IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: JS 148/02

In the matter between:

Satawu obo Chauke & 131 others **Applicants**

and

Roadway Logistics (Pty) Ltd **Respondent**

JUDGMENT

CELE AJ

Introduction

[1] This is a claim about an unfair dismissal of 131 applicant's members who were employed by the respondent. The claim was opposed by the respondent. In the pleadings and, to an extent, during the trail, the applicant attacked the substantive and procedural fairness of the dismissal of its members. In his closing arguments however, Counsel for the applicant, correctly conceded that the attack of the dismissal

based on the substantive ground did not take any material form and he abandoned that ground. Accordingly, those facts which relate to the commercial reason underlining the dismissal of the applicant's members will be taken as common cause between the parties. The 131 applicant's members will henceforth be referred to as the 131 employees.

Background facts

1. How the respondent came into existence

[2] In 1991 a company called Roadway Transport had about 12 specialised contracts in terms of which it would transport gas in specialised vehicles. In 1996 Roadway Transport bought another company called Unity Long Haul which had 2 divisions, a contracts division and a cross-dock division. The cross-dock division was a parcel business which collected freight, consisting of large items, from the manufacturing plants into distribution centres throughout South Africa. The cross-dock division therefore operated the curia services. The two divisions were lumped and run together. In 1998 Roadway Transport bought Hellmanns, which was another cross-dock operating company. The plan was to merge the two cross-dock operations into one with a view to making the operation profitable overall. Still in 1998 a public company listed on the Johannesburg Stock Exchange (JSE) called Steinhoff International Company acquired Roadway Transport. Roadway Transport became a 100% subsidiary of the Steinhoff

Company.

[3] On 1 July 2000, the respondent was established, being owned 50% by Roadway Transport, a 100% subsidiary of Steinhoff, and 50% by Unitrans which was also a public company, listed in the JSE. From the beginning, the business of the respondent was split into 2 divisions, a furniture distribution division and a cross-dock division.

2. Core function of the divisions

[4] The furniture distribution division was dedicated into transporting furniture manufactured by Steinhoff to retailers. That included Edblo, Sealy and Goma gomma products. It employed about 600 employees. The cross-dock division on the other hand, was involved in the transportation of large parcels, such as fridges, television sets and other so called white goods on the open market. The cross-dock division employed some 340 employees, consisting of 260 wage earners and 80 salaried staff. It operated in Wadeville, Durban, Cape Town, Port Elizabeth and Bloemfontein. At Wadeville it had 130 wage earners who are the applicant's members and employees involved in the matter and 40 salaried staff. The two divisions operated independently of each other as they had their own management structures and budgets.

3. The financial standing of cross-dock division

[5] From the time of its formation, the cross-dock division was making a loss. During the 2001 financial year, that is 1 July 2000 to 30 June

2001, some remedial action was taken by the respondent, with a view to turning the division into a profitable business. This entailed, *inter alia*, the embarking upon new business drives, the implementation of the cost controls, effecting price increase and the termination of the relationships with non-profitable customers.

[6] At the end of the 2001 financial year the remedial action had only saved R2 million as the division lost R28 million. R11 million rand loss was incurred in the business of the respondent overall. The cross-dock division had the capital expenditure of R 40 million rand with a reasonable return thereon being about 20% per annum, Instead of making R 16 million in the 2001 financial year, the cross-dock division lost a total of R 58 million. That suggested to the respondent that the division was no longer viable and that all attempts of rescuing it had failed.

4. <u>Attempts to resolve the financial challenges</u>

[7] A consideration was then made to the respondent focusing on what it considered as its core business, the furniture distribution and transportation of the furniture manufactured by Steinhoff and to dispose of the cross-dock division. Discussions were held by the respondent with various businesses including Value Logistics, Cross Cape and OneLogix. Different transactions and models were explored with them. The essential problems facing the respondent was that it proved impossible to put a value to its business as it was losing R 2 million a

month and was comprised primarily of goodwill in the form of a customer book. Potential purchasers were not interested in the assets of the business as they had their own existing infrastructure.

