

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J2526/99

In the matter between:

CHEMICAL WORKERS INDUSTRIAL UNION

First Applicant

SANGWENI AND OTHERS

Second and further Applicants

and

LATEX SURGICAL PRODUCTS (PTY) LTD

Respondent

JUDGMENT

JAMMY AJ

1. The hearing of this matter was an extended one and the evidence adduced substantial. To traverse it in detail has however been rendered unnecessary by the subsequent submission by the legal representatives of the respective parties, Advocate C Orr representing the Applicants and Mr A Soldatos, the attorney for the Respondent, of comprehensive heads of argument which have been of considerable assistance to this Court in its assessment and determination of the salient aspects

of the dispute.

2. The Respondent conducts the business of the manufacturing and distribution of condoms and surgical and examination gloves. An auditor to the company, Mr H B Farber, testifying as to the financial position of the company in 1998, traced a pattern of increasing financial loss in the immediately preceding years. As at the financial year ending 30 September 1996, the Respondent had sustained a loss in excess of R9 000 000. In the next financial year the loss approached R13 000 000 with turnover having decreased, as against the immediately preceding year, by some R3 000 000. The pattern continued during 1998 and by September 1998 an accumulated loss had been sustained by the Respondent in the sum of R16 153 229.
3. A substantial drop of between 8% and 9% in the gross profit of the Respondent during the period 1996 to 1997, Mr Farber explained, was due to defectively manufactured goods with a concomitant increase in manufacturing costs. The Respondent's problems were exacerbated by a disputed claim by the Southern Metropolitan Council for gas charges in an amount of approximately R3 400 000, leading to legal action which however, eventually became settled. A further aggravating factor, in the context that the Respondent's business was entirely structured on tenders invited and submitted, was the increasingly competitive activity of its competitors whose tenders were based on significantly lower manufacturing costs than those prevailing in the Respondent's operations. A tender to the Western Cape Provincial Administration had been lost and a new contract with the state appeared to be in jeopardy when assessed against competitive tenders in comparison with which its own fared

poorly. What was described as the turmoil in financial markets and foreign currencies, resulting in the substantial depreciation in the value of the Rand and a resultant increase in interest rates, were further contributors to what had become a desperate state of affairs.

4. Evidence was adduced through the Respondent's witnesses that the Respondent's situation at that stage was exacerbated by a protracted wage-related strike embarked upon by the individual Applicants and which radically affected the Respondent's ability to generate turnover. During the latter years of the decade and in an effort to alleviate its financial difficulties the Respondent had involved an entity known as Omnimed (Pty) Ltd in the management of its business operations and it was now envisaged that the examination gloves operation of the Respondent would be acquired by another entity, either Omnimed or an unidentified Malaysian investor who appeared however, to be more interested in the acquisition of the condom manufacturing sector of the business. The contribution to turnover which had historically emanated from the manufacture of surgical gloves had decreased as the Respondent lost its share of contracts for their supply and in the result the majority of employees engaged in the testing and packing area related to those gloves, the sales of which had decreased by approximately three hundred thousand pairs per month, were manifestly surplus to its needs.
5. The prevailing malaise inevitably spread to other sectors of the Respondent's manufacturing business, a duplication becoming evident in quality control cleaning and maintenance operations. The necessity for the possible out-sourcing or indeed the total termination of these "support" services became increasingly

possible.

