IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Case No: D 776/98

In the matter between:

THABISILE NXUMALO & 5 OTHERS Applicants

and

MISSION KWASIZABANTU Respondent

JUDGMENT

LYSTER A J:

1. The 5 applicants in this matter are former employees of a Christian mission situated in a rural area of KwaZulu Natal. They allege that they were dismissed by Respondent in October 1997 and that the circumstances of their dismissal falls within the ambit of section 187 of the LRA, and that their dismissals were automatically unfair. In terms of the Pre-Trial minute, clause 4, it was agreed that the issue that the Court had to decide was;

"Whether the termination of the of the Applicants' employment with Respondent constituted an automatic unfair dismissal on two grounds;

1. As a result of their membership of the National Farm and Allied Workers Union (NAFAWU).

2. For refusing to sign the contract of employment."

2.1 This is ambiguous to the extent that it appears to say that the Court is required to make a finding on both grounds, and that if the Court can only make a finding on one ground, then an automatic unfair dismissal cannot be said to have taken place. This is obviously not correct, and it was conceded by Respondent's attorney that if the Court found that the dismissal was as a result of trade union membership, then the respondent must fail.

2.2 Secondly, clause 4 of the pre-trial minute purports to require the Court to decide whether the dismissal was brought about by the ~membership of the trade union. I can only assume that this must have been a drafting error by the parties. In terms of section 5 of the LRA, read with section 187 (1), an automatically unfair dismissal is not limited to dismissals for "membership" of a trade union only, but for participating in the lawful activities of a trade union. As such membership of the union is not a requirement in terms of this section, and employees who seek to join the union are also protected by the Act.

3.1 Two of the Applicants gave evidence, and their version is as follows:

3.2 Applicants did not, as most of Respondents employees did, live on the mission premises. At an unspecified date in early 1997, the Applicants and 3 other employees approached Respondent's farm manager, Dietmar Joosten, for an increase in their daily wage of R

9-00 (R 54-00 per week). The request for an increase was turned down.

3.3 A meeting was held on 9/10/97 on the Respondent's premises and was attended by Applicants, and other persons working for Respondent and */* or residing at the mission.

3.4 Applicants joined the trade union at the meeting, along with 3 other male workers who resided on the mission premises.

3.5 The meeting was unruly and people became angry with the president of the union Shezi.

3.6 The following day 10/10/97 the farm manager Jooslen, gave Applicants a document purporting to be a contract written in Zulu, and told Applicants to sign the contract.

3.7 In later evidence by one of Respondent's senior staff members, it appeared that the document had originally been drawn up in English by a labour consultant, and translated into Zulu by this (Zulu speaking) senior staff member, one Sibisi.

3.8 It was common cause that these two versions i.e Zulu and English differed in meaning, and a second English translation which the parties agreed on, was produced for the Court.

3.9 The crucial portion of it reads as follows:

"The mission is a non-profit organisation, but believes that finances permitting you must be able to get "soap money". The mission will inform you how much that will be.

Should you feel that will not satisfy your needs the mission gives you the freedom to find alternative employment where you will receive more."

3.10 The original English version was significantly different in its meaning and reads as follows:

"Although the Mission is a non-profit organisation, it would like to compensate you for services, depending on the availability of funds and according to what has <u>been agreed between the Mission and yourself</u> (my underlining).

The mission acknowledges that your work is done on a voluntary basis and you are free to seek alternate employment if your needs are not met."

4.1 The Applicants refused to sign the document, because they understood it to mean that they could be required to work for no money.

4.2 Joosten thereafter dismissed Applicants for their refusal to sign the contract, and their membership of the Union and told them to leave the premises and said they should wait at the gate for their money.

4.3 Applicants received R 10.

4.4 All other employees and persons residing at mission signed the contracts, although in cross examination Applicants said that they were not aware if there were some people who had not signed.

4.5 Applicants reported to the trade union (NAFAWU) that they had been dismissed, and the union sent a letter to Respondent on 10/10, claiming that the dismissal of Applicants was substantively and procedurally unfair.

4.6 Respondent alleged in reply by letter on 16/10/97 that the Applicants had "terminated their own services" by not reporting for work.

4.7 Applicant, with the assistance of the union, referred a dispute to the CCMA alleging dismissal for trade union activities.

