

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO J2807/98

In the matter between:

JOSEPH NTULI

Applicant

and

FONTANA HOLDINGS (PTY) LTD

Respondent

JUDGMENT

JAMMY AJ

1. At the time that his employment by the Respondent was terminated on 21 May 1998, the Applicant in this matter, Mr Joseph Ntuli, held two significant positions. He was the National President of the Distributive, Catering, Hotels and Allied Workers Union ("DICHAWU") and, by agreement between that union and the Respondent in the course of earlier substantive negotiations, he was that union's full-time shop steward representing its members employed in the company. To this latter end he occupied by a designated office and utilised administrative facilities in a building in Johannesburg forming part of the company's property portfolio.
2. The Applicant alleges that he was retrenched on 21 May 1998 in circumstances which he contends were unfair and which entitle him to appropriate compensation in terms of

the Labour Relations Act 1995. The Respondent contends that, as far as practicably possible in the particular circumstances in which that retrenchment occurred, the requirements of Section 189 of the Act were complied with and that the basis upon which the Applicant's services were terminated, and the payment to him of the amounts calculated to be due to him as a consequence thereof, were unconditionally and unreservedly accepted by him in writing at the time, as constituting a full and final settlement of any and all claims which he might as a consequence have had against it.

3. THE RESPONDENT'S CASE

The company's principal witness was Ms E F Smith, its Industrial Relations Officer. The Respondent, she stated, recognises two trade unions which organise within its employee complement. They are DICHAWU and the South African Commercial Catering & Allied Workers Union ("SACCAWU"). At all material times DICHAWU represented the majority of eligible employees within the bargaining unit.

4. The company had for some time been under severe financial pressure, necessitating rationalisation and retrenchment programmes during the preceding three years which resulted in a reduction in its total workforce by approximately two-thirds, the closure of certain retail outlets, the outsourcing of certain of its hotel cleaning activities and, pertinently in relation to this matter, the outsourcing of its cashier and merchandising functions.

5. Prior to the substantive negotiations in 1996/97, she testified, the Applicant had been employed as a full-time cashier and merchandiser. By subsequent agreement with the union, he performed that function for two weeks in every month, the other two weeks being devoted to union

activities in his capacity as a shop steward. That agreement in turn was re-negotiated the following year to provide that, whilst he would continue in the employ of the Respondent, the Applicant would thenceforth function as a full-time union shop steward, utilising accommodation and facilities provided by the Respondent for that purpose.

6. In the course of negotiations related to the downsizing, restructuring and retrenchment programmes referred to, the union had been represented, inter alia, by the Applicant and by its National Organiser, certain Oscar Malgas, who, in that context, had become well-known to management. On 19 May 1998 and at its Highpoint branch, the Respondent received a letter on the union's letterhead and signed on behalf of Mr Malgas and over his name in his capacity as National Organiser. It was marked for her attention, said Ms Smith, and read as follows:

"Re Union Office at Fontana

Please be informed that the union hereby wishes to suspend the use of the union office and that our permanent shop steward should be transferred to one of branches until further notice."

A copy of that letter was a component of a bundle of documents tabled in this matter.

7. The letter was received late in the afternoon and was duly faxed to her the following morning at the company's Head Office where she was based, she testified. On receipt thereof she telephoned the company's Attorneys and was advised to act in terms of that directive and suspend the Applicant's functions and office as directed. She then telephoned the Applicant, informed him of the receipt of the letter and requested him to come and see her. She then prepared a letter to him which was also submitted in evidence. It is necessary, in my view, that I record its

contents in their entirety. It read as follows:
"Dear Joseph

**I enclose a copy of a letter which I have received from the National
Organiser of DICHAWU, Mr Oscar Malgas, the contents of which
are self explanatory.**