6. The *conspectus* of this evidence, illustrating an excessive number of employees in the service of the Respondent and particularly in the cleaning room and in the testing and packing areas of its operations, was at no stage of these proceedings materially disputed by the Applicants and I do not propose to dwell unnecessarily on this aspect of the matter. The cold economic factors directing the process, although exhaustively examined in the course of cross-examination on behalf of the Applicants, have to my mind been unarguably established and the necessity for some form of radical action to address what was an increasingly deteriorating state of the Respondent's financial affairs, does not seem to me to have been open to question.
7. There is a plethora of authority in these Courts that, provided that its prerogative to do so is exercised in good faith, an employer is best placed to assess and determine the state of its affairs and the nature and course of any remedial action which may thereby be indicated. Such are commercial decisions with which, in the absence of *mala fides*, Courts will be loathe to interfere. See, for example -

Steyn and Others v Driefontein Consolidated Ltd t/a West Driefontein (2001) 2BLLR 239 (LC)

8. In these circumstances, I have concluded that the challenge to the substantive reasons for the retrenchment of the individual Applicants, to the extent that it is directed to the commercial rationale underlying it, cannot be sustained and I turn now to

consider the alleged procedural defects in the exercise which are based, in essence, on the contentions that the Respondent failed to comply with the constituent requirements of Section 189 of the Labour Relations Act 1995 (“the Act”). The company had, it is alleged, made a final decision to retrench prior to embarking on consultations with the First Applicant and did not, through the medium of such consultation, seek to reach consensus on appropriate measures to avoid the dismissals, to minimise their number, to determine their timing and to mitigate their adverse effects. There was no consultation, it is contended, regarding the reasons for the dismissals, alternatives thereto, the number of employees to be affected and the basis of their selection as such. In short, the fundamental statutory requirement of full, effective and proper consultation with the First Applicant in its capacity as the collective bargaining agent of the individual employees affected by the exercise, was not met.

9. Finally, the Applicants contend, quite apart from the defects in the implementation of the programme, the dismissals in question were automatically unfair in that they “involved an infringement of the Second and further Applicants’ fundamental right to belong to a union”.
10. The Applicants properly draw attention in their submissions to a line of cases in the Labour Courts which have alluded to the fact that fair retrenchment does not entail mechanical compliance with Section 189 of the Act on a checklist basis. What the section does is to provide guidelines for the equitable implementation of the process. In -

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

Brassey AJ, at page 655, commented thus:

“It cannot be assumed that every breach of s189 necessarily makes the retrenchment unfair: Every invalid dismissal will doubtless be unfair but, as I have tried to make clear, not every dismissal in conflict with the section will necessarily be – or be treated as – invalid. It would be even more dangerous to assume that every retrenchment in compliance with the section is necessarily fair. Section 189, which, (with one exception of no relevance here) deals only with matters of consultation, is obviously not intended to be exhaustive. A Court determining the fairness of a 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”.

11. Pursuant thereto a sequence of meetings followed in which the Applicants acknowledge, significantly in my view, that the parties “consulted, or attempted to consult”. These took place on 1 July, 19 August, 4 December, 10 December and 14 December 1998 and on 4 January, 8 January, 13 January, 19 January, 8 February and 12 February 1999. There was little consensus in their context. But notwithstanding energetic attempts by the Applicants, both in the course of cross-examination and in their

submissions, to characterise the attitude of the Respondent throughout as illustrating bad faith and a devious and manipulative approach to the issues in question, I am not persuaded that this is what emerges.

12. The fundamental premise in the Applicants' challenge to the fairness of the procedure is that, notwithstanding the motions of consultation seemingly observed by the Respondent during the material period, the decision to retrench upon its own terms and conditions had been taken even before the invitation to the union to embark upon that process was conveyed.
13. The sequence of exchanges between the parties as chronicled in the pleadings and documentation in this matter however, does not support that conclusion and it is apposite, in my opinion, to allude in that regard to:-

Fletcher v Elna Sewing Machines Centres (Pty) Ltd (2000) 21ILJ 603

in which, at 614 the view was expressed that the requirement of consultation at the contemplation stage, will –

“... more often than not prove to be a lofty ideal, acknowledged in principle but compromised in practice. In my perception, there can be few employers who, having identified, as they are fully entitled to do, the necessity for a valid and *bone fide* reason to reorganise, 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 the legitimate purpose of consultation with employees who might thereby 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”.

