CASE NO: 424/93
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ATLANTIS DIESEL ENGINES (PTY) LTD

and

NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA

SMALBERGER, JA

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ATLANTIS DIESEL ENGINES (Pty) LTD Appellant

and

NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA Respondent

CORAM: HOEXTER, SMALBERGER, KUMLEBEN,
NIENABER et HOWIE, JJA

HEARD: 14 November 1994

DELIVERED: 30 November 1994

JUDGMENT

SMALBERGER, JA:-

The appellant ("the company") is a manufacturer of diesel

engines and components. In March 1991 it retrenched a number of its hourly-paid employees. Most of them were members of the respondent ("NUMSA"). Consequent thereon NUMSA sought an order in the Industrial Court, in terms of s 46(9) of the Labour Relations Act 28 of 1956 ("the Act"), that the retrenchment constituted an unfair labour practice. Relief was sought on behalf of the affected employees in the form of reinstatement, alternatively, compensation. The Industrial Court held that no unfair labour practice had been committed and dismissed the application. Its judgment is reported at (1992) 13 ILJ 405 ("the IC judgment").

NUMSA, in terms of s 17(21A)(a) of the Act, appealed against this decision to the Labour Appeal Court ("the LAC"). It upheld the appeal, set aside the Industrial Court's determination and substituted a determination in favour of NUMSA that the company had committed an unfair labour practice. The LAC made no specific order of reinstatement or compensation but came to the following decision (at p 654 H-I):

> "It appears to this court to be a wiser course to leave the details of reinstatement (if at all) and/or compensation (if any) to be discussed and negotiated between the appellant union and the respondent company. Should they fail to reach agreement, they may submit the matter to arbitration or approach this court for a decision upon presentation of the relevant evidence."

The judgment of the LAC is reported at (1993) 14 ILJ 642 ("the LAC judgment"). The company, having obtained the required leave, now appeals against that court's findings and determination. The essential facts of the matter are not in dispute. They are set out in the main in the LAC judgment at 644I-646I. No point would be served by repeating them in detail. It will suffice to highlight the following:

1) In 1990 the company found itself in serious financial difficulties. The market for its products was declining and its operational capacity was substantially in excess of its needs. It had considered retrenchment - and had consulted with NUMSA in this regard - but was able to avoid that course

largely because of resignations and by redeployment of personnel.

2) In January 1991 the company notified its employees that its financial plight persisted and that it was considering "downsizing" itself. It further informed them that a cost analysis group, comprising senior members of management and representatives of shareholders, had been appointed to consider the company's organizational structure and "to analyse all cost-relevant factors". The group in due course reported in writing its finding to the company ("the CAG report").

3) A consultative process was set in motion involving the company, NUMSA and certain other unions representing elements of the overall workforce ("the other unions"). To this end a series of five meetings was held in February and March 1991.

4) In the course of these meetings the company furnished

NUMSA and the other unions with certain details relevant to its financial position and the retrenchment issue. Certain proposals were tabled. At the third of these meetings (held on 15 March 1991) NUMSA requested management to furnish it with the full CAG report to enable it to make helpful proposals with regard to retrenchment. The company's response was that the report was confidential; that its essence had already been communicated to NUMSA; and that disclosure of the full report could prejudice both its business and that of its suppliers.

5) NUMSA did not persist in its demand for the full report at the fourth meeting. At the fifth and final meeting (held on 20 March 1991) NUMSA resurrected its demand for the full CAG report when invited to put forward further proposals to avoid retrenchment. The company declined to do so in the absence of a specific undertaking by NUMSA to preserve the report's confidentiality (citing certain recent leakages to the

press). It nevertheless undertook to provide certain confidential information in general terms, which it proceeded to do. As NUMSA was unable to put forward any alternative proposals concerning retrenchment, the company gave notice that retrenchment would ensue forthwith.

The unfair labour practice definition in the Act at the operative time read (to the extent that it is relevant):

" 'unfair labour practice' means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and an employee, and shall include the following:

(a) .....

(b) the termination of the employment of an employee on grounds other than disciplinary action, unless -

(0 . .

(H) (aa) ....

(bb) prior consultation in regard to such termination of employment took place with either such employee or where the employee is represented by a trade union or body recognised by the employer as representing the employees or any group of them with such trade union, body or

group;

(cc) ....

(dd) . . ."

The central issue in the appeal is in my view correctly identified in the LAC judgment at 646I as follows:

> "[T]he essence of the dispute concerns the question whether or not there was proper prior consultation by the company with the union [NUMSA] in respect of the retrenchment. The union alleged that the company had failed to consult properly because of its refusal to disclose to the union the full content of the CAG report."

