CASE NO: J 2123/1998

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

In the matter between –

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA & 45 OTHERS APPLICANT

and

TOYOTA SA MARKETING, A DIVISION OF TOYOTA SOUTH AFRICA MOTORS (PTY) LTD RESPONDENT

J U D G E M E N T

The 45 individual applicants in this matter (the second to further applicants), all members in good standing of the first applicant ("the union") had been in the employ of the respondent until their services were terminated by the respondent on 3 July 1998 for operational reasons.

The applicants contend that the dismissal was unfair and not for a valid reason. They say the respondent came to a financial decision to retrench before it consulted with the union. The respondent failed to consult about the real reason for the retrenchment and about alternative positions in its National Parts Distribution Centre ("NPDC") and failed to offer the employees positions which were available in that department. The applicants also argued that the respondent failed to consult over the selection of employees to be retrenched in the Loss Control and Maintenance Department ("the LCMD").

In their statement of case, the applicants allege that the real reason behind the retrenchment was the union affiliation of the employees in question, alternatively, the alleged misconduct of the respondent's employees. In the end result of the pretrial process, the applicants recorded the allegation that the respondent had contemplated retrenchment on 16 September 1996 and decided to outsource the functions of the LCMD and to retrench employees in October 1996 and May 1997. In this regard I refer to the proposal of Mr M HUMAN, the respondent's line manager of the LCMD, of 16 September 1996, proposing outsourcing as a solution to the problems of the LCMD. The

proposal or recommendation to management was motivated, inter alia, by Mr Human's perception of continued poor work performance of the LCMD employees and the inability of the Department to provide value for money. Resolutions to outsource and retrench were taken by the respondent's management committee ("MANCOM") in October 1996, and in May 1997.

The applicants' case is that the respondent's decision to retrench was taken long before 24 October 1997 when the first consultation meeting with the union was held. The applicant also claimed that the respondent failed to disclose all relevant material information to the union and failed to attempt to seek consensus on appropriate measures to:

Avoid the retrenchment or minimise the number of retrenchments; change the timing or mitigating the adverse effects of the dismissals; or selecting those employees to be dismissed, improve the severance pay of the dismissed workers.

There were 90 workers in the LCMD. Forty-five were transferred to the PDC.

Section 197 of the Labour Relations Act, 66 of 1995 ("the Act") was referred to in the applicants' statement of case and the

applicants' heads of argument, but not pursued as a cause of action.

The respondent is involved in the marketing of motor vehicles, motor vehicle accessories and spare parts. In April 1997 the respondent received an automotive market and intelligence report of an investigation conducted by market research consultants who predicted that the in 1997 consumer year there would be a decline in the demand for motor vehicle parts, accessories, engine and driveline components.

The respondent argued that it was compelled to continuously improve its cost-effectiveness to ensure its profitability. It was of the view that the market report had demonstrated that it was necessary to restructure the LCMD, which provided cleaning, security and maintenance services. During May to August 1997, according to the respondent, the economic circumstances of the respondent had not improved. On 4 June 1998, the respondent offered voluntary severance pay which seven employees accepted.

On 27 August 1997, the respondent's Human Resources Manager, Mr GROENEWALD, addressed a proposed memorandum to the shop stewards' council in regard to a proposed restructuring of the LCMD. The respondent contends that it consulted the shop stewards previously on 23 May 1997 about the issue of retrenchment. However, this was disputed by the applicants. According to them, the meeting did not take place.

