

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS 1495/01

**SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION (“SACCAWU”)**

1ST APPLICANT

G HLANGU

2ND APPLICANT

J PHUNGULA

3RD APPLICANT

PROFESSOR MALINGA

4TH APPLICANT

PETER MAKHOMBE

5TH APPLICANT

AND

GALLO AFRICA

RESPONDENT

JUDGMENT

REVELAS, J:

- [1] The first applicant (a trade union) who represents four of its members, the second to fifth applicants (“the employees”) contends that the termination of their services by the respondent, was both procedurally and substantively unfair. Their dismissals emanated from the respondent’s alleged operational requirements, of which they were notified on 9 May 2001. The unfair dismissal dispute subsequently referred by the applicants, remained unresolved as at 23 August 2001, (despite conciliation) and a certificate to that effect was issued by the CCMA. The applicants seek financial compensation.
- [2] The respondent conducts its business in the music industry and it involves the production and distribution of music products. The second, third and fourth

respondents (Hlangu, Phungula and Malinga) were in the employ of the respondent as drivers assistants. The fifth respondent (Makhombe) was employed as a packing manager. The employees were employed at its Durban branch.

- [3] It was common between the parties on the pleadings (the pre-trial minute) that there were consultative meetings between the respondent and the first applicant (“the union”) on ten different days in March and April 2001 and a further meeting after the dismissal on 12 June 2001. In the same pre-trial minute it is noted that meetings were called where the respondent informed them of its decisions. It was not disputed that during the financial year 2000/2001 the respondent reflected a financial loss in the region of eight million rand, due to various factors which included a 40% decline in the consumer demand for audio tapes and a general change in the business environment of the respondent. The respondent then needed to restructure its business operations and foresaw the retrenchment of many of its employees.
- [4] Following the several meetings held between the Union and the respondent, the second, third and fourth applicants each received a letter dated 3 May 2001 wherein they were offered alternative positions with the respondent at its new branch in Johannesburg. They were notified to contact the respondent’s human resources official, Mr Gift Sibeko at a given telephone number before 8 May 2001 if they were interested in taking up the positions (general assistant and scanner), failing which, their services would be terminated. According to the respondent, there was no response to the offer, and the services of the second, third and fourth applicants were terminated. A similar letter containing an offer of a position in Midrand was made to the fifth applicant. Since, according to the respondent, he would not consult thereon, his services were also terminated.
- [5] The following events preceded these letters.
- [6] In a letter dated 9 March 2001, the respondent addresses a letter to the Union, wherein it informed the Union that there was a need to commence with retrenchment consultations in view of the respondents financial problems. A letter was also circulated to the respondents employers three days later, wherein the respondents proposed retrenchment of some of its employees was announced. The respondent undertook in these letters, to consult on the decision to retrench and alternatives to avoid retrenchment, the selection criteria, severance packages, and the time frame wherein the retrenchment would take place. Disclosure of financial information pertaining to the need to restructure and an opportunity to discuss “follow up issues” was also promised.
- [8] On 12 March 2001, the Union requested details and information pertaining to the reason for the retrenchments, its financial status including business plans for the next five years, details on all its employees (in particular to determine how LIFO would be implements), various types of organographs,

its income expenditure and recent savings. The Union also suggested times and dates for the proposed meetings, the first of which was held on 16 March 2001. The information was provided and further meetings were held. The Union also wanted to know at which stage the respondent became aware that the demand in audiotapes began to diminish and that re-assessment of the Trutone Industries Plant (there these tapes were manufactured) was required. This information was furnished.

