

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

CASE NO D 224/99

In the matter between:

RANI NAIDOO

Applicant

and

BEIER FOOTWEAR

Respondent

JUDGMENT

BASSON, J

- [51] The applicant, Ms R Naidoo, was dismissed by the respondent, Beier Footwear, for operational reasons with effect 14 December 1998. The applicant alleged that her retrenchment dismissal was unfair.
- [51] The reason for the retrenchment dismissal was that the department in which the applicant worked during November/December 1998 was to be closed down. The economic rationale for this downsizing was not challenged by the applicant in any meaningful way.
- [51] The respondent consulted during November/December 1998 in regard to the proposed retrenchments with the majority union at its factory, the National Union of Leather Workers (“the union”). The applicant was a former shop steward and executive branch committee member of the union as well as a member of the union at the time when the retrenchment process took place.
- [51] The retrenchment that was implemented by the respondent was done in pursuance of an agreement reached with the union.
- [51] Mr M Nel (“Nel”), the factory manager at the time, testified that the union and management had reached agreement on the proposed criteria for identifying the retrenched. The respondent also called as a witness Mr N Oates (“Oates”), the general manager of the footwear division.
- [51] Nel (supported by the evidence of Oates) stated in this regard that the usual criterium applied in identifying

the retrenchees, that is, when a whole department had to close down, all employees who worked in such redundant department were to be retrenched. In other words, all such employees stood to lose their jobs even though employees in other departments may have had longer service in terms of the criterion of LIFO. Again, the applicant did not challenge the evidence that this was the agreed criterion and paragraphs 2(a) and (b) of the minutes of this meeting on 7 December 1998 (exhibit B25) appeared to fully support Nel's evidence.

[51] However, the applicant averred that a certain Mr R Reddy ("Reddy") was indeed transferred from one department to another during this retrenchment exercise. However, this was never pleaded and Nel's evidence that Reddy was still in his original position in January 1999 (when Nel left the respondent) was not challenged. In the event, I am satisfied that this complaint (which was not fully canvassed as it was not pleaded) can not be sustained.

[51] The real complaint of the applicant was based on the fact that she had concluded a written agreement with the respondent (annexure "RN" to the applicant's papers - exhibit B9) on 24 March 1998 and that the respondent allegedly failed to comply with its obligations in terms of this agreement.

[51] In order to assess the validity of the applicant's contention in this regard, the circumstances which gave rise to the agreement and the events which followed subsequently have to be carefully examined.

[51] Nel testified that during February/March 1998 the applicant was working as an examiner in the finishing department when it was decided to move that department from the basement to one floor above. Due to a shortage of space, this department then had to share the lines of two of the other departments already situated there.

[51] However, as there were already two examiners working on those lines, this meant that the applicant's position as an examiner had become superfluous. The only work available was that of a table hand in the finishing department. This meant that the applicant had to be demoted. In order to accommodate the applicant's dilemma, Nel, in his capacity as the respondent's factory manager, entered into a written agreement with the applicant, at her insistence.

[51] Nel further testified that the position of examiner in the outwork department was to have become available around September/October 1998, when the present incumbent (also a Ms R Naidoo, hereinafter referred to as "the retiree") was set to retire at that date.