On 27 August 1997, when the shop stewards council was addressed, the economic reasons advanced by the respondent for a future retrenchment was that a trend amongst consumers had started, they were buying cheaper vehicles at the lower end of the entry level market, which impacted negatively on production levels and the demand for replacement parts. The respondent was experiencing below-budget sales for the year. Reference was also made to other manufacturers in the motoring industry who were experiencing similar problems. The respondent also announced its intention to outsource the cleaning, security and maintenance functions in order to save costs. It referred to previous methods such as training and counselling in order to improve service levels, all which proved

unsuccessful. Notice was given of the number of employees to be affected by the proposed restructuring of the LMCD and the number of employees in the different categories were numbered as follows:

Management	4
Supervisors	4
Clerical administrators	16
Security guards	30
Cleaners	26
Maintenance workers	3
Gardeners	3

The respondent also conveyed that since all employees in the LCMD would be affected, selection criteria would not be applicable. The proposed introduction of the reorganization would be from October to November 1997. Severance pay would be paid out in terms of clause 23.2 of the National Bargaining Forum Agreement ("the NBF agreement"). The respondent further expressed its intention to make an effort to secure employment with sub-contractors or re-employ them in the future, if possible.

Subsequent to the above meeting of 27 August and the memorandum, the respondent advised the union on 26

September 1997 that it wished to enter into consultations with the union in terms of clause 21 of the NBF agreement. This letter was in response to a letter from the union received on 22 September 1997, wherein the respondent was called upon to stop implementing its plans and follow the process in terms of the NBF agreement.

On 3 October 1997 the union requested the respondent to provide information regarding:
the commercial rationale for its proposal of 27 August 1997; the type of market research performed; the number of temporary staff employed since June the previous year; the amount of overtime work performed; business plans and financial statements, as well as the salaries of different levels of employees and the number of possible retrenchees.

In response, the respondent advised that the LCMD was not cost-effective and undertook to disclose relevant financial information at a meeting to be held on 24 October 1997, which was the first consultation meeting in a long consultation process. The respondent also stated that the retrenchment was not a foregone conclusion. At the first consultation meeting which was held on 24 October 1997, the commercial rationale behind the proposals to retrench was provided with a cost analysis of the LCMD, demonstrating that outsourcing of the cleaning, maintenance and security functions would result in a saving of 25.3% *per annum* for the respondent. Quotations and business proposals from three companies were provided. The union was also provided with a letter which included information regarding the respondent's business plan for 1997, a list of seven employees who were accepting packages and twelve employees who had been offered

alternative positions, a breakdown of the overtime worked and the names of present and temporary employees.

After this meeting, nine further meetings were held from November 1997 to June 1998, save for the two meetings which were held on 3 July 1998, the date on which the retrenchments were implemented.

During these meetings, information was provided and disputes raised and proposals made.

At the eighth consultation meeting, which was held on 19 February 1998, the activities of sub-contractors come under scrutiny as services were being provided by them in terms of contractual arrangements. The union was dissatisfied about this fact. It appears that it was of the view that this was a premature, partial implementation of the retrenchment proposal. The union also proposed an improved severance package of three weeks' remuneration per completed year of service, and an increased notice period at this meeting. The respondent proposed that the matter be referred to the CCMA for an advisory arbitration award. The respondent undertook not to implement its proposals while the CCMA process was under way and requested the union's members to desist from engaging in an overtime ban.

The relationship between the parties was governed by the terms of the NFB agreement, a collective agreement which obliged the parties to refer certain disputes to arbitration in terms of clauses 23.1 and 36 of that agreement.

The union, on the same day (19 February), referred a dispute to

the CCMA in terms of section 24(2) of the Act. The union termed the dispute as the respondent's failure to adhere to clause 2.3 of the NFB agreement, which relates to job security.

On 30 April 1998 the parties concluded a collective agreement which defined the process to be followed subsequent to the arbitrator's award, in the pending dispute before the CCMA. I agree with the contention that in essence the dispute before me was similar to the one that had been the subject matter of the arbitration.

