IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J3232/00

In the matter between:

NATIONAL CONSTRUCTION BUILDING
Applicant

and

D Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicant union is a registered trade union that represents a group of employees ("the individual applicants") who on 9 May 2000 after refusing to sign new contracts of employment, was informed by the respondent that they were retrenched.

2. The individual applicants referred a dispute to conciliation. After conciliation had failed, they referred the dispute to this Court for adjudication. The individual applicants contend that the dispute that gave rise to their dismissal was a dispute concerning matters of mutual interest as contemplated by the

provisions of the Labour Relations Act 66 of 1995 (“the Act”).

3. The respondent contends that the individual applicants were retrenched.

4. The issues

5. This court is required to determine the following issues:

4.1 Whether the respondent had a fair and proper reason to retrench the individual applicants;

4.2 Whether the respondent was obliged to negotiate the issue of changes to conditions of employment instead of consulting on same as part of a restructuring process;

4.3 Whether the conduct of the respondent on 9 May 2000 constituted a lock out, and if so, whether such lock out was in compliance with the provisions of the Act.

4.4 Whether the conduct of the respondent constituted an automatic unfair dismissal.

The common cause facts

6. The respondent took over Iscor Refractories in 1999 as a going concern. The individual applicants were all employed at Iscor Refractories. The employment of the individual applicants were all transferred to the respondent in terms of the provisions of section 197 of the Act.

7. The respondent has since June 1999 been engaged in talks with all the employee representatives. These talks included wage talks and talks surrounding the conditions of employment, which the respondent had inherited from the previous owners.

8. On 5 January 2000, the respondent issued notice to the applicant union and the employees that it intended to embark upon a restructuring and redundancy programme. The representatives were informed that the respondent wanted to renegotiate the then existing conditions of employment, as these were suited to a parastatal such as Iscor, and were impossible for the respondent to bear.

9. On 27 January 2000 the employees representatives were warned that the respondent was serious about making these changes urgently. Negotiations began with the said representatives.

10. About 43 employees were subsequently retrenched. These employees are not party to this dispute.

11. During the said restructuring process, the respondent proposed that all issues pertaining to the conditions of service, rules, regulating and procedures, all previous agreements, would form part of a consultation process during the

restructuring of the respondent. The respondent intended to restructure its entire business, including conditions of service, rules, regulations and procedures, and all previous agreements, The individual applicants were not in agreement with the proposed restructuring.

12. A memorandum was circulated to all employees and the individual applicants on 16 February 2000. The memorandum stated that at the next meeting due on 25 February 2000 all proposals and comments of the various subcommittees would be discussed by the working committee and consolidated into a new draft proposal, which would then be referred to management for consideration. Management had undertaken to give careful consideration to each and every proposal prior to any transformation changes being commenced with. Further negotiations could follow but it was management's clear intention to transform the company into an internationally orientated business which would be flexible and market related with effect from 1 March 2000. The original date set was 1 February 2000.

13. The respondent wanted to reduce certain employment benefits of the employees to reduce its costs, as part of its restructuring process. The individual applicants contended that this issue should have been negotiated and not have formed part of the restructuring process.

14. On 8 March 2000 the respondent brought this process to an end, when it became clear that the applicant union would not accept the changes that the respondent wished to institute, in order to protect the future of the respondent. The respondent stated that with immediate effect all positions in the respondent were being declared redundant, along with the then existing conditions of employment.

15. From 9 March 2000 all redundant positions were offered to the persons filling those positions at the respondent, but only on condition that they accepted them along with the respondent's conditions of employment. Since 9 March 2000 the respondent has been operating on the new conditions of employment.

16. The respondent issued a memorandum on 3 April 2000 to the individual applicants and all employees. The memorandum reads as follows:

"NEW CONDITIONS OF EMPLOYMENT

In June 1999 Hernic-Premier became the owners of the then Iscor Refractories. Management has since then been engaged in talks with all Employee Representatives.

These talks included wage talks and talks surrounding the Conditions of Employment, which as per the law, Hernic-Premier inherited from the previous owners.

In January 2000 the Representatives were informed that Hernic-Premier

wanted to renegotiate the then existing Conditions of Employment, as these were suited to a parastatal such as Iscor, and were impossible for Hernic-Premier to bear for much longer.

On 27 January 2000 Representatives were warned that Hernic-Premier was serious about making these changes, urgently, and negotiations began with the Representatives.

On the 8 March 2000 this process was brought to an end by the company, when it became clear that NACBAWU would not accept the changes that Management wished to institute, in order to protect the future of the company.

On 8 March 2000 the company stated that with immediate effect all positions in the company were being declared redundant, along with the then existing conditions of employment.

From 9 March 2000 all redundant positions would be offered to the persons filling those positions, but only on condition that they accepted them along with the Hernic-Premier Conditions of Employment. It should be noted that since 9 March 2000 this company has thus been operating on the Conditions of Hernic-Premier."

