

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO. J 1110/98

In the matter between:

Transport Security & Allied

Workers Union of South Africa

1ST Applicant

William Mdebuka & Others

2ND and further Applicants

AND

NITE EXPRESS

Respondent

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JUDGMENT

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MLAMBO J.

1. William Mdebuka and the other individual applicants (“the individual applicants”) were employed for varying periods by the Respondent until they were dismissed on 31 March 1998. The individual applicants were all employed as linehauls checking/ auditing supervisors.
2. The Respondent, a division of Sun Couriers (Pty) Ltd, is involved in the

express roadfreight industry. Mr Burns, the Respondent's general manager, testified that for some time the Respondent was experiencing theft of customers' items in its care on an increasing scale. As a result the Respondent came under increasing pressure from customers. According to Burns' testimony the problem was more pronounced in Gauteng.

3. The applicants did not dispute the Respondent's allegation that thieving was at the core of its problems. Though not disputing this allegation, the applicants did not admit that indeed theft was taking place. Their stance was that they were not involved in theft and were not aware that theft was taking place. Their testimony was to the effect that they always heard from management that theft was taking place.
4. The Respondent's preferred solution to its problem was to restructure its auditing/ linehaul checking department where the individual applicants were employed. In view of the fact that the individual applicants were members of the first applicant, the Respondent per letter on 10 February 1998, invited the first applicant to a consultation meeting in respect of a possible restructuring of the auditing/linehaul checking department.
5. A meeting took place between the parties on 18 February 1998 where the first applicant requested the Respondent to provide a written motivation for the

contemplated restructuring. A further meeting took place on 11 and 30 March 1998. During these meetings the first applicant refused to discuss the possible retrenchment of its members by virtue of them being supervisors. The first applicant also refused to discuss the possible employment of its members by any private contractor who could be appointed to take over the auditing /linehaul checking function.

6.

7. The individual applicants were given notice of their dismissal for operational reasons on 31 March 1998 effective 17 April 1998. The Respondent appointed Indlovu Operational Services to perform its linehaul / auditing functions.

8. The applicants' case is that the dismissal was unfair for lack of substantive reasons therefor and was without compliance with a fair procedure as contemplated in section 189 of the Labour Relations Act no. 66 of 1995 ("the Act"). The issue to be determined by the court is recorded in the signed pre-trial minute as follows:

7.1 Was the decision of the Respondent to sub-contract out its linehaul checking/auditing function a rational decision based on its operational requirements.

7.2 In the event of the court finding that the Respondent's decision (referred to

in 7.1 above) was not a rational decision, what relief, if any, should be awarded to the further applicants. It is recorded that the applicants seek reinstatement retrospectively to date of dismissal.

8. The pre-trial minute also records, as common cause, the following facts:

8.1 The consultative process between the parties broke down because the parties could not reach agreement in respect of the legal entitlement of the Respondent to sub-contract its auditing/linehaul function.

8.2 The Respondent negotiated employment for each of the second and further applicants with the independent contractor which took over its auditing/linehaul checking function.

9. The Respondent's motivation for its decision to restructure its linehaul checking/ auditing department is:

"RESTRUCTURING/RETRENCHMENT AT NITE EXPRESS

Due to continuous theft and pilferage at both RDS and Nite Express a management decision has been taken to restructure the Security and Audit functions at both companies. There is a desperate need to move away from allowing permanent employees to carry out any security functions eg: Checking /auditing functions on incoming/outgoing freight, access control etc.

It has become vitally important that security guards and audit staff are supplied by an outside company in order to place total responsibility for losses and claims with that supplier."

10. The testimony of Mr Burns was that the theft of customers goods was a

priority issue. It affected the Respondent's turnover to an extent that its survival was at stake. The respondent's case was that it was normal in the industry that the linehaul /checking function was performed by an outside contractor hence its decision to sub-contract its auditing/linehaul checking function.

