IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J1231/98

In the matter between

MSIMANGO DUMISANI AND OTHERS Applicant

and

MINTROAD SAWMILLS (PTY)LTD Respondent

JUDGMENT

JAMMY,AJ

1. The respondent in this matter, a company of more than 40 years standing, operates in the timber industry as a processor of raw wood principally for the wholesale timber trade.

2. In 1996 and 1997 it conducted its business activities from two sites, a stand in Alrode where all production was carried out and where all its machinery, vehicles and most of its staff were located, and a second stand in Robertsham, from which it conducted a minimal retail business, comprising the sale of limited products to nurseries. At all times material to this dispute, its staff complement, as testified to by its managing director, Mr. Roy Smith, was approximately 120 employees at Alrode and a maximum of six at Robertsham.

3. It is common cause that, at that time, the National Entitled Workers Union ("the Union") enjoyed majority representation of the respondent's workforce, that as such, it was their collective bargaining agent recognised by the respondent and that the two applicants in these proceedings were members of the Union.

4. It is also common cause that, in early September 1997, the Union orchestrated a protected strike in the company, as a result of an unresolved wage dispute and that, after a prolonged period of some five weeks, the issue was resolved through the intervention of the Commission for Conciliation, Mediation and Arbitration. That strike, Mr. Smith testified, "brought us to our knees". The respondent, already under severe financial pressure, was now in "dire straits" and the Directors accordingly consulted the company's accountant, Mr. Joseph Pollack, in order to "weigh up its options". Its reserves, principally as a consequence of the strike, were depleted, its overdraft was unacceptably high and it was desperately in need of working capital if it was to survive.

5. Various options were considered, said Mr. Smith, and it was ultimately decided that the only practical of action was to sell the Robertsham stand, which was "not productive anyway". That was negotiated, at a price considerably in excess of its market value, and the entire proceeds of the sale, R550000, were to be injected into the respondent.

6. The sale of the property obviously necessitated the closure of the Robertsham branch,

Mr. Smith testified. Its entire staff would be assimilated into the employee complement at Alrode, but although the cash injection would initially relieve some pressure, the respondent's financial position was still precarious and it became apparent that the production of certain products would have to cease, with the result that approximately eight of its employees would become redundant.

7. A letter was accordingly addressed to the Union on 10 November 1997 in the following terms:

> re: OPERATIONAL STREAMLINING AND CLOSURE OF BRANCH
>
> In accordance with the LRA 1995, section 189 (3) we hereby inform you that our branch in Robertsham will cease to operate as of 19 December 1997, to coincide with our annual shut-down, and furthermore it is our intention to stop production on a number of our products**,** necessitating an overall dismiss of approximately 8 persons. It is indeed unfortunate but a number of contributing factors have led to this decision, namely non-profit**,** drastic reduction in turnover**,** and an exhorbitant increase in raw materials and overheads**.**
>
> The employees affected are labourers, we would look to the length of service of the employees and to retainment of skills before deciding on who to dismiss, but would, more or less work on the lines of, last in first out. We propose a severance package of 1 weeks pay in lieu of each completed year worked, and off course all leave due to them. The chances of the branch being re-opened are nil, we have already made arrangements for the sale of the stand, but if there is an improvement in sales and it becomes necessary to employ more staff within 3 months of us re-opening here in Alrode, then the people who were retrenched will be approached and given the first opportunity for employment, should they wish.
>
> Your assistance and input in making this move as smooth as possible would be appreciated. Kindly bear in mind that this decision, in light of the fact that our business was started over 50 years ago and was built up over the years with hard work, was certainly not an easy one to make, in fact, the contributing factors have more or less forced this on us.
>
> We await your reply as to when we may meet, which has to be sooner rather than later, as time is now running out.
>
> ROY SMITH
> MANAGING DIRECTOR
> November 10, 1997

8. An exchange of at times confrontational correspondence then followed, with the detailed substance of which I do not consider it necessary, for reasons which will become apparent, to burden this judgment. In essence, the Union's stance was that closure of the Robertsham branch had already been decided upon "before disclosure of information and before consultation". It was not prepared to enter into substantive discussions with the respondent unless and until the comprehensive financial information for which it repeatedly called, was furnished. It is common cause that information that the respondent considered to be

relevant to and adequate for the consultation process was tendered by it on a basis of inspection and examination which, having regard to the substance and volume of the material in question, it considered reasonable, but that those tenders were rejected by the Union as being unacceptable and inadequate for the purpose for which it was required.

