Case no: 689/93

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between;

LANZERAC MANOR (PTY) LIMITED	Appellant
and	
M DE VRIES	1st Respondent
S ANTHONY	2nd Respondent
G AUSTIN	3rd Respondent
D CONSTABLE	4th Respondent
E FORTUIN	5th Respondent
E JACOBS	6th Respondent
M JACOBS	7th Respondent
S LUCAS	8th Respondent
C NKASANA	9th Respondent
S NTWANTI	10th Respondent
T PHATO	11th Respondent
C PHILANDER	12th Respondent
S SISHUBA	13th Respondent
K SMITH	14th Respondent
I TITUS	15th Respondent
D TUKUWAYO	16th Respondent
N WILBROWN	17th Respondent

Coram: JOUBERT,HEFER, F H GROSSKOPFJJA, VAN COLLER et SCOTT AJJA

Heard: 28 August 1995

Delivered: 28 September 1995

J U D G M E N T

F H GROSSKOPF .JA:

The seventeen respondents were employees who were retrenched by their employer, the appellant, on 14 May 1992. They brought an application against the appellant and two others in the industrial court in terms of s 46(9) of the Labour Relations Act 28 of 1956 ("the Act"). They sought an order declaring their retrenchment to be an unfair labour practice in terms of the Act. The relief claimed by the respondents was for their reinstatement, alternatively, for compensation. The industrial court held that the retrenchment of the respondents did not constitute an unfair labour practice and dismissed the application, save that the first respondent was granted compensation for being treated less favourably than the other respondents. The judgment of the industrial court is reported as De Vries & Andere v Lanzerac Hotel & Andere (1993) 14 ILJ 432 (IC). The respondents appealed to the Labour Appeal Court ("the LAC") against the industrial court's

decision, save insofar as it related to the unequal treatment of the first respondent. The LAC upheld the appeal, set aside that part of the industrial court's order against which the appeal was directed, and replaced it with the following:

> "2 (a) The retrenchment of the appellants [now respondents] constituted an unfair labour practice. (b) Each appellant [respondent] shall be reinstated by the second respondent [now appellant] in his or her job or a comparable job, with its current attendant benefits, should he or she present himself or herself for work within 30 days of the date of this judgment or such later date as the parties concerned may agree, (c) The second respondent [appellant] shall in any event within 30 days of the date of this judgment pay to each appellant [respondent] an amount equivalent to six times his or her monthly remuneration, calculated at the date of dismissal plus interest at the rate of 18,5% per annum on the said amount over a period of one year."

The appellant was also ordered to pay the respondents' costs of appeal. The judgment of the LAC is reported sub nom De Vries & Others v

Lanzerac Hotel & Others (1993) 14 ILJ 1460 (LAC).

The appellant thereafter duly complied with paragraph 2(b) of the abovementioned order of the LAC relating to the reinstatement of the respondents. The appellant was granted leave to appeal to this Court against the remaining orders of the LAC.

The appeal must be decided on the facts found by the LAC, but this Court is also entitled to have regard to any additional facts which appear from the record of the industrial court proceedings insofar as they are not inconsistent with the facts found by the LAC. (See Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others 1994(2) SA 204 (A) at 214E-G.) The conclusion of the LAC on the crucial question whether the appellant committed an unfair labour practice is not, however, a decision on a "question of fact" and may therefore be reconsidered and determined by this Court. (See Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992(4)

SA 791 (A) at 802B-I; Performing Arts Council case, supra, at 214G-

H.)

The facts found by the LAC are set out fully in its reported judgment, and I shall refer to them insofar as is necessary for a proper understanding of the case.

In February 1991 Lanzerac Landgoed (Edms) Bpk, a company controlled by Mr C H Wiese ("Wiese"), acquired the Lanzerac Estate outside Stellenbosch. The Lanzerac Hotel ("the hotel") was situated on the estate, but it was so badly run down that it had lost its grading. A Mr Groenewald had managed the hotel on behalf of the former owner, and he and Wiese came to an agreement that he would conduct the hotel business in the name of a close corporation for his own account. However, by September 1991 the hotel business was in such financial straits that Groenewald's close corporation was unable to pay the staff their September salaries. Wiese then decided to take over the running of the hotel in the name of Skiereiland Beleggings (Edms) Bpk,

another one of his companies. The name of this company was later changed to Lanzerac Manor (Pty) Ltd, which is the present appellant.