- [7] The Union, through Mr Khulekane Ngubane represented the second to fifth applicants during the retrenchment discussions that followed. He also represented other employees affected by the retrenchment and who were members of the Union. Ms Freda Lowe, the respondent's executive director, represented the respondent in these discussions.
- [8] As stated, the first meeting was held on 16 March 2001. The Union was not present and neither was its present on 23 March 2001. The 16 March meeting centred mainly around the respondent's financial situation. All the information which was requested was furnished in writing, together with other information not requested. When a meeting was scheduled : Mr Israel Mothobeki (a union member) was however present. At the 26 March 2001 meeting, Mr Ngubane was present together with the relevant shopstewards and explained that his absence was due to time constraints as he had ambitiously overbooked his schedule. One of the main issues the respondent had to explain to the union at this meeting was , how the costs would be reduced by relocating the respondent's Durban operations to Johannesburg, and how it would affect the members. Ms Lowe advised that a feasibility study was on its way.
- [9] It was conveyed to the Union at his meeting that approximately 59 positions would be affected by the retrenchment. These included two general assistants, the managers, sixteen drivers, eleven van assistants, one filing clerk, one calling counter clerk, one secretary and several other positions which were listed that would make up the number. I mentioned just a few, and in particular, those which included the positions of the applicants in question.
- [10] The question of voluntary retrenchment packages were also discussed, as well as the positions of temporary employees and LIFO.
- [11] As at 7 April it had been agreed that overtime would be banned except in emergency situations. And the suggestion that was debated at the insistence of the Union was reducing the working week from 44 to 40 hours.
- [12] As could be expected, there was concern about the employees from the Durban branch that was to be closed. The second to fifth applicants would be included in a bumping exercise and transferred to Johannesburg. This decision led to a dispute between the parties. The respondent offered the positions in Johannesburg but individual employees did not want to fully cover their relocation costs as this would prove to be unaffordable given the financial constraints which resulted in their retrenchments in the first place.

- [13] The applicant contended that the respondent who had been *mala fide* throughout the consultations, had terminated the services of the individual applicants whilst the question of relocation had not been resolved.
- [14] According to the applicants, they accepted the offer of re-employment but were dismissed notwithstanding.
- [15] The second respondent testified on behalf of the applicants at the trial. His testimony was that apart from dismissing them pre-maturely, the respondent failed to offer himself and the other applicants assistance after they had been dismissed. No employer is obliged to give post dismissal assistance to employees who had been retrenched. That is trite. There is no merit in this argument.
- [16] In addition, he stated that the respondent should have consulted with them directly. This was however not put to Ms Lowe when she testified. In any event even if it is correct that the respondent did not consult directly with the employees, it was under no obligation to do so since they were at all relevant times represented by a trade union.
- [17] The fifth respondent's case is different, in that he says that his dismissal was unfair in that the respondent should not have consulted with him without his representatives being present, and further, that no alternative employment was offered to him.
- [18] On the evidence that was presented, I accept that there was a need to restructure and to close down the respondent's coastal plants and to retrench some employees. It would appear from the minutes of the meetings that the union accepted the respondent's reasons to close down the coastal plants, in particular the Durban branch where the four individual applicants were employed. The Durban branch had shown a 61% decline in business. Ms Lowe gave extensive evidence hereon which remained largely unchallenged.
- [19] The only two issues remaining unresolved at the end of the consultations with the Union, were reduced salaries and the insistence by the individual applicants on relocation assistance. Ms Lowe persisted in her stance that the respondent could not afford it. The second applicant was present at a meeting held on 19 April 2001, when this aspect was discussed. It was indicated by the respondent that it would assist by virtue of loans. The respondent's decision not to provide relocation allowances, was based on the fact that the employees would not be filling vacancies, but will take up positions of retrenched employees.
- [20] At the meeting of 25 April 2001, it was made clear that the respondent would consult individually affected employees who, if they do not accept alternative employment, will be dismissed. This was also contained in the letters of 3 May 2001, where assistance in the form of a loan was offered.

