IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no. J 124/98

In the matter between:

Security Retail, Transport and Allied Workers

Union of South Africa and others **Applicants**

and

Wingprop C.C **Respondent**

JUDGMENT

MLAMBO J.

1. The individual applicants were dismissed on 15 October 1998 for alleged operational reasons. They dispute the fairness of their dismissal on procedural and substantive grounds. The Respondent however, alleges that the dispute was settled between the parties on 7 October 1998. The issues to be decided by the court , as minuted in the pre-trial minute are:
2. Whether or not the dispute that arose from the dismissal of the individual applicants was settled on or about 7 October 1998.

3. Only if it is found that the dispute referred to at the previous paragraph was not settled, then the court must determine whether the dismissal was procedurally and substantively fair as envisaged by section 189 of the Labour Relations Act 66 of 1995.

4. If it is found that the dismissal was settled and that the dismissal was unfair for any reason, then the court must determine appropriate relief if any, for the applicants.

5. Whether costs must be awarded to any party.

Background

6. The Respondent, a property management company had for sometime been experiencing break-ins and thefts at the property situated at Highpoint, Hillbrow Johannesburg. This led the Respondent to mention in a number of meetings with the individual applicants that if the situation did not improve the Respondent would seriously consider subcontracting its security functions.

7. On 30 September 1998 the Respondent issued the individual applicants with a letter giving them notice that their employment would be terminated on 15 October 1998.

It is proper to cite the letter in full:

"As you are probably aware Wingprop C.C is a property company that owns and manages commercial properties. We are not a security company, therefore, have no expertise in handling or managing a security company.

After long consideration, we have decided to employ a professional security company to look after the security needs at Highpoint. The fact of the matter is, it has become impossible for us to continue to manage a security department, within our property portfolio, without the necessary experience of the highly complex functions of training, grading and operations of a security company.

We, therefore, have no alternative but to retrench our whole security department and sub contract out our security needs to a professional security company. You are therefore, given two weeks notice, as required by law, notice of your retrenchment and will be required to vacate our post by Wednesday 15 October 1998. You are entitled to certain benefits regarding your retrenchment such as leave pay and severance pay, all of which will be honoured by Wingprop C.C.

I would like to take this opportunity to thank you for your past services to Wingprop C.C and trust you understand our position. I wish you all the best of luck in the future."

7. The union which represented the individual applicants at the time, the Professional Transport Workers Union, on hearing of the dismissal letters, challenged the fairness of the decision on procedural and substantive grounds. It was then agreed to have a meeting on 7 October 1998.

8. On 7 October 1998 a meeting took place between the Respondent represented by Mr Rossiter, Ms O' Callaghan and Mr Craxton. The individual applicants were represented by Mr Jackson Maluleka (Maluleka) from Professional Transport Workers Union. According to the Respondent the following individual applicants also attended the meeting: S. Tsotetsi, L.Chaane; P Mahlangu; I Ncaphai and M Kheswa. The Respondent's case is that the dispute

regarding the termination of the employment of the individual applicants was settled at this meeting.

9. According to the Respondent the terms of the settlement agreement were the following:

"5.1 Respondent's management was not possessed of the necessary skill and ability to manage an effective in-house security department.
5.2 Respondent would close its in-house security department on 15 October 1998.

5.3 All the positions in Respondent's security department would become redundant on 15 October 1998.

5.4 There were no other positions within Respondent's organisation to which security employees could be transferred, as they were not possessed of the necessary skills to perform Respondent's maintenance and administrative functions.

5.5 All employees employed in Respondent's security department would be retrenched on 15 October 1998.

5.6 Respondent would insist that "A Team Security' recruit the employees retrenched from respondent's security department during the course of the following week and to facilitate this process a meeting was arranged for 13 October 1998.

5.7 Respondent would insist that "A Team Security" recruit the employees retrenched from Respondent's security department during the course of the following week and to facilitate this process a meeting was arranged for 13 October 1998.
5.8 Every retrenchee would receive normal remuneration for the period 1 October 1998 to 15 October 1998.

