

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: J866/98

In the matter between

Applicants

and

Respondent

JUDGMENT

MASERUMULE A J

[1] This matter comes before Court as a referral in terms of s191 of the Labour Relations Act, 66 of 1995, as amended (“the Act”). The union acts herein on behalf of seven of its members who were retrenched by the Respondent on 11 April 1997. The relief sought is reinstatement and compensation.

[2] The union led evidence first and called two witnesses, namely Messrs Sironce

Tshabalala (“Tshabalala”) and Julius Timello Mohoboko (“Mohoboko”).

[3] Tshabalala testified that he was employed by the Respondent on 3 March 1995 and was a union shop steward at the time of the retrenchment. He was also one of the seven employees retrenched. He testified that on 7 April 1997 a notice informing employees of possible retrenchment was put up on the notice board. The notice itself is, however, dated 1 April 1997. The reason given for the possible retrenchment was financial difficulties. The notice also informed employees that a consultation meeting with the union over the possible retrenchments would be held on 8 April 1997.

[4] A meeting was held between representatives of the union and the Respondent on 8 April 1997. Tshabalala was present at this meeting, as was Mr Motaung, the union official. Mr Johan Prinsloo (“Prinsloo”), whom he had met for the first time on 1 April 1997, acted as the spokesperson for the respondent. According to his testimony, nothing was agreed to at the meeting relating to the retrenchments, save that the Respondent had, at the union’s request, agreed that it would furnish the union with its financial statements. Tshabalala also testified that wage increases were discussed at this meeting.

[5] On 11 April 1997, the 7 individual applicants were called and handed retrenchment notices. The notices, all dated 1 April 1997, informed the employees that they were being retrenched with effect from 11 April 1997, but that they need not serve their notice period. The employees were instructed to stop working on the same day. The notices did not say when the notice period was to commence nor what its duration was.

[6] The employees refused to accept their retrenchment packages as, according to Tshabalala, the union was not party to any agreement to retrench them. They did subsequently collect their retrenchment packages on different dates because they needed the money and they knew that the union had referred the matter to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”).

[7] When the employees collected their packages, they were each made to sign an acknowledgement of receipt which also purported to be an agreement before they could be paid. The acknowledgement stated that the acceptance of the money was “in full and final settlement of all and any claims and/or disputes arising from the termination of this contract of employment either now or in future.” The acknowledgement is not signed by any person on behalf of the Respondent although each of the individual applicants signed.

[8] During cross-examination, it was put to Tshabalala that at the meeting of 8 April

1997, there was an agreement that 7 employees, instead of 25 whom it was initially intended to retrench, would be retrenched. Tshabalala denied this, saying that he knew nothing of such an agreement. He also denied that his signature of the acknowledgment of receipt of his retrenchment package meant that he accepted his retrenchment. He also denied knowledge of a letter which, it was put to him, had been sent to the union on 30 July 1998, and which purportedly provided the union with the information which the union had requested at the meeting of 8 April 1997.

[9] Mohoboko was the second and last witness called by the Applicants. He testified that he and 6 of the Applicants were called by Mr. Johan Prinsloo (“Prinsloo”) and Mr. Louw of the Respondent on 11 April 1997 and were informed that there was no work for them. They were offered their retrenchment pay and unemployment insurance fund cards which they declined to accept as there was no agreement relating to their retrenchment with their union. Mohoboko further testified that he had met Prinsloo for the first time on 1 April 1997, when Prinsloo had come to Respondent’s premises to resolve an alleged strike/lockout.

[10] Under cross-examination, he confirmed that he did collect his retrenchment pay on 19 April 1997 and that he signed the acknowledgement of receipt, similar to the one signed by Tshabalala. He denied that he had, by his signature, waived his right to challenge his retrenchment as he knew that the union was going to refer the

matter to the CCMA. This concluded the Applicants' case.

