

BMD KNITTING MILLS (PTY) LTD v SA CLOTHING & TEXTILE WORKERS UNION (2001) 22 ILJ 2264 (LAC)  
LABOUR APPEAL COURT (CA4/2000) A  
19 April 2001  
Before ZONDO JP, DAVIS AJA and DU PLESSIS AJA

#### Introduction

[1] On 5 October 1998 appellant notified respondent that it was contemplating the retrenchment of certain employees. After a number of meetings the parties reached an agreement under the auspices of the Independent Mediation Services of SA (IMSSA) on 11 September 1998 (the IMSSA agreement). The agreement reflected that the parties had achieved consensus in respect of the terms and conditions of the retrenchment of affected personnel in certain departments of appellant's business operations other than the security department. The agreement provided that the security department employees would be dealt with in a separate process.

[2] Although the IMSSA agreement contemplated that appellant would convene a meeting within two weeks of the date of the conclusion of the agreement, being 11 September 1998, to consider respondent's proposal with regard to the outsourcing of security functions, no such meeting took place.

[3] On 23 October 1998, 11 security guards, who were employed in the security department and all of whom were members of respondent, were dismissed. Respondent referred the resultant dispute to conciliation before the Industrial Bargaining Council for the Clothing Industry on 9 November 1998. A conciliation meeting was held on 15 February 1999 but the dispute remained unresolved.

[4] Respondents then sought an order from the Labour Court declaring that the dismissal of their members was unfair and ordering their reinstatement on the same terms and conditions that governed their employment prior to the date of dismissal. Waglay J held that the dismissal of the 11 security guards was unfair for the reason that:

'[T]he evidence tendered by the respondent's witnesses indicated at best for respondent that the reason for the dismissal was both cost-savings as well as the need to restructure the guard function. This being so the respondent was obliged to inform the applicant thereof. By simply maintaining that the only reason was to save costs it did not grant the applicant an opportunity to address the other issue. How can it be said that respondent properly consulted with the applicant if it failed in being truthful about the very initial step ie giving reasons for its proposed dismissal. For the reasons stated above I am not satisfied that the dismissal of the guards was substantially fair.'

Waglay J ordered appellant to reinstate each of the 11 members of respondent on the same terms and conditions that regulated their employment prior to the date of dismissal as and from the date of their dismissal, that is 23 October 1998.

#### Background

[5] On 5 August 1998 Mr Murray Meeuwis, human resources manager of appellant, wrote to a Mr van der Rheede of respondent informing him that in terms of s 189 of the Labour Relations Act 66 of 1995 (the Act) appellant was contemplating certain retrenchments. The reason which Mr Meeuwis gave for the decision was as follows:

'There has been a dramatic downturn and demand for our products compared to last year (minus 35% approx) and the trend, we believe, will continue well into next year. The company's profitability has been severely affected and all costs have to be looked at critically in order to ensure the survival of our business in a declining market. Further documents and graphs will be made available at our proposed meeting.'

He invited Mr van der Rheede 'or a delegated official' and the shop stewards to enter into urgent consultations regarding this decision.

[6] A number of meetings were held between the parties as from 14 August 1998. It appeared that agreement between the parties was reached with regard to all contemplated retrenchments save in respect of the security guards.

[7] To this end, the IMSSA agreement was concluded on 11 September 1998 and it read as follows:

#### 'BMD KNITTING AND SACTWU MEDIATION MEETING 11/9/98 POINTS OF AGREEMENT:

- 1 The company will proceed and implement the proposed retrenchment on the basis of one week's notice plus two weeks' per year severance package.
- 2 Xmas bonus will be paid (pro rata) as in the past.
- 3 Six months' moratorium on retrenchment.
- 4 Security department will be dealt with in a separate process.  
Company to convene meeting in two weeks.

Company has open mind on the issue and will consider and respond to union's proposal.

Company will consider the union's proposal to outsource to existing employees if it is decided to outsource.

If individuals are retrenched at the end of the process, they will receive conditions no less favourable than those currently retrenched.

5 The criteria to be applied are:

- (a) LIFO;
- (b) skills;
- (c) personal circumstances.

The final list will be drawn up by the company in consultation with the five shop stewards and shop stewards from affected departments.

6 In order to assist retrenched staff, the company offers:

- (a) a secretarial assistance for typing of CVs,
- (b) distribution of a list of names to other companies,
- (c) paid time off to be granted to five shop stewards for five days specifically to assist retrenched workers,
- (d) the company will make the sum of R10 000 available for use by the union

for retraining retrenched workers, to be released on receipt of a proposal and budget for spending.

