NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J2360/00

Delivered : 2001-06-04

Revised : 2001-08-06

In the matter between

M FRITZ Applicant

and

BRITISH AMERICAN TOBACCO COMPANY Respondent

JUDGMENT

PILLAY J: A point raised in *limine* in this unfair retrenchment was that the disputes had been settled on behalf of the applicant by her trade union.

The applicant had referred a dispute on her own behalf to the CCMA on 18 January 2000. As at 30 March 2000 it remained unresolved and a certificate was issued to that effect.

The trade union, of which the applicant became a member on 8 November 1999, referred the dispute to the CCMA for 119 members on 19 January 2000. Evidence was led by the human resources manager that the dispute was settled at the CCMA at conciliation with the trade union on 6 April 2000. The applicant's claim was part of the settlement as her name was included on the list of employees who were represented by the trade union. It was also elicited in cross-examination of the human resources manager that she was aware that the union representatives knew that the applicant had referred an individual case on her own behalf. Despite this, the trade union proceeded to settle the matter on behalf of the applicant amongst others. Furthermore, payment was made to the applicant in terms of the settlement on 31 May 2000.

The applicant's case was that she did not mandate the union to settle the matter for or on her behalf. In fact, it was her evidence that she was not aware of her dispute with the respondent being settled until the respondent's statement of defence was delivered. In

support of the trade union's purported lack of mandate Mr Modise for the applicant handed in a list of names of employees. Against the applicant's name on the list the words "individual case" was written. Although Mr Modise cross-examined the human resources manager about the list he led no evidence as to its authorship, its origin or its significance. These were issues in dispute and Mr Modise could not expect to have them admitted as evidence without proving them through a witness.

There is no evidence that the applicant had expressly advised the trade union that she did not mandate them to represent her in the retrenchment dispute. Whether the lack of mandate should have been implied from her individual referring was not argued. It may seem strange at first blush that there would be two referrals for the same individual. However, there is no evidence that the issue of a double referral was raised as a technicality at the conciliation with the trade union.

The only evidence of what transpired at the conciliation with the trade union is that of the human resources manager. The applicant was not there and cannot refute that the trade union represented to the respondent that it was authorized to represent her. As a fee-paying member the trade union would in the absence of any limitations on its mandate have been entitled if not obliged to represent her. If it did not have such a mandate then this is a matter between the applicant and her trade union.

When the settlement payment was made into the applicant's account on 31 May 2000 it was done electronically. Although a pay slip had been issued she testified under cross-examination that she had not received it. The pay slip makes it clear that it is an "arbitration award" and a "lump sum payment" of R4 917, that is a month's salary.

Even if I accept the applicant's evidence that she did not receive the salary slip it is quite surprising and highly improbable that she was not aware of the payment into her account, particularly as she was still unemployed. It would also be reasonable to have expected her to have inquired about it. She certainly spent the money and, on her version, without knowing how it came to be in her account. Even though she alleged that she had learnt that the payment was a settlement of her claim only when the respondent's defence was delivered the payment was only refunded on 6 April 2001.

The applicant's explanation that she protested about the payment and intended to refund it immediately but did not have the means to do so would have been acceptable but for

the fact that this issue is dealt with most unsatisfactorily in the pretrial minutes. The pretrial minute was filed on 13 December 2000. With regard to the settlement of the applicant's claim the applicant made no admissions about having received the payment or acknowledgement as to what the payment was for, or indeed that she intended to refund it. Instead, the applicant puts in issue the fact that she received payment in full and final settlement of the dispute. (See paragraph 6.1.8.13 of the pretrial minute.)

In the circumstances the court finds that the trade union resolved the dispute relating to the applicant's retrenchment on 31 December 1999.

In view of this finding perhaps the parties would like to address me on the further pursuit of this matter. It seems to me that this finding dispenses with the entire dispute. You confirm that, Mr Le Grange?

MR LE GRANGE: That is correct, your Ladyship. If I may, M'Lady, just indicate, M'Lord indicated that the matter was settled on 31 December. It was settled in fact on 6 April with the date of the conciliation meeting, and it is the date of the settlement agreement which your ladyship will find on page 144 of the bundle. It was settled on 6 April and in fact the payment was made precisely one year later, on 6 April 2001, but the matter was settled on 6 April 2000. The applicant was dismissed on 31 December, or retrenched on 31 December 1999, M'Lady.

COURT: What did I say?

MR LE GRANGE: I thought your lady said the trade union resolved the dispute pertaining to the retrenchment, oh, which was on 31 December. I apologize. I just misinterpret it. My apologies. M'Lady, I would submit that that in fact is the end of the matter and costs should just follow the cause. As the court pleases.

COURT: Mr Modise, do you confirm that this ruling dispenses with the entire matter?

MR MODISE: I agree, but if I may get the opportunity to address you in costs?

COURT: Yes.

MR MODISE: Because I never had that opportunity.

COURT: I was going to invite you.

MR MODISE ADDRESSES COURT

COURT: Any reply on costs, Mr Le Grange?

MR LE GRANGE REPLIES

COURT: Having taken into account the circumstances of the applicant and the possibility that she might not have been aware until after the settlement that the union had settled her claim, the court is inclined to make an award of costs but on a limited basis.

In the circumstances the claim is dismissed, the applicant to pay 25% of the respondent's costs.

COURT ADJOURNS

ON BEHALF OF APPLICANT: MR MODISE

ON BEHALF OF RESPONDENT: MR LE GRANGE

PILLAY AJ: