

In The Labour Court of South Africa

Case No: D751/99

In the matter between:

The National Union of

First Applicant

Elizabeth Ngwenya and

Second Applicant

and

Newcastle Diamond Cutting

Respondent

JUDGMENT

Ngcamu AJ:

[1] The Second and further applicants were employed by the Respondent up to their date of dismissal. They were all members of the First applicant.

[2] The Respondent is a company duly registered and incorporated as such who carry on

business cutting and polishing diamonds at Newcastle, Kwa Zulu Natal.

[3] The second and further applicants were dismissed on 23rd April 1999 on operational reasons. The dismissal has been challenged by the applicants on various grounds. The Bargaining council for the Diamond cutting industry could not resolve the dispute and it was then referred to this Court.

[4] Several issues were placed in dispute. Only the identity of the parties and their status was placed as matters in common cause. Both parties called witnesses to substantiate the allegations contained in the pleadings. The challenge to the dismissal is both on substantive and procedural grounds.

[5] The director of the Respondent Mr. Royffe testified that the company experienced difficult trading conditions since 1997 and it was difficult to sell the finished items. The company had to reduce production. This was discussed with the managers. A synopsis was then sent to the First applicant on 25th January 1999 setting out the difficulties in trading trends. In this synopsis the respondent indicated that there would be staff reduction. The method of selection of the employees was suggested. He testified further that at the time of writing the synopsis the respondent had not come to the conclusion of retrenchment. The retrenchment was considered as a result of the market demand for the polished diamonds and stock piling.

[6] A meeting was held with the Union representatives on 5th February 1999. At this meeting the question of retrenchment was addressed and discussed. The meeting discussed the notice of retrenchment, medical check up of retrenched employees, avoidance of retrenchment, the application of LIFO and FIFO criteria, as well as severance compensation. The discussions on 5th February 1999 are minuted and there appears no objection from the first applicant regarding the reason for the retrenchment. There was no dispute on the market situation. However, the first applicant requested the financial statements. The respondent was prepared to provide the financial statement but only to the auditors.

[7] The respondent explained by letter to the first applicant why the alternatives to avoid or minimise the loss of jobs could not work. The first applicant then proposed job sharing and rotational lay offs as well as early retirement. Voluntary packages were also suggested by the first applicant. In the letter addressed to the respondent dated 3rd March 1999 the first applicant never suggested any objection to the retrenchment.

[8] Mr. Royffe further testified that there were no volunteers for the retrenchment. He testified that the first applicant failed to come up with workable suggestions. He denied that the retrenchment was as a result of a previous strike. He denied that a decision had already been made at the time consultations commenced. He further denied that told the first applicant that retrenchment was the only option. He told the court that the first applicant left the meeting on 12th March 1999 and did not return.

[9] Mr. Povey, a labour consultant contracted to the respondent also gave evidence on behalf of the respondent. He testified that he attended the meetings between the first applicant and the respondent and took minutes. He denied the suggestion that the first applicant left the meeting as it was of the view that it was over and that a new date would be arranged. Although his evidence was that a new date was agreed on each meeting, this does not appear to be the case if I considered the minutes presented to me. However there is nothing turning on this point with regard to the issues to be decided.

[10] Mr. Ntshangase was the only witness called by the applicants. He is the union organised and attended a meeting on 5th February 1999. He testified that Mr. Royffe said there was no other means except the retrenchment and that Mr. Royffe only wanted to discuss how workers were to be retrenched and the selection criteria. According to Mr. Ntshangase there were no discussions about avoiding the retrenchment or reducing it. He denied that any selection criteria was agreed. He testified that the union came with the idea of job sharing but the respondent did not accept any proposals. According to Mr. Ntshangase, LIFO principle was agreed but not to be coupled with selection by department.

The union wanted the financial statements to be sent to their research department. He testified that the consultations were not proceeded with properly and there were no proper consultations on proposals. He believed that the respondent wanted to retrench first applicant is members. The union also had problems with LIFO coupled with retention of skill.

[11] In the letters addressed by the first applicant, there was no challenge on market conditions or rationale for the retrenchment. There was no attack on this point during the cross examination. The attack was that the retrenchment was made in bad faith. The respondent did set out the market conditions in the document entitled "Developments in the Polished Diamond Industry-First Quarter 1999". This document was sent to the First applicant. The employer is in my view, entitled to make a decision about his business and on what he perceives to be the best method to follow in its operations which includes the reduction of staff.

[12] In *Fletcher v Elna Sewing Machine Centre (Pty) LTD* (2000) 21 ILJ 603 (LC) par 39 the court stated "In my perception, there can be few employers who, having identified, as they are fully entitled to do, the necessity for a valid and bona fide reason to re-organise, restructure or in some other manner, redefine their business operations, will not have decided in principle what they perceive is the optimum method of doing so. What I consider to be a legitimate purpose of consultation with employees who might be affected therefore, is not to assist them in making up their minds, but to determine, by way of consensus, whether there is any practical and viable basis for changing them. There is to my mind, nothing unfair in that concept. In its broad context, it is a realistic and prevailing phenomenon of commercial life". I am in agreement with this decision in that the economics dictates that if it is necessary to shed jobs so that the enterprise may survive, it can legitimately be done. In the absence of any evidence to the contrary, I accept the rationale for the retrenchment.

[13] Section 189(2) compels the employer to reach consensus on certain matters. In order

for the employees to engage in proper discussions, certain information may be required. In this case I have been told that the applicants requested financial statements. According to the respondent it was prepared to furnish the information to the auditors. The information was supplied. I am satisfied that there were consultations regarding the methods of avoiding retrenchment. The suggestions made by the first applicant were not accepted by the respondent as they were not workable. It was submitted on behalf of the applicants that rotation should have been implemented. It was also submitted that job sharing would have worked in other departments. It was however not suggested what would have happened with those departments where job sharing could not work. It was accepted by Mr. Ntshangase that the respondent did mention that the proposals were not practical. In my view, to compel the employer to implement proposals which are not workable will have the effect of further damaging the business instead of saving it. I reject the suggestion that alternatives to retrenchment were not considered.