9. The issues for determination by this court are defined in the minute of a pre-trial conference between the parties as:

> "Whether the respondent complied with the provisions of section 189 of the Act and whether it disclosed a reason for the retrenchment of the applicants".

10. The minute also records that the basis for the allegation by the applicants of substantive fairness is that "no commercial rationale was shown by the respondent" to justify their retrenchment. It emerged pertinently from the submissions made that that allegation was sourced directly in the applicants' contention that the respondent had failed or refused to make financial disclosure to the Union on a basis which would substantiate such rationale.

11. A considerable portion of the two court days of this hearing was devoted to that issue. Evidence from an expert witness called by the respondent, -a qualified member of its Auditing firm, who testified and was cross-examined at length regarding the nature and adequacy of the financial information tendered by the respondent, and further testimony presented by Mr. Smith on that subject, was the subject of exhaustive examination by Mr. D. Maluleke, representing the applicants. The challenge by the applicants regarding alleged non-compliance by the respondent with the requirements of section 189 of the Act, was the basis moreover of his comprehensive closing submissions to me.

12. It was only at that stage of the proceedings however, that a new factor was introduced by Mr. G. Higgins, for the respondent, ostensibly as a point *in limine*. That, however, is a misconception of the legal characterisation of his intervention. A point *in limine* is one taken by a party at the onset of the matter and which might bear upon the subsequent conduct of the proceedings. It is not one raised at the conclusion stage when issues in and aspects of the dispute which might otherwise have been obviated, have already been canvassed.

13. That said however, if the point, at whatever stage it is raised, has legal validity in the in the context that it might possibly have material relevance to the determination of the matter, then, subject to issues of costs which might arise from its irregular presentation, it is incumbent upon the court to hear and consider it.

14. The whole question of the adequacy of the tender and substance of financial disclosure by the respondent, and of its general compliance with section 189, Mr. Higgins submitted, was *res judicata*. It had been exhaustively dealt with and disposed of in the context of an urgent application brought by the Union and other applicants, including those in the present matter, against the respondent in December 1997 for an order interdicting the respondent from proceeding with its proposed retrenchment of those applicants.

15. In papers filed in that application, precisely the same allegations regarding purported financial non-disclosure were made as those now before this court. In the result, the application was dismissed and in the written reasons for that order, Grogan A.J., at page 10 of the judgment, having comprehensively examined the same documentation now tabled

in this matter, came to the following conclusion:

> "I am satisfied that by 24 November 1997 the respondent had disclosed all relevant information regarding the matters expressly specified in section 189 (3) -namely, the reasons for the proposed dismissals; alternatives considered before proposing the dismissals and the reasons for their rejection; the number and job categories of employees likely to be affected; the proposed methods of selection of employees affected; the timing of the dismissals; severance pay and assistance proposed; and the possibility of re-employment. By then, the only information outstanding was that related to the respondent's financial circumstances and other matters first demanded by the first applicant on 25 November 1997. It is by allegedly denying this information (and particularly, as I understand the case from the bar, the financial details) that the applicants claim the respondent has breached its duty to consult. The respondent, for its part, contends that it did not deny the first applicant access to the information, but on the contrary took reasonable steps to ensure that its officials could have sight of it if they so wished.
>
> The first applicant cannot and does not deny that it could have availed itself of the three express offers by the respondent to peruse its financial documents. What it did, instead, was to insist, first, that the respondent deliver over the documents and, second, that it abandon its decision to proceed with the retrenchments when finally, on 4 December 1997, it agreed to inspect the documents at the respondent's premises. By that stage, it had already had more than a week to avail itself of the respondent's offer to inspect the documents with the assistance of the respondent's auditor. By that stage, it also knew that the persons selected for retrenchment on 18 December 1997 had been advised thereof.

