IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO. P79/97

In the matter between:

C M YOSE & 12 OTHERS APPLICANTS

and

KILLIN SERVICES CC TRADING AS

G S M SERVICES GROUP RESPONDENT

JUDGMENT

MLAMBO, J:

[1] The applicants were all employed by the respondent and stationed at its George branch until 31 May 1997 when their employment ended. They allege that they were all retrenched with effect from 31 May 1997. They allege that the termination of their employment was unfair and was not in compliance with sec. 189 and sec. 196 of the Labour Relations Act No. 66 of 1995 (the Act).

[2] The respondent disputes the applicants allegations and states simply that all the applicants absconded and the respondent viewed this as a repudiation of their contracts of employment, which repudiation it accepted.

[3] The applicants must satisfy the Court that a dismissal occurred. See section 192(1). If the Court finds that a dismissal indeed took place, the respondent must satisfy the court that same was fair. See section 192(2). The respondent's case is that all the applicants signed contracts of employment in terms of which they could be redeployed to any branch of the respondent should operational requirements so dictate. I did not understand the applicants to deny this. To that extent therefore I accept that indeed the respondent was entitled to relocate any of the applicants at any given time due to operational requirements.

[4] The respondent's case is therefore that when it was advised of the cancellation of the Pillsbury Brand's contract it had to consider the redeployment of its employees who were employed on that contract. It is not disputed and, I accept it to be so, that the Pillsbury Brand's contract was respondent's big contract in George. It was in this contract where a majority of the respondent's employees in George were employed.

[5] The respondent's case is that it then instructed Mrs Daisy Bennett, the George branch manager, to consult with the George employees, including the applicants, about the cancellation of the Pillsbury Brand's contract. She was, so the contention goes, instructed to advise such employees that the hostel would be closed and, importantly, that a number of the employees would be relocated to

other contracts. The respondent contends that the instruction was that those employees originally from Port Elizabeth would be relocated to contracts in Port Elizabeth and were to be offered transport to relocate them and their belongings on 2 June 1997.

[6] Bennett, the most senior member of management in George denied that she received the instruction contended by the respondent. She testified that around the 21 May 1997 she received telephone instructions from Mrs Martins, the director of the respondent that as a result of the loss of the Pillsbury contract, she was to dismiss the guards as there were no jobs where they could be relocated to. Bennett testified that she was instructed initially not to carry out this instruction until the cancellation of the Pillsbury Brand's contract was confirmed in writing with reasons. She testified that, whilst waiting for the go-ahead to carry out the dismissal, she spoke to Mr van den Bank, the person responsible for the Pillsbury Brand's contract to speak to those in charge of the new company taking over the contract to consider employing some of the applicants as they would be jobless.

[7] She testified that she was then instructed by Mr Martins, the respondent's operations manager, on 29 May 1997 in the morning to do a number of things. She wrote the instructions on a piece of paper which was part of the discovered documents and indeed part of the evidence. She stated that her instructions

were:

1. That on Tuesday, 2 May 1997 all cars and rifles from George would be collected;

2. That she was to send letters notifying the other George contracts of the termination of the contracts, that is D.F. Scott, Nite Express and Standard Bank;

3. She was to sell the beds and mattresses, the stove and the deepfreeze;

4. She was to terminate the telephone service;

5. She was to retrench all the guards except for Mlenze and Mavumengwana.

She testified that she then informed the applicants of their retrenchment the same day, effective 31 May 1997.

[8] In cross-examination it was put to her that she was never instructed to retrench the applicants but to relocate them to other contracts. She denied this. The gist of her cross-examination and the impression created is that when she retrenched the applicants she had no instructions to do that.

The only person who can confirm the respondent's intentions not to retrench but to relocate is Bennett as she was the person who was to carry out that instruction. As Bennett denies this it is therefore necessary to consider the parties' conduct after 29 May 1997 and on a balance of probabilities decide on a version.