4.8 In terms of an agreement reached on 24/10/97 between the union and Respondent, Applicants were to return to work on 27/10/97.

4.9 Applicants returned to work on 27/10/97 and were again told by Joosten to sign the contracts and resign from his union.

4.10 Applicants refused and were again told to leave.

4.11 It was put to Applicants by Respondent's Attorney, that Joosten would say in evidence that after October 1997, Applicants had performed"togt" labour for Respondent, which Applicants denied. This reference to "togt labour" is directly relevant to Joosten's evidence and his credibility, and will be dealt with later in his judgment.

5.1 Applicants signed union stop order forms dated 2/10/97. First Applicant (Nxumalo) said she had forgotten the dates, and said she could have been mistaken as to when she joined the union, having originally said in evidence that she had joined on 9/10/97.

5.2 First Applicant then nevertheless clung to her version that she had been dismissed the day after joining the mission that is, 10/10, although she conceded that she could not recall dates.

5.3 First Applicant also said Respondent had dismissed the three other workers who had joined the union, and had met these persons at a CCMA meeting in Stanger.

6.1 Applicants' second witness (Ngwenya) recalled that Shezi, the trade union official, had come to the mission on two occasions, and that on the second occasion, being 9/10/97 on her version, this meeting had become rowdy and people wanted to assault Shezi.

6.2 She also insisted that she had joined the union on 9/10/97, and that Joosten had insisted that Applicants sign the contract and resign from the union.

6.3 It was put to the Applicants that a meeting had been held on 7/10/97 and that a senior mission staff member, one Stegan had addressed Applicants and others about this need to formalise the working relationship between the mission and those living and working there, and that after their contracts were produced, Applicants declined to sign them and left of their own free will. Both witnesses denied this.

6.4 It was also put to them that they had failed to start work again on 27/10/97 following this agreement, which they denied.

7.1 Shezi, the General Secretary of NAFAWU gave evidence. He said he heard from workers who worked near the mission that mission employees wished to join the union, and he obtained a list of what he believed to be potential members, being some 50 people from the mission.

7.2 He said that only 6 had joined, and all 6 had been dismissed. He knew of 4 others who wished to join.

7.3 He said he attended two meetings at the mission. He was extremely vague on dates and claimed he had epilepsy induced memory failure. He said he thought the first meeting was on 2/10 and the second one on 9/10/97.

7.4 With regard to the second meeting, he said the problem arose during the course of the

meeting, when some employees demanded to know how their names had appeared on the list of potential members.

7.5 He said that after this second meeting, the 6 women who had joined came to him and said that they had been given documents to sign and when they refused they were made to leave work.

7.6 He said that after it had been arranged with the mission that they return to work on 27/10/97, they did so but were again told to sign the document or leave work, and that thereafter the matter had been referred to the CCMA..

7.7 He conceded that there was documentary proof of his meeting of 2/10/97 and none for the meeting of 9/10/97.

7.8 He argued that he had referred a dispute with Respondent to the CCMA on 3/7/97. This related to a meeting held in July 1997. In the dispute referral, the union alleged that the meeting held by the union on the Respondent's premises had been attended by management officially and that workers had been chased away and that he Shezi, had been intimidated.

7.9 It was put to him that the respondent had a long relationship with the union, and that if it was going to victimize employees for being union members, it would have done so in July. He replied saying that the Respondent did not, at that stage, know who the union members were.

7.10 He was asked why the union joining forms were dated 2/10 and 3/10/97, if the workers had joined on 9/10/97 and gave a series of vague and unsatisfactory answers, and ended up saying that he did not know why they were dated 2/10 and

8. The respondent called 3 witnesses, being Amon Sibisi, a senior member of the missions leadership, the farm manager, Dietmar Joosten and an administrator, Katherina Schlenker.

9.1 Sibisi gave some background to the missions work, saying that aside from its various projects, farming, dairy etc, it provided spiritual ministries to large numbers of people with social problems. He said many of these people came to the mission for assistance and often ended up working for the mission on a voluntary basis for varying periods of time. He said it was often difficult to distinguish between people who worked for this mission and those seeking help there. He said that in September 1997, Respondent felt the need to regularise the arrangement that it had with workers and volunteers, and accordingly had a document drawn up (in English) by a labour consultant, which he, Sibisi, translated into Zulu. This document being annexure Al and A2, to the paginated pleadings, differs fundamentally in meaning from the original English version, being Annexures Bi and B2 (see paragraph 3.9 and 3.10 above). When questioned on the differences in meaning. Sibisi said that he had "tried o do what I thought was best" and that he had had "no malicious intent".