17. On 20 April 2000 the following memorandum was distributed to each of the individual applicants:

“INSTRUCTION TO SIGN YOUR LETTER OF APPOINTMENT

On 8 March 2000 Management issued an ultimatum to the representative trade unions, NACBAWU and SAWU, concerning the new Conditions of Employment.

SAWU accepted the Conditions of Employment but NACBAWU did not.

Notwithstanding this NACBAWU members continued working at the company, despite their rejection of the Hernic-Premier Conditions of Employment.

From this the company has concluded that employees who carried on working since 8 March 2000 have accepted the Conditions of Employment as they also declined the option of a severance package which was offered.

Despite this there has been a refusal by employees, on who’s advice it is unknown, to not sign the new letters of appointment.

Therefore you are hereby instructed to sign the letter of appointment that was issued to you in terms of the new organisation structure and as required by the Basic Conditions of Employment Act - by close of business on 8 May 2000. If you have already signed your letter of appointment and submitted it to management, please ignore this instruction.

Failure to comply with this instruction, which is confirmation of the Conditions in place since 9 March 2000 could place your continued

employment at Hernic-Premier Refractories in jeopardy.

Complete the section below and return to your Superior by close of business on 5 May 2000.

Non-return of this instruction, or non-completion thereof, will be interpreted by the company as refusal to sign and accept the new job offer."

18. The individual applicants refused to sign the new employment contracts or agree to the terms contained therein. The individual applicants were informed by the respondent that should they not agree to the new contracts they would face retrenchment. If they agreed, they would not be retrenched. The individual applicants job titles remained unchanged and only the conditions of employment relating thereto were changed.

19. The employees were given a last opportunity on 8 May 2000 to agree to the new contracts of employment on 9 May 2000.

20. On 9 May 2000, the employees reported for duty. They were refused entry. Whilst waiting outside the premises they were called individually to sign the new contracts of employment. After they refused to sign, they were told that they were retrenched. The individual applicants were dismissed on 9 May 2000.

21. The individual applicants who had refused to sign the new contracts of employment were replaced with contract employees.

The parties contentions

22. The individual applicants contended that the respondent was not entitled in terms of the provisions of the Act to have dismissed them for alleged operational reasons and by virtue of the provisions of collective agreements binding upon the parties. Further that the dismissal of the individual applicants for alleged operational reasons was not effected in accordance with a fair procedure.

23. The individual applicants contended further that the conduct of the respondent constituted an automatic unfair dismissal.

24. The respondent contended that it had a proper reason to retrench the individual applicants. It was entitled in order to reduce its costs and restructure its business implement the restructuring process which ultimately gave rise to the retrenchment of the individual applicants. The new contracts of employment offered to the employees were alternative positions offered to the employees.

Disputes on matters of mutual interest not to be resolved through

dismissal?

24. The Act prohibits the unilateral change of employment conditions by an employer. This prohibition is found in both section 64(4) and in Schedule 7(2)(b) of the Act. An employer cannot simply implement a unilateral change of conditions of employment conditions. An employer can only change conditions of employment by agreement with the employees.

25. 1. Section 187(1)(c) of the Act states that a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5(1) or, if the reason for the dismissal is to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee. Section 5(1) of the Act states that no person may discriminate against an employee for exercising any right conferred by this Act.

26. It is trite that disputes concerning matter of mutual interest, must be resolved by the bargaining process itself which may include a resort to force. Dismissal is not a legitimate instrument of coercion in the collective bargaining process. The change in the definition of lock out means that even the temporary and tactical dismissal is precluded. In this regard see *National Union of Metalworkers of SA & Others v Fry's Metal (Pty)* Ltd (2001) 22 ILJ 701 LC.

27. It is clear from the provisions of section 187(1)(c) of the Act that an employer is prevented from dismissing an employer who refuses to accept a demand in

respect of any matter of matter of mutual interest. Where an employee is dismissed, such a dismissal will be an automatic unfair dismissal.

Analysis of the evidence and arguments raised

28. The crisp issue to be determined is whether the respondent, as a matter of law, was entitled to effect a change to conditions of employment of the individual applicants as part of a restructuring exercise resulting from the operational requirements of the respondent and whether the dismissal of the individual applicants constituted an automatic unfair dismissal in terms of section 187(1)(c) of the Act.

29. It is not in dispute that the respondent purchased the business of the respondent from Iscor Refractories in June 1999. At the time of the purchase, Iscor Refractories was making a loss of about R4 000 000.00 per month. That business was in danger of imminent closure. Prior to the sale of the business, Iscor had more than 1 000 employees. This resulted in the retrenchment of 700 employees after consultations that taken place with the trade unions.

30. In addition, and in October 1999, the respondent acquired the business of Union Fire Clay, which conducted similar operations to that of Iscor Refractories, but having some different products.

31. In addition, as part of the obligations the respondent took over with Iscor Refractories, was a recognition agreement with the applicant union, which required an annual wage and conditions of employment negotiation in June of every year. By agreement however, and due to the takeover of June 1999, the negotiations were held late in the year and a collective agreement in this regard was concluded on 9 December 1999.

