IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO D211/97
In the matter between:

SACCAWU First Applicant
G. NDINGI & 5 OTHERS Second to further Applicants

and
WIMPY AQUARIUM Respondent

JUDGEMENT

REVELAS J:

[1] There are six applicants in this matter. They were employed as waiters, soft servers (persons who prepare desserts) and chefs by the respondent, a well-known franchise restaurant, who has its particular restaurant on the beachfront in Durban.

The six applicants were dismissed by the respondent on 31 July 1997, for alleged operational requirements. Their notice period was extended to 30 August 1997.

[2] The applicants attack their dismissal on both procedural and substantive grounds. It was felt by the applicants, particularly the first applicant, who negotiated on their behalf and represented them in this matter, that the real reason behind the retrenchment was because the first applicant had demanded increases from the respondent during wage negotiations. The applicants contended that the respondent's financial difficulties were raised for the first time during these wage negotiations, which commenced in March 1997 the inference being that these difficulties weren't genuine.

[3] Mr Dirk Benade, the owner of the respondent, told the Court that he bought the franchise as a flagship business from a concern called Pleasure Foods. He stated that he subsequently found out that the actual figures of the profits to be made by the restaurant, as furnished to him at the time of the sale thereof, did not coincide with the harsh reality that the respondent was actually starting t run at a loss. The location of the restaurant suggests that it should be packed with patrons during the holiday season, but that it would be quiet during other times. In other words, the restaurant was seasonal business. This was also conceded by Mr Colin Naidoo, a union official who gave evidence on behalf of the applicants and who was part of the wage and

retrenchment negotiations.

[4] Mr Benade, the owner of the respondent, testified that Pleasure Foods advised him, when he complained about his financial position to them, that his wage expenditure was far too high. The respondent had to cut down on the number of its permanent employees as a consequence.

[5] Whereas Mr Naidoo and Mr Ngubane, another union official who testified on the applicant's behalf, did not deny that the respondent was in a precarious financial position, their complaint was that the respondent's financial situation could be salvaged if it had sat down with the first applicant in good faith. Then only, could they have jointly come to a decision to solve the respondent's financial problems. The first applicant contended that it only stands to reason, that in a situation such as the respondent found itself, the employer should simply terminate the services of casual employees and thus avoid retrenching permanent employees.

[6] It is common cause that the respondent's financial difficulties were raised during wage negotiations. This does not mean the respondent was *mala fide*. The wage negotiations began shortly after Messrs Coopers and Lybrand, accountants employed by the respondent, produced their audit results. I am unable to draw any negative inference from the fact that

the situation regarding the respondent's financial difficulties was discussed during wage negotiations.

[7] The reality of the situation is that the respondent had begun to discuss the possibility of retrenchments in March 1997 and had only come to a final decision on the 31st July 1997.

[8] The applicants further contended that the respondent's financial difficulties could be overcome by implementing some of their other proposals which were suggested during the discussions held between the parties around the issue of retrenchment. The first applicant argued that these proposals were not properly considered by the respondent and it was alleged that the respondent did not conduct the consultations between itself and the first applicant in good faith. The proposals put forward for discussion and consideration by the first applicant were the following:

(1) The introduction of short time, for a period of two months;

(2) The application of LIFO across-the-board in every department of the restaurant. (This proposal was contained in a letter by the first applicant written on the 30th June 1997 and it stated that this proposal was made under protest, meaning that it did not really go along with this proposal).

(3) A suspension of the wage demands: (obviously pending or on condition that the proposed retrenchments be withdrawn).

(4) The respondent should seek volunteers, such as people who are not fit for work.

(5) That a moratorium be imposed on the employment of casual workers.

[9] Mr Naidoo and Mr Ngubane both testified that they respectively proposed “LIFO by skills” and “bumping”, which, according to their explanations amounted to the opposite of LIFO across-the-board, in that the “bumping” and “LIFO by skills” allows for exception to the across the board situation. The minutes of a discussion held between the respondent and the first applicant, on 30 July 1997, reflects that the parties agreed to "LIFO by department". It is common cause that cashiers were not retrenched by the respondent.

[10] The respondent argued that it identified the six applicants in question as retrenchees in terms of LIFO. However, an exception was made in so far as cashiers were concerned, because in that department, it would have had the result that there would be no cashiers left. Cashiers are difficult to train and should be literate. It was pointed out that grillers and/or chefs and cleaners need not be literate.

[11] The first applicant levelled the complaint against the respondent that the respondent made no attempt to assist the applicant in finding alternative employment in or outside its operations. Mr Benade gave evidence that he approached Pleasure Foods to obtain alternative employment for the six retrenchees in the Wimpy franchise, but had, to that date, not been successful. He was prepared to give the retrenchees each references, which could assist them in finding alternative employment within the franchise. This was not mentioned during the consultations. However, I have no reason to believe that Mr Benade was lying when he said he had approached Pleasure Foods, particularly as he subsequently was prepared to employ the applicants as casuals which shows that he was not indifferent to what happened to the retrenchees after their retrenchment.

[12] There was a further complaint that two of the six applicants were not called upon to work as casuals subsequent to their retrenchment. This argument relates to events which occurred subsequent to the retrenchment. The respondent's case is that the second applicant undermined the respondent and behaved aggressively on the occasions that he was on the premises. The fifth applicant did not make any endeavour to obtain casual employment subsequent to his retrenchment. The second applicant only worked on two week-ends.

[13] The second and fifth applicant denied that they were guilty of any of the aforesaid, when they gave evidence. However, these two applicants both testified as to excellent relationships with the respondent and did not advance any other reason as to why they were not called upon to work as casuals.

