IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JS1010/2001

In the matter between:

MADINGOANE OLIVER & 4 OTHERS
Applicants

and

THE FIBROUS PLANT
Respondent

JUDGMENT

NDLOVU AJ

[1] In terms of their statement of case, the Applicants claimed that they were unfairly dismissed by the Respondent, their erstwhile employer. The dismissal aforesad was allegedly based on the Respondent's operational requirements. The Applicants asked the Court for an order reinstating them retrospectively in the employ of the Respondent.

[2] In or about December 1999 a company known as BPB Gypsum

(Pty) Ltd closed down its business at its Pretoria branch, leaving only its Brakpan branch operating. In terms of a collective agreement concluded between the management and CEPPWAWU, the collective bargaining agent representing the company's affected employees, two options were put on the table for these employees to select from. The first option was a total retrenchment package and the second option was what the Applicants' papers described as "a business empowerment opportunity" offered by the company In respect of the latter option each individual affected employee could participate in the management of a new factory which would be opened and located on the premises of the Brakpan branch of the BPB Gypsum. This new factory was to be called "The Fibrous Plant CC" (the Respondent herein).

[3] The Respondent was involved in the business of manufacturing cornices, which were ornamental mouldings for roof ceilings. It supplied only one customer, namely BPB Gypsum (Pty) Ltd., Brakpan.

[4] The evidence of the Respondent was adduced from Moses Mametse Moeketsi and Ben Sello Keagile. For the Applicants only Josephine Hlongwane (the Fifth Applicant) testified.

[5] It was common cause that the Respondent commenced its business on or about 10 January 2000. All five Applicants started work at the inception of the business. The Fourth and Fifth Applicants were among the retrenched employees from BPB Gypsum (Pty) Ltd. Pretoria.

[6] It was also common cause that Moeketsi was the Union's agent

and representative during its negotiations with BPB Gypsum, Pretoria,which negotiations culminated in the collective agreement referred to above being concluded.

[7] It turned out subsequently that Moeketsi took over the Respondent as its sole member. None of the former employees of BPB Gypsum Pretoria took part in the management of the Respondent, in terms of what was envisaged as an option alternative to their retrenchment from BPB Gypsum Pretoria. According to the Applicants (the Fourth and Fifth in particular) they were sidelined by Moeketsi whom they alleged betrayed them by taking over the business himself when he had been mandated only to negotiate a settlement on their behalf and for himself.

[8] On the other hand, Moeketsi's version was that he was offered the business by the management only after the affected employees (including the Fourth and Fifth Applicants) had failed to come forward and avail themselves to take up the management of the Respondent. He had accepted the offer and thus became the sole member of the Respondent. In terms of the Applicants' statement of case, the dispute about the alleged Moeketsi's betrayal of the Fourth and Fifth Applicants and others, was referred to the CCMA for conciliation under case number GA109495. The conciliation meeting in this regard was held on 1 August 2001. When the dispute remained unresolved it was referred for arbitration, which was still pending.

[9] The conciliation meeting in respect of the present case was held on 3 August 2001, only two days after the first conciliation meeting in respect of the alleged business empowerment

dispute. The dismissal of the Applicants was effective on 30 June 2001. It follows, accordingly, that both disputes were referred to the CCMA after the dismissal of the Applicants. It appears to be the case further that although the alleged business empowerment dispute did not relate to dismissals *per sé*, it was, nevertheless prompted or triggered by them.

[10] Although Moeketsi held himeslf out as the employer of the Applicants and that he dismissed them as alleged in the Applicants' statement of case, Hlongwane, the only witness for the Applicants, persisted in her evidence that as far as she was concerned she was part of the management of the Respondent and that she was never employed by Moeketsi. She regarded herself as part of the management and co-employer of the First, Second and Third Applicants. She rejected that Moeketsi was part of the management. According to her, he had nothing to do with the Respondent's management.

