IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

D260/05

In the matter between:

MANICKUM GOVENDER **APPLICANT**

And

INDEPENDENT NEWSPAPERS KWAZULU-NATAL **RESPONDENT**

JUDGMENT

Cele J

Introduction:

1. This is a claim of unfair dismissal of the applicant based on the operational requirements of the respondent. The respondent in its capacity as the erstwhile employer of the applicant opposed the claim.

Background Facts

2. The applicant commenced employment with the respondent in 1980 as a casual employee. On 1 July 1985 he was permanently employed as a General Assistant in the Publishing Department. He joined the South African Typographical Union (SATU), a union which operated within the respondent's business together with two other unions being MWASA and CEPPWAWU. He worked in various positions within the respondent but in 2003-2004 he was working in the machine room, making posters for advertisements.

3. In November 2003 the respondent represented by its Human Resources Manager, Ms Rogany, held an informal meeting with the regional shop stewards of the unions operating in business. Ms Rogany informed the shop stewards that there was a possibility of a restructure to take place in the Production Department of the respondent. A second meeting was held on 16 January 2004, attended also by the shop stewards' regional co-ordinators. It still pertained to the possible restructuring at the respondent. In that meeting the respondent issued notices in terms of section 189 of the Labour Relations Act 66 of 1995 ("the Act") and served them on all the unions. The first consultation meeting was held on 6 February 2004. On 28 January 2004 the respondent sent out a letter to the unions setting out the proposals that had been made at the meeting of 21 January 2004. A further consultative meeting was held on 6 February 2004. An agreement was then reached on 26 February 2004 between the respondent and all union representatives, including applicant's union, in relation to the retrenchment of some of the employees by the respondent. The settlement agreement reached was however reduced to writing and signed by all parties thereto on 11 March 2004. The relevant part of the agreement reads:

> "The conditions contained in this agreement apply only to full-time, permanent members of staff (both union and non-union) who are affected by this restructure process in terms of section 189 (A) of the LRA. It is agreed that the following categories and number of staff were affected by the restructure which subsequently led to their retrenchment.
>
> Production: 110
>
> - Factory Aids, Platemakers, General Assistants, Inserters
>
> Circulation: 80
>
> - Van Assistants
> - Publishing

- Workshop
- Subscriptions
- Drivers

Advertising: 2

- DTP/Ad Production

….

….

….

- The company agrees that the union representatives will be introduced to the outsourcing company.
- The company confirms that the six drivers being retrenched on a voluntary basis will not be replaced as their positions are entirely redundant and the company will provide the union concerned with the names of the affected drivers.
- The company agrees to provide the relevant union with the names of the staff whose positions are declared entirely redundant

….

….

….

….

- It is recorded that the union representatives were mandated by their members to accept this agreement.

…."

4. The issues which the court is required to decide pertain to the substantive fairness of the dismissal. At the commencement of the trial, issues around procedural fairness were abandoned by the applicant. In respect of substantive fairness the issues are whether:

- The applicant was at all material times employed as a Printer's Assistant as opposed to a General Assistant in the works room.

- The functions that were performed by the applicant were:-
  - (a) retained as part of the business of the respondent thereby rendering the retrenchment of the applicant as part of restructuring in which the respondent was engaged, unnecessary, or
  - (b) outsourced as a contract function in terms of the restructure exercise, in accordance with the agreement concluded with the applicant's union.
- The respondent:-
  - (a) failed to properly consider alternatives to the dismissal of the applicant for operational reasons, which dismissal was not reasonably necessarily required as part of the respondent's restructuring, or
  - (b) addressed all issues contemplated in terms of the Labour Relations act and raised by the SATU in its capacity as the applicant's representative.
- The court can order re-instatement in circumstances where the respondent contends that the applicant has accepted that his functions were outsourced.