5.9 Every retrenchee would receive all accrued leave pay.

5.10 Every retrenchee who had completed one year of service in Respondent's employ would receive payment in respect of two weeks as severance pay and every retrenchee who had completed less than one year of service in Respondent's employ would receive payment in respect of one week as severance pay."

10. The applicants deny that the dispute was settled at the meeting of 7 October 1998. Their

version is that Maluleka misrepresented them at the meeting and did not put forward their case properly and according to their wishes. They state that as a result of Maluleka's conduct they resigned from the Professional Transport Workers Union and joined the First Applicant.

11. On 7 October 1998 First Applicant sent a letter to the Respondent and stated the following, inter alia:

"The abovementioned trade union has been given a mandate to represent a majority number of your employees, who after serious considerations (sic) of your meeting with their union felt that they are not being properly represented, given the merits of the case, and agreed to take their matters further with us. Your letter written to individual employees dated 30 September 1998 and a letter from the union "Professional Transport Workers Union of South Africa" has reference in this regard."

The letter went on to challenge the fairness of the decision to dismiss the individual applicants inter alia for lack of compliance with section 189 of the Labour Relations Act no. 66 of 1995 ("the Act").

12. The Respondent responded to this letter on 8 October 1998. The Respondent's submission is that when it responded on 8 October 1998 it was under the mistaken impression that it was dealing with Maluleka's union i.e the union they met with and settled the dispute on 7 October 1998. Paragraph 2 of the response is to the following effect:

1. **"The way we understand this situation is of procedure and that we did not consult with you prior to taking our decision. As the decision was taken a long time prior to our security workers joining the Union, we were unaware that we had to notify the union prior to giving notice to our security workers, thus the procedure was incorrect. In order to rectify the procedural matters we therefore, officially retract the letters of notice to all our security workers who are paid up members of the abovementioned trade union (SERTAWU): Namely: Sebata Tsotetsi, Lucky Chaane,**

Palot Mahlangu, Sydney Duma, Rodger Redebe, Samson Malungana, Alson Chauke, Aaron Nkadimeng, Isaac Ntsie, Margret Radebe, Patience Mbanjwa, Jackson Ngcobo, Isaac Ncaphai, Solomon Nembula, Archie Mthunjwa, Lefios Seoke, Ruben Machate, Boy Mthombeni and Masse Keswa within the prescribed 48 hours in terms of section 64(4) and (5) of the Labour Relations Act 66 of 1995. Please inform and officially advice your members accordingly of our official retraction of their retrenchment notice. (as listed above)"

13. The Respondent apparently realised their alleged error on 12 October 1998 and sent a letter to the First Applicant saying inter alia:

"**In the light of the above, we retract all undertakings, expressed by us in our fax to you on the 9th October 1998 of our action, as expressed in our letters to our employees regarding retrenchment still holds. We are presently negotiating with the legal union representatives of our workers regarding our action, and are sorry for the mix up. In view of the error on our part please cancel the meeting scheduled for Wednesday 14th October 1998 with yourselves."**

Thereafter the applicants then referred the dispute for conciliation in terms of section 191 and when conciliation failed to resolve the dispute it was referred to this court for adjudication.

Was the dispute settled on 7 October 1998

14. The individual applicants deny that the dispute was settled on 7 October 1998. Maluleka who could have shed light on this issue did not testify. His failure to testify is shrouded in controversy in that the Respondent alleged that Maluleka was intimidated and actually assaulted by the applicants, a fact denied by them. I have decided that for purposes of the issue I have to decide it is not of any assistance to make any finding regarding Maluleka's failure to testify. The Respondent though, for its part issued a subpoena attempting to secure

Maluleka's attendance. He did not come apparently because he received the subpoena very late and for the reason that his union was engaged in a nationwide strike and he was apparently heavily involved in the strike.

