismissal was substantively fair in that it was based on the operational requirements of the Respondent, the selection of the Applicants for dismissal was not effected in accordance with a fair procedure.

Relief

1. In this regard, as **Johnson and Johnson** (supra) suggests (at 1219G-H) I am limited to

ordering compensation as opposed to reinstatement or re-employment and, if compensation is ordered, the amount of compensation ordered must be equal to the remuneration the Applicants would have earned between the date of their dismissal and the last day of the hearing, a period of some 17 months. However, in line with subsequent decisions (such as, **Vickers v Aquahydro Projects (Pty) Limited** [1999] 6 BLLR 620 (LC) and **Buthelezi v Amalgamated Beverage Industries** [1999] 9 BLLR 907 (LC)), and for the reasons stated in them, I believe compensation, if awarded, should not exceed 12 months remuneration.

1. I must therefore decide whether to award the Applicants all (the full twelve months) or nothing.

1. The only guidance given by the Labour Appeal Court as to how this “all or nothing” discretion ought to be exercised is at 1220A where Froneman DJP (as he then was) says the discretion not to award compensation must be exercised judicially and at 1220C-D where he says the following:

"The nature of an employee's right to compensation under s.194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s.194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee."

1. In judgments subsequent to **Johnson and Johnson**, this court has introduced the notion of fairness into the equation. (See **Whall v Brandadd Marketing (Pty) Limited** J1130/97 unreported ; **Lorentzen v Sanachem (Pty) Limited** [1999] 8 BLLR 814 (LC); **de Bruyn v Sunnyside Locksmith Suppliers (Pty) Limited** [1999] 8 BLLR 761 (LC)).

1. As Grogan AJ points out in **Whall v Brandadd Marketing (Pty) Limited** at paragraph 37:

"The sole guiding principle mentioned by the Labour Appeal Court on whether not to grant compensation (or indeed whether to grant it) is that such decision must be exercised judicially. Guidance as to *how* such a discretion should be exercised must be derived from the purposes of the Act as a whole, read within the broader Constitutional context, and of sections 193 and 194 in particular.

When exercising the discretion as to whether to grant compensation the Court must, in my opinion, have regard to what is fair to both the employee and the employer. One of the purposes of the Act is to protect employees against unfair dismissal (section 185). Others are to advance economic development (section 1)

and to effectively resolve labour disputes (section 1 (d)(v)). While the punitive effects of section 194(1) may be ameliorated by the (implicit) limit of compensation to the equivalent of 12 months' remuneration, the decision as to whether to order compensation must nevertheless in my view be exercised with the above considerations in mind.

1. The Respondent argued that Padayachee was not entitled to compensation for the following reasons:

1.1. she failed to accept the reasonable alternative position offered to her of packer in the finishing section;

1.4. she was re-employed by the Respondent as a packer earning R3 000,00 per month;

1.4. she did not accept the Respondent's offer made to her that the Respondent would consider any applications made by Padayachee for other positions and that she would be credited with her previous years of service with the Respondent for the purpose of calculating her long service award entitlements in the event of a further retrenchment exercise; and

1.4. the stance adopted by Winkworth during the consultation process namely that all vacancies should be advertised so that recently retrenched employees should have similar standing in applying for any such position.

1. In order to convince me that it had made adequate redress by virtue of the offer made to Padayachee during the course of the consultation process, the Respondent would have to show more than that the reason for refusing the offer or not taking up the offer was not good. It would have to show that, if the Applicant had taken up the offer, she stood to gain as much as she stands to gain from an order for compensation calculated according to the statutory formula. The actual value of the offer made to Padayachee was never raised or canvassed in evidence. However it was clearly a demotion (Moxley's letter to Padayachee dated 31 March 1997 indicates a loss of earnings (at page 190 of the bundle)) and that Padayachee regarded it as a step downwards, "an insult", having worked her way out of the mill as a packer and into a clerical position and was confident that she could do the work even of a supervisor (having acted in that position for a period of time).

1. On a balance of probability, on the available evidence, I must conclude that the value and nature of the offer does not constitute "sufficient redress" for the purposes of denying Padayachee compensation.