[8] The respondent made an attempt but in vain to sell the cross-dock division as a going concern with a view to maximizing return and to secure continued employment for the workforce. On 23 August 2001 the respondent concluded a customer referral agreement with OneLogix. The agreement entailed the handing over of cross-dock clients to OneLogix in the hope of some consideration based on the profits derived by OneLogix in the forthcoming 12 months. A firm decision was then taken to close down the cross-dock division. That led to the retrenchment of 131 employees. The entire cross-dock division in South Africa was closed down, as it was a term of the customer referral agreement concluded between the respondent and OneLogix.

5. Further Developments

1. The Leondale distribution centre.

[9] In 2001, Unitrans, in conjunction with Lewis Stores and the Reliant Group, Opened a regional distribution centre pilot project in Welkom. The distribution centre involved the warehousing of products of retailers in what was called smart sheds and the distribution thereof to various households in Welkom. The distribution function was contracted out to the respondent's furniture distribution division. The

regional distribution centre in Welkom was however closed down in December 2001.

[10] In October 2001 Unitrans had opened a similar regional distribution centre at Leondale in the Roodekop, in conjunction with the Reliant Group which included Furniture City and Glicks. Similarly, the respondent's furniture distribution division was contracted by Unitrans to transport furniture from the Leondale regional distribution centre to end-users or households on a fetch-and-deliver basis. The Leondale regional distribution centre did not involve cross-docking. By the end of August 2001 the respondent's cross-dock division had to close down in its entirety. In the process of staffing the Leondale regional distribution centre transport contract, the respondent re-employed about 29 wage earners who had been retrenched from the cross-dock division in Wadeville. It stationed them at the Leondale regional distribution centre. About 25 of those employees are part of the 131 employees. In March/April 2002 another 6 former cross-dock employees were engaged by the respondent as part of Leondale distribution centre transport contract. That was done via a labour broker, Ebutsi. In March 2002 Unitrans approached the respondent to take over the entire operation of the Leondale distribution centre and it finally took it over.

2. <u>The Laanglaagte distribution centre</u>

[11] At the time of the retrenchment of the 131 employees in August 2001,

the respondent's furniture distribution division had a consolidation hup in Garankua. The Steinhoff furniture which was destined for low volume areas was gathered and stored at a consolidation hub until a viable load was made up which was then dispatched to furniture retailers. In March 2002 the respondent opened another furniture distribution consolidation hub in Wadeville. A further consolidation hub was opened by the respondent in Laanglaagte. All the consolidation hubs opened by the respondent were not cross-dock operations.

The elimination criterion for retrenchment

[12] The applicant challenged the identification of Mr Meshack Sekgasho as a retrenchee over Mr George Modman. That was the only challenge posed by the applicant on the selection criterion. Particulars of the challenge had not been disclosed prior to the trial with the result that the respondent did not know that Mr Moolman's position was being contested. The respondent produced a letter of 24 August 2001 through which Mr Moolman was retrenched together with other employees. According to the respondent, Mr Moolman could have been re-employed with a number of other employees. The issue was not taken further by the applicant.

The procedural fairness

[13] The respondent scheduled a meeting of its cross-docking and head office employees for 1 August 2001. The purpose of the meeting was

to inform all the relevant employees that the respondent would be restructuring in the month of August 2001. On 1 August 2001 the respondent issued a notice of possible retrenchments, addressed to its cross-docking and head office employees. The notice read:

> "Due to operational reasons, the company regrets to inform employees that if no alternatives are found, we will have to embark on a retrenchment exercise.

The company proposes that employees consider the following alternatives:

- Voluntary retrenchment.
- Transfer of employees.
- Early retirement.

Employees are also urged to suggest alternatives to retrenchment for discussion at consultative meetings.

Should the company embark on a retrenchment exercise, we believe that the following selection criteria should be used, where possible, to select employees who are involved in retrenchment:

- LIFO – "last in first out" principle and
- Skills

Possible date of implementation: 31.08.01

The company will assist employees that are affected, where possible, in the following matters:

- UIF
- Provident Fund

- ❖ Seeking other employment

The company believe that where possible, retrenched employees get preferential treatment if any positions become available, within six months following the finalisation of the retrenchment.

