

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No. J782/98

In the matter between:

Samuel Makgabo & Others

APPLICANTS

and

Premier Food Industries Ltd

RESPONDENT

(General Foods Industries Ltd)

JUDGEMENT

PIENAAR, A J

INTRODUCTION

1. The issue to be determined is whether the dismissal of the 270 Individual Applicants by the Respondent for operational reasons, was procedurally and substantively unfair.
2. The Applicants were retrenched as a result of the closure of the Respondent's bakery at Isando,

where all the Applicants were employed in different capacities. The Applicants were at all relevant times, during the retrenchment exercise, and prior to that, represented by the Food and Allied Workers Union (FAWU). FAWU entered into a collective agreement (Recognition and Procedural Agreement) with the Respondent during November 1995 and acted as the sole bargaining agent of all the employees in the bargaining unit at Isando, in terms of this agreement.

3. The Respondent was originally cited as Blue Ribbon Bakeries (Premier Milling) as First Respondent and Premier Milling (Pty) Limited as Second Respondent. The parties however agreed that the correct citation of the Respondent is indeed General Food Industries Limited.

EVIDENCE

4. Mr Reid gave evidence on behalf of the Respondent and Messrs Mabatha and Mgigina on behalf of the Applicants.
5. Mr Reid was the Respondent's Regional General Manager (in the Gauteng area) and is no longer employed by the Respondent. Mr Reid was personally involved in the operations of the Isando branch.
6. Messrs Mabatha and Mgigina were employed by the Respondent at their Isando branch prior to their retrenchment.

RESPONDENT'S CASE

7. According to Mr Reid, the Isando Branch showed increasing losses from as early as 1995. The Respondent operated 5 other bakeries in Gauteng alone. A loss-making investigation was

conducted during 1995/6 and the Respondent, inter alia, invested in excess of R5 million from 1996 in upgrading equipment and to improve production at this bakery. Such investigation was conducted by the Joint Management Team ("JMT"), which was established under a Worker Participation Agreement. The JMT consisted of both management and FAWU representatives. The FAWU representatives consisted of both national and regional co-ordinators and were, inter alia, flown in from as far as Cape Town and accommodated at the cost of the Respondent, to attend such meetings. The shop stewards (trade union representatives) of the Isando branch also attended the JMT meetings.

8. The Respondent continued to suffer losses and another loss-making investigation was conducted. Several meetings were held by the JMT from November 1996 to February 1997 to discuss inefficiency in production and distribution at Isando. The production averages at the Isando branch compared to similar operations of the Respondent at Cape Town, inter alia, showed that the Isando branch was under performing and experienced unacceptable losses. During these meetings the FAWU representatives were warned of the consequences if financial and production difficulties experienced by the Respondent at the Isando branch, were to continue. This was discussed in detail with reference to specific statistics relating to damaged and lost loaves including incidents of late deliveries.
9. After several meetings, the JMT reached an agreement in terms of which the Respondent, inter alia, terminated all fixed term contracts and contracts of it's casual employees at Isando. The compliment of maintenance employees was increased to address the concerns of the employees in respect of the maintenance of machinery at Isando. The Respondent's national and regional engineers also investigated alleged problem areas within the bakery.
10. Despite an agreement at the JMT with regard to the mobility of permanent employees at Isando

bakery, same could not be implemented at shop floor level. The employee representatives were not constructive at these meetings and chose to address irrelevant points such as that the manager, Mr Reid, had not yet introduced himself to the workforce, whilst Mr Reid, in fact, almost daily moved amongst the workforce and set time aside for such meetings. The shop stewards furthermore failed to attend some of the meetings.

11. During early-February 1997, the Respondent experienced increasing problems relating to production, late deliveries and discipline at Isando. Such problems continued to cause a decline in production of bread and the losses escalated on a daily basis.
12. Mr Reid was of the opinion that the representatives of the employees were not bona fide in their attempt to constructively address the problems experienced by the Respondent at Isando and, in fact, warned the shop stewards that the Isando bakery would be closed, if the parties could not find solutions to the problems.
13. Despite efforts by the Respondent to secure the effective intervention of FAWU at a more senior level, such co-operation was not forthcoming.
14. On 11 February 1997, the Respondent issued a formal notice to all relevant parties of its intention to restructure the Isando bakery. The FAWU representatives were, inter alia, invited to consult in respect of the proposed restructuring and advised that should the parties fail to reach an agreement by 14 February 1997, the employer would invoke the retrenchment procedure. According to Mr Reid, the Respondent had no intention of retrenching its permanent staff at that stage – only casual and fixed term employees were to be affected by the proposed restructuring.

15. The Respondent had a special meeting with its sales personnel on 14 February 1997, inter alia, sharing with the sales personnel the poor financial and sales results. Several problems attributed to the sales personnel were raised and discussed.
16. At the meeting of 18 February 1997 between the Respondent and the shop stewards, the Respondent made several proposals to address the concerns raised above, which proposals were rejected by the shop stewards. Needless to say, nothing much was achieved at this meeting.
17. The lack of co-operation from the shop stewards caused the Respondent to address a letter to the National Co-ordinators Chairperson of FAWU on 19 February 1997. Several complaints were raised by the Respondent in respect of loss of customers, delays in production, go-slows, acts of sabotage, etc. experienced at the Isando bakery. The acts of sabotage referred to foreign objects being found in loaves of bread, i.e. cigarettes, pens, bottle tops, steel pipes, etc. The loaves being produced per hour were still far below the required standard. The Respondent received no written reply from FAWU to this letter.
18. On 21 February 1997, the Respondent had a meeting with the shop stewards and members of the JMT to discuss the lack of co-operation of its Isando employees. The Respondent again expressed its concern with regard to the problems experienced with regard to low production, lost sales, acts of sabotage, etc. During this meeting, one of the shop stewards, Mr Thubegale, acted in an extremely disruptive and abusive manner towards management. The Respondent again obtained no meaningful input from the FAWU representatives and shop stewards.
19. On 24 February 1997, the Respondent wrote another letter to the National Co-ordinators Chairperson of FAWU and FAWU Co-ordinators complaining about the lack of co-operation and

coercive tactics by FAWU members at Isando branch. Details of problems experienced by the Respondent were again spelt out by the Respondent in respect of acts of sabotage such as a bread crate forcibly thrown into a cooler and the flour sock being cut with a knife.

20. The shop stewards endeavoured to explain the alleged acts of sabotage at a subsequent meeting held between the parties on 27 February 1997. The shop stewards, inter alia, suggested that a basket was blown into the cooler by a fan. Mr Reid explained that this suggestion was impossible given the layout of the factory.
21. Despite the aforesaid meetings and even a subsequent meeting on 3 March 1997 with the FAWU National Co-ordinators, the Respondent continued to suffer low volumes, late deliveries and disruptions of its business. Losses increased daily.
22. On 3 March 1997, the Respondent issued a formal notice of the proposed closure of the Isando branch and the pending redundancies and/or retrenchments. This notice was sent to all relevant parties.
23. Consultations with FAWU representatives, shop stewards and some JMT members in respect of the proposed retrenchments, commenced on 5 March 1997. During this meeting, the Respondent, inter alia, showed exhibits of an iron rod found in the divider and tiles inserted in loaves, once baked. FAWU responded to certain proposals made by the Respondent and the Respondent replied thereto. The parties, inter alia, agreed that concrete proposals would be submitted at the next meeting scheduled for 7 March 1997.
24. During the period 2 to 6 March 1997, the Respondent experienced further disruptions resulting in late deliveries and unacceptable quality of bread.

25. The Respondent sent an urgent letter to FAWU dated 6 March 1997 referring to the above, including several alleged acts of sabotage by its employees. Given the difficulties experienced by the Respondent, it, inter alia, suggested a temporary transfer of the Isando business to other bakeries.
26. At a subsequent meeting between the Respondent, shop stewards and members of the JMT Committee on 7 March 1997, the Respondent, inter alia, complained about the drivers refusing to comply with a specific instruction although having agreed to same earlier.
27. Apart from the alleged sabotage and late deliveries experienced by the Respondent, some employees at the branch also refused to follow instructions in respect of the loading of bread for customers. In this regard, the employees specifically refused to firstly load the vehicles of a particular hawker and customer of the Isando branch, AA Distributors, as instructed by the Respondent.
28. The sales personnel alleged that AA Distributors was given preference to other customers and took their business away and, more in particular, AA Distributors interfered with their customers. The Respondent, on the other hand, contended that AA Distributors was its largest customer who, at that time, purchased approximately 20 % of its product, and conducted its business outside the areas allocated to its sales personnel. No disciplinary action was instituted against such sales personnel and the branch eventually lost, not only the business of other major customers, but also that of AA Distributors. It is noted that the Applicants' representatives were warned of the risk of losing AA Distributors as a customer as a result of late delivery and poor product as early as

January 1997.

