

IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

CASE NO : J 3324/98

In the matter between

Applicants

UNION AND OTHERS

and

Respondent

JUDGMENT

LANDMAN J :

1. Drilcon drills holes in the veld for its client SASOL. Around June 1998 Drilcon experienced a slow down in operations. It did not receive new contracts but hoped to negotiate some in August. In June work for its fleet of 12 drilling machines was rapidly drying up. This situation prompted Drilcon to hold a meeting with Mr Mhlongo, the SACWU organiser based at Newcastle, on 8 June. Its own shop steward Mr Doctor Mhlanga

was also in attendance. Drilcon stated that it was contemplating retrenchments. Proposals and counter proposal were tabled at this meeting.

2. On 18 June Drilcon advised SACWU that it would have to put some employees on unpaid leave until the end of July while it waited to see if any further contracts would be awarded. If no contracts materialised the employees would be retrenched.

3. Another meeting was held with SACWU on 22 June. Again the company's perilous situation was explained to the union. Drilcon proposed that the employees remain on unpaid leave. The employees were not yet on leave but they received their pay that day and many went off on what Drilcon believed was to be unpaid leave until the end of July. The situation was unchanged on 30 June when Drilcon wrote to SACWU. SACWU, as evidenced by Mr Mahlongo's letter of 3 July, also believed that three teams of employees would take unpaid leave but only until 1 July.

4. Most of the workers who were on unpaid leave arrived back at Drilcon's premises on 1 July. Mr Doctor Mhlanga arrived, he said, on 2 July. They were told there was no work for them but they refused to leave and occupied their caravans. The police were called to the premises on two occasions. Drilcon led evidence that this was because of the union members intimidating other staff while demanding pay. The union's position is less clear. But it is conceded that the Police were called in.

5. Management held a meeting with Messrs Mhalngo, Mhlanga and Gwebu, another shop steward, on 6 July. It was a confrontational meeting with both parties tabling their perspectives on the supposed agreement between them. The union position was that it would not enter into consultations on the retrenchments because Drilcon had put its workers on unpaid leave.

6. Although Mr Mhlongo and Mr Vermaak, Drilcon's manager, have no recollection of this it is highly probable that

on 7 July Drilcon sent a letter, page 135 of Bundle B to SACWU proposing voluntary retrenchments and a severance package. Mr Mhlongo refers to a letter from Drilcon of this date in his reply of 8 July. He does not believe it was the document at page 135. I am of the view that it probably referred to this letter.

7. On 7 July five employees, some or all of whom were union members, volunteered for retrenchment by submitting their names on blue writing paper to management. They were Messrs Steven Gwebu, Absalom Khumalo, Alfred Tsotetsi, December Hlope and Edward Tsoletsi. Drilcon did not deal with them but convened a meeting with SACWU for 9 July. Drilcon brought in a new face for this meeting, namely Mr Gert van Deventer, the partner of its labour relations consultant. The meeting was taped and submitted as exhibit 1. What purports to be a transcript was contained in the bundle of documents. Despite some quibbles during the trial it was conceded that the transcript was accurate. It is however incomplete. The brief typed minute which accompanied the transcript accurately sums up the consensus between the parties. It reads:

“ After some more discussions the company and the union reached the following agreement:

- The company will pay 14 days' wages to the employees on unpaid leave.
- The company will offer a voluntary severance package to all employees on 9 July 1998 and the package would be available until the 14th July 1998.
- At least 12 employees must leave the service of the company. If 12 employees had not applied for the voluntary package by the 14th July 1998 the remainder will be retrenched according to LIFO.
- If more than 12 employees applied for the voluntary severance package the company will consider those applications as well.
- The severance package (voluntary as well as forced severance package) would consist of the following:
 - seven days notice.

- two weeks' wages for every year completed service or part thereof.

- all other outstanding money.

The company will proceed and communicate the abovementioned to all employees after the closure of the meeting.”

8. The transcript and the voices on the tape make it clear that the parties at the meeting envisaged that some employees might volunteer immediately and that they will receive their package that same day. After the meeting Mr Mhlongo left for Newcastle. The shop stewards informed their members about the agreement.

9. At about 11:00 that morning six employees, Messrs Steven Gwebu, Aron Makhanya, Vusi Khumalo, Ezekiel Makhanya and John Maseko placed or had their names placed on a piece of blue paper which was presented to Mr Vermaak as the names of volunteers for retrenchment. I pause to note that only Steven Qwebu's name was on the 7 July list.

10. At 11:30 another list on identical blue paper was presented to management. The origins of this list, its presentation and its implications are a matter of dispute. The list contains the names of 12 employees. It includes the names of Messrs Alfred and Edward Tsoletsi and December Hlope whose names were on the list of 7 July. Absolom Khumalo (assuming he is not known as Vusi Khumalo) does not seem to have volunteered a second time.