- [51] In other words, the position of “outwork quality control examiner” was offered to the applicant as a transfer, already in March 1998, and it was agreed that her appointment to such position would take place in September/October 1998 when the retiree was due to leave the employ of the respondent. The contents of the written agreement reflected this agreement. In fact, it was common cause that this was the intention of both the parties.
- [51] At the same time, and to further assist the applicant, it was also agreed in terms of the said written agreement (hereinafter also referred to as the “March agreement”) that, as of 31 March 1998, the applicant’s basic rate of pay would be set at that of a tablehand plus a premium of R 136 per week.
- [51] This much appeared to have been common cause and the applicant stated that the purpose of the agreement was that she would be “promoted back” to the position of an examiner. However, it is also of some importance to note that the applicant also stated that her main concern was not the position as such but much more so the increased salary.
- [51] Also common cause was that (in terms of the said agreement) the applicant would, in fact, (together with such premium) receive the equivalent of as an examiner’s pay as from 31 March 1998. This rate of pay would then remain in effect until 31 August 1998 whereupon the applicant would be “transferred” to an examiner’s rate of pay (and the premium would then fall away simultaneously).
- [51] The March agreement was signed by the applicant and by a union official, Mr G Govender, on her behalf. Nel and a Mr G Weeks signed on behalf of the respondent.
- [51] I have no doubt that the respondent had an obligation in terms of this agreement to appoint (or transfer) the applicant to the position of outwork quality control examiner as soon as the retiree left the respondent’s employ in September/October 1998. In fact, the respondent’s witnesses stated clearly that they agreed with such contention made by the applicant.
- [51] However, as Nel testified, other events subsequently intervened.
- [51] At the end of August 1998, the applicant was allegedly promoted into the position of an examiner, not in the agreed position, but in the finishing department or section. The applicant disputed this fact and stated that she had merely been paid as an examiner as from this date (see the agreement above at paragraph [16] which foresees this happening). Other documents of the respondent, however, especially the list of retrenchees in November/December 1998 (exhibit B33), identify her “job title” as that of an “examiner”.

- [51] More importantly, a second set of events took place around the end of September 1998. The retiree (who occupied the position of outwork quality control examiner) wanted to stay on after her retirement date at the end of September 1998 and wanted to retire only at the end of 1998. The fact that such request was made, was common cause.
- [51] According to the respondent's witnesses, the applicant (who was still a shop steward of the union at the time) was "not 100% happy" about this. The applicant thus refused to sign a letter (exhibit B38) that the respondent wished her to sign as they did not want to create a precedent in letting the retiree stay on longer.
- [51] According to the evidence of Nel and Oates, the applicant's unhappiness related to the fact that she did not want the retiree to stay on until December 1998 because another employee, referred to as "Pricilla" in the evidence and hereinafter, wanted that position (that is, the position of outwork quality control examiner) as from 1 October 1998 (the original date of retirement of the retiree). Moreover, it was alleged that the applicant (as shop steward) actively supported Pricilla for that position and therefore did not want the retiree to leave only at the end of the year but immediately as from 1 October 1998.
- [51] The applicant disputed this and contended that she herself had still coveted the position of outwork quality control examiner (on the basis of the March agreement) at the time. The applicant stated that she had still relied on the agreement and took this up with a union official.
- [51] However, the applicant did not take up this position with management and neither was this ever taken up on her behalf by the union. It was never put to Nel in cross-examination (the respondent's witnesses testified first) that the applicant had made an objection to the retiree staying on longer and based such objection on the fact that she herself still wanted that position in terms of the March agreement. Further, it was never the applicant's case that it was the respondent who had recommended Pricilla for that position.
- [51] When confronted in cross-examination with the important fact that the first time that the applicant ever even objected or tried to enforce her rights under the March agreement was only after the retrenchment exercise was completed, the applicant answered: "Yes, because I had an agreement and I knew I was going to get the new job".
- [51] However, this simply cannot be true. The said letter which the respondent wanted the applicant to sign (exhibit B38 dated 25 September 1998) made it clear that: "Mrs P Ganram ("Pricilla") was to have replaced

Mrs R Naidoo (“the retiree”) from 01/10/1998”. And: “Mrs R Naidoo (“the applicant”) and Mrs P Ganram (“Pricilla”) have mutually agreed that Mrs R Naidoo (“the retiree”) will work until shutdown 1998”.

[51] The applicant denied that this letter was ever shown to her (it was common cause that she had refused to sign it). However, the contents of the letter (quoted above) clearly supported Nel’s evidence that Pricilla was earmarked to take over from the retiree at the end of 1998, that is, as from 1 January 1999.

[51] It is therefore inconceivable that the applicant, being the shop steward actively involved in the issue of the retiree’s request to stay on longer in the position that she was offered in terms of the agreement, would not know about the fact that Pricilla was being earmarked for the job. In fact, it was never put to Nel that the applicant did not know about the fact that Pricilla was earmarked for the job but it was merely put that the applicant had not supported Pricilla’s position.