15. The minute of the meeting on 7 October 1998 is crucial. It reflects the following:

"NEGOTIATIONS/ CONSULTATIONS

Retrenchment packages were discussed and Mr Rossiter offered two weeks pay for employees who had worked for a whole year instead of only one week as required by law. For employees who had not worked a full year one week's pay was offered. All leave pay that is due will be paid out. Discussion between Wingprop C.C and the new sub-contracting security company had already taken place and it was arranged that all retrenched employees would be offered a job with them. They are, therefore, required to make an appointment and fill out an application for a position with the new security company, if they wish to join them.

<u>ACCEPTANCE</u>

Mr Jackson Maluleka accepted the reasons Wingprop C.C gave for the retrenchments decision and asked for a caucus meeting with himself and the Executive Members of his union. Mr Rossiter, Mrs O'Callaghan and Mr Craxton left the Office for them to have their meeting in private.

The meeting resumed half and later where Mr Jackson Maluleka informed Wingprop CC management representatives that the union the Executive Members had accepted the offer made by Wingprop CC, and a meeting between Wingprop CC, the union and all retrenched employees of Wingprop CC, the new security company who will be recruiting security guards, should take place the following week. This was agreed and a meeting was scheduled for Tuesday 13th October 1998.
The meeting closed and Mr. Jackson Maluleka thanked Mr Rossiter for his co-operation and expressed the appreciation for the friendly and amicable manner in which the meeting was held."

16. These minutes were disclosed and discovered for the first time at the commencement of

this trial. They were also not disclosed during the conciliation of this dispute at the Commission for Conciliation Mediation and Arbitration ("the Commission"). The Respondent's version is that a copy of the minutes was to be given to Maluleka on 13 October 1998 as the parties had agreed to meet again on that date. That meeting did not materialise as the individual applicants had joined another union.

17. The applicants' case is that there was no agreement to settle the dispute on 7 October 1998 and that I Ncaphai and S Tsotetsi who are alleged to have been present at this meeting were not present. It is common cause that Ncaphai was on leave and that his leave was approved by Ms Callaghan. According to him he was away from 5 October 1998 until 14 October 1998. Tsotetsi was not on leave nor was he on duty on 7 October 1998 but he also denied that he attended the meeting.

18. The Respondent could not provide independent confirmation that indeed Tsotetsi and Ncaphai were at the meeting of 7 October 1998, such as an attendance register with their signatures. There is no evidence to negate the evidence of Ncaphai that he was on leave and that he was not present. The Respondent's version that some of the individual applicants attended a meeting with A Team Security, on 13 October 1998 is also suspect. For instance Machate, one of the individual applicants was on leave from 29 September 1998 to 24 October 1998 but is alleged to have attended the meeting. His testimony is that he went home to Bushbuckridge and no one on Respondent's side could contradict this. The Respondent's allegation of the A Team meeting become more doubtful when one considers

that at that stage the individual applicants had joined another union which was challenging the fairness of their dismissal and more importantly, was disputing that the dispute was settled on 7 October 1998..

19. Another aspect which is crucial is the Respondent's letter of 8 October 1998 i.e the letter the Respondent thought was going to Maluleka's union. If indeed it is correct that the dispute was settled on 7 October 1998 the Respondent would not have taken the matter lightly. The Respondent would have insisted, as it did in these proceedings, that as far as it was concerned the matter was settled on 7 October 1998. Though the letter alludes to Maluleka and the individual applicants accepting the reasons necessitating the retrenchment, no case is made out in that letter that the dispute itself was settled. If the Respondent believed then as it does in these proceedings that the dispute was resolved it would never have retracted the retrenchment letters. In my view the retraction of the retrenchment letters contradicts the Respondent's stance in these proceedings that the dispute was settled.

20. A further aspect linked to the supposedly agreed meeting of 13 October 1998 is that it makes no logical sense for the Respondent if it retracted the dismissal letters to continue insisting on this meeting. Having retracted the letters must have meant that there was no agreement anymore and therefore there could be no meeting on 13 October 1998 which was part of an agreement that is no more. In any way there is no mention of this supposed agreed

meeting of 13 October 1998 in the letter of 8 October 1998. This ties in with the thinking that had respondent strongly believed that the dispute was settled it would mentioned this meeting and insisted that it takes place.

