

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

APPEAL CASE NO : JA 49/98

In the matter between :

LIBRAPAC CC

Appellant

and

FEDCRAW & OTHERS

Respondents

JUDGMENT

[1] This is an appeal against an order made by Tip AJ in the Labour Court whereby an arbitration award made by a commissioner for the Commission for Conciliation, Mediation and Arbitration (the CCMA) was made an order of the Labour Court, albeit in somewhat modified form. The effect of his order also disposed of an application for the review of the arbitration award.

[2] The appellant (Librapac) dismissed the second and further respondents (the employees) on 9 May 1997. Conciliation in terms of the Labour Relations Act 66 of 1995 (the LRA) failed and a certificate to this effect was issued on 20 June. Arbitration followed. The arbitration hearings took place on 5 and 6 August. On 25 August the commissioner handed down his award, finding that the dismissals were procedurally and substantively unfair. He ordered the

reinstatement of 23 employees whose names appeared on a list furnished to him. Twenty employees presented themselves for reinstatement on 2 September. Librapac refused to reinstate them on the basis that it disputed the award and that they had to apply to the Labour Court for the award to be made an order of Court. This was done. The application was filed on 19 September, but only served on Librapac on 17 October. Librapac filed its answering affidavit on 12 December, together with the review application already referred to. The matter came before Tip AJ on 2 March 1998. He directed Librapac to apply for condonation for the late filing of the review application. The condonation application was filed on 4 March and heard by Tip AJ on 9 March.

- [3] Tip AJ found that the review application was not brought within a reasonable time. He also refused to exercise his discretion (to grant condonation nevertheless) holding that Librapac's prospects of success in showing that the dismissals were fair were not good.
- [4] What he did do, however, was to restrict his order (making the arbitration award an order of court) to only twelve employees, instead of the twenty-three employees named in the arbitration award. The stated reason for this was that the original referral to conciliation was only done on behalf of sixteen employees, four of whom had, on the papers before him, signed statements admitting theft. In respect of these four, he ordered a remittal to the CCMA for

a fresh arbitration hearing before another commissioner.

- [5] On appeal Librapac attacked Tip AJ's finding on various grounds which will be dealt with later. There is no cross-appeal on behalf of the eleven employees who fell off the table in the course of the process in the court below.

Condonation for late review

- [6] Review of arbitration under the auspices of the CCMA must proceed in terms of section 145 of the LRA (**Carephone (Pty) Ltd v Marcus NO and others** [1998] 11 BLLR (1093) LAC; (1998) 19 ILJ 1423 (LAC); para's [23]-[29]). Except in cases of alleged corruption the review application must be brought in the Labour Court within six weeks of the date that the award was served on the person applying for review (section 145(1) (a) of the LRA).
- [7] Librapac received the reasons for the award on 26 August 1997. It therefore had to apply for review within six weeks, that is, at the latest, by 7 October. The review application was only filed on 12 December, more than two months late.
- [8] The explanation for the delay is a brazen one. The view adopted by Librapac, on the advice of its attorneys, was to ignore the arbitration award and not to institute review proceedings until the employees sought to compel enforcement of the award by seeking to make it an order of court in terms of

section 158(1)(c) of the LRA.

- [9] Section 143 of the LRA provides that an arbitration award is final and binding. The award's lawfulness does not depend on it being made an order of the Labour Court. The latter step is only an aid to its practical enforcement.
- [10] Librapac's delay in bringing the application for review was thus based on a deliberate, wilful decision not to comply with a lawful and binding award in terms of the Act. It amounted to a flagrant and cynical disregard for the express provisions and underlying purpose and structure of the LRA. I am not aware of authority that countenances behaviour of this kind.
- [11] In the court below Tip AJ considered the matter on the basis that an arbitration award could be reviewed under section 158 (1) (g) of the LRA, where no time limit is set. He nevertheless found the delay to be unreasonable and I fully agree with his finding. Even in such cases the degree of unreasonableness of the delay may be of such a nature so as to justify the refusal of a condonation application (**Wolgroeiërs Afslaeërs (Edms) Bpk v Munisipaliteit Kaapstad** 1978 (1) SA 13 (A) at 41 A-C).
- [12] However, as already mentioned, the review proceedings should have been brought under section 145 of the LRA, which sets a time limit of six weeks from the date of the award within which a review application must be brought. Assuming, without deciding, that condonation of this statutory time period may

be granted by the Labour Court (an issue on which I express no view), this is a case where, in view of the wilful and deliberate decision not to bring the review application earlier, condonation should be refused without further enquiry into the merits, or prospects of success (**Allround Tooling (Pty) Ltd v NUMSA** [1998] 8 BLLR 847 (LAC) para. 10, and the cases cited there).

[13] There are also further grounds for refusing to condone Librapac's wilful and deliberate delay in bringing review proceedings. The application for condonation should have been brought as soon as it became apparent that there had been a delay (**Allround Tooling (Pty) Ltd v NUMSA**, above, at para. 8). It did not do so and only brought the application when ordered to do so by the judge in the court below. There is no proper explanation why it was not done earlier.

[14] It follows that the appeal against the implicit dismissal of the condonation and review applications in the court below must fail.

Enforcement of the arbitration award

[15] What remains is the appeal against the (partial) enforcement of the arbitration award by it being made an order of the Labour Court.

[16] Whether it is permissible to revisit all the issues determined at the arbitration at the stage when enforcement of the award is

sought in the Labour Court (in the absence of a review application) or whether only the possible nullity of the award may be raised (compare for example Van Zijl v Von Haebler 1993 (3) SA 654 (SE)), was not fully debated on appeal. In view of the conclusion reached it is not necessary to decide this issue. For the purposes of this judgment I have assumed (again without expressing any view on it) that the wider enquiry is permissible.

[17] Essentially two points were relied upon, namely

- (1) that because only one employee signed the application for referral of the dispute for conciliation, the commissioner lacked jurisdiction to arbitrate the issue in respect of the other employees, and
- (2) that given the circumstances set out in the affidavits in the proceedings in the court below, the commissioner's finding of an unfair dismissal could not stand. Neither point has merit.

[18] There is no evidence that objection was made, at the conciliation stage, to the participation and standing of the sixteen employees who were then part of the proceedings. It is apparent from the referral form that the person who signed the form purported to do so on behalf of everyone listed on the form. Failure to object at that stage amounted to acquiescence in their right to be parties to the dispute. That could not be undone later.

[19] No evidence, other than unsubstantiated hearsay of unidentified persons, was presented at the arbitration hearing which individually implicated any of the employees in dishonesty. The commissioner's findings of an unfair dismissal was thus not without objective foundation. There existed no valid reason not to enforce his award by making it an order of court.

[20] The appeal must therefore be dismissed.

[21] The respondent's heads of argument were delivered late, with the flimsiest of excuses for doing so. As a mark of displeasure the costs of preparation of these heads will not be allowed.

[22] The appeal is dismissed with costs, except for the costs relating to the preparation of respondent's heads of argument.

Froneman DJP

I agree,

Ngcobo AJP

I agree,

Kroon JA

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Attorneys

Date of hearing : 4 March 1999

Date of judgment : 11 March 1999