

SOUTH AFRICA / JUDGMENT

Ngcobo and Others v Blyvooruitzicht Gold Mining Company Ltd (J1178/98) [1999] ZALC 64 (28 April 1999)

[1999] ZALC 64

COURT

Labour Court

BEFORE

de Villiers

CASE / FILE NUMBER

J1178/98

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: J1178/98

In the matter between

Mlungisi Ngcobo First Applicant

Jackson Mapheto Second Applicant

Abie Ntutu Third Applicant

Kabi Mohoase Fourth Applicant

Phillip Malie Fifth Applicant

Michael Sekoboto Sixth Applicant

Paul Noko Seventh Applicant

Dumisane Matiwane Eighth Applicant

and

Blyvooruitzicht Gold Mining Company Ltd Respondent

JUDGMENT

de VILLIERS A J

- [1] This is a referral in terms of section 191(5)(b) of the Labour Relations Act 66 of 1995 (“the Act”) for the reinstatement of the eight Applicants in their employment with the Respondent following the termination of their employment contracts on 22 January 1998.

Preliminary

Issues

Joinder of Applicants Five to Eight

- [2] The original Statement of Claim reflects the names of the first four Applicants only. The Certificates of Outcome of Dispute Referred for Conciliation reflect the names of the First Applicant (under Reference Number GA27810), the Fourth Applicant “and two others” (under Reference Number GA 26670), the Sixth Applicant “and two others” (under Reference Number GA26906) and the Seventh Applicant “and two others” (under Reference Number GA27350).
- [3] In chambers prior to the commencement of the proceedings, the First Applicant advised that the Applicants had intended to add the names of the Fifth to Eighth Applicants to the list which appears on the Statement of Claim, but that the Court registrar had advised that this was not necessary and that they could add the other names when the matter came to trial. The First Applicant also advised that the “others” referred to on the Certificates of Outcome were applicable to the Second, Third, Fifth and Eighth Applicants. In Court it was confirmed that the Second Applicant was one of the “others” referred to on the Seventh Applicant’s certificate, that the Third and Fifth Applicants were the “two others” referred to on the Sixth Applicant’s certificate and that the Eighth Applicant was the “other” referred to on the Fourth Applicant’s certificate.
- [4] Because the Respondent did not object to the joinder of the Fifth, Sixth, Seventh and Eighth Applicants and because I am satisfied that all of their rights to relief depend on the determination of substantially the same question of law and facts and that they all have a substantial interest in the subject matter of these proceedings, I ordered that Applicants Five, Six, Seven and Eight be joined as parties in these proceedings in terms of Rule 22(2)(a).

Correction of Citation of Respondent

- [5] According to the Statement of Claim, the Respondent is cited as D V Steyn. However, all further documentation relative to this dispute, including the Certificates of Outcome, cite the Respondent as Blyvooruitzicht Gold Mining Company Limited. In chambers it was agreed that the Applicants’ employer at the date of termination of their contracts of employment and the intended Respondent was the Blyvooruitzicht Gold Mining Company Limited and that the Applicants had erroneously cited that company’s General Manager as the Respondent. Therefore, in terms of Rule 22(4) and (5) I ordered that the Blyvooruitzicht Gold Mining Company Limited be substituted, and be correctly reflected, as Respondent in these proceedings.

Jurisdiction

- [6] The Applicants, in their Statement of Case and during the course of the proceedings, alleged that the Respondent had breached Clause 8 of the Retrenchment Agreement between Respondent and the National Union of Mineworkers (“the union”) dated 10 December 1997, in that the employer had outsourced their jobs to another contractor when that clause prohibits this. The minute of the pre-trial meeting also cites the outsourcing of their jobs as a separate issue for

determination.