5. There are preliminary points which were raised by the respondent in the form of special pleas. Their resolution was made dependent on the evidence which was to be led by the parties. Such points are that:-

   1.(a) any dispute between the parties in relation to the retrenchment of the applicant was settled by means of an agreement concluded, *inter alia*, between the respondent and SATU on or about 11 March 2004;

   (b) the applicant was employed as a General Assistant Publishing in the works room and formed part of the employment categories to which the agreement applies;

(c) the applicant was a member of SATU and this retrenchment was pursuant to the terms of the afore mentioned agreement;

(d) the applicant is bound by the agreement concluded with his union and is not entitled to pursue any claim pertaining to his retrenchment.

2. SATU should have been joined in these proceedings. As a consequence of non-joinder the claim falls to be dismissed.

The Trial

6. The Production Director of the respondent, Mr Niles Reinertsen and the Press Captain and Trade Training instructor, Mr David Crawford were called as witnesses for the respondent while the applicant was the only witness for his case. The respondent had to prove the fairness of the reason underlying the dismissal of the applicant due to its operational requirements.

The respondent's version

7. The core business of the respondent was the production, printing and distribution of newspapers. According to international standards most companies outsourced the workroom as it was not the core business of newspaper companies. The inserting process could be done mechanically or it could be outsourced. In 2004 the respondent found it necessary to have to reduce the cost base of its business. It decided against the retention of its unqualified staff employed as General Assistants so as to focus on its core business. Various meetings were then held with all the unions operating in its business. The unions were initially opposed to the outsourcing of the non core business of the respondent. Mr Reinersten attended one of the meetings with union representatives to give an explanation on some of the issues that had been raised. In that meeting, held on 6 February 2004, he explained that the staff deployed in the work

room otherwise known as publishing were all classified as general workers and all were affected by the restructuring. They were graded B1 as opposed to the supervisor and charge hand who were graded B5 and B3 respectively. He explained that out of 11 supervisors and charge hands 8 would be retrenched. 192 general assistants were to be retrenched consisting of 110 from the Production, 80 from the Circulation and 2 from Advertising sections.

8. Various addressed were made on behalf of the respondent by its Press Room Managers and joint communiqués were issued to explain to the staff the nature of the retrenchment. Various notices were also placed on the notice boards by the Unions for the information of their members pertaining to the retrenchment.

9. The respondent had initially been against the idea of seeking services of an external facilitator from the Commission for Conciliation, Mediation and Arbitration (CCMA). Upon the insistence of the unions, a Ms Patel was appointed to facilitate the process.

10. In 2004 the applicant worked at the machine room specifically making posters for advertisements. Every shift in the respondent's business was controlled by a supervisor or a Press Captain or leading hands who were all called Machine Minders. As the applicant was unqualified he was not a journeyman or Machine Minder. To qualify as a journeyman, he had to go through an apprenticeship, be tested and to pass the set requirements. Mr Reinertsen did have a discussion with a Press Room Manager to have the applicant undergoing apprenticeship. The applicant had to agree to take a salary cut for that training. The training was often taken by the staff who came young into the work and would then go through it. The applicant did not undergo that training and was therefore unqualified. He had not even lodged any dispute about his grading with the CCMA. His job title was that

of a Printer's Assistant who made posters but did not produce newspapers. The process for the production of newspapers was different from that used in the production of the posters. A high speed printing process was used for producing newspapers but not for posters.

11. Mr Crawford attended all meetings which the unions had with the respondent. He was one of the representatives for SATU. He even signed the agreement dated 11 March 2004 and did so on behalf of SATU and as its witness, assisting Mr Myburgh, also of SATU. According to him all staff that were to be affected by the retrenchment were described in a meeting of 6 February 2004. Mr Reinersten described affected employees as those who were unqualified. He would not understand why that description was not used in the minutes of that day. After every meeting the unions had with the respondent, SATU would convene a meeting and representatives would report back to the members. Mr Crawford was not able to tell if the applicant attended all such meetings.