The company hereby urges parties to suggest alternatives in order to minimize the effect of retrenchment.

Should you require any information with regard to the abovementioned, you are requested to contact Lizette Schreiber at (011) 878 0400"

[14] On 3 August 2001 the respondent issued a letter addressed to the applicant. It reads:

"**SUBJECT: RESTRUCTURING**

Our meeting scheduled for 01.08.2001 at 10:00 refers.

We herewith confirm that the purpose of the meeting scheduled for 01.08.2001 was to inform all the relevant employees that the company will be restructuring in the month of August 2001.

Management will be exploring options to make the company more effective.

The options include:

a. Buying customers from another company to increase desperately needed volumes.
b. Another company buying customers from us
c. Closing the company down

> Since legislation prescribes that the company should inform employees of possible retrenchments as soon as it is under consideration, we herewith give you formal notice that the restructuring exercise may lead to the retrenchment of employees. Refer in this regard to the attached letter.
>
> We propose that our first consultative meeting be scheduled for Monday, 6 August 2001, at 14:00. Kindly confirm your attendance.
>
> We urge all parties to identify alternatives to retrenchment."

[15] Up until 12h40 on 6 August 2001 the applicant had not responded to the letter of 3 August 2001. Then Ms Screiber, a Human Resources Manager of the respondent telephoned the applicant and spoke to Mr Nyamezele. The respondent learnt for the first time that Mr Nyamezele would not be available for a meeting of that day at 14h00. It was proposed that the next consultative meeting be held on 10 August 2001. The respondent wrote a letter dated 6 August in which it confirmed the meeting but complained that the applicant was using delaying tactics in the holding of consultative meetings. On 8 August 2001 the applicant issued a letter to confirm that it would attend the meeting of 10 August 2001 but denied using any delaying tactics. He expressed a view that the respondent had already decided about the issue and wanted the applicant to rubber stamp the same.

[16] On 10 August 2001 the first consultative meeting between the

respondent, the applicant and shop stewards went ahead. The respondent explained the purpose of the meeting which had been scheduled for 1 August 2001 to have been for informing the parties that management of the respondent wanted to initiate a restructuring initiative. The respondent's position was that it wanted to focus on the core business which included the distribution of furniture for the Steinhoff Group. The divisions which were to be included in the restructuring included the cross-dock Head office, Finance Department and the workshops. The respondent reported that it had explored different avenues to resolve the financial loss suffered by the cross-dock and had decided that the operations of GoLogix and cross-dock would merge. The respondent said that going ahead with the GoLogix transaction would however result in retrenchment.

[17] The applicant made two comments in the course of deliberations namely:

- Management took the wrong path by buying Hellmanns;
- The union would like to wait for the final decision as no alternatives could be suggested when the union did not know what the final decision was.

Management said that they could not wait for the final decision as the restructuring would result in retrenchment and that therefore the parties needed to consult on alternatives as was required by law. It said that any alternatives or suggestions could assist decisions made

by management in the negotiations process. The alternatives suggested by the applicant are that:

- Management was to let the other companies in the group know (Steinhoff and Unitrans) that a number of employees would be retrenched in the event that they had vacancies.

- GoLogix was to consider more experienced employees when they required more employees to perform the added duties.

[18] In the course of further deliberations between the parties, the applicant requested that the details of the deal between the respondent and GoLogix be provided in writing to it and to the shop stewards. The next meeting was scheduled for 13 August 2001.

[19] On 13 August 2001 a further consultative meeting was held wherein the minutes of the meeting on 10 August 2001 were confirmed. The respondent did not have any new information on GoLogix to give to the applicant and the shop stewards. The only suggestion put forward was that Unitrans and Steinhoff were to be informed by letter of the availability of retrenched employees for re-employment. A further consultative meeting was scheduled for 20 August 2001.

