IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No. CA 13/2002

In the matter between:

ENTERPRISE FOODS (PTY) LTD. **Appellant**

and

ALLEN & 11 OTHERS **Respondent**

JUDGMENT

DAVIS AJA

INTRODUCTION.

[1] This is an appeal against a judgment of **Cheadle AJ** sitting in the Labour Court which was delivered on 11 June 2002 in which the learned Acting Judge found that the dismissal of respondents was substantively and procedurally unfair. The Court a quo ordered that the appellant pay each respondent an amount equal to twelve months' remuneration. Appellant has now appealed against the whole judgment and order which was granted.

THE FACTS.

[2] Appellant operates a business in the processed meat industry and manufactures polony, viennas, spreads, bacon, ham and other canned meat products. In 1993 appellant merged with Renown Foods which resulted in the acquisition of several abattoirs and processing plants across the country. In particular, it acquired a

processing plant located in Pietersburg that focused on emulsion products, a plant in Germiston which focused on muscle cut products and a plant in Maitland, subsequently moved to Montague Gardens, which manufactured a range of processed meat products and 'Herti' meats.

[3] As a consequence of the merger it appeared that there was a duplication in function at various of the plants and for this reason the operations of the merged company were in need of a process of rationalisation. A project team worked on a rationalisation plan during 1997 together with an American consultant, Mr Brett Thompson. The team examined all the factories and plants within appellant's organisation and Thompson in particular recommended that appellant should look closely at establishing 'focused factories'. According to Mr Scholtz, who testified on behalf of appellant, the project team made no specific proposal, was not approved by the board and 'it was left unshelved'.

[4] In 1998 appellant decided to upgrade its Pietersburg plant which was over 40 years old and where the machinery was in urgent need of replacement. In July 1998 appellant purchased new machinery at a cost of R40 m. The new production facility in Pietersburg was completed with great speed and the first viennas were manufactured at the plant in June 1999.

[5] According to Mr Scholtz, it was always part of appellant's plan to upgrade the

Pietersburg plant to divert the production of polonies and viennas from the Montague Gardens factory to the newly commissioned Pietersburg plant.

[6] Mr Scholtz testified that appellant did not plan to close down the Montague Gardens plant, albeit that approximately 40% of its production would have been so diverted to Pietersburg. Appellant's case was that the decision to close Montague Gardens was precipitated by a shareholder demand to reduce costs in order to ensure the achievement of a profit target, namely a 25% return on appellant's funds. At this stage, Mr Scholtz established a project team to investigate measures to ensure that appellant's return on funds for that year, being 9%, could be increased so as to meet shareholder expectations. A business plan was developed and presented to appellant's executive committee on 25 May 1999 and to the board of directors on 9 June 1999.

[7] According to the evidence presented to the court ***a quo,*** the presentation to the board included the view that appellant's performance had been negatively affected by exchange rates, interest rates, trends in consumer behaviour and low chicken prices. There was an unnecessary duplication of production facilities within the organisation and the new automated process at Pietersburg meant that there was now space capacity which could be used at far less cost than retaining production elsewhere. The rationalisation plan prepared by Mr Scholtz's team included the recommendation that the Montague Gardens facility be closed and

the plan contained the estimate that 733 employees would be rendered redundant of which 394 were employed at Montague Gardens.

[8] A minute of an executive committee meeting of 25 May 1999 confirms that this committee analysed and then approved of the plan. On 9 June 1999 the board of directors approved the plan.

[9] On 12 July 1999 Mr Scholtz together with Mr Korff, the human resources director of appellant, traveled from Johannesburg to Cape Town to inform employees at Montague Gardens of these developments. A presentation was made to the management team and thereafter to all salaried staff and shop stewards of the unionised workforce. A written notice summarising the presentation was also put on the notice board at the Montague Gardens plant. In this written notice, employees were informed that it was with regret that the appellant was required to announce that, owing to extremely poor economic conditions and resultant operational requirements, management had little choice but to restructure appellant. They were also informed that the process 'may regretfully result in the closure of the plant'. Employees were informed that management would be available for consultation with employees and/or their representatives as from 12 July 1999 and that the consultation process should ideally be finalised by 31 July 1999 and, if no alternative to retrenchment could be found, the notice month would be August 1999.

