

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

CASE NO J 2908/98

In the matter between:

**ENTERTAINMENT CATERING COMMERCIAL
& ALLIED WORKERS UNION OF SOUTH AFRICA**

First Applicant

BENNET MBATHA & 37 OTHERS

**Second and Further
Applicants**

and

SHOPRITE CHECKERS t/a OK KRUGERSDORP

Respondent

JUDGMENT

BASSON, J

- [65] The individual applicants were dismissed by the respondent during November/December 1997.
- [65] The applicants contended that the issue to be decided was whether the respondent, Shoprite Checkers trading as OK Krugersdorp, was entitled to dismiss the individual applicants for refusing to work new shift patterns unilaterally implemented by the respondent.
- [65] The respondent viewed the matter differently, contending that the crisp issue for determination was whether or not the respondent was entitled, given its operational requirements, to retrench the individual applicants when and in the manner it did.
- [65] The evidence that OK Bazaars Ltd was in a very severe financial crisis or predicament during 1996 to 1997 was not contested by the applicants. In fact, it faced financial ruin. OK Krugersdorp was then still a store of OK Bazaars Ltd before that company was sold as a going concern to Shoprite Checkers. I will use the term “respondent” to refer either to Shoprite Checkers or its predecessor.
- [65] The evidence that OK Bazaars Ltd entered into consultations both with the majority union (SACCAWU) and with the first applicant (ECCAWUSA) was also not contested. It was further common cause that

SACCAWU had a membership of approximately 8000 employees at OK Bazaars Ltd stores nationally whilst ECCAWUSA had a membership of some 800 employees. The applicants contended, however, that ECCAWUSA had majority membership at the respondent, that is, the OK Krugersdorp store.

[65] The respondent led evidence to show that OK Bazaars Ltd concluded a so-called “Job Security Agreement” with SACCAWU during February 1996.

[65] The rationale of the agreement appeared clearly therefrom, especially from the preamble (the Bundle, exhibit B2): “The parties agree that the maintenance of growth of employment levels in the company are of vital importance to the well-being of the union and its members and the company as a whole. The parties agree that employees have a right to expect that the company and the union **will take all reasonable measures to avoid any loss of jobs** and to secure their long term employment” (emphasis supplied).

[65] In order to achieve the above objectives, OK Bazaars Ltd and SACCAWU agreed on the implementation of certain principles. These included the principle of job flexibility: “The parties agree that **flexible work practices are important to ensure the continued viability of the business**” (paragraph 1.3 of the said agreement, exhibit B3 - emphasis supplied).

[65] In other words, the principle of “job flexibility” was introduced (see paragraph 2.1 of the said agreement - exhibit B4). Shift patterns “that will meet the trading patterns/volumes of the store/operating unit in the area” were thus introduced (at paragraph 2.2 - exhibit B7). Job flexibility entailed, *inter alia*, that permanent employees would be required to work shifts different from the shifts they had worked before. This would have enabled the respondent to use less casual labour, thereby reducing the casual wage bill.

[65] Mr G Lotz, an industrial relations manager at the head office of OK Bazaars Ltd at the time (hereinafter referred to as “Lotz”), gave evidence in regard to this agreement and confirmed that the introduction of the said new shift patterns was aimed at reducing the wage bill.

[65] Lotz explained that the wage bill of OK Bazaars Ltd was much higher than that of its competitors’. Moreover, Lotz explained that SACCAWU would not have entered into this agreement if it was not understood that their members’ jobs were on the line due to OK Bazaars Ltd confronting a financial crisis. In other words, the co-operation of SACCAWU and its members were obtained in the interests of saving their jobs.

