AFRICAN GRANITE COMPANY (PTY) LTD VS
MINEWORKERS UNION OF NAMIBIA 1993/02/08

Hannah J

LABOUR LAW

Obligation of employer to give certain information to registered trade union in terms of Sec. 50 of Labour Act. Employer need not follow the language of the section. Substantial compliance will suffice.

Obligation of employer to afford "an opportunity to negotiate" mean that employer is under an obligation to enter into genuine negotiations and is obliged to negotiate in good faith.

Pay in lieu of notice. Having regard to definition of "remmune-ration in the Act such pay does not include benefits in kind.

Employee occupying residential premises as part of his contract. As a general rule such employee is entitled to reasonable notice to quit.

IN THE LABOUR COURT OF NAMIBIA

In the matter between

AFRICAN GRANITE COMPANY (PTY) LTD.	**APPLICANT**
and	
MINEWORKERS UNION OF NAMIBIA	**FIRST RESPONDENT**
SECOND TO 45th RESPONDENTS BEING THOSE PERSONS WHOSE NAMES APPEAR IN ANNEXURE "A" TO APPLICATIONS NOTICE OF MOTION	**SECOND TO 45TH RESPONDENTS**

CORAM: HANNAH, J.

JUDGMENT

HANNAH, J. : At the conclusion of the hearing of this matter on 22nd January I made an order in terms of prayer 2 of the Notice of Motion ejecting the second to forty fifth respondents from the applicant's premises at Spitzkoppe and granted certain other ancillary relief. I said that I would give my reasons for making the order at a later date and this I now do.

The circumstances giving rise to the application were essentially these. The applicant is the proprietor of a granite mine at Spitzkoppe and it employed the second to forty fifth respondents in various capacities. I shall refer to these respondents as "the individual respondents". The individual respondents are members of the first respondent, to which I shall refer as "MUN", and on 6th

November, 1991 MUN entered into a recognition agreement whereby the applicant recognised MUN as the representative of those of its employees who were members of MUN in respect of labour related grievances and any other issues subsequently agreed upon.

On 20th November, 1992 the applicant ceased mining operations at its mine because some weeks prior thereto its major customer had cancelled its contract for the supply of granite. The applicant decided that to continue to operate in these circumstances would have been wholly uneconomic. The applicant saw little prospect of being able to continue to employ the individual employees and indeed had informed MUN and the Labour Commissioner by letters dated 13th November, 1992 that in the event of the mine closing it would be necessary to retrench all the individual respondents. As I have said this event did in fact occur a week later on 20th November.

On 17th November representatives of the applicant and MUN met and the applicant's chairman explained that because of the loss of its major customer, the prevailing market conditions for the sale of yellow granite and the large amounts of mined granite already on the mine, it was imperative that mining operations cease with immediate effect. This was unacceptable to the General-Secretary of MUN who maintained that some research into the applicant' s marketing difficulties should be done. The applicant undertook to consult the Ministry of Mines concerning alternative sales opportunities but its stance that

immediate closure was necessary remained the same. It was agreed at this meeting that subject to discussions between the two sides continuing the workforce would go on leave from 21st November until 10th January, 1993 such leave to be the usual annual leave supplemented by special leave. It was in these circumstances that mining operations ceased on 20th November.

The next meeting took place on 27 th November and the applicant's chairman outlined the steps which had been taken following the first meeting to find a solution to the applicant's problems but he said no immediate solution to the problems could be found. The parties then discussed the situation if the mine did not reopen on 11th January and the workforce had to be retrenched. MUN's General-Secretary indicated that there was little prospect of retrenched workers finding alternative employment and considerable hardship would be suffered. He then outlined the demands being made by MUN on behalf of the employees if retrenchment were to take place. The applicant's chairman gave his response and agreed that the applicant would consider those matters upon which agreement had not been reached before making its final proposals. It was agreed that counterproposals would be made by fax to save costs and it was agreed that the General-Secretary would be on the mine on 11th January to consult the workforce regarding the terms of the proposed retrenchments.

By letter dated 4th December the applicant set out its proposals regarding the terms of retrenchment and its

reasons therefor. The letter ended with a request that MUN should respond by 8th December.

The response of MUN is contained in its letter dated 8th December. Its response was to declare a dispute in terms of clause 11 of the recognition agreement which provides as follows:

"11. DISPUTE PROCEDURES.

11.1 Both parties agree to thoroughly discuss and generally to resolve by all possible means any grievances that may arise. Only after such efforts have been made to agreement on such matter, shall either party declare a dispute.

11.2 The party declaring a dispute shall do so by presenting a written notice to the other party which notice shall set out the nature of the dispute.

11.3 A meeting shall be convened within 7 (seven) days of receipt of the notice referred to above for the purpose of endeavouring to settle the dispute.

11.3 In the event of the dispute not being resolved after the above procedures have been followed, the parties may agree to make use of the dispute resolving procedures in the Wage and Conciliation Ordinance, 1952. In the event that the parties agree to refer the dispute to either mediation or arbitration they shall do so as soon as possible.

11.4 Notwithstanding that a dispute may have been referred to mediation or arbitration or a Conciliation Board, the parties may continue to meet and agree to any dispute resolving procedure."

MUN's letter states that the declaration of a dispute was made because of the applicant's "current non-

stand" on the question of notice pay, severance pay, re-employment should the mine reopen and use of machinery in that eventuality which might make certain jobs redundant. I shall deal with MUN's contention that the applicant had adopted a "non-negotiable stand" in due course.

The declaration of a dispute led to a meeting between the two sides on 14th December. At this meeting MUN scaled down its earlier demands on the question of notice and severance pay and modified its demands regarding re-employment. The applicant's chairman agreed to put the revised proposals to his board.

This meeting was followed by a letter from the applicant dated 22nd December but a more important letter is one dated 6th January which, according to the applicant's general manager, was posted on 7th January. Unfortunately it was not received by MUN by the time the individual respondents returned to the mine on 11th January. The letter was a response to MUN's revised demands and while the applicant felt unable to move any closer to MUN on the question of notice pay it agreed to the revised MUN demand for two weeks severance pay. It also made a concession regarding medical examinations in the event of re-employment and suggested that the question of new machinery be discussed once mining operations were recommenced. The letter also spelled out in terms the fact that the individual respondents would be retrenched on their return from their extended leave on 11th January and that the individual respondents would be taken to Swakopmund, where the applicant had its offices, to be

According to the applicant's general manager various attempts were made between 4th and 8th January to contact MUN's General-Secretary both by telephone and by telefax but to no avail. The General-Secretary states that he was in his office from time to time and his telefax machine was operational. The matter therefore remains a mystery.

Coming now to 11th January, 1993, MUN's General-Secretary failed to attend the mine as he had agreed he would do. Whether his attendance would have changed the course of events that day can only be a matter of speculation but it never helps in delicate labour relations when one side fails to adhere to an agreement of this nature.

The individual respondents returned from their leave and were transported to Swakopmund where their shop stewards were informed that the services of the individual respondents were being terminated, that cheques had been prepared together with payslips, and notices of termination would be issued. The General-Secretary admits that cheques were presented together with payslips but denies that the manner in which the amount of each cheque was made up was conveyed to the individual respondents. I find this contention difficult to follow as the payslips, certain copies of which are annexed to a replying affidavit, clearly show how the amount was calculated. One further contention by the General-Secretary, namely that notice in writing was not given on 11th January, is also satisfactorily dealt with

in the reply. Apparently what happened was that the individual respondents were advised by their shop stewards on 11th January not to accept the cheques, pay slips or notices and they accepted such advice; but on 15th January a further attempt was made to hand over the notices of termination and on this occasion the individual respondents accepted them.

To continue with events of 11th January, frantic telephone calls were made to MUN and a meeting was arranged with the General-Secretary that evening at Usakos. He did not attend at the appointed time and the applicant' s chairman left for Windhoek. He was stopped en route by the General-Secretary and there is an acute dispute as to what took place. That dispute cannot be resolved on the papers now before me and I proceed on the basis of the General-Secretary's version, namely that he informed the applicant"s chairman that the individual respondents had stated their intention of returning to the mine to await further developments and that the chairman had replied that he anticipated that negotiations would continue at a later date when he returned from Johannesburg. On the basis of this version it would appear that the applicant had not closed the door on further negotiations and was prepared to adhere to the terms of the recognition agreement which provides, inter alia, that in the event of no agreement on retrenchment being reached and in the further event of the applicant proceeding with the retrenchment MUN may declare a dispute and proceed in terms of the dispute procedure. A dispute had, of course, already been declared and in the event of the parties being unable

to reach a negotiated agreement the next step was to refer the matter for conciliation in terms of the Labour Act, 1992.

To complete the events of 11th January, the individual respondents did indeed return to the mine where they occupied the workers' hostel and it was their continued occupation which resulted in this application being brought as a matter of urgency. The applicant contended that the occupation was unlawful because the contract of employment of each individual respondent had been terminated and the occupation of the hostel was without its consent.

Mr Corbett, for the respondents, accepted that if the applicant could establish that the individual respondents' contracts of employment were lawfully terminated then, subject to one further argument on the question of a notice to quit, they had no right to occupy the hostel, they were trespassers and the applicant was entitled to an order ejecting them. Some argument was also addressed to the question whether the applicant might also be entitled to such an order even if the termination of the contracts of employment was unlawful but it is unnecessary to consider Mr Corbett's submission in this regard because Mr Smuts, for the applicant, was content to rest his case solely on the lawfulness of the termination. His position was that if the termination of the contracts of employment was unlawful then he was not entitled to the relief sought.

It has been necessary to trace the history of the meetings

and communications which took place between the applicant and MUN in order to deal with the first leg of Mr Corbett's argument based on alleged non-compliance with section 50 of the Labour Act. This section provides:

> **"(1) Any employer who intends to terminate any or all of the contracts of employment of his or her employees on account of the re-organization or transfer of the business carried on by such employer or to discontinue or reduce such business for economic or technological reasons, such employer shall -**
>
> **(a) inform -**
>
> **(i) the registered trade union recognized by him or her as an exclusive bargaining agent in respect of such employees; or**
>
> **(ii) if no such trade union exists, the workplace union representative elected in terms of section 65,**
>
> **on a date not later than four weeks before such contracts of employment are so terminated or such other period as may in the circumstances be practicable, of his or her intentions, the reasons therefore, the number and categories of employees to be affected by such intended termination and the date on which or the period over which such terminations are to be carried out;**
>
> **(b) afford such trade union, workplace union representative or the employees concerned an opportunity to negotiate on behalf of such employees the conditions on which, and the circumstances under which such terminations ought to take place with a view to minimizing or averting any adverse effects on such employees;**
>
> **(c) notify the Commissioner in writing of his or**

> her intentions and the reasons therefor, the number and categories of employees to be affected by such intended termination and the date on which or the period over which such terminations are to be carried out.
>
> (2) Any employer who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and on conviction be liable to a fine not exceeding R4 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment."

Mr Smuts was content to accept that any material noncompliance with section 50 would render any termination of a contract of employment on the ground of redundancy unlawful and, for the purposes of this judgment, I will assume this to be so. The question to be considered is, therefore, whether the applicant complied with the section.

The first point made by Mr Corbett in his submissions on section 50 was with regard to subsection (l)(a). He submitted that the applicant had failed to show that it informed MUN on a date not later than four weeks before 15th January, 1993, the date when the contracts of employment were terminated, of its intention to terminate the contracts and the date on which such termination was to take place. He submitted that the applicant's letter dated 13th November fell far short of giving the required information on these matters, that at subsequent meetings the applicant's precise intentions were not clarified nor was a settled date for termination of the contracts indicated and it was not until the letter of 6th January that section 50(1)(a) was complied

...

It is perfectly correct that the applicant[1]s letter dated 13th November does not precisely follow the language of section 50(1)(a) and state that the applicant intends to retrench forty nine employees on such and such a date because the mine has to be closed for economic reasons. What it does state is that -

> ".... a real possibility exists that the mine will have to be closed down for a period of time, the effect of which will be that employees will have to be retrenched."

It then invites discussion on the problems being experienced with a view to finding alternatives to closing the mine and it explains why closure is contemplated. It identifies the employees who will be retrenched in the event of closure and it states that in the event of retrenchments taking place the applicant -

> ".... wishes to effect the retrenchments prior to employees taking annual leave over Christmas."

While it is, as I have said, correct that the letter does not precisely follow the language employed in the section it is, to my mind, clear that it is saying that subject to any alternative course of action being identified in the course of discussions with MUN the applicant intends to close the mine and retrench certain employees and that such retrenchment will take place immediately prior to the

employees taking their annual Christmas leave, a date which was no doubt readily identifiable. In my view, this was substantial and sufficient compliance with the section.

The purpose of section 50 is to bring the employer and the employees' representative together to the negotiating table when the employer intends retrenchments. It may be that the employees' representative will wish to endeavour to persuade the employer that the intended retrenchments, or some of them, can be avoided. In the present case the employer actually invited the employees' representative to engage in such an exercise and for that reason qualified its intentions to some extent. Is it really to be said that when an employer qualifies his statement of intention so as to leave the door open to negotiation this can then be used against him as showing non-compliance with the section? I think not.

