IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN **CASE NO: D1049/99**

In the matter between:

MHAMBISENI JOHNSON CEBEKHULU Applicant

and

UNITRANS ZULULAND (PTY) LIMITED Respondent

JUDGMENT

JAMMY AJ

The Respondent company, Unitrans Zululand (Pty) Limited, by which the Applicant was employed until his retrenchment on 31 January 1999, is a subsidiary of Unitrans Freight (Pty) Limited, itself a corporate constituent of a group of companies held by Unitrans Limited. Unitrans Freight (Pty) Limited has numerous other subsidiaries in diverse areas of business which include the sugar and minerals industries. One of the business operations of Unitrans Zululand (Pty) Limited is a mining contract at Richards Bay Minerals of which, at the time that his services were terminated, the Applicant was one of two Assistant Depot Managers, a position which he had held since 1 December 1994.

Other businesses falling within the Respondent's commercial ambit comprised a sugar contract at Amatikulu, a sugar contract at Empangeni, a sugar contract at Mtubatuba and

the operation of a fuel depot at Empangeni.

Testifying for the Respondent, Mr M J Hidden, who at all material times was its Human Resources Manager, described how, in or about October and November 1998, the fortunes of the Respondent in the geographical area of the Zululand in which it operated, were detrimentally affected by three factors. The first was a severe drought which radically reduced the sugar crop in the area. The second was the cancellation of a fuel distribution contract which the Respondent held with Engen in the context of a distribution agreement between that company and Total South Africa, which had given notice that it would thenceforth be performing that function itself. The third negative factor was a series of increases in the price of fuel during the period in question. The cumulative effect of these factors was radically to distort the company's profit forecast for the financial year 1 July 1998 to 30 June 1999.

In mid October 1998, said Mr Hidden, the trading results for the first quarter were assessed, the profit forecast for the year ended 30 June 1999 was reduced by approximately R5 000 000 and the need for radical remedial action was apparent. In the context of a possible restructuring of the company, all positions were examined and, where considered to be surplus to the Respondent's requirements, were identified for possible reduction. Closely examined in that context was the need for two Assistant Depot Managers at Richards Bay Minerals, the only one of the Respondent's contracts where this function was duplicated.

The Depot Manager at Richards Bay Minerals, Mr K Wellman was accordingly instructed by him to call the Applicant to a meeting on 15 October 1998. It is not disputed that the purpose of that meeting was not conveyed to the Applicant but when it convened, the circumstances in which the company found itself were explained, the necessity for the rationalisation of human resources was analysed and the Applicant was informed that, as a consequence, he was to be retrenched. An attempt, he was told, would however be made to find him alternative employment within the group.

Later that day, a letter was handed to the Applicant and it is apposite, in my view, that it be here quoted in its full text.

"Dear John

OPERATIONAL REQUIREMENTS – TERMINATION OF CONTRACT

With reference to our discussion today, the severe impact of the drought on the cane operations has demanded a review of the Company's operations and a rationalisation of human resources.

Given our obligations under Section 189 of the Labour Relations Act read in conjunction with clause 15 – Retrenchment Procedure of the National Bargaining Council Agreement, we have no alternative, in terms of our operational requirements, but to notify you of our intention to terminate your contract of employment on 30 November 1998.

There are developments elsewhere in the Unitrans Group and every effort will be made to find you alternative employment within the Group. On behalf of management I wish to thank you sincerely for your contribution to the development and success of Unitrans Zululand.

We wish you everything of the best".

Clause 15 of the Retrenchment Procedure referred to, has relevance. It is a comprehensive procedure incorporating the necessity, where retrenchment is contemplated, for immediate notification, consultation, the provision of information relevant to the exercise, including the reasons for retrenchment, the number of persons possibly to be effected thereby, the proposed date of implementation and, in detailed particularity, the consideration of defined alternatives. It deals with guidelines in selection of employees for retrenchment with specific reference to retirement age, early retirement, the principle of last-in, first-out, "subject to skills and organisational criteria". There is further reference to formal notification following consultation, the alleviation of hardship and the provision of references. In short, having regard to the established requirements for fair procedure, it is, as I have said, a comprehensive and very proper section in the retrenchment context.