1. The fact that Padayachee was given temporary and then permanent employment as a packer in the coating plant also does not constitute redress. According to her evidence, which was not disputed, she heard about the temporary job from a friend and applied in the normal course. She was interviewed and then given the job, not because the Respondent was trying to make amends but, presumably, because she was the best person for the job. Were I to deprive Padayachee of compensation for this reason, it would serve to penalize her for trying to mitigate any loss she might have suffered as a result of the dismissal. Had I had an unfettered discretion, it would have been appropriate to subtract whatever she has earned from any compensation payable. Regretably, I am unable to do so (for reasons given in **Johnson and Johnson** (supra)).

1. The fact that she did not accept the Respondent's offer that it would credit her with her previous years of service in the event of her being successful in any future applications for positions with the Respondent is too nebulous a factor to be taken into account for the purposes of this exercise.

1. There is thus no reason to deprive Padayachee of compensation due to her in terms of section 194 (1) of the Act. Her normal pay at the date of dismissal was R2 765,00 per month and she is therefore entitled to compensation in the sum of R33 180,00

1. As far as Jenny Singh is concerned, the only redress which the Respondent has made was the "with prejudice" offer of a six months fixed term contract as a data capture clerk, some 14 months after her dismissal. The salary she would have earned during this period would have amounted to R13 488,82 before deductions (R519,20 per week x 4.33 x 12). The amount she would have earned at her previous rate of pay (R3 000,00 per month, normal pay) over a 12 months period would have been R36 000 (before deductions). It is my view that substantially the same kind of redress was not made and therefore Singh is entitled to compensation in the sum of R36 000,00.

1. The Respondent's representative argued that, apart from the fact that she refused the offer outlined above, she should be deprived of compensation because of Winkworth's insistence that positions be advertised and because of her failure to advise the Respondent, in terms of her letter of dismissal, that she wished to be considered for suitable vacancies. Again, it is my view, that the Respondent in order to make redress for a wrong had to offer something more than an entitlement. It has always been open to the

Respondent to make Singh an offer by way of redress - the dispute was referred to the CCMA in May 1997. To hide behind her failure to exercise her options in terms of her letter of dismissal when she held the view that she ought not to have been dismissed at all is opportunistic to say the least. To deny her compensation because of her representative's insistence that policy and procedures be properly followed would also be unfair.

Costs

1. In terms of section 162, this Court may make an order for the payment of costs, according to the requirements of the law and fairness.

1. In the normal course, costs would follow the result. However, in view of the fact that a number of issues in dispute raised by the Applicants were resolved in favour of the Respondent, it would be unfair to burden the Respondent for all of the Applicants costs, particularly in respect of the eleven days which it took to hear this matter. In making the order I have taken this into account.

Leave to Appeal

1. Because of the nature of the evidence and the findings I have made, I am satisfied that, in the event of either party seeking to appeal against this judgment by way of appeal or cross appeal, the Labour Appeal Court could reasonably come to conclusions different from those arrived at by this Court. In view of the costs already incurred by both sides in this dispute and in order to avoid further, unnecessary costs being incurred, I hereby grant the parties leave to appeal and cross appeal as the case may be.

1. I therefore order as follows:

1.1. The dismissal of the First and Second Applicants was substantively fair in that it was based on the Respondent's operational requirements.

1.1. The dismissal of the First and Second Applicants was not effected in accordance with a fair procedure in that the process in terms of which they were selected for dismissal was unfair.

1.1. The Respondent must pay:

1.1.1. the First Applicant the sum of R36 000,00 (thirty-six thousand rands) on or before 24 December 1999;

1.1.1. the Second Applicant the sum of R33 180,00 on or before 24 December 1999.

1. The Respondent must pay the Applicants' party and party costs excluding the costs of three of the eleven days of the hearing.

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I de VILLIERS A J
Acting Judge of the Labour Court

Date of Hearing : 17 to 20 May 1999
13 to 21 September 1999
11 October 1999

Date of judgment : 15 December 1999

For the Applicants : Phillip Dreyer, Kocks Dreyer Attorneys

For the Respondents : Murray Alexander, Deneys Reitz Attorneys