**As you are aware, during the course of previous substantive
negotiations on terms and conditions of employment with
DICHAWU, a representative trade union at our respective
workplaces, you were appointed into the position of permanent
shop steward on terms and conditions no less beneficial to you
and in respect of which you would, for all intents and purposes,
attend to trade union affairs with regard to Fontana Holdings
(Pty) Limited.**

**In the light of this letter, we are placed in the position where your
portfolio as full time permanent shop steward now becomes
redundant with the result that you are required to resume your
duties as a shelf packer at one of our stores.**

**Unfortunately, since you assumed the position of full time shop
steward, these positions have now been declared redundant,
alternatively have been outsourced to an external concern.
Effectively, this means that there would be no position for you
within the group.**

**However, I would appreciate it if you were to attend a consultation
with me on Thursday 21st May 1998 at 10h30 in order that we
may canvas alternatives to your retrenchment.**

**Should there be no alternatives, it is envisaged that your
employment with us would terminate on 31st May 1998 and you
would be compensated one week for each year of service you have
enjoyed with the company.**

**As with other retrenchments, you would be given preference when
other positions become available in the near future and we shall
communicate with you in this regard should the need arise.**

**We must emphasize that no decision has as yet been taken pending
the consultations with you.**

**Until such time as this is resolved you are required not to attend at
the offices and shops of the company including that of Legal
House.**

**Yours sincerely
FONTANA HOLDINGS (PTY) LIMITED
LYN SMITH"**

8.The Applicant duly collected that letter, together with the copy of the letter from Malgas which accompanied it and later that day telefaxed a letter to the Respondent, for the attention of one of its directors and herself which it is also necessary, in my view, to set out in full.

"Dear Sir/Madam

Re: The letter addressed to you by O Malgas

I hereby wish to put on record that Malgas is not a union. Further note that it is Joseph Ntuli who is the president of DICHAWU (the union).

Therefore it is incorrect for any member and/or official of DICHAWU to perform duties not authorised by myself.

My intention of writing this letter is to request you to have a meeting with myself to fully address my company on supra.

It should be noted that all what he saying in the letter is incorrect. DICHAWU should solve its internal problems, not by using Fontana.

I have high respect of the chairman of Fontana, my employer and the directors of the company including the noble man Ari Soldatos. I do not wish them to soil their good names by playing dirty tricks.

I was appointed by Fontana to this office. I understand that as terms and conditions of employment are negotiated annually, my employer can put this discussion and/or renewal but not on any individual's bidding.

I would like to reiterate my position that I will continue to investigate allegations made by workers to me as their President about the way Malgas is doing this in the office.

Oscar Malgas will be suspended as such. He must wait I will call him to answer in defence.

I shall likewise inform the employers about things which may affect our relations with us regarding Malgas.

There is no secret about this, Malgas may be invited to listen to what I have to say as the President of DICHAWU.

Hoping that you will find this in order.

Yours faithfully

Joseph Ntuli
Permanent shopsteward."

9. She met with the Applicant later in the day, Ms Smith continued, when he again read the letter which she had addressed to him. She informed him that any problem that he had with Mr Malgas had nothing to do with the Respondent. The Applicant became angry and aggressive but eventually left and, by arrangement, met with her again in the company's boardroom the following day. She again explained to him that the Respondent could not get involved in union matters. The Applicant apologised for his aggressive behaviour the previous day and calmly informed her that he could not suggest any alternatives to his retrenchment and had decided to accept the retrenchment package. He was requested to wait while she "fixed everything up" but informed him that if he was interested, she could guarantee him a job with an organisation known as Jazz Sales & Marketing, to which the cashier and merchandising functions within the company had been outsourced. He indicated however that he was not interested.

10. The Applicant then waited on the premises for approximately a half hour during which the amount due to him was calculated and recorded and a cheque for the amount due to him was prepared. He was then handed that cheque, in an amount of R9 683,22 together with a letter in the following terms:

"Following our consultation we enclose herewith a cheque in the amount of R9 683,22 in full and final settlement of all or any claims which you may have arising from or in connection with your employment with us and the subsequent termination thereof.

