

Sneller Verbatim/MC

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J1115/98

2001-06-18 to 21

In the matter between

GEORGE NETHAVANI & OTHERS

Applicant

and

FONTANA KWIK SPAR

Respondent

J U D G M E N T

Delivered on 22 June 2001

REVELAS J:

1.The services of the individual applicants, some of whom had been in the employ of the respondents for many years, were terminated with effect from 28 February 1998 for alleged operational requirements. The applicants contend that their dismissal was unfair in that there was no valid reason for their dismissal in the first place, and in the second place, there was no consultation whatsoever with them, prior to their dismissal and therefore the respondent did not comply with any of the provisions of section 189 of the Labour Relations Act 66 of 1998 ("the Act").

2.The applicants' case is that on 28 February 1998 they received a letter in an envelope together with their payslips informing them they had been dismissed as from the same date. They then complained to their Union UPUSA of whom they claim they had been members since 1997. When UPUSA's representative Mr Nthuli then wrote to the respondent, he was advised

that the consultation process had been completed and that there was nothing to be done further. The Union then referred a dispute about the dismissal to the Commission for Conciliation Mediation and Arbitration where conciliation proved to be unsuccessful, and the matter was consequently referred to the Labour Court for trial. The applicants were represented by UPUSA in this matter.

3.The respondent's case is that the 38 individual applicants, (or "the employees") were all members of one of two trade unions, namely DICHAWU and SACCAWU and that the respondent had in fact consulted in early February 1998 with these two unions regarding the retrenchment. The respondent contends that an agreement had been reached with the two trade unions on the retrenchment exercise as envisaged by section 189 of the Act, and the employees were all paid their severance packages.

4.According to Ms L Smith, the respondent's personnel official, the respondent was unaware that it was under any obligation to consult with UPUSA and that in fact, when Mr Nthuli's letter of 2 March 1998 arrived, it was the first time she had become aware of UPUSAS' involvement with the employees. By then it was too late to consult with UPUSA.

5.During cross-examination, she expressed the view that if the employees were indeed members of UPUSA she found it surprising that UPUSA only became an active party after the event (the retrenchment exercise) and after the dismissal.

6.Ms Smith also testified that during the period 1996 to 1998 the respondent's business went to a decline as Hillbrow degenerated due to crime. The respondent in its endeavours to cut down on costs, examined it's wage bill and concluded that by making use of outsourcing, approximately, R872 000 could be saved as an expense.

7.In a letter dated 12 February 1998 (one which employees claim they only received on 28 February 1998) the employees were invited to take up

employment with the new contractors which took over the security, cleaning, cashier and packing functions. The employees did not take up this offer.

8.Their version was that they knew nothing about this offer and Mr Nthuli also did not explore this invitation on their behalf in his letter of 2 March 1998, as he believed the respondent was not entitled to outsource and that there was indeed no reason for the restructuring that took place within the respondent.

9.The relevant part of a letter to the two unions reads as follows:

"In addition your members have been invited to apply for this letter is addressed to SACCAWU for the attention of Mr Mjeza who is apparently the regional organiser. A similar letter is also sent to DICHAWU for the attention of Oscar Malgas."

In the letter to SACCAWU it is stated:

"In addition your members have been invited to apply for positions with Jaz Sales and Marketing CC on terms and conditions to be negotiated between your members and Jaz Sales and Marketing CC.

... the aforementioned amount is tendered and accepted by your members in full and final settlement of all or any claims which they may have, arising from or in connection with their employment with the company and the subsequent termination thereof.

We wish to thank you for your assistance in finalising this matter as expeditiously as possible and on selection criteria which have been agreed as being fair and reasonable."

10.I now turn to the applicants' version of the events. The applicants contend that they knew absolutely nothing about the retrenchment and that they were never members of either DICHAWU or SACCAWU.

11.Mr George Nethavani, the first applicant, testified that he never belonged to SACCAWU and that he knew nothing about the retrenchment. He also

stated (as was also stated by the other witnesses) that he joined UPUSA during 1997. This witness' evidence has to be rejected.

12. Firstly, he was unable to explain why there was a stop order application form signed by himself in favour of SACCAWU. He denied that the signature was his. The inference union seeks the court to draw from that is, that the respondent had fraudulently attached the first applicant's signature, or forged his signature on the application form. However, his signature bears an almost identical resemblance to the signature on his application for membership of UPUSA (dated 1997) which was handed in by UPUSA as proof that the employees have been members of UPUSA since 1997 and not since March 1998, after the retrenchment was concluded.

13. The following observations can be made from the application form for UPUSA membership, signed by Mr Nethavani.

14. It is undisputed that at the time of his dismissal in 1998 (not in 1997) Mr Nethavani earned R2 028. On the application form, under the section, where the employee's salary has to be filled in the subscriber who completed the form, had written first written R202 (the first three digits of his 1998 salary) and deleted it. Then the figure was replaced with R1 750, being the salary that Mr Nethavani earned in 1997. It is highly unlikely that the mistake would have occurred in this form, if the application form was indeed completed in March 1997.