11. Mr Burns' testimony which is undisputed, is that to the respondent, outsourcing the linehaul checking auditing function made business sense. It was for this reason that the Respondent decided to appoint Indlovu. Mr Burns testified that the Respondent was able to negotiate better terms and conditions with Indlovu, for those of its employees who would be retrenched. It is common cause that the first applicant thwarted all attempts to discuss the possible retrenchment of its members as well as their employment by Indlovu.

12. Mr Burns testified that the situation did not immediately improve under Indlovu. After one and half years the contract with Indlovu was not renewed and another contractor was appointed. Whilst there were initial problems the situation gradually improved. According to Mr Burns the decision to outsource the linehaul /auditing function was important for the Respondent which actually resulted in the solution of the theft problem in the long run.

13. The applicants dispute the fairness of their dismissal as well as the

appointment of the subcontractor to take over the linehaul /checking function. As regards the applicant's attack of the appointment of a sub-contractor their basis for the attack is that the theft problem did not immediately improve under Indlovu and that the contract with Indlovu was not renewed when it expired.

14. It is correct that the contract with Indlovu was not renewed. The reasons provided by the Respondent for non-renewal of the contract is that there was conflict in the management style of Indlovu and theirs which could not be reconciled. However after Indlovu another subcontractor was brought in and the situation improved significantly.

15. In my view the applicants can succeed in their criticism of the Respondent's appointment of a subcontractor if they can show that the theft problem did not improve. They failed to show this and, in fact according to the Respondent the introduction of a subcontractor improved matters in the long term. The applicants could not negate this version and were content to criticise the appointment of Indlovu in particular.

16. It is so that those in charge of managing companies as business enterprises are entitled to continuously explore ways and means which will ensure that the enterprises they manage remain profitable, viable and competitive . They are also entitled to also introduce measures that are designed to prevent or

reverse negative growth such as losses. In this case it is so that the Respondent was experiencing a serious problem of theft and loss of customers goods and that this problem was impacting negatively on the Respondent's profitability and the ability to provide an efficient and reliable service.

17. In my view the introduction of a subcontractor contributed to the improvement of the situation. The Respondent provided evidence which the applicants did not dispute to the effect that turnover improved significantly once another subcontractor was employed. It appears justified therefore to find that the decision of the Respondent to subcontract its linehaul checking/ auditing function is beyond reproach and was directly based on its operational requirements. It is unfortunate that the applicants refused to participate meaningfully in the consultation process with the Respondent. In my view they deprived themselves of an opportunity to challenge Respondent's intentions. They also deprived themselves of putting forward their suggestions and alternatives about how, in their view, the problem could be solved with minimum or no job losses.

18. This court will be reluctant to come to the aid of parties who fail to utilize their opportunities during the consultation stage. This court will assist parties who can show that the Respondent ignored or was simply not interested in their suggestions. This court to the extent that it can scrutinize the facts informing the

Respondent's decision, will also consider what likely effect would there be if the other parties' suggestions were taken into account.

19. In the court's view the decision to subcontract was also fair because it was taken after careful consultation with employees. It was also fair because it was not taken for any ulterior motives. Whilst it is correct that courts should be slow to interfere in business decisions, I am of the view that courts should retain the function of scrutinizing and ensuring that such business decisions, if they effect employees, are legitimate and fair. In this case the court, having scrutinized the Respondent's decision to subcontract the linehaul/checking function, finds that the decision was rational and fair.

20. The order of the court is therefore:

1. The decision of the Respondent to sub-contract out its linehaul checking /auditing function was rational and based on its operational requirements.
2. The applicants' claim is dismissed.
3. There is no order as to costs.

MLAMBO J.

Date of judgment: 21 June 1999

For the applicant: Mr Mokau for Transport Security and Allied Workers

Union of South Africa.

For the Respondent: Mr Kirchmann of Linde Dorrington & Kirchmann