Sneller Verbatim/JduP

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J4028/00

2002-02-12

In the matter between

TELKOM S A Applicant

and

COMMUNICATION WORKERS' UNION AND OTHERS Respondent

and

CASE NO: J3767/00

In the matter between

MELAPO TECHNOLOGIES (PTY) LTD

Applicant

and

COMMUNICATION WORKERS' UNION AND OTHERS

Respondent

–

J U D G M E N T

–

REVELAS, J:

1. It is important to note that there are two applicants in this matter, and that the two matters were heard simultaneously.

1. 1. 2. Telkom, one of the two applicants in this matter, sold the business of its Uvatek Division to the second respondent, who is also the applicant in the other application, whom I shall refer to as "Melapo", as what it termed "a going concern", with effect from 1 April 2000. The sale of the Uvatek business formed part of outsourcing of Telkom's business. The applicant also offered voluntary retrenchment packages to certain employees, of Melapo.

3. On 31 May 2000 the Union referred three separate disputes arising out of the Uvatek transaction to the Commission for Conciliation, Mediation and Arbitration for conciliation ("the CCMA"). The dispute, in the first review application, is about an alleged unfair dismissal on 31 March 2000 by the applicant, of certain members of the Union who were employed in the Uvatek business of the applicant.

4. Referral of the Telkom dispute and another dispute called "the Voluntary Retrenchment, or Melapo,

Dispute", were both referred outside the 30-day time limit prescribed by section 191(1) of the Labour Relations Act, 66 of 1995 ("the Act"). The Union then made application to the CCMA for condonation of the two late referrals. The applications were opposed and came before the third respondent, ("the commissioner"), who condoned the later referrals of the Telkom and the Melapo dispute.

5. The applicants now seek to review the aforesaid determination condoning the two late referrals in two separate applications. For purposes of convenience the two applicants set down their applications to be dealt with simultaneously.

1. 6. Prior to the hearing of the condonation application the commissioner was furnished with affidavits and other documents setting out the various facts and positions of the parties, and heard full argument on them.

7. The case for the respondents was that before giving effect to the Uvatek sale Telkom advised the Union and its members to be affected by the sale, as in terms of section 197 of the Act, the employees in question would automatically be transferred to Melapo and their consent would be required. The respondents allege that subsequent to 1 April 2000 the Union and its members

discovered facts which they say caused them to believe that it had never been the intention of either of the applicants to transfer one aspect of the Uvatek business known as the "Single Line Telephone Business" to Melapo.

8. The respondents further contended that Telkom and Melapo had contemplated the retrenchment of approximately 350 employees engaged in December by a telephone business, subsequent to the transfer. One week after the transfer of the Uvatek employees, Melapo gave its first indication to retrench, and offered voluntary retrenchment packages to a number of employees. On 26 April 2000 Melapo announced that it would retrench certain employees on 1 April 2000. On 30 April 2000 such retrenchments were indeed effected.

1. 9. Following the transfer and subsequent retrenchment of the employees in question, the Union identified the three separate disputes and referred them to the CCMA. These disputes are separate and should be stated herein:

10. Section 197 of the Act contemplates the automatic transfer without consent of employees where the whole or part of a business is sold as a going concern.

11. The Union's case is that the single line telephone business, which was part of the Uvatek business sold by

Telkom to Melapo, was not sold as a going concern in that it was understood by both parties that this business would be closed and that the employees engaged therein would be retrenched. The employees involved in this business could not therefore be subjected to the automatic transfer as contemplated in section 197 of the Act. Since their consent was not sought or obtained, says the Union, in regard to any transfer by Telkom to Melapo, they remained employees of Telkom.

12. It was further contended by the Union, that Telkom effected the *de facto* termination of its members' services on 31 March 2000. On that date therefore they were unlawfully dismissed by Telkom. This dispute is then referred to as "the Telkom dispute".

