**IN THE LABOUR COURT OF SOUTH AFRICA**
**(HELD AT JOHANNESBURG)**

**CASE NO. J 116/97**

In the matter between:

**NATIONAL CONSTRUCTION BUILDING AND ALLIED WORKERS UNION AND FIVE OTHERS** First to Sixth Applicants

and

**NATURAL STONE PROCESSORS (PTY) LTD** Respondent

**J U D G M E N T**

**MPOFU, AJ:**

[1] The first applicant is the National Construction Building and Allied Workers Union, representing 5 individual applicants who are employees of the respondent. The applicant originally initiated the proceedings on behalf of 16 employees which number was, by agreement between the parties and during the trial, trimmed down to the present number.

[2] Prior to 1994 the respondent operated a tombstone manufacturing factory which was described as a labour intensive operation. The majority of the applicants were employed in the 1980's. With the opening up of business opportunities after the 1994 elections, the respondent secured a lucrative contract with a Japanese company for the supply of granite slabs used in the construction of buildings. This accounted for a marked upward shift in the revenues generated by the company. While the old tombstone business generated annual takings of approximately R1 million the new revenue generated by the new business approximated R20 million.

[3] In 1994 the company opened up a new slabbing-factory or plant in order to meet the new demand. For the ensuing two years, this new factory was run in tandem with the "old" tombstone-factory In view of the aforegoing and in October 1996 the company decided to close down the tombstone-factory and concentrate its

energies towards the more profitable slabbing factory which had by then been running for two years. The commercial rationale for this decision is patently obvious and cannot be assailed. The applicants' representative wisely did not attempt to do so.

[4] The original 16 applicants, all members of the first applicant, constituted the entire workforce employed in the tombstone-factory. It remained to be decided what to do with them.

[5] The respondent shortly thereafter took a so-called "in principle decision" to retrench the entire tombstone-factory workforce. This was communicated to the union by letter dated 14 November 1996 together with an invitation to consult. This letter contained the following portion:

"2. **Selection criteria:**

All employees of the tombstone-factory would be involved and therefore no selection criteria are to be used.

3. **Number of employees to be retrenched:**

All employees in the tombstone-factory."

[6] The union responded by letter dated 20 November 1996 in which it requested from the company inter alia the following information: Financial information, date of last appointment of an employee and "to provide us with a total list of employees from the top manager down with the following information: date engaged, date of birth, qualification and position". This, the union stated, it required "in order to facilitate proper consultation and alternatives".

[7] It is common cause that at least two consultation meetings were held between representatives of the parties on 3 and 5 December 1996. As can be discerned from the unchallenged notes taken thereat, relevant correspondence between the parties confirming what was discussed as well as a holistic view of the evidence led in this court, the stances adopted by the parties on the key issues, can be summarised as follows:

1. On selection criteria: The union wanted the "last in, first out" (LIFO) principle to be applied across the two operations namely the tombstone-factory and the slabbing factory or plant. The company argued that this would be impractical because of different skills required as between the two operations. This therefore raised the applicability or otherwise of so-called "bumping" in the present circumstances.

2. On financial information: The union demanded full disclosure as aforestated. The company refused to furnish

any financial information stating that such information was irrelevant because firstly, the retrenchment was "not for financial reasons" and secondly, the company and the union were parties to a separate agreement which contained a severance-package formula.

3. On recall arrangements: The union suggested, and the company agreed, that when vacancies arose in the slabbing plant the retrenchees would be given preferential treatment.

[8] In support of the company's contention the respondent called Mr Prinsloo ("Prinsloo") who was at the relevant time chief executive officer of the respondent company. The main focus of Prinsloo's testimony was to emphasise the differences between the operations conducted in the two plants. Prinsloo also testified on the perceived hardships which the company would have suffered if all 16 tombstone factory employees were to have "bumped out" an equal number of slabbing factory employees.

[9] Section 189(7) of the Labour Relations Act 1995 ("the Act") provides that:
"The employer must select the employees to be dismissed according to selection criteria
(a) that have been agreed to by the consultant parties; or
(b) if no criteria have been agreed, criteria that are fair and objective."

[10] It is trite that the LIFO principle is per se, and subject to recognised exceptions, one of the well-recognised "fair and objective criteria" postulated in section 189(7)(b). What does often become contentious is whether in a given case LIFO should be applied only within a distinct department or category of employees or across the board to include in the selection pool employees in other departments who have similar or less skills than those who have been made redundant in the department targeted for closure, a method otherwise known as "bumping". It is incumbent upon the employee to justify its departure from the LIFO principle.