[14] It was submitted that the respondent did not suggest how the retrenchment could be reduced. This is correct but one must not lose sight of the fact that the problem the respondent was facing was stock piling with no sales. The respondent did not want to put on hold the retrenchment. This in my view cannot be said to be unfair in that the respondent is entitled to take steps which will reduce costs.

[15] From the evidence presented, I am satisfied that LIFO was followed. It was submitted by the applicant that it had no problem with the application of LIFO but should not have been coupled with retention of skill. In my view, it is a sensible business method to retain skills when reducing staff to see to it that the business operation does not grind to a halt and then close down for lack of skill. It was not suggested that LIFO was not properly applied.

[16] It was suggested that the consultations were approached in bad faith by the respondent. The evidence has shown that the employees are trained in various categories. I find it difficult to accept that the respondent would train employees and then retrench them in order to reduce union membership. I therefore reject the suggestion that the retrenchment was

aimed at reducing membership. This is so because some of the employees have been re-employed. It was not suggested that those re-employed are not union members or that only union members were retrenched. The alternatives raised by the applicant were discussed and only grey areas were referred to by the applicant. There were no specifics regarding the grey areas referred to.

[17] The respondent first sent the synopsis to the applicant before the consultations were held. The information requested was in regard to the financial statements. I see nothing objectionable in the financial statements being furnished to the auditors to protect the respondent's business. The auditors were not disclosed to the respondent. The respondent's submissions were that the proposals made were not workable. The explanations were given as to why the proposals could not work. In view of this I do not accept that there was no compliance with section 189 (2) (a). The method of selection suggested by the respondent was LIFO. The applicants submitted that there was no consensus on this. On the evidence presented to me, the applicant was not objecting to the principle except that it should not have been coupled with retention of skill. No other method of selection was proposed. The respondent is not obliged to reach consensus but an attempt must have been made to reach consensus. No volunteers came forward and no workable plan was put forward.

[18] If there was no consensus the respondent was entitled to proceed with the retrenchment. If there is no agreement on certain issues all the respondent had to do was to follow a fair procedure. It is not a legal requirement that a mechanical checklist had to be followed. In this regard, see *Johnson and Johnson (Pty) Ltd v CWIU* 1998 12 BLLR 1209 LAC. The question to be answered in the end is whether the purpose of the section has been achieved. I have no evidence to show that the criteria used was unfair. The assessment of the procedure used is not on moral grounds. The employer drives the process of retrenchment and has to see that the business is not placed in jeopardy.

[19] It was never suggested that the information supplied was insufficient and that the first applicant was not able to engage the respondent meaningfully as a result of this. There was

no evidence to support the allegation that the retrenchment was premature. I therefore hold that sufficient consultations were held with first applicant but no practical system was presented to the respondent.

[20] In *Mahomedy's v Commercial Catering and Allied Workers Union of SA* (1992) 13 ILJ 1174 LAC p 1194 G-I the court held:

“The employer is not entitled to take final decisions to retrench without prior consultations with its employees or trade union. There are several reasons for this: one of them is that the employees should be given the opportunity to persuade the employer that the retrenchment is unnecessary; that alternative measures are available to the employer, such as a reduction in wages or short-time.” I have mentioned that the proposals made were not workable in the case before me.

[21] It was submitted that the second and further applicants are black rural women.

There is no evidence on record to suggest this. There is not obligation on the employer to put retrenchment on hold if the employees or the union does not co-operate. The suggestion that the retrenchment should have been put on hold and first applicant put on terms to engage in consultation has no legal basis. I therefore find it proper and reasonable for the employer to engage the employees if the union is dragging its feet.

[22] In the light of the evidence presented, I am satisfied that there was a fair reason for the retrenchment. I have come to this conclusion on the basis that this has not been sufficiently attacked by the applicants. The evidence on behalf of the respondent stands uncontradicted on this point.

[23] I am satisfied that there were sufficient consultations regarding the retrenchment, selection criteria and proposals made by the first applicant. I am satisfied further, on the evidence on record that the first applicant changed its position on the alternative proposals but none were workable. The procedure followed in the retrenchment is in my view fair and in compliance with the Labour Relations Act.

[24] In the circumstances the application by the applicants should fail. There is no reason

why the costs should not follow the results. The order I make is as follows:

(a) The dismissal of the second and further applicants was substantially and procedurally fair.

(b) The applicants to pay the respondent's costs on party and party basis.

Cases referred to:

1. NUMSA v Atlantis Diesel Engines (Pty) LTD (1993) 14 ILJ 642 LAC
2. Mahomedy v Commercial Catering and Allied Workers Union of SA (1999) 13 ILJ 1174 (LAC)
3. SACWU and Others v Afrox LTD (1998) 2 BLLR 171 (LC)
4. Johnson and Johnson (Pty) LTD v CWIU (1998) 12 BLLR 1209 LAC
5. Fletcher v Elna Sewing Machine Centre (Pty) LTD (2000) 21 IL 603 (LC)
6. NEHAWU v University of Fort Hare 1997 (8) BLLR 1054 (LC)
7. UPUSA and others v Grinaker Duraset, 1998 (2) BLLR 1054 (LC)
8. Hlongwane and Another v Plastix (Pty) LTD 1990 (11) ILJ 191
9. National Union of Metalworkers of S.A. v Ascoreg (1999) 20 ILJ 2649

Ngcamu AJ