[11] The Respondent called Prinsloo as its only witness. He testified that he was employed by the Respondent in late January or early February 1997 as a personnel manager on a fixed term contract. He first met Mr Motaung, the union official, on 1 April 1997 at Respondent's premises to resolve an alleged illegal strike. On that day, he also arranged a meeting with Mr Motaung to discuss rationalisation and wage increases. On that day, and at about 16h20, he faxed a notice to the union advising of possible redundancies and confirming a meeting to discuss same on 8 April 1997. According to his testimony, at the conclusion of the meeting on 8 April all issues relating to the retrenchment, including the number of employees to be retrenched, were agreed upon. The 7 employees who were to be retrenched were then given letters of retrenchment on 11 April 1997.

[12] Under cross-examination, Prinsloo testified that although he was the Respondent's personnel manager, he could not say for sure how many employees the Respondent employed, nor how many of the employees were members of the union. He also conceded that the employees and Mr Motaung met him for the first time on 1 April 1997, notwithstanding the fact that he claimed to have been the Respondent's personnel manager from February 1997.

[13] Prinsloo was also cross-examined about a letter dated 30 July 1998 which, he

claimed had been sent to the union on 1 April 1997. Prinsloo had referred to this letter, which is signed by himself and contains a statement at its end signed by himself to the effect that the letter was faxed to the union on 1 April 1997 at 16h10. This allegation is also in the Respondent's Statement of Response which was also prepared and signed by Prinsloo. He could not offer any reasonable explanation why the letter was allegedly sent to the union on 1 April 1997 whereas it was dated 30 July 1998. He also could not explain why he initially claimed that the notice of redundancy which informed the union of the meeting scheduled for 8 April 1997 was sent to the union at 16h10 on the same day when the original fax reflects 14h07 as the time of receipt by the union. Prinsloo could also not give a satisfactory answer to why he claimed in his evidence and in the Respondent's Statement of Response that the Respondent only became aware that its employees had joined the union in January 1997, when there were minutes of a meeting held between the union and the Respondent on 6 December 1996, during which recognition of the union and ancillary matters were discussed.

- [14] Prinsloo was also cross-examined about the minutes of the meeting on 8 April 1997 at which he claimed agreement had been reached on the retrenchments. These minutes had been specifically placed in dispute by the Applicants in the Pre-Trial Minute and it was not conceded that they are what they purport to be. He was asked why, since he agreed that wage increases were discussed at this meeting, there is no reference whatsoever to this item in the minutes. Prinsloo

could provide no answer.

[15] Prinsloo was also cross-examined about the letters of dismissal which were handed to the employees on 11 April 1997 all of which are dated 1 April 1997. His answer was that the date was a typographical error, and ought to be 11 April 1997. He was, however, unable to say why it was not pleaded as such in the Statement of Response, of which he was the author. Prinsloo was also asked about the consultations, which, according to the Statement of Response, were held with the union prior to 1 April 1997 in anticipation of the retrenchments. His answer was that he had no personal knowledge thereof as he was not present in any of the previous meetings between the union and the Respondent. He testified that Mr Louw of the Respondent, who was in Court, was the person who had personal knowledge thereof as he was present in those meetings.

[16] The Respondent did not call Mr Louw to give evidence, although Prinsloo had indicated during his testimony that he would indeed be called to deal with those matters which did not fall within his personal knowledge. The Respondent closed its case after the completion of Prinsloo's testimony.

Were there *bona fide* consultations prior to 11 April 1997?

[17] In all dismissal cases, an employer bears an onus to prove, on a balance of

probabilities, that the dismissal was for a valid reason and was effected in accordance with a fair procedure, see s192(2) of the Act. Where the employer relies on operational reasons for its dismissal of employees, it must prove, on a balance of probabilities, that it consulted in good faith with the union representing such employees or the employees themselves, in an attempt to reach consensus on the issues set out in s189(2) of the Act, see **Johnson & Johnson v CWIU** [1998] 12 BLLR 1209 (LAC).

