IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO. J4930/2000**

In the matter between:

SOUTH AFRICA TRANSPORT AND ALLIED WORKERS UNION APPLICANT

ABRAHAM MONYELO AND 54 OTHERS SECOND AND FURTHER APPLICANTS

And

Forecourt Express (Pty) Ltd **RESPONDENT**

JUDGMENT

ZILWA AJ

INTRODUCTION

1. In this application the applicants are challenging the dismissal of the second and further applicants ("the applicants") on the 30th September 1999 for alleged operational requirements. The applicants contend that their dismissal was not for a fair reason and that the respondent failed to comply with the requirements of Section 189 of the Labour Relations Act no. 66 of 1995 ("the Act").

2. Consequently this court is enjoined to determine both the substantive and procedural fairness of the applicants' dismissal by the respondent.

BACKGROUND FACTS

3. The respondent ("Forecourt") is a subsidiary of Cargo Africa and its main business is the ferrying of motor vehicles and it had several contracts with various motor manufacturers in South Africa. According to the respondent's evidence (per Du Plessis), it does not own a fleet of carriers nor does it employ drivers, it outsources the actual collection and delivery of these motor vehicles to independent transport companies and supervise the logistics thereof. The respondent did not have the contract to ferry vehicles for Daimler Chrysler SA LTD ("DCSA"), of which 50% thereof was held by Fauna Motorvervoer (PTY) LTD ("Fauna"). All the applicants were employed by Fauna as drivers, yard workers, mechanic and administrative staff respectively. Fauna had employees mainly based in Eikenhof and East London.

4. On or about the 23rd August 1999 the respondent bought Fauna as going concern (liabilities excluded) in order to obtain the DCSA contract from Fauna in the sum of R12 059 550-00. The respondent wanted the DCSA contract in order to increase its market share and improve its profitability.

5. Fauna was a transport company which transported new passenger vehicles for DCSA from its factory in East London to either directly to the dealers or to a storage yard in Eikenhof in Vanderbijlpark. Both passenger and commercial vehicles were delivered by Fauna to dealers from Eikenhof across the country.

6. The respondent contend, which is disputed entirely by the applicants, that Fauna was not only a unprofitable operation, but was financially unsound and had been for sometime. It

avers that the purpose of acquiring Fauna was to get the DCSA contract and not to acquire Fauna so as to run it as a transport carrier operation. It contends that the contract would not have been profitable if it was operated as its previous owner, Willem Jacobus Kruger ("Kruger") had run it. If the DCSA contract was run in the way that respondent ran the Volkswagen contract, it was potentially very profitable. Fauna's business structure did fit with its operational objectives or requirements. This resulted in the respondent selling off all the fleet it acquired from Fauna and retrenching the applicants with effect from the 30th September 1999.

CONSULTATION PROCESS

7. The respondent consulted with the first applicant ("union") on 4 occasion. The first meeting was held on the 20th August 1999 between respondent, Fauna and the Union. Its purpose was to inform the Union that the respondent had acquired Fauna as a going concern and that the contracts of employment of Fauna employees would be transferred to the respondent with effect from the 1st September 1999. Respondent further stated that it would like to propose certain operational changes once it has taken over to ensure that it operates effectively and on a viable basis. These changes were set to be tabled in a meeting that was to be held on the 26th August 1999.

8. On the 26th August 1999 the respondent was not yet ready with its proposals and the respondent and the Union ("the parties") agreed on the following time table: -

    1. the respondent to forward its proposals to the union on the 27th August 1999.

2. the Union to forward clarifying questions to the respondent by the 30th August 1999.

3. the respondent to respond to the questions by the 31st August 1999.

4. Union to meet with employee on the 1st September 1999.

5. the parties to meet further on the 2nd September 1999.

9. On the 27th August the respondent presented its proposal in the form of a letter. The relevant parts of the letter read:

" 1. Background

It is our view that this operation can not continue to be operated on a viable basis without making significant changes to the operation. The financial performance of Fauna has been less than satisfactory during the recent past. Forecourt has acquired the operation as certain synergistic opportunities exist between this operation and other contracts. (i.e. The Volkswagen SA contract) operated by Fourcourt. Utilizing these opportunities will not only make Fauna operation a viable prospect but it would also enhance the viability of Forecourts other vehicle ferrying operations.

