IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

Case No. D237/2002

In the matter between:

B. MAHLINZA & 11 OTHERS Applicants

and

ZULU NYALA GAME RANCH (PTY) LTD Respondent

JUDGMENT

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1. The twelve Applicants in this matter contend that they were unfairly retrenched by the Respondent. It is common cause that all of the Applicants were, at all material times, members of the South African Commercial Catering and Allied Workers' Union (SACCAWU).

2. The Applicants contend that their dismissals were both substantively and procedurally unfair. In this regard they complain that they were never consulted at all in regard to their retrenchments and neither was their registered union, namely SACCAWU.

3. The Respondent's reply to the Applicants' Statement of Case is devoid of any particularity concerning a defence. Save for admitting its own identity and that this Court had jurisdiction to determine the dispute, the Respondent denied everything else.

4. The first Pre-trial Minute also failed to reveal what the Respondent's case was to be. Supplementary Pre-trial Minutes that were filed indicated, finally, that the Respondent's case was that :

4.1. there was a general need to retrench insofar as there existed a commercial rationale which was based on the operational requirements of the Respondent;

4.2. at all material times the Respondent had a closed shop agreement with another union called the National Union of Farm and Allied Commercial Employees (N.U.F.A.C.E);

4.3. the Respondent said that it did not have to furnish the Applicants with a list of employees and their dates of engagement because all of that information was furnished to the representative trade union i.e. N.U.F.A.C.E;

4.4. the Respondent submitted that a selection criteria of last in first out was used, save in the case of two instances where skills and special circumstances were preferred;

4.5. the Respondent contended that it was only obliged to consult N.U.F.A.C.E, that there was no legal duty upon it to consult with the Applicants or their trade union and that the selection of employees for retrenchment was done in consultation with N.U.F.A.C.E.

5. In essence the Respondent's case was that it was only obliged to consult with N.U.F.A.C.E, which it did and in that regard selection criteria were agreed and implemented with N.U.F.A.C.E.

6. It is trite that the Respondent bore the onus of establishing that the dismissals of the Applicants were fair.

7. The Respondent called two witnesses to advance its case. The first witness was Mr Deon Steyn, the Lodge and Marketing Manager. Although he gave some evidence about the commercial rationale for the Respondent's

proposed reduction in staff generally, at the material time, he said he was not involved in the retrenchment exercise at all and he accordingly gave no evidence about how the individual applicants were selected for retrenchment. He gave evidence at some length concerning the dates of engagement of those employees who had been employed after the retrenchment in question but, in view of my finding in this matter, all of that evidence is not material to the real issue.

8. The second witness called by the Respondent was a Mr Opperman. He was a labour relations practitioner, operating as a consultant in the firm "*Necessitas*" and he testified that he had been retained by the Respondent in order to guide the retrenchment process. Notwithstanding the Respondent's contention in the Supplementary Pre-trial Minutes that it was not obliged to consult with SACCAWU, he advised the Respondent to consult SACCAWU and SACCAWU were accordingly invited to a meeting concerning the proposed retrenchments. That meeting took place on the 4th of October 2001. As I understand Mr Opperman's evidence he did this not because he thought the Respondent was under a legal obligation to consult SACCAWU (even though he concedes that SACCAWU had members employed by the Respondent) but because he thought that this was fair.

9. There is a dispute of fact about what happened at the meeting on 4 October

2001 but in view of the finding I have come to in this matter, that dispute of fact is not material. It is however common cause that following the meeting both SACCAWU and N.U.F.A.C.E wrote to Opperman on 16 October 2001 requesting feedback meetings with their members. N.U.F.A.C.E were granted such a meeting but, for reasons which are not entirely clear to me, Mr Opperman did not reply to the letter from SACCAWU which was sent to him on the 16th of October 2001.

10. Notwithstanding this request from SACCAWU Mr Opperman says that in his opinion SACCAWU had decided to withdraw from the consultation process because of their attitude at the meeting of 4 October 2001 but he could give no satisfactory explanation as to why SACCAWU, if that was their attitude, nevertheless requested a meeting with their membership in regard to the proposed retrenchment exercise. Neither could Mr Opperman give any satisfactory explanation about why he then decided to exclude SACCAWU from the process. On the 26th of October 2001 he sent N.U.F.A.C.E a formal letter about the proposed retrenchments but because he had, by that stage, decided to exclude SACCAWU from further involvement, that letter was not sent to SACCAWU and it follows that they were not involved in any other meetings with the Respondent.

11. Having invited SACCAWU to a meeting concerning the retrenchment of their members, the evidence does not provide any satisfactory explanation as to why SACCAWU was subsequently excluded from the whole process. For this reason alone the dismissals of the Applicants is procedurally unfair.

12. Notwithstanding the fact that it did consult SACCAWU initially, the Respondent contends that it was not lawfully obliged to and that SACCAWU's exclusion, later in the process, is therefore of no consequence. Reliance on this contention by the Respondent is ill-founded.

13. In this regard, Section 189 (1) of the Labour Relations Act sets out clearly who an employer must consult concerning retrenchments. In this matter there is no evidence of a workplace forum in the workplace and the only thing that would excuse the Respondent from consulting with SACCAWU, a registered trade union which, to the knowledge of the Respondent had members in its workforce, is the existence of a collective agreement requiring the Respondent to consult with the other party to the collective agreement about retrenchments. There is no such collective agreement. What the Respondent relied upon was the agency shop agreement that it had concluded with N.U.F.A.C.E but that collective agreement imposes no

obligation on the Respondent to consult N.U.F.A.C.E about retrenchments.

