IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Case

No: J5460/00
In the matter between:

G VISSER First Applicant
NATIONAL EMPLOYEES' TRADE UNION Second Applicant

and

HENRED FRUEHAUF TRAILERS (PTY) LTD Respondent

JUDGMENT

JAMMY AJ:

1. The First Applicant ("the Applicant") having been what he acknowledged in his testimony to have been fairly retrenched by the Respondent some two months earlier, was re-employed by it on 19 June 1998. In his position as charge hand in the Respondent's paint store, he was assigned various duties, one of which was as assistant to the production foreman, one McLennan.

2. There is confusion as to the date upon which, he alleges, he was again retrenched, this time unfairly, in the year 2000. In the referral, prepared by his Trade Union, of the dispute to the Metal and Engineering Industries Bargaining Council for conciliation, it is alleged to have arisen on 5 September 2000. In fact, the Applicant testified, he inferred and accepted that he had been dismissed in the course of a meeting with management representatives on 25 August 2000. The substantive fairness of that retrenchment, if in fact it is found to have occurred, is not contested by him. No procedures were followed however, which would have rendered the process a proper one in the context of Section 189 of the Labour Relations Act 1995.

3. The Respondent however, denies that the Applicant was at any time dismissed at all. Following an initial consultation with the Applicant on 25 August 2000, the Respondent alleges, which was the first step in the required procedure, the Applicant voluntarily elected to accept a retrenchment package and leave the service of his company, thereby rendering any further consultative action on its

part unnecessary. There had been nothing unfair or improper in its conduct to that stage.

4. As part of a re-organisation shortly after the Applicant's re-employment, the Respondent relocated the paint shop in its Wadeville premises to another locality, known as Reef, some 4 kilometres away. Logistical problems which then emerged however, necessitated its return *in toto*, to Wadeville some time later. When that happened, and in the context of an economy driven general downsizing of its operations, it identified a surplus at supervisory level of its staff complement in the paint shop. One of the possible options considered by management in that regard, as a solution to their problem, was the retrenchment of the Applicant, - whose service with the company was significantly shorter than the two other potential candidates in the process, - in the context that his position had become redundant.

5. On 25 August 2000 therefore, the Respondent's then General Manager, Mr S Leibach, convened a meeting. The Applicant was informed by his foreman that he was to be in Mr Leibach's office at 11.00am. He was told that he could, if he wished, be accompanied by a representative, but not knowing the purpose of the meeting, he did nothing in that regard. The meeting comprised Mr Leibach, his production manager, Ms D Muller and himself. At the outset, he was again asked if he required a representative. When he asked why, he was, the Applicant testified, told that the company could no longer afford him in his present position and could not create another position for him. He was asked if he wished to make any representations and indicated that he would be prepared to accept a reduced salary in the same position. This was rejected. The possibility of his appointment as a spray painter was briefly examined but, he says, he was told that he was not adequately qualified. Nothing further was said, no date was set for any further meeting and he was not informed of a date upon which his employment would terminate.
   Cross-examined by Mr C Hinds, representing the Respondent, the Applicant conceded that, at the conclusion of the meeting, Mr Leibach said that he would revert to him and that he was himself invited to come back with alternatives which would then be considered. As far as he was concerned however, he accepted that he was "out".

6. 25 August 2000 was a Friday and when he reported for work on the following Monday, he found that his various duties had been taken over by the foreman, McLennan and another employee, a certain Spandiel. There was no work for him to do and with the permission of his foreman, he went home some two hours later.

7. Questioned about a further discussion at or about that time which he had with Mr Leibach, the Applicant agreed that he had requested details of a severance package. When it was put to him that what he had said was that he could "see

where this was going", and that they "Should not waste time but should give him his package and he would go", the Applicant's response was vague and prevaricative. He could not recall this, he said, but could not dispute it, following this, after apparent reconsideration, with a denial.

8. It was also correct that on the Tuesday, he had reported late and worked only briefly. This again was because there was nothing for him to do. He had asked for, and Mr Leibach had given him, a rough estimate of his package, he had been requested to obtain a tax directive, and on 5 September 2000, he was given a letter confirming his retrenchment package, with the exclusion of leave pay, bonus pay, notice pay and wages due, - all of which were eventually paid to him. He did not return to work thereafter. It was common cause, in fact that his last full working day was 25 August 2000.

9. There is little in dispute between the parties as to the substance of the meeting of 25 August 2000. The testimony of Mr Leibach and Ms Muller was mutually corroborative in that regard. It was explained to the Applicant that a reduction in salary was not practical because it was his post which had become redundant. It was the Applicant himself who had discounted the possibility of his appointment as a spray painter because, on his own assessment, he was not adequately qualified. The issue of other possible alternatives was left open with a further invitation to the Applicant to revert with suggestions and a commitment by the company to give the matter further consideration. It was correct that no further meeting date was fixed - this would have been convened in due course. At no stage of the meeting however, was the Applicant informed that he was dismissed or a termination date discussed or established. As far as the company was concerned, the consultation process had been commenced, was in progress, but had not been completed.

10. That process however, Mr Leibach testified, was aborted by the Applicant in their subsequent discussion, to which I have made earlier reference. The Applicant had now unequivocally and of his own volition decided to accept a package and terminate his employment. At no stage had that termination been effected by the Respondent. As a consequence of this development, a tax directive was obtained, his severance package, of which he had, at the Applicant's request, made a rough calculation, was finally determined, and the Applicant left the service of the company of his own accord.

11. The subsequent involvement of the Second Applicant, the Trade Union, was, it emerged from the evidence, on its own initiative following a report to it by another employee. The Applicant himself, he testified, was not acquainted with trade union procedures.

12. It is a trite principle of employment law that the onus of proving dismissal must be

discharged by the party alleging it. Where there is a dispute of fact in that regard, it must be determined on a balance of probabilities. Where there is no radical dispute of fact, but rather an issue of inferences to be drawn from common cause aspects, the law is equally clear. It was succinctly stated in-

Govan v Skidmore 1952(1) SA 732 (N)

where, at p. 734, the learned judge said this:

"*... in finding facts or making inferences in a civil case, it seems to me that one may ... by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one."*

13. The Applicant says, and the Respondent's witnesses acknowledge, that he was shocked and upset by the substance of the meeting on 25 August 2000. His perception may well have been, in the circumstances, and as he put it, that he was being disposed of. That perception, however, is not a legally relevant criterion. He does not dispute that he was not, at any stage, informed that he had been retrenched and was being dismissed. The Respondent's evidence as to what occurred at the meeting has not been controverted in any material respect and those facts, in my view, do not support the inference which the Applicant seeks to draw from them. Mr Leibach's evidence as to what occurred in their subsequent discussion is to my mind entirely credible and emphatically refutes the contentions which the Applicant now asks the Court to accept. The Applicant acted precipitately. Had he allowed the process to run its course and then challenged either its adequacy or the Respondent's bona fides in applying it, that may have been a different matter. He did not do so.

14. In the result, I find that the Applicant has failed to prove that he was at anytime formally dismissed by the Respondent and his claims must therefore fail.

I accordingly make the following order:

1. The application is dismissed with costs.

2. The First and Second Applicant's, jointly and severally, are to pay the Respondent's costs.

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B M JAMMY

Acting Judge of the Labour Court of South Africa

Date of hearing: 4th and 5th February 2002
Date of Judgment: 7th February 2002
On behalf of the Applicant: Mr M Landman
On behalf of the Respondent: Mr C Hinds