1. 13. On 12 and 26 April 2000 Melapo persuaded certain employees to terminate their employment by the acceptance of a voluntary retrenchment package. In doing so Melapo induced acceptance of this package by the employees affected. The Union and its members contend that it did so by threatening employees that should they not accept the package they would be faced with compulsory retrenchment on less favourable terms.

14. It was argued at the condonation hearing, before the commissioner, that in effect Melapo's ultimatum amounted to a choice between resignation and dismissal.

It was argued that the issuing of this threat made continued employment intolerable, with the result that Melapo is deemed to have dismissed these employees unlawfully.

15. Furthermore, Melapo failed to consult with the Union prior to offering voluntary retrenchment packages to its members despite an ongoing collective bargaining relationship between Melapo and the Union. Consequently, it was argued, the dismissal of the employees who accepted the voluntary retrenchment was unfair, and this dispute was referred to as "the voluntary retrenchment dispute".

16. The two aforesaid disputes are those relevant to this application before me and the application for condonation which was before the commissioner in this matter.

17. Thirdly, on 30 April 2000, Melapo retrenched certain of the Union's members in accordance with a notice issued by it on 26 April 2000. In so acting it was argued that Melapo failed to comply with the provisions of section 189 of the Act. This dispute was referred to as "the compulsory retrenchment dispute", which is not before me.

18. Section 191(1) of the Act reads:

    1. "**If there is a dispute about the fairness of a dismissal,**

the dismissed employee may refer the dispute in writing within 30 days of the date of the dispute to the Commissioner."

Section 119(1) of the Act reads:

"**(1) The date of the dismissal is the earlier of -**

(a) the date on which the contract of employment is terminated; or

(b) the date on which the employee left the service of the employer."

19. In terms of section 191(2) of the Act an employee is enjoined – **"to show good cause before a commissioner would permit him or her to refer the dispute after the 30-day time limit has expired. The section makes it clear that condonation is not there merely for the asking, the employee must tender an adequate explanation for the delay. This explanation must be considered by the commissioner. Due regard must also be had to other generally accepted requirements for the grant of condonation as contemplated in the words 'good cause'.**"

The aforesaid was held in *Rustenburg Platinum Mines (Rustenburg Section) v CCMA and Others* 1998 (19) ILJ 327 (LC).

20. See also: *Fidelity Guards Holdings (Pty) Ltd v Epstein and Others* 2000 (21) ILJ 2001 (LC), at 214, para.21.

1. 21. When a commissioner is faced with an application to grant condonation, there are certain factors which

he or she should consider which is applicable to the High Court and all other courts, including the Labour Court. That is the degree of lateness, the explanation for the delay, the prejudice to the parties, and importance of the matter and the prospects of success. In this regard see *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), at 532C–F, and also the Notice of the Guidelines of Conciliation Proceedings, Government Gazette Notice R896 GG 18936.

22. On behalf of Melapo, it was argued – and this was the main thrust of its argument – that the most important question to consider when faced with a condonation application, is whether there is a reasonable prospect of success. It was argued that this the commissioner failed to do because on the facts before him he could not have rationally come to a conclusion that there were any prospects of success or good prospects of success for that matter.

23. The gist of Telkom's argument was that there is no adequate explanation for the delay, and in this regard reliance was placed on the judgment of the Labour Appeal Court in *NUM v Council for Mineral Technology* 1997 (3) BLR 209 (LAC) where it was held that:

"A further principle which is applied, and that is that without a reasonable and acceptable explanation for the delay, the

prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."

24. The third respondent determined the following in respect of the degree of lateness, that the voluntary retrenchment disputes concerned dismissals that were effected between 12 and 26 April 2000, the dispute should have been referred within 30 days, i.e. between 12 and 16 May 2000, and in the circumstances this referral was between 5 and 19 days late.

25. The other dispute, namely the Telkom dispute, was 30 days late.

26. Insofar as the degree of lateness is concerned I may at this stage observe that, although not negligible, these delays are certainly not substantial.

27. In respect of the prospects of success in the Melapo dispute, the third respondent found that a communication by the chairman of Melapo to the employees namely:

"It is specifically recorded that the terms and conditions of this offer, which we consider to be extremely generous, will not be construed to represent a precedent for any future restructuring exercise that may be conducted by the company."

amounted to what the commissioner, regarded as coercion. In

his reasoning he did express opinions, which amounted to criticism of the chairman in question, which demonstrates that he indeed considered on the prospects of success.

28. Insofar as the Telkom dispute is concerned, he did not make a specific finding as to prospects of success, but in dealing with the reasonableness of the explanation for the delay, such reasoning could be implied.

1. 29. This was an application for review in terms of section 158(1)(g) of the Act. It was held in *Carephone (Pty) Ltd v Marcus N.O. and Others* 1998 (10) BLLR at 1326 (LAC) that –

"When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it does seek to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which could neither affect its justifiability in review processes equated to justness or correctness."

30. Section 158(1)(g), which provides for review on any ground recognised by law, is often seen as a more expansive and permissive basis for review rather than that contained in section 145 of the Act which simply states what judicially has been recognised as the common law grounds of review.

31. With regard to the relationship between constitutional review and common law review, the Supreme Court of Appeal held as follows in *Commissioner for Customs & Excise v Container Logistics (Pty) Ltd* 1999 (8) BCLR, at 833 (SCA):

"Although it is difficult to conceive of a case where the question of legality cannot ultimately be reduced to a question of constitutionality, it does not follow that common law grounds for review seems to exist. What is lawful and procedurally fair within the purview of section 24 is for the courts to decide, and I have little doubt that to the extent that there is no inconsistency within the Constitution, the common law grounds for review intended to remain intact."

32. I was referred to this dicta by counsel on behalf of the respondents.

1. 33. What is of utmost importance in this application is to appreciate that the Labour Court is not entitled to reconsider the application for condonation. The commissioner accepted the explanation proffered by the respondents, and his reasoning is not rationally disconnected to the facts before him.

34. Section 197 is one of the more difficult labour law topics. It is quite conceivable that the employees may not have realised this immediately, and only after speaking to their lawyers realised that they might,

possible have a case. That is what the explanation for the delay amounted to in respect of the Telkom dispute, as well as the Melapo dispute.

35. It is possible that even if another commissioner may have found this explanation unconvincing, that is not the test to apply in applications such as this, according to the *Carephone* decision. In accepting a voluntary severance package does not mean that the matter is brought to an end automatically. To expect from a commissioner to have made such a finding, with regard to the prospects of success, is simply setting too high a standard.

36. The third respondent stated, and I believe in relation to both disputes:

1. **"Insofar as the delay is concerned in this matter, this matter is not a usual matter in the sense that there are issues that do not serve as an ordinary unfair dismissal matter. The issues are not open and closed, as the respondents would have us believe. These issues need to be considered conscientiously and the applicants, the members of the first respondent, were required to acquire a proper understanding of the dispute within the circumstances that they found themselves. In these circumstances I am satisfied that the delay was not unnecessary."**

37. Even though the commissioner had substantial material

before him, as is not always the case in other condonation applications before commissioners of the CCMA, the issues were not as simple as made out by the two applicants. This was not the kind of matter in which a commissioner should have found had poor prospects of success. The same applies to his understanding of the explanation for the delay, which was clearly not substantial as I have said before.

38. In my view there are no grounds upon which I can find that the commissioner's finding should be set aside on review.

39. Consequently both applications for review are dismissed with costs.

_____

E. Revelas

ON BEHALF OF THE APPLICANTS: ADV A FRANKLIN SC

ON BEHALF OF MELAPO: MR ROBIN CARR

ON BEHALF OF RESPONDENT: ADV P R JAMMY