- [7] The agreement referred to by the Applicants is a collective agreement (as defined in the Act) which does not provide for a procedure for a dispute about its breach (regarded as a dispute pertaining to its interpretation and application) to be resolved through conciliation and arbitration. Thus, jurisdiction for the determination of this dispute lies with the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) in terms of section 24 of the Act, which requires the dispute first to be referred for conciliation and then, if unresolved, for arbitration.
- [8] I therefore found that this Court does not have jurisdiction to adjudicate this dispute and hence stayed the proceedings with regard

to this aspect of the Applicants’ claim and hereby refer this dispute to arbitration by the CCMA in terms of section 158(2)(a) of the Act.

Application for Absolution from the Instance

- [9] The Respondent placed the onus for establishing the existence of a dismissal as defined in the Act on the Applicants, who began by leading evidence. At the close of the Applicants’ case the Respondent applied for an order for absolution from the instance.

What it asked was for the Court to find that the Applicants had failed to prove, on a balance of probabilities, on the evidence then before the Court, that there had been a dismissal in terms of s186 of the Act.

- [10] For the reasons given by my brother Landman J in *Schmahmann v Concept Communications*

- [1997] 8 BLLR 1092 (LC) I am satisfied that this Court is competent to consider an order of absolution from the instance. At the hearing I dismissed the application and now furnish my reasons.

- [11] The Respondent contended that it never contemplated retrenching the Applicants. What it contemplated was outsourcing the security

function and offering the Applicants alternative work underground. The representative union had agreed to this and persuaded the

Respondent to offer voluntary retrenchment as an alternative to deployment underground. It contended further that the Applicants'

failure or refusal to explore the possibility of continuing in employment in alternative positions underground, their request to be retrenched, and their acceptance of the package indicated that they had elected to terminate the contract of employment.

[12] At the end of the Applicants' case, the only evidence before me was the evidence of the Applicants' three witnesses and the letters from the Respondent terminating their services. The bundle of documents prepared by the parties had not been admitted into evidence nor had any evidence been adduced in support of the Respondents' contentions.

[13] What emerged from the three witnesses' testimony was the following:

13.1. They were summoned to a meeting on 14 January 1998 attended by two management and two union representatives (all the Applicants were members of the union at the time and conceded that the union was their bargaining agent).

13.2. They were advised that their positions as security guards were to become redundant.

13.3. They were told that they were to be given a choice - either they could accept an alternative position working underground or they could take the agreed retrenchment package and leave the employ of the Respondent.

13.4. When they asked the company representatives why they were being retrenched, they were told that management had made the decision.

They then requested the general manager of the mine to address them.

13.5. They declined management's offer of individual interviews regarding the alternative of working underground for various

reasons.

13.6. They were then asked to choose between a package and the alternative of working underground, by way of secret ballot. When the meeting with the general manager failed to materialize, they chose the package in the belief that they could continue their "struggle" against the retrenchment afterwards.

13.7. They were then given letters in which the Respondent terminated their services on 30 days notice.

13.8 All three witnesses denied that they had agreed to the retrenchment or that they had mandated the union to agree on their behalf.

[1] The Respondent based its application for absolution on two legs.

[2] Firstly, it asked the Court to infer from the testimony and the conduct of the Applicants that they had agreed to termination of their services because:

15.1. they had taken the packages;

15.2. they were aware of the Respondent's contentions that there was a representation made by the union to the Respondent that they had agreed (through the union) to voluntary retrenchment (from the Respondent's response to their Statement of Case) and had failed to call a union representative as a witness to prove that there was no agreement between the Respondent and the union;

15.3. until these proceedings, they had not alerted the Respondent to the possibility that their representatives had acted without a mandate.

[3] Secondly, the Applicants, by refusing to attend interviews where the details of alternative employment would be more fully canvassed had, in effect, unreasonably failed to consider the Respondent's offer of alternative employment and had therefore, in effect, repudiated their contracts of employment.

[4] The test for granting absolution is set out in Harms, Civil Procedure in the Supreme Court paragraph O2, at p.417, 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 inquire whether the plaintiff has made out a prima facie case. The application is akin to and stands on very much the same footing as an application for the discharge of an accused at the end of the state case in a criminal trial.