7 All other points agreed between the parties prior to today to remain of force.'

[8] It was common cause that the envisaged meeting which was to be held within two weeks after the conclusion of the agreement never took place. According to the evidence of Mr Meeuwis, the reason for the failure to hold the meeting was due to respondent's refusal to respond to his invitations to attend the necessary meeting.

[9] At a meeting which eventually took place on 18 September 1999 to discuss the retrenchment of one Deon Charles, appellant requested that this meeting also deal with the proposed retrenchment of the security guards. Respondent insisted that discussion of the proposed retrenchment of the security guards take place at a separate meeting. On 22 September 1998 Mr Meeuwis suggested that he was available to meet either on 28 September, 30 September and 1 October 1998 but no response was received. On 6 October 1998 appellant proposed dates for a meeting between the parties. Respondent confirmed that it would meet appellant on 9 October 1998.

[10] On 8 October 1998 appellant informed respondent that they could not meet at 14:00 on 9 October as agreed but that it could meet earlier on that day. No such meeting took place. On 12 October 1998 appellant wrote to respondent requesting a meeting on 13 October 1998 to discuss the issue of the security department. Respondent replied that it was available to meet on 15 October 1998.

[11] According to Mr Meeuwis's evidence, it became increasingly difficult thereafter to arrange a meeting because Mr Richard Kawie, the regional organizer of respondent, was attending a course at the University of Cape Town (the university).

[12] Mr Kawie testified that, notwithstanding his attendance at a course at the university, he had made every effort to meet with appellant. For this reason he had written to Mr Meeuwis on 13 October 1998 in the following terms:

'Numerous telephone messages were left with yourself to finalize a date for a meeting. Your threatening manner and approach is noted and we will respond at our proposed meeting. Secondly your company has failed to supply proper details as per request from our shop stewards for information. We propose a meeting on Thursday 15 October 1998 at 10.00 am.'

[13] On 22 October 1998 Mr Meeuwis wrote to Mr Kawie as follows:

'Despite our expressed desire to meet on Friday last week there has been no response from the union in this regard nor attempts to meet this week. We feel that the company has done more than enough in respect of trying to reach consensus on this issue and consultations have now been in progress since the beginning of August. It is our intention to implement the part outsourcing of the security function with effect from 23 October 1998. For the record we are giving due consideration to the points raised by the union at our last meeting.... Arrangements will be made for existing guards to be interviewed by Combat Security. It is hoped that many of them will be able to secure employment with the security company.'

[14] Mr Kawie responded on the same day as follows:

'Mr Kawie expressed to you during the meeting that he would be attending the University of Cape Town on 19-30 October 1998.

Secondly your company's response confirms the union's view that -

- (a) Your company is not willing to consider alternatives.

(b) Your company is not willing to minimize the number of dismissal and your selection criteria is based on racial lines....

(d) Your method of selecting employees is based on a discriminatory process ... we are willing to meet with you on Saturday 24 October 1998 at 11h00 at your company's premises to resolve this matter amicably. We wish to place on record that if your company continues to retrench our members we will seek relief at the Labour Court.'

[15] Notwithstanding his offer, appellant issued letters of retrenchment on 23 October 1998 and the 11 security guards were dismissed. On 24 October 1994, Mr Reeves, the managing director of Combat Force, the company to which the security function had been outsourced made himself available at respondent's premises to interview the dismissed employees for possible jobs with his company. It appeared that respondent refused to participate in this process. Dismissal of a fair reason

[16] Section 188(1) of the Act provides as follows:

'A dismissal that is not automatically unfair, is unfair if the employer fails to prove -

- (a) that the reason for dismissal is a fair reason -
  - (i) related to the employee's conduct or capacity; or
  - (ii) based on the employer's operational requirements, and

(b) that the dismissal was effected in accordance with a fair procedure.'

[17] In SA Clothing & Textile Workers Union & others v Discreto - A Division of Trump & Springbok Holdings (1998) 19 ILJ 1451 (LAC) at para [8] Froneman DJP set out the test for determining whether a dismissal is for a fair reason (albeit in terms of the Labour Relations Act 28 of 1956), as follows:

'The function of a court in scrutinizing the consultation process is not to secondguess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process had been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational, commercial or operational decision, properly taking into account what emerged during the consultation process.'