[51] In the event, I am satisfied on the evidence presented that the applicant knew at the end of September 1998 that Pricilla was going to be appointed to the position of outwork quality control examiner when the retiree retired at the end of 1998. At the very least, she knew of a third party who was threatening the position that she had allegedly still coveted.

[51] However, the applicant (in terms of her own concession at paragraph [26] above) did absolutely nothing to convey any objection to management.

[51] This was totally against character. It was common cause that the applicant “insisted” in March 1998 that the agreement must be in writing. Further, the applicant testified that she was so vociferous as a shop steward in putting forward the case of union members that management did not like her. It must be noted that this alleged dislike was never put to any of the respondent’s witnesses when they testified and that no weight can accordingly be given to the suggestion that management had acted against her out of dislike. Be that as it may, she herself testified to the fact had she vociferously defended the rights of others and had insisted that her own rights be reduced to writing.

[51] However, the applicant never lodged a formal complaint or vociferously objected to management on the basis of the March agreement when it became known that Pricilla was going to get the position that she had allegedly still coveted. It was also common cause that no such formal complaint was ever received, not even via the union.

[51] In the event, it is far more probable that she did not object because she had, indeed, acquiesced to Pricilla

being appointed to the said position of outwork quality control examiner. This was the evidence of both Nel (who was intimately involved in this process) and Oates. They even went further and testified that the applicant (as shop steward) had actively promoted Pricilla's cause.

[51] In view of the fact that this was clear in terms of, *inter alia*, the direct evidence of Nel, there is no merit in the argument that the respondent should also have called Pricilla to testify. After all, the greatest weakness of the applicant's case is that she knew of Pricilla's pending appointment yet she took no steps to formally object thereto.

[51] In the light of the probabilities which strongly support the respondent's evidence in this regard, I am satisfied that the applicant had shown her acquiescence in Pricilla getting the position that was promised to the applicant in terms of the March agreement. In the event, the applicant had made it clear that she no longer intended to rely on the agreement but that she agreed to Pricilla taking up the promised position instead. It is therefore clear that, having done so, the applicant no longer had any claim in terms of this agreement.

[51] I need not speculate in any detail on why the applicant had done so. Suffice to say that perhaps this was because she had already received the salary of an examiner as from the end of August 1998 (this was common cause). After all, the applicant herself testified that she had been more interested in receiving the salary of an examiner than the position as such. Perhaps it was because (on the respondent's version) she had already occupied the position of examiner in the finishing department and therefore (at the time in September 1998) had no further need to be promoted to such position in another department. In fact, Nel testified that the applicant was happy to accept the position of examiner in the finishing department.

[51] The above conclusion that the applicant no longer relied (or could rely) on the March agreement is also borne out by the events which occurred after September 1998.

[51] As was pointed out above, during November 1998 the respondent entered into consultations with the union in regard to the proposed retrenchments. It was common cause that the parties agreed that there was an economic rationale to, *inter alia*, close down the department in which the applicant worked at the time. The department in which she would have worked had she been transferred to the position of outwork quality control examiner was, however, not affected. At a follow-up consultation meeting on 7 December 1998 the final list of retrenchees was agreed to and this list included the applicant's name (exhibit B32).

[51] If the applicant's version was true and she had still coveted the position of outwork quality control examiner

and had wanted to enforce the March agreement it was, of course, inconceivable that the applicant would not have raised as an objection to her being identified for retrenchment, either by herself or through her union (she was no longer a shop steward having been disciplined, *inter alia*, for her objection to the retiree staying longer-*supra* at paragraph [23]). After all, the applicant was now being earmarked for retrenchment whilst another employee (Pricilla) was going to take up the position as outwork quality control examiner. However, no such objection was ever made, either by herself or on her behalf by her union representatives.

[51] The applicant tried to explain this failure by insisting that she never knew that she stood to be retrenched. The applicant placed the blame for this lapse squarely on the shoulders of the union representatives who, she alleged, had never reported back to any of the employees until the retrenchment was a *fait accompli* and she was informed by Nel on 14 December 1998 that she had been retrenched.

