

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no : JA29/00

In the matter between :

**SOUTH AFRICAN BROADCASTING
CORPORATION**

APPELLANT

and

COMMISSION FOR CONCILIATION

**MEDIATION AND ARBITRATION
ZOLA MKHOSANA N O**

**FIRST RESPONDENT
SECOND RESPONDENT**

**ISRAEL SABATA PAPANE
BROADCASTING, ELECTRONIC MEDIA**

THIRD RESPONDENT

AND ALLIED WORKERS UNION

FOURTH RESPONDENT

JUDGMENT

COMRIE AJA :

1. The appellant is the South African Broadcasting Corporation which for convenience I shall refer to as the SABC. The third respondent is Mr. I. S. Papane (“*Papane*”) who was formerly employed by the SABC at Bloemfontein as a senior production assistant. On 22 September 1999, following a disciplinary hearing, Papane was dismissed by the SABC for having failed to comply with his prescribed duties.

2. The fourth respondent is the Broadcast, Electronic Media and Allied Workers Union (the “*union*”). It is party to a collective agreement, styled the Relationship Accord (“*accord*”), with the SABC. This accord provides that a dispute of right, if it cannot be resolved internally, should be referred to arbitration. The parties must endeavour to agree upon the appointment of a mutually acceptable arbitrator, “*failing which the arbitrator will be appointed by the Director of IMSSA at the request of the parties*”. IMSSA is the Independent Mediation Society of South Africa.
3. Papane was aggrieved at his dismissal. On his behalf the union, in its Free State region, took up the complaint. When internal resolution failed, the Free State region sought to refer the continuing unfair dismissal dispute to arbitration in terms of the accord. As far as the Free State region was concerned, Papane was not only a member of the union, but also its regional chairperson.
4. The SABC was not averse to arbitration, but subject to an important reservation. In March 1999 it had received written notification from the union’s national executive committee and national president (Mr. H. du Buisson) that Papane had been “*expelled from the union after disciplinary action*”, and that Papane held no position in the union, not even as a member. Pursuant thereto the SABC ceased from April 1999 to deduct union dues from Papane’s salary. When arbitration loomed, the SABC raised the question of Papane’s membership of the union, and voiced its concern over whether arbitration in terms of the accord was the correct course to follow. In a letter to the Free State region dated 3 December

1999 the SABC (per. Mr. Weber) wrote :

“ The SABC can unfortunately not participate in setting up any arbitration procedure, unless clarity is received as far as the status of Mr. Papane as being a member of BEMAWU, is concerned”.

5. There was in any event no agreement on the identity of an arbitrator. This was how IMSSA entered the picture. It appointed Adv. Osler to arbitrate. The question of Papane's membership of the union continued to be controversial. The Free State region, and Papane , maintained that he had not been expelled or properly expelled; that he remained a member in good standing; and that during July 1999 he had been elected regional chairperson. du Buisson , on the other hand , persisted in saying that Papane's membership had ceased. While these exchanges were going on, IMSSA proposed a solution, namely a two - phase arbitration. The first phase would be between Papane and the union, to determine if he was a member. If yes, the second phase would be between the SABC and the union (on behalf of Papane) with regard to the dismissal. If no, then implicitly the dismissal dispute would have to go to the first respondent (the CCMA). That was how the SABC understood the matter. On 8 March 2000 it wrote to Papane's attorneys summarising its attitude and the proposal. The letter included the following paragraph :

“ The importance of finalising the issue of your client's membership to (sic) the union, is to determine which forum has the jurisdiction to adjudicate the matter i.e IMSSA (in terms of the Relationship Accord - where your client is a member of the union) or the CCMA, where your client is not a member of the union”.