14. For all of the above reasons the Respondent was therefore obliged to consult SACTWU or at least the individual Applicants about their retrenchment. It did neither and the Respondent's whole case falls into a vacuum.

15. During argument, Mr Koornof properly and fairly conceded that his whole case was reliant on the proposition that the Respondent was entitled to deal only with N.U.F.A.C.E in regard to the retrenchment of the Applicants. That is so because there was simply no other evidence from the Respondent which discharged the onus of establishing that fair selection criteria had been applied in regard to the dismissals of the Applicants.

16. In this regard the only evidence that was led by the Respondent was the evidence of Mr Steyn, the Lodge and Marketing Manager, and Mr Opperman. Mr Steyn testified that he had not been involved in the retrenchment process. That left the Respondent with the evidence of Mr Opperman in order to establish that fair and objective selection criteria were applied to the dismissals of the Applicants. Leaving aside the difficulty that Mr Opperman was the labour consultant hired in order to advise the Respondent in the retrenchment process (and that he would accordingly have a clear interest in

protecting his advice in court) Mr Opperman did little to advance the Respondent's case in this connection. All that he said about selection criteria was that LIFO had been the initial criteria used but that N.U.F.A.C.E had requested changes and changes were agreed. No lists of employees were put up (with their engagement dates) and although Mr Opperman says N.U.F.A.C.E were consulted on the final selection criteria there was no evidence as to what this final selection criteria was, how it applied to the Applicants and in fact there is just no evidence which demonstrates that the Applicants were fairly selected for retrenchment.

17. In the circumstances the Respondent has not discharged the onus of proving that the Applicants' dismissals were fair and in the result I find that the dismissals of the Applicants were both procedurally and substantively unfair.

18. The primary remedy that I must give effect to, in terms of the Labour Relations Act, is reinstatement. However, in my judgment a reinstatement retrospective to the date of the Applicants' dismissals (i.e. November 2001) is not fair. The Respondent did present evidence about a marked downturn in bookings at the material times, due to a variety of factors, including the events of September 11, which according to the Respondent dramatically affected tourism. There was no serious challenge to this evidence and in my opinion

the Respondent has established that it was entitled to take steps to protect the financial integrity of its business. The flaw in its case is accordingly not that no commercial rationale was demonstrated in respect of proposed retrenchments, it is rather that the Respondent has not discharged the onus of proving that the dismissals of the individual Applicants and their selection for retrenchment was fair. In the circumstances I consider that an order of reinstatement retrospective to the date of the Applicants' dismissals is inappropriate in the particular circumstances of this matter.

19. The difficult task is to determine what relief the Applicants should get, in addition to their reinstatement, which they are clearly entitled to.

20. All of the Applicants received retrenchment pay and that is a factor I must take into account. It was contended, by the Respondent that three of the Applicants had been re-employed but that is disputed by the Applicants (even though the particular employees who are said to have been re-employed did not give evidence). I invited the parties to resolve this issue but this was not done. If they were re-employed I do not know in what position they are working and what they are getting paid.

21. The order of reinstatement will cause substantial disruption to the business of

the Respondent. The Respondent may have to embark immediately on another retrenchment exercise, which may entail additional disruption and cost, but such disruptions are the inevitable consequence of a reinstatement order. However, it is clear that the Respondent was suffering financially at the material times. The delay in setting matters down for trial (this case concerned a dismissal in November 2001) should also not fall on the shoulders only of the Respondent. Had this dispute been determined earlier, as was certainly envisaged when the 1995 Labour Relations Act came into force, the problem of substantial back-pay would not have been as large.

22. During the evidence of Mr Steyn reference was made to legal entities other than the Respondent in this matter. This related, apparently, to what may be different ownership of the businesses from which the Applicants were retrenched or in respect of which they sought reinstatement. These entities all operate in the Zulu Nyala Group and Mr Koornof undertook that one employer would give effect to any order that I would make. In this regard the Respondent is cited as Zulu Nyala Game Ranch (Pty) Limited but Mr Koornof said that the correct legal description of the Respondent may be Zulu Nyala Game Lodge (Pty) Limited. He undertook, on behalf of that legal entity (insofar as it was necessary) to give effect to any order that I make. In the result I make the following order :

22.1. the dismissals of the Applicants in this matter were procedurally and substantively unfair;

22.2. the Respondent, alternatively Zulu Nyala Game Lodge (Pty) Limited, is directed to reinstate the Applicants on the same terms and conditions as applied to them before their dismissals in November 2001;

22.3. the aforesaid reinstatement order is not fully retrospective. In this regard the Respondent, alternatively Zulu Nyala Game Lodge (Pty) Limited must pay to each of the individual Applicants a sum equivalent to the wages they would have earned prior to their dismissals calculated for a period of three months only;

22.4. the Applicants are not entitled to any other back-pay;

22.5. there was no legal representation and accordingly there is no order as to costs.

DATED at DURBAN this 30th day of APRIL 2003.

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N P WOODROFFE AJ