

Sneller Verbatim/MC

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS377-01

2001-11-05

in the matter between

BUTIMAFANA RACHEL NGOBENI

Applicant

and

STANTOL STEEL

Respondent

J U D G M E N T

REVELAS J:

- 1.The applicant referred a dismissal dispute to this court. He said he was retrenched by the respondent, Stantol Steel CC, the business activities of which included the manufacturing of structural steel. Mr Stanley O'Dell is the sole member of the respondent. He is also a member of a close corporation called Khoza & O'Dell Projects CC, a construction company.
- 2.The respondent's case was that it did not terminate the services of the applicant as the applicant had resigned on 17 January 2001, and further that he did not resign from the respondent, but from Khoza & O'Dell Projects CC where he had been working as a foreman since August 2000. He was previously employed at Stantol Steel CC, (the respondent) as a welder.
- 3.According to Mr O'Dell the applicant was transferred to Khoza & O'Dell to fill an affirmative action position, a foreman amongst other things, with a view to own share options and to be part of running a business in

future. This was done because the applicant was recognised as an employee with linguistic skills and very good communication skills and potential in other areas. Mr O'Dell testified that the applicant was the best candidate for the position within Stantol Steel at the time.

4.The applicant hotly disputed that he was ever transferred or that he was ever employed as a foreman by Khoza & O'Dell. He insisted that he was employed by Stantol Steel and that the latter had dismissed him through Mr O'Dell.

5.The applicant's case is that when he arrived at work, Mr O'Dell informed him that his services were terminated, apparently with immediate effect, because there was no work left in the business.

6.In the bundle of documents, handed up by the parties, at page 24 and which was provided by both parties in terms of a pre-trial minute, there is a letter addressed to the respondent by the applicant purportedly written by him on 16 January 2001, which letter Mr O'Dell said he never received. The applicant also produced a transmission slip as proof that he had sent the document to the respondent on the 16th, but the portion which could prove successful transmission had been torn off.

7.In the letter the applicant demands to know the reason for the termination of his employment, and payment of an unspecified amount of money. He advised the respondent that he would be taking legal steps against it.

8.The following day, 17 January 2001 the applicant went to the respondent's premises where Khoza & O'Dell was also situated. According to the applicant Mr O'Dell had told him that he was retrenched because there was no work left as stated hereinbefore, but he added that he would contact the applicant as soon as a new position became available within the respondent.

9.The applicant also gave evidence that he was promised a severance package of R3 000. These two undertakings, the applicant says, were recorded in

writing in a settlement agreement reached between the parties on the same day and the undertaking went along with other undertakings to pay the applicant an amount of R2 000, an undertaking to pay a traffic fine of R600 incurred by the applicant.

10.The applicant was also aggrieved about the fact that he did not receive severance pay and that the respondent had employed a new boilermaker subsequent to his departure, and declined to employ the applicant who also applied on the advice of a business called Africol.

11.It is common cause that a settlement agreement was indeed reached between the applicant and Mr O'Dell on 17 January 2001. The respondent, in evidence produced a two page settlement agreement which Mr O'Dell says was the agreement in question. The original of that agreement is marked exhibit A.

12.The applicant contends that EXHIBIT A, (a copy of which was also contained in the bundle), is not the agreement which was reached on the 17th. His version is that the agreement in question, which the parties signed on that day was a three page document with different terms, although some of the terms contained in exhibit A was also contained in the three page document. The two undertakings regarding severance pay and re-employment was not contained therein.

13.For purposes of understanding the evidence and the conflicting versions properly it is necessary to quote from the relevant parts of exhibit A which is almost the entire document. It reads as follows:

"SETTLEMENT AGREEMENT 17/01/2001

between Stanley O'Dell A

Khoza and O'Dell Projects

and

Rachel Butinfana Ngobenj ID 6301165410081

hereby agree the following

1. That Rachel accepts R2 000 as full and final settlement between himself and Khoza and O'Dell Projects.
2. Khoza and O'Dell Projects will pay a fine of R600 on Rachel's behalf.
3. This agreement is in full and final (sic) between the parties and replaces any previous agreements.
4. The parties hereby agree that no further claims whatsoever will be instituted between them, or any organisation or individuals related to Khoza and O'Dell Projects."

14. The agreement is then signed by the applicant and Mr O'Dell. Mrs O'Dell signed as a witness below the applicant's name and signature.