2. PROPOSED OPERATIONAL CHANGES

A fleet of 13 carrier vehicles are currently operated by this operation on a double crew basis. It is our proposal to change the fleet as follows:

I. Five (5) of the current vehicles are old and in our opinion
no longer viable. Mr. Fourie has offered to purchase these vehicles.

II. Six (6) of the remaining vehicles will be sold to a company called Accurate Auto Ferriers with whom Fourcourt will subcontract for ferrying vehicles in terms of its contract. Fourcourt's overhead and operating costs will be reduced as it will not be required to operate these vehicles on a permanent basis. Vehicles will be contracted in on a demand basis whenever required.

III. The remaining two (2) vehicles are available to be sold to owner drivers with whom Forecourt will contract to ferry vehicles.

IV. The eight (8) vehicles referred to in (ii) and (iii) above will be utilized for local ferrying of vehicles and not for forecourts long distance needs.

V. For the purpose of long distance ferrying forecourt propose to subcontract with Highway Carriers – a sister company. Highway currently operates multi-purpose carrier vehicles. These vehicles could carry motor vehicles in one direction and a general freight load on the return leg, obviously bringing significant efficiencies and cost saving to the operation.

VI. Further efficiencies can be achieved by utilizing vehicles used on Forecourts Volkswagen contract more effectively by using these vehicles for the Fauna operation where possible.

The way in which the ferrying of vehicles in convoys are currently operated is not efficient and is very costly. Significant peaks and valleys exist in the demand for the movement of vehicles in this manner. It is therefore our proposal not to employ permanent staff for this purpose but to hire in staff i.e. from the labour broker as and when required, with obvious increased efficiency and cost savings.

Should the abovementioned proposals be implemented a need for operating a workshop for this contract is no longer required. It is therefore proposed to close down the workshop attached to the Fauna operation.

Further costs savings can be achieved by integrating the management and administrative functions of the fauna operation with the existing forecourt operations.

3. IMPLICATIONS FOR STAFF

Should the abovementioned proposals be implemented the implications for employees currently employed at the Fauna operation can be summarized as follows:

i. Forecourt will negotiate with Accurate Auto Ferriers regarding the possible employment of six (6) of forecourts drivers to operate the vehicles they intend to purchase. The exact conditions of employment they will offer still needs to be discussed and agreed.

ii. Two (2) of the existing drivers could be identified to take over the two vehicles proposed to be operated on an owner driver subcontract basis.

iii. This would mean that a total of 18 of the current drivers will be surplus and should suitable alternatives not be found it, regrettably, would mean that they may have to be retrenched.

iv. We propose that we reach an agreement with the labour broker who will have to provide temporary convoy drivers to consider the employment of drivers who may be surplus, should the company's proposal be implemented. These drivers could be utilized on an ad-hoc basis in accordance with the demand for the movement of the vehicles in convoy.

v. Should the workshop be closed it would result in a total of 8 workshop employees becoming redundant. Once again should suitable alternatives not be found it may unfortunately result in retrenchments.

vi. The proposed integration of the administration and management functions with that of Fourcourt would also render a number of employees redundant although the majority of these would not be the subject of these consultations. For the purpose of these consultations I would like to indicate that the tea lady may be surplus.

We realize that the abovementioned proposals, if implemented, could result in significant hardship to the employee who might be affected by it. We do believe though that the future viability of the business requires us to sincerely consider the implementation of these proposals.

Yours Faithfully
J. VAN DER WALT
HR ADVISOR "

10. The second meeting took place on the 7th September 1999. The Union noted that the changes proposed by respondent were significant and inconsistent with the notion of taking over a business as a going concern. It disagreed with the need to retrench as it felt, inter alia, that Forecourt was simply replacing its members with labour brokers. It further disputed that the convoy drivers were subject to peaks and valleys as they were constantly busy because of heavy workload. However, respondent was adamant that it was necessary to retrench all the employees that were employed by Fauna in view of the financial situation. In fact, the respondent insisted in the implementation of all its proposals depicted in its letter of the 27th August 1999. The parties then discussed severance pay after which the Union proposed 4 weeks severance pay and 2 weeks notice pay. Respondent on the other hand proposed 1week severance pay for every year or part thereof and 2 weeks notice pay. No agreement was reached on any issue in this meeting. The respondent had not supplied any financial statements to the Union in support of its position on the financial issues.