[18] In the present matter, the Respondent seeks to rely on meetings held prior to 8 April 1997, as well as the meeting of 8 April 1997 for its contention that it has complied with the provisions of s189(2) of the Act. Insofar as meetings which took place prior to 8 April 1997 are concerned, there is no evidence before Court as to whether or not those meetings indeed took place and if so, what was discussed during such meetings. As indicated previously, Mr Louw was the person who was to give evidence about these meetings, but he was not called to enlighten the Court on this score. Prinsloo did not attend these meetings and could throw no light on what these meetings were all about, if they did take place.

[19] The only evidence before Court in relation to consultations is therefore evidence about the meeting of 8 April 1997. There is a serious dispute of fact about what occurred at this meeting. On the one hand, Tshabalala testified that no agreement was reached on the retrenchments, as the union requested that it be furnished with

financial statements to enable it to consult on the retrenchments. On the other hand, Prinsloo testified that all the issues relevant to the retrenchments were discussed, and that agreement was indeed reached on such issues.

[20] I have considered the evidence of Tshabalala and Prinsloo as well as the available documentary evidence. I find the evidence of Prinsloo to be most unsatisfactory and I reject it insofar as it is inconsistent with that of Tshabalala and the available documentary evidence. I found Prinsloo to be an unreliable witness, whose testimony was often at odds with the documentary evidence and the Respondent's pleadings. He sought to rely on the minutes of the meeting of 8 April 1997 to back up his version that there was indeed agreement at the conclusion of the meeting. However, the Respondent did not lead any evidence as to how the minutes were compiled and by whom they were compiled, given the fact that they had specifically been placed in dispute. The minutes were accordingly not proved and could not be used to support Prinsloo's version of what occurred during the meeting. Secondly, Prinsloo sought to rely on the letter dated 30 July 1998 for his contention that the Respondent had complied with the provisions of s189(2) of the Act. However, the letter was not sent to the Applicants' union on 1 April 1997 as claimed by Prinsloo who, during his cross-examination, was at pains to assure the Court that he could not say that the letter was indeed sent on 1 April when it was dated 30 July 1998. Further, the letter seems to have been prepared long after the retrenchments and cannot constitute compliance with the requirements of s189 of

the Act.

[21] Regard also needs to be had to the letters of dismissal given to the employees on 11 April 1997. These letters are dated 1 April 1997, as is the notice sent to the union on the same day, advising it of possible retrenchments. Added to this is the letter dated 30 July 1998, which Prinsloo stated was meant to constitute compliance with the provisions of s189, when it was in fact purportedly sent to the union more than a year after the retrenchments. Added to this is the failure of Mr Louw to testify about the two meetings which were allegedly held prior to 8 April 1997 and which purportedly dealt with the possible retrenchment of the Applicants. Further, no evidence of any nature whatsoever was placed before the Court with regard to the reason for the retrenchments and the financial status of the Respondent at the time, or now. The totality of this evidence points towards a complete failure by the Respondent to comply with the provisions of s189 of the Act. I am satisfied that, on the available evidence, the Respondent did not in a *bona fide* manner attempt to reach consensus with the union on the issues set out in s189(2) of the Act prior to retrenching the individual Applicants. On the contrary, it appears to me that the decision to retrench the Applicants was made on 1 April 1997, the date on which the union was given notice of the possible retrenchment of the individual Applicants and a week before the date of the first consultation meeting.

[22] I am inclined to agree with Mr Motaung's submission that Prinsloo *ex post facto* concocted the purported minutes of the meeting of 8 April 1997 as well as the letter dated 30 July 1998, which had purportedly been sent to the union with the information requested by the union at the meeting of 8 April 1997, with the specific intention to mislead the Court about the events that preceded the retrenchments. I am overall satisfied that the retrenchments were not effected for a valid reason nor in accordance with a fair procedure. The dismissal of the individual Applicants was therefore unfair.

[23] I now turn to deal with the Respondent's contention that, in any event, the Applicants are not entitled to any relief by virtue of the acknowledgement which they signed when they collected their retrenchment packages. In essence, the Respondent is claiming that the individual Applicants have waived their right to challenge their retrenchment. I do not agree with this contention.