As far as the CAG report is concerned, the LAC judgment also correctly records (at 647A) that:

> "The full report was disclosed only a few days before the hearing. It consists of a department by department analysis of the company's position, and recommends certain corrective actions, including reduction of staff spread over a two-year period."

In its judgment the LAC (at 65IE) referred to the Industrial Court's finding that the CAG report contained sensitive and confidential information which, if disclosed, could prejudice the

company's business. It went on to hold (at 653H-I) that

> "without deciding whether the relevant information was indeed confidential or not, it is clear from a perusal of the report that the company could have blocked out those details which it sought to keep secret without disturbing the broader import of the report."

It finally concluded (at 654C-D):

> "In the circumstances we find that there was a duty on the company to make the relevant portions of the report available to the appellant [NUMSA], either in full or in condensed form but without exclusion of relevant facts and details. Its failure to do so means that it had failed to consult properly with the appellant and had therefore committed an unfair labour practice."

The unfair labour practice definition casts upon an employer a duty of prior consultation with its employees (or their representative union or unions) before termination of their employment on non-disciplinary grounds. This raises issues of broader principle : when does such duty arise; what is the extent thereof; and what is the proper procedure to be followed by employers, and the concomitant rights of employees, in relation to

the issue of retrenchment? That a lack of accord exists in relation to these matters in the decisions of the Industrial and Labour Appeal Courts appears from the judgment of THRING, J in Chemical Workers Industrial Union and Others v Sopelog CC (1994) 15 ILJ 90(LAC) at 100I to 103C. No useful purpose would be served in stating and analysing the different points of view expressed in these decisions. They reflect, broadly speaking, two opposing approaches. The first finds general recognition and acceptance in the IC judgment at 407G-409B; it tends to negate the need to consult as a necessary prerequisite to a decision at managerial level to retrench. The second finds expression in the LAC judgment at 649C-650C. The latter approach requires consultation once the possible need for retrenchment is identified and before a final decision to retrench is reached. It proceeds on the premise that consultation requires more than merely affording an employee an opportunity to comment or express an opinion on a decision already made. It envisages a final decision being taken by management

only after there has been consultation in good faith.

I agree with what I have referred to as the second approach. 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 their union representatives 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 retrenchment, 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 their unions with regard to retrenchment. Furthermore, the ultimate decision to retrench is one which falls squarely within the competence and responsibility of management. The need to consult before a final decision on retrenchment is taken has its rationale both in pragmatism and in principle (cf. South African Roads Board v Johannesburg City Council 1991(4) SA 1(A) at 13 B-C). It is rooted in pragmatism because the main objective must be to avoid retrenchments altogether, alternatively, to reduce the number of dismissals and mitigate their consequences. Consultation provides employees or their union(s) with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or, if such need is accepted, the extent and implementation of the retrenchment process. It satisfies principle because it gives effect to the desire of employees who may be affected to be heard, and helps serve the underlying policy of the Act - to avoid or at least minimize industrial conflict. Where retrenchment looms employees face the daunting prospect of losing

their employment through no fault of their own. This can have about serious consequences and threaten industrial peace. Proper consultation minimizes resentment and promotes greater harmony in the workplace.

Counsel for the company and NUMSA respectively were essentially in agreement as to the existence of a duty to consult and the stage at which it arises, as outlined above. They were not ad idem with regard to what the duty comprehends. Mr Gauntlett, for the company, contended that an employer's duty extended no further than:

a) to consult in good faith at the appropriate time;

b) to make, to the extent that circumstances permit, a sufficiently full disclosure of relevant information to the affected employees (or their union(s)) to enable the consultative process to take place fairly; and

c) to allow them an adequate opportunity to be heard, the extent of such opportunity being dependent upon the facts of each particular case.

Mr Tip, for NUMSA, accepted the correctness of (a) and (b). As far as (c) is concerned, he contended that the employer's duty extended beyond merely providing the affected employees with an adequate opportunity of being heard. He argued that the endeavour to avoid retrenchment, or minimize its consequences, should amount to a joint problem-solving exercise with the parties striving for consensus where possible. I agree that consultation, if circumstances permit, should be geared to achieve that purpose (bearing in mind that problem-solving is something distinct from bargaining and that the final decision, where consensus cannot be achieved, always remains that of management). Such a course would best serve the objectives of the Act and be conducive to industrial peace.