The court has the discretion to grant or refuse absolution from the instance. 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."

[5] The prima facie case which Applicants had to make out in order to avoid an order for absolution was whether the Respondent had terminated their services.

[6] At the end of the Applicants' case there was no evidence before the Court as to whether, in fact, the union had represented to management that the Applicants had accepted a voluntary termination.

At that stage it was a mere allegation made in the Respondent's papers and put to the witnesses as the Respondent's version. I also could not draw any adverse inference from their failure to lead a union witness to testify. In order to draw an adverse inference I would have to find that the only reason why the Applicants failed to call union witnesses to testify was because they would give evidence detrimental to their case (See The South African Law of Evidence, 4th edition, pp. 604-605, and the authorities cited there).

- [7] From the evidence of all three witnesses it is clear that the union has abandoned them - all three testified and corroborated each other's version as to the unsuccessful efforts which had been made in getting the union to assist them. I have no reason to doubt their testimony that they did all that they could to get the union to assist them. The absence of union officials - either as witnesses or as representatives - in these proceedings is not through want of trying on their part.
- [8] At the end of the Applicants' case there was also insufficient evidence before me to enable me to conclude necessarily that by taking the package they had in fact agreed to the termination of employment or waived their rights in any way (See Decision Surveys International v Dhlamini and Others, Unreported Decision of the Labour Appeal Court, Case Number JA3/98). There was also no evidence regarding the reasonableness or otherwise of the offer of alternative employment from which I could conclude that their refusal to explore the offer was unreasonable.
- [9] Finally, the wording of the Respondent's letter to the Applicants terminating their services clearly states that it is the Respondent who is terminating the contract. Evidence as to the context in which this letter was sent was only adduced after the Applicants had led their evidence.
- [10] Therefore, on the evidence before the Court at the end of the Applicants' case I believed that a reasonable person might have found that the Applicants had established a prima facie case that the Respondent had terminated the contracts of employment and thus that there was a dismissal as defined in s186(a) of the Act.
- [11] The Respondent's application for absolution from the instance was therefore dismissed.

DETERMINATION

OF THE DISPUTE

- [12] In order to determine the dispute, two issues have to be addressed:

Were the Applicants dismissed?

Was the dismissal fair?

Were the Applicants dismissed?

- [13] The dispute relates to the termination of the Applicants' contracts of employment as security guards on 22 January 1998 following an agreement between the Respondent and the union regarding the restructuring of the security function on the Respondent's mine.

- [14] The Applicants allege that they were unfairly "evicted from their jobs".

- [15] The Respondent alleges that:

28.1 It consulted and reached agreement with the Applicants' union, duly recognized as the bargaining agent of the Applicants, that:

- (a) the entire security function should be outsourced;
- (b) the Applicants would be offered alternative positions underground;
- (c) those Applicants who did not want to avail themselves of the offer to work underground could take voluntary retrenchment by accepting the agreed package;

28.2 The Applicants did not avail themselves of the opportunity to explore the possible alternative positions and elected to take the packages.

[16] The Respondent thus denies that it terminated the contracts of employment of the Applicants and places the onus on the Applicants to establish the existence of a dismissal as defined in s186.

[17] The following facts are not in dispute:

30.1 At all material times, the Applicants were members of the union and it was their bargaining agent.

30.2 The Applicants attended a meeting on 14 January 1998 with the Respondent's two representatives and two union representatives

at which their manager advised them that the entire security department was to be restructured and the security function outsourced to Goldfields Security, an independent contractor.

30.3 At that meeting the Applicants were told that the Respondent wanted to give each of them alternative employment underground on the mine.

30.4 Those who did not want alternative employment could take, as an alternative, the retrenchment package agreed to between the

Respondent and the union.

30.5 The Applicants were told that each employee would be interviewed separately to advise management as to what they wanted to do.

30.6 All security personnel (approximately 50), including the Applicants, took the agreed package and were paid their provident fund benefits.