- [21] According to Ms Lowe, the fifth respondent did not participate in the meeting scheduled for him to be consulted with, on an individual basis. This is also borne out by the letter sent to him. He reasoned that he would not participate without his representatives being present. It appeared from the evidence that Mr Mothobeke of the Union had been invited to attend the meeting but failed to attend because the convenor, Mr Moloi, was not invited. This was because of the deadlock on the question of severance pay and the reduction in salary. The stance of the Union was that the consultation process was not over, until the outstanding issues (salaries and relocation costs) were addressed.
- [22] The services of the fifth respondent were then terminated.
- [23] The other individual applicants were advised in the letters of 3 May 2001 to contact Mr Gift Sibeko before 8 May 2001 to indicate whether they would accept alternative employment or not. They were advised that their failure to accept the offer would result in their retrenchment.
- [24] The first applicant corroborated Mr Gift Sibeko's testimony that none of the applicants contacted Mr Sibeko. Mr Ngubane testified that he phoned Mr Sibeko about the offer of alternative employment in Johannesburg for the four individual employees. According to him Mr Sibeko said he would revert to him, but did not. This was disputed by Mr Sibeko who said he heard nothing from the Union or the individual employees. Firstly, Mr Sibeko did not give the impression of a lying witness, whereas there were several examples which indicated that Mr Ngubane was. Secondly, making a telephone call to Mr Sibeko would be inconsistent with the stance he held from March to May 2001, namely that members would accept transfers, provided their relocation costs are paid by their employer. According to him it was the main dispute between the parties. None of the letters written by the Union after the letters of 3 May 2001 (those referring to Mr Sibeko) make reference to an acceptance of the offer of employment. It also remains curiously unexplained why Mr Ngubane did not phone someone else who worked for the respondent when Mr Sibeko failed to revert to him, if he was indeed serious about accepting the transfer offer. Mr Ngubane simply did not take the consequences of the 3 May 2004 letters seriously. He thereby jeopardised the positions of the individual applicants who were retrenched as a consequence.
- [25] Prior to 3 May 2001, when the last crucial meeting was held in an attempt to resolve the outstanding issues, ten consultative meetings were already held between the union and the respondent. The minutes of these meetings show the respondent's generally upfront and co-operative approach to the retrenchment. Therefore the allegation of *mala fides* on its part, remains unsupported by fact.
- [26] During the trial, I raised my concerns about the fairness or otherwise, of presenting the employees in question with an offer of employment in another province and refusing to pay their relocation costs. I was persuaded that the

respondent's conduct was not unfair in this regard.

- [27] The respondent did offer in writing, that it would assist the four employees by means of a loan. It is also of significance that they would be taking up positions of employees who had been retrenched in the course of a bumping exercise, agreed upon with the union. The retrenchment exercise was effected countrywide at several branches. To pay transfer costs for employees who were relocated as a means of avoiding retrenchment, would be adding to existing financial difficulties. Furthermore, the employees in question failed to participate in the final discussions with Ms Lowe and Mr Beecham (in the case of the fifth applicant) and Mr Sibeko (in the case of the other applicants). Once they had accepted the alternative positions, the question of transfer costs and the loans offered could be revisited.
- [28] In my view, the respondent complied properly with the provisions of section 189 of the Act, in so far it could. It did all it could to achieve the kind of consultation envisaged by the Act and the law.
- [29] Consultation in terms of section 189 of the Act, is a two-way process. No meaningful consultation can take place if one party withdraws from the process. There should also ultimately be finality in the consultation process. It cannot be held in abeyance by a party who insists that the process is not finalised when it is quite clear that the process had been.
- [30] The applicants are not entitled to any financial compensation as they were dismissed for a fair reason and in accordance with a fair procedure.

Accordingly, the application was dismissed with costs on 15 November 2004.

E. REVELAS

JUDGE OF THE LABOUR

COURT OF SOUTH AFRICA

REPORTABLE

DATE OF HEARING:	8 NOVEMBER 2004
DATE OF JUDGMENT:	15 NOVEMBER 2004
REASONS:	17 OCTOBER 2005
ON BEHALF OF THE APPLICANT:	Mr MJ Molefe of SACCAWU
ON BEHALF OF THE RESPONDENT:	Mr T Ngcukaitobi of Bowman Gilfillan

Inc.