14. What is of course required by the broad concept of consultation, is an attempt by the parties to reach consensus with regard to the various elements of the retrenchment process, but not consensus itself. Agreement on those issues is not a prerequisite to the implementation by the employer of the exercise in question. It is sufficient that all relevant aspects of the matter be canvassed in the course of the interaction between the parties and that each of them be given a full and proper opportunity to engage thereon. It is when that opportunity is not afforded or where it is frustrated by the approach or the conduct of one or the other of them, that the procedure will be flawed. See, in that regard -

**Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union
(1999) 20 ILJ 89**

in which the Court commented that –

“The achievement of a joint consensus seeking process may be foiled by either one of the consulting parties”.

This would occur where one of the consulting parties –

“... may do it by refusing to take part in any of the stages of the

consultation process, or by deliberately delaying the whole process .. It may also appear that any one of the parties simply went through the entire formal process with no intention of ever genuinely reaching agreement on the issues discussed ...”

Referring to the inappropriateness of the “checklist” approach to Section 189, the judgment continued:

“The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus seeking process) has been achieved ... If that purpose is achieved, there has been proper compliance with the section. If not, the reason for not achieving the purpose must be sort ... If the employer was not at fault and did all it could, from its side, to achieve the kind of consultation referred to above, the purpose of the section would also have been achieved”.

15. It is the Respondent’s contention that it was precisely that process of frustration and delay, as evidenced by the minutes of the meetings in question, upon which the First Applicant embarked. This was evidenced, *inter alia*, by the First Applicant’s intransigent insistence during a critical period of the consultation process, that the wage dispute between the parties, upon which the strike action embarked upon by the individual Applicants was based and which served to exacerbate the already critical position in which the Respondent found itself, be first resolved before the First Applicant was prepared to pursue the consultation process insofar as it related to the envisaged restructuring and retrenchment. A further example of this obstruction on the part of the First Applicant was its refusal to participate not only in the consultation process relating to the selection of the individual employees to be retrenched but in the evaluation process invoked, in what the Respondent contends

was absolute good faith, to identify them. The First Applicant had initially acknowledged the sensitive skills requirements, in the broad public interest, of the Respondent's manufacturing operations and which would justify a deviation from the general principle of LIFO in that selection process but, in the end result, reneged on that acknowledgement and reverted to the stubborn insistence that, all other considerations apart, LIFO be applied.

16. The involvement of the outside agency TNMC CC in the conduct of the actual evaluation process was preceded by an invitation to the First Applicant to attend a preparatory meeting with the consultant involved, a certain Ten Nabel, in order that the process might be properly explained. The First Applicant's attitude was that it would not participate in any such procedure whilst the strike persisted and its members consequently refused to participate personally in the process, with the evaluation thereafter necessarily having to be made by the agency on the basis of what were, insofar as material factors were concerned, objective criteria submitted to it in the form of employee records, performance assessments and so forth.
17. As I have already indicated, a detailed analysis of the extended cross-examination of the Respondent's witnesses, exhaustively traversing, in the "checklist" context, the Respondent's conduct in relation to each element of the requirements of Section 189 of the Act, is to my mind neither practical nor necessary and nor, in the same context, is a critical dissection of the exchanges between the parties in the course of the eleven meetings which have been chronicled. The state of affairs emerging therefrom was eventually summarised, accurately and fairly to my mind, in the final communication by the Respondent to the First Applicant

on 16 February 1999. That letter, transmitted by telefax, was a lengthy one but in the context of its summation of the interaction between the parties and their respective positions at that stage, it is a document of such material importance as to merit its incorporation in this judgment in full.