The approach approved above is the one that should be followed as a general rule in a matter such as the present in order to achieve the required degree of fairness necessary to avoid falling foul of the unfair labour practice definition. It must be

emphasized, however, that whether an employer has, in a retrenchment matter, complied with the duty of prior consultation will inevitably depend upon the peculiar facts and circumstances of each individual case. The scope and extent of consultation may be attenuated in certain circumstances because of eg considerations of urgency or confidentiality or some equally compelling reason (cf. Administrator, Transvaal, and Others v Zenzile and Others 1991(1) SA 21(A) at 40 C-E). I further agree with what was said in the LAC judgment at 652C that

> "[a]n employer cannot be expected to disclose information which (a) is not available to it; (b) is not relevant to the issues under discussion; and (c) could harm the employer's business interest for reasons other than its relevance to the consultation process, eg trade secrets and other confidential information".

I come now to what is the crux of the present appeal. Did proper consultation with NUMSA take place concerning retrenchment having regard to the relevant facts, and the principles enunciated above? If not, the company would have failed in its

duty to consult and would have been guilty of an unfair labour practice. The answer to the question posed lies in whether the company disclosed to NUMSA whatever information it could reasonably have been expected to reveal so that effective consultation could take place. In this respect the CAG report assumed cardinal importance because the whole retrenchment process revolved around it.

The evidence establishes that there had always existed a good and harmonious working relationship between the company, its employees and their representative unions (including NUMSA). This is exemplified by the fact that even on appeal, in seeking to preserve that relationship, neither party has sought costs against the other. There was accordingly no valid reason for the employees (or NUMSA) to distrust the company or suspect its motives. Mr Tip conceded that the company had a legitimate interest in seeking to protect the confidential content of the CAG report, and that its refusal to disclose the whole report was not due to a lack of good

faith on its part. It was not contended on appeal, in my view rightly, that the company had consulted in bad faith, despite certain misgivings expressed in the LAC judgment at 653A and whatever contrary (but erroneous) perception NUMSA might have had at the time. The only issue therefore is whether the company acted unreasonably and, accordingly, unfairly.

That the CAG report contained confidential information prejudicial to the company's business interests was not seriously contested. In this regard Mr Greyling, the company's commercial director, testified as follows:

> "Kan u net weer vir ons verduidelik wat was die vertroulikheid wat u na verwys het in Januarie/Februarie 1991. Was daar oënskynlik sensitiwiteit om inligting openbaar te maak aan die Vakunie? Wat sou dit wees?
>
> Die verslag soos ons horn aan u voorgele het bevat sekere inligting wat op die datum van uitreiking daarvan, middel Februarie, baie vertroulik van aard was. Onder andere daarin is daar aanduidings van die soort van prysverlaging wat ons op komponente vlak met plaaslike leweransiers sou beding het. Daar is 65 van hierdie

ondememings wat komponente aan ons lewer en met elkeen van daardie 65 mense moes ons om die tafel gaan sit en ons probleem aan hulle verduidelik en 'n betere prys nit hulle nit beding. Daar was geen manier dat ons kon toelaat dat hierdie soort van inligting algemene kennis word nie.

Daar is ook aanduidings in daardie verslag van die omvang van pryskonsessies wat ons aan die Engelse of wat ons van PERKINS sou beding. Die ander lisensiehouer.

: Ja.

: Weer eens, dit sou ons - ons saak benadeel net indien daardie soort van inligting algemene kennis sou geword het. Die groep het hulle ondersoek afgehandel aan die einde van - einde van Februarie. Daar is eintlik nie baie tyd gewees om hierdie strategic alles in plek te stel nie.

: Waarom sou dit u benadeel, kom ons begin maar by die plaaslike verskaffers, waarom sou dit u benadeel om prysverlagings deur plaaslike verskaffers algemene kennis te maak?

: Jy ontneem jouself van 'n geleentheid om te beding en te onderhandel indien die persoon wat jy nader alreeds vooraf kennis het van wat jy wil hê by horn."

In the light of Greyling's evidence the company was entitled

(in the absence of reasonable safeguards) to refuse to divulge the full contents of the report. Mr Tip conceded as much. Its attitude in that regard cannot be labelled improper, unreasonable or inherently unfair.

In its judgment the LAC held (at 653F) that there "can be no doubt about the relevance of the CAG report and the instrumental role which it played in the decision to retrench a number of the appellant's [NUMSA's] members". It then went on to list various matters covered in the report which pertained in some way to the decision to retrench (at 653G). It declined to make any finding as to whether what it termed "the relevant information" in the CAG report, was confidential. It simply held, as previously mentioned, "that the company could have blocked out those details which it sought to keep secret without disturbing the broader import of the report". It did not attempt to define what those details were, nor did it consider how their omission from the report by blocking them out would have impacted upon it and whether the report, thus

modified and abridged, would have been acceptable to NUMSA. It then went on to add (at 6531):

> "To the extent that the alleged confidential information might have been relevant, the company should at least have indicated the nature of the information which it refused to disclose to the appellant and should then have sought ways of making the nub of the information available without prejudice to the company's interests."

