

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 26 June 2000

CASE NO. J466/99

In the matter between:

JOHN AND 62 MEMBERS OF WESUSA

Applicants

and

HTK MANUFACTURS SA (PTY) LTD

Respondents

J U D G

M E N T

LANDMAN, J:

[1] This is a trial which commenced in September of 1999 and has been resumed in June of this year. At the close of the case for the applicants Mr van As, who appeared on behalf of HTK Manufacturing applied for absolution from the instance.

[2] This court, which is equivalent to a High Court, has the power to grant absolution from the instance in the course of a trial. The test to be applied is set out in Harms, Civil Procedure in the Supreme Court, paragraph 07 or 02, as follows:

"The test to be applied by the court at this stage of the trial is, is

there evidence upon which a reasonable man might find for the plaintiff. Another approach is to enquire whether the plaintiff has made out a prima facie case. The application stands on very much the same footing as an application for the discharge of an accused at the end of the state's case in a criminal trial."

Harms goes on to say that the court has a discretion. Then, he says:

"In the exercise of this discretion it will not normally have regard to the credibility of witnesses unless the plaintiff's witnesses are so obviously lying or have so palpably broken down that no reasonable man can place reliance upon them. The court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging in the defendant's case. Of course absolution from the instance can only be granted where the onus lies upon the plaintiff or (as it is termed in this court) the applicant."

See Schahmann v Concept Communications (1997) 8 BLLR 1092 (LC).

[3] In this case the onus of proving that there has been a dismissal lies upon the applicants. The onus of proving, should it be found that there is a dismissal, that it was fair, lies upon HTK Manufacturing.

[4] This case is very correctly summed up in the address which Mr Kotze, who appeared on behalf of the applicants, made when the case commenced. He said: "The question to be decided today will be basically a judgment on the facts. The case for the applicants is that on 14 January 1999 they were put to a choice by representatives of the respondent to work and to continue their employment with the company and to resign to the union and if they do not resign from the union they must leave the premises, hand in their overalls and their employment will be terminated. They refused to resign from the union and they were then ordered off the

property under the threat of the respondent calling in the assistance of the South African Police Services. And they also handed in their overalls which the applicants will aver was a clear indication that they accepted the fact that they were dismissed on no notice or this dismissal was given prior to 14 January and they never returned to the employment and they were never asked or requested to return.

They were never notified that they were absent without leave or anything of the sort and that is my understanding from the papers, that the respondent denies that they were ever dismissed and that he ever put them to this choice."

[5] A number of witnesses were led on behalf of the applicant. The evidence of the witnesses who attested in September of last year conflict with the evidence of the two witnesses namely Mr Mhlongo and Mr Shebi who attested in this court today. In September, for instance, it was the evidence of Mr Zungu and Mr Zulu, particularly Mr Zulu, that he was called into the office and told that he should resign or leave. Mr Zulu says that they were called into the offices individually. He was called into the office at 07:15 and he could not explain how another witness, Mr Lahoka, who said that he was the first witness to be called, was only called in at 08:30. In addition, Mr Lahoka denies that he attended a meeting on 11 December at which WESUSA's representatives were present. Quite clearly he was there because the transcript has been admitted as evidence. It is said to be common cause and to be truth of what was said or what was recorded. Ms Munyai of the union was also there. That the meeting was to discuss short time and failing short time retrenchment. In fact, the union members present were advised that when HTK Manufacturing opened up after the shut down in January there would be no work for them to do.

[6] The evidence, of Mr Mhlongo and Mr Shebi is that they were called together. They gathered outside the office of Mr George van der Merwe. There, as a group, they were told that there was no more work for them and all the members of WESUSA were dismissed. Nothing was said about an ultimatum to resign from the union.

[7] It is common cause that after they had been addressed, either individually, as some say, or as a group, as other say, they departed to the union offices in Benoni. There some of them say they spoke to Ms Thangu, others to Ms Munyai. But it is common cause, or at least this is the evidence of Ms Munyai, that she instructed Ms Thangu to write a letter. The letter which was written on behalf of these members on 14 January states:

"I write this letter concerning our members. I want to know that why you told the members to leave at work and stay for seven weeks and after that you said you are going to pay them one hour per week. Go Mr George, what is your .. (unclear, possibly problem) to these employees. It means have a lot of money, so now it is a final notice. Tomorrow morning all the employees must go back to work. If you fail to do that I will refer this matter further and you must prove to us that the law saying that employees must stop work and we ask an urgent meeting tomorrow on the 15th January at 10:00 because we want this people back to work. If you fail I will contact you at Labour Court."

It is noticeable that this letter says nothing about an ultimatum to resign from the union. Of course, I am not concerned at this stage about that, what I am concerned about is whether or not there was a dismissal.

[8] Mr Kotze has referred me to the transcript of the tape of the meeting which was held on 11 December, particularly to page 29, where he says it is clear that Mr George van der Westhuizen said that the contracts of the WESUSA members expire on 15 December. They will be paid until then and then the contracts will terminate and he will see what happens. It is contended that the employees were dismissed on 15 December. This conflicts with the pleadings in this case.

[9] However, the tape also goes on to refer to the fact that short time was being discussed and that when the shut down was over, the employers could not allow the workers to return because there was no work for them to do. This corresponds substantially with the union's letter of 14 January wherein it refers to staying away for seven weeks and being paid one hour per week. That in fact is short time. The letter shows that the WESUSA employees were not dismissed. The union wants the employees to return to work. It is not complaining that they were dismissed It is complaining that they were told to stay away for seven weeks and be paid one hour per week.

[10] In addition, there is other correspondence which was put to the union organiser, which tends to indicate that if there was a dismissal it took place in February 1999.

[11] I am not convinced on this evidence, and on the test which is set out in the passage which I have read from Harms that there is evidence upon which a reasonable court might find for the applicants. In making this decision I am clearly entitled to take into account, in this case, the credibility of the witnesses. It is quite clear that the version of the witnesses who gave evidence in September last year and those who gave

evidence in June this year were totally irreconcilable. I do not believe that they can be reconciled. The evidence given by various other witnesses has been proved to be palpably false, particularly that of the shop steward, Mr Lahoka. This is a case where I find that absolution from the instance should be grant and I grant absolution from the instance.

[12] I order WESUSA to pay the costs on a party and party scale.

DATED AT JOHANNESBURG ON THIS THE DAY OF JULY 2000.

JUDGE A A LANDMAN

: MR G KOTZE

: Kotze & Vlettter Attorneys

: ADV M VAN AS

: Leppan Beech Attorneys

: 26 JUNE 2000