[11] In this leading article on the subject, the learned author, H Cheadle, described "bumping" as follows:

"The LIFO principle is to retain long serving employees at the expense of those with shorter service in like or less skilled categories of work. Accordingly LIFO would not apply to employees in a different grade if the longer serving employee could not do the work of the employee with shorter service in that grade. The principle, if not qualified by agreement, should apply throughout the establishment or the collective bargaining union provided that it falls within like or lesser categories of work. In other words, should an employee with

long service be made redundant in one department, he should be transferred to a similar post elsewhere in the establishment, even though it may be occupied by an employee with shorter service. Should there be no such post, the practice is to offer the longer serving employee a less skilled position occupied by employees with shorter service. This procedure is graphically called 'bumping'. In short, one 'bumps' sideways and down. The restriction of this principle to departments can lead to abuse. Long serving employees can be transferred to departments where redundance is expected and thereby retrenched at a later stage. Such a practice would clearly subvert the objective application of the principle".

See Halton Cheadle "Retrenchment: The New Guidelines" (1985) 6 ILJ 127 at 137. The views expressed in this article received the approval of the Labour Appeal Court in the case of Reckitt and Colman (SA) (Pty) Ltd v Bales (1994) 15 ILJ 782 (LAC) at 796B. That case is also authority for the proposition that an employer has a duty to consult an employee in respect of "bumping" (at 795B). A useful and summarised discussion on the topic of "bumping" with reference to the applicable case law is contained in a useful article by Rycroft entitled "Bumping as an Alternative to Retrenchment" (1999) 20 *ILJ* 1489.

[12] In the present matter it is common cause that the individual applicants who are properly before this court had longer service than some of the employees in the slabbing plant. In fact, on a perusal of the complete list of employees in both plants which was supplied to the union by the company, in one of the consultation meetings all the present individual applicants (as distinct from the original 16) had longer service than any of the non-tombstone-factory employees.

[13] Prinsloo described in great detail the various jobs performed in the slabbing factory. These ranged from slabbing, sawing, polishing, packing etcetera. It is not necessary to go into the intricate and rather technical details of each of these functions. Of relevance are the following points which emanated from Prinsloo's testimony as given by him in his evidence-in-chief and during cross-examination:

1. Putting aside the need for training, a subject dealt with separately in the next part, there were no formal impediments which would have prevented tombstone-factory workers from working in the slabbing factory. In fact, the evidence was that when the slabbing plant was opened in 1994 an invitation was extended to all tombstone-plant employees to be transferred to slabbing and the current applicants had remained in the tombstone plant purely out of choice. Some employees accepted the invitation and had indeed moved over to the slabbing plant.

2. In respect of almost all the various functions performed in the slabbing plant a minimum period of three months basic training would have been required to equalise the skills of all the employees. A major proportion of this training related to the aspect of occupational safety. The remaining extent of the training related to the production side in respect of each specific function.

3. Perceived hardships, including late or non-delivery of the lucrative overseas contracts which were a source of the new boom, may have resulted if there was a wholesale transfer of all 16 tombstone plant employees, since this would have resulted in the introduction of a 50% proportion of untrained employees into the slabbing plant (the total number of production employees in the slabbing plant was 30). This introduction would in turn have had the result of stalling production for the period of training these transferees.

[14] At face value it would seem that points 1 and 2 above operate in favour of the applicability of "bumping" while point 3 negates it. There were, however, other aspects of Prinsloo's evidence which, in my view, operate to diminish if not totally undermine the impact of point 3. Firstly, Prinsloo conceded that his postulation of a 50% dilution of the workforce did not take into account the fact that not all the tombstone-plant employees would have been beneficiaries of the LIFO principle. In fact, Prinsloo testified that at least two of them would still have been retrenched. Secondly, Prinsloo's postulation did not consider the possibility of training during the process of production which would not have involved any inherent decrease in production levels. Prinsloo conceded under cross-examination that all the employees in the slabbing plant who were employed later than the 1994 commencement of production, had been trained during the process of production. A quick look at the list of employees referred to earlier reveals that at least 23 of the 30 employees fall into this category.