Yours faithfully
FONTANA HOLDINGS (PTY) LIMITED"

That letter was signed by the Applicant and witnessed, beneath an endorsement below her own signature to the letter, reading as follows:

"Agreed and accepted this 21st day of May 1998."

11. Thereafter, on 25 May 1998, the following letter was addressed by her to the union for the attention of Oscar Malgas:

"This serves to confirm that following your letter of 19th May 1998, consultations were held with Joseph Ntuli and regrettably, there were no alternatives within our structures but to terminate his employment on the basis of our operational requirements."

12. Cross-examined by the Applicant, Ms Smith acknowledged that, whilst she had had no communication directly with Mr Malgas for some two months prior to these developments, she had been telephoned by the manager of one of the Respondent's shops who advised her that leaflets distributed by a third union, the United Peoples Union of South Africa ("UPUSA") were being distributed on the premises. He was instructed not to interfere but commented that he thought that the Applicant had been involved in organising that distribution. She herself did not believe it, she said. She could not comment on the source of the telefax from the union on 19 May to the Highpoint store - she had received it only the following morning. She presumed that it had been sent there late the previous afternoon because the Respondent's Head Office was already closed for the day. She had not invited the other shop stewards to be present on 20 and 21 May in her meetings with the Applicant because he had not suggested that she should do so and he himself had, to that point, been the permanent shop steward in the company. It was not true, she stated emphatically, that she was part of any

conspiracy either to exclude the shop stewards from the process or to remove him from his office.

13.Mr D L Afeltra was the Respondent's second witness. He is employed as a General Manager and the union's letter of 19 May 1998, he testified, was faxed to and received by him at its Highpoint branch at approximately 5.30 pm that day.

14.Approximately a week to ten days earlier, a store manager at its Twist Street branch had telephoned him to advise that there was a problem- a third union was "speaking to the people." His reaction was to telephone the Applicant but when he could not make contact with him, he telephoned the DICHAWU National Organiser, Oscar Malgas, who informed him that he knew nothing about this but would investigate it.

15.He heard nothing further until the letter of 19 May was received. That letter was marked for the attention of the Respondent's Industrial Relations Officer, Lyn Smith, and he faxed it to her at Head Office the following morning. The next day, he instructed the caretaker at Eagle House, the Respondent's building where the Applicant had the use of an office, to lock that office and a couple of days later, made arrangements to meet the Applicant at the premises to enable him to remove his personal possessions.

16.Mr Afeltra was questioned by Mr Ntuli regarding his personal relationship with Mr Malgas who, he stated, was not his friend, although he had on occasion lent him money which, in one instance, had not yet been repaid. It was not true that he and Mr Malgas were colluding and co-operating to get rid of the Applicant, he said. He had, he reiterated, initially tried to communicate with the Applicant and had only telephoned Mr Malgas when he was unable to do so.

17. THE APPLICANT'S TESTIMONY

Mr Joseph Zwane, called by the Applicant, testified that he is employed at the Highpoint branch of the Respondent's business and knows the General Manager, Mr Afeltra. Approximately a week before the Applicant's dismissal, Oscar Malgas had visited the shop and enquired from him whether he had noticed forms from another union circulating on the premises. He knew nothing of this, he said, and Mr Malgas then informed him that the Applicant had been "recruiting employees for UPUSA." He had been told this, Mr Malgas stated, by Mr Afeltra, the General Manager.

18. On 20 May 1998, on which date a meeting of union members was scheduled to take place at the branch, he received a telephone call from Ms Smith at the Respondent's Head Office, who informed him that the Applicant had been dismissed and that he, Mr Zwane, was "to look after the other employees." Employees had been advised that they were not allowed to receive telephone calls at that time and he subsequently learned that a message left for him by the Applicant had not been conveyed to him for the reason that the Applicant had allegedly been dismissed. He was denied permission to meet the Applicant that day on the company's premises.