With regard to his relationship with the trade union, he said he had met Shezi at a meeting

held at the mission on 3/7/97. He said after the meeting of 3/7/97, the union had declared a dispute with the CCMA, alleging that Respondent's officials and "patients" had chased the Respondent's employees away from the Respondent's employees away from the meeting, and had intimidated union officials, including the union's General Secretary, Shezi. Sibisi said that this dispute had been resolved and that a date had been set for another meeting.

9.2 He said on 25/8/2000 that he received a letter from the union in which it was alleged that after the aforesaid dispute had arisen, Respondent had given unnamed members of this union notice of termination of their services. In the letter, the union threatened to take legal action against the Respondent.

9.3 He said a further meeting, was arranged for 2/10/97, and that unlike the first meeting, he and Rev Stegen had not attended the meeting.

9.4 He confirmed that some days after this meeting, he had received a letter, on 10/10/97, from the union, in which it was alleged that ten members had been dismissed, and that thereafter, a dispute was referred to the CCMA, alleging dismissal for trade union activity. The union suggested a meeting to attempt to resolve the matter and a meeting was held on 24/10/97, at which" it was agreed that the applicants would return to work on Monday 27/10/97.

9.5 On 27/10/97, it was reported to Sibizi that the Applicants had not turned up for work, and accordingly a letter was addressed to the union informing the union that Respondent regarded Applicants as having "Terminated their own services."

10.1 In cross examination, Sibisi agued that the Applicants were different from the volunteer workers in that they had been paid a fixed daily amount since 1993, and that a contract had never been formulated for them, and that the first time that the Respondent had considered formulating a contract for them was after the date of the trade union's intervention in the work place.

10.2 At this point in his evidence he gave a number of rather enigmatic replies to the questions concerning the timing of the contracts and the intervention of the trade union into the work place. On more than one occasion he used words such as "we live in a changing country". In answer to the question: "was the introduction of the contract spurred on by the changes in the country?". He answered: "We felt that things had to be put down on pen and paper." In answer to the question from the Court as to why Applicants, who were permanent employees, were given contracts to sign in which they acknowledged that they were volunteers, without a fixed daily rate he said that he had fully expected management to formulate a different sort of contract for the category of employees that Applicants fell into, and that he would not understand why this was not done. He said that the appropriate person to answer those sorts of questions was Dietmar Joosten, the farm manager.

10.3 He also agreed, when it was put to him in cross-examination, that it was "strange" that, after having been requested to sign the contracts, the applicants had decide to quit their jobs.

10.4 When he was asked why the Respondent had not pursued them and explained to and

explained to them that there was no necessity for them to leave their jobs, he said "something snapped between us and them."

10.5 It was then put to him by the Applicants attorney, Mr Ngcobo, that it was even more strange that, having left their jobs of their own accord, that they should go to the trade union and complain of having been dismissed. In answer he said that "something snapped, those days were difficult", and "it was a strange event." He followed this up by saying; "Before we talked to them man to man, or man to woman, and then it was through the trade union."

10.6 Reference was then made to the letter of 28/10/97, sent by Respondent to the union, advising that Applicants had "terminated their (own) services." It was put to him that the Respondent had done this with undue haste. Sibisi said in reply;

"Something snapped, these were unusual circumstances, the workers were talking to us through the union and we wanted to show the union that these were the circumstances, it was the first time we had a third party speaking to us."

10.7 He was asked if he was upset by the fact that he was speaking to the workers through a third party, and he replied "it surprised me."

10.8 It was then put to him why, if the Respondent enjoyed such close amicable and Christian relations with the Applicants, why it could not have waited 3 days until the end of the month

before writing the letter of 28/10/97, and he replied, "yes we could have waited a week, a month, a year, but in the case this case the point had been made."

10.9 It was then put to him that the workers had again come on the 27th, had tendered their services and had again been told to sign the contracts and resign from the trade union. He denied this was the case.

