IN THE LABOUR COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: C6/98

DATE: 27-8-1998

In the matter between:

THE FOOD AND ALLIED WORKERS UNION & OTHERS Applicants

versus

FOODTOWN INCORPORATED (PTY) LIMITED t/a TRAVENNA Respondent

—

J U D G M E N T

BRASSEY, A: 1. The applicants in this matter are a trade union and 67 of its members, who are former employees of the respondent. They applied for an order in the following terms:

1. That a settlement agreement entered into between the first applicant and the respondent on 29 September 1997 be made an order of Court in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995.

2. That the second to 68th applicants are reinstated in terms of the above agreement on terms and conditions no less favourable to them than those which governed their employment prior to their dismissal.

3. That the second to 28th applicants are awarded

compensation for the period 9 October 1997 to date they resumed employment with respondent, equivalent to the wages they would have earned during that period. Ancillary relief is also sought, together with costs of suit.

2. The dispute, as the prayers foreshadow, is concerned with an agreement that was concluded in the course of proceedings before the Commission for Conciliation, Mediation and Arbitration on 29 September 1998. The proceedings arose out of industrial action that had occurred at the premises of the respondent and the consequential dismissal of the employees. In the course of the proceedings, agreement was reached on

(a) the re-engagement of the dismissed employees, subject to certain qualifications, together with a preservation of the benefits that had accrued to them under their employment contracts, prior to their dismissal.

(b) on the question of wages and working conditions, that would apply for the coming year. The agreement, which it is unnecessary to recite here, gave the first applicant to option of choosing between one of two wage regimes that would operate for the coming year.

3. The ink was barely dry on the agreement when an exchange of correspondence occurred between the parties on effect and import of its terms. The correspondence commenced with a letter of 1 October 1997 which was sent by the first applicant to Senior Commissioner Cloete of the Commission for Conciliation, Mediation and Arbitration in which clarification was sought on the following:

a. Whether or not the parties agreed that in the event that neither of the wage alternatives were accepted by the first applicant and its members, the remainder of the contract was null and void.

b. Whether the dispute related to the dismissal of the 67 workers or whether it related to

negotiations around wages and conditions of employment.

c. Why the respondent was given an opportunity to deliberate on the issue of wages and other conditions of employment, whereas the first applicant was denied such an opportunity.

The actual terms of the letter are not before me, but the summary of it that I have cited above is substantially common cause between the parties.

4. On 1 October 1997, the respondent's attorneys addressed a letter to the first applicant indicating that the respondent was prepared to honour its obligations in terms of the agreement and pointing out that it was now for the first applicant to indicate which option in relation to the issue of wages it chose: whether R150 per month for all workers commencing on 1 June 1997 for a period of 12 months to 31 May 1998, with new negotiations to commence in April 1998, or an increment of R180 per month, commencing 1 September 1997, such increment agreement to last until 31 August 1998 with new wage negotiations to commence on 1 June.

5. The response to that letter was a letter of 2 October 1997 indicating that the 2nd to 68th applicants had accepted the R150 increase. That letter, however, did not stop there. In paragraph 2 of it there is a reference back to the earlier letter and it is stated that:

"...the third paragraph is still not true because as you know, majority of the union members did not have a say in the wage matter on 29 September 1997."

That statement was enough, in my view, to set alarm bells

ringing in the mind of the respondent's management. From then on it could not be certain that the workers represented by the first applicant, their trade union, were indeed in agreement with the terms of the settlement and, in the light of that uncertainty, it was permissible, in my view, for the respondent to seek clarity and indeed certainty on the issue. That clarity was sought by correspondence emanating from the respondent's attorneys dated 2 October and thereafter. In its letter of 2 October, the attorneys pertinently put to the applicant the fact of the agreement and said that unless a commitment was given by the employees to the settlement agreement, the respondent might consider that the agreement had been repudiated and would in such circumstance disavow any further obligation to re-employ the members of the first applicant.

6. The response to that was in a letter dated 2 October 1997:

"1. It appears you are adamant that the dismissal was not unfair. Note that should you commit an offence by dismissing him unfairly due to the fact that we are not in agreement on wages, we reserve our members' rights.

2. We believe that you have enjoyed the monopoly of duress of compulsion during the hearing on the unfair

dismissal, we therefore call for the reviewal of the said hearing.

3. You are challenged to show the good faith that you are alleging.

4. It was very clear on 29 September 1997 at the CCMA who actually violated/abused the LRA and concept and principle of democracy in the

Republic.

5. It is believed that the hearing was manipulated by some forces.

6. The understanding that the workers are not dismissed and remain not dismissed is the bottom line."

A letter in those terms, inflammatory as they were, could only have served to exacerbate the uncertainty and confusion that must by now have existed in the minds of the management of the first applicant. A response was sent on the same day requesting an explanation for the standpoints that were adopted.

7. The exchange of correspondence that followed culminated in a letter of 7 October 1997, in which inter alia the first applicant said the following:

"If your fear is all sorts of disputes that is of paramount importance that you should be specific as to what it is that you are attempting to avoid. To

clarify you further, the issue of us reserving our right also relate to the fact that your trustworthy regarding the financial information is doubtful because FAWU expected you to provide the financial records on 29 September 1997, which you have never provided and you also failed to tender an apology or reason for not doing so. In other words we are not happy about the turn of the events at the CCMA."

From this passage it is evident that the first applicant is soliciting financial information from the respondent at that date. The financial information, at best for the first applicant, had to relate to whether it should choose the one

alternative or the other. That a choice had already been made and made on 2 October 1997, and that the first applicant should be persisting in its request for the information served only to provide further confirmation, justifiable in my view, that the first applicant was questioning the very basis and substratum of the agreement between the parties insofar as wages were concerned.