[20] The next consultative meeting was held on 20 August 2001 as earlier scheduled. Minutes of the meeting of 13 August 2001 were accepted. It was reported by the respondent that a client referral agreement was negotiated with GoLogix. The implications of the agreement were

that:

- Those clients who had been serviced by the respondent were to be serviced by GoLogix, provided each client agreed to the arrangement.

- The cross-dock division would seize its operations from 21 August 2001.

- All cross-dock employees would be retrenched with effect from 31 August 2001. A few of the salaried staff would be retained to finalise the administrative work.

- GoLogix had an option to approach any of key personnel who were interested in being employed by then, which would then be a new employment contract as the arrangement GoLogix had with the respondent did not amount to a transfer of business as a going concern.

[21] The applicant had it recorded that it was yet to be officially informed of the retrenchment and that consultation in relation thereto had not yet taken place. The applicant wanted to know the reason which prompted a deal with GoLogix and they wanted a copy of the agreement between the respondent and GoLogix. The next meeting was to be held on 23 August 2001.

[22] The next consultative meeting held was on 24 August 2001. Also

present was a Mr De Klerk, as a representative from Steinhoff. He was introduced as one who would help in the retrenchment matter. Mr De Klerk said that Steinhoff had taken a strategic decision and decided that all the companies in the group were to focus on their core business which was furniture. The result was then the closure of the cross-dock division. The applicant responded by saying that it had not yet been informed about the retrenchment and that not enough information was supplied by the respondent to it and to the shop stewards. A discussion proceeded on whether consultation preceding retrenchment had in fact taken place. The applicant declared that it would refer a dispute. The respondent informed the employees that they were to collect their belongings and leave the premises as the operations were closing down with immediate effect. Employees were notified that they would be paid up to the end of August 2001 and that management was still prepared to consult further on the retrenchment issue.

[23] On the same day, 24 August 2001 the applicant, acting on behalf of its dismissed members, referred a dispute about an unfair dismissal on operational requirements, to the National Bargaining Council for the Road Freight Industry for conciliation ("the Council"). A certificate of outcome was issued by the Council on 15 February 2002 when the dispute could not be resolved. The applicant referred the dispute to this Court.

The issue

[24] The statement of the facts that was to be relied on by the applicant and its members to establish the claim was stated to be:

> "The company re employed some of the employees as independent contractors, doing the same job, with the same payment and time or duration of working hours, same production, even more overtime."

[25] The legal issues that were said to arise from the above facts were stated as:

> "The company failed to comply with section 189 of the LRA, 66 of 1995 as amended – Procedural aspects.
>
> Substantive aspects – company re-employed those employees as independent contractors."

Evidence

The dismissal of the employees was not in dispute and therefore the respondent had to prove that the dismissal of the employees was procedurally fair. As stated earlier, the substantive ground was abandoned by the applicant.

[26] The only witness called by the respondent was its Operations Director, Mr Jurgens Nel. He attended all 4 consultative meetings and conceded that at the commencement of the discussions on 10 August 2001, the respondent was pre-disposed towards retrenchment. He said that while restructuring of the cross-dock division was discussed, the respondent made it clear from the onset that there was a possibility of

restructuring. He referred to the minutes of the discussion to indicate that the applicant and the shop stewards were alerted to the possibility of restructuring. He said that the shop stewards did not come up with any proposals to counter the closing down of the cross-dock division. According to him the agreement on client referral between the respondent and GoLogix was not relevant to the consultation process as there would be no transfer of business from the respondent to GoLogix as a going concern. He said that the respondent was considering various alternatives at the time. They included:

(1) GoLogix taking over the cross-dock division as a going concern;
(2) GoLogix buying their clients which included the closure of cross-dock and
GoLogix taking over the key personnel and
3) The respondent buying more business.

[27] He said that management remained open to be persuaded on the existence of a suitable alternative but that instead the applicant wanted to wait for a final decision when it could not come up with any alternatives until a final decision was taken by the respondent. He said that the applicant appeared to him to have been against the consultation process. He said that the applicant did not come up with any opposition of note, to retrenchment. He said that the invitation to consult was always left open with the applicant notwithstanding the 31 August 2001 stipulation in the notice of 1 August 2001.