11. The third consultation took place on the 10th September 1999. The Union proposed that the respondent delay the retrenchment and asses the situation after 3 to 6 months and the necessity thereof could be revisited, and that a committee be established by National Bargaining Council for the Road Transport Industry to mediate the dispute. The respondent rejected both these proposals. The issue as to whether the

Union proposed the retention of the East London drivers is in dispute. The Union indicated that it could only accept retrenchment if respondent agreed on its severance package proposal, however, the respondent responded that it stood by its offer that was made in the previous meeting.

12. The final meeting was held on the 16th September 1999. The respondent indicated that will retrench all the employee except 17 East London convoy drivers, 2 yard employees at Eikenhof and 1 inspector at East London. The retention of the latter 3 employees had been proposed by the respondent in the 10th September 1999 meeting. The dismissals were to be effective from the 30th September 1999. The respondent issued the retrenchment letter on the 17th September 1999. The applicants were not obliged to work until the dismissal date.

> The issue as to whether the respondent informed the Union the DCSA contract required it to ferry vehicle off-wheels and therefore eliminating the need for convoy drivers during the consultation process is in dispute.

SUBSTANTIVE FAIRNESS

13. It is trite that Section 185 and 188 of the Act prescribe that an employee can only be dismissed for a fair reason. Where the relies on the operational requirements of the business to justify a dismissal of an employee, the onus is on the employer to prove the existence of such valid economic reason.

14. Although previously the Labour Courts adopted a lenient approach in assessing the commercial rationale for the employers decision that leads to retrenchment, recently the courts have, indeed, adopted a slightly stricter approach. The courts do enquire whether a reasonable basis exists for the employers decision, BMD KNITTING MILLS (PTY) LTD V SACTWU (2001) 7 BLLR 705 (LAC). The court is entitled to

consider whether there were viable alternatives to dismissals and whether the consultation was a sham, NEHAWU & OTHERS V THE AGRICULTURAL RESEARCH COUNCIL & OTHERS (2000) 9 BLLR 1081 LC.

15. It is clear from the respondent's evidence that due to its nature and business model it did not own carriers or employ drivers and its acquisition of Fauna was not going to change its existing model. In fact, what it wanted was the DCSA contract from the transaction. Its model entails the outright outsourcing of carriers and the permanent use of labour brokers for convoy drivers.

16. It is, therefore, obvious to me that as early as the 23rd August 1999 where the sale was concluded the respondent had already concluded that it was to sell all the existing carriers and engage the services of labour brokers. It is logical that when there are no carriers there are no drivers, where there are labour brokers there are no permanent employees, where there are no company owned carriers there is no service / repair workshop.

17. It is worth noting that in the respondent's proposals dated the 27th August 1999 there was no mention or motivation for the retrenchment of all 14 yard workers. One cannot assume that their inclusion from any written proposals more so that the affected employees were specifically mentioned. It is my view that the respondent has failed to justify the dismissal of these employees, although as an after thought the respondent wanted to rely on efficiencies and financial situation as the main reasons.

18. The respondent did not place any evidence before me in support in of its contention that the financial situation of Fauna was hopeless and that it had been so for a considerable period. The evidence presented in court was economic in this regard. The fact that some of the Fauna carriers were in disrepair and

that Kruger could not recapitalise the business and that being the reason why Fauna was sold is a mere *ipse dixit* and the court cannot speculate without a tangible information. Neither Kruger testified nor Fauna's financial statements were presented in this court to substantiate the respondent's contentions.

19. The respondents audited financial statements for the year ending on the 30th June 1999 and the year ending on the 30th June 2000 were presented in court by respondent as evidence. The year 1999 financials reflect a loss of just over R2 million. Despite this loss the respondent managed to purchase Fauna in August of the same year for over R12 million. This situation boggles ones mind as to the *bona fide* of the precarious position which the respondent found itself that necessitated the retrenchment of about 80% of Fauna employees in less than 30 days from the date of its acquisition. The June 1999 reflected loss further raises a question as whether the much talk about efficient Forecourt business model is efficient in reality.