If I am wrong in my view of the effect of the letter dated 13th November, the intentions of the applicant were put beyond any real doubt when the parties met on 17th November. By then the applicant was of the view that it was imperative that mining operations should cease immediately and this view was conveyed to MUN. Mining operations did in fact cease three days later on 20th November. If the applicant's intentions were qualified on 13th November they were no longer so on 17th. Also, with regard to the date of retrenchment it must have been clear that in agreeing to give the workforce extended leave from 21st November until 10th January the applicant was postponing the date of

retrenchment from immediately prior to annual leave to immediately thereafter.

Turning now to the applicant's letter to the Labour Commissioner dated 13th November this was couched in very similar terms to the letter sent to MUN and for the reasons already given I am of the view that the letter was substantial and sufficient compliance with section 50(1)(c).

Lastly, it is not without significance that both the letter to MUN and the letter to the Labour Commissioner stated that they were written in terms of section 50 of the Act. There could have been no real doubt in the minds of the recipients that the purpose of the letters was to provide the information required by the section and they would, in my view, have been read with that in mind.

As I have said, the purpose of section 50 is to bring the employer and the employees' representative to the negotiating table and the requirement contained in subsection (l)(b) that the employer shall afford "an opportunity to negotiate" must mean that the employer is under an obligation to enter into genuine negotiations and that he is obliged to negotiate in good faith. This obligation formed the basis of the next leg of Mr Corbett's submission with regard to section 50. He submitted that although the two parties met from time to time and discussed the proposed terms of retrenchment the applicant's letter dated 6th January constituted a refusal to negotiate further and thus evidenced bad faith on the part of the applicant.

Further, that on 11th January the applicant remained resolute that the employees could either take or leave the package being offered and that this was further evidence of bad faith.

In my opinion, this submission is based on too narrow a view of the negotiations which took place between the two sides in November and December. During those two months the two sides met from time to time clearly with a view to resolving the differences which existed between them. This is evident from the fact that they were both prepared to shift ground and make concessions but, unfortunately, the final gap was too wide to be bridged. The applicant obviously considered it had gone far enough to meet MUN's demands and MUN, for its part, considered that the applicant had not gone far enough. It was in these circumstances that the applicant decided that the retrenchment had to be implemented on the basis of its last offer but it by no means followed from this that the matter was finally disposed of. The parties could still have agreed to refer their outstanding differences to mediation or arbitration in accordance with the agreed disputes procedure and it was open to MUN to report a dispute to the Labour Commissioner in terms of section 74 of the Act.

In my opinion, genuine negotiations did take place between the applicant and MUN and the evidence I have before me suggests that throughout these negotiations the applicant acted in good faith with a view to resolving the differences which existed. Even on 11th January the applicant was still

prepared to negotiate as is evidenced by the statement in the affidavit of the Secretary-General of MUN that the roadside meeting between himself and the applicant's chairman concluded with the latter saying that he anticipated that negotiations would continue when he returned from Johannesburg.

MUN' s stance seems to be that genuine negotiations could only properly continue while the individual respondents remained in employment and, in particular, remained on the mine where they could be consulted by their representative as a group. I can well understand that such a situation would have been highly convenient for the purposes of continued negotiation but in the particular circumstances which existed it was, with respect, an unrealistic stance to adopt. The decision to retrench had been discussed at length and it is clear that there was no real possibility of averting retrenchment. Mining operations had ceased on 20th November and it was unrealistic to expect the applicant, some two months later, to continue to retain a redundant workforce.

For the foregoing reasons I am satisfied that the applicant complied with the provisions of section 50.

Mr Corbett's next submission was to the effect that the applicant failed to comply with the statutory provisions governing notice and that this failure also rendered the termination of the contracts of employment unlawful. He submitted that in terms of section 47 of the Act the

applicant was obliged to give at least one month's written notice of termination and that such notice had to be given on or before the first or the fifteenth day of a month. While he accepted that the applicant had the option of paying the individual respondents their pay for the period of notice he submitted that the pay was wrongly calculated as running from the 11th January, not 15th January; further that the amount paid did not take account of the accommodation and food to which the individual respondents would have been entitled had they been required to serve the period of notice.

The first part of this submission is based on a statement made in the applicant's founding affidavit that the contracts of employment were terminated on 11th January but that the individual respondents refused to accept the position. It was not made clear in the founding affidavit when notice ran from although in its letter dated 6th January, which was annexed, the applicant expressly stated that the individual respondents would be paid for the period from 11th to 15th January and that the notice period would then run from 15th January. In his answering affidavit the General-Secretary of MUN alleged that on 11th January the applicant failed to give the individual respondents notice in writing and that in any event such notice should have run from 15th January. He did not, however, allege what the position was when the individual respondents ultimately accepted their pay and notices. This is dealt with in the applicant's replying affidavit where, as I have said earlier, a copy of the notice and certain payslips are

annexed. It is quite plain from these that the notice ran from 15th January and that the individual respondents were paid for the period from 11th January to the date when the notice became effective. In my view, there is no real dispute with regard to this matter and I can properly find on the affidavit evidence that written notice was given, that it ran from 15th January and that the individual respondents were paid a full month's wages in lieu of serving such period of notice. With regard to the second part of the submission, Mr Corbett contended that a liberal construction should be given to section 47(5) which provides:

"If notice of termination of a contract of employment is given in terms of subsection (1), the employer shall pay to the employee as his or her remuneration in respect of the period of notice an amount which is not less than an amount equal to the amount he or she would otherwise have been paid in respect of the period of such notice had the contract of employment not been terminated." Mr Corbett submitted that the amount to be paid should include not only the payment in money which the employee would have received had the contract not been terminated but an allowance for the loss of any benefit enjoyed by the employee in terms of the contract of employment.

In the present case, he submitted, the individual respondents should have been paid not only a month's wages in lieu of notice but, in addition thereto, they should

either have been paid an allowance for the loss of their right to free accommodation at the mine hostel and food or they should have been given the right to remain in the hostel during the period of notice with free food.

The obligation imposed on the employer by section 47(5) is an obligation to pay the employee his or her remuneration in respect of the period of notice and Mr Corbett's submission may well have merit were it not for the definition of "remuneration" set out in section 1 of the Act. "Remuneration" is defined as meaning -

> "any payment in money made or owing to any employee by virtue of his or her employment, excluding -

11.5 any payment made or owing to such employee by way of compensation for travelling and subsistence expenses incurred by such employee in the course of his or her employment;

11.6 any payment made or owing to such employee by virtue of such employee * s retirement from the employment of such employer or the termination of such employee's employment."

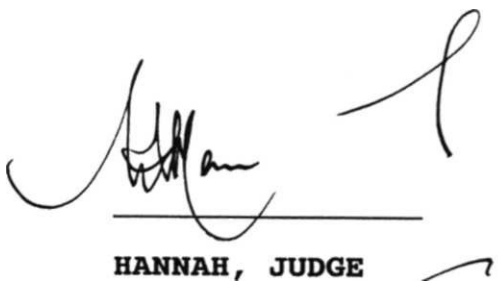
It is plain from this definition that the expression "remuneration", as used in the Act, means payment in money and does not include benefits in kind which the contract of employment confers on the employee. The obligation imposed on the employer by section 47(5) to pay the employee his remuneration in respect of the period of notice must be construed accordingly. In my view, there is no scope for the more liberal interpretation contended for by Mr Corbett.

A further submission made by Mr Corbett was that the individual respondents should have been given reasonable notice of the termination of their respective rights to hostel accommodation and meals and this, he contended, they were not given. He based this submission on considerations of equity and fairness and submitted that notice of one month would have been reasonable. I am prepared to accept that an employee who has a right to occupy residential premises arising out of the contract of employment is, as a general rule, entitled to reasonable notice to quit the premises when his contract of employment is terminated by the employer: but what is reasonable must always be governed by the circumstances of each case. In the instant case the individual respondents had their homes elsewhere than the applicant's mine and they only resided at the mine hostel in order to enable them to carry out their duties. Indeed on 11th January they were not even residing at the hostel because that was the day of their return from an extended annual leave. There is nothing in the evidence to suggest that any of them would have encountered difficulty or inconvenience in simply making the return journey to their respective homes once they had been paid and handed their fares. In my view, in these somewhat unusual circumstances no notice to quit was required.

This was not a case where it was contended that the individual respondents would suffer any hardship if they were to be evicted from the mine hostel. Indeed, from the evidence before me it seems that the contrary is true. They were not occupying the hostel because they had nowhere else

to live but because they considered that to do so would strengthen their negotiating position. Their occupation was not only a thorn in the applicant's side but by remaining together as a group they could more easily consult with MUN. The General-Secretary of MUN said that were they required to disperse to their homes throughout the country it would be difficult to obtain their authority to accept any settlement which might be negotiated. However, I do not consider this to be an insurmountable difficulty. There is nothing to prevent MUN from obtaining a general authority to negotiate through the conciliation procedure as favourable a settlement as is possible. There is no need to refer each negotiating step back to its members.

For the foregoing reasons an order was made on 22nd January ejecting the individual respondents from the applicant's



HANNAH, JUDGE

Counsel for Applicant:		D.F.Smuts
Instructed by	:	Lorentz & Bone

.

Counsel for Respondents:		A.W.Corbett
Instructed by	:	Legal Assistance Centre