“RESTRUCTURING\ LATEX SURGICAL PRODUCTS

1. As you are aware, the company and your union have, since approximately June 1998 been involved in ongoing discussions, consultations and meetings with a view to restructuring the company following its progressive losses in the order of R14 million since its incorporation in 1990. During the last financial year, the company sustained a loss in the order of some R2 million which has, effectively, been a repetition of the dismal performance which it has illustrated over the last 9 years.
2. Numerous consultations were held with yourselves between the period June 1998 to February 1999, during the process of which:
 - 2.1 You were provided with all financial information, balance sheets, income statements and cash flow projections;
 - 2.2 You provided us with a report which we completed timeously and satisfactorily in accordance with your requests;
 - 2.3 You, regrettably, adopted a stance throughout the consultations that you would only meaningfully participate in the consultation process once the dispute on salaries and substantive terms and conditions of employment had been agreed upon.
3. On the 16th November 1998 your members engaged on protected strike action, which strike action endured up until 1 February 1999. During the course of the strike action embarked upon by your members you were, once again, invited to participate in the consultations with a view to bringing same to some type of finality. You adopted a course, during the strike action, which was largely to the effect that until such time as the strike action had ceased, you would not be prepared to meaningfully consult on behalf of your members on the proposed restructuring of the company. We were at pains to point out to you that the restructuring of the company was in no way linked to the strike action embarked upon by your members and, in order to determine a fair and proper assessment of the skills of all employees concerned together with their general worth to the company, it was proposed that an independent evaluation be conducted of each employee's skills, educational levels and general performance

and attitude towards his\her work which would include the experience levels of each employee. It was pointed out to you that this process was essential in order that we determine a fair and objective assessment of each person, particularly having regard to the interests expressed by a potential investor in the business as well as basic and fundamental legal requirements. You were invited to sit and meaningfully participate in this process in order to ensure transparency and to ensure further that the interests of your members were protected and in fact represented during the course of the assessment aforesaid. Regrettably, you refused to accept our invitation and we were left with no alternative but to conduct the assessment without your input and contribution.

4. The assessment was duly conducted during January 1999 over a period of some two weeks. During the course of this process, each and every employee was assessed on his\her:

- 4.1 Educational qualifications;
- 4.2 Special skills with regard to the business;
- 4.3 Absenteeism record, disciplinary record and years of service with the company;
- 4.4 Ability to be engaged in multi-skilling activities;
- 4.5 Overtime record and willingness to co-operate in this regard; and
- 4.6 General conduct and demeanour during the interview.

5. In addition, and to a limited degree, the general willingness of the employee to assist the company through these difficult and trying times was taken into consideration in assessing the suitable person to be retained for one or more particular task or duties.

6. Subsequent to the completion of the evaluation exercise, a further consultation was scheduled for the 2nd February 1999. Regrettably, the union failed to honour its commitments to attend this consultation and when we enquired of the union as to why it had not honoured its obligations, the reply forthcoming was that it had forgotten to attend this consultation. Having given the union the benefit of the doubt, a further consultation was subsequently arranged for the 8th February 1999. During the course of this consultation:

- 6.1 The company's intended course of action was itemised and specified;
- 6.2 A list of names of those employees who would be retained, based on the aforementioned criteria, was provided to the union;
- 6.3 The union was invited to submit counter-proposals with regard to the list of employees which the company proposed retaining;

6.4 The severance package of one week's remuneration for each completed year of service or part thereof which any affected employee had had with the company was proposed, coupled with full employer and employee contributions to the Pension Fund;

6.5 An assurance was given that any employee who stood to be effected as a result of the company's proposed course of action would be provided alternative employment by Workforce (Pty) Limited, a sub-contracting concern with which the company has had an ongoing relationship for some time now. The assurance was given that whenever a situation arose where the service of such an employee would be required, Workforce (Pty) Limited would duly liaise with the employee concerned with a view to him/her acquiring such a job provided that he/she had the necessary skills and ability to deal with the task at hand;

6.6 Proper and adequate letters of reference would be given to each employee who stood to be effected as a result of the company's proposed restructuring.

7. A further meeting was arranged for Friday, 12 February 1999 during which the union would provide the necessary feedback.