29. The Applicants' representatives alleged that management sabotaged the business as an excuse to close the Isando bakery. The Respondent denied these allegations.
30. Further meetings were conducted between the Respondent and the various FAWU representatives at the branch on 10 and 11 March 1997. In the meantime the incidents of sabotage continued and the Department of Health threatened to close the bakery unless there was a dramatic improvement in the cleanliness of the bakery. Losses also continued to escalate.
31. During such consultations, the parties exchanged ideas to prevent the closure of the Isando branch. Details of such proposals and the Respondent's response thereto are dealt with in detail in the various minutes.
32. Mr Reid dealt in detail with such proposals and explained why the proposals submitted by the FAWU representatives, could not be implemented. No agreement could, however, be reached between the parties to prevent the proposed retrenchments.
33. The losses suffered by the Isando branch, however, continued to increase up to approximately R100 000,00 per day, which eventually forced the Respondent to issue a notice on 12 March 1997 to close the business with effect from 14 March 1997. The FAWU Representatives were, inter alia, advised that the continued operation at the Isando bakery was jeopardising not only the other bakeries in Gauteng, but also the continued viability of the Respondent. The FAWU Representatives were, however, informed that the Respondent would continue with consultations relating particularly to the implementation of the retrenchment.

34. Some employees were also requested to be transferred to other bakeries and the FAWU representatives were invited for further consultations relating to the implementation thereof.
35. The Respondent held another meeting with the shop stewards and the JMT members on 12 March 1997. At this meeting, the Respondent requested to maximise the retention of drivers, who were to be transferred to other branches and the possibility of production employees be given an opportunity to move to the other bakeries. These proposals were, however, rejected.
36. Another meeting was held with the sales personnel on the 12th of March 1997, where the Respondent again explained and requested their transfer to other branches. This proposal of the Respondent was rejected.
37. The Respondent closed its Isando operation on 14 March 1997 and several further meetings were held between the parties, inter alia, resulting in an agreement on severance pay. The Respondent paid an amount of approximately R16 million towards severance pay, which was more than double of what the Applicants were entitled to in terms of the minimum prescribed by the Basic Conditions of Employment Act No 75 of 1997.
38. During the aforesaid consultation process, the Respondent again offered alternative positions to some of its employees at other branches, which the representatives of the employees rejected out of hand. A few employees eventually took up positions at other branches, although the Applicants disputed this.
39. Mr Reid conceded that the Respondent did not comply with the 60-day notice period required in terms of the retrenchment procedure, which formed part of the Collective Agreement between the Respondent and FAWU. In terms of clause 14.2.1 of the retrenchment procedure, the Respondent

was obliged to give 60 days notice to FAWU before the proposed implementation date of a planned retrenchment, however “subject to conditions that may arise at particular operations”.

40. Mr Reid explained that it was not possible for the Respondent to comply with the aforesaid provision due to loss of production, increased losses and acts of sabotage. He furthermore referred to the contents of the various meetings between the parties prior to the notice being issued, which addressed various factors considered during a normal retrenchment exercise.

41. The parties agreed on the contents as well as accuracy of all the minutes of such meetings, including the minutes pertaining to the consultations with regard to retrenchment, referred to above.

42. Mr Reid made a good impression on the Court and his evidence was hardly contested – in fact, no witness was called to contest his evidence on the procedures followed with regard to the consultation process.

APPLICANT’S CASE

43. The Applicants called two witnesses in support of their case. Mr Mabasa, the first witness, worked in the Production Line and the second witness, Mr Mgigina as a Sales Supervisor at Isando. None of the two witnesses were either shop stewards or union officials and, as such, did not represent the Applicants at the consultations with the Respondent.