A further meeting with the Applicant, Mr Hidden testified, was held on 10 November 1998 when the circumstances relevant to the decision to rationalise were again reviewed and "the Applicant was given an opportunity to respond and to raise alternatives to his notified retrenchment". He was informed that it was possible that the position of contract supervisor at Mtubatuba might become vacant and also that Unitrans Natal was in the process of acquiring a contract for the transport of Rainbow Chickens and that a suitable management position might arise in that regard. As it transpired, and for reasons not germane to this judgment, neither of those possible eventualities materialised. In the course of the meeting on 10 November, Mr Hidden continued, the Applicant had raised the question why, if the difficulties which the Respondent was experiencing were attributable to drought-related problems in the sugar industry, his position in the unrelated mining contract was being affected. He also drew attention to the fact that the Assistant Depot Manager at one of the sugar contracts had shorter service than his own and should consequently be selected for retrenchment ahead of him. This, said Mr Hidden was not the case. It was explained to the Applicant that the employee concerned, a certain Daniel Ndimande, had in fact been with the company since 1982, some eleven years longer than the Applicant, and that in any event, to disrupt the company's organisational structure by "bumping" someone out of a sugar contract to be replaced by a person from the mining sector, would be impractical and untenable – the latter would not have the necessary skills.

Despite responsible efforts, Mr Hidden stated, no alternative positions for the Applicant could be found and accordingly, on 25 November 1998, the Applicant was given formal written confirmation of the termination of his employment on 30 November.

. On the basis of what, in the absence of a satisfactory explanation from Mr Hidden for that development, I can only presume was legal or other advice leading the Respondent to reconsider the propriety of its conduct of the matter to that point, a further letter was addressed by Mr Hidden to the Applicant two days later, on 27 November 1998. Purported discussions held with the Applicant on 15 October and subsequently and what were contended to be the company's attempts to find alternatives to his retrenchment,

were alluded to and what was then stated was this:

> "Since receiving this letter, (the letter of 25 November), you have expressed certain concerns about your retrenchment. The Company has accordingly decided to retract your retrenchment and to engage in further discussions with you regarding the rationalisation and appropriate measures to avoid retrenchment. The Company wishes you to make representations regarding the rationalisation and any other issues relating to retrenchments.
>
> As required by Section 189 of the Labour Relations Act, and in order to facilitate proper consultation, we advise you as follows …..".
>
> Then followed a reiterated review of the drought-related problems in the sugar cane operations, a reference to the number of employees (twenty-nine) now likely to be affected by the rationalisation and the job categories from which they would be selected. What was then, significantly in my view, recorded was that –
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> "In the event that there are no alternatives to retrenchment, the method for selecting which employees to retrench will be by depot and by job category, based on the principle of last-in, first-out."
>
> The letter concluded with the company's proposal to pay one week's salary for every completed year of service and its commitment "to providing employees with every assistance in finding alternative employment." Re-employment would be offered "if suitable vacancies arise". Finally – "The company wishes to meet you on 8 December 1998 to commence consultations with you regarding the issues referred to above".

. There is only one inference which may rationally be drawn from this concluding invitation and that is that the consultations purportedly held prior to 27 November 1998, notwithstanding the recorded contention that they had dealt comprehensively with the issues regarding which the company now wished "to commence" consultations, could, on the company's own assessment of its position, have had no validity or relevance to the requirements of Section 189 of the Labour Relations Act which they purportedly satisfied.

. The proposed meeting in fact took place on 10 December 1998, and his letter of 27 November, said Mr Hidden, served as an agenda in that regard. For approximately one hour the same issues were discussed as had previously been dealt with, with the Applicant expressing the same concerns. Following that meeting, the Respondent "expected further consultations and input from the Applicant but none were forthcoming" until, on 22 December 1998, the Respondent received a telefaxed letter from a firm of attorneys, which enquired, in the light of the retracted retrenchment on 27 November, as to "the present status of our client's employment".