[10] On 12, 13, 20, 22 and 27 July 1999 consultations were held with individual members of management at Montague Gardens. At the termination of this process, respondents were given notice on 31 July 1999 that they would be retrenched with effect from 31 August 1999.

The finding of the Court *a quo*.

[11] **Cheadle AJ** found that the conduct of appellant had been both substantively and procedurally unfair. He found that the decision to close down the Montague Gardens plant had been directly attributable to the shareholders' requirement for a 25% return on funds. Thus Cheadle AJ said 'It was that requirement that triggered the establishment of the project team under Mr Scholtz. No evidence was led on why 25% was required. There may have been very good reasons for doing so. But in the fact of the closure of a profitable plant, the retrenchment of 733 employees and the fact that the restructuring plan was not a long-term solution, the company was required to explain why the shareholders' demand for a 25% return was operationally required.'

[12] As Cheadle AJ found that the appellant was unable to provide a satisfactory explanation, he held that appellant had failed to prove that its primary reason was either operationally required or fair.

[13] Regarding procedural unfairness, **Cheadle AJ** found that the consultation process had in effect taken place after the shareholders' approval for the restructuring had been given on 9 June 1999. At the very least the document tabled at a meeting of

the executive committee of appellant on 25 May 1999 illustrated the desire of appellant to ensure that the new plant at Pietersburg became operational before any announcement was made regarding Montague Gardens for 'this timing will give Pietersburg at least a month to sort out start up problems before the Montague Gardens announcement'. In short, the process of consultation had taken place long after the appellant had contemplated a restructuring of its organisation in general and the closure of Montague Gardens in particular.

SUBSTANTIVE FAIRNESS.

[14] Mr Van der Riet, who appeared on behalf of appellant, submitted that the court ***a quo's*** focus on the shareholders' intention to earn 25% return on capital missed the fundamental basis upon which the restructuring was predicated. He submitted that the unchallenged evidence of appellant's witnesses was that in the 1998/1999 financial year various factors, including lower sales volumes, resultant pressure on prices, an exchange control crisis in South Africa and a world surplus of protein had impacted negatively on the profitability of appellant. As a result of these factors, by May 1999 the return on capital had decreased from 19% at the end of the previous financial year (at the end of August of that year) to 9%. Appellant was clearly concerned with falling profit margins and accordingly appointed a project team to investigate the restructuring of its organisation during which period the team revisited a rationalisation plan produced by Mr Thompson in 1997. Mr Van der Riet contended that the investment of R40 m in the Pietersburg plant did not entail an automatic closure of the Montague Gardens

plant. He submitted that nothing on the record supported the conclusion to the contrary. However, with the subsequent but rapid deterioration of market conditions, a further consideration of possible duplication of production facilities was undertaken. Following this, appellant decided to concentrate facilities in the Gauteng area which was the source of the vast bulk of appellant's business. It was these developments that necessitated the reconsideration and ultimate decision to close down certain facilities, including Montague Gardens.

[15] Significantly Mr de Klerk, who appeared on behalf of respondents, did not contest the existence of 'justifiable grounds' for the restructuring of appellant's organisation. He submitted, however, that the need to restructure had initially been triggered when appellant merged with Renown Foods in 1993. The 'Thompson' report in 1997 clearly indicated the need to reduce unnecessary duplication of production and to focus appellant's business in the area where its largest market was located. Mr de Klerk submitted further that the adverse economic conditions in 1999 might have played a role but were not the overriding cause for the closure of the Montague Gardens plant.

[16] On the basis of Mr de Klerk's submission, it appears that respondents' complaint had less to do with the existence of justifiable objective reasons for the restructuring of appellant's business than with the manner in which appellant had sought to argue its case in respect of the substantive fairness of the dismissals. In

fact the respondents accepted that there were justifiable economic reasons for closing the plant.