30.7 On 22 January 1998 the Applicants received letters confirming the termination of their contracts of employment with immediate effect.

[1] The Applicants contend, and the evidence of their three witnesses corroborates their version, that they made it clear to the Respondent's representatives at the meeting on 14 January 1998 that they wanted to meet the Respondent's General Manager before making any decisions regarding the alternative or the package. They took the package and accepted the letters terminating their services in the belief that they could fight their dismissal after

the meeting with the General Manager failed to materialize. They argued that at no stage did they voluntarily agree to terminate their services with the company, either directly or through their union representatives. Their evidence, when cross examined as to why they did not consider the offer of alternative employment, was that, before exercising the option, they wanted to know why they were being “removed” from employment and that they were too old, too sick or too scared (having been involved in disciplining other staff members who work underground) to consider the alternative.

- [2] According to Raymond Lubhedze, the only witness for the Respondent who attended the meeting on 14 January 1998, the Applicants did indeed ask to see the General Manager but, after a caucus, their representative at the meeting, the First Applicant, advised the Respondent’s representatives that:

they wanted to be retrenched like everyone else had been;

they wanted the word “voluntary” deleted from the forms (on which they were to indicate their preference vis á vis alternative employment or the acceptance of the package);

they wanted their provident fund payout ready on the day they got their “retrenchment envelopes” (the Court understood this to mean the letters terminating their employment);

they wanted to leave as soon as possible.

- [3] The Respondent’s chief personnel officer, Gabriel Maluke, the author of the document dated 15 January 1998 (the contents of which corroborate the Respondent’s version) confirmed that this is what he had been told by the Respondent’s two representatives and the two union representatives who had attended the meeting.
- [4] The Respondent’s Human Resources Manager, Willem Boshoff, confirmed the minutes of a meeting between himself and the branch committee of the union (which included the two union representatives who had signed the document dated 15 January 1998) at which the union officials had advised that the security personnel would “like to have their packages as soon as possible” and that they would like to fetch their provident fund benefits. (The First Applicant confirmed that he had gone to the union’s offices with the Respondent’s representatives to arrange for the prompt payment of the provident fund monies prior to the date on which they left the services of the Respondent).
- [5] Boshoff also testified that it was not the intention of the Respondent, at the time the proposal to outsource their positions was made, that the Applicants’ contracts of employment would be terminated. He testified that during a meeting with the union on 5 January 1998 the union agreed that the positions could be outsourced and that the affected employees should be interviewed to explore the possibility of their being suitable for alternative employment underground. The option of allowing the Applicants to take the package instead was a request made by the union and agreed to by the company (a) because a number of employees had previously requested voluntary retrenchment and (b) as a quid pro quo for agreeing to the outsourcing of the security function, since the agreement

between the union and the Respondent, dated 10 December 1998, at Clause 8 prohibits this.

- [6] The critical question for decision is whether the Applicants have adduced sufficient evidence to persuade the Court that the Respondent, in the words of Landman AJ (as he then was) in *Schmahmann v Concept Communications Natal (Pty) Ltd (supra)* effected or caused the termination of the employees' services or whether the Applicants and/or their recognized bargaining agent were responsible

for the termination.

- [7] I am satisfied, on a balance of probabilities, that the Respondent and the union agreed that the work done by the Applicants should be outsourced and thus that the Applicants are bound by that decision. The evidence of Boshoff and Maluke, who attended the meeting on 5 January 1998, confirms the agreement. I also accept that, at that stage, the Respondent did not contemplate dismissing the Applicants. Boshoff testified that the Respondent wanted to explore the possibility of providing the security personnel with alternative

positions but did not take the matter further when the security staff elected to take the package. He testified that he was, in fact, surprised when the security staff rejected the option of further alternative employment in favour of taking the package.