. Correspondence then ensued between the attorneys for the respective parties, the Respondent's attorneys recording in the course thereof, that consultations had commenced "on or about 15 October 1998", had "continued intermittently" until the notice of 24 November 1998 was given and that "this notice was retracted on 27 November 1998 and our client continued to seek alternatives to the retrenchment …"

. Reference was also made to the further meeting which had been held on 10 December 1998 at which, it was alleged, the Applicant had been advised that no alternatives could be found. A final consultation, it was stated, would be held on 30 January 1999. Alternative proposals to retrenchment, if any, were invited in writing from the Applicant prior to that date and these, it was stated, "will provide our client with an opportunity to prepare for the aforesaid consultation".

. This further consultation and the possibility of further alternative proposals notwithstanding however, the Respondent, on 30 December 1998, gave formal written notice to the Applicant of the termination of his employment as at 31 January 1999. What is in my view remarkable about this communication is that, notwithstanding the retraction of the earlier notification of retrenchment on 27 November 1998, it records again the contention that consultations in that regard had been in progress since 15 October 1998, since which date, by inference and to all intents and purposes, the Respondent had been doing everything possible both of its own initiative and in accordance with the relevant statutory requirements, to avoid what was now being

conveyed as a final decision to retrench the Applicant.

6. That letter was written on the same date as, and recorded what was described as, a final "consultation" with the Applicant during which, the letter recorded, it was explained that "the rationalisation of human resources in the Company has been done by depot and job category and the method for selecting which employees' contracts to terminate was based on the principle of "Last-In First-Out". The Applicant would be paid, it concluded, severance pay based on one week's pay for every completed year of continuous service and the Company would continue to try to find alternative employment either within the Company or in the "Group's other Companies". He was thanked for his valuable service. That letter, Mr Hidden testified, was given to the Applicant either in the meeting on 30 December or the following day. No practical alternatives had been received and no challenge to the process had been mounted. As far as the Respondent was concerned "we felt we had attempted to engage and reach consensus regarding avoidance of retrenchment, the minimising of its consequences, the timing, mitigating circumstances, selection methods and so forth." The severance pay, he conceded, had not been discussed.

7. Mr Hidden's evidence was briefly corroborated by Mr K G Wellman who, at the relevant time, was the Depot Manager at the Richards Bay Minerals Contract. He had procured the Applicant's attendance, and was himself present, at the initial meeting with Mr Hidden on 15 October 1998 and at the follow-up meeting on 10 November. The necessity for the company to restructure by, *inter alia,* reducing the number of assistant depot managers at Richards Bay from two to one was explained to the Applicant at both meetings. He was also told that the alternative position possibly available for him at Mtubatuba, was no longer open but was told that further alternatives would be sought.

8. The Applicant, said Mr Wellman, had little to say at either of those meetings but had asked what the drought problem had to do with the viability of, and his position at, Richards Bay. Mr Hidden had not, to his recollection, told the Applicant that he could not furnish any information since he was only a messenger for the board of directors – an answer, it should be noted, similar to that given by Mr Hidden when the same submission

was made to him.

. Cross-examined, Mr Wellman conceded that when he had requested the Applicant to attend the initial meeting on 15 October, the Applicant had no knowledge, and was not told, what that meeting was to be about.

. The request to him, on short notice, to attend the initial meeting with Mr Hidden on 15 October 1998 was confirmed by the Applicant at the outset of his testimony. Before he could sit down however, he said, Mr Hidden informed him that he was "very sorry", but management had decided to terminate his services on 30 November because of the drought in the sugar industry. He did not understand what was happening, said the Applicant and requested the presence of a colleague to assist him. Mr Hidden's response was that this would make no difference, management's decision had been taken. He agreed however that someone else should be present and, the Respondent's Industrial Relations Officer having declined to do so, he arranged with a colleague, Mr Paul Makhatini to assist him. The meeting reconvened approximately an hour later, and he asked Mr Hidden to repeat what he had said. He was told again that management had decided to terminate his services on 30 November because of the drought in the sugar cane fields. He responded that he had never worked in the sugar cane divisions but, since 1985, always on the mine. Mr Makhatini raised the same query.

. Mr Hidden's response however was that he "knows nothing – he was just a message carrier" for management. Mr Makhatini commented that in that case, they should be given the opportunity to discuss the matter with the person or persons who "had sent the message". This suggestion was rejected, Mr Hidden responding that all he could do was to offer to the Applicant a possible vacancy at the Mtubatuba Depot. That however had not materialised.