44. According to Mr Mabasa, the Isando Branch was managed poorly. The mechanics and/or maintenance people employed by the Respondent could not address the constant failure of machines and the employees did not receive training to operate the new mixer that was installed.

The Respondent disputed this.

45. Mr Mabasa furthermore testified that the Respondent deliberately sabotaged the premises, in order to close the Isando branch. This allegation was disputed by the Respondent insofar as there was no reason to close a branch, where it recently invested more than R5 million, and which branch was a flagship of the Respondent.
46. Mr Mabasa explained the allegations of sabotage, particularly with regard to the cutting of the flour sack and the forcing of a crate into the prover. These explanations were, however, never passed on to the shop stewards or FAWU representatives despite the Respondent's request to the shop stewards to obtain instructions and feedback from its members in respect of the alleged sabotage. In fact, on the report back from the shop stewards, different versions or explanations were given to the Respondent regarding the alleged incidents of sabotage.
47. Mr Mabasa did not make a good impression on the Court and failed/refused to answer some questions put to him during cross-examination.
48. Mr Mgigina, the second witness for the Applicants, was employed as a Van Sales Supervisor and in essence dealt with the dispute the employees had with AA Distributors. Mr Mgigina could, however, not identify specific incidents where AA Distributors interfered with the routes and customers of the sales representatives and his evidence was based on general allegations.
49. Of more importance was Mr Mgigina stating that the problems which the Respondent experienced in the production line, i.e. sabotage etc. was as a result of the Respondent giving preference to AA Distributors.

50. Both Mr Mabasa and Mr Mgigina introduced new evidence and versions which were never put to the Respondent's witness, Mr Reid, and which apart from its improbabilities, are rejected by this Court on this basis.

51. Neither Mr Mabasa nor Mr Mgigina could explain why their evidence did not correspond with the contents of the minutes of the various meetings held between the Respondent and the employees' representatives.

52. It is significant that no shop steward or union official testified on behalf of the Applicants, despite one shop steward, Mr Thubegale being present in Court during the proceedings.

FINDING

53. The onus rests on the Respondent to show that the retrenchment was both procedurally and substantively fair.

54. The Court should, in essence, determine whether the purpose of section 189 of the Act has been complied with, which in itself is not a mechanical exercise.

55. As a general rule, the Court should not lightly interfere or second-guess the decision of an employer to retrench its employees, or to close down a branch, as was the case here. Even if the Court would not come to the same decision as the employer, the Court should not ordinarily question the commercial imperatives that underlie the decision to retrench as long as it is bona fide and based within the framework of the Act. (See S A Clothing & Textile Workers Union & others v Discreto a division of Trump and Springbok Holdings (1998) 19 1451 (LAC) and Mamabolo v Manchu Consulting CC (1999) 20 ILJ 1826 (LC) at 1831 B - D).

56. An employer should however not be allowed to abuse a retrenchment process to penalise its employees for misconduct or substitute same for discipline, unless that in itself becomes an operational issue.
57. Although the Court is of the opinion that the Respondent's business was not, at all times, especially prior to the arrival of Mr Reid, properly managed, such poor management should not be seen in isolation, particularly where it was clear that the employees had no or little intention of co-operation with management.
58. Where an employer experiences acts of sabotage, it is generally difficult to discipline, although not always impossible. Unidentified acts of sabotage may, in certain circumstances, give rise to dismissals based on the operational requirements of an employer. In this particular case, the employees' failure to follow instructions with regard to the loading of the bread of AA Distributors was a matter for discipline, which the Respondent could and failed to institute. The Court is, however, satisfied that such incident alone, could not alter the whole chain of events, which led to the Applicants' retrenchment.
59. I am furthermore satisfied that this particular case can be distinguished from the employer's approach in the matter of Chauke v Lee Service Centre CC t/a Leeson Motors (1998) 19 ILJ 1441 (LAC), inter alia, given the process followed by the employer to deal with the alleged incidents of sabotage and, in particular, the poor product and late delivery, which led to the Respondent losing customers. The Applicants furthermore, at no stage suggested in their pleadings or otherwise that discipline should have been implemented as an alternative to retrenchment, but chose to blame management for the sabotage. I am satisfied that the decision of the Respondent to retrench and the circumstances leading thereto falls within the framework of the definition of operational

requirements as envisaged in terms of the Act.