19. As far as he was concerned, said Mr Zwane, the Applicant had had nothing to do with UPUSA or any other union and when he heard that he had been dismissed he went to his office at Eagle House, only to be informed by the caretaker that he had been "chased away." He then communicated with UPUSA to ascertain whether there was any truth in the allegation that the Applicant was now involved with them. They had never heard of the Applicant, he said.

20. Cross-examined by Mr Soldatos, representing the

Respondent, Mr Zwane stated that any problem between the Applicant and Malgas was a union matter and not management's concern. It was, in his opinion, similarly no concern of management if a third union was in fact now organising within the company. Employees had the right to join whichever union they chose.

21. Referred to an Affidavit which he had signed in support of the Applicant's Statement of Case and in which there was no reference to his having been informed by Ms Smith that Mr Ntuli had been dismissed, whereas he was now testifying to that effect, Mr Zwane was compelled to concede that this "might have been a mistake." He was adamant however, that that is what she had told him.

22. Testifying himself, the Applicant stated that on Tuesday 19 May 1998 he was approached by Oscar Malgas, the union's National Organiser, at the union offices at approximately 1 pm. He was informed by Mr Malgas, in the presence of "a few colleagues" that he had heard rumours that Fontana employees were joining UPUSA and had been told that he, the Applicant, was planning a meeting of employees but not at the union's offices. He responded that he knew nothing about the UPUSA allegations but was entitled, in his capacity as National President of the union, to call any meeting that he wished. He was then accused by Mr Malgas of refusing to co-operate, that it was useless to discuss anything with him, that he was using his shop steward office at the Respondent's premises "to fight him" and that he would instruct the Respondent to close that office and suspend him. At that point Mr Malgas began to dictate a letter to the union secretary and he, the Applicant, left to go to his own office.

23. This was an internal union matter, said the Applicant, but he thought it wise to inform the Respondent that it should

expect a letter from Malgas but that it should not involve itself in union affairs. He realised, he said, that Malgas was "using the only method available to make me lose my job." He accordingly prepared a letter to the Respondent which he faxed to it on the morning of 20 May, requesting a meeting at which he could explain the prevailing situation.

24. Later that day he received a call from Lyn Smith at the company's Head Office to the effect that both his letter and the letter from Malgas had been received. He was requested to come to the office to collect a letter which the company had written to him, regarding consultations which it required with him. When he arrived there, he was told by Ms Smith that the company was required "as a question of law" to implement the union's direction to suspend him. He was greatly upset by this and became very angry, exchanging "hurtful" words with Ms Smith, in the course of which she referred to his position as National President of the union, as being a "token." He was then requested to take the company's letter, leave and return the following day at 10.30 am for further discussions. He was told that he could go to his office but at 12 noon that day Mr Afeltra arrived and instructed him to move out - an instruction subsequently confirmed by Ms Smith when he telephoned her to query it.

25. He duly attended the meeting the following day, still feeling angry and frustrated. As far as he was concerned, an individual member of the union, acting without authority, was receiving the Respondent's co-operation. Having been told that he was being retrenched, no alternative proposals were made by the company and when asked whether he was able to offer any suggestions, he replied that he could not. They knew the position "and so", he concluded, "I accepted the retrenchment package."

26. He had however, he said, done so under duress and with the full intention of pursuing the matter as an unfair labour practice. It was for that reason that he eventually referred it to the appropriate Bargaining Council and then to this Court.

27. Asked by Mr Soldatos, in the course of cross-examination, who had assisted him in drafting his papers in this matter, the Applicant replied that he had done so himself. He had a Standard 10 education and had studied for a certificate in Human Resources at UNISA.