[9] A number of factors are common cause and they are that:

1. a telephone conversation took place between Mrs Martins and Bennett on 29 May 1997;

2. the respondent lost the Pillsbury Brand's contract during May 1997;

3. all the applicants did not work beyond 31 May 1997;

4. the respondent's contracts at D.F. Scott, Nite Express and Standard Bank in George were not serviced from the end of May 1997 and were actually terminated during June 1997;

5. Bennett continued as branch manager and later worked from her home until January 1998;

6. On 2 June 1997 the respondent sent vehicles in convoy to George to collect its belongings there and returned to Port Elizabeth with Mlenze, Mavumengwana and Sothwane.

[10] It is common cause that Mr and Mrs Martins never at any stage communicated with the applicants about relocating them to other contracts. It is further common cause that after 29 May 1997 Mrs Martins spoke to Gary Fetumani, one of the applicants, when she says she requested him to go and guard at Standard Bank. This was after Standard Bank had telephoned her, complaining that there were no guards. She testified that Fetumani refused to go to Standard Bank and said he was just collecting a few things.

[11] A proper assessment of Mrs Martins' evidence reveals an awareness on her part of a problem in George. This was evidenced by the lack of guards at Standard Bank and that most telephone calls went unanswered from the George branch. Despite this awareness of the problems in George which also manifested itself in the telephone conversation with Fetumani, Mrs Martins did not ask the one very important question as to why Fetumani refused to go to Standard Bank and why there were no guards there. If indeed she had no inkling of the problem one would have expected her to ask Fetumani these questions in order to clear any confusion or correct any incorrect instructions issued to the applicants. After all it is undisputed that the applicants were very happy working for respondent, especially those staying in the hostel.

[12] Another opportunity which presented itself to clarify the respondent's decision and clear confusion was on 2 June 1997 when the George vehicles, rifles, etcetera were collected from George. There was evidence that the applicants refused to part with the vehicles until they were paid. This is testimony of a stand-off of sorts between the applicants and those employees of the respondent from Port Elizabeth who had come to collect those assets. Even if Mr and Mrs Martins were not there that was an opportunity for the applicants to be told that they were not dismissed, but were to be relocated. This clarification never materialised.

[13] One would also have expected Mr and Mrs Martins to have received a full report from the people who went to collect the George assets, as to what happened and why they did not bring all the redeployed George employees. This was still early and timeous for respondent to clear any confusion and reassure the applicants that they were not dismissed, that Bennett acted incorrectly by dismissing them and that they still were in employment. This did not materialise.

[14] Bennett's employment continued unabated for another eight months until January 1998. No disciplinary action of any sort was taken against her for dismissing employees without instructions. Mrs Martins testified that this issue was raised with Bennett during dinners and so forth. The impression gained from this evidence is that the matter was raised informally with Bennett and nothing was done thereafter. If one believes the respondent's version that she was never instructed to retrench the applicants then it is strange that no action was taken:

1. to correct the situation on the ground by reversing Bennett’s decision;
2. and to discipline Bennett;

After all her actions had exposed respondent to a claim of unfair dismissal by the applicants.

[15] The respondent received early notice of possible legal action arising from

Bennett's action by way of a letter dated 30 July 1997 from applicants' attorneys. In this letter which was received by respondent it was advised that:

“Our instructions are further that our clients were unfairly retrenched on 29 May 1997.

In this regard our instructions are that you did not comply with section 189 of the Labour Relations Act in any way whatsoever.

Our clients have already referred the matter to the CCMA in terms of the Act and our instructions are now to proceed to refer this matter to the Labour Court for determination.

You also did not comply with sec. 196 of the Labour Relations Act.

Our instructions are therefore to demand from you payment in respect of everyone of our clients the equivalent of 12 months' salary of each employee as well as pay severance pay equivalent to one week per completed year of service.

Unless this amount is paid into our trust account within seven days of date of this letter we will immediately proceed to the Labour Court".