- [65] Lotz further identified the various measures that were introduced to address the financial crisis faced by OK Bazaars Ltd and explained how the introduction of altered or flexible shift patterns for permanent employees would have reduced the casual wage bill. In the new retailing environment, stores had to be open later and on weekends to meet the increased demand for trading during these times. During these new peak trading times, permanent employees would have to work new shifts in preference to employing casuals.
- [65] In addition, Lotz explained that reduced reliance on casuals would have the further operational benefit of reducing shrinkage and boosting sales as the permanent employees were more committed to the business and were better trained than casuals, resulting in the improvement of customer service during the peak trading hours.
- [65] The respondent's evidence that OK Bazaars Ltd entered into consultations with ECCAWUSA during September 1996 with the aim of concluding exactly the same agreement as had been concluded with SACCAWU was not contested in any meaningful way.
- [65] It was further common cause that the respondent disclosed its desperate financial position to ECCAWUSA and, following a dispute between the parties, disclosed additional information sought. However, no consensus could be reached between ECCAWUSA (the first applicant) and OK Bazaars Ltd concerning the introduction of new flexible shift patterns.
- [65] OK Bazaars Ltd then issued letters of retrenchment and in fact retrenched certain of the individual applicants during November 1996 at its OK Krugersdorp store as a result of their refusal to work new shift patterns. The applicants were so dismissed on a Saturday and Sunday only.
- [65] Eventually, an agreement of settlement was reached on 29 November 1996 (exhibit B296 and B297). The agreement stated at paragraph 1 that "[w]ith immediate effect they [ECCAWUSA and OK Bazaars Ltd] will enter into **meaningful consultations** arising out of the **operational requirements** of the company, as well as **the possible need to retrench** members of the union" (emphasis supplied).
- [65] As it was abundantly clear from this paragraph as well as from the other documentation presented during the meetings between ECCAWUSA and OK Bazaars Ltd up to this stage of their consultations, the employer was engaging ECCAWUSA in a retrenchment exercise.
- [65] Indeed, it was also clear from the agreement between SACCAWU and OK Bazaars Ltd that this agreement

was entered into to prevent job losses and, hence, it was labelled a “job security” agreement (*supra* at paragraph [6]).

[65] Much was made of the fact that Lotz stated that “retrenchment was not the answer” and that “[r]etrenchment will be a last resort” at a consultative meeting on 15 October 1996 (exhibit B75) as well as the evidence of Mr A Lehmann (industrial relations consultant at OK Bazaars Ltd at the time) that the respondent did not contemplate retrenchment at the time.

[65] However, these statements must be viewed against the background of Lotz’s evidence that the company took every precaution to preserve jobs as well as the clear evidence that the whole process was driven by the need to save the company from financial ruin, as it was also clear from minutes of other meetings (see also Lehmann’s letter, exhibits B160 to B161).

[65] In fact, it was clearly stated at later meetings and in communication between the parties that the object of the consultation exercise was to avoid job loss (see, *inter alia*, exhibits B149; B150; B158; and B177). See also the terms of the settlement agreement of 29 November 1996 quoted above at paragraph [17].

[65] In the event, I am satisfied on the evidence presented by the respondent that the consultations between OK Bazaars Ltd and the two unions was a retrenchment exercise aimed at saving the jobs of the permanent employees by ensuring that OK Bazaars Ltd became financially viable. In other words, this exercise was driven by the operational requirements of the company and must be viewed against the background of the severe financial crisis faced by the company.

[65] In the event, the fact remained that the need to introduce new shifts was an alternative to the retrenchment of the individual applicants.

[65] Further, the fact that this entailed the altering of the employment contracts of the permanent employees who previously worked from Monday to Saturday at 13H00 does not take away from the fact that this was a retrenchment exercise.

[65] There is accordingly no merit in the applicants’ argument that the respondent had embarked upon negotiations to unilaterally change the contracts of employment of the individual applicants and therefore had to resort to economic power play by locking them out when a dispute about its demand to unilaterally change the shift patterns arose. In other words, the employees *in casu* were not dismissed for refusing to work according to terms and conditions of employment which were unilaterally introduced by the employer.