28. He agreed, as Mr Zwane had stated, that it was not possible for the company to enquire whether, in addressing the letter to the Respondent of 19 May, the union had complied with its own internal procedures but, in the context that he was employed by it, it was obliged to consider whether or not what it was being requested to do was an unfair labour practice. It should at least have made enquiries to ascertain whether the proper procedures had been followed in order, he said, "to protect its employees against unfair treatment by the union."

29. Earlier in his career with the company, it had been indicated to him by a director that he had management potential and would eventually be promoted to that position. He did not however mention this to Ms Smith in the course of their discussions. In the second meeting on 21 May he had not asked for more time to consider his position. As far as he was concerned, "the doors were closed for me."

30. The Applicant was then intensively questioned regarding his ostensible acceptance, as indicated by his signed receipt on 21 May 1998, of the amount paid to him on that date in full and final settlement of his claims against the Respondent. He had, however, he stated, signed that acceptance under duress. Asked why he had not stated this or endorsed the

document to that effect, he replied that he was "not a lawyer." He had decided himself to accept what was being offered and challenge his dismissal later. As far as he was concerned the settlement agreement signified by the document was void because it had, he repeated, been signed by him under duress.

31. CONCLUSION

It seems to me, on the *conspectus* of the evidence presented in this matter, that whether or not it considered it prudent to distance itself from what was patently an internal dispute between two high-ranking union officials, the company's conduct in implementing the direction conveyed in Mr Malgas' letter of 19 May without further query or investigation, was precipitate in the circumstances and a potential source of the further disruption and confrontation which, according to its evidence, it was at pains to prevent. No evidence was presented regarding the rationale underlying the advice from its Attorneys which it apparently received in that regard but it seems to me, in all the circumstances of the matter, that the issue was not a legal one but rather one in which the exercise of prudent discretion and a considered course of action was indicated.

32. I am not persuaded however, that the Applicant's perspective of some form of *mala fide* collusion between the Respondent's General Manager on the one hand and Mr Malgas on the other, was justified in the circumstances. Mr Malgas, as far as he was concerned, was a subordinate in the union hierarchy, with no authority to act as he did. That however, as was repeatedly stressed, was not the Respondent's concern although, as I have stated, some further enquiry on its part, perhaps in the form of the convening of a meeting with the relevant union officials, may well have been the better industrial relations option.

33.I am also prepared to accept that, in the peculiar circumstances governing the Applicant's ongoing employment at the time, coupled with the financial constraints under which the Respondent was clearly operating and the restructuring process necessitated thereby and in which the Applicant had been directly involved, no conventional employment position to which the Applicant might have been transferred was available and it is common cause that the Applicant himself was either unable or unwilling to make any suggestions of his own in that regard. The very fact that those discussions ensued negates the Applicant's contention that he was dismissed at the behest of a third party. Mr Malgas' letter of 19 May 1998 did not require his dismissal but merely his suspension from the office of permanent shop steward.

34.Even if this were not the case however, the Applicant's case is comprehensively compromised by his signature to the document of 21 May recording his acceptance of the retrenchment package offered to him at that time in full and final settlement of any and all claims which he might have had arising from his employment and its termination. There is substance, in my view, to the Respondent's submission that the Applicant is an intelligent, experienced and high-ranking union official, well-schooled in the exigencies of employment relationships, and with a sufficient working knowledge of the basic legal niceties involved, to have at least accepted that package conditionally, or with the reservation of his rights, or expressly under protest, had that been his state of mind at the time. I do not believe him when he says that that was in fact the case and the probabilities in my view, are, as suggested in argument, that his decision to characterise what had occurred as an unfair labour practice, was one made some significant time after the events in question and probably in the cold hard light of

his continued festering resentment towards his union adversary.

35. For all of these reasons, the Applicant has failed, in my opinion, to establish that the termination of his employment in the circumstances in which it occurred was either procedurally or substantively unfair and his application is accordingly dismissed. The Respondent did not seek an order for costs and none is made.