10.10 He also said in cross-examination that he had been given a list of what he believed were union members, prior to the meeting of 2/10/97. In answer to a question concerning this document and what he believed it to be he said in cross-examination; "My fears were confirmed" When he was asked why he had said this, he answered; "My gut feeling was that I didn't think that all those people could be members of a union. I know the people, and that they would choose to deal with us on a direct basis, not through a trade union."

10.11 It also emerged in cross-examination that Respondent conceded that it was the Applicant and three other workers had asked for an increase in early 1997, and that three other persons had their services terminated. It was put to Sibisi that these three employees had joined the trade union, and had refused to sign the contracts. Insofar as it was the Applicants version that one of the these three was Joseph Dindi, Respondent said that Dindi was still employed by Respondent.

16.1 Respondent's following witness was the farm manager Dietmar Joosten. Only the material aspects of his evidence will be summarized. He confirmed that all Applicants had asked him

for an increase. He said that when he had received the contracts from the management on 6/10/97, he had asked an employee by the name of Maria to explain the documents to them, and that the following day, he had gone to the Applicants to ascertain what their response was to the signing of the contracts. Their response, according to Joosten, was that they would not sign, and that they would simply leave their employment. He denied having made their continued employment conditional upon the signing of the contracts, and resigning from the union. He said he waited for the Applicants to return on 27/10/97, but they did not arrive.

11.2 He said two of the Applicants had since worked for short periods on the farm.

11.3 He said that he considered the Applicants to have been permanent employees, and, unsolicited, he added that they were not "togt". When it was pointed out to them that the Respondent's pleadings described the Applicants as "togt" workers, he contrived to say that a "togt" and a permanent worker was the same thing.

11.4 He said that on the day after the Applicants refused to sign the contract, they had decided to leave their employment, and that he had pleaded with them to stay. It was put to him that this aspect, i.e the issue of him pleading, had never been put to the two Applicants who had testified, and that he (Joosten) was making it up, which he denied.

11.5 He confirmed that he had the right to hire and dismiss people.

11.6 The evidence of Sibisi was out to him viz: that he (Sibisi) had expected that another form of contract was to be drawn up and negotiated with permanent employees and that Sibisi had implied that this would fall within Joosten's responsibilities. Joosten said that he had no intention of entering into another contract with permanent employees.

12.1 Respondents final witness, administrator Katharina Schlenkber, said that her computer records, drawn from information given to her by Joosten, indicated that two Applicants had been employed on a short term basis after October 1997. She also said that as far as she was aware, Joseph Dindi had never left Respondent's employ. She also confirmed that the Applicants last day of work was 7/10/97, according to her records.

ANALYSIS OF EVIDENCE

13.1 Mr Ngcobo for the Applicants correctly conceded that in view of the fact that Applicants alleged an automatically unfair dismissal, they had a duty to establish that there had been a dismissal, and that once this had been established, Respondent had to show that the dismissal was fair.

13.2 It is clear that there is substantial confusion as to the question of dates of the various meetings. There was a discrepancy between the evidence of the two Applicants who testified as to when the meetings took place, and Mr Shezi's evidence served only to confuse the matter further. I further obtained the impression from Applicants' evidence that they

appeared to believe that they ought to be consistent in their evidence by insisting that they were dismissed on the 10/10/97, because this was claimed in the pleadings. I do not intend to traverse all the various discrepancies with regard to the question of the dates of the various meetings. These things took place two and half years ago, the persons involved are unsophisticated rural labourers and their inabilities to recall proper dates and their insistence upon obviously incorrect dates, does not in any way impact negatively upon their credibility. I accept the evidence of Respondent and find that the meetings were on 3/7/97 and 2/10/97, and that the Applicants' last day of work was 7/10/97.

13.3 The two Applicants gave their evidence in a straighiforward way and corroborated each others evidence in all material respects. Mr Scott suggested that they corroborated each others versions on one aspect so well that an inference that had to be drawn was that they had colluded in giving this evidence, and that therefore it was false. I do not agree, and in any event, that particular piece of evidence concerned a peripheral issue viz: how Joosten treated his labourers generally.

13.4 I agree with Mr Ngcobo for the Applicants that the probabilities overwhelmingly support Applicants' version, and that the Respondent's version does indeed defy logic.