[18] In essence the test enunciated in Discreto follows the approach to judicial review of administrative action enunciated by Froneman DJP in Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1425 (LAC), namely that courts should afford administrative bodies a significant margin of appreciation and not evaluate their actions in terms of value judgments which the courts impose upon the activities of such bodies. Thus as Froneman DJP said at para [36]:

'As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof but to determine whether the outcome is rationally justifiable, the process will be in order.'

[19] I have some doubt as to whether this deferential approach which is sourced in the principles of administrative review is equally applicable to a decision by an employer to dismiss employees particularly in the light of the wording of the section of the Act, namely, 'the reason for dismissal is a fair reason'. The word 'fair' introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.

[20] It is however unnecessary to decide this question because, whatever test is employed to the present dispute, appellant was able to show that the reason for the retrenchment of the security guards was that of cost-saving and for reasons which follow, respondent was not able to contest the fairness thereof.

[21] Mr Stelzner, who appeared on behalf of appellants, referred to a number of calculations regarding cost-savings which had been made by appellant to which respondents had access. These

reflected that post retrenchment costs per month would amount to R24 401,95 together with a guard contract of R19 580. This represented a monthly saving of R16 824,98 over the existing costs, of six officers and 11 guards.

[22] Mr Steenkamp, who appeared on behalf of respondent made much of a figure of R59 000 for the employment of ten guards compared to R29 000 for 11 guards pre-retrenchment which was cited by Mr Henry McCue, appellant's risk manager. However these figures did not take account of important hidden costs. As Mr McCue testified:

'The security company still works on a 12-hour basis, security company carries the cost of the people that are off and putting the replacements there, I don't carry the cost of that so under the new Act I would have to get extra people in, the security company carries the burden and the cost of the two gentlemen that is off ... my cost from the company side would be far higher, I would exceed that R59 000 that I am presently paying to Combat Force. We would have to look at the aim of the Act to come down to 45 hours a week and for security they would have to get quite a few extra people to do that and to keep for those people that are off.'

[23] Appellant thus placed evidence before the court which substantiated its reason for retrenchment, namely the downturn in production which necessitated a saving of costs. To the extent that the reason or cost-saving was disputed by respondent, a cogent explanation was given by Mr McCue, namely, when the service offered by Combat Force was compared to the amount which such service would have cost appellant to run internally, there was a clear cost-saving.

[24] It was not contested that there had been a 'dramatic downturn and demand for our products'. For this reason I find that appellant discharged the onus showing that there was a fair reason for its decision to retrench the security guards.

The procedural fairness of the dismissals

[25] Mr Stelzner submitted that appellant had consulted adequately on ways to avoid dismissal of respondent's members. It had considered proposals which might have minimized the number of dismissals and mitigated the adverse effects of dismissals. He submitted that appellant had convened numerous meetings after its initial decision on 5 August in order to consult with respondent, in terms of its obligations under s 189 of the Act. After the IMSSA agreement had been concluded on 11 September, appellant attempted on numerous occasions to convene a meeting that would have allowed the consultation process to continue. This process of consultation was stultified by respondent's refusal to attend any of the meetings which had been proposed.

[26] Mr Steenkamp submitted that there was no question that respondent had adopted a subversive attitude designed to postpone inevitable retrenchments. He referred to the evidence of Mr Kawie who had tried to contact Mr Meeuwis with a view to finalizing a date for a meeting, proof of which was to be found in letters written by Mr Kawie on 8 October 1998 and 13 October 1998. Similarly Mr Kawie had testified that he attempted to contact Mr Meeuwis telephonically. It was never denied that Mr Meeuwis could have contacted Mr Kawie by telephoning him on his cellphone, the number of which he knew.

[27] On the basis of this evidence it is probably a fair reflection of events to conclude that until 22 October 1998 no party was at fault for the failure to implement the agreement and hold a further meeting in order to engage in further consultation.

[28] However on 22 October 1998 appellant moved decisively when Mr Meeuwis wrote to respondent informing it that it was appellant's intention to implement the outsourcing of the security department with effect from 23 October 1998 and that in arriving at this decision it had given due consideration to the points raised by respondent at the previous meeting with appellant on 3 September 1998.

[29] On the same day appellant received a letter from respondent offering to meet on 24 October 1998 'at your company premises to resolve this matter amicably'. Notwithstanding this letter, appellant proceeded to dismiss the 11 security guards. No reason was proffered by appellant as to the urgency of this decision and hence as to the existence of any compelling reason which justified its action to ignore the offer made by respondent to meet but one day later.