[11] Hlongwane testified that there were six of them from the defunct BPB Gypsum Pretoria's factory who had opted for the empowerment opportunity in the Respondent. She and the Fourth Applicant were two of the six members of the Respondent's management. Moeketsi was not part of the group. She told the Court that even after she was advised that Moeketsi was in fact the sole owner of the business, she still did not regard him as such and that it was herself and her five colleagues who owned the business.

[12] Hlongwane further told the Court that the arbitration in respect of the alleged empowerment dispute had already started. It was not clear from her evidence at what stage the arbitration hearing

was, as at the time of this trial.

[13] It would seem to me that the evidence which Hlongwane handed before the Court was evidence only relevant in respect of her business empowerment dispute which is pending before the CCMA. I fail to conceive how and why the Fourth and Fifth Applicants referred two different and mutually irreconcilable disputes, one for arbitration before the CCMA and another for adjudication before this Court, both disputes emanating from the same set of facts. To my mind, by referring the business empowerment dispute to the CCMA, the Fourth and Fifth Applicants thereby made their choice. They made an election to pursue the dispute on the basis that they were not employees of the Respondent but they were part of its management. That being so, it seems to me, they disqualified themselves from referring another dispute, based on the same facts, claiming to have been employees of the Respondent and that, for that reason, the Respondent dismissed them. They could not have it both ways. As I have indicated already, Hlongwane's evidence simply confirmed her choice of dispute, that is, that she was the owner of the Respondent and not its employee. Her evidence was therefore not relevant to sustain the Applicants' case in the present matter before the Court.

[14] No further evidence was tendered on behalf of the Applicants' case. As for the First, Second and Third Applicants, it seems to me that their case was premised on a different footing to that of the Fourth and Fifth Applicants. They (that is, First, Second and Third Applicants) were not part of the employment complement which was retrenched from BPB Gypsum Pretoria. They were therefore not among the six employees who allegedly opted for

the so-calledbusiness empowerment opportunity from the Respondent. They were said to have been “picked from the gate” when they were employed by the Respondent when the Respondent commenced its business activity on 10 January 2000. Their status as employees of the Respondent was therefore not in dispute.

[15] That being the case and in the light of the nature of Hlongwane’s evidence, as described above, it was expected that evidence would be led on behalf of the First, Second and Third Applicants, relevant to their particular situation. It was submitted by Mr Khoza (for the Applicants) that he had found it not necessary to call evidence on behalf of these Applicants because of what he claimed was a contradiction between the evidence of Moeketsi and Keagile. He submitted that Moeketsi had testified about having attended a certain consultation meeting at 09h00, whereas Keagile had stated that Moeketsi attended that meeting at 11h00. Of course, this was not a material contradiction, if anything.

[16] In a dismissal dispute the onus is on the employee to prove the fact of dismissal (Section 192(1)). Once the employee has done so, the onus shifts to the employer to prove that the dismissal was fair (Section 192(2)). In either instance, proof must be established beyond a balance of probabilities.

[17] It follows that in terms of Section 192(1) the Applicant must prove that, firstly, he/she was an employee of the respondent and, secondly, that he/she was dismissed by the respondent. It would seem to me that the first leg of this requirement was not satisfied insofar as the case for the Fourth and Fifth Applicants was concerned. No acceptable evidence was tendered before

the Court that they were the employees of the Respondent. Therefore, no employer-employee relationship existed between them, on the one hand, and the Respondent, on the other. The evidence of Hlongwane only helped to confirm their standpoint (if Hlongwane's evidence is to be accepted to cover the Fourth Applicant's case as well) that they were not the Respondent's employees.

[18] In the circumstances, the Respondent had the duty to prove the fairness of the dismissal only in respect of the First, Second and Third Applicants.

[19] According to Moeketsi, when the business started in January 2000 there was a backlog of outstanding orders and another special order from Goldrift City Casino, which the Respondent had to attend to urgently. This necessitated the employment of more staff. By the end of May 2000 the Respondent had employed about 30 employees.

[20] Moeketsi further told the Court that during the first six months of the business all employees were engaged on a casual basis. Each individual employee's engagement was reconsidered on a month-to-month basis. He said the reason for this was because the Respondent had no contract with any customer during that period and therefore did not want to commit itself. During that time the Respondent was still negotiating a contract with BPB Gypsum, which was eventually concluded by the end of June 2000. In terms of the contract the Respondent was to supply both the Brakpan and Germiston branches of BPB Gypsum.