- [65] In my view, care should be taken not to equate a *bona fide* retrenchment exercise which is aimed at avoiding job losses to a negotiating exercise which is aimed, not at avoiding job losses, but is primarily aimed at unilaterally amending terms and conditions of employment to suit the operational requirements of an employer.
- [65] In other words, where the amendment to terms and conditions of employment is proffered by an employer as an alternative to dismissal during a *bona fide* retrenchment exercise and it is a reasonable alternative based upon the employer's operational requirements, the employer will be justified in dismissing employees who refuse to accept the alternative on offer.
- [65] In practical terms, the respondent has further satisfied me that it made commercial sense and was reasonably necessary for the continued viability of the company's business that the proposed new flexible shift patterns be introduced, also at the OK Krugersdorp store. The evidence that the peak of trading at the OK Krugersdorp store was on a Friday, Saturday, Sunday and Monday could not be meaningfully challenged and was borne out by documentary evidence.
- [65] In the event, the refusal by the applicants to take their day-off on the slow days (Tuesday, Wednesday or Thursday) and their insistence in taking off either on a Friday or a Monday (on their own evidence) clearly went against the operational requirements of the company that wanted its permanent employees to work during peak trading times in terms of the operational requirements discussed above. This would namely have saved on the casual wage bill and this saving would have made it easier for the company not to retrench its permanent employees.
- [65] The mere fact that the business did not survive in the end does not mean that there was no such commercial rationale at the time. In fact, it showed that OK Bazaars Ltd found itself in severe financial difficulties at the time.
- [65] The fact that the casual wage bill remained the same up to today at the OK Krugersdorp store also does not persuade me that there were no such operational requirements at the time.
- [65] It was clear from the evidence that the new shifts were never properly introduced at the store during 1996 to 1997 due to the recalcitrance of the individual applicants and the effect of such shifts on the casual wage bill could therefore not be assessed.
- [65] The fact that employees at the OK Krugersdorp store now work the ordinary working hours from Monday

to Saturday at 13H00 also does not persuade me that the economic rationale was suspect. This was explained in the light of the very few permanent employees who remained behind, making it possible to work with less permanent employees and more casuals. Had this alternative been followed in 1997 it would, of course, have meant retrenching the permanent employees to ensure the same decrease in their numbers. This was also explained at paragraph 21 of the pre-trial minute dated 25 August 1999 (filed on 17 September 1999).

[65] In the event, I am satisfied that the respondent offered a reasonable alternative to retrenchment when the respondent required the individual applicants to work new shifts to assist the respondent in reducing its wage bill and thereby alleviating (albeit in a small way) its financial crisis. See in this regard also the judgment of *SA Chemical Workers Union v Afrox* (1998) 19 ILJ 62 (LC) at 66A-B: “The enterprise which provides the employment must maintain its way, grow and prosper for rights to a job to have meaning. If it fails then the right to a job fails with it. Economics dictate that if it is necessary to shed jobs so that the enterprise may survive or alter or adapt its business then so be it. This basic economic premise has been incorporated in the LRA by way of the exception permitting dismissal for operational requirements”.

[65] In my view, this would be so also where it makes commercial sense to change the terms and conditions of employment (the altered shift patterns) to ensure the continued viability of the business.

[65] The applicants conceded that the dismissal was preceded by consultations.

[65] In any event, the only witness on behalf of the applicants, Ms J Malebye (hereinafter referred to as “Malebye”), stated categorically that the individual applicants were not going to entertain the different shift system proposed by management. Malebye added that this view was shared by all the individual applicants.

[65] In the event, I am satisfied that, regardless of the respondent’s operational requirements and proposals put forward by management at their various meetings, the applicants who worked at the OK Krugersdorp store were not going to work the different or altered shift patterns proposed. Malebye made it clear that the main reason for this stance was that it was “inconvenient” for the individual applicants not to have long weekends off every second week (apparently because some of them had family members staying a distance away).

[65] In the event, given the unwillingness of the individual applicants to entertain the change to the shifts suggested by management, the applicants can now hardly complain that consultations on this alternative offered was not exhaustive enough or that the respondent countenanced no other alternative.

[65] Further, Malebye conceded that the employer’s financial crisis and the resultant need to reduce wages by

way of job flexibility were explained to the individual applicants in meetings which took place even after the meeting of 26 September 1997 (the date that consultations ended according to the respondent's witnesses - see, *inter alia*, exhibits B428 and B430).

[65] Malebye also could not dispute the fact that consultations broke down because the shop stewards (she herself was not one of them) walked out of this meeting (see exhibit B424). Malebye added that the union officials who conducted consultations on behalf of the individual applicants did not assist them with the subsequent consultations at store or branch level. The union (the first applicant) can therefore not be heard to complain that its advice was not sought during the consultations at store level. After all, ECCAWUSA was a signatory to the settlement agreement of 29 November 1996 (see paragraph [17] above).