60. The Applicants' contention that the Respondent deliberately sabotaged its own business, as an excuse to close the Isando branch, is not only highly improbable, but does not tie in with the evidence accepted by the Court. These allegations of the Applicants are rejected.
61. The Court therefore finds that the Respondent had a valid reason to close its Isando bakery and that it furthermore properly considered the alternatives put forward by the Applicants' representatives during the consultation process. It is, in any event, generally left to the employer to decide whether the alternatives proposed on behalf of the employees are viable and the sole issue essentially to be determined is whether the proposal, which had been suggested, has been given bona fide consideration. (See Chemical Workers Industrial Union v Lennon Limited [1994] 10 BLLR 1 (LAC)).
62. The case before this Court was different, in one respect, from the normal retrenchment disputes to be determined by this Court. In this regard, the Court refers to the closure of the business, before exhausting the full consultation process.
63. Generally, parties exhaust the full consultation process with regard to the decision-making as well as implementation phase, before the business is closed and notice is given to employees. The Respondent in this matter gave notice of closure of its business, after conclusion of the implementation phase, and then continued with consultation on implementation.
64. I am of the view that nothing in the Act prohibits or limits an employer's right to close its business, after conclusion of consultations on the implementation, and especially given the circumstances, such as sabotage, increased losses, etc. experienced by the Respondent in this matter. This view

should, however, not be seen as the ideal situation, particularly given the probabilities that employees may, even during the phase of implementation, make viable alternative proposals to the decision to implement a retrenchment or close the business of an employer.

65. Insofar as the Respondent failed to give the 60 days notice of its intention to retrench, as required in terms of the Retrenchment Agreement, the Respondent relied on the general rule that such agreements only operate as a guideline, and in particular, that the relevant clause in the Recognition Agreement specifically provides for exceptions, which were present at the time the notice to retrench was issued.

66. I am in agreement with the Respondent that the circumstances the Respondent was faced with, warranted non-compliance of the particular clause.

67. The whole retrenchment exercise should furthermore not be seen in isolation, insofar as the events preceding the retrenchment, inter alia, the loss making exercises addressed many issues normally canvassed during retrenchment consultations.

68. No witness was called by the Applicants to contest the procedures and Mr Reid was hardly cross-examined in this regard.

69. I, therefore, accept Mr Reid's evidence with regard to the procedures and, in particular, find that the Respondent complied with the procedures as envisaged in the Act, read with the Code on Dismissal for Operational Reasons.

70. Lastly, I refer to the failure of the Applicant to call Mr Thubegale, the shop steward who was present at Court, as a witness, to deal with the evidence given by Mr Reid. In this regard I make

an adverse inference from the Applicant's failure to call this witness in line with the decision of the Appeal Court in Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A).

71.I, therefore, find that the dismissal of the Applicants was both procedurally and substantively fair.

COSTS

72. There is no reason why the costs of the matter should not follow the result. It would, however, be unfair towards the Applicants to also award costs in respect of the interlocutory applications. FAWU withdrew as the Applicants' representative prior to the matter being heard without tendering costs and it was up to the Respondent to address same with FAWU at the appropriate time.

ORDER

73. The Application is dismissed with costs, excluding costs of the interlocutory applications.

CASE LAW REFERRED TO:

74. The following cases were referred to in the above judgement:

74.1. S A Clothing & Textile Workers Union & others v Discreto a division of Trump and Springbok Holdings (1998) 19 1451 (LAC);

74.2. Mamabolo v Manchu Consulting CC (1999) 20 ILJ 1826 (LC) at 1831 B - D;

74.3. Chauke v Lee Service Centre CC t/a Leeson Motors (1998) 19 ILJ 1441 (LAC);

74.4. Chemical Workers Industrial Union v Lennon Limited [1994] 10 BLLR 1 (LAC);

74.5. Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A).

ACTING JUDGE PIENAAR

12 September 2000

PARTIES APPEARING BEFORE THE COURT:

APPLICANT:

Mr Tsatsi
Doe Tsatsi Attorneys

RESPONDENT:

Adv Paul Kennedy
(Instructed by Bell, Dewar & Hall Inc)