- [8] I also agree with the Respondent that the Applicants' version - that the meeting on 14 January 1998 went no further than their demand to see the General Manager and that they at no stage indicated, either directly or through their agent, the union, that they were willing to accept the package and leave their employment - when weighed against the totality of the evidence is improbable. The evidence of Lubhedze as to what transpired at the meeting on 14 January 1998, coupled with the evidence of Maluke and the document dated 15 January 1998, persuades me towards acceptance of the Respondent's version that the Applicants rejected the offer of exploring the possibility of being deployed to work underground and indicated a willingness to have their services terminated on certain conditions.

- [9] Where the Respondent and I part company is in its contention that by failing to explore the Respondent's offer of alternative

employment and by electing to take the package, the Applicants were responsible either for repudiating their contracts of employment or agreeing to the termination of their contracts of employment.

- [10] On the Respondent's own version, including the documents which it produced at the hearing, the security personnel were clearly not happy about their positions becoming redundant. From the evidence of Lubhedze and the minutes of the meeting on 14 January it is also clear that they refused to volunteer for retrenchment. The memorandum typed by Maluke and confirmed by the signatures of the two union officials does not show that the Applicants or their officials agreed to their contracts coming to an end. It merely confirms that they "wanted to be retrenched like all the other people who have been retrenched on the mine". Boshoff's evidence, and the document which it supported - the minutes of the

meeting between himself and the union's branch committee on 21 January 1998 - also does not show, as the Respondent suggested in its closing statement, that the Applicants had volunteered to end their contracts of service. All that evidence proves is that they wanted the packages and pension fund payouts as soon as possible and wanted to leave as soon as they could.

[11] The evidence, taken as a whole, leads me to the conclusion that:

41.1 The Respondent offered voluntary retrenchment to the Applicants as an alternative to their exploring the possibility of working underground.

41.2 The Applicants refused to take voluntary retrenchment, for whatever reason (Lubhedze suggested that it may have been because they did not want to hinder their chances of future re-employment) and stated that they wanted to be in the same position as all other employees who had been retrenched by the Respondent.

[12] In other words, they were making a counter-offer to the Respondent the content of which was that they were not interested in working

underground or volunteering to be retrenched but that they would accept the termination of their services by their employer on

condition that they received the agreed severance package and their provident fund benefits and could leave as soon as possible. Their representatives confirmed this to Maluke. The Respondent then accepted the offer and terminated their contracts as per the letter dated 22 January 1998. Hence, the Respondent effected the termination of the contracts.

[13] The Respondent argued that the Applicants had unreasonably refused to explore possibilities for re-deployment, and thus had repudiated

their contracts of employment as per Van Zyl AM in Thubane v Hendlers Industrial Carriers

[1997] 2 BLLR 131 (IC), where the industrial court found that if a redundant employee refuses to accept a reasonable (my emphasis) alternative post, he is deemed to have repudiated his contract of employment and is therefore not dismissed.

[14] There is insufficient evidence regarding the unreasonableness of the Applicants' refusal or the reasonableness of the alternative

post for me to make a finding in this regard. The reasons given by the Applicants for their refusal to consider employment underground

appear, prima facie, to be reasonable. Lubhedze's evidence also suggests that the options were given in fairly stark terms - either you agree to work underground or you take a package. Although the intention of the Respondent may have been to explore possibilities for re-deployment in the proposed one-on-one interviews, this does not

appear to have been fully explained to the Applicants. As far as they were concerned it was an either/or decision which they were being called upon to make. Liking neither, and possibly fearing that they would be deprived of whatever benefits might flow from a retrenchment at the instance of the Respondent if they agreed to voluntary retrenchment, they asked for the employer to terminate their services and to give them the severance package agreed to by their union. The Respondent then complied with their request, paid them the package and terminated their services on 22 January 1998.

[15] The Respondent suggested that the mere acceptance by the Applicants of their retrenchment packages was an indication that there was an agreement in respect of that retrenchment. The Labour Appeal Court has made it clear that acceptance by employees of retrenchment

packages does not necessarily indicate a waiver of rights. In *Decision Surveys International (Pty) Ltd v J Dlamini & Others*, supra, the LAC held that the evidence of the employee that he had not intended to abandon his rights by signing an acceptance letter, if unchallenged, was sufficient proof that he had not abandoned his right. I am of the opinion that the principle applies equally to the present case. The Applicants' acceptance of the package must be weighed against their explicit denial, Lubedze's evidence and the Respondent's minutes, all of which suggest that they did not volunteer to have their contracts of employment terminated.

[16] I therefore find that the existence of a dismissal as defined in s186(a) has been established in that the Respondent terminated the Applicants' contracts of employment.

Was the dismissal fair?

[17] At the end of the hearing of evidence I asked the parties whether, in the event of my finding that a dismissal had taken place, either party would wish to place any further evidence before me in order for me to make a determination as to whether the reason for the dismissal was a fair reason and whether it was effected in accordance with a fair procedure. Both parties agreed that no further evidence would be forthcoming and that I could make this decision based on the evidence before me.

[18] It is clear from the evidence that the reason for the dismissal was based on the operational requirements of the Respondent. In order to determine the fairness of such a dismissal the Court must determine

(a) whether there was, in fact, an economic, technological,

structural or similar need which led to the termination and (b) whether the provisions of s189 had been complied with prior to

termination.

- [19] Boshoff testified that the Respondent was in the process of a major restructuring and downscaling exercise and had reached agreement with the Applicants' union on the need to downscale operations and to restructure certain functions and that it had negotiated a retrenchment agreement with the union in respect of those of its members who would be affected by the retrenchments.
- [20] Because of the closure of vast sections of the plant, a number of security positions had become "factually redundant". In addition, the Respondent wanted to update the security around the metallurgical department with the introduction of hi-tech surveillance equipment together with a more "C.I.D." approach. Instead of doing this on a piecemeal basis, the Respondent wanted to outsource the entire security function to the contractors who were already engaged in security operations on the mine.
- [21] At a meeting with the union on 5 January 1998 the issue was deliberated at length, according to Boshoff, and finally, after a caucus, the union agreed that the security personnel could be re-deployed but that, because some personnel had already requested voluntary retrenchment, all security personnel should be given the opportunity to apply for voluntary retrenchment as an alternative. It was further agreed that personnel should be interviewed individually to assess their capability relative to the re-deployment and that the entire process would be monitored in accordance with the terms of the retrenchment agreement.
- [22] Acting on feedback from the union (as per the meetings on 14 and 21 January 1998 which I have dealt with above), the Respondent paid all security personnel the agreed package and issued letters terminating their services
- [23] Maluke confirmed the essence of the decisions taken at the meeting on 5 January 1998 and the content of the document dated 15 January 1998, in which the union confirmed that the security personnel wanted to be retrenched.
- [24] The Applicants, who agreed in response to questions put to them in the pre-trial conference and at the hearing that they were members of the union and that the union was their representative at the time, are bound by the agreements between the Respondent and the union and to the representations made on their behalf by the union to the Respondent, even if they did not give a specific mandate to the union, both in terms of the ordinary rules of agency and in terms of the principles of collective bargaining and majoritarianism. As Grogan (Workplace Law, 3rd ed., 1998, at p.203) points out:

"The basis for a union's authority to conclude agreements to which some of its members might object is the principle of 'majoritarianism'. In other words, a union does not require a specific mandate each time it decides to act on its members' behalf, and the employer, consequently, does not have a right independently to inquire into whether a union has a mandate on each occasion it deals with the union."

[14] In addition, the Courts have made it clear that the very principle of majoritarianism implies that a union may take decisions which are against the direct interest of a minority. In *Ramolesane & Another v Andres Mentis & Another*

(1991) 12 ILJ 329 (LAC), at 336A, Van Schalkwyk J said the following:

“By definition, a majority is, albeit in a benevolent sense, oppressive of a minority.

In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforceable against them also.”