[17] Manifestly, the executive committee of a company, such as appellant, is far better positioned than a court to determine the basis for a significant business decision such as the restructuring of operations. However, as **Zondo JP** said in **CWIU and Others v Algorax (Pty) Ltd** [2003] 11 BLLR 1081 (LAC) at para 69 concerning the question of fairness of a dismissal: 'When either the Labour Court or this Court is seized with a dispute about the fairness of a dismissal, it has to determine the fairness of the dismissal objectively. The question whether the dismissal was fair or not must be answered by the Court. The court must not defer to the employer for the purpose of answering that question. In other words it cannot say that the employer thinks it is fair, and therefore, it is or should be fair'. The Court must examine whether there is a fair reason to dismiss. If as **Zondo JP** noted in **Algorax, supra** there are two rational solutions, one of which preserves jobs, fairness as mandated by the Labour Relations Act 66 of 1995 ('the Act') dictates that this is the solution that must be adopted by the employer (at para 70).

[18] Mr de Klerk's concession was therefore wisely made. On the record, there were objective reasons for the restructuring of appellant's organisation, which included job losses, notwithstanding that not all elements of the reasons had been raised by appellant when it presented its case before the Court ***a quo***. In my view, therefore, the dismissal of respondents was not substantiantively unfair.

PROCEDURAL UNFAIRNESS.

[19] Mr van der Riet submitted that management has a duty to manage the enterprise as effectively as it can. In the event that an enterprise is confronted with difficult economic problems, there must be an investigation and plans should be formulated to deal with the problem. He submitted that the law relating to retrenchment does not prohibit management from engaging in these initiatives before discussing these problems with employees. On Mr van der Riet's submission, the law relating to retrenchment only requires management to present its plan as a proposal and to have an open mind regarding alternative proposals

emanating from its employees during the consultation process.

[20] Mr van der Riet submitted that the evidence indicated that appellant understood that it was under a legal obligation to consult fairly with affected employees before it could implement any restructuring plan. The plan which was presented to employees was described as ‘’n voorlopige besluit’ and employees were then invited to consult about whether or not the proposal should be implemented. Mr van der Riet also submitted that, after the consultation process had taken place from 12 July 1999 no attempt had been made by respondents to formulate alternative plans or to object **strenuously** to the process which had been initiated by appellants.

[21] Mr de Klerk submitted that the facts showed that appellant had embarked on a restructuring exercise in 1998 when it decided to invest heavily in its Pietersburg plant and must have contemplated the possibility of retrenchments at that stage when a decision was made to shift some 40% of Montague Gardens production to the Pietersburg plant.

[22] Section 189(1) of the Labour Relations Act 66 of 1995 (‘the Act’) provides:

“When an employer contemplates dismissing one or more employees for reasons based on the employer’s operational requirements, the employer must consult –

a) any person whom the employer is required to consult in terms of a

collective agreement;

b) if there is no collective agreement that requires consultation –

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

[23] The phrase which is required to do the key work in this section is "**when an employer contemplates…the employer must consult..."** In my view, the word 'contemplate' does not exclude an employer from developing a preliminary approach upon which a decision may be based. Hence Mr Van der Riet is correct to contend that appellant could investigate a new plan without consultation.

However as **Cheadle AJ** noted in his judgment 'Fundamental to ***bona fide***

consultations is that the consultations precede the final decision'. Hence in the present dispute the question that arises is what the nature and status of the 'investigation,' as Mr Van der Riet called it, were.

[24] Mr Van der Riet submitted that the final decision had not yet been taken when the board made 'a decision' at its meeting on 9 June 1999, notwithstanding that there is nothing in the minutes of the board meeting which suggests that the board contemplated a further process of examination, pursuant to alternative proposals having been made by the affected employees. However, Mr Van der Riet emphasized that, when Mr Scholtz made his presentation to the employees at Montague Gardens, the slides he employed reflected that what had been taken was ''n voorlopige besluit'. Thus Mr Van der Riet contended that respondents had been presented with no more than 'a provisional' decision.