[30] Mr Stelzner attempted to counter this difficulty by referring to the meeting with Mr Reeves of Combat Security which was held on 24 October and in terms of Mr Meeuwis's letter of 22 October where it had been indicated that Mr Reeves may have been prepared to offer employment to some of the dismissed employees.

[31] It might well have been in the interests of the dismissed employees and respondent to have attended the meeting on 24 October 1998, particularly with a view to minimizing the effect of the retrenchment.

However this conduct does not provide a satisfactory answer as to why appellant ignored respondent's offer to meet on 24 October, at which meeting careful consideration could have been

given to any alternatives to retrenchment which may have been proposed by respondent. Had the meeting been held on 24 October as proposed by respondent, it would have given effect to the intention of the parties as contained in the IMSSA agreement. That agreement reflected that both parties considered that the process of consultation had not yet been completed as at 11 September 1998 and that further meetings were required to conclude the process of meaningful consultation as envisaged in s 189.

[32] In the light of the manner in which appellant chose to ignore this bona fide offer of respondent on 22 October and to proceed with the dismissals notwithstanding. I find that appellant breached the obligations imposed on it in terms of s 189 of the Act to engage in a meaningful process of consultation before dismissals for operational requirements could be effected. For this reason it failed to comply with the statutory requirement of procedural fairness.

#### Compensation

[33] Section 193(1) of the Act provides, inter alia that '[i]f the Labour Court finds that the dismissal is unfair, the Court ... may ... (c) order the employer to pay compensation to the employee'.

[34] Section 194(1) of the Act provides that -

'[i]f a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. Compensation may however not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim'.

[35] Once the court has decided to exercise a discretion to award compensation on the grounds of procedural unfairness, the court is mandated to award the amount of compensation pursuant to the formula as provided in s 194 of the Act (*Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at para [40]).

[36] Mr Stelzner submitted that respondent's failure to attend the meeting on 24 October with Mr Reeves was sufficient to justify the court to exercise its discretion against the award of any compensation. I disagree. Admittedly respondent should have considered participation in that meeting to negotiate the losses of their members but in itself this does not detract from the fact that appellant breached its obligation to consult fairly. In itself the failure to meet and consult justified the award of compensation which must now be fixed in terms of the formula contained in s 194.

[37] Where s 194(1) is to be applied rigidly, the period in terms of which compensation should be awarded would amount to more than 15 months. Significantly s 194(2) provides as follows:

'The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[38] Section 194(2) contains a 12-month cap. Can it then be said that dismissal for procedural unfairness can result in compensation of remuneration for more than 12 months whereas compensation for a dismissal for an unfair reason is limited to 12 months' remuneration? In *Whall v Brandadd Marketing (Pty) Ltd* (1999) 20 ILJ 1314 (LC); [1999] 6 BLLR 626 (LC), Grogan AJ employed the distinction between s 194(1) and (2) to find that the court has to exercise two separate discretions, to decide to award compensation per se and then to decide upon the quantum thereof (at paras [36]-[37]). That interpretation not only subverts the wording of s 194(1) but runs contrary to the finding in *Johnson's* case. There may however be a *via media* between the two approaches which is to be sourced in a purposive interpretation of the applicable sections.

[39] Section 194(2) envisages that the amount of compensation cannot be less than that awarded in terms of s 194(1) and not more than 12 months' remuneration. Accordingly s 194(2) is based upon the assumption that an employee could not be awarded more than 12 months' remuneration in terms of s 194(1). Were it to be otherwise the upper limit contained in s 194(2) either would be meaningless, or would work an anomalous result such as in the present case where dismissal for an unfair reason would result in a maximum of remuneration for 12 months' compensation but a dismissal for procedural unfairness would necessitate an award of remuneration of more than 15 months.

[40] When the two subsections are examined in this light, the interpretation which gives best effect to the purpose of this section is as follows: A court has a discretion to award compensation for dismissal on ground of procedural unfairness in terms of s 193(1)(c). If it decides to so exercise its

discretion, it must follow the formula contained in s 194(1) subject to a maximum of compensation equal to 12 months' remuneration.

Order

The order of the court a quo is set aside and in its place the following is substituted:

1 The dismissals of the following members of respondent ... by the respondent was procedurally unfair.

2 Appellant is ordered to pay compensation to each of these members of respondent equal to the remuneration that each member would have been paid for 12 months commencing upon 23 October 1998 at the rate of remuneration of each member at the date of dismissal.

Appellant is ordered to pay costs.

Zondo JP and Du Plessis AJA concurred.