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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS 501/01

12/02/2002

In the matter between

DOROTHEA FRANKEN & 17 OTHERS Applicant

and

MOLLY MOP CLEANING SERVICES CC Respondent

J U D G M E N T

Delivered on 20 February 2002

REVELAS J:

1. The respondent, Molly Mop Cleaning Services CC conducts business in the cleaning service industry. In this case, it employed several cleaners (approximately 55) and a supervisor and contracted their services to ABSA bank in Pretoria. The respondent also employed an area manager, Ms Steyn. For many years, the respondent managed to successfully tender for a

cleaning contract with ABSA bank.

1. 1. 2. On 29 August 2000, the provincial property manager of ABSA wrote to Mr Von Landsberg of the respondent and advised him of the termination of the cleaning contract with three months' notice. The respondent was also given the opportunity to tender for another cleaning contract with ABSA.

3. On 30 October 2000 the respondent notified to its employees as follows:

"As you are aware, ABSA head office called for tenders and gave us the opportunity to tender again for the cleaning contract.

We hope that we might be successful. We, however, regret to inform you that if we are not successful this letter serves as a letter of termination of your services with Molly Mop Cleaning Services. Your last working day will be 30 November 2000. (My emphasis)

If Molly Mop be awarded any new contract, you will be contacted and offered re-employment.

We wish to express our appreciation for your services and wish you every success for the future."

4. The letter is not addressed to any particular employee and is not signed by Mr Von Landsberg.

5. This application concerns 18 of the 55 employees whose service were terminated. These are the 18 applicants

who work the nightshift at the respondent. The first applicant Mrs Franken,was the supervisor of the 2nd to 17th applicants.

6. The applicants allege that their last working day was 28 November 2000. It is their case that no consultations were held with them and that the dismissals were substantively and procedurally unfair.

1. 7. The respondent contends that it had no choice but to terminate the services of the applicants due to the fact that another cleaning company obtained the cleaning contract previously held by the respondent and there was no more cleaning work for the applicants.

8. Respondent further argued that it had consulted within the spirit of Section 189 of the Labour Relation Act 66 of 1995, ("the Act"), and therefore the dismissal was fair, both procedurally and substantively.

9. It is common cause that the respondent paid no severance pay to the applicants. The respondent argued that it was not obliged to pay any severance pay, as it had offered the applicant alternative employment in Centurion near Pretoria. The positions offered were similar in nature to the work under the contract with ABSA, yet the applicants and unreasonably rejected this offer of alternative employment out of hand, on the basis that they had to travel further.

10. The respondent argued that the respondent was not obliged to pay the first applicant severance pay, since she was offered the position of area manager, which offer she had also unreasonably turned down.

11. The applicants claim that notice pay is due to them, since this was not paid to them for the month worked in November 2000. The respondent argues that the letter dated 30 October 2000, referred to above (the notice letter), constitutes a proper notice and the applicants had worked their last month (November) and received payment therefore.

1. 12. The individual applicants each earned R780,00 per month. It is not entirely clear what first applicant, their supervisor (Mrs Franken), earned per month.

13. Mr Von Landsberg testified that at the beginning of September 2000, and at the workplace, he advised the applicants that there was a possibility that the service contract with ABSA would be terminated. He offered the applicants work in Centurion, but that their attitude was that they were not prepared to travel that far. It is not certain to me whether he , at that stage, conveyed to them that there were only five posts available for cleaners in Centurion. He repeated the offer to the day shift. It follows that fifty five emplyees (including the applicants)

were offered only five positions.

14. Two of the nightshift employees who are not applicants in this matter testified on behalf of the respondent. They confirmed that Mr Von Landsberg had consulted with them and that the nightshift staff all refused to accept the positions in Centurion.

15. Mr Von Landsberg said he had also consulted with Mr Thobejane, the official for SATAWU, who represented the applicants. According to Mr Von Landsberg four or five of the staff members were members of SATAWU and one of the applicants, Paulina Sibanda, was the shop steward for SATAWU.

1. 16. Mr Thobejane denies that there were any consultations with him regarding the retrenchment. According to him the only consultation he had was with Mr Von Landsberg, was about an unrelated retrenchment, prior to the one in question. He also negotiated on behalf of the applicants during wage negotiations.

17. Mr Von Landsberg could not say with any certainty whether any union dues were deducted from the applicants' salaries, because they received their pay slips and he did not keep a copy thereof. I found this a particularly evasive answer.

18. Mr Von Landsberg also testified that he had a lunch with Mr Thobejane where the applicants’ positions were

discussed. This was also denied. He did not have the applicants interests at heart. There are two letters on record, written by Mr Thobejane, from which it is apparent that the respondent, or rather Mr Von Landsberg, was unable to consult with him at the times that he had proposed. No fixed date was set. There are no notes of any meetings, which could be provided by Mr Von Landsberg. Between these two witnesses there is no trace of a joint consensus seeking attempt.

19. Ms Steyn, the area manager, on three occasions, the last one being on 28 November 2000, met with the employees in question and told them abreast of the developments. She was not called to testify by either party. Yet, even on the respondent's version, these meetings do not assist the respondent.

1. 20. In my view, such meetings, as may have been held, did not constitute proper consultations. Neither Mr Von Landsberg nor Mr Thobejane could give my any detail of what was discussed on behalf of the applicants or in their interests.

21. In my view there was no proper consultation as required by Section 189 of Act.

22. The respondent argued that it had complied with the spirit of Section 189. If I were to find on these facts, that there was consultation in the spirit of

Section 189 of the Act, in this matter, the whole section might as well be disregarded.