[28] The applicant called three witnesses, Mr Xolani Nyamezele the organiser of the applicant, Mr Godfrey Mafisa, a shop steward and Mr

Itumeleng Sebesho who was employed by the respondent as a Supervisor. Their evidence was to the effect that:

- The consultation meetings were about restructuring and not retrenchment. Up until the meeting of 20 August 2001, no discussion pertaining to retrenchment had taken place between the respondent and the applicant. The announcement on the retrenchment took them by surprise. They had not come into that meeting prepared to discuss the retrenchment matter.

- Before 1 August 2001 no managers of the respondent had ever reported to them that the respondent was experiencing financial problems. The notice of 1 August 2001 clearly showed that the respondent had already decided to embark on a retrenchment exercise. On 10 August 2001 the respondent presented the union with a *fait accompli*.

- The business of the respondent was never known to be divided into two divisions, the cross-dock and the furniture division. It was not true that Mr Nyamezele had approached the consultation meetings with an attitude adverse to retrenchment, assuming that the respondent had already decided to retrench. When he wrote a letter dated 8 August 2001 he was reacting to a mood in which another letter, not discovered, was issued by the respondent to the applicant.
- No details of the respondent's financial positions had been

given during the consultations. The respondent had failed to supply the applicant with a copy of the client referral agreement with GoLogix.

Analysis

[29] Section 189(1) of the Act requires that consultation must take place at the time when the employer contemplates dismissal. In the case of **National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd (1993) 14 ILJ 642 (LAC),** the moment when an employer contemplates dismissal was taken to mean:

> "It simply means that an employer, who senses that it might have to retrench employees in order to meet operational objectives, must consult with the employees likely to be affected (or their representatives) at the earliest opportunity in order to advise them of the possibility of retrenchment and the reason for it."

[30] The actual timing of the consultation will depend on the circumstances of each particular case. When considering this question the interests of both the employer and the employee should be taken into account and balanced. In the process of consultation, the parties are required to attempt to reach consensus. The employer must consult in good faith in that it must not have made up its mind, prior to consultation, to dismiss. However, in the case of **Nehawu and others v University of Pretoria (2006) 5 BLLR 437 (LAC)** the court held that:

> "In the light of the above I conclude that there is nothing wrong with an employer coming to the consultation table with a predisposition towards a particular method of solving the problem which has given rise to the contemplation of dismissal of employees for operational requirements. What is critical is that the employer should nevertheless be open to change its mind if persuasive argument is presented to it that that method is wrong or is not the best or that there is or may be another one that can address the problem either equally well or even in a better way."

[31] The applicant has submitted that the initial discussion with the employees while knowing that there were union official, was unfair and in breach of section 189(1)(c) of the Act. This is in clear reference to the notice of restructuring dated 1 August 2001 issued by the respondent but not sent to the applicant until sent with the letter dated 3 August 2001. The difference in timing between the issue of the notice and its receipt by the applicant is a period of two days. In my view, while the conduct of the respondent was deplorable, it did not amount to a serious violation of section 189(1)(c) of the Act. I do not take the view that a period of 2 days was critical in the circumstances. In any event, the applicant did want to reschedule the consultative meeting of 10 August to a later date.

[32] The fact that a notice of possible retrenchment was sent directly to the employees, which is a factor, should not be seen in isolation but

against the subsequent developments. The respondent scheduled four consultative meetings with the applicant. The concern, that a notice of possible retrenchment was sent to the employees, was probably raised in the meeting, but its non-inclusion in the minutes suggests that, if raised, it was not a serious issue, worthy of minuting. No prejudice has therefore been shown to have been caused to any employee.

[33] The applicant has submitted that the respondent induced employees to enter into retrenchment agreements without consulting with the union. When the consultation began, again this issue does not appear to have been seriously canvassed, as a concern of the applicant. It does not form part of the issues raised for deliberation by the parties. The subsequent meetings granted an opportunity to cure any prejudice which may have been caused thereby.