. He worked normally, said the Applicant, until 10 November 1998 when he was again summoned to a meeting at the Respondent's head office. He was once again not told the purpose of that meeting but arranged for Mr Makhatini to accompany him as before.

3. He was told that the Mtubatuba position was no longer open but that Mr Hidden would try to find a vacancy in the Group. The fact that he was a "messenger" was repeated but the person who had sent the message was not identified. They were invited to comment, said the Applicant, but saw no point in doing so if Mr Hidden was, as he had stressed, merely a messenger and unable to furnish them with meaningful information.

4. He continued to work until 30 November when he received a telephone call from Mr Hidden's secretary requesting him to collect a letter. There had been no discussions between 15 October and 10 November, nor between 10 November and 30 November. The letter dated 15 October however, purportedly the first notification of his pending retrenchment, had been given to him for the first time only on 25 November.

5. When he took delivery of the letter of the 30th November he was advised by Mr Hidden telephonically at the switchboard that he should not continue work but should go home. He would receive his salary up to and including 31 December 1999, he was told.

6. On 10 December 1998 however he was again called to a meeting together with Mr Makhatini. He was asked to confirm that he had received the letter of 30 November and was told that Mr Hidden was "still trying to find me a position in the Unitrans Group." He did not comment.

7. On 30 December 1998, a meeting was scheduled with the Respondent's attorneys and his own advisers. The company's attorneys did not however arrive and he was then informed by Mr Hidden that no alternative job was available. He was asked if he had anything further to say and again repeated that they wished to discuss the matter with the "person who had sent the message". This was again rejected and he was instructed to wait outside the office. Approximately a half hour later, he was handed the letter of 30 December 1998 to which earlier reference has been made.

8. At no time in the course of this whole saga, the Applicant testified, had any rationalisation for the Respondent's decision to retrench him been properly explained to him, no selection criteria had ever been discussed, the issue of severance pay had never been raised until he read about it for the first time in the letter of 30 December and at the conclusion of the meeting on that day, all that Mr Hidden had said was that if they were unhappy with what had happened, they could refer the matter to the Bargaining Council.

9. The Applicant remained unwavering and consistent in his testimony during comprehensive cross-examination by Mr M Alexander on behalf of the Respondent. It was correct that at the meeting of 10 December the company had invited alternative proposals and it was also correct that he had been unable to suggest any. When he sought to develop the issue further, Mr Hidden's response that he was merely a messenger in the process was repeated and his request to discuss the matter further with the decision makers, was consistently refused. Mr Hidden had never raised his purported frustration at the lack of alternative proposals, in the course of those discussions.

10. The Applicant's testimony was in turn corroborated by Mr Makhatini who presented the same picture of what had occurred at the meetings referred to, emphasising Mr Hidden's consistent response that what was occurring was a management decision and that he was merely a messenger and could not elaborate.

11. I have already indicated that in my view, the irresistible inference to be drawn from the fact that the Respondent saw fit, on 27 November 1998, formally to retract its notification to the Applicant of his pending retrenchment, is that it had itself determined, or had been independently advised, that its management of the process to that point had been inadequate and unsatisfactory in the context of the statutory requirements for fair retrenchment procedure. On that basis, no significance can, in my view, be attached to the purported consultations and correspondence prior to that date. That much is endorsed by the substance of its letter to the Applicant of 27 November 1998 in which the Respondent's intention thenceforth to embark upon a comprehensive consultation programme and the issues therein to be canvassed, are conveyed. Significantly, a formal invitation to commence those discussions on 8 December 1998 is also made.

. What falls to be assessed from the *conspectus* of the evidence before this court in that context therefore, is the adequacy of the Respondent's conduct after 27 November 1998 and the issue of its good faith or otherwise in pursuing it. There is a plethora of authority in this court dealing with the formal requirements of fair procedure in the context of Section 189 of the Labour Relations Act 1995. The substance and purpose of that section, by way of example, was analysed by Brassey A J in

Sikhosana and Others v Sasol Synthetic Fuels (2000) 21ILJ 649

What emerges from that decision is that not every breach of Section 189 of the Act will necessarily make the retrenchment unfair whilst conversely compliance with the requirements of that section will not necessarily render it fair. At page 655 of the judgment, the court said this:

"A court determining the fairness of retrenchment must consider, in addition to the matters for which the section provides, whether the employer really needed to retrench, what steps (it) took to avoid retrenchment, and whether fair criteria were employed in deciding whom to retrench. Compliance with S189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment. The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but 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".