[24] According to Prinsloo, the money collected by the individual Applicants, and in respect of which they signed the acknowledgements, is their severance pay. In terms of s196 of the Act, an employer is obliged to pay retrenched employees a severance package calculated in accordance with its provisions. Such severance pay is, therefore, legally due to retrenched employees, whether or not they contest their retrenchment. In my view, an employee cannot waive his rights in terms of the Act when he acknowledges receipt of money which, by law, the employer is

required to pay, and in circumstances where he had not agreed to the termination of his employment. *In casu*, the evidence of Tshabalala and Mohoboko was that they did not accept their retrenchment and in fact refused to accept their pay when it was initially offered to them on 11 April 1997. They also testified that when they accepted their retrenchment pay they were aware that the union was going to pursue the matter, and they specifically denied that they had waived their rights.

[25] I am satisfied that, having regard to the fact that even when they refused to accept their retrenchment pay the individual Applicants were nonetheless retrenched and were instructed to stop working, reliance cannot be placed on their signature of the acknowledgement of receipt of their retrenchment pay to found a waiver. I have already indicated that the retrenchment pay was, in any event, due to them by virtue of s196 of the Act, and the individual Applicants' consent was not required before it could be paid to them.

[26] It is also trite that before a waiver can be upheld, it must be demonstrated that the person who is alleged to have waived his or her right knew that he or she was waiving her right, see **Laws v Rutherford** 1924 AD 261, and **Decision Surveys International (Pty) Ltd v J Dlamini and Others** (Unreported decision of the Labour Appeal Court, Case No, JA3/98, at pp. 13-14). The plea of waiver cannot, given the abovementioned facts, be upheld.

Relief

[27] The individual Applicants have indicated that they wish to be reinstated, and none of the provisions of s193(2) are present.

[28] As regards compensation, the Court is required to award compensation which is just and equitable. The individual Applicants were dismissed on 11 April 1997 and the last date of the hearing of this matter is 17 February 1999. This represents a period of 22 months and therefore goes beyond the permissible maximum compensation payable in terms of s194(2) of the Act, which has a ceiling of the equivalent of 12 months' compensation. There was a delay occasioned by the referral of the dispute to the CCMA for arbitration when it was required to be referred to this Court for adjudication. This delay amounted to a period of about 4 months. There was also a delay between April 1998 when an application for a case number was made and July 1998 when a Statement of Case was filed. These delays were entirely due to the Applicants, and the Respondent cannot be held responsible for them. These delays will be taken into account in making an order for compensation.

[29] Given all of the above, I make the following orders:

1. The dismissals of Sironce Tshabalala, George Dlangamandla, Petrus Serame Radebe,

Julius Mohoboko, Thomas Pama, Johannes Letlotlo and Michael Ouyngé were not for a valid reason nor in accordance with a fair procedure.

2. The Respondent is ordered to reinstate the individual Applicants in its employ on terms no less favourable to them than those applicable to Respondent's employees currently performing the same or similar work as that performed by the individual Applicants at the time of dismissal. The reinstatement order is with effect from 1 March 1999, and the individual Applicants should report for duty by not later than 15 March 1999.
3. Those of the individual Applicants who fail to report for duty by 15 March 1999 forfeit their entitlement to reinstatement.
4. For purposes of any future retrenchment exercise which the Respondent may implement, the period of service of the individual Applicants shall be deemed to have been continuous and unbroken by their retrenchment on 11 April 1997.
- 5.
6. The Respondent is ordered to pay to each of the individual Applicants compensation equivalent to 12 months' remuneration, calculated on the basis of their remuneration as at the date of their dismissal.
7. The Respondent is ordered to pay Applicants' costs, including the disbursements

incurred in instituting these proceedings and attending Court on the days on which the matter was heard.

P MASERUMULE A J

Acting Judge of the Labour Court

OF HEARING: 15 - 17 February 1999

26 February 1999

e Applicant: Mr Motaung of EHCWAWU

e Respondent: Mr van Deventer of van Deventer Attorneys of Pretoria