[51] The respondent's witnesses (Oates and Nel) stated, however, that the issue of the applicant's retrenchment was specifically raised by the union official (a Mr Van Rooyen) at the meeting of 7 December 1998. Although this was not minuted (the minutes were exhibits B25 and B26) it was clear from the minutes that the minutes really only recorded agreements and were not intended to be a blow by blow account of a meeting which lasted for at least two hours. No union official testified (the applicant was the only witness on her behalf) and I therefore see no reason not to accept the version put forward by the respondent's witnesses. It was also their version that the issue of the March agreement never came up for discussion and that this was therefore not the basis on which the concern in regard to the applicant was raised.

[51] Also in regard to the fact that it was improbable that the union did not report back or communicate with the applicant during the retrenchment process, it has to be noted that the union's Van Rooyen sent a letter dated 18 December 1998 (exhibit B28) to the respondent again raising the position of the applicant as retrenchee (together with another retrenchee). This letter followed closely upon the retrenchment process which ended on 14 December 1998. This makes it all the more unlikely that the union official who conducted the retrenchment consultations and who wrote the letter (Van Rooyen) never appraised the applicant of her position as retrenchee during the retrenchment process. It is namely clear from the letter that he must have had some communication from her. The applicant tried to explain away any contact between her and the union, stating that the Bargaining Council informed Van Rooyen about this (as she had referred the dispute to the Council before 18 December 1998).

[51] In spite of her contentions to the contrary, I still believe that it remains improbable that the union never informed the applicant about her impending retrenchment, especially because her position was specifically raised by Van Rooyen (*supra* at paragraphs [42] and [43]). After all, the union knew about the March

agreement, in fact, a union official signed on behalf of the applicant (*supra* at paragraph [17]). It is therefore strange that the union would not have raised the issue of the March agreement if it was still in force in November 1998 and the applicant was still relying on it. The applicant tried to explain this failure by referring to the fact that the union official who signed the agreement was not the same official who represented her during the retrenchment exercise. Again, the applicant appeared to blame the union.

[51] However, no union official testified in regard to any of these alleged misunderstandings.

[51] In the event, I am satisfied that the applicant (and any her union representatives) must have known that she was identified for retrenchment and even at that late stage nobody ever objected on the basis that the respondent was contractually obliged to appoint her in the position of outwork quality control examiner.

[51] Again, if the applicant had not agreed to Pricilla taking that very position and, in fact, had still coveted it herself, it was highly improbable that she (or her union representatives) would not have objected to her being identified as retrenchee during the retrenchment exercise in November/December 1998. In other words, on the probabilities, the respondent's version stands to be accepted, that is, that the applicant did not object simply because there was no contractual basis for her to rely on as she had shown her acquiescence in Pricilla being appointed to such position when the incumbent retired (even to the point of actively promoting it).

[51] In the event, the applicant was identified as retrenchee in consultation with the union of which she was a member at the time on the basis that the department or section in which she was working was being closed down due to economic difficulties that the respondent was experiencing. The respondent has satisfied me that such process was fair and that it had a commercial rationale for the said downsizing.

[51] In closing, I must also point out that I found it strange that the applicant did not base her claim on breach of contract as such as one could have expected her to do because of her almost exclusive reliance on the March agreement. In other words, it appeared that the applicant was relying on obligations in terms of such agreement (and breach of contract) rather than on the unfairness of the retrenchment process as such in terms of the Labour Relations Act, 66 of 1995. Be that as it may, for the reasons explained fully above, I am, in any event, not satisfied that such agreement was still in force at the time of the retrenchment. Indeed, I am satisfied that the agreement was no longer in operation at such time. It follows that the lapsed agreement can play no role in assessing the fairness of the respondent's conduct during the retrenchment exercise. In the event, the application, based as it was on the alleged unfairness of the applicant's retrenchment dismissal in terms of the Labour Relations Act, 66 of 1995, stands to be dismissed.

[51] I see no reason, in fairness, why I should not order that costs are to follow the result.

[51] I make the following order:

The application is dismissed with costs.

Basson, J

On behalf of the applicant: Mr K Moodley of Anand Jayrajh & Associates

On behalf of respondent: Mr R Pemberton of Garlicke & Bousfield Inc

Dates of hearing: 15 & 16 May 2000

Date of judgment: 23 May 2000