. For the Respondent in this matter to have reassessed its position, retracted its initial notice and to have thereupon, to all intents and purposes, embarked afresh upon the process, is not in itself either unfair or improper, all other things being equal. One such other factor however is that its conduct in that context must have been motivated by a genuine acknowledgement of its inadequacies and a sincere and genuine intention, made in good faith, to remedy the situation on an equitable basis.

. I am not convinced, from the testimony adduced in this trial, that this requirement is satisfied as far as the Respondent is concerned. The picture which it seeks to present, of

total commitment to the consultation process on a realistic basis, of genuine effort to identify alternatives and of unqualified attempts to involve the Applicant in that process, is not one which I find myself able to accept unreservedly in the face of the consistent and mutually corroborative evidence of the Applicant and Mr Makhatini. There is, in my view, substance to the submission made on the Applicant's behalf that what happened after 27 November 1998 was an attempt by the Respondent to paper over the cracks in its conduct prior to that date, by merely "going through the motions" of compliance with the relevant statutory requirements. The eventual denial by Mr Hidden, seemingly endorsed by Mr Wellman, of an emphatic aspect of the Applicant's evidence, supported by Mr Makhatini, that he had consistently refused to elaborate on the commercial rationalisation for, and to engage the Applicant in meaningful discussion in that context regarding his retrenchment, because he was merely a messenger, was preceded by a comment that he had no recollection of having said this. In the light of what, as I have said, I consider to be compelling evidence to the contrary, I am unable to discount this possible fallibility of memory on his part.

. As I have stated, I do not think that in pursuing the process after 27 November 1998, the Respondent acted with the necessary degree of good faith. The compelling impression which emerges from the testimony as a whole, was that having, at a much earlier stage, immutably decided that the Applicant should go, its purported compliance with fair procedure in that context, was superficial, insincere and misleading. Having been given no realistic opportunity to participate in the process to that point, the Applicant in my opinion, was justified in his conclusion that no purpose would be served by his engagement in what he already perceived was a flawed exercise.

. In the absence of any material evidence to the contrary, the commercial reasons for the retrenchment exercise embarked upon by the Respondent appear to have been sufficiently established in the context of the severe effects on its overall viability of the drought, insofar as it affected the sugar industry. The necessity to seek to address that situation by a general restructuring which would include operations within the Group not directly affected by those exigencies, but which would nevertheless contribute to the cost savings perceived as necessary, is not to my mind unreasonable.

7. For the reasons for which I have stated however, I have concluded that the basic tenets of procedural fairness were not observed or complied with by the Respondent to a degree which would satisfy the applicable legal and equitable principles involved. The retrenchment of the Respondent, in the circumstances in and on the basis upon which it was effected, was therefore procedurally unfair.

8. It has now been finally determined by the Labour Appeal Court that the relief of reinstatement is not competent in the case of a dismissal that is unfair only because the employer did not follow a fair procedure.

See: Mzeku and Others v Volkswagen SA (Pty) Limited (2001) 8BLLR 857 at 882

The Applicant is however entitled to be compensated if indeed this court, in its discretion, determines that compensation is appropriate. I have no hesitation in concluding that this is such a case and having regard to the limitation on the amount of compensation defined by the Labour Appeal Court in

Johnson & Johnson (Pty) Ltd v CWIU (1998) 12BLLR 1209,

the order that I make is the following:

The dismissal of the Applicant by the Respondent was substantively fair but procedurally unfair.

The Respondent is ordered to pay to the Applicant as compensation for his unfair dismissal the amount of R83 244 being the equivalent of twelve months salary at R6 937 per month, which was the Applicant's prevailing rate of remuneration as at 31 January 1999, the date of his retrenchment.

The Respondent is ordered to pay the Applicant's costs.

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B M JAMMY
Acting Judge of the Labour Court

28 August 2001

Representation:

Mr Z E Buthelezi: Mathe & Zondo Inc.

t: Mr M Alexander: Denys Reitz