[15] The only evidence which suggests that the Respondent knew, or ought to have known, that the union was acting contrary to the mandate given by the Applicants was the Applicants’ version as to what occurred at the meeting on 14 January 1998, namely that the meeting went no further than their requesting to meet with the General Manager. If this were so, then perhaps the Respondent could not have relied on the representation made by the union in the document dated 15 January 1998 because it would have known that that was not what the Applicants, or indeed the majority of the security guards affected by the decision, wanted. Its subsequent action in terminating the contract might then have been suspect and the Applicants may have been justified in claiming that the termination was unfair.

[16] But I have already rejected the Applicants’ version on this point for reasons set out above and there is no other evidence before the Court which indicates that, prior to the termination of their employment, the Applicants advised the Respondent, either directly or indirectly, that the union did not have a mandate to make agreements with or representations to the Respondent on their behalf even though they were aware that their employment with the Respondent was to be terminated. It was only after their services had been terminated that they took steps to complain directly to the Respondent. When the Respondent terminated the Applicants’ contracts on 22 January 1998 it was acting on a representation made by the union (in the document dated 15 January 1998 and at the meeting on 21 January 1998) upon which it was entitled to rely. (See, for example, *Ramolesane & Another v Andres Mentis & Another*, supra, and generally on agency see *Visser and Potgieter Estoppel: Cases and Materials*, 1994 chapter 6 pp. 286 - 300 but particularly at p. 290 where the authors cite *Silke on Agency* 438 as follows:

“Any person who by words or conduct represents (or permits to be represented) that another person professing to bind him has authority

to do so, is bound by the acts of the latter to any person to whom the profession is made and who so acts on the faith of that

representation as to prejudice him in the event of such authority being subsequently denied; provided that the representation, whether by words or conduct, was of such a nature that it could reasonably have been expected to mislead.”

- [17] I am satisfied that what took place at the meeting between the union and the Respondent on 5 January 1998 complies with the provisions of s189 of the Act which requires an employer to consult with, amongst others, “any registered trade union whose members are likely to be affected by the proposed dismissal”.
- [18] Having made out a case for outsourcing the Applicants’ positions, which was based on a real need (to secure the metallurgical plant more effectively), and which was accepted by the union, the parties (the union and the Respondent) deliberated upon viable alternatives and reached agreement on what should be done. When the Applicants rejected the alternatives and requested to be retrenched, which request was conveyed to the Respondent by its own employees and confirmed by the union, the Respondent complied with this request, terminated the Applicants’ and the other security guards’ services and paid the severance benefit agreed to between it and the union, thus complying with s189(2)(c).
- [19] If the Applicants believe that the union misrepresented their position, or did not have a mandate to speak on their behalf, their claim for any loss suffered as a result lies against the union. The Respondent was entitled to rely on the representations made by the union and to act on them by virtue of the recognition agreement between itself and the union and the Applicants’ membership of the union at the time.
- [20] The Applicants tendered documentary evidence, which was not disputed by the Respondent, that the Respondent had settled a similar dispute between itself and two other employees by agreeing to send a “reference introductory letter” to the security

contractors to whom the Applicants’ positions were outsourced. The Applicants tendered this evidence in the belief that the

Respondent had re-employed the two employees (thus calling into question whether there was a need to retrench). However, it is clear from the document and from the evidence of Boshoff that the dispute with these two employees was settled on the basis that the Respondent would merely introduce them to the contractors who could then employ them if they so wished. I am therefore not sure what relevance this evidence has to the Applicants’ case. In any event, all but one of the Applicants are already employed by the contractors.

- [21] I therefore find that the reason for the dismissal was a fair reason based on the Respondent’s operational requirements and that it was effected in accordance with a fair procedure.
- [22] The application is therefore dismissed. There is no order as to costs.

I de VILLIERS A J

Acting Judge of the Labour Court

DATE OF HEARING: 09 - 12 March 1999

DATE OF JUDGMENT: 28 April 1999

For the Applicants: In person

For the Respondent: Mr Pretorius of Neil Pretorius Attorney

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