15. Even though the form is dated in March 1997. 1998 was first written on the form and then the "8" in "1998" was replaced by a "7". It is also unlikely in my view, that a person who completes a form in 1997 would write 1998 in error, whereas it is rather common when people date a document in a year, particularly early in the year, the previous year could in error be written down.

16. The probabilities are in my view, overwhelming that this form was

completed *ex post facto* in order to create the impression that the employees did not become members of UPUSA after their dismissal, but in fact became members prior thereto and that the respondent was under an obligation to consult with UPUSA.

17.Mr Nethavani could also not explain why the respondent would forge his membership from of the SACCAWU Provident Fund. He could not give a proper explanation for the deductions made for the Provident Fund on his behalf every month. Neither could he explain the union fees that were paid every month and the stop order form he had signed. He stated that these monies should be returned to him as the company had no authority to deduct these monies. In my view, the probabilities militate against a scenario where an employer would, without informing an employee, make deductions for a provident fund on his or her behalf and deduct union fees on such an employee's behalf when the employee does not belong to such a union.

18.I now turn to the evidence of Ms Olivia Msane, who also gave evidence on behalf of the employees. She gave evidence that she was never a member of SACCAWU, denied any knowledge of this union and was adamant that it mandate to consult about any retrenchment on her behalf.

19.She sat in court while Mr Nethavani gave evidence and listened to the questions put to him during cross-examination about his signatures on the SACCAWU stop order form and application form for UPUSA membership. She was clearly intent on denying that the signature on any document relating to SACCAWU was her signature but admitting that the signature on an UPUSA application form was hers.

20.However, during cross-examination Mr Soldatos who appeared for the respondent, did not, (as he did with Mr Nethavani), present her with the SACCAWU stop order application form first, but with her application to become a member of UPUSA. She immediately denied that the signature was

hers. In this regard it is significant that when Mr Soldatos cross-examined Mr Nethavani, (on his signature), he criticised Mr Nethavani for taking so long to admit or deny that his signature was on a particular form.

21.Immediately after Ms Msane gave her answer, gesticulations were made by other employees in the Court and Ms Msane realised that she should not have denied that it was her signature or said that it was a forgery, which was her first response. She then stated that she would answer only when told which application form it was. At this point, Mr Soldatos asked Mr Nthuli not to "make signs" at his client.

22.Ms Msane could not explain why monies were deducted on her behalf, regarding her membership of SACCAWU and why she was member of the SACCAWU Provident Fund.

23.Then Mr Edward Mchunu, also one of the 38 employees, then gave evidence. He denied that he was a member of DICHAWU as alleged by the respondent. He was presented during cross-examination with minutes of one of the meetings where the retrenchment in question was discussed, on which occasion he represented those employees who were members of DICHAWU. He denied that he was present at any such a meeting.

24.The inference the Court should draw in this regard, says UPUSA, is that these minutes were forged.

25.Mr Nthuli put to Ms Smith, that the fact that these minutes were not signed, meant that they were not genuine. Minutes should rather be signed, but on the overall probabilities of this particular case, it is hardly likely that these minutes were forged.

26.Mr Mchunu also denied that he knew Mr Joseph Nthuli, who attended the meeting in question. According to the evidence of Ms Smith who knew Mr Mchunu very well, Mr Nthuli and Mr Mchunu were both shop stewards of DICHAWU.

27. Ms Smith gave evidence of how she pleaded with Mr Mchunu to accept the offer to be employed by Jazz Sales, but he refused. The reason he gave her was that the remuneration offered was inadequate.

28. As was the case with the two witnesses referred to above, Mr Mchunu did not impress me as a truthful witness.

29. In the circumstances, I am unable to find that the employees in this case were not members of SACCAWU and DICHAWU as contended by the respondent. Their stop order applications are before court and the evidence presented to the contrary, is in my view, untrue.

30. Even though there was no obligation on the respondent to consult with UPUSA, there is still a duty on the respondent to discharge the onus that it had consulted fairly with those who represented the employees in this matter.

31. One meeting was held in January 1998 and two in February 1998. A proper reading of the minutes of these consultation meetings indicate that selection criteria was discussed and that the consultations broadly complied with the prerequisites laid down in section 189 of the Act. The latter section requires parties to attempt to reach consensus when a retrenchment is contemplated. In this matter consensus was indeed reached in form of an agreement. According to Ms Smith the agreement was not signed as the shops stewards, as well as SACCAWU and DICHAWU officials, preferred not to attach their signatures to retrenchment agreements. This is in my view, not a satisfactory situation but it does not detract from the fact that the employees were, in the respondents view, properly represented during consultations by two unions. It may well be, that the employees (who are now UPUSA members) feel that DICHAWU and SACCAWU had sold them down river. If that is indeed the case, then their cause of action would lie against these two unions.

32.In the circumstances the application must fail.

33.I now return to the question of costs. The employees, with the assistance of their union put before court a lying version. Forgery was committed to mislead the court. There is no reason why in such a case they should not pay costs. I would have granted costs on the attorney and client scale but Mr Soldatos did not pursue that avenue.

34.In the circumstances I make the following order:

1.The application is dismissed with costs.

E. Revelas