REPORTED ILJ entered
PART 4 1988

CASE NO. NHN 13/2/261

IN THE INDUSTRIAL COURT

In the matter between:

THULANI WELCOME LUTHULI & OTHERS — Applicants

and

FLORTIME (PTY) LIMITED, subsidiary company of Romatex Floorcoverings Limited — 1st Respondent

NATIONAL UNION OF TEXTILE WORKERS — 2nd Respondent

CONSTITUTION OF THE COURT:

DR D G JOHN — Additional Member

ON BEHALF OF:

Applicants:

MR N BRAUTESETH

Of De Villiers Evans & Petit

First Respondent:

ADV K R McCALL SC

instructed by Shepstone & Wylie

Second Respondent:

ADV W H TRENGOVE SC

instructed by Cheadle Thompson & Haysom

PLACE AND DATE OF PROCEEDINGS:

DURBAN - 19th November 1987

This application under s.43 of the Labour Relations Act raises the question of how far a retrenchment procedure agreed to as part of a recognition agreement extends, and whether employees who are not members of the union with which the recognition agreement has been concluded can assert a right to separate notification and consultation by the employer.

On 19th August 1985 the first respondent (hereafter referred to as "the company") concluded a recognition agreement with the second respondent (hereafter referred to as "NUTW") when 95% of the company's employees were members of that union. In November 1986 a number of the company's employees resigned from NUTW but the percentage of employees that remained members of NUTW was never less than 70%, according to the company, or 65%, as conceded by the applicants.

The recognition agreement lays down a retrenchment procedure which requires the company to endeavour to avoid retrenchment wherever possible but once it has taken the decision to retrench it is forthwith to inform the union, and in any event has to give the union two weeks' notice of the impending retrenchment with the reasons therefor, and the departments, jobs and number concerned. During the notice period the parties shall consult with each other on ways of seeking to avoid the retrenchments and

if it/..

if it is unavoidable, on the criteria for selection of employees for retrenchment. In terms of the agreed procedure the company is to give each employee one week's notice of termination or cash in lieu thereof. The company accepts the principle of "last-in first-out", provided that other reasonable objective criteria mutually acceptable to the parties can be employed, but also reserves the right to retain employees with essential or unique skills or abilities. In addition to any other monies payable to an employee on termination the company undertakes to pay a retrenched employee an amount equivalent to one week's wages for each year of completed service. Finally, the retrenchment procedure stipulates that within 7 days after retrenchment the company will furnish the union with a list of names, addresses and occupations of those retrenched, and when a vacancy occurs in a particular occupation the company will inform the senior shop steward in writing and keep the vacancy open for a period of 5 days to enable suitable listed persons to be re-employed.

Early in 1986 two factors caused the company to consider the possible retrenchment of workers in its "needle carpet tile" department (NCTD). These factors, which were the need for a machine to improve manual-intensive methods of working and the general downturn in the economy, would result in some redundancy. In April 1986, and again in July 1986, there were discussions with the union on this issue. However, from July 1986 to March 1987 the

introduction of/..

introduction of the new machine was delayed and accordingly also the decision regarding retrenchment. When it could no longer delay the retrenchment the company gave NUTW two weeks' notice, in terms of the retrenchment procedure, by a telex dated 17th March 1987, and thereafter a meeting took place between officials of the union and representatives of the company on 24th March to discuss ways and means of avoiding the retrenchment. The parties agreed that retrenchment was unavoidable and that the selection criterion of LIFO would be applied. They also agreed that the retrenchment should be effected as quickly as possible in order to enable those retrenched to be paid out without delay and to start looking for alternative employment. The retrenchment would thus be effected prior to the expiry of the two week notice period, which would have expired on 31st March 1987, but the retrenched employees would be paid for the full period of the retrenchment notification (i.e. up to that date) and in addition for the full period of their individual notice period of one week. In other words, instead of having to work through the agreed periods of notice the retrenched employees would be released from their obligation to work and would be paid in full as if they had worked throughout the notice periods provided for in the agreement.

NUTW notified the company's employees by notices on the company's notice board and convened a meeting on

26th March 1987 at the factory to discuss the retrenchment issue with the workers. This meeting was addressed by an NUTW official. Later that day the factory manager met the workers in the NCTD who were working on the day, or B, shift at approximately 15h45. The purpose was to advise 14 of the 33 workers on that shift of their retrenchment, to give them reasons therefor, and to afford them an opportunity to ask questions and make suggestions regarding the retrenchment. It was also explained how the amounts payable to them on their retrenchment had been made up. The company alleged that the 14 workers accepted the retrenchment "in a pleasant and calm manner". It was intended that the factory manager would hold a similar meeting with 16 workers of the NCTD on the night, or A, shift at the end of work that following night. However, the shift refused to start work that evening until they were informed who was going to be retrenched. The factory manager subsequently disclosed the names of the 16 workers who were to be retrenched (two of whom were absent) and called the 14 to a meeting to enable him to address them. The company states that the atmosphere was hostile but that the factory manager nevertheless advised the 14 workers present of their retrenchment and the reasons therefor and asked for questions or suggestions, if any. The response was that they wanted their pay slips (though not the money) so that they could leave immediately, which they did.

These 14/..

These 14 ex-employees of the A shift are the applicants in this case. They all claim to be members of the Textile and Allied Workers Union (hereafter referred to as TAWU). The company acknowledges that it was aware that there was inter-union rivalry between NUTW and TAWU at the time when 10 of the 14 applicants resigned from NUTW (4 of them were never members of that union). It asserts that at all times NUTW had a majority of at least 70% but it was not aware whether or not all of the balance of 30% of the workers were ~~or were not~~ members of TAWU.

The case made by the applicants in their founding affidavit was that they were dismissed on 26th March and that the factory manager refused to give them any reason for that dismissal. They were surprised by subsequently finding their Unemployment Insurance Cards endorsed to the effect that they had been retrenched. They denied knowledge of the impending retrenchment, or of the meetings between the company and NUTW, or of the notices on the company's notice board about retrenchment, or of the meeting of employees called by NUTW on 26th March to discuss the retrenchment. In the argument presented to the court on behalf of the applicants, however, the contention of dismissal without any reason was expressly abandoned and the matter was argued on the basis that there had been a retrenchment but that this had been handled unfairly as far as the applicants were concerned because the employer

had failed/..

had failed to notify them or their union of the intended retrenchment or to consult with them or their union on the ways for minimising retrenchment or determining the selection criteria. The application therefore revolves around the question whether there is a duty on an employer to notify and consult with a minority of employees and their union when there is a retrenchment procedure, agreed with the majority union, to which the employer has given effect.

It was argued for the applicants that in this case TAWU represented a minority but nevertheless a substantial number of employees and it was unfair of the company not to have consulted the minority union or its members individually. Mr Brauteseth for the applicants referred to a passage in the case of Mynwerkersunie vs African Products (Edms) Bpk (1987) 8 ILJ 401 at 412 I in which the following sentence appears:

"Moontlik kan aangevoer word dat waar applikant substantiewe hoewel nie meerderheidsverteenwoordiging het nie daar tog van respondent verwag kon word om met applikant te onderhandel". That case was concerned with an employer's refusal to negotiate wages for employees in recognised bargaining units where the union had only minority representation in each of the units concerned, but Mr Brauteseth submitted that the court had a discretion to extend the reasoning encapsulated in the

quoted sentence/..

quoted sentence to this sort of case, and in equity should do so.

The company's response to the applicant's founding affidavit was to apply for the joinder of the second respondent, the NUTW, because of the recognition agreement with that union and the fact that according to the respondent it had never represented less than 70% of the company's employees. Moreover, in terms of the recognition agreement its provisions had been made part of the contract of employment of every employee then in service or subsequently employed. Despite the opposition of the applicants, the Industrial Court at an earlier hearing ordered the joinder of the second respondent.

Both the respondents relied heavily on the principle of what they termed "majoritarianism". This term, though ungainly, has the utility of being self-explanatory. The principle, according to the respondents, is one which is adhered to not only by NUTW but by TAWU as well. NUTW alleged in its affidavit that TAWU in three factories formally challenged NUTW's claim to representivity in order to acquire sole collective bargaining rights for itself. In these cases there was an agreement between the two unions and the employers involving the holding of a secret ballot and an undertaking that the loser would not thereafter claim any rights, facilities or

representative status/..

representative status among any of the employers in those factories for so long as the victorious union retained its majority. In two of these factories NUTW were successful and in the other TAWU emerged as the majority union. Later in its affidavit NUTW alleged that following the break-away in September 1986 "TAWU sought to persuade employees to resign from the NUTW in order that it lose its majority and accordingly its special status as the recognised union, and instead to join the TAWU in order that it might acquire a majority and the coveted status of the recognised union. In 5 out of 120 recognised factories TAWU acquired a majority and the concomitant special status of recognised union. It vigorously asserts that status against all comers". It was now not open to TAWU or its members previously employed by the company to attempt to escape the consequences of majority recognition simply because in this case it did not suit them.

For the company it was argued that it had done all that the recognition agreement required and that it would have been put in an impossible position in the practical implementation of the retrenchment process if it had been required to consult TAWU (the extent of whose membership at the factory was not known to the company, other than that it was a minority) or the individual employees. The retrenchment procedure had been agreed between the

company and/..

company and the union, NUTW, to which the vast majority of the company's employees belonged at the time the agreement was concluded. Its provisions were fair and were in line with guidelines of the Industrial Court. Agreements voluntarily entered into between an employer and the union had been given effect to in a number of cases in the Industrial Court, reference being made to Ngwenya and Others vs Alfred McAlpine & Son Limited (1986) 7 ILJ 442, Building Construction and Allied Workers Union and Others vs Masterbilt CC (1987) 8 ILJ 670 at 676 and Transport and General Workers Union vs Putco Limited a decision in the Industrial Court, not yet reported, dated 26th June 1987.

Inter-union rivalry is not a rare phenomenon, nor one confined to South Africa. One might wish that there was a greater readiness among trade unions themselves to agree on ways in which this rivalry could be conducted, perhaps by acceptance of rules similar to, though perhaps more extensive than, the "Bridlington principles" adopted by the TUC in Britain in 1939. With the number of trade unions and trade union federations in South Africa and the diversity of their philosophies, however, this is probably too much to hope for at present, although the two unions involved in this case did agree on a ballot to determine sole collective bargaining rights in three other companies. Generally, however, there is likely to be a

free-for-all/..

free-for-all, with employers finding themselves in the middle. There may well be circumstances, as suggested in the African Products case, when it might reasonably be expected of an employer that he should negotiate with a union which has substantial though not majority representation. Where, however, there is a majority union which has concluded a recognition agreement, including retrenchment procedures, with an employer and the parties have agreed that the provisions of the agreement, including ~~that~~ those procedures, be made a condition of employment of each employee, it would in the view of this court go too far to impose on the employer a duty to consult separately a minority group of employees and their union in accordance with the guidelines indicated by the Industrial Court. These are the circumstances in this case and accordingly the court must hold that the applicants have failed to make a case which would justify the issue of an order of reinstatement or a finding, which at this stage would be prima facie only, that there has been unfair labour practice in the termination of the applicants' employment by the company. The application must therefore be dismissed.

Costs

Both respondents pressed for an order for costs against the applicants. This of course requires that unreasonableness or frivolity on the part of the applicants be shown. "Frivolity" is defined in the Shorter Oxford English Dictionary as "the quality of being frivolous; disposition to/..

disposition to trifle; levity". "Frivolous" is defined as "of little or no weight or importance; paltry; trumpery; not worth serious attention. Law. In pleading: manifestly futile". If the word is given its first meaning there is no frivolity in this application; on the contrary, it raises a point of inter-union rivalry which, potentially at any rate, is of importance. Giving the word its second meaning, that which it has in law according to the dictionary, the application shows frivolity, in the circumstances because it is manifestly futile. It is also unreasonable. This is because the court holds it to be improbable that the applicants were not, as they allege, aware of the various events leading up to their retrenchment. Likewise, the probabilities are that they were fully aware that they were retrenched and not dismissed. In their founding affidavit they stated that their union had been endeavouring to persuade the company that it was now representative of the majority of the workers, and that the company appeared to be reluctant to recognise their union; they contended that the company's action in dismissing them, if it were based on that fact alone, amounted to rank victimisation. They further alleged that if in fact they were retrenched then no steps had been taken by the company to consider other alternatives to their retrenchment or to establish criteria for retrenchment based on established principles, or alternatively if such criteria were established they had not been adhered to. In their replying representations

the applicants/..

the applicants state "that the acquiescence by NUTW with the proposed retrenchment suited its purposes as it substantially diluted the percentage of TAWU membership in the factory, thus consolidating its claim to overall representation. This fact and the animosity which existed on the shopfloor between NUTW and TAWU placed a burden on the respondent to ensure that it acted fairly in regard to the rights of the applicants as non-NUTW members, in the negotiations over their impending retrenchment. The applicants submit that the respondent has been both aware of this and has aided NUTW in that seven of the dismissed workers, who were all NUTW members, have been re-employed by the respondent since that date". As regards the last sentence, the retrenchment procedure required, as mentioned above, that the company inform the senior shop steward of NUTW, the union with which the recognition agreement had been concluded, of vacancies. It was therefore to be expected that NUTW members would be those of the retrenched workers who would be approached by NUTW. There was nothing to prevent the applicants or their union, however, from keeping in close touch with the company with a view to securing re-employment in any vacancies that occurred. In the course of argument the applicants' attorney expressly withdrew any allegation of mala fides against the company though such an allegation remains against NUTW.

Mr McCall for the company in arguing for an order for costs

referred to/..

referred to the Masterbilt CC case (see above) where such an order was made. Prof Landman's judgment at page 681 G contains a paragraph which is peculiarly apt to the circumstances of this case. It reads as follows:
"The applicants based their case partially on the respondent's alleged failure to honour the provisions of the procedural agreement. I have not been able to find any material breach of this agreement. Rather I have found that not only has the respondent scrupulously observed the provisions of the agreement, but it has provided more benefits than it was obliged to. The conclusion which must be reached is that the applicants knew from the outset that their allegations of breach of faith were baseless. Where a party persists in pressing an application under those circumstances it is acting unreasonably".

The applicants in that case were all the employees retrenched when the respondent moved the location of its factory. Here, of course, it is a group of employees belonging to a minority union who were retrenched. But the approach of the applicants in both cases was similar, and in this case the presence of the minority union, although not itself a party as in the Masterbilt case, is manifest. The court has come to the conclusion that an order for costs is appropriate in this case and the applicants, jointly and severally, are accordingly ordered

to pay/..

to pay the costs of both the respondents. The order granted on 12th August 1987 by the Industrial Court made no mention of costs and accordingly the present order does not include the costs incurred by the first respondent in the hearing of that joinder application.

SIGNED at JOHANNESBURG this 4th day of DECEMBER 1987

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D G JOHN
ADDITIONAL MEMBER