Wiese thereupon called a meeting of the hotel employees and told them that his company was going to take over and conduct the hotel business, and that they were free to apply for re-employment at the hotel. He further informed them that although he was not obliged to do so, he would pay their September salaries.

Those employees who were accepted for employment were advised in writing on 1 October 1991 by Skiereiland Beleggings that they were being offered a "temporary appointment" for a trial period of two months during which they would be "assessed for suitability for a permanent appointment". Those who were found to be "acceptable for a permanent appointment" would then receive another letter of appointment. The two month trial period went by without any further notification to the employees. On 11 January 1992 each employee was given a further letter informing him or her that due to unforseen

circumstances no permanent appointments would be made before 31 January 1992. No permanent appointments were made after 31 January. The reason why no decision could be made in this regard was Wiese's inability to find an experienced hotelier to conduct the hotel business. In the meantime the hotel was being run at a huge loss. Wiese testified that he never contemplated permanent appointments.

On 26 March 1992, nearly six months after their initial appointment, the employees were told for the first time what the appellant had in mind with regard to the future of the hotel and their further employment at the hotel. By that time agreement had been reached between Wiese and Mr S P Fitzgerald ("Fitzgerald"), an experienced and successful hotelier. The effect of the agreement was that Halcyon Hotels (Pty) Ltd ("Halcyon"), a company controlled by Fitzgerald, would enter into a partnership venture with the appellant. Halcyon would run the hotel as from 1 April 1992 while the appellant would be the sleeping partner. Fitzgerald realised from the outset that

the hotel was overstaffed, and that this was one of the reasons why the hotel was running at a loss. The staff situation further deteriorated when Wiese started restoring the manor house on the estate as his private residence, thereby substantially reducing the number of rooms available for hotel guests. This obviously necessitated a further reduction in staff. Fitzgerald insisted that he should have the right to determine, in accordance with his own management criteria, which staff members had become redundant. Wiese agreed to give Fitzgerald a free hand in deciding which employees to retrench, and undertook on behalf of the appellant as the employer to assume responsibility for the severance packages of those employees who were to be retrenched.

Meetings of two different categories of employees were held on 26 March 1992. Both Wiese and Fitzgerald addressed the meetings and informed the employees that the appellant and Halcyon had formed a partnership, that they had agreed that Halcyon would manage the hotel as from 1 April 1992, that the guest rooms in the manor house were to

be taken out of service, and that at least one of the three restaurants would be closed. The employees were further advised that the hotel was overstaffed and that posts would have to be rationalised, but that no employees would lose their jobs before the end of April 1992. They were told that all the employees would be assessed during April by the new manager, Colleen Thompson, that they should therefore do their best, and that the new management would then select those employees who would be engaged by the partnership and those who would be retrenched. The employees at the meetings were given an opportunity to ask questions, but there was no reaction, save from one employee who objected to the suggestion that one person might be asked to do two jobs. The new management carried out the selection process during April 1992 and came to a final decision as to which employees were to be retrenched. It is common cause that the seventeen respondents were then retrenched without being afforded the opportunity to be heard or to make representations.

On 30 April 1992 the first, second and fourth to seventeenth respondents received letters informing them that their services had become redundant and would be terminated with effect from 14 May 1992. The third respondent received a similar letter on 10 April 1992, terminating his service as from 30 April 1992. It is common cause that the retrenchment package which was thereafter paid to each respondent was adequate. The respondents maintained, however, that their retrenchment amounted to an unfair labour practice, mainly because there had been no consultation with them before their retrenchment. The LAC concluded as follows in this regard (at 1464F-G of its reported judgment):

> "It should have been apparent to the respondent [appellant], especially where the only retrenchment selection criterion was merit, as it is said to have been, that fairness cried out for giving each affected employee a chance to deal with unfavourable conclusions concerning his performance."

In terms of s 1 of the Act, as it read in 1992 when the

dispute arose, "unfair labour practice" is defined to mean:

> "any act or omission, other than a strike or lock-out, which has or may have the effect that - (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby; (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby; (iii) labour unrest is or may be created or promoted thereby; (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby;"

Before its amendment in 1991 the definition of "unfair labour practice" specifically required "prior consultation" with an employee or his representative union before termination of his employment on non-disciplinary grounds. This Court considered the definition of unfair labour practice as it stood before its amendment in 1991 in Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa 1995(3) SA 22 (A). In dealing with the duty to consult

Smalberger JA concluded as follows at 28F-29C:

> "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 Africa Roads Board v Johannesburg City Council 1991 (4) SA 1 (A) at 13B-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 serious consequences and threaten industrial peace. Proper consultation minimises resentment and promotes greater harmony in the workplace."