[65] After all, consultations remain a joint problem-solving exercise and no viable alternatives were offered by the applicants during the consultation process or in evidence before Court that could have reduced the wage bill and assisted to address the financial predicament of the respondent. The remark that the individual applicants were willing to assist the respondent in its predicament (made by Malebye when giving evidence) therefore rings hollow and cannot be accepted.

[65] In fact, it was clear from Malebye's evidence (discussed at paragraph [38] above) that it would have been futile to try to persuade the individual applicants to take their day-off on a Tuesday, Wednesday or Thursday.

[65] See in this regard also the judgment in *SA Chemical Workers Union v Afrox Ltd* (*supra* at paragraph [35]) at 75A -B: "Consultation during a process of retrenchment is the opportunity allowed by law and fairness to the consulting party, such as the union, to influence the exercise of the managerial prerogative. A failure to utilise this opportunity closes this avenue. Criticism after the event is no substitute for co-operation when it is called for during the consultation process. It would be far too paternalistic to insist that where a union declines the opportunity to involve itself in seeking solutions to a retrenchment situation the employer should *mero motu* engage in unilateral attempts to accommodate union members elsewhere".

[65] In the event, as far as the question of the procedural fairness of the dismissal is concerned, I am satisfied that the respondent complied with its obligation to consult and that the dismissal was accordingly procedurally fair.

[65] The fact remains that the individual applicants were not committed to assist the respondent in addressing its financial crisis. The economic rationale underlying the need for changing the shift pattern was fully

explained to the individual applicants and to their representative union. However, the individual applicants were not interested to give their commitment to save the business and, in the result, their jobs themselves, if this entailed taking their day-off on a Tuesday, Wednesday or Thursday. This was the reason why they steadfastly refused their co-operation to ensure the respondent's viability.

[65] In the event, there is also no merit in the argument that the individual applicants were dismissed because they refused to work unlawfully in terms of provisions of the Basic Conditions of Employment Act, ("the BCEA") at the time.

[65] The fact remained that the individual applicants were dismissed for their failure to give a commitment to meet the respondent's operational needs if this meant that they could not have long weekends off every other week.

[65] After all, the fact that the respondent required the applicants to take their day-off on a Tuesday, Wednesday or Thursday was not, in itself, an unlawful request in terms of the provisions of the BCEA at the time. In fact, it was Malebye's evidence and the applicants' case that before their dismissal the individual applicants worked a shift pattern, each shift taking off a long weekend every other week. If this was so, the individual applicants worked a shift from Monday to the following Thursday. Taking their day-off in the middle of the week would therefore not have required them to work a longer work week than they already did voluntarily.

[65] Further, the concession that the applicants may have worked more hours per week than permitted in terms of the BCEA was elicited in cross examination by the applicants' legal representative. It was, however, never pleaded that the individual applicants were dismissed for refusing to work unlawful hours of work, whether unbeknown to the parties at the time or not.

[65] In the event, this question was never fully ventilated in evidence as the respondent was not alerted that this was the case it must meet. This dispute was raised only at the argument stage of the proceedings and addressed by way of further heads of argument. It can further be noted that it was always possible for the respondent to obtain an exemption in terms of the BCEA and that the prohibition was therefore not absolute. This may even have been possible because the hours of work per week did not exceed the prescribed limit on average (see exhibit B418).

[65] Be that as it may, I reiterate that I am satisfied that the individual applicants were not dismissed for refusing to work unlawfully. Accordingly, I need not deal with the respondent's argument that proposed hours of work were, in any event, lawful in terms of the BCEA.

[65] Further, the principles enunciated in the judgment of *Boardman Brothers Natal (Pty) Ltd v CWIU* (1994) *ILJ* 517 (SCA), which dealt with a dismissal for misconduct and therefore are clearly distinguishable from the present matter, are not applicable. I accept that one's sense of fairness may in given circumstances dictate that an employer cannot dismiss employees for refusing to work unlawfully. This is especially so in the circumstances which presented themselves in the above judgment (where a reasonable employer should have realised that the employees were not able to cope with the long hours of work expected from them) but this was simply not the case on the facts which were presented in evidence *in casu*. It can therefore not be said that the Labour Court, in taking this view, is condoning an unlawful employment practice.