11. All the workers whose names were on the two lists handed in on 1 July were called individually to the office where they received a cheque, their blue card and a letter saying that they had been voluntarily retrenched. They signed for their cheques and their blue card. Mrs Venter, the accountant, said that their forms were also initialled or signed by a shop steward. Most of them were initialled by Mr Doctor Absolom Mhlanga

who used the initials DA. Mr Mhlanga denies this. His own form was signed by Steven Gwebu as shop steward. The employees who had been paid then left for home peaceably.

12. The next day, 10 July, Mr Mhlanga telephoned Mr Mhlongo and told him that the employees had handed in a list for food but were retrenched. Mr Mhlongo telephoned Mr Vermaak and was told to speak to his labour consultant. I might add that the pleadings say that Mr Vermaak said, on this occasion, that the employees had volunteered for retrenchment.

13. Subsequently SACWU referred a dispute to the CCMA and, when conciliation failed, it launched an application in this court complaining that Drilcon had unfairly dismissed 17 members. At the commencement of the trial Mr Modise, who appeared for the applicants, stated that he was not acting for the employees whose names appear at 2, 4, 5, 6, 12 and 14 on annexure "A" to the statement of case. It was also conceded that the dismissals were substantively fair.

14. The issue which must be decided is a relatively crisp one although the evidence relating to it is sparse. Did the employees on the 11:30 list also volunteer for retrenchment as contended by Drilcon or were they unilaterally duped into putting their names on a list in the belief that the list was an attendance record and was to be used for issuing food rations? The union contends that instead of getting food they were retrenched as volunteers.

15. There is support for Mr Mhlanga's version. It is improbable that food, which is issued every Wednesday, would have been issued on 23 June when most of the affected employees had been paid and, on Drilcon's version, were to be leaving until the end of July 1998. The evidence of Mr Vilakhazi that some food was found in the caravans after 9 July would indicate the contrary. The evidence is however inconclusive and unsatisfactory on this issue. Mr Mhlanga's version is also supported, to an extent, by the fact that the supply of food rations to employees, including those who would not immediately accept voluntary retrenchment but who would remain at headquarters was raised on at least three occasions during the

meeting held on 9 July.

16. Mr Vermaak denies that he instructed Mr Mhlanga to ascertain the names of the employees who were present and who required food. Mr Vermaak says that at 11:30 a shop steward brought the 11:30 list of 14 employees to him. There appears to have been nothing of importance said to him for he could not recall anything. It does not seem that the shop steward said anything like: "Here is a list of more volunteers for retrenchment." Mr Vermaak inferred that this was the intent and purpose of the list. I have listened to the tape and it is clearly recorded that the manner of identifying volunteers for retrenchment would be the handing over of a list of names of volunteers.

17. Mr Vermaak's inferences were confirmed by subsequent events. The persons on the 11:30 list made no protest when they were called to collect their cheques, blue cards and certificate of voluntary retrenchment. They were dressed in their home-going attire and had packed their belongings. They were not vociferous nor did they protest as they had done on the two occasions when the Police were called to the scene. I also accept the evidence of Mrs Venter that Mr Mhlanga initialled the receipts of most of the employees who were paid off. He made no protest to Steven Gwebu, his fellow shop steward, who signed his form. He was not intimidated into accepting these items. If he and his fellow employees were duped they would have discovered the deception the moment they were called to the office to collect their severance pay.

18. The probabilities point to the 7 July volunteers as being most likely to re-volunteer on 9 July. This leads to the reasonable inference that they and the other workers whose names are on the 11:00 and 11:30 lists were volunteering for retrenchment. The three were not called to rebut the inference that they were again volunteering. This raises in my mind doubt whether they authorized SACAWU to bring this application on their behalf. Mr Modise, at the commencement of the trial informed me that he was not proceeding on behalf of no 14 on annexure A to the Statement of Case, Alfred Tsotetsi. But Edward Tsotetsi and December Hlope claim unfair retrenchment. They did not give evidence.

19. In the circumstances I do not accept the version of Mr Mahlangu. It follows that the applicants have not shown that the individual applicants did not voluntarily terminate their employment with Drilcon. I reach this finding on the balance of probabilities and it is as a result of the probabilities that I do not find the version of Mr Mahlangu credible. In addition I do not believe his reasons for accepting his cheque and blue card on 9 July. Should I take the onus of proof, which rests on the individual applicants to prove that they were dismissed, into account, it has the effect of strengthening my finding.

20. In the premises the application is dismissed. The first applicant is to pay the costs of the respondent.

SIGNED AND DATED AT BRAAMFONTEIN THIS 27TH DAY OF NOVEMBER 2000.

A A Landman

Judge of the Labour Court

20, 21, 22 and 23 November 2000

27 November 2000

Mr L Modise of Routledge-Modise

Mr Maddern of Wright Rose Innes Inc