The agreement was signed on behalf of the respondent by Mr GROENEWALD. Mr MBATHA signed on behalf of the union. (He also gave evidence at the hearing.) The agreement was titled "NPCD Production Backlog Recovery and Loss Control and Maintenance Department Outsourcing Retrenchments". The agreement dealt with the agreed process to be followed regarding the pending retrenchment. The respondent argued that if the arbitrator ruled in favour of the respondent in the arbitration, the pending retrenchments could proceed. The dispute was about the respondent's failure to implement alternatives (*ie* redeployment to the NPCD). Mr KHUBEKA, a senior union official who testified on behalf of the applicants, conceded that this was the case.

By 25 May 1998 the certificate of outcome was still not at hand. After attempts on the part of the respondent to persuade the union that the parties jointly refer the issue to a advisory arbitration, the union declined. Further meetings were held on 3 July 1998, and the applicants were retrenched. The applicants

argue that it was extremely unfair that the retrenchments took place on this day. Discussions were still taking place.

The certificate of outcome was issued on 4 August 1998 in respect of the dismissal for operational requirements. The CCMA then set down the collective agreement dispute which was heard by an arbitrator who found that the respondent had complied with clause 21.3 of the NFB agreement.

Following the issue of the certificate of outcome being issued on 4 August, the applicants referred the dispute for adjudication.

In limine, the respondent raised the point of this Court's lack of jurisdiction. The respondent argued that on the common-cause facts, the papers and the collective agreement, the dispute was disposed of at the arbitration hearing. It argued that clause 2.5 of the written agreement of 30 April 1998 precluded this Court from hearing the matter.

The first part of the agreement provides that the LMCD employees, including those who were used in the MPCD, are subject to the arbitration award, and if it is confirmed that the planned retrenchments are legal, they would proceed on terms previously agreed upon. The second part provides that if the backlog in the NPCD is not cleared at the time of the arbitration award, then the LCMD employees working in the NPCD would remain as temporary employees, but would be retrenched after clearing the backlog.

The respondent contends that this clause of the agreement disposed of the matter, since the arbitration award was granted

in favour of the respondent.

I ruled that on the papers alone, this question could not be determined. Evidence, particularly as to the reason for the dismissal had to be led. Here, I might add that Mr HUMAN's 1996 proposal and subsequent resolution were of significance, and it does not appear that these issues were fully canvassed by the arbitrator. The point *in limine* was dismissed. I ruled that the applicants had the duty to begin to lead evidence in the light of the arbitration award. An explanation was required from the applicants. On the face of it did appear as if the arbitration disposed of at least the procedural aspects of the retrenchment, and of course the question of re-deployment alternatives.

The union then led the evidence of Mr KHUBEKA and Mr MBATHA. At the end of this evidence the respondent applied for absolution from the instance, on the basis that the evidence of the two witnesses called by the applicants, and who contradicted each other, the applicants failed to discharge the onus of establishing the Court's jurisdiction.

It is of significance that by April 1998 a backlog had arisen in the NPCD, and the union suggested that instead of casuals, LMCD employees should be used. This resulted in the actual agreement. I agree with the submission that the two witnesses for the applicants contradicted each other on vital aspects. Mr KHUBEKA was clearly the more frank witness of the two; but despite this, I did not believe that absolution was warranted for the same reasons as dismissing the *point in limine.*

The respondent did not close its case, and the matter was

postponed for the respondent to consider its position. When the trial commenced in June 2001, the respondent called as a witness Mr HUMAN, its line manager, and after his evidence was heard the matter was to be determined on all the evidence.

The applicants filed Heads of Argument on 17 October 2001. The respondent filed Heads of Argument on 31 October 2001.

The first part of the alleged substantive unfairness is premised on the contention that the decision to retrench was taken long before the consultation started. The second part is that the respondent failed to consult about placing LCMD employees in the NPDC and in fact not placing them despite the consistent overtime work in that Department.

Mr HUMAN testified that a decision was taken by the respondent's management in principle, to outsource the LCMD functions. It was not a final decision. Before the final decision was taken, there was an interval of eighteen months during which there was much consultation.