6. While the two - phase proposal was acceptable to the SABC and Papane, it was unacceptable to du Buisson and the national office , who refused to participate. As a result IMSSA found itself unable to proceed with the arbitration. The SABC and Papane both appear to have accepted the proposal's failure and also the failure of the arbitration process. Consequently, on 5 May 2000, Papane referred the unfair dismissal dispute to the CCMA. But Papane was out of time, so he sought condonation of the late referral in terms of s. 158 (1)(f) of the Labour Relations Act no. 66 of 1995. The application for condonation was opposed by the SABC on two broad grounds : first, want of jurisdiction; second, undue lateness and lack of prospects of success such that condonation should be refused.
7. On 29 August 2000 a commissioner, the second respondent, granted condonation for the following succinct reasons :

“THE FINDING GRANTED

It is clear to me that there was confusion over the membership of Mr Papane.

The letter from the president of the union says that Mr Papane was expelled. It does not indicate at which meeting the decision was taken whether Mr Papane was present or not.

The Free State region denies the fact that Mr Papane was

expelled from the Union. They even referred the matter to IMSSA on his behalf.

I am of the opinion that Mr Papane's delay in referring the matter to the CCMA was caused by this confusion, not through his negligence.

Condonation granted".

8. The SABC thereupon reviewed the commissioner's decision in the Labour Court upon substantially the same grounds as it had advanced before the commissioner. Papane opposed the review. Farber AJ dismissed the review application with costs, but granted leave to appeal to this Court. I shall deal in turn with each of the two broad grounds.

Jurisdiction

9. If Papane, at the time of his dismissal, was not a member of the union, then his entitlement to refer his unfair dismissal dispute to the CCMA is undoubted and undisputed. On the other hand, if Papane was then a member of the union, it was up to the union to pursue his claim in terms of the accord, if necessary to private arbitration. The difficulties which faced the commissioner and the Court a quo were as follows : In his referral of the dismissal dispute to the CCMA, Papane claimed to be a member of the union and to have the backing of its Free State region. He explained, however, that his attempts to have the dispute referred to private arbitration had come to nought, and that his membership was

disputed by the national office. In these circumstances could Papane, while asserting membership and a right to arbitrate, proceed in the CCMA?

10. It is not apparent from his brief reasons how the commissioner viewed the matter. Farber AJ rejected arguments for Papane based on s. 24 and s. 147 of the LRA. He found, however, that inasmuch as the agreement to arbitrate had become incapable of implementation the obstacle to the CCMA's jurisdiction had in the intendment of the law fallen away. It is unnecessary for us to rule on the correctness or otherwise of the learned Judge's reasoning, because in argument in this Court, Mr. Maseremule (who appeared for the SABC) conceded jurisdiction. He did so for the reason that at this stage it would be proper to have regard to the attitude of the national office. Papane was expelled from the union (rightly or wrongly) in March 1999; union dues were not deducted from April onwards; and as far as we are aware, Papane (and the Free State region) took no legal steps (eg, under s. 158 (1)(e) of the LRA) to challenge the expulsion prior to his dismissal in September 1999. His status therefore was then, and still is, one of being a non - member, albeit open to challenge and reversal. The national office was entitled to adopt the standpoint that Papane was not a member, unless and until the expulsion was reversed, and it was accordingly entitled to refuse to be party to arbitration in terms of the accord. Once it is accepted that Papane should be treated for the time being as a non - member, the jurisdiction of the CCMA is uncontested.

11. I think this reasoning is sound in the special circumstances of this case. It disposes of the jurisdiction issue.

Condonation

12. The lateness of the referral to the CCMA is largely explained by the summary of events which appears earlier in this judgment. As I have shown, Papane and the Free State region were anxious to arbitrate in terms of the accord. The SABC, for its part, was not unwilling to arbitrate the dismissal either via IMSSA or before the CCMA, whichever be the correct forum. But the SABC understandably did not wish to be drawn into the dispute between Papane and the national office of the union, and to this end expressed its concurrence in the proposed two - phased arbitration. That proposal foundered. I find it rather surprising, therefore, that the SABC should rely on lateness when it was an active party to the cause of the lateness. The same contradictory attitude is to be found in Weber's affidavit opposing condonation where, prior to invoking delay, he states:

“ 23. The [SABC] was at any point in time and still is prepared to have this matter arbitrated over, on condition that it should happen in the correct forum”.