Mr Benade also gave evidence as to the difficulties he experienced with contacting the retrenchees because of the location of certain employees and telephonic accessibility. I do not believe that it is necessary for the Court in this instance to penalise the respondent or to interfere in the respondent's business operations in so far as its method of selecting casuals is concerned. It would naturally happen that on some occasions some people would be found to work as casuals in more instances than others. This cannot be monitored by this Court subsequent to the retrenchment.

[14] As to the question of short time which was proposed by the first applicant, Mr Benade said that he furnished the first applicant with a roster, to return with proposals, which the first applicant never returned, and made no proposals in respect of short time. The first applicant stated that only one roster was given to it five days before the retrenchment

was announced, and that the second roster was not forthcoming. In this regard a dispute of fact exists.

[15] In my view, it is very significant that the proposal to introduce short time was coupled with the qualification that it should only be introduced for a period of two months. It can hardly be argued that the precarious financial situation which the respondent found it in at the time, could be salvaged by introducing short time for a period of only two months.

[16] The respondent, began consulting with the first applicant in March 1997. This is confirmed by Mr Ngubane, the official of the first applicant. During the period leading up to the eventual retrenchment, discussions were held with the officials of the first applicant. There was uncontested evidence that Mr Benade arranged meetings with the first applicant at its offices on two occasions, which could not take place due to the tardiness on the part of the first applicant.

The union officials who testified in this regard could not provide a satisfactory answer as to why these meetings could not be attended. Meetings were indeed held on 13 June, 26 June and 30 July 1997, all pertaining to the question of the possible termination of employment of the six applicants.

Only on 13 June were six retrenchees identified, only as to the selection criteria to be implemented and not by their names at that stage. None of the applicants' witnesses could deny that the respondent was running at a loss due to its high wage expenditure and that Mr Benade had to obtain a loan to subsidise the respondent's business. The loan did not obviate the financial difficulties.

[17] In the above circumstances, I am unable to find that the decision to retrench these particular six employees, or individual applicants, was taken at some time prior to discussion with the first applicant or that the respondent wanted to get rid of these particular six applicants. This is mentioned since the minutes of a meeting reflect that Mr Benade was accused of wanting to get rid of certain employees. The evidence simply does not bear out this contention.

[18] The respondent, in my view, advanced goods reasons why it could not adhere to the applicants' proposals. This does not mean that it did not consider those proposals. There was no evidence before me to suggest that the consultations were held in bad faith.

[19] The thrust of the first applicant’s attack of the

dismissals was the "casualisation", as it was termed, of the business. Mr Benade illustrated that it was the only way to deal with a business which is seasonal in nature.

[20] To argue that the mere removal of casual employment as a whole from a business such as the respondent would solve its financial problems, loses sight of the reality of a seasonal business. In such a situation, the employer should be able to exercise his or her managerial prerogative, in introducing casual staff into the business operations as a means to lower an excessive wage bill which keeps the business in debt. This was the case in this particular matter before me.

[21] Mr Naidoo had difficulty in understanding why the respondent appointed a new supervisor two months before announcing the retrenchment. In this regard, a supervisor needs a particular knowledge of the business and should be a permanent employee.

[22] It was argued that the second applicant, who had previously been an assistant manager at Durban North Beach should have been appointed as supervisor. In this regard the managerial prerogative to choose a supervisor of the employer's choice must also be taken into account. An employer, when it selects a person to fulfil the position of a

supervisor, may decide on a specific personality and should not be forced to appoint a supervisor of someone else's choice.

[23] It was also argued that some of the applicants should rather have been demoted to fulfil positions of general cleaners within the respondent's business. Mr Benade explained why positions could not merely be shuffled interdepartmentally within the business. Demotion is not always an answer or an alternative to retrenchment in all cases. The argument in favour of employing casual labour due to the seasonal nature of the business is also applicable here.

[24] The termination of employment for operational requirements is due to no fault of employees. For this reason the employer bears the onus to show that the termination was for a fair reason and that the employer followed a fair procedure, as required by section 189 of the Labour Relations Act, No 66 of 1995, ("the Act") in terminating such employment. In accordance with the findings set out hereinbefore in this judgment, I do not find that there was no fair reason for the retrenchment. I also find that the respondent complied with section 189 of the Act.

[25] In so far as costs are concerned, in the normal course, costs should follow the result, in which case I should make an order that the applicants pay the costs of the respondent in this matter. However, I have considered the fact that the applicants' services were terminated due to no fault of their own, as it occurred during a retrenchment exercise. Costs were incurred by the applicants to obtain witnesses, because certain admissions were not made earlier by the respondent when requested. I am however not prepared to penalise the respondent for the applicants' costs to obtain the presence of five witnesses at court, who did not testify but sat in court for two days.

[26] I am of the view that each party should pay their own costs in this matter.

[27] It is also common cause that the applicants, have not yet received their severance pay and this needs to be addressed.

[28] In the circumstances, I make the following order.

(1) The application is dismissed.

(2) The respondent is to pay each one of the applicants their severance pay in the amount of one week's wages per year of

service worked for the respondent in this matter, which amounts are to be the same as the amounts offered by the respondent to them on 31 July 1997.

E REVELAS

ON BEHALF OF APPLICANT :

MR V MACWI

Legal Officer SACCAWU.

ON BEHALF OF RESPONDENT :

MR N MATHE

instructed by

Official Employers

Organisation.

Date of Hearing :17 June 1998

Date of Judgement : 18 June 1998.