8. On the 12th February 1999 Mr Magqaza attended at the company's premises and indicated that the union was not prepared to involve itself further in the consultation process unless and until the company stringently applied the principle of last in – first out. The company, in return, indicated that having regard to the precarious position of the business, skills retention was of paramount importance and in most instances would supersede the principle of last in – first out. With that, the union indicated that it no longer wished to be involved in the process, proceeded to indicate that it would declare a dispute with the company and then proceeded to leave the company's premises forthwith.

9. It is regrettable that the union has adopted such a stance, particularly having regard to the difficult financial situation in which the company finds itself coupled with the continued attempts on the part of the union to delay and frustrate the consultation process. As such, and in the light of the deadlock which has now arisen between the company and the union, we have no alternative but to implement our proposals, as we hereby do. You are accordingly hereby notified that:

9.1 With effect from 16 February 1999, the employment of those of your members whose names appear on annexure "A" hereto and being transmitted simultaneously herewith, will be terminated. Your members enlisted on annexure "A" hereto will accordingly receive:

9.1.1 payment in lieu of notice – 14 days or in terms of the employment contract;

9.1.2 1 week's remuneration for each completed year of service or part thereof which

such employee has enjoyed with the company;

9.1.3 all contributions (i.e. employer plus employee) to the Pension Fund;

9.1.4 accrued leave pay.

10 Those members who have been the subject of disciplinary action over the last week due to the alleged misconduct during the course of the strike are not effected by this notice at this point in time. The status of their employment will be determined once the chairman of the disciplinary hearing has provided us with his findings in that regard. Should any employee whose name appears on annexure "A" hereto not be dismissed for misconduct following the conclusion of his/her disciplinary hearing, his/her employment will be terminated for the reasons of our operational requirements with effect from the day immediately subsequent to which the chairman of the disciplinary hearing hands down his finding.

11 By way of some background, we illustrate the company's position to be thus:

- 11.1 Contractors will be retained on the condom night-shift section having regard to the fluctuating needs and requirements which necessitate an increase or in fact minimising of labour on very short notice. Should any affected employee meet the criteria and express a willingness to work on the night shift condom section of our operations, we will make the necessary arrangements for that person to be interviewed by Workforce and to acquire a position with it;
- 11.2 The status quo will be retained with regard to engaging contractors on the examination gloves for the same reasons as recorded above;
- 11.3 The biggest area to be effected in our business is that of testing and packaging for surgeons gloves. As you are probably aware, a significant amount of the government contracts have been lost or shared with other companies and whilst we had previously been targeting one million pairs of gloves per month, this target has now been reduced to 650 000, almost halving itself. This necessarily means that half the amount of labour is required in that section;
- 11.4 The carousel machine has been dispensed with the result that instead of cuffing of a glove being conducted separately and distinct from testing, the process has now become integrated with the result that separate "cuffers" are no longer required.
- 11.5 Having regard to the fact that the surgeon glove machine is no longer going to run at full and optimum levels, those persons previously engaged on that machine will either be transferred by virtue of the process of multi-skilling\multi-tasking or, alternatively, have their position declared redundant due to our operational requirements.

12 The following alternatives were considered during the course of the process and the reasons for rejecting such alternatives follow:

12.1 THE QUESTION OF SHORT TIME

- 12.1.1 this was considered but was not regarded as being feasible due to the following factors:
 - 12.1.1.1 not all personnel have the necessary skill to combine cuffing, testing and stripping operations;
 - 12.1.1.2 the administrative and supervisory functions of a small group are far easier and more manageable with the result that far more investments can be obtained with a smaller workforce;
 - 12.1.1.3 it is essential that an element of continuity be maintained from a production and quality control point of view.