13. What would have happened, one may ask, if the first phase of the arbitration had gone ahead, and if Adv. Osler - as between the union and Papane - had held that Papane ceased to be a member from March 1999 and remained a non - member? Such an award would have compelled Papane to refer the unfair dismissal dispute to the CCMA, as the SABC expected (see para. 4 of its letter dated 8 March 2000 quoted earlier). Could the SABC then have been heard to complain about lateness

when, on this hypothesis, Papane had followed the very course to which the SABC was agreeable? That does not sound fair or right.

14. Papane was dismissed on 22 September 1999. In terms of s.191(1) he had 30 days within which to refer the consequent dispute to the CCMA (assuming it had jurisdiction). The actual referral took place on 5 May 2000. Papane was accordingly out of time by about 6 ½ months. While this is a substantial delay, it is not beyond the bounds of condonation. Rademan v. Containerlink (PA5/00 - LAC, unreported). The question of delay was addressed by Weber, in his affidavit opposing condonation, as follows:

“24(b) ever since the “dispute” was declared by the Free State Region Bloemfontein (19 November 1999), almost seven (7) months ago and almost eight (8) months after termination of the Applicant’s services, the Respondent was placed in a very difficult position as to decide at which forum this dispute should be dealt with, which fact was on numerous occasions pointed out to the Applicant.

The Applicant remained steadfast in his approach, claiming to be a member of the union (BEMAWU), hence the request for arbitration by IMSSA.

The Applicant did not heed the request made by the Respondent, at that early stage, to have his membership status addressed, between himself and the union.

As a result of the dispute between the Applicant and the union, which the Applicant never attempted to resolve before involving IMSSA, can be attributed to the Applicant's own negligence. The Applicant was the creator of his own misfortune and the Respondent should not be held liable and accountable accordingly.

The Applicant had ample time to address this membership issue, which he recklessly disregarded.

It further needs to be noted that in terms of the relevant document attached, that he was considered by the union to have been expelled before the termination of his services, yet he did not do anything to rectify the situation, had it been a problem to him”.

15. Mr Maserumule developed this contention in oral argument. He said there were three periods of delay: first, from March to September, 1999, when Papane took no legal steps to challenge his dismissal; second, from September 1999 to March 2000, when the Free State region sought to pursue Papane's dismissal dispute in terms of the accord; third, from March (perhaps April) 2000 to 5 May 2000, on which latter date that dispute was referred to the CCMA. With regard to the first period, Papane did not know in advance that he would be dismissed, although towards the end he knew that disciplinary proceedings were pending. It would be unrealistic to expect him to have instituted proceedings against the national office and the union's president in order to cater for this contingency. And it is speculative to suppose that such proceedings, if commenced, would have been concluded by September. I would not hold this first period against Papane.

16. As for the second period, it is not as though Papane sat idly by. Supported by the Free State region, he sought to resolve and then arbitrate the dismissal dispute in terms of the accord. It appears in retrospect that he took the wrong road, and perhaps he should have foreseen that it would eventually run into a dead end. There were signs along the way that this is what might happen. But Papane and the Free State region were hopeful that the two - phased arbitration would get them home. I think that was not unreasonable of them , especially if one bears in mind that the SABC went along with the proposal and did not tell Papane that he was wasting his time.
17. Coming to the third period, whether counted from March or April, it was not simply a case of filing a referral document with the CCMA. When the two - phased arbitration fell through, Papane and his attorneys had to consider what to do. Having decided on the CCMA, an application for condonation had to be prepared and served in addition to the referral. All this would have taken time. Even allowing for some urgency, I do not consider that Papane was dilatory during this period.
18. It is my view that the delay has been fully and adequately explained and that such explanation amounts to what is sometimes called a “strong” explanation. It remains to note that the SABC at no stage claimed any prejudice to it as a result of the delay.
19. According to the leading cases on condonation, Papane had also to satisfy the commissioner that he enjoyed prospects of success in the unfair

dismissal dispute. It is established as a general rule that the stronger the explanation for the delay, the weaker the prospects need to be. Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A); NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC). It was urged upon us that in his founding affidavit in support of condonation Papane said too little about his prospects of success in the unfair dismissal dispute. He stated:

“5. On the 22nd of September 1999 a Disciplinary Hearing was held against me pursuant to which Disciplinary Hearing I was found guilty and dismissed by the SABC, such dismissal was effected without any reason and the procedure followed was accordingly deficient in many respect”.

Later in that affidavit he stated:

“17. I believe that there are strong prospects of success which in the present case will compensate for the long delay”.

20. However, there was more to it than that; the referral itself was before the commissioner. Although unsworn, its contents cannot be treated as irrelevant. It was in respect of this referral that Papane made the statements in para's 5 and 17 of his affidavit. Among the statements in the referral were the following:

“ SABC unfairly dismissed me on the 30 September 1999 for alleged non - compliance with the duties of my Service Contract. I

submit that I complied with the duties entrusted upon me by SABC”.

and

“ A disciplinary hearing was held but this had several deficiencies”.

and, in answer to the question why the dismissal was procedurally unfair:

“ Bias on the part of the panel, misdirection on the part of the decision makers, disregard of my version and my evidence completely and the law”.

and, on substantive issues:

“ No reason was given in respect of my dismissal hence the dismissal was both procedurally and substantively unfair”.

21. On prospects Weber in his answering affidavit, to the condonation, stated:

“(c) It is further the Respondent’s contention that there is no prospect for the Applicant in succeeding on the merits of this case, owing to the fact that the applicant refused to work the scheduled shifts and, therefore, made himself guilty of non - compliance of the duties of his contract of service, indicating a breach thereof. This aspect will further be explained when arguing this matter”.

22. Annexed to Weber’s affidavit was a letter dated 20 September 1999 from

the SABC to Papane in reply to an undated letter (also copied of record) from Papane to the SABC. The effect of this correspondence was that Papane objected to Mr P. Tati sitting on the disciplinary panel, and also objected to Ms H. Mofokeng not being allowed to sit on the panel. The SABC in its letter of 20 September, just two days before the disciplinary hearing, overruled these objections. It will be recalled that one of the allegations made by Papane in the referral to the CCMA was “ bias on the part of the panel”.

23. In his replying affidavit (on condonation) Papane simply stated:

“2. I confirm that I have been unfairly dismissed without any reason whatsoever by the Respondent and that the procedures followed was (sic) accordingly deficient”.

It can be seen from the foregoing that Papane at least contended that the disciplinary panel was rigged and partial, and that this led to an unwarranted conviction. Further, this was not an afterthought; he challenged the constitution of the panel prior to the disciplinary hearing.

24. No doubt it would have been preferable, as Mr Maserumule submitted, if Papane had included more detail about the charges and the hearing and if he had stated his criticisms and complaints with more precision. None the less it seems to me that Papane put enough before the commissioner to show that he enjoyed some prospects of success in relation to the unfair dismissal dispute. Given the strong explanation for the delay, I consider that those prospects passed muster for the purposes of condonation.

25. For the foregoing reasons I conclude that condonation was properly granted by the commissioner and that the review of that decision was properly dismissed by Farber AJ.

26. The appeal is dismissed with costs

R.G. Comrie
Acting Judge of Appeal

I agree.

C.R. Nicholson
Judge of Appeal

I agree.

M.T.R. Mogoeng
Judge of Appeal

Appearances:

For the Appellant: Mr P. Maserumule of Maserumule Inc. Braamfontein

For the Respondent: Ms. V. Phatsoane of Naude Attorneys, Bloemfontein

Date of Hearing: 10 May 2002

Date of Judgment: 11 July 2002