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REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 143/96

In the matter between:

MEDITERRANEAN WOOLLEN MILLS (PTY) LIMITED Appellant

and

SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS' UNION Respondent

CORAM: **MAHOMED, CJ, EKSTEEN, ZULMAN, STREICHER, JJA et FARLAM, AJA**

HEARD: 26 February 1998

DELIVERED: 17 March 1998

JUDGMENT

EKSTEEN, JA

The appellant has for many years carried on business in the textile industry in Hammersdale, in Kwa-Zulu Natal. During 1991 it employed a total work force of some 442 persons. At the beginning of that year the appellant company started wage negotiations with the respondent union, which apparently represented the majority of the work force. The negotiations, which had commenced early in February, dragged on inconclusively, and so, early in April, appellant declared a dispute. A Conciliation Board was duly established to mediate the dispute, but on 24 July, while the Conciliation Board was still engaged in attempts to resolve the issue, those workers who belonged to respondent embarked on an illegal strike. Some 75 workers, who presumably did not belong to respondent, did not take part in the strike.

The strike seems to have been a most unpleasant incident. According to appellant's resumé of the events, strikers formed up in squadrons chanting anti-management slogans, displayed derogatory placards, and conducted noisy sit-ins on the factory premises. Threats of death were alleged to have been made by the shop stewards against specific members of

the management of the factory, and some R30 000 worth of new equipment was taken out of the factory. When eventually on 2 August the police informed the appellant that the strikers together with outside elements were marching through Hammersdale to the factory premises, "the chairman made his final decision known i.e. the summary dismissal of the striking workers. This done the gates were closed."

This seems to have brought the respondent and its members to their senses, and on 6th August officials of the respondent met with representatives of the appellant and formally apologised for the "mistakes" their members had made. They pleaded with appellant to re-instate their members who now had no money and whose families were suffering. They conceded having learnt their lesson and undertook that it would not happen again. They committed themselves to future co-operation and to repair the damage to their mutual relationship.

Appellant relented, and though it steadfastly refused to withdraw the dismissals, it agreed to re-employ the strikers on a temporary basis for 3 months on its terms. These terms, incorporated in the written agreement each worker seeking re-employment was

required to sign, were strict and uncompromising. They read i.a. as follows:

"TERMINATION.

5.1 This Contract of Employment is subject to 24 hours notice of termination by both parties.

5.2 This Contract terminates on Thursday 12 December 1991, and payment for that week will be effected on Friday 13 December from 11h00.

ACCEPTANCE.

6.1 I do hereby accept that I am accepting a Temporary Contract of Employment and do not expect any greater rights than those granted by law to temporary workers. In addition, I fully understand that I have no expectation of this Contract being renewed."

The terms of the contract were clear and explicit and left no room for misunderstanding or for the entertainment of any false hopes.

But then the appellant, acting presumably in what it considered to be *ex abundante cautela*, called a meeting of all the striking workers prior to their signature of these contracts of temporary employment. The workers were addressed by Mr. Varoli, the appellant's managing director, and a video recording was made of the occasion. In the course of his address Varoli stressed the temporary nature of the contract but then proceeded to say:

"Now the purpose of that contract ... is to see whether we at management and you as workers ... can develop a relationship that we can work together, to see if we can work together and if we can work together we will review this contract with the workers that can work."

Then later on he said:

"What is the purpose of this contract? The purpose of this contract is to see whether we can re-establish a working relationship that we used to have between the workers and management. That means we develop a working relationship that we can work together well. If management for example has difficulty with some workers, if we see there is a group of workers that has a lot of difficulty, management does not have to renew the contract. If however there are workers that management feels happy about, then management will renew the contract. They will come out with a new contract, a permanent contract. Is that understood?"

These assurances by the Managing Director of the appellant clearly conveyed to the workers that, despite the strict wording of the temporary contract to the effect that they were to have no expectation of the contract being renewed, they could in fact entertain such an expectation if they behaved themselves so well during the three month period that management felt happy about them. In fact, not only would their contract be renewed, but appellant would "come out with a new contract" offering them permanent employment.