It is true that the current statutory definition of unfair labour practice does not specifically cast upon an employer a duty to consult, but in my opinion it could never have been the intention of the legislature, when amending the definition in 1991, to do away with consultation as a relevant consideration in determining whether, on the facts of any given case, a retrenchment constituted an unfair labour practice.

Counsel for the respondents submitted that there was a duty to consult with the employees at an early stage when retrenchment was still being contemplated. He pointed out that the respondents were warned for the first time at the meetings held on 26 March 1992 that their continued employment was at risk as a result of the pending retrenchments. By then a final decision on retrenchment had already been taken without having afforded the employees any opportunity to discuss the matter or to make representations, even if only with regard to the selection criteria and the implementation thereof. The respondents, however, did not challenge the appellant's right to effect such retrenchments as were found to be necessary. What they really objected to was the manner in which the retrenchments were eventually carried out without hearing the affected employees or giving them any opportunity to make representations. In view of the conclusion which I have reached on this latter aspect I find it unnecessary to consider whether the appellant's failure to consult at the earlier stage was unfair

in all the circumstances.

The need for consultation became crucial once the performance of the affected employees had been assessed, and the selection for retrenchment had been completed by the new management. In my opinion the affected employees should have been afforded a proper opportunity to make representations and deal with any unfavourable conclusions regarding their work performance before any final decision on their retrenchment was made. An opportunity to make representations would at the same time have served the primary object of the Act, namely to avoid or at least reduce industrial conflict.

It is common cause that the affected employees were never given any chance to be heard in this regard. There was therefore no way in which they could have satisfied themselves that their interests had been duly considered in the selection process, and that they had been treated as fairly as circumstances permitted. Their retrenchment without such consultation constituted an unfair labour practice in my judgment.

The reason why the appellant never even attempted to discuss the retrenchments with the respondents was that Wiese believed that the retrenchment guidelines did not apply in the case of these employees which he simply regarded as temporary employees, Wiese was clearly wrong in this respect, but it should be pointed out in fairness to him that he bona fide considered prior consultation to be unnecessary in this case. This error on the part of Wiese cannot, of course, justify the appellant's failure to consult with the respondents.

According to their letters of appointment these employees were not employed on a truly temporary basis, but rather on a probationary basis. (See Le Roux and Van Niekerk The South African Law of Unfair Dismissals at 64, 65 and 72.) This was certainly not a case where the employer was not required to follow a fair procedure on retrenchment simply because the respondents were "temporary employees".

Counsel for the appellant submitted that the only reasonable

option open to the appellant in March 1992 was to conclude the partnership agreement with Halcyon. Fitzgerald, so it is contended, was not prepared to conclude the agreement if it did not include a term giving Halcyon an absolute free hand in the selection of employees who had to be retrenched. Counsel referred to this demand by Fitzgerald as the "Halcyon condition", and submitted that it placed no obligation on Halcyon to consult, while it effectively precluded the appellant from interfering in the selection process.

The basic difficulty that I have with this defence is that it was raised for the first time during argument on appeal in the LAC. The Halcyon condition now relied upon was not pleaded by the appellant. Nowhere in the pleadings was it suggested that the appellant would have followed the proper retrenchment guidelines had it not been for the so-called Halcyon condition which the appellant felt compelled to accept. Nor was the point fully canvassed in the evidence of either Wiese or Fitzgerald in the industrial court. In these circumstances I am of the

view that this point is not one that can properly be considered at this stage. (See Slagment (Pty) Ltd v Building. Construction and Allied Workers' Union and Others 1995 (1) SA 742 (A) at 752G-753C.)

It is clear in any event that the real reason why the appellant did not consult with the retrenched employees was Wiese's mistaken belief that it was not necessary to do so. In my view it had nothing to do with the so-called Halcyon condition. I agree with the findings of the learned judge a quo in this regard at 1464B-C of the LAC judgment, and the following observation at 1464C-D:

> "There is no suggestion that Fitzgerald's selection process would have been unduly inhibited by adherence to the requirement of consultation with the work-force. Consultation was not attempted because it was thought unnecessary."

I am not persuaded by the appellant's argument that the retrenchment of the respondents did not constitute an unfair labour practice.

The appeal is accordingly dismissed with costs.

F H GROSSKOPF
Judge of Appeal

Joubert JA Hefer
JA Van Coller AJA
Scott AJA Concur