12.2 ELIMINATING OF THE USE OF CONTRACTORS

- 12.2.1 all that is required of the company with regard to contractors is the aspect of quality control. No personnel management is necessary and to the extent that there is non-performance on the part of any staff, the burden in this regard rests with the contractor. This proves to be a huge benefit to the company which can concentrate on its business, namely the manufacture of latex related products;
- 12.2.2 contractors have ensured that whenever necessary, overtime will be worked. There has been a concerted refusal by numerous permanent employees to work overtime as and when required, notwithstanding the fact that the needs and exigencies of the company's operations required same as a matter of urgency;
- 12.2.3 having regard to the fluctuating requirements and the production process, the engagement of full time employees is not a viable proposition.

12.3 THE ISSUE OF LONG LEAVE

Financially and for the reasons set out above, this is not a meaningful alternative. Furthermore, skills unless continually exercised are inevitably lost with the result that the company's operations become impeded and hampered to a significant degree.

13 Please bear in mind that the company's financial position is extremely difficult and that the company has not been able to afford the luxury of time. We have endeavoured, where it has been possible to accommodate the union and to ensure that the union consults with us in a proper and meaningful

fashion. We have endeavoured to consult with the union since June 1998 and really have made no progress in this regard with the result that we are left with no choice but, having resulted in the deadlock which has arisen, pursue the aforementioned avenues without reaching any agreement.

14 Notices of termination of employment have been served on affected employees during the course of this morning.

18. The sole and only response from the First Applicant on the same date, was a telefax baldly reading thus:

“RE: DECLARATION OF A DISPUTE

We are hereby inform you (sic) that we are declaring a dispute on the basis that the company unfairly retrenched our members, and refused input by the union on selection criteria. We are therefore left with no option but to refer the matter to CCMA for conciliation”.

The letter is signed by Bongani Magqaza, the union organiser who was its principal representative throughout the consultation process.

19. The First Applicant seemingly saw no necessity to record its rejection of or any dispute with any element or aspect so comprehensively traversed by the Respondent and it is to be noted as a matter of some significance, in my view, that Mr Magqaza was not called to testify in this trial on behalf of the Applicants.
20. Nor for that matter did any other witness for the Applicants present *viva voce* evidence for the assistance of this Court other than Ms Z Vuma, the expert called to rebut the expert testimony adduced on behalf of the Respondent with regard to the

evaluation process utilised in the selection of the individual employees to be retrenched. Ms Vuma's testimony was premised essentially on the submission that the purpose of the evaluation exercise and by whom and how it was to be conducted, must of necessity be communicated to those to whom it is to be applied. In answer to a question from the Court however, she explained that the evaluation process did not require the consent of those individuals but merely their awareness of it. She appeared ambivalent in that context however in the course of further testimony.

21. Questioned by Mr Soldatos, Ms Vuma stated that she was not aware that the individual Applicants in this matter had refused to participate in the process and conceded that, in those circumstances, it was impossible for the Respondent, or TNMC, to apply what she had referred to as "best practice" in that situation. It was fair, she said, for the company to have sought the co-operation of the union and its individual members in the independent assessment to be conducted under the auspices of TNMC and she was unable to comment meaningfully on whether or not it had been possible for the Respondent to communicate with the individual employees concerned. Analysing the specific criteria applied in that process, Ms Vuma acknowledged that qualification level was an accepted criterion, as were special skills. It was correct that performance record, discipline and the question of absenteeism were factors generally taken into account. The subjective criteria of willingness and motivation however were not generally used in assessments of this nature. Skills could be assessed by a competent supervisor able to provide appropriate feedback to the assessor. In the end result however, she stated, the criticism which she directed at the basis

of the expert evaluation carried out on behalf of the Respondent, was premised on the assumption that there had been willing participants in the process. That, she acknowledged once again, had not been the case and in the broad context in which her testimony was adduced, it did not serve, in my opinion, to diminish the probative value of the Respondent's evidence in support of the selection process implemented by it.