It would appear that all the striking workers agreed to accept this offer and each of

them signed a separate contract of temporary employment with the terms stated above. Before the three month period had expired appellant began entering into fresh contracts with certain of the workers in terms of which they were permanently employed by appellant as from a specified date in 1992. Eventually all but 40 workers were re-employed. The forty who were not employed are those in respect of whom the respondent has brought the present proceedings. The respondent was unsuccessful before the Industrial Court but succeeded in its appeal to the Labour Appeal Court. The present appeal is against this latter judgment which was one given by the majority of its members.

In the proceedings before the Industrial Court the parties handed in a document recording what was common cause between them. From this document it appears to have been common cause that during the currency of the temporary employment contract the appellant conducted a "selection exercise" in order to determine which of its employees would be offered permanent employment and which not. In making this selection appellant did not consult the respondent or any of the individual workers. In fact it was appellant's case that the fate of those employees who had not been offered permanent employment had

been decided by their managers in consultation with "management". They had subjectively assessed the workers and rejected them on the basis of factors such as absenteeism, poor work performance, poor relationship with the managers and co-workers. It was also common cause that the workers who had been rejected were ignorant of the alleged grounds for their rejection; that they were not informed of the reasons for this rejection; and that they had not been required to attend any of the hearings in respect of such decision.

It was also common cause that nobody was rejected because of operational requirements of the appellant. The evidence led before the Industrial Court did not add materially to these agreed facts and the determination of whether or not this procedure constituted an unfair labour practice may conveniently be decided on such facts.

If, then, one has regard to the salient features of the dispute, one finds that some 370 of the appellant's 442 employees were dismissed for striking illegally. Then, as a result of respondent's intervention, appellant was persuaded to offer a contract of temporary employment to all the striking workers. This contract in its wording was unequivocally one for three months employment and no more. Before the employees were afforded an

opportunity of accepting this contract by signing it, however, appellant's managing director told them explicitly that, should they live up to appellant's expectations during those three months, they would be re-employed. This assurance must undoubtedly have created the impression in the minds of the employees that, despite the provisions of the contract that they were not to entertain any expectation of the contract being renewed or of re-employment, there was in fact a very real prospect of re-employment provided they were not "difficult" and that their behaviour during those three months was such that appellant felt "happy" with them. In assessing the performance of their duties appellant applied certain criteria, such as regular attendance, proper work performance and amicable behaviour towards their managers and their co-workers. At the end of the three months most of them were rewarded with permanent contracts of re-employment while others were rejected and left with no further employment. These workers, moreover, were not told why they had been rejected, nor were they given any opportunity to explain any features which might have given rise to their rejection. They were merely left with the conclusion that they had not been re-employed because their temporary contract had expired, whereas the true

reason for their not being re-employed was something else - a reason which was not conveyed to them. This in itself seems to me to be basically unfair (cf. *Cremark A Division of Triple P-Chemical Ventures (Pty) Ltd v. S.A. Chemical Workers Union and Others* (1994) 15 ILJ 289 (LAC) at 293 D-E). In addition they were not given an opportunity of meeting the objections against them. If, for example, absenteeism had been held against them, they may conceivably have been able to show that the attendance records had been inaccurately kept, or that they had been unavoidably detained in hospital through no fault of their own. Several of the workers who had not been re-employed had been in appellant's employ for ten or more years. Fairness it seems to me would require that such persons should at least have been given an opportunity of being heard. Failure to do so amounts, on the face of it, to an unfair labour practice, which entitles these workers to some relief in terms of the Labour Relations Act (Act 28 of 1956) ("the Act") under which these proceedings were instituted.

Several objections to the granting of such relief, however, have been raised. In the first place it was contended that this had not been the basis of respondent's case before the

Industrial Court and that it should be held to the allegations contained in its Statement of Case before that Court. The relevant paragraphs in that Statement of Case read as follows:

> "4. In late November and in December 1991 the Respondent [i.e. the present appellant] terminated the service of the persons whose names appear in annexure A.
>
> 5. The Respondent purported to use as its basis for the termination of services of the employees the effluxion of a fixed term contract.
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> .....
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> 7. The Respondent retained the services of a large number of other employees who had been re-employed in terms of the said agreement between the Applicant [i.e. the present respondent] and the Respondent. The said termination of services took place without any prior consultation with the Applicant or the persons whose names appear in annexure A.
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> 8. The termination of the services of the dismissed workers was in breach of the agreement between the Applicant and the Respondent, was discriminatory, was not based or any objective selection criteria and was procedurally irregular. In the premises the Applicant and the affected employees are of the view that the termination of the services of the persons whose names appear in annexure A hereto constitutes an unfair labour practice."