21. The evidence of the individual applicants is basically that Maluleka went against their wishes and instructions when he informed the Respondent's management that the matter was settled. Lucky Chaane, one of the individual applicants who testified, stated that Maluleka wanted to push them to accept the retrenchment package. He testified that after the meeting he telephoned Maluleka to advise him that they no longer wished to be represented by him. His evidence further suggests that during the meeting on 7 October 1998, they informed the Respondent's representatives that there was no agreement hence the decision to hold another meeting on 13 October 1998.

22. Ncaphai also testified. He denied that he was present at the meeting on 7 October 1998 and that the dispute was resolved. He testified that he left on 5 October 1998 as he was on leave until 15 October 1998. Tsotesi also denied being present at the meeting of 7 October 1998 and agreeing to settle the dispute. He says he could not attend as he was not a shop steward. He conceded that he was not on duty on 7 October 1998 and was present in the building where the meeting of 7 October took place.

23. Probabilities militate against an agreement having been concluded on 7 October 1998. The securing of alternative positions with a new security company was part of the

negotiations. In the court's view an agreement on the employment of the individual applicants by the new security company was also necessary. The meeting did not materialise where this agreement would have been secured. The fact that this meeting did not materialise and when Maluleka advised the Respondent that he was no longer representing the individual applicants must have confirmed to the Respondent that there was no agreement. It was therefore nonsensical for the Respondent to issue a letter to Maluleka on 13 October 1998 accusing him of not attending the meeting.

24. The fact that some of the individual applicants who are alleged to have been present on 7 October 1998 were actually on leave creates difficulties for the Respondent. Ncaphai was on official leave approved by the Respondent. It is inconceivable that he would sacrifice his leave and not visit his family. It is also common cause that Tsotetsi was not a shop steward and for that reason alone he could not have attended that meeting. However the single most telling factor against the Respondent is its retraction of the dismissal letters on 8 October 1998. Probabilities suggest that the Respondent would not have retracted the dismissal letters if indeed the matter had been settled. One would have expected the Respondent to insist as it has done in these proceedings that the matter was settled.

25. As far as the decision to dismiss for operational requirements is concerned, it is undisputed that section 189 of the Act was not complied with. The Respondent's version of the reasons which motivated it to restructure and retrench were also not challenged. It appears justified therefore to make a finding that the dismissal was procedurally unfair only.

26. It remains for the court to decide whether compensation should be paid to the individual applicants, and if so, how much. It is correct that the Respondent did not comply with the provisions of section 189 of the Act before taking the decision to dismiss. This much is apparent from the Respondent's own letter i.e the retraction letter of 8 October 1998. The principle in **Johnson & Johnson v CWIU & Others [1998] 12 BLLR 1209 (LAC)** which negates payment of compensation is not applicable in this case.

27. In this case the Respondent attempted to remedy the failure by holding a meeting with the applicants after it had already taken the decision. If one understands the Respondent's thinking especially emanating from the retraction letter of 8 October 1998 adherence to a fair procedure would not have changed the situation. Furthermore it cannot come to the Respondent's assistance that perhaps it thought that the matter had been settled because it is clear that it did not have this state of mind. Under the circumstances it seems fair that the Respondent pay the individual applicants compensation for the period provided in section 194(1).

28. The order of the court is therefore:

8. The dispute was not settled on 7 October 1998.
9. The dismissal of the individual applicants was procedurally unfair.
10. The Respondent is ordered to pay the individual applicants compensation amounting to six months each.

11. There is no order as to costs.

MLAMBO J

Date of judgment: 21 June 1998.

For the applicants: Mr Sebola of Security, Retail, Transport and allied workers Union of South Africa.

For the Respondent: Mr Wilke instructed by Marston & Taljaard Attorneys.