14.1 In terms of the pre-trial minute this court is enjoined to decide whether the termination of Applicants' employment constituted an automatically unfair dismissal on two grounds:

(i) As a result of their membership of NAFAWU.

(ii) For refusing to sign the contract of employment.

14.2 As I have already indicated, this must be regarded as being read disjunctively i.e the court is not obliged to make a finding on both counts, although nothing prevents it from doing so.

14.3 In my view these two matters are so inextricably interconnected, that I believe that if this court made a finding in favour of the Applicants as per (ii) above, dismissal for refusing to sign the contract then, taking into account in the probabilities, a finding in respect of (i) above would necessarily follow.

15.1 It is common cause that the Applicants approached Joosten for an increase in early 1999, and were turned down. Applicants had worked for Respondent for several years, and at no stage had it ever been contemplated by Respondent that their contractual status be reduced to writing. It is also common cause that they were employed in a different capacity to other persons residing on and sometimes working for the Respondent. I say this notwithstanding Sibisi's transparent attempts to blur the lines between Applicants and Joosten's faintly ridiculous insistence that permanent workers and "togt" workers were the same thing.

15.2 The trade union entered the scenario in July 1997. It is common cause that there was substantial hostility surrounding its appearance on the scene, although there was no direct evidence that Respondent's senior staff had participated in or facilitated the union's negative

reception. Nevertheless, it was sufficient for the union to refer a dispute to the CCMA alleging that the union's staff had been intimidated and that the workers had been chased away from the meeting.

15.3 This led to a second meeting taking place on 2/10/97. In the interim, certain incidents occurred at Respondents premises between Respondent and unnamed employees, causing the trade union to address a letter to Respondent, complaining of unfair dismissal of union members, on 25/8/97.

15.4 The meeting of 2/10/1997 took place and Applicants formally joined the trade union, and signed membership, or joining forms. Shezi's evidence regarding the differing dates or the forms was evasive and disingenuous, and it is clear that the Applicants joined the union on the 2nd, or on the day after. However, Applicants' case does not stand or fall on Shezi's evidence.

15.6 At this meeting of 2/10/97, there was again a robust expression of hostility against the trade union officials, from people residing within the Respondent' s premises who wished to know how their names had found their way onto the unions potential list of members. Sibisi had to intervene to allow Shezi to leave the premises.

15.7 Thereafter, and on an unknown date nearly October, a general meeting was called by Respondent at which workers, voluntary and permanent, were addressed by Rev Stegen and

informed that it was necessary to formalise their working relationship, and that the workers were to be regarded as voluntary workers, working for "pocket" or "soap" money. At the end of this meeting, almost all those present other than the Applicants, signed the contracts. No direct evidence was led as to who else did not sign the contracts.

15.8 Thereafter, and in all probability on 6/10/97, Applicants were approached by Joosten, given the contracts again, and had the contracts explained to them by Maria, in Zulu.

15.9 In its pleadings, Respondent deals with this meeting as follows in paragraph 3.8 (page 12 paginated pleadings): "Applicants indicated to the Respondent that they were not prepared to sign the contracts and indicated that they would rather cease employment with Respondent."

15.10 Even on its own version, the overwhelming impression is created by this submission, and the evidence of Joosten, that the Applicants were given an option-sign the contracts, or leave. Such an inference is inescapable, and certainly the probabilities hugely favour this version, and not the Respondent's version, which is that Applicants were not forced to sign at all, and merely decided to leave their jobs.

15.11 The latter proposition is ludicrous and I am surprised that Respondent pursued it in the presence of so much evidence to the contrary.

15.12 Moreover, Applicants then took themselves off to their trade union, and complained that they

had been unfairly dismissed for refusing to resign from the union. The union duly acted on this and wrote to the Respondent and filed a referral with the CCMA, alleging an automatically unfair dismissal.

16.1 These last two issues are common cause and are entirely consistent with the Applicants' version of the events. There is some discrepancy between the Applicants' and Joostens' evidence as to precisely what happened at the meeting on 6/7/97, when Maria was present, and when Joosten returned to check with the Applicants as to what their attitude was to the signing of the documents. Bearing in mind my earlier comments concerning the confusion about dates, these discrepancies are not in anyway significant. Again Respondents own version corroborates and supports the Applicants version - if no negative consequences flowed from refusing to sign the contracts, why should Joosten make a specific point of again meeting with Applicants to ascertain what their attitude was to the signing of the contracts?