It was contended that in its Statement of Case respondent relied on an unfair termination of services, whereas in fact the employees' services had come to an end by the expiry of their temporary contracts. Their true complaint was therefore that appellant had refused to re-employ them rather than that it had terminated their employment.

It has, however, been held that the Act

"had in mind that, once a particular employment relationship is established, the parties to it remain 'employee' and 'employer' as defined beyond the point of time at which the relationship would have terminated under the common law". *(National Automobile and Allied Workers' Union v. Borg-Warner SA (Pty) Ltd 1994(3) SA 15 (A) at 25 I-J)*.

Had the dismissed employees come to the Industrial Court and claimed re-instatement on the ground that their dismissal had constituted an unfair labour practice, it could hardly have been contended that the Industrial Court would not have had jurisdiction to consider the claim on the ground that the dismissed workers could no longer be regarded as employees. Whether such a claim would have succeeded or not is another matter. As long as the parties were involved in negotiations or in dispute on the issue they would, in the eyes of the law, be considered employer and employees. (*Borg-Warner* case, *supra*).

This being so, it follows that those employees selected to be re-employed after the termination of the three month period must be regarded, in the eyes of the law, to have remained employees after their dismissal, during their temporary contract period, and thereafter under their further contract. Those who were not so selected however remained employees after their dismissal and throughout their temporary contract, but appellant

sought to terminate that status by choosing not to offer them further employment together with the rest. In that sense one might well see the appellant's action as an attempt to terminate their employment.

In any event, the gist of respondent's complaint in its Statement of Case seems to have been that the refusal by appellant to re-employ the 40 workers together with the majority of their co-workers was procedurally irregular in that it took place without any prior consultation with the respondent or with the persons concerned, and that it therefore constituted an unfair labour practice.

The allegation is pertinently made in para 5 of the Statement of Case that appellant "purported" to use the "effluxion of a fixed term contract" as the basis for the termination of the employees' services. The implication is clear that they are alleging that appellant used the expiration of the temporary contract as a device, as in *Cremark's* case (*supra*), to terminate their relationship as employer and employee. The written contract, after all, cannot be read in isolation and must be seen in conjunction with the explicit verbal assurances given to the workers by appellant's managing director immediately prior to his

invitation to them to sign the written contract.

Then it was also submitted that respondent's case had always been one of unfair dismissal and not one of unfair failure to re-employ. Nowhere in the Statement of Case is the expression "dismissal" or "unfair dismissal" used. Instead respondent used the expression "termination of services", and, as I have indicated above, this may well not be inconsistent in the circumstances with the appellant's refusal to offer these particular workers a fresh contract of employment while doing so in respect of all the other workers. The appellant seems also to have understood the gist of respondent's complaint in this light. In its opposing representations in terms of section 46(9) of the Act appellant does not refer to a dismissal, and para. 10 thereof reads as follows:

> "10. The Respondent denies that its failure to offer further employment to the former employees constitutes an unfair labour practice."

This indeed was the real dispute between the parties before the Industrial Court and before the Labour Appeal Court and is still the real dispute before us. If there is any ambiguity in the wording of the Statement of Case, "it ought, in my view, to be resolved

in accord with the true or real dispute between the parties as disclosed by the history of the matter" - Per Ackermann J. in *Mine Surface Officials Association of SA v. President of the Industrial Court and Others* (1987) 8 ILJ 51 at 60 D-E. The true and real dispute between the parties in the present matter is whether, in the circumstances the appellant's failure to offer further employment to those workers represented before us by the respondent constitutes an unfair labour practice or not, and that is the dispute the Courts have been called upon to resolve. For the reasons given in this judgment I am of the view that it did. It follows therefore that the appeal cannot succeed.

The appeal is dismissed with costs.

EKSTEEN , JA

MAHOMED, CJ)
ZULMAN, JA)
STREICHER, JA)
FARLAM, AJA) Concur