[15] For the sake of finality I may mention that Prinsloo also conceded that when a vacancy arose on 18 November 1996 (i.e. between the time of the "in principle decision" and the actual retrenchment) the respondent had employed a new outsider to replace a slabbing plant employee who had resigned in that period. He further testified that at least another two slabbing plant employees, namely Makeketa and Moshe, were unskilled general labourers, one of them being a sweeper. Accordingly, to replace them with any longer serving employees would not have involved any training

[16] The applicants' only witness was Mr Letsapa. To say the least, Mr Letsapa gave evidence which can only be described as hopeless in content. He contradicted himself on several occasions and frankly did not add much to

the issues in this case. Insofar as whatever testimony he gave was relevant, no store can be placed on it. Any issue on which he and Prinsloo differ, Prinsloo's evidence will be preferred. For example his evidence that the requisite training for a transferee would take “a few months” is accepted only in so far as it accords with Prinsloo’s estimation of approximately 3 months.

[17] Dismissal has been described as the economic equivalent of the death sentence. In addition, retrenchment is in its nature dismissal which is not precipitated by any culpability on the part of the employee. It is for these reasons that the legislature has seen it fit to attach stringent and peremptory requirements to be strictly followed if a retrenchment exercise is to pass muster. This is not to take away the management prerogative to restructure its business enterprise. That prerogative remains intact even in the present non-typical circumstances where the retrenchment exercise seems to have been fuelled by the arrival of happy times for the company as opposed to the usual case where the enterprise itself resorts to retrenchment to protects its own survival. It is possible however that an employer in the happy position of the respondent should be adjudged by a reletively stricter standard in relation, for example, to its failure to consider seemingly achievable in-service training of its long serving employees in circumstances where, on the probabilities, it could easily have afforded to do so. Needless to say such a standard should not be so strigent as to stray outside the already elaborate requirements set out in section 189 of the Act.

[18] All the aforesaid factors operate to influence my conclusion that had the company been willing to consider the question of "bumping", the present applicants may well not have been dismissed. It is an important consideration that the union had repeatedly placed the “bumping” alternative on the table. The weight of the evidence indicates that the respondent did not at any stage give the union’s proposals serious open-minded consideration. Consequently the respondent failed to comply with the provisions of section 189 of the Act. To that extent, at the very least, the retrenchments were procedurally unfair.

[19] In view of the conclusion I have reached on this issue, it is not necessary to deal extensively with the question of refusal to supply financial information. Suffice to say that an employer should not enjoy the privilege of unilaterally determining the relevance of such information. Even where, as in the present case, the commercial rationale for the retrenchment exercise is not disputed such information may still be of relevance, for example, to the negotiation of severance packages which are higher than the statutory minimum. It is generally undesirable for the employer to regard itself as the exclusive and sole arbiter of the relevance or otherwise of the information sought.

[20] Relief

At this stage I may just mention that the applicants before the court are all presently employed by the respondent, having been re-employed, according to Prinsloo, some time in 1998 or 1999. Their evidence was that these employees have been re-employed at lower categories than their pre-retrenchment employment. The applicants asked for the court to make an order for their reinstatement in their employment and into their previous conditions of employment. The "bumping" method is comfortably consistent with the engagement of longer-serving employees in 'lower' categories of work. It follows that employees who should have been beneficiaries of such bumping are not necessarily entitled to the same conditions of employment as they held in their redundant positions.

[21] Costs

As far as costs are concerned the applicants were unable to lead any evidence on the first day of the trial due to the fact Letsapa, their only witness, had not arrived in court. On the next day Letsapa was called upon to give an explanation to the court. In a nutshell his explanation that he had come late to the union offices because he was tired from working on the previous day, bordered very closely on the contempt of court. Although I cannot say with certainty that had the delay caused by the absence of any witness on behalf of the applicant on the first day not occurred that the case would have been finalised in one day, this is a distinct possibility. I accordingly propose to hold the applicants liable for the costs of the entire first day of the trial. The first applicant also shared the duty to secure the attendance of the other applicants and/or their witnesses in court.

[22] In the circumstances I make the following award:

1. The dismissal of the individual applicants for operational requirements was procedurally unfair.
2. The respondent is ordered to pay the individual applicants compensation equal to the remuneration that each would have been paid between the date of their dismissal and the date(s) of their (respective) re-employment.
3. The respondent is ordered to pay the wasted costs subject to order 4.
4. The applicants are ordered to pay the costs of the first day of the trial.

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**MPOFU, AJ**

: MR L S KEKANA (Union Official)

: NACBAWU

: MR D SHORT (Attorney)

: Samson, Okes, Higgins Inc

: 1 & 2 FEBRUARY 2000

: 3 FEBRUARY 2000