It appears from the evidence and the minutes of the various meetings between the company, NUMSA and the other unions that the company was prepared to, and did in fact, divulge, at least in general terms, important aspects of the CAG report. From its point of view it went as far as it could without harming or prejudicing its business interests and prospects. It was even prepared to offer the full report to NUMSA in return for a guarantee of confidentiality. NUMSA claimed it was unable to give the guarantee sought. The reasons advanced by it for its inability to do so are not entirely convincing, but there is no need to embark upon a consideration of them. By making the offer the company demonstrated its

willingness to make the fullest possible disclosure provided confidentiality was adequately protected. There is no reason to believe that its offer was not a genuine one.

The finding of the LAC that the company could simply have blocked out the details in the CAG report which it sought to keep secret is in my view flawed as it overlooks the realities of the situation. First, NUMSA throughout insisted upon having sight of the full report. Its attitude in this respect was seemingly based upon a wrong and unjustified perception that the company was unfairly trying to withhold relevant information from it. It is therefore unlikely that it would have been satisfied with anything less than the full report. There was certainly no evidence on its behalf to suggest the contrary. Second, what would have been blocked out would have been the very information which the company had declined to furnish because of its confidential nature and on which NUMSA was insisting. With this information blocked out NUMSA would have been in no better a position than

it was; by the same token the company would not be providing any more information than it already had. Blocking out parts of the report would therefore have served no purpose.

On appeal there was a subtle shift in emphasis in relation to the matter of alleged non-disclosure. It was argued on behalf of NUMSA that it was the company's responsibility to "manage", the information at its disposal. Apart from the question of blocking out parts of the CAG report, it was contended that there were relevant non-confidential aspects of the report that the company could and should of its own initiative have disclosed to NUMSA in fulfilment of its duty to make proper disclosure. Two such aspects were raised in argument. They were (1) the number of retrenchments envisaged on a department to department basis and (2) the fact that the retrenchment programme was due to extend over a period of two years. It can be accepted for present purposes that no valid reason existed why the company could not have passed this information on to NUMSA. Non constat that its

failure to do so constituted a breach of its obligation to consult fully and fairly.

With regard to (1), NUMSA was in the nature of things fully alive to the fact that the company operated in different departments. According to Mr Olifant, a NUMSA shop steward, the information made available by the company with regard to the possible number of retrenchments, expressed in percentages, made it impossible to determine how many employees were to be retrenched per department. If this information was considered by it at the time to be relevant to the consultative process, NUMSA could specifically have asked the company for the necessary details. It apparently never did so at any of the five meetings, or at any other time. Much the same situation pertains to (2). NUMSA knew that the issue of retrenchment had arisen in 1990 but that retrenchment had successfully been avoided; it must have been alive to the reasonable possibility that the issue could arise again in future. There was nothing which precluded NUMSA from enquiring of the

company whether it envisaged further retrenchments. Neither of these matters was specifically raised at the Industrial Court hearing. Olifant did not stress the need for such information, or its importance to NUMSA; the company's witnesses were never called upon to explain why the information was not passed on to NUMSA. There is nothing to indicate that the company would have refused to furnish the information if asked for it. Nor was it suggested by Olifant that the information would have enabled NUMSA to make a meaningful contribution to the resolution of the retrenchment issue. The inference is irresistible that NUMSA did not regard the information as particularly relevant or significant at the time; by the same token the company may have regarded the matter (possibly wrongly) in the same light. Whatever the position, the company's failure to disclose the information, when NUMSA could reasonably have sought and obtained it, cannot be said to have been materially unfair.

In determining whether or not there has been an unfair labour

practice the court is ultimately required "to exercise its moral judgment in order to ascertain the right and justice of the case" (Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992(4) SA 791(A) at 796H). The court's view as to what is fair in the circumstances "is the essential determinant in deciding the ultimate question" (Supra at 798G). Its decision "is the passing of a moral judgment on a combination of findings of fact and opinions" (supra at 798I).

Applying this approach to the present matter it cannot in my view be said, on an overall conspectus of all the relevant facts and circumstances, that the company acted unreasonably in the sense that it failed to consult fully and fairly with its employees (through NUMSA and the other unions), as it was required to do, in relation to the retrenchment issue. It follows that the company was not guilty of an unfair labour practice. This finding renders it unnecessary to consider whether it was competent for the LAC to have made a determination in the form in which it did.

In the result the appeal is allowed, the determination of the Labour Appeal Court is set aside, and the finding of the Industrial Court that the appellant did not commit an unfair labour practice, is restored.

J W SMALBERGER
JUDGE OF APPEAL

HOEXTER, JA)
KUMLEBEN, JA) concur
NIENABER, JA)
HOWIE, JA)