[25] Significantly the slide presentation also contained the following: 'Bg het genoodsaak dat die volgende besluit geneem is:….

sluit en verkoop Montague Gardens aanleg'. Thereafter the following appears on the slide:

'Bogenoemde besluit het niks te doen met Montague se werksprestasie, of resultate nie. Die mark vir ons produkte lê in Gauteng en Natal (70%). Inteendeel, is tans en sy span by baie geleenthede uitgewys as die span met die meeste vaardighede. Ons verloor uitstekende werkers voor ons julle 'n

geleentheid gee om vrae te vra, gaan Hennie julle inlig t.o.v. wanneer die fabriek sluit, retrenchment pakette, ens'.

[26] While there is little evidence to suggest that at the consultations on 12 and 13 July respondents offered any alternative to the closure of the plant, the minutes of the consultation meeting held on 20 July reflects a different picture from that suggested by Mr Van der Riet. For example, the following appears in the minutes:

'**Charles (Smith**): The general consensus was that the process was not correct. The notice of 12 July said the plant will close – the process was decided before hand…..

Charles (Smith): If you look at the Act, the process of consultation with people, why wasn't it discussed with management two months ago? If the process started earlier, a management buy-out could have been possible…..If we were informed six weeks ago, when the process was initiated, when top management knew that the closure was a possibility, then we could have made a plan.'

[27] Mr Korff is then reflected as saying the following: 'The Labour Law consists of a number of issues which include Labour Law, Common Law and judgments. There is a mechanical check list that is important. The proper approach is to come to consensus. We came down to Montague to inform the people personally. We could have faxed the notification to you but we wanted to do it face to face

and discuss it personally.'

[28] Kurt Rietman is then reported as saying 'Let us come back to one point, namely, everyone should be notified of the possibility of closure. This case is not a maybe, it is a cut and dry case that the factory will close 31 August. When Mr Korff suggested that respondents could provide appellant with alternatives Mr Smith said ' If the factory close, the assets must be moved before 31 August. (sic) We do not know what are for sale. If this process was started earlier, we could have tried'.

[29] Far from passively accepting the decision of appellant, it appears that respondents were aggrieved by the manner in which they were informed of the decision and it was their perception, as is evident from these minutes, that a final decision had already been made. The only evidence which was offered to the contrary was that of Mr Korff to the effect that he had reported to Mr Havenga, the managing director of appellant, as well as Mr Scholtz's testimony that both he and Mr Korff had reported to the shareholders subsequent to the meetings of 12 and 13 July. Significantly, after having received that report, shareholders wanted to bring the date of closure forward to the end of July but they were ultimately persuaded that this was not possible.

[30] In summary, there is no evidence that the decision taken at the board meeting on 9

June 1999 which followed upon the executive committee meeting of 25 May 1999 was intended to be anything other than a final decision. The manner in which the presentation by Mr Scholtz was phrased, is indicative that the so-called process of consultation was nothing more than a procedure designed to inform affected employees of a decision already taken.

[31] Given that the statutory obligation upon appellant was to consult employees when it contemplate the dismissal of such employees, the manner in which appellant sought to discharge its obligation falls far short of the standard demanded by section 189 in which a ***bona fide*** consultation is required to precede a final decision to dismiss.

RELIEF.

[32] In ordering that the appellant must pay each of the respondents an amount equal to twelve months remuneration, **Cheadle AJ** preferred the evidence of respondents over that of appellant, to the effect that the process which began on 12 July 1999 was not a proper process of consultation and that respondents had 'been presented with **a fait au accompli** - a decision which had been made by the company to close the Montague Gardens plant before the announcement and the consultations.'

[33] In my view, there is nothing on the record to disturb this finding nor the relief which followed as a consequence thereof, namely that each respondent should be awarded twelve months remuneration calculated at their respective rates of remuneration on the date of dismissal.

[34] For these reasons the appeal is dismissed with costs.

D.M. Davis

I agree

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Zondo JP

I agree

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Jafta AJA

Appearance:

For the Appellant	**:**	**Adv Van der Riet SC**
Instructed by	**:**	**Cliff Dekker INC**
For the Respondent	**:**	**Mr De Klerk**
Instructed by	**:**	**De Klerk Attorneys**
Date of Judgement	**:**	**11 May 2004**