15. The applicant disputes that the agreement was reached between himself and Khoza and O'Dell as reflected on exhibit A. He maintains that the agreement he signed reflected the respondent, Stantol Steel as the employer party. He denies that paragraph 3 and 4 relating to the full and final settlement clauses, were recorded in the agreement he signed and that in this agreement there were two further paragraphs relating to the question of a severance pay package of R3 000 and re-employment.

16. The applicant was asked under cross-examination for an explanation as to why the agreement he allegedly signed consisted of an extra third page and this would be the second page on his version, containing two further undertakings when the first page did not record paragraphs 3 and 4 of exhibit A, which is only two pages. In other words on the applicant's version there were the same amount of paragraphs, yet requiring a full second page instead of, in other words a three page document instead of a two page one.

17. The applicant answered that the first page of the agreement was written in a fashion that there were far greater spaces between the heading and the names of the parties than on exhibit A. The applicant acknowledged that the signature on exhibit A was his. He seems to suggest that the last

page of exhibit A, which only contained the signatures of himself, Mr O'Dell and Mrs O'Dell, was also the last page of the agreement which he had signed. In other words Mr O'Dell must have attached the last page of this three page document to the exhibit A, which he must have fraudulently re-wrote after the applicant had signed the alleged former agreement. The staple marks on the two pages constituting exhibit A, suggest no fraudulent interference. There are only two holes as far as the eye can see and there is only one staple mark, only one crease which, a staple mark which was caused by the stapler.

18. In my view the version of the applicant in respect of the alleged previously existing agreement with more beneficial terms for him, seems highly unlikely as will appear hereinafter when considering the other evidence. It also appears to be fabricated.

19. On his own version Mr O'Dell was kind to him. He never disputed Mr O'Dell's evidence that he was to be advanced in his career as an employee with potential, *inter alia* because of his linguistic abilities and communication skills, that the advancement proceeded with the support of Mr O'Dell and was Mr O'Dell's idea. These facts and the impression of an honest witness, which Mr O'Dell made, was inconsistent with the fraudulent conduct attributed to him by the applicant in this regard.

20. The applicant denied that he was employed by Khoza and O'Dell. And the next question is whether the applicant was employed by Khoza and O'Dell. The applicant did not challenge the evidence that the respondent was a factory based area whereas Khoza and O'Dell which performed construction work was based at sites. When the dispute in this matter arose the applicant was based at a site where the Metro project, a construction near the Johannesburg railway station was in progress and conducted by Khoza and O'Dell. The applicant was not working at Stantol Steel at that

time. According to Mr O'Dell he was based at the site as a foreman.

21.The applicant was since his transfer to Khoza and O'Dell no longer a weekly paid wage earner but a salaried employee who earned more than he previously had as a welder. He also paid provisional tax. This evidence the applicant also did not dispute.

22.In deciding the question as to whom the applicant was employed by, it would have been helpful if either party had produced pay slips, but this was not done. But on the evidence I am satisfied that the applicant was employed by Khoza and O'Dell. Mr O'Dell's wife, Mrs Heila O'Dell confirmed this fact. She worked with the daily administration of the respondent at Khoza and O'Dell. Mr O'Dell is involved of the day to day running of both businesses in question. He did not adopt an overly technical approach to this question. He appeared to have taken responsibility for the respondent and Khoza and O'Dell in this matter.

23.In my view Mr O'Dell had nothing to gain from fabricating evidence that the applicant was employed by Khoza and O'Dell and that a settlement was reached with that party as opposed to the respondent.

24.On the facts presented I have no reason to believe that the applicant was employed by the respondent.

25.Mr O'Dell also gave evidence that he had a counselling session with the applicant on 15 January 2001, that is the day on which the applicant says he was dismissed. The counselling session was about the applicant's performance on site, particularly the Metro Mall site. During this meeting several concerns were raised by Mr O'Dell and in particular the fact that the applicant only returned to the site on 10 January 2001 when he was supposed to return sooner.

26.The applicant denied that such a meeting took place with Mr O'Dell on the 15th. He stated that he and Mr O'Dell had a discussion on 10 January, five days earlier. Mr O'Dell, in support of his version that a meeting

was held, relied on a three page minute he had kept of the meeting of 15 January 2001 which formed part of the bundle and was found at pages 21, 22 and 23. This minute reflected Mr O'Dell's concern and that Mr O'Dell had explained to the applicant that salaried employees were not entitled to overtime pay. The applicant felt that he did not have to return to the site on 10 January 2001 as he was not required to work overtime unless he was remunerated accordingly.