At page 15, the judge continued:

> "Given the first applicant's repeated failure to attend meetings and to accept invitations to inspect books, the respondent can be forgiven for concluding by 9 December that the first applicant was engaging in delaying tactics.
>
> On the papers, therefore, I cannot conclude, as the applicants contend that I should, that the respondent breached section 189 by refusing to disclose information or by frustrating the duty to consult. This is not the case, like *NUMSA v Comark Holdings* (Pty) Ltd [1997] 5 BLLR, upon which the applicants sought to rely, where the employer had, after inviting the union to consult on possible staff reductions, unilaterally taken the decision to reduce its workforce while the union was still consulting with its members under the impression that a further meeting was to take place. It is also distinguishable from *FAWU v Simba (Pty) Ltd* [1997] 4 BLLR 408 (IC), in which the employer was restrained from closing a factory and terminating the services of the employees concerned for a period laid down by a collective agreement which bound the employer not to retrench for a period of six weeks after notice thereof was given, and in which such notice was not given. In this case, it was the first applicant that chose not to consult, first, because in its view the respondent had already made up its mind, then because the respondent declined to deliver documents it had requested and, finally, because the respondent refused expressly to undertake to halt the retrenchments indefinitely while the first applicant made good the delays that had been caused by its own deliberate decision not to engage in consultation."

16. In the present matter, no evidence other than the documentation submitted by agreement between the parties, was presented by or on behalf of the applicants, Mr. Maluleke's expressed position being that they relied solely on those documents and the evidence in chief and under cross-examination of the respondent's witnesses, to substantiate their claims.

17. That documentation in its entirety was precisely that upon which Grogan, AJ based his findings in the application proceedings referred to, and there is nothing, in my view, in the testimony which I have heard in this matter, which would justify any different conclusion on my part with regard to what are in essence the same contentions and allegations now made by inter alia, the same applicants, in these proceedings.

18. The concept of the *exceptio res judicata* in the context of interdict and trial proceedings was analysed, also by Grogan,AJ in the as yet unreported Labour Court matter of

National Union of Mineworkers v Elandsfontein Colliery (Pty) Ltd
Case No. J801/98

19. Following a comprehensive review of relevant case authority, the judge said this:

> " It follows in my view, that in the civil law the plea of *res judicata* can in principle be raised as an exception in trial proceedings when the original judgment upon which the excipient relies was given for purposes of an interdict application. If this principle is applied in the context of the Labour Relations Act, it follows that again in principle, a judgment handed down in an application brought in terms of section 158(1), (i) or (iv) can be relied upon for purposes of a plea of res judicata in respect of a referral in terms of section 191.
>
> I have emphasised the words "in principle" advisedly. Whether the requirements of plea of *res judicata* will be satisfied in any particular case must depend on various considerations including, in particular, the likelihood that issues or evidence not dealt with in the prior judgment might emerge were the matter to go to trial: *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 © at 501-2; *Kommissaris van Binnelandse Inkomste v ABSA Bank* Bpk 1995 (1) SA 653 (A) at 669F-1.

20. I am in full agreement with that analysis. I have already stated that, in my view, no issues or evidence have emerged in this matter which were not fully canvassed in the earlier application proceedings between the parties. In these circumstances, the respondent's plea of *res judicata* is valid and the applicants' claims must fail.

21. In view of the fact however, that, as I have stated, that plea was raised virtually at the conclusion, rather than properly at the inception of the matter, it does not seem to me that the applicants should be burdened with costs that might possibly have been avoided or significantly curtailed had normal procedures been followed in that regard.

22. I accordingly make the following order:

(a) The application is dismissed.

(b) There is no order as to costs.

B.M. JAMMY
ACTING JUDGE OF THE LABOUR COURT

Dates of hearing: 10 and 11 February 1999

Date of judgment: 22 February 1999

For the applicants: MR. D. MALULEKE

For the respondent: MR. G. HIGGINS