23. The letter of 30 October 2000 constituted a complete *fait accomplis*. The applicants had no choice in the matter. If they had been consulted they could have perhaps influenced events. The contract with ABSA bank was not the only service contract that Mr Von Landsberg was involved in by virtue of the fact that he was a member of the respondent.

24. Consultation as envisaged by Section 189 of the Act is a joint consensus seeking exercise. The letter of 30 October 2000 reflects the attitude of the respondent. "Bumping" could have been discussed. Alternative employment in other companies could have been discussed. The possibility of a new tender and future re-employment could have been put on the table.

25. It was argued that a letter, which was before me, in which Mr Von Landsberg pleaded with ABSA to extend the contract for a month, indicated that he considered alternatives to dismissal.

1. 26. As the respondents counsel conceded, Mr Von Landsberg was a businessman and not a missionary. In my view he wrote that letter out of self-interest and not just because he felt sorry for the applicants. Mr Von Landsberg had no problem with charging his

employees 15% interest on loans to them, through a company of which he was a director. So much was subtracted from their salaries as repayment for the loans, that on 28 November 2000 some applicants received no money at all.

27. If five positions are offered to fifty five employees and they were told in unequivocal terms that only five of them would qualify for the position, or would be successful in applying for the position, that would not constifute a genuine offer of alternative employment to avoid dismissal. I also do not believe it was properly explained to the applicants that they would be dismissed unless they accept the offer of five positions in Centurion.

28. In the circumstances, the respondent is obliged to pay the applicants severance pay. One week's wages for every completed year of service would have been fair.

29. Notice should have been given to employees unequivocally and in clear terms. The notice was not unequivocal in this matter. The termination of the applicants' services, was conditional upon the event of a contract not being concluded with ABSA. It is not open to the respondent on the one hand to argue that the notice letter was proper notice, and on the other hand, to argue that it is not a *fait accomplis*.

1. 30. In the circumstances I find that the respondent ought to have paid the applicants one month's notice pay.

31. Relief:

I do not believe that the applicants could be reinstated. There are no positions left. On the evidence before me, another service company which has its own employees obtained the contract with ABSA. There remains only the question of compensation.

32. The dismissal was substantively as well as procedurally unfair. Since the dismissal was substantively unfair, I have a discretion as to how much compensation to grant.

33. I do not intend to grant compensation for the maximum amount permitted by the Act. The applicants were not frank with the court. They denied that Ms Steyn ever visited them. Ms Steyn did not give evidence, although several versions were put to the respondent’s witnesses on behalf of the applicants which she was to substantiate as if she were called to testify. Furthermore, the two nighshift employees (who are not applicants) testified that Ms Steyn did in fact explain to them that the contract with ABSA would come to an end.

34. When the applicants received the notice of 30 October

2000, they did not immediately contact a lawyer. They did however, contact the union official in question, who did very little by way of assisting them.

1. 35. I gained the impression from Mr Thobejane that he did not try his best to protect the interests of the applicants and it is probably because he received no union dues. It may be that the union is at fault, in this case, but this should not be taken into account, at the expense of the respondent.

36. In my view, compensation equal to an amount of six months' renumeration for each employee would be fair.

37. Insofar as the first applicant is concerned, Mr Von Landsberg and his secretary both testified that she was offered the position of area manager but that she unreasonably refused to accept the position.

38. The first applicant, testified that she discussed the position of area manager on one occasion (in a garden) with Ms Steyn, who was going to resign due to pregnancy, Mr Von Landsber’s secretary. No firm offer was made to her. The first applicant testified that she and the respondent’s secretary agreed that she would not be suitable due to the fact she did not get on particularly well with Mr Van Landsberg. She denies that there was a second occasion when the general manager, who testified to that effect, offered her a

position.

39. What is certain, is that no offer was made in writing and the offer did not emanate from any proper consultation process in terms of Section 189 of the Act. Therefore the respondent was obliged to pay the first applicant severance pay.

1. 40. The fist applicant also testified that no consultations were held with her and that on 28 November 2000, she and the other applicants were given notice. Ms Steyn apparently arrived with the pay packages and announced that it was their last day of work. The applicants phoned their attorney whom they visited the next day and referred a dispute to the CCMA.

41. However, the referral to the CCMA reflects that the referral was signed on 28 November 2000 and indicated who the attorney for the applicants were. This means that prior to determination of their services, there was contact with an attorney and the applicants were aware that their position was precarious.

42. However, it is simply not true that the first time they heard of their dismissal was on 28 November 2000. That does not accord with the other evidence and the probabilities. Ms Franken's evidence in this regard was contradictory. What is evident from Ms Franken's

(the first applicant) evidence is that the individual applicants waited for events to take their worst turn, instead of making an effort themselves to avoid the retrenchments. There should have been some effort forthcoming from the applicants to indicate at least a willingness to approach the process as a bilateral one or to mitigate their losses.

43. In such circumstances, I do not believe that the applicants are entitled to the maximum amount for compensation provided for in the Act.

44. In the circumstances I make the following order:

1. 1. The dismissal of the applicants was procedurally and substantively unfair.
2. The respondent is to pay the applicants severance pay in an amount equal to one week's wages worked for every completed year of service.
3. The respondent is to pay the applicants notice pay equal to one month's wages.
4. The respondent is to pay the applicants compensation in an amount equal to six months' renumeration, each.
5. The respondent is to pay the applicants' costs in this matter.

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