20. It further transpired from evidence that even though the DCSA contract required that its motor vehicles must be ferried off-wheels this operation was phased in over a period of a year with effect from the 1st September 1999. In the circumstances there can be no valid reason to retrench all the Eikenhof drivers at the same time in September 1999 if the critical objective thereof was not to replace them with labour brokers.

21. The respondent did not substantiate its contention that the drivers were subject to peaks and valleys. The respondent made this allegation in its proposals dated 27th August 1999 some few days before it could take control of the Fauna operation and logically to gain sufficient knowledge about the Eikenhof business activities. However, despite this logical shortcoming it did not want to entertain any further period to further assess the Fauna business in order to ascertain the real

need to retrench as it did.

In the view of the aforegoing I am of the opinion that the respondent has failed to discharge its onus to establish existence of the economic reasons to retrench. I am inclined to believe that the respondent simply replaced the applicants with the labour brokers in order to streamline Fauna operations to fit its business model.

PROCEDURAL FAIRNESS

22. When an employer contemplates dismissals based on operational reasons it must consult the representative Union or the employee, in its absence, with the main objective of reaching consensus on the aspects listed under Section 189 of the Act. If consensus has not been reached then the court must determine where the fault for such failure lie. If the failure is due to the fault of the employer then the procedure followed is likely to be found to be unfair. The courts, however, do not adopt a checklist approach on the compliance with the requirements of Section 189 of the Act by the employer. What is important is whether the process was fair when taking into consideration the requirements of the Act. See JOHNSON & JOHNSON (PTY) LTD V CWIU (1998) 12 BLLR 1209 (LAC) and ALPHA PLANT AND HIRE SERVICES (PTY) LTD V SIMMONDS & OTHERS (2001) 3 BLLR 261 (LAC).

23. Section 189 (3) provides as follows: -

> " The employer must disclose in writing to the other party all the relevant information, including, but not limited to-
>
> i. the reasons for the proposed dismissal;
>
> ii. the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
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> iii. the number of employees likely to be affected and the job categories in which they are employed;

iv. the proposed method for selecting which employees to dismiss;

v. the time when and the period during which, the dismissals are likely to take effect;

vi. the severance pay proposed;

vii. any assistance that the employer proposes to offer to the employees likely to be dismissed, and

viii. the possibility of the future re-employment of the employees who are dismissed."

24. In relation to the above provisions it is apparent from the evidence in this matter that the respondent did not comply with its overall requirements. Neither its letter of the 27th August 1999 nor the subsequent consultations indicate that the respondent disclosed the alternatives that it considered before proposing the dismissals and the reasons for rejecting each of these alternatives, the proposed method for selecting which employees to dismiss, and the yard workers were not disclosed as likely to be affected by the dismissals.

25. The parties did not reach consensus on the selection criteria to be utilized to select the employees to be dismissed. In such circumstances it is imperative, in terms of Section 189 (7), that the employer must utilize criteria that are fair and objective. It appears from the evidence in this matter that the respondent in selecting the employees to be dismissed did not consider LIFO, the level of skills of the employees, employees close to the retirement age, voluntary retrenchment or employees general work performance and conduct. I am persuaded to form a view that the selection criteria adopted by the respondent in this matter was in fact arbitrary.

26. Without considering further evidential issues in this respect I am satisfied that the dismissal of the applicants were procedurally

unfair.

27. I will make no finding in respect of the alleged automatically unfair dismissal of Cecelia Matsana as applicant did not pursue this matter during trial.

28. In view of the above I accordingly make the following order: -

1. That the respondent's dismissal of the second and further applicants listed in Annexure "A" on the 30th September 1999 was both substantively and procedurally unfair;

2. That the respondent is ordered to pay compensation to the second and further applicants listed in Annexure "A" hereof 12 months wages as reflected therein;

3. That the respondent is order to pay the costs of this application including all the previously awarded costs.

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ZILWA A J

DATE OF JUDGMENT : 11 JUNE 2003

FOR APPLICANTS : MR. VAN DER RIET SC

INSTRUCTED BY

CHEADLE, THOMSON & HAYSON

INC.

FOR RESPONDENT : MR. T. J. BRUINDERS
INSTRUCTED BY

BOLUMAN GILFILLAW INC.

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