32. As at the end of December 1999, the respondent had debts as a result of the acquisition of about R125 million. To service these debts the respondent had to make a profit of at least R3 million per month. The respondent, in terms of the acquisition agreement with an overseas investor, Vesuvius, had to achieve certain profit warranties, which in essence required a profit margin of 25% on turnover. The respondent had different sets of employment for different employees, being the former Iscor employees and the Union Fire Clay employees. The former Iscor Refractories employees had certain fringe benefits contained in “hidden agreements”, which costs the respondent R840 000 per annum. These “hidden agreements” all formed part of the conditions of employment of the Iscor Refractories employees.

33. In November 1999 the respondent made a profit of R3 628.63. In December it suffered a loss of R3 798 501.47. From January to June 2000 there were monthly profits of R624 243.85, R825 835.37, R1 474 017.68, R667 697.37,

R1 672 750.10 and R3 674 734.97 respectively.

34. It is also not in dispute that as a result of the position that the respondent had found itself in December 1999, the respondent embarked upon a profit improvement plan, which included a total restructure of the respondent, including productivity standards measurement, marketing, technology, codes and procedures, previous agreements, conditions of employment, integration and proper deployment of personnel, human resources policies and if necessary retrenchments. As part of a total restructuring process at the respondent, the respondent required that all issues pertaining to the conditions of service, rules, regulations and procedures, all previous agreements, should form part of a consultation process to be implemented.

35. Further consultations took place in January 2000 which resulted in 43 employees being retrenched. The individual applicants could not reach an agreement on the new conditions of employment. Several meetings took place between the parties which could not resolve the dispute about the new conditions of employment. This prompted the applicant to issue a memorandum of 3 April 2000.

36. Mr Snyman, who appeared for the respondent contended that the respondent *de facto* had a proper and valid operational reason related to its operational

requirements, to embark upon the actions it did. I do not agree with those contentions.

37. It would appear from the evidence led that the true reason for the dismissal was the individual respondent's failure to accept the new conditions of employment. What is clear from the letter of 3 April 2000 is that after the respondent could not have its own way around the new conditions of employment, it stated that the positions in the company are declared to be redundant along with the existing conditions of employment. The respondent stance was that all redundant positions would be offered to the persons filling the positions but on condition that they accepted new conditions of employment. The respondent's intention was therefore made quite clear. It wanted to compel the employees to accept the new conditions of employment. That intention was also made clear in the memorandum of 20 April 2000.
38. After the individual applicants had been told that they were dismissed, they were replaced with other employees. This supports the individual applicants contentions that they were dismissed for failing to agree to the new conditions of employment. If retrenchment was a true reason it is inexplicable why the individual applicants were replaced with contract employees.

39. This is not a genuine retrenchment but rather a ploy that was used by the respondent to dismiss the individual applicants who had refused to accept the

new conditions of employment. The respondent had certain remedies open to it which it did not pursue.

40. The dismissal of the individual applicants did not arise from the need to avoid the spectre of pending insolvency. It is clear from the contents of exhibit "D" and the evidence that was led by van der Hooven that the respondent suffered a loss only during December 1999 and not thereafter during the year 2000. It was the evidence of Mulder and van der Hooven that savings on the cost of employment arising from the abolition of certain benefits amounted to a total ranging between R820 000.00 and R1 000 000.00 per annum.

41. On the facts of this matter, the respondent clearly has invoked dismissal, in the guise of retrenchment, as a direct negative inducement to the individual applicants to abandon their reluctance to accept the new conditions of employment. The threat of retrenchment of those individual applicants who did not accede to the respondent's demand was made at a point in the negotiations where an impasse had been reached on these demands and was clearly prompted by the impasse. Before reaching this impasse in the negotiations, the respondent had no intention of, and had not contemplated, dismissing the individual applicants. That this was the respondent's state of mind emerges clearly from the rider it added to the letter namely that it would not retrench the individual applicants if they accepted the conditions of

employment. This is also bourne out by the fact that after the applicant's were dismissed they were replaced with contract workers.

42. On a balance of probabilities the true cause of the dismissal of the individual applicant was their refusal to agree to the new terms and conditions of employment that entailed the signing of a new employment contract and the abolition of certain benefits such as winter jackets, canteen subsidies, transport allowances, bursary schemes etc. The dismissal were therefore automatically unfair.

43. It was argued that the individual applicants should not be reinstated since they were replaced by contract workers. I do not agree. The respondent brought it upon itself when it dismissed the individual applicants under the guise of a retrenchment. There is no reason why the individual applicants should not be reinstated in their previous positions.

44. There is no reason why costs should not follow the results.

45. In the circumstances it is ordered that:

46. The termination of the individual applicants services constituted an automatic unfair dismissal.

47. The respondent to reinstate the individual applicants from the date of dismissal on terms and conditions no less favourable than those that governed their employment and with no loss of benefits.

48. The respondent to pay the costs of the application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

NTS : F J WILKE INSTRUCTED BY RAMUSHU MORARE ATTORNEYS

DENT : S SNYMAN OF SNYMAN VAN DER HEEVER HEYNS ATTORNEYS

NT : 12 AUGUST 2002