16.2 In circumstances where the probabilities so overwhelmingly support the Applicants version, it is not necessary to comment on the respective credibility of witnesses, but I shall nevertheless make one or two remarks.

16.3 Sibisi was quite transparent in his antagonism to the trade union, and his various comments in this regard have been catalogued above. When he says that Respondent had no problem with the trade union, I simply do not believe him. The agreed facts and the probabilities belie this, and I find him to have been untruthful. Joosten was ever more disingenuous and

evasive. Sibisi deferred to Joosten in matters of Labour relations, and this is clear when he says that he had expected Joosten to enter into a different sort of contract with permanent workers. Joosten on the other hand portrayed himself as a humble servant of management, who merely carried out their instructions without any knowledge or understanding as to why he was doing so. I have no doubt that he was not telling the truth about the events of 6th and 7th October and on 27th October, when he said Applicants did not show up for work. In fact, the evidence and the probabilities support the view that Joosten was the driving force behind the introduction of the contracts and the decision to dismiss those who refused to sign them.

16.4 I therefore find that Joosten did make Applicants further employment contingent upon them signing the contracts, and resigning from the trade union.

16.5 Nowdays one seldom has the opportunity to see a "contract" as one sided and vague as this, and it is reminiscent of the sorts of documents which were prevalent in the pre-industrial era of master and servant.

17.1 Mr Scott argued that even if the court did find that there had been a dismissal brought about by contractual coercion, that this was not "a matter of mutual interest between employer and employee" within the meaning of section 187(1)(c), and therefore an automatically unfair dismissal had not taken place.

17.2 Section 187(1) (c) reads as follows:

"(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee,* acts contrary to section 5 or, if the reason for the *dismissal* is

(c) to compel the *employee* to accept a demand in respect of any matter of mutual interest between the employer and employee"

17.3 Section 5 prohibits victimisation for trade union activities. Section 5 (2) (c) (iv) prevents an employer from prejudicing an employee because of his/her refusal to do something that an employer may not lawfully require an employer to do.

17.4 I do not understand Mr Scotts inability to catergorize this issue as one of mutual interest between employer and employee. To put such a "contract" before a permanent employee and to require her to sign it on pain of dismissal (for that is my finding) falls four square within the parameter of section 5(2) (c) (iv) and section 187(1)(c), in my view. The cases he quoted relating to disputes of right and of interest do not assist him. A "matter of mutual interest as between employer and employee" as per section 187, can clearly in my view be constituted by a rights or an interest dispute. Du toit et al Butterworths 1998 2nd Edition The new Labour Relations Act, are of the view that "a matter of mutual interest must be construed widely to include all matters arising in the employment context. (At 316). This is an eminently sensible approach.

17.5 Accordingly there is no doubt in the mind of this court that Applicant has shown that a

dismissal took place and that such dismissal falls within the category of automatically unfair dismissal as defined in section 187 and section 5 of the LRA.

18.1 I am also of the view, for the reasons given above that the probabilities overwhelmingly favour the view that, inextricably bound up with the contract issue, Respondent also required Applicants to resign their membership of the trade union, and dismissed them for refusing to do so. In view of ;

Sibisi's palpable antagonism to the trade union, which he expressed in his evidence;

2 the fact that Respondent had never before considered it necessary to regulate its workers contractual relationships, and only deemed it necessary to do so once a trade-union appeared on the scenario;

3 the fact that the six person who joined the union were the six persons who were dismissed;

4 Applicants' evidence to the effect that they were dismissed for this reason;

18.1.5 The fact that the trade union followed up such allegations with a letter and a CCMA referral;

There is, I believe, no other rational conclusion that this court can come to, than that referred to in 18.1 above.

19. In the circumstances there will be Judgement for the Applicants, with costs. Respondent is to pay each of the Applicants the sum of R 5 184-00 as per clause 5 of the pre-trial minute,

being 24 months wage calculated in terms of section 193(3) of the LRA.

LYSTER A J

: Mr I B G Ngcobo of of I BG Ngcobo & Partners

nt: Mr R N Scott of Austen Smith Attorneys

13-15 March 2000

t: 31 March 2000