12. Mr Crawford remembered being approached by the applicant sometime before the agreement of 11 March 2004 was signed. The applicant told him that he was concerned that he was a Machine Minder but was going to be outsourced. He asked the applicant to produce papers for his qualification but he failed as he was not qualified. When asked what qualifications the applicant had, he said to him that he had no papers. He was then told that there was nothing which the union could help him with. Nor could he prefer him over all the other unqualified members. He then told the applicant to follow whatever agreement would be reached with the respondent. There was no lack of clarity that he was going to be affected as one of the 110 employees in the Production Section to be retrenched.

13. As a Trade Training instructor, Mr Crawford looked after all the training within KwaZulu-Natal in his field and he looked after all apprentices. As a

Press Captain, he was also a Machine Minder. To qualify as a machine minder, a candidate had to undergo a four year apprenticeship which involved a study of all modules and the passing of a practical test called a Trade Test. The apprenticeship was referred to as an N course or a T/1/2/3. According to him the applicant had never attempted the apprenticeship under him and was therefore not an apprentice.

14. During the consultation process the employees were offered to stay in the company if they wanted to but that they would have to under contract. All unions preferred outsourcing because they were told it was lawful and could not be stopped. Union members voted in favour of outsourcing and representatives were authorised to sign the settlement agreement.

15. The respondent used what was known as the Peterson Grading to categorise different levels of its employees. According to Mr Crawford that grading was used more for salary ratings as Grade 1 and Grade 2 were also used. The staff under Grade 1 were the qualified and those in Grade 2 were unqualified. The applicant fell under Grade 2 as he was not possessed of any scarce skills. Even if the applicant may have passed some modules, he would not be qualified until he passed the Trade Test. The fact that he may have had some staff working under him at the time of retrenchment did not mean that he was a supervisor or that he was qualified.

16. The work which had been done by the applicant was then done by a person known as Derick, through an outsourced company. Derick was a Machine Minder who, in addition, was doing commercial printing which had not been done by the applicant.

17. The employment termination letter of the applicant was dated 12 March 2004. Thereafter he never approached any of the union representatives.

The severance pay was therefore given to him in cash as he had requested. On 18 March 2004 the applicant issued a written request, advising the respondent, that his pension fund benefits were to be paid to him in cash. On 7 May 2004 an amount of R 97 573,13 was paid out to the applicant as a retrenchment benefit effective from 31 March 2004, by means of a cheque. As he had been requested, he signed a copy of the memorandum as an acknowledgement of receipt of the cheque and the IRP5 certificate. When Messrs Reinertsen and Naicker of the respondent spoke to the applicant on re-employment, the applicant said he wanted to go into some business as the salary offered was too low. He never, at that stage, raised any outstanding issues, such as being incorrectly identified for retrenchment.

18. Mr Crawford conceded that in the section 189 notice no mention had been made of what was to happen to skilled or unskilled employees. He said that when they met the respondent thereafter, they were told exactly what was to happen. He conceded that the minutes of their first consultation meeting did not make any reference to qualified and unqualified employees, notwithstanding the fact that job categorisation was used, such as Factory Aids, Platemakers and Inserters. In relation to the letter of 28 January 2004 issued by the respondent to the unions, he said that the categorisation “General Assistants” was clearly understood to include Press Assistants. The term “General Assistant” did have a degree of uncertainty to their members but not to union representatives as Mr Reinertsen had explained in the meeting what was to happen, *inter alia,* in the works room. He also conceded that in the agreement of 11 March 2004 there was no use of the categorisation “Unqualified and qualified employees.” He said that it was before the agreement had been signed that the respondent supplied the names of the affected employees. The list included the applicant.

The applicant's version

19. After he had taken up permanent employment with the respondent, he occupied various positions at different times and they included being an Inserter, Operator and a charge hand in the mail room. For a period of about 3 years he took up modules with the respondent and thereafter qualified as a Supervisor in the mail room. In 1994 he successfully applied to be transferred to the machine room, for a vacancy in News Set Department, which he assumed on 1 May 1994. He was then holding the position of a grade (ii) (a) which corresponded with a grade B(5) according to the Peterson Grading. Implicit in the transfer was a reduction in his salary due to his loss in shift rates. He had to undergo a probation period and thereafter a decision was to be taken about his permanent status. On 14 October 1994 he wrote a letter requesting his position to be rectified. Authorisation for the increase in his hourly rate was granted on 21 October 1994. On 17 September 1996 he wrote a letter in which he requested a review of the job title which he asked to be re-described according to the capacity he held in the machine room of the Works Department. On 4 February 1998 he wrote a letter in which he asked the respondent to consider him as a qualified journeyman. He stated that he had worked as a journeyman without assistance and supervision. He stated that he had been disappointed by not being given formal training (apprenticeship) so that he could be certified as a qualified journeyman. Again on 12 February 1998 he requested a job re-grading, stating that he had been in platemaking, cutting, finishing of jobs and printing for four years while holding grade (ii) (a). on 30 April 1998 the respondent issued a letter in which the position held by the applicant was stated as of a Printer's Assistant-Machine Room-Works Department. The certificate of service issued by the respondent on 12 March 2004 states the occupation of the applicant as one of Printer's Assistant.

20. In 1996 he was a Machine Minder even though he earned a salary that was higher than that of the position. He needed a proper job description and was given one of Printer's Assistant but he was not given a letter explaining his position. Nor was he given a Peterson grading. He should have been a grade C2 or C1, according to the salary he was earning at the time, which was much more than that of a grade B1. In 1998, Mr Hutson, a Manager of the respondent agreed to let him do the apprenticeship so that he could be a journeyman. Mr Hutson left the respondent and was replaced by Mr Naicker. Mr Naicker advised the applicant that he had to take a salary cut if he had to do the apprenticeship. Yet the applicant knew of people whose salary was not cut when they did the apprenticeship. He could not afford a salary cut as he had a daughter at a university. Management promised him that his job would not be affected whereupon he continued with it, printing posters for various papers and attending to the special orders from the printing room. He had two assistants for whom he had to set up the machine.

21. The applicant attended two of the three meetings pertaining to the outsourcing of some of the functions of the respondent. He was told that his position would not be affected. In the discussions there was no mention of unqualified people having to be affected. In applicant's understanding a Printer's Assistant was not a General Assistant. There was however another Mr Manickum Govender who was a Factory Assistant with grade B(1). The applicant was not a B(1) grade nor was he in the machine room.

22. Towards the end of February 2004, the applicant heard that his name was among affected employees. He approached Mr Myburgh who represented SATU members to ask why he was affected. Mr Myburgh said that the applicant was a General Assistant and that he could not assist him as the applicant had no qualification documents. He approached Mr Crawford for

help. Mr Crawford said that he thought the applicant was a Machine Minder but he did not say if he would do anything for him. When he took the matter up with Mr Neo Naicker, he was told that his job was redundant. His last working day was at the end of February 2004. The letter of termination of employment dated 12 March 2004 came to him after he had already left work. He believed that his position was not redundant and that there was a Mr Derick Maharaj and people from Workforce who took over from him. He was told to apply for a position with the Workforce but was offered one third of the salary earned by Mr Maharaj and it was much less than what he himself had been earning. He denied that he wanted to start his business. He refused to join Workforce because he wanted his job back and because the whole process had not been properly explained to him.

23. The applicant conceded that he had no qualifications of a Machine Minder. He conceded that SATU could conclude a valid agreement with the respondent on retrenchment but he said the concluded agreement did not cover or include him. He conceded that SATU thought he was a General Assistant and therefore that it incorrectly understood his grading. He conceded that the respondent acted on representations of SATU to include him in the list of affected employees. He believed the respondent was partly to blame as it was supposed to have upgraded his position. He agreed that Mr Derick Maharaj, who took the work he had been doing was employed by an outsourced company, Capital. He pointed out that his position was not redundant but was outsourced. He agreed that he had not informed the respondent, just before the agreement was signed, that SATU was not representing him. He conceded that he accepted the retrenchment package without reserving any of his rights.

Submissions by parties

Respondent's submissions

24. Ms L Pillay appearing for the respondent conceded that the special plea relating to the non-joinder of SATU did not stand for adjudication. The court had earlier enquired whether the order sought would in any substantial manner affect SATU. She added that any claim against SATU would have, in any way, prescribed.

25. She highlighted the other points that had been raised as a special plea. She pointed out that the applicant had agreed that the union had signed the agreement of 11 March 2004 for its members, including him and therefore that there was no longer any live issue in that regard. She said that the agreement was one signed at a collective bargaining level. She pointed out that the respondent had acted in compliance with the agreement, *inter alia*, by paying the applicant who in turn, accepted the same without reservations.

26. In relation to other issues falling out of the special plea, she submitted that there was a general need for the respondent to retrench and the unions agreed with it. She said that there was a need to retrench the applicant as his functions had been outsourced by agreement. She said that respondent's evidence, which was subsequently confirmed by the applicant, was that the poster making done by the applicant was not a core function of respondent's business. She submitted that it was not competent of the court to order reinstatement as the post of the applicant no longer existed and the outsourced company had not been joined as a party. In respect of compensation she pointed out that the applicant had already received the severance pay, the notice pay and an *ex-gratia* payment.

27. In respect of the selection criteria, she said that the respondent and the unions agreed on employees to be retrenched and that a case of bumping

had not been pleaded by the applicant. She submitted that the selection criteria was applied as agreed to. She submitted that the dismissal was premised on fair reasons.

Applicant's submissions

28. Mr R.B. Donachie appearing for the applicant submitted that the purpose of an agreement is to settle an existing dispute. In this matter, the parties had to agree on a category and the number of the staff that was to be retrenched. He pointed out that the parole evidence rule applied in this matter. He submitted that the agreement made no mention of the Printer's Assistant to be included in the category of affected employees. He said that nowhere was it stated that a General Assistant included a Printer's Assistant. Nor did the agreement refer to any unskilled or unqualified employees. He said that the agreement covered employees in the A2-B1 grades

29. He argued that the job of the applicant continued after the retrenchment and that the purpose of the retrenchment exercise to cut costs, was never achieved. He said that there was no evidence, except vague submissions, that the termination of such services as were offered by the applicant was necessary. He said that as the list of retrenchees was given to the unions after the signing of the agreement, a mistaken inclusion in the list of names could not be cured by the agreement. He said that the dismissal was substantively unfair and that the applicant was entitled to be reinstated. When asked by court he could not explain who of the 110 workers in Production could have been wrongly excluded such that his place was taken by the applicant.

Analysis

30. This matter concerns the question of whether the termination of an employment relationship between the applicant and the respondent was founded on a fair reason. That an employer and employee may agree to terminate the employment contract is trite. Should such an agreement be reached by the parties to it, a new contract to terminate the employment relationship comes into being and supercedes any provision to the contrary in the contract of employment.

31. In this case, the underlying reason for the dismissal of the applicant, together with other employees, was stated to be a cost cutting measure. The respondent wanted to meet the demands of the highly competitive market within which it operated by ensuring that it maximised the use of resources as efficiently and as effectively as would be possible. To achieve the stated objective, it decided to rid itself of those functions which it deemed, did not constitute its core function of its business. During the trial it became common cause that the function executed by the applicant was a non core business of the respondent.

32. Mr Donachie has submitted that the whole exercise, in respect of the applicant, has been in futility in that the job of the applicant continued after the retrenchment and that the purpose of cutting costs was never achieved. He was saying that the respondent ought to have proved a direct saving consequent upon the retrenchment. That, in my view, was a narrow approach which omits the indirect saving because the work and expenditure involved in supervising the retrenched employees by the managerial staff had fallen away. Management had more time to concentrate on other functions. See in this respect-*Seven Abel CC t/a The Crest Hotel v Hotel and Restaurant Workers' Union & Others* (1990) 11 ILJ 504 (LAC).

33. I now return, as I must, to the special plea raised by the respondent. The submissions by the respondent are that:

(a) any dispute between the parties in relation to the retrenchment of the applicant was settled by means of an agreement concluded*, inter alia*, between the respondent and SATU on or about 11 March 2004;

(b) the applicant was employed as a General Assistant Publishing in the works room and formed part of the employment categories to which the agreement applies;

(c) the applicant was a member of SATU and this retrenchment was pursuant to the terms of the afore mentioned agreement;

(d) the applicant is bound by the agreement concluded with his union and is not entitled to pursue any claim pertaining to his retrenchment.

34. During the trial, the applicant conceded to the submissions under (c). He also conceded to the submission under (d) provided the court found under (b) that he was correctly classified as a General Assistant.

Was the dispute settled by the agreement?

35. In terms of the agreement between the parties, 110 employees in the Production Section of the respondent were to be retrenched. That categorisation had formed part of the discussions between the parties. In one of the consultative meetings Mr Reinertsen was called to come and explain, *inter alia*, the category of employees to be retrenched. In his evidence in court he said that the explanation he proffered was that unqualified employees were to be retrenched. That explanation was subsequently confirmed by Mr Crawford who was present in that meeting. While the descriptive “unqualified employees” does not appear in any of the minutes and in the agreement, I am persuaded by the evidence of the two witnesses of the respondent that such an explanation was, in all probabilities, given by Mr Reinertsen. The unions accepted his explanation

and he was therefore excused. The respondent was to supply a list with names of retrenchees. That it did. Neither the unions nor the applicant took issue with the respondent on why the applicant was included in the list. Unless the proceedings are mechanically recorded, the minutes of a meeting are only a summary of the issues traversed in that meeting. Even in his evidence, the applicant testified that he spoke to Mr Myburgh of SATU who said that he had been included in the list because he was a General Assistant.

36. In his evidence the applicant conceded that he did not withdraw his mandate for SATU to represent him when the agreement was signed. By then, he had already seen his names in the list. He proceeded to take part in the processing of documents for the payment to him of the retrenchment package which was only paid in terms of the agreement reached by the respondent and the unions. He was offered some further employment which he turned down because he considered the salary to have been too low. The probabilities of this matter make it difficult to resist making a conclusion that the applicant indeed wanted to take the money paid out to him and to reinvest it in some business as testified to by Mr Reinertsen.

37. Whether the applicant was in a senior and a responsible position, would not help to resolve the issue. In the list of retrenches there are senior employees such as:

- S.A. Zuma – Vanman Supervisor
- D. Govender - Transport manager Circ.
- E. Wilson – Publishing Supervisor
- R. Dunbar – Senior Ad. Prod. Supervisor

38. In my view, the agreement of 11 March 2004 between the parties, was one legitimately signed at a collective bargaining level. Therefore any dispute between the parties in relation to the retrenchment of the applicant was settled by means of this agreement.

Was the applicant a General Assistant

39. At the end of the trial it had become common cause that the applicant was not possessed of any qualifications appropriate to the industry in which the respondent operated. He had made some attempts to be allowed to undergo the apprenticeship with the respondent but he was not successful to do it under his terms. There were a number of employees of the respondent who had undergone the apprenticeship and had been qualified in some fields. To distinguish the applicant from that group he could be referred to as unqualified employee and therefore a General Assistant. Nothing really turned on being a Printer's Assistant as he was not a qualified Printer. He was therefore in no different position from the Platemakers who were referred to as such in the list but were also known as General Assistants. It must be remembered that the main consideration was whether he performed a core function in the business of the respondent and he conceded that he did not. He conceded that the function he performed at the time was outsourced and was thereafter carried out by a private company distinguishable from the respondent.

40. From the foregone, it must follow that the points raised by the respondent as a special plea must be and therefore are all upheld.

41. The following order will therefore issue:

1. The claim of the applicant is dismissed.
2. His dismissal was substantively fair.

3. No costs order is made.

_____

Cele J

Date of Hearing: 25 August 2008

Date of Judgment: 9 January 2009

Appearances:

For the Applicant: Mr R.B Donachie - Henwood Britter and Caney

For the Respondent: Ms L. Pillay – Webber Wentzel Bowens