[34] The applicant submitted that the referral agreement entered into by the respondent amounted to a sham as it is clear that the purpose for which it was entered into was defeated. I understand the referral agreement here to be reference to the client referral agreement between the respondent and GoLogix. Through evidence the respondent has successfully shown that the cross-dock division had clients to service. Once a decision was taken to close down the cross-dock division measures could reasonably have been taken to find an alternative business proposal for them, to the extent that they agreed with the same. In my view, the client referral process was never intended to provide a solution to the closing down of the cross-dock

division. It was a step, rightly or wrongly taken, consequential to the closure of the cross-dock division. It was a business decision which the respondent had a prerogative to take.

[35] The applicant contended that the new regional distribution hubs had similar tasks to those of the cross-dock division. The applicant concluded from that, that retrenchments by the respondent were for ulterior reasons. When the reasons for the closure of the cross-dock division were proferred by Mr Nel of the respondent, the applicant chose not to vehemently contradict the same through effective and purposeful cross-examination or through its own evidence. The applicant finally conceded that there was a commercial reason underlying the closure of the cross-dock division. There is a high probative value to the version of the respondent that the regional distribution hubs were opened by different companies which contracted with the respondent leading to the re-employment of some of its staff compliment. The ulterior reasons suggested by the applicant are not self evident and the applicant has not seen it fit to identify them.

[36] The applicant contended that the respondent did not engage the applicant in meaningful consultations and that consultations must be exhaustive and not merely sporadic, superficial or a sham. It submitted that the union could not be held to blame for failing to consult if, from the outset, it was confronted with a *fait accompli.* In the letter of 8 August 2001, issued by the applicant to the respondent,

the applicant pointed out, *inter alia*, that it was of the opinion that the respondent was trying to use the consultation process as a scape goat to undermine the law as it had already decided about the issue and wanted the applicant to rubber stamp the retrenchment decision.

[37] As already pointed out earlier, the law permitted the respondent to approach the consultation table with a pre-disposition towards a particular method of solving the problem. That method in this case was retrenchment. What remained critical though, was that the respondent should have been open to change its mind if a persuasive argument or alternative suggestion was presented by the applicant or the shop stewards. The minutes of the consultation process do not suggest any intransigent attitude and approach on the part of the respondent. They instead showed an attempt at engaging the applicant when the applicant wanted to wait for a final decision to be made by the respondent.

[38] The letter of 3 August 2001 issued to the applicant by the respondent, when read together with the minutes of the consultation meetings, all suggest that the respondent was considering various alternatives such as:

- buying customers from another company to increase desperately needed volumes
- another company buying customers from it
- closing the company down.

[39] In the consultative meeting of 13 August 2001 minutes of the meeting held on 10 August 2001 were accepted. The applicant was effectively accepting that the respondent stated that a final decision, as suggested by the applicant, could not be waited for as restructuring would result in retrenchment and there was a need to consult on alternatives. No alternatives of any substance were put by the applicant against the restructuring which would lead to retrenchment. Instead, the applicant appears to have gone along with the proposal of the respondent when the applicant suggested that:

- Management should let the other companies in the group know that a number of employees would be retrenched.

- GoLogix was to consider more experienced employees when they required more employees to perform the added duties.

[40] A proper conspectus of all the evidential material before me shows that the respondent was open to change its mind if persuasive arguments and alternative suggestions were presented to it, showing that the method it adopted was wrong or not the best or that there was another one that could address the problem, either equally well or even better. The respondent, in my view therefore did not confront the applicant and its members with a *fait accompli*. The consultative process was therefore not in violation of section 189 of the Act.

[41] Accordingly, the dismissal of the 131 employees was substantively and procedurally fair. I proceed to make the following order.

The application is dismissed with costs.

CELE AJ

Date of last hearing: 23 June 2006

Date of judgment: 22 December 2006

For Applicant: Mr S.C Mhlangwane

(of Mhlangwane Attorneys)

For Respondent: Adv A.T Myburgh

Instructed by: Perrott, Van Niekerk & Woodhouse Inc)