[65] It follows from the foregoing that the individual applicants were retrenched when they refused to commit themselves to assist the respondent in addressing its severe financial predicament in an effort, not only to make the business viable but also, in the process, to save their jobs. As the proposed new shifts, which would have enabled the respondent to have the permanent employees working over the busy weekends by taking their day-off during the middle of the week, was a reasonable alternative based upon a sound cost-saving rationale and proposed in an effort to avoid job losses, the dismissal for their refusal to co-operate in this process was substantively fair.

[65] In view of the above finding that the dismissal was also procedurally fair (at paragraph [46]), the application based upon an alleged unfair dismissal falls to be dismissed.

[65] In view of the above conclusion, I do not have to deal with the contention that the first applicant did not have the authority to act in this matter for and on behalf of the individual applicants, save to state that they appeared to have *locus standi* in their own names.

[65] Further, it is not necessary to decide whether the agreement between the respondent and ECCAWUSA concluded on 29 November 1996 (*supra* at paragraph [17]) amounted to an agreed change to the terms and conditions of employment of the individual applicants because the fairness or otherwise of the retrenchment dismissal was not predicated on such change having been agreed to. The disciplinary steps taken by the respondent in regard to a possible breach of such agreement were abandoned, in any event.

[65] In this regard it can merely be noted that such change would have to have been consulted upon at the level of the store management and the individual applicants to ascertain the operational needs of the store before its implementation. The fact that the individual applicants never worked the proposed shifts appeared to suggest that no such agreement had been obtained. This does not mean, however, that the fact that

such agreement was concluded is irrelevant. I reiterate that it was clear from the terms of this agreement that the parties were engaged in a retrenchment process (see the agreement quoted at paragraph [17] above).

[65] For the sake of completeness, it must be noted that the applicants' contention that there was an agreement reached on 2 December 1996 in terms of which it was agreed that the individual applicants at the OK Krugersdorp store would work shifts according to which they were entitled to take off a long weekend every other week was not supported by the evidence or the probabilities. It seems highly improbable that the respondent would have agreed to permanent employees taking off on a Friday or a Monday when it was clear from the evidence that these were the busy trading times.

[65] Even if the individual applicants were allowed to and did work such shifts until October/November 1997 (and there were indications to the contrary that some permanent employees did take their day-off during the middle of the week) this did not mean that when Mr B Makhonza (the store manager as from October 1997) tried to "implement" the shifts with the day-off in the middle of the week he was thereby seeking to alter an agreed term and condition of employment.

[65] In any event, as it was fully explained above, there were clear operational requirements for taking the day-off in the middle of the week and it was this need of the respondent that the individual applicants outrightly refused to meet.

[65] In other words, even if the respondent required from the individual applicants to work new shifts as from July/October 1997, the economic rationale for working such shifts to cover the peak trading hours from Friday to Monday was fully explained and it was the individual applicants themselves who made it abundantly clear that they were not going to assist the respondent and take their day-off on a Tuesday, Wednesday or Thursday, whatever the operational requirements of the respondent may be (see the discussion at paragraphs [38] to [41] above).

[65] In exercising my discretion to award costs against the applicants, I take into account also the fact that they were the authors of their own misfortune. Indeed, there appears to be no reason why the applicants should not be ordered to pay the costs, jointly and severally, the one paying the other to be absolved. This would include the first applicant as it was made clear that the union was, in fact, a party before Court.

[65] I make the following order:

The application is dismissed. The applicants are to pay the respondent's costs, jointly and severally, the one paying the other to be absolved.

BASSON, J

Appearing on behalf of the applicants: Adv TJ Bruinders instructed by Nomali Tshabalala
Attorneys.

Appearing on behalf of the respondent: Adv G Aber instructed by Deneys Reitz.

Dates of hearing: 20 March 2000; 22 March 2000 to 24 March 2000;
27 March 2000 to 31 March 2000. Written
argument closed on 18 April 2000.

Date of judgment: 26 April 2000.