[21] After the contract aforesaid was concluded, individual contracts

were then in turn concluded with the respective employees on 1 July 2000, who, therefore, all became permanent employees of the Respondent. For that reason and for the purpose of the LIFO principle, all employees were deemed to have assumed employment with the Respondent as from 1 July 2000.

[22] Once the Respondent finished the outstanding backlog and the special order from Goldrift City Casino the business workload decreased. The Respondent then faced stiff competition with other business entities dealing in the same commodity. Some of its competitiors used cheaper material, for example, polystyrene, instead of more expensive plaster, which was used by the Respondent, thus cheaper prices by its competitors.

[23] The Respondent introduced alternative methods which it felt might assist in avoiding retrenchment of staff. The normal production target of 35 pieces per day per person was reduced to 30 and subsequently to 25 pieces per day per person. It was not worthwhile producing more when the supply demand thereof had considerably decreased. When this idea did not work, the “short time” measure was then introduced. Moeketsi subitted that every time the employees were consulted before a particular measure was taken.

[24] On 7 June 2001 Moeketsi called a staff meeting at which he addressed the employees, including the Applicants, about the continuing crisis of the Respondent’s business. Keagile, who was the Respondent’s supervisor, was also present at the meeting. The employees held a caucus meeting at which they elected four employees from their midst to constitute a committee which would represent them at all consultation meetings with the

Respondent's management.

[25] On the same day (that is, 7 June 2001) Moeketsi requested the employees to submit proposals through their committee as to what further alternative measures could be implemented to avoid the retrenchment. He was due to meet with the committee during the afternoon of the same day at which the committee would advise him of the employee's proposals.

[26] According to Moeketsi he met with the committee on the afternoon of 7 June 2001. However, the committee advised him that they had been mandated by the affected employees to tell him that the employees had no proposals to make and that they left the matter in his (Moeketsi's) hands. However, he said he continued to encourage them to come forward with proposals.

[27] When nothing was forthcoming from the employee's committee or the employees themselves, Moeketsi, on behalf of the Respondent, issued a notice on 19 June 2001 which read as follows:

[27.1] "Further to our meeting and discussions on 7/06/2001, where it was indicated that due to a slow-down in the industry that there will be a possibility of retrenchments taking place.

[27.2] You were further requested to discuss any alternatives and options with me. To date no alternatives have been presented, despite the fact that a reduced working week to four (4) days as per discussion has been in effect since the beginning of May 2001.

[27.3] The Fibrous Plant has no alternative but to retrench people during the week of 25/06/01 so as to ensure the continuation of the business.

[27.4] A separate meeting will be held to confirm which contract workers will be retrenched, with a second meeting to be held with the remaining contracts to discuss the restructured position".

[28] On 27 June 2001 Moeketsi called all the affected employees individually (including the five Applicants) and handed them letters of retrenchment. The retrenchment was effective on 30 June 2001.

[29] Moeketsi contended that the Applicants were dismissed for a fair reason and that a fair procedure was followed in their dismissal.

[30] The evidence of Keagile corroborated that of Moeketsi in most material respects. A few contradictions in their evidence did not detract from the Court's finding that, viewed in its entirety, the evidence tendered on behalf of the Respondent reflected the probable truth of the matter.

[31] In the light of there being no acceptable evidence to gainsay the Respondent's version, I am accordingly, of the view that the Respondent discharged its onus of proving that the dismissal of the Applicants was both substantively and procedurally fair.

[32] In the result, the Court makes the following order:

[32.1] The application is dismissed.

[32.2] There is no order as to costs.

S K NDLOVU, AJ

Appearances:

For the Applicants	:	Mr W Khoza (Union official)
For the Respondent	:	Adv W Hutshinson
Instructed by	:	Fluxman Rabinowitz-Raphaely Weiner Rosebank, Johannesburg
Date of Judgment	:	19 June 2003