IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: JR 106/07

In the matter between:

TELESURE INVESTMENT HOLDINGS (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

HONNORAT, E N.O. **Second Respondent**

FENTON SHANE SHAND **Third Respondent**

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicant sought an order reviewing and setting aside the award issued by the second respondent under case number GAJB 19642-06 dated 14

December 2006. Third respondent was employed as a creditor's supervisor and his core function was to service the account of the newly established subsidiary company of the applicant.

Background Facts

[2] At the beginning of 2005 and in anticipation that the subsidiary company had the potential to grow the applicant made provision for the employment of staff additional to the four who were reporting to the third respondent.

[3] The need to streamline the department serving the servicing unit became apparent to the applicant towards the end of the financial year 2005.This need necessitated the restructuring which would involve the taking over of the functions that were exclusively done by the supporting team of Unity and to be devolved to the other employees within Telesure group.

[4] The applicant contended that the restructuring process included consultation with all affected staff members including the third respondent. The consultation according to the applicant was conducted by the General Manager Finance and this was done during the later part of June 2006, and proceeding into July of the same year. The rational for the restructuring and the proposed dismissal was explained to those employees who were to be affected.

[5] According to the applicant, positions which were vacant were advertised during July 2006, but the third respondent never

applied. When alternative positions were identified and offered to the affected employees the third respondent was only interested in higher positions according to the applicant.

The grounds for review

[6] The applicant challenged the arbitrator's award on the basis that the second respondent had no jurisdiction to consider the matter as the dispute fell within the ambit of the provisions of section 191(12) of the LRA, because more than one employee was affected by the restructuring.

[7] The third respondent argued that whilst he did receive the letter wherein the applicant indicated the intention to raise the point *in limine* relating to section 191(12) of the LRA, he never did. It would indeed appear from the transcript of the record of the proceedings that the applicant did not raise the point *in limine.*

[8] The case of the applicant is that when the point *in limine* was raised the Commissioner indicated that "*there was no point in limine to be raise, let us proceed"*. This is however not reflected by the record.

[9] It is however apparent from the record that the applicant had indicated prior to the hearing that it intended raising the point *in limine* at the hearing. This intention was indicated through a letter addressed to third respondent dated 04 December 2006. The relevant part of the letter reads as follows:

"In anticipation of the matter currently set down for 14th December 2006 at 09h00 room 420 Anderson Street, I wish to advise you that I will be raising the following point in limine at the arbitration proceedings.

I confirm that in terms of Section 191(12) of the Labour Relations Act, 66 1995, as amended, that is a dispute about the fairness od a dismissal, the dismissed employee (being yourself) may refer the dispute in writing to the CCMA or any tribunal which has jurisdiction in terms of Section 191.

Sub-section 12 of this provision, however, makes a distinction where the employee may elect to refer the dispute either to arbitration or to the Labour Court when employees are dismissed by reason of the employer's operational requirements following a consultation procedure in terms of Section 189 that applied to that employee only.

I, however, confirm that the matter referred by you does not fall within the ambit of the provisions of Section 191(12) as the retrenchment process applied to various other employees as well. As such, you were required to refer your dispute to the Labour Court in terms of the provisions of Section 191(50(b) (ii)).

It will thus be argued that the CCMA lacks the requisite jurisdiction to entertain your matter and that the matter should be dismissed on that basis alone.

I trust that you find the above in order and look forward to hear from you in this regard."

A copy of this letter was forwarded to the CCMA under the cover of the letter received by the office of the Convening Senior Commissioner on 06 December 2006.

[10] It has not been disputed that the Commissioner had sight of the applicant's letter regarding the issue of jurisdiction of the CCMA.

[11] The applicant further contended that the issue concerning jurisdiction arose during the opening remark by the applicant's representative, when he indicated, *"employees were consulted."* It is apparent that at that point when the representative made the submission about consulting with employees, the Commissioner intervened and said:

"What alternatives were offered to the applicant because I am not interested in the others, I am interested in the applicant." (my emphasis)

[12] The objective facts before the Commissioner were that in the first place the issue of jurisdiction was raised in the letter which was addressed to the third respondent and subsequently forwarded to the CCMA. The Commissioner committed a gross irregularity by failing to apply his mind to the issue raised in the letter which pertinently dealt with the issue of jurisdiction. Had the Commissioner applied his mind to the issues raised in the letter, he may have found that the CCMA did not have

jurisdiction to entertain the dispute. For this reason alone the award stands to be reviewed.

[13] In the second instance the Commissioner failed in his duty and denied the applicant a fair hearing when he intervened and told the applicant's representative that he was not interested in him making a submission about the consultations that the applicant had with the other employees.

[14] If the Commissioner had been patient and afforded the applicant a fair hearing, he would have realised that reference to consultation with other employees may have meant that the employee was not the only one retrenched and therefore the provisions of section 191(12) was applicable.

[15] In terms of rule 24 of the CCMA a Commissioner has a duty to inquire into jurisdiction at any point during the proceedings. The investigation that the Commissioner was required to conduct which, he failed to do, was whether other employees were dismissed arising from the consultation during the same period.

[16] In my view the Commissioner committed a gross irregularity by failing to enquire into whether he had jurisdiction to entertain the dispute.

[17] The dictates of law and fairness do not require costs to be awarded.

Order

[17] In the result I make the following order:

1. The award of the second respondent is reviewed and set aside.
2. The matter is remitted back to the first respondent for consideration by another Commissioner other than the second respondent.

3. There is no order as to costs.

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MOLAHLEHI J

Date of Hearing: 27 November 2007
Date of Judgement: 21 February 2008

APPEARANCES:

For the Applicant: Mr W S S Badenhorst from Leppan Beech Inc.

For the Respondent: Mr R Maddern from Wright Rose-innes Inc.