[16] Needless to say, but the respondent never responded to this imminent threat of litigation nor did it take any action against Bennett who had put it in that situation. In fact, by that time the CCMA had already certified, as early as 8 July 1997 that the dispute regarding the retrenchment of the applicants remained unresolved. This dispute according to the section 135(5)(a) certificate had been referred for conciliation on 26 June 1997. Therefore the respondent must have

received notice of the consequences of Bennett's conduct as early as June 1997. Needless to say, the respondent did nothing against Bennett or to respond to the letter to correct the situation and take back those individual applicants who had been incorrectly dismissed.

[17] It is common cause that the respondent received the applicants' statement case on 3 September 1997 and did not respond thereto in any way. Default judgment was applied for and enrolled for 6 March 1998. Despite this, no response was filed. It was only on 26 March 1998 that the respondent was represented in Court and a postponement was requested. The matter was postponed and respondent was ordered by the Court to file a response on or before 9 April 1998. No such response materialised and the matter was again enrolled for 21 April 1998. On that day again the respondent was ordered to file a response and the matter was postponed until 25 May 1998.

[18] It is clear therefore that despite the respondent's protestations to the contrary, its conduct is such that it took no issue with the decision by Bennett to dismiss the applicants. It took no issue simply because it must have reconciled itself with what she had done. This can only mean that Bennett's decision to dismiss the applicants was sanctioned by it. The respondent's defence that the applicants absconded, is therefore rejected.

[19] There can be no question of the applicants absconding if in fact they were told by their manager that they were retrenched. I have no reason to doubt the evidence of Bennett. She testified that when Mr Martins instructed her as he did on 29 May 1997 she took notes on a piece of paper. Each entry on this paper can be confirmed by her evidence as well as by objective facts. The authenticity of this note was not challenged in any way by the respondent.

[20] I therefore find that the applicants were dismissed on 29 May 1997 by Bennett instructed by Mr Martins on behalf of the respondent. I further find that there was no compliance with the provisions of sec. 189 of the Act before the applicants were retrenched. It is clear that no consultations as contemplated in sec. 189 were held with the applicants prior to 29 May 1997 when they were retrenched. Procedurally therefore, the dismissal was unfair. I do not deem it necessary to determine if the dismissal was also substantively unfair as the applicants have not pleaded that case nor made it out.

[21] The respondent has tried to make out a case that the second applicant was not a permanent employee and that instead she was a casual. The second applicant denied that she was a casual employee. No evidence was led that the third applicant worked only a number of days per week. In fact indications are that she worked on a full time basis. Probabilities do not support the respondent's version on this issue and I accordingly reject it.

[22] In relation to compensation it is common cause that the applicants were not paid any severance pay when they were dismissed. In addition, they were not paid for the last two weeks of their employment in May 1997. I therefore find that the failure by the respondent to pay the applicants severance pay was in breach of sec. 196(1). They are clearly entitled to this. The applicants have also requested compensation totalling 12 months each. This is one matter which could have been finalised some time ago had the respondent complied with the rules of this court and filed a response timeously. The applicants came to court twice trying to have the matter heard but failed because the respondent had failed to file a response. There is therefore no reason why the maximum relief n Section 194(1) should not be awarded. As far as compensation is concerned I align myself with the approach by My Brother Zondo in CWIU v JOHNSON & JOHNSON (PTY) LTD [1997] 9 BLLR 1186 (LC).

[23] I therefore make the following order:

1. The dismissal of the applicants on 29 May 1997 was procedurally unfair and not in compliance with section 189 of the Act.

2. The respondent is ordered to pay severance pay to the applicants as follows:

2.1 One week to all the applicants except applicant no 3; and

2.2 Three weeks to the third applicant.

3. The respondent is ordered to pay 12 months salary to each applicant as compensation

4. The respondent is ordered to pay the costs of this action.

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MLAMBO J

Appearing for the applicant:

Appearing for the respondent:

Date of hearing: 25 and 26 May 1998

Date of judgment: 12 June 1998