22. For all of the reasons with which I have dealt thus far in this judgment therefore, I have determined that the allegation of procedural unfairness in the retrenchment of the individual Applicants has not been proved and I turn finally to deal with the contention that their dismissal was automatically unfair.
23. That contention is premised on the submission that the selection of the individuals dismissed was made by virtue of their membership of the First Applicant and that, on application of the test defined by Froneman DJP in

S A Chemical Workers Union v Afrox Limited (1999) 20ILJ 1718 at 1726,

the answer to the question whether these Applicants would have been selected for retrenchment but for their membership of the union must be in the negative.

24. The Court, in that case, dealt with the determination of factual causation, that is to say, in the context of the instant case, whether membership by the individual Applicants of the union was a cause for their dismissal or, otherwise structured, whether their dismissal would have occurred if they had not been

members of the union.

“If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not render the dismissal automatically unfair; the next issue was one of legal causation, namely whether such participation or conduct was the ‘main’ or ‘dominant’ or ‘proximate’ or ‘most likely’ cause of the dismissal. There are no hard and fast rules to determine the question of legal causation ... I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable or plausible inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases”.

25. The applicability of that general analysis to the conduct of the Respondent, the Applicants contend, is evidenced by the fact that the results of the evaluation exercise conducted by TNMC were “already slanted in favour of the non-union members due to the fact that the individual Applicants had not participated in the exercise” for what they contended were valid reasons. Secondly the identification of the workers to be retrenched was, “manipulated to the detriment of the individual Applicants”. The factual causation referred to in *Afrox* had accordingly been established and in relation to legal causation, the most probable inference to be drawn from the facts, it was contended, is that these individual Applicants were selected for retrenchment because they were members of the union. That conclusion is based on the submission that no evidence was adduced by the Respondent to the effect that any persons other than the individual Applicants were retrenched and moreover that the

founders of the Applicants' factory "had specifically located the factory in a specific area in an attempt to ensure that they would not have a unionised workforce" – an indication of longstanding anti-union hostility. The "causation" contentions by the Applicants' in that context are, to my mind, implausible to say the least, based as they unarguably are, on what present as subjective misperceptions of the prevailing factual situation.

26. The First Applicant, an established registered trade union had, at all material times been recognised by the Respondent and afforded organisational and collective bargaining rights in respect of its members in the Respondent's workforce. The uncontested evidence of the Respondent's human resources manager Mr S Mahlutshana in that regard, was to the effect that of a total complement of employees of approximately two hundred and thirty at the time, the majority were members in good standing of the First Applicant, which was the only union active in the Respondent's operation, although no formal recognition agreement had been concluded with it.
27. Following the termination of the employment of the individual Applicants, he testified further, more than forty members of that union, including union representatives, remained in the employ of the Respondent, constituting more than 30% of the one hundred and twelve employees who constituted the restructured workforce. There is no evidence before this Court and nor is there any suggestion that those union members were thereafter subjected to any form of discrimination or harassment suggestive of anti-union activity on the part of the Respondent. A further submission in rebuttal of the Applicants' contentions on this aspect of the matter was that the Respondent had taken no

disciplinary action directed towards terminating the employment of union members who had participated in unprotected industrial action in furtherance of their wage demands on 17 August and 22 September 1998, whereas that conduct, in a hostile environment, would have presented a convenient vehicle for their disposal.

28. The allegation in question is, in these circumstances, in my opinion far-fetched, with no semblance of realistic substantiation and it is accordingly rejected.

29. In conclusion therefore, none of the grounds submitted by the First and further Applicants to support the allegation of the unfair dismissal of the individual employees, whether substantive, procedural or automatic, having been established to my satisfaction, this application cannot be sustained and must fail. No submissions were made as to why an award of costs in this matter should not conventionally follow the result and the formal order that I make is accordingly the following:

29.1 The application is dismissed.

29.2 The First and further Applicants are ordered jointly and severally to pay the Respondent's costs.

B M JAMMY
Acting Judge of the Labour Court

18 June 2002

Representation:

Applicants:

ate C Orr instructed by Cheadle Thompson & Haysom Inc.

Respondent:

Soldatos: Fluxman Rabinowitz – Raphaely Weiner Inc