27. Other problems were also discussed with the applicant. The applicant denied that any of these issues were raised with him on 15 January, save for the issue of his late arrival which was discussed on 10 January 2001. Mr O'Dell stated that he had no discussion about this issue with the applicant and on the 10th told him that he would talk to him about these issues on a meeting to be held on the 15th.

28. In respect of the minute, the applicant's evidence is once again that Mr O'Dell fraudulently fabricated a document, namely the minute of the meeting which never took place. According to him his services were merely terminated on that day without reason. Mr O'Dell's evidence was that the applicant's services were terminated by virtue of the fact that the applicant had resigned on the 17th because he told Mr O'Dell that since Mr O'Dell was no longer happy with him, after their meeting of the 15th, resignation was better. Mr O'Dell stated that he did not object to the applicant resigning because there were problems with his performance, yet they did not want his dismissal. According to Mr O'Dell the business Khoza and O'Dell was "an affirmative action" or black empowerment business and as I understood it a high level of tolerance regarding performance of employees was adopted at Khoza and O'Dell and the applicant was in any event the best candidate for the position.

29. In this regard the letter of 16 January is a crucial piece of evidence as

it reflects that the applicant was dismissed the previous day, when Mr O'Dell says he had a meeting with the applicant about the applicant's unsatisfactory work performance. A torn transmission slip is not conclusive proof that the letter in question, which Mr O'Dell insists he never received, was in fact sent per telefax machine. All the slip proves is that a document was sent on 16 January 2001 to the respondent but it does not prove which document.

30.If it were not for the other improbable and in some cases false evidence produced by the applicant, I may very well have considered this evidence to cast a different light on the applicant's case. But as shown above he gave more than one false version which affected his credibility adversely.

31.Of further importance on the question of resignation was that it was common cause that once before, when criticised by Mr O'Dell, the applicant resigned but returned three days later on his mother's advice and was re-employed.

32.Mr O'Dell also gave undisputed evidence that "up to date" he has never embarked on any retrenchments in either of his business concerns in respect of any employees, including the applicant.

33.After the applicant's resignation he also signed a worker's fund withdrawal notification. According to the evidence of Mr O'Dell and his wife, the applicant completed the form, including question 10 under section A of the form which is headed "Member details". Here the applicant ticked off the box next to the word "resignation" as opposed to the words retrenchment, dismissal or ill health, all of which were provided for in section A. The applicant would have it that Mr O'Dell completed section A and he, the applicant, completed the remaining sections which was section D and E. Section B and C were apparently not relevant to complete.

34. I find it highly improbable that a retrenched employee would sign a document when his former employer gave the reason for his dismissal as a resignation when it was in fact not a resignation.
35. The handwriting in Section A resembles the applicant's handwriting, even though no expert witness gave evidence to this effect. Mrs O'Dell confirmed that the applicant completed the form and that her husband only signed and dated the document. Mr O'Dell's handwriting is reflected on exhibit A and the date which he signed is dissimilar to the applicant's handwriting and to the handwriting on the document.
36. The applicant has an onus to prove that he was dismissed, in terms of section 192 of the Labour Relations Act 66 of 1995.
37. On the evidence presented by the parties, I had to make a credibility finding. As demonstrated hereinbefore I am not able to make such a credibility finding in favour of the applicant. It was also significant in his argument, when he argued, that he only wanted more money. He was hurt because he was not re-employed and because he did not receive the R3 000.
38. Mr O'Dell explained, when he gave evidence, that the applicant owed that amount to his father-in-law for a caravan which he had bought.
39. The applicant never addressed during argument on the fact that he was retrenched and why this process was unfair. The applicant also signed a settlement agreement voluntarily. He never stated that he was forced to sign the agreement. He only placed the contents of the agreement, or the identity of the agreement before court, in question. If he now has "biased regret" one may have sympathy with him, but it was his choice to sign the agreement and it was also his choice as well to have resigned. I am not in a position to undo the settlement agreement on that basis. The applicant is an adult person who exercised a choice for which he alone must take responsibility. In the circumstances I cannot come to

the applicant's assistance and therefore his application must fail.

40. On the question of costs I had to consider that the applicant brought a case with no merits to this court. He had in fact settled the matter. He put up a false case before the court and did not think twice before he levelled slanderous allegations against his former employer who is a man who on his own version was good to him and appears to have integrity.

41. I make the following order:

The application is dismissed with costs.

E. Revelas