The applicants argued that during the long period between the decision to retrench and the consultations, when nothing was discussed, the union could have used its influence to alter the outcome, if consultations were held during this period.

The letter of 27 August 1997, in its language, appears to be categorical and has a tone of finality to it, particularly with regard to its stance on selection criteria. Mr HUMAN's 16 September 1996 proposal indeed placed a strong emphasis on poor performance as a reason behind this proposal, but that is not the

only reason given for the decision to outsource, which seems to me, was an in-principle decision. The many consultations after the decision was taken demonstrate this. Cost effectiveness was an important factor.

The respondent demonstrated that it found itself in certain financial circumstances where outsourcing was the only solution. The fact that Mr HUMAN's 1996 proposal to MANCOM did not focus on the respondent's financial problems, which was not gain-sayed by the evidence at all and that the respondent did not mention this fact earlier than it did, does not assist the applicants' argument about the "real reason" behind the retrenchment, being poor performance. Whereas it may have been a problem and a factor, it was not the sole reason behind the proposal.

The financial position was put forward. The cost-effectiveness, (a 25.3% saving) was a legitimate factor to be considered. There was also evidence that employees were trained to enhance their performance. It was argued that where collective poor performance was identified as an operational problem, it should be assessed and evaluated properly with proper notice to the Union before looking at outsourcing. Mr HUMAN had investigated solutions for four years before he wrote the proposal in question. He evaluated the situation. He considered the previous training and counselling which had been conducted. He formed an opinion and made a recommendation. He did not take the final decision.

It is difficult to determine at what point an employer is entitled to decide whether training is to no avail, but in my view the

standard must not be set too high as to place the employer in a position where no progress in its business can be made. This would particularly be the case where there are financial difficulties. Employees should be counselled for poor performance, and in some instances, trained to improve poor performance. This can easily be achieved on an individual basis, but as a collective problem the same principles do not apply, for obvious reasons. It is difficult to determine whether only certain, or all employees are under performing and if only certain, which ones may be identified. In any event there was the evidence of Mr. Human that the Union was aware of the productivity problems in the LCMD.

During evidence it was demonstrated that certain of the employees could not simply be posted in different job categories such as, for example, the position of a receptionist. Other examples were also referred to.
Section 189 of the Labour Relations Act 66, 1995 ("the Act"), does not require an
employer to consult with its employees about whether it may take a decision that
there will be, in its opinion, a need to retrench in order to resolve a difficulty which has arisen in its commercial operations. Management still maintains a prerogative. The fact that an employer takes an in-principle decision to outsource, but opens itself to discussions and persuasion to the contrary, which in this case was done, is not in breach of s 189(1) of the Act.

In the decision of *Atlantis Diesel Engines (Pty) Limited v National Union of Metalworkers of South Africa* (1994) 15 *ILJ* 1247 (A) at 1252F, the Appellate Division (as it was then known) stated, per

Smalberger JA:

"**It seems to me that the duty to consult arises, as a general rule, both in logic and in law, when an employer having foreseen the need for it contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies; an appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure. Once that stage has been reached, consultation with employees or the union representative becomes an integral part of the process leading to the final decision on whether or not retrenchment is unavoidable. Consultation provides an opportunity, *inter alia*, to explain the reasons for the proposed retrenchments, to hear representations on possible ways and means of avoiding retrenchment (or softening its effect) and to discuss and consider alternative measures. It does not require an employer to bargain with its workers or unions with regard to retrenchment. Furthermore, the ultimate decision to retrench is one which falls squarely within the competence and responsibility of management.**"

In dealing with that judgment, the Labour Court, in the decision of *Fletcher v Elna Sewing Machine Centres (Pty) Limited* (2000) 21 *ILJ* 603 (LC) at 614C-G, per Jammy AJ stated that:

"**The rationale underlining the equitable principles enunciated in the *Atlantis Diesel Engines* case is not open to question, but in a hard realistic and uncompromising commercial environment, it will in my opinion 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 *bona fide* reason to re-organise, restructure or in some other manner, redefine their business operations, will not have decided in principle what they perceive is the optimum method of doing so. What I consider to be the legitimate purpose of consultation with employees who might thereby be affected therefor, is not to assist them in making up their minds, but 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. … The need to retrench, when all other attempted avenues to redress its deteriorating situation has failed, was clearly identified …"

Mr HUMAN gave evidence that there were sound commercial reasons why there was a delay between October 1996 and May 1997. There is no absolute obligation to communicate a *prima facie* decision immediately. Obviously, the need to engage in consultation pursuant to the decision, must take place within a reasonable time which would be determined on all the facts and circumstances in any given case. In the matter under consideration, the delay was not unreasonable, given the process which ensued.

The respondent was at all times prepared to, and did, go to arbitration in an effort to resolve the issues. As a result of the consultation process, the decision to go to arbitration on the issue of the NPDC was arrived at. In this regard, the evidence of Mr KHUBEKA that this issue was the actual dispute between the parties about which they had embarked upon an arbitration route. Mr MBATHA signed that agreement.

Mr Khubeka testified that what the Union sought from the arbitration was an order that the terms of the NBF agreement he implemented by the respondent with specific reference the respondent's "obligation to re-deploy retrenchees to the NPDC". He also stated that had the retrenchees been re-deployed to the NPDC, the parties would not be in court.

The respondent was also criticised for failing to mitigate the effect of its decision to retrench. Evidence was also led that the restructuring involved the occupation of a different building on the same premises, which on the evidence clearly required different arrangements in cleaning operations. Mr HUMAN testified that he attempted to assist employees in gaining employment with the sub-contractors but that employees refused to engage in the interview process. This was confirmed by Mr KHUBEKA who said they had "*nothing to say*". One of his sub-contractors for cleaning purposes undertook to employ the respondent's cleaning staff at their current salaries. They did not apply for these positions. In view of this evidence the applicants' stance to alternative employment was unreasonable.

Insofar as selection criteria is concerned, the respondent demonstrated during the evidence of Mr. Human and during the cross-examination of Messrs Khubeka and Mbatha, that the application of the LIFO list drafted by Mr Mbatha in consultation with the employees (which he initially distanced himself from) would be impractical.

Mr. Khubeka conceded that for most part, the employees in the LCMD had limited literacy and numerate skills and he agreed with the skills requirement for permanent employees in the NPDC. It

was demonstrated that this department, when the applicants were temporarily employed there, they were supervised on a level which was not sustainable on a permanent basis.

Mr Khubeka conceded that the disputes regarding (which are dealt with in the NBF agreement) severance package selection criteria (skills were applicable, not only LIFO) and commercial rational (which was not attached), were not issues before this court. The respondent provided information relevant to the process as requested on 24 October 1999 and thereafter.

In weighing the documentary evidence, read together with Mr HUMAN's evidence and in accepting Mr KHUBEKA's and Mr MBATHA's evidence insofar as they corroborate the objective facts, common-cause facts and the innate possibilities, the respondent was not in breach of s 189 of the Act. There was no substantive unfairness in the retrenchment process engaged over a period of more than one and a half years during which some twelve consultative meetings were convened.

Insofar as the engagement of employees in the NPDC is concerned, the evidence of both parties indicated that overtime was sporadic in frequency and quantity. On this issue the respondent went further than consultation. It went to arbitration, a process which sanctioned its actions. It is improbable on the facts, that the respondent, in the consultation process, simply put up a *mala fide* charade over a period of eighteen months.

Insofar as costs are concerned, even though the applicants were responsible for the preparation of the Court files, particularly in

October 2000 when the matter first came before Basson J, who struck the matter from the roll, the respondent approached the matter in a manner which also wasted time. The record will reflect this. I therefore decline to make any costs order.

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E REVELAS

Johannesburg
12 March 2002