8. In response thereto, the attorneys for the respondent sent a letter reaffirming the need for a signature of an undertaking by the individual

applicants that they would abide by the agreement in question. The letter, which is dated 7 October, stated that:

"No employee will be re-employed unless the declaration is signed by him/her and handed in on arrival at Travenna. The contents of your latest letter and your letter transmitted to our offices on 3 October 1997 at 9:58 substantiate the reasonableness of the employer's attitude."

The individual applicants declined to sign the declaration that was proffered for their signature and declined even each to sign a copy of the agreement of settlement so as to signify their assent to it. These acts of recalcitrance, when taken in conjunction with the correspondence written on behalf of them by their representatives, they indicated, quite plainly that they were, at best for them, uncomfortable with the contents of the settlement agreement and wished to reopen, and possibly contest, some of its terms. By taking that standpoint they evinced, in my view, an intention, objectively determined, not to be bound by the terms of the settlement agreement.

9. In the circumstances that constituted a repudiation of the settlement agreement by them and

that repudiation, being material, justified at common law a cancellation of the agreement by the respondent. The respondent cancelled the agreement as against the individual employees by dismissing them and as against the first applicant, by notification to that effect. It is not seriously contended by Mr Steenkamp, who acted on behalf of the applicants, that if dismissal can constitute cancellation, that dismissal had precisely that effect in the circumstances of this case.

10. It now remains for me to consider what implications that repudiation has for the present proceedings. In terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995, this Court has the power to make any arbitration award or any settlement agreement, other than a collective agreement, an order of the Court. It was common cause between the parties that as at 29 September and at least until 9 October, this Court would have had jurisdiction to make this agreement an order of the Court. Mr Wessels, who appeared on behalf of the respondent, argued before me, however, that once the agreement had been cancelled by dint of its repudiation, this Court no longer had jurisdiction to make the agreement an order of Court.

He went further indeed, and submitted that it was not even competent for this Court to enquire into the question of repudiation in order to determine whether the agreement was extant and thus capable of being an order of Court.

11. I have already made a ruling on the jurisdictional question against Mr Wessels, and it is necessary for me only briefly to give my reasons for doing so.

12. The consequences of cancellation are not to denude the agreement of any content whatever. They do not produce the result that an agreement is void ab initio, but serve only to put an end to the executory obligations that each party may have to perform under the agreement. The effect of cancellation may be that obligations that have arisen prior to cancellation themselves cannot be enforced because they are dependent on the performance of some corresponding obligation of the other party which is, as yet, outstanding. That has given rise to the doctrine of accrued rights, namely that rights which have accrued due and enforceable prior to the cancellation of a contract remain enforceable, despite its cancellation, but executory rights do not have that result. It is

unnecessary for me to recite the authorities in that regard, or to enquire into their import. It is enough for me, in the circumstances, simply to make the point that cancellation of an agreement does not make it void. The agreement still has a life and still has, at least potentially, a juristic effect. Thus in principle it would be competent for me to make the agreement an order of court under section 158(1)(c) which remains, in existence at any rate in limping form.

13. It by no means follows, however, that I should exercise that power in every case. In a case such as the present one, in which the question of cancellation has been raised and aired and in which I have come to the conclusion that the settlement agreement has indeed been cancelled as against those who would enforce it, it seems to me that I have a discretion to deny the grant of an order making the agreement an order of this Court. If analogy is necessary, and I suspect it is not, it can be derived by comparing this case with one denying, in the exercise of a discretion, specific performance of a conventional contract. It is trite that the Court has such a discretion and I take it that discretion applies a fortiori in cases in which

specific performance is sought through the instrumentality of an order of this Court.

14. I conclude therefore (and Mr Steenkamp did not argue the contrary,) that I have a discretion to decline to make the agreement an order of this Court. I propose to exercise the discretion in precisely that way in the circumstances. I can see no virtue whatever in making the agreement an order of Court. The matter might be different had the agreement had a viable life and had it been performed in part by one or other parties. In the present case, however, the agreement was all but stillborn and I see no reason why this Court should seek to breathe life into it for any purpose.

15. The consequences of denying the agreement effect were debated in argument but I take it that it is unnecessary and indeed, undesirable for me to pronounce on them. To what extent the applicants can rely either on the dismissal that pre-dated the agreement, or the dismissal that was implicit in the acceptance of repudiation, is a matter for argument before another forum.

16. That being so, I decline to make the agreement an order of Court as prayed for and that being my decision, the consequential relief that is claimed must also be denied.

17. It remains for me to consider the question of costs which was debated before me thoroughly, if not at length. In my view, this is a matter in which costs should follow the event, but with the qualification that I should enunciate in due course.

18. It appears that there is some vestige of a relationship between the first applicant and the respondent in respect of other premises within the Kimberley area where the respondent does its business. It might be that that factor would have weighed against the grant of a costs order in the present case. However, I am inclined to consider, having regard both to the standpoint and to the tenor of the attitude evinced by the applicants to the settlement agreement which was the product of considerable effort as between the parties, that the applicants should be visited with the displeasure of the Court that a costs order entails. I intend to make an order accordingly.

19. The one aspect that I referred to was the prolixity of the answering affidavit. The affidavit traverses the history of this dispute, I will not say from its genesis but certainly from shortly thereafter. There are annexed to the affidavit a significant number of annexures that do not pertain, in my view, to the issues being raised. It seems to me that the answering affidavit is indeed unnecessarily prolix and I can think of no alternative in dealing with that prolixity but to deny the respondent the costs of the affidavit.

20. In the circumstances, I make the following order:

1. The application is dismissed.

2. The applicants must pay the respondent's costs, save the costs attendant upon the answering affidavit.

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BRASSEY, A