

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

CASE NUMBER: J 1333/00

In the matter between:

COMMUNICATIONS WORKERS UNION

Applicant

and

TELKOM SA LIMITED

First Respondent

MOLAPO (PTY) LIMITED

Second Respondent

J U D G M E N T

BASSON, J:

[1] This is an application for urgent interim relief.

[2] The applicant (the Communications Workers Union) seeks an order, *inter alia*, declaring the first respondent's offers of voluntary retrenchment and severance packages that were made pursuant to or in contemplation of the agreement of transfer (between the first and second respondents), as being made contrary to section 189 of the Labour Relations Act, 66 of 1995 ("the LRA").

[3] The applicant also seeks an interdict to restrain the first respondent (Telkom SA Limited) from transferring the said Iuvatech Electronics business as a going concern to the second respondent (Molapo (Pty) Limited) and the second respondent from receiving the Iuvatech Electronics business as a going concern until the first respondent has complied with its obligations in terms of the applicable collective agreement and sections 189 and 197 of the LRA.

[4] The nub of the applicant's case is that the first respondent had a statutory duty to act in terms of section 189 of the LRA.

[5] I quote from section 189(1):

"When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements the employer must consult ..." (emphasis supplied).

[6] However, in order for this statutory duty to apply to the first respondent as the employer of its employees, it is required that the employer (the first respondent) must contemplate dismissing one or more of those employees, as it appears clearly from the provisions of section 189(1) of the Act quoted above.

[7] The question *in casu* is therefore whether the first respondent contemplated dismissing those employees to whom offers of "voluntary retrenchment and severance packages" were made (see the notice of motion quoted at paragraph [2] above).

[8] In order to substantiate its allegation that the employer *in casu* contemplated retrenching the employees concerned, the founding affidavit refers to a letter setting out what had allegedly transpired at a meeting on 29 March 2000 (annexure "GR1(a)"). In this regard I was referred to paragraph 2.3.5 of the said letter (and I quote):

"If the required number of employees does not accept the voluntary package, Molapo [the second respondent] would commence the process in terms of section 189 of the LRA, and consult with our client on the compulsory retrenchment of employees" (emphasis supplied).

[9] In order to try to substantiate this allegation that the second respondent was indeed contemplating the "compulsory" retrenchment of the employees concerned, I was referred to a minute of the said meeting on 29 March 2000 (at page 2 of the minutes) where it is stated of Mr Hart (of Molapo (Pty) Limited):

"He stated that it was also likely that management would provide employees who choose to apply for such termination of service of more favourable terms than could be expected to be achieved through any possible future restructuring exercise that may have to be initiated by the company" (emphasis supplied).

- [10] From the minutes as a whole and from these observations by Mr Hart I am not persuaded in the least that the second respondent (at the meeting of 29 March 2000) did indeed indicate that the dismissal of the employees on whose behalf relief is claimed in terms of the notice of motion was contemplated. Even though a “possible future restructuring exercise” was apparently envisaged, there was no evidence that such exercise was being undertaken and, more importantly, that this would have meant that the dismissal of the said employees was on the cards, so to speak.
- [11] In the event, I am not persuaded that the first respondent (Telkom SA Limited) was contemplating dismissing any one of such employees when it sold the said business (Iuvatech Electronics) as a going concern on 15 April 2000. In other words, I am not persuaded that the first respondent was contemplating that these employees now stood to be dismissed by the buyer of the business as a going concern, that is, by the second respondent (Molapo (Pty) Limited), after midnight tonight when the said sale becomes effective. It follows that there was no duty on the employer to consult in terms of section 189(1) of the Act (discussed above at paragraph [6]).
- [12] In the event, I am not *prima facie* satisfied that the right of the employees to be consulted during dismissal exercises as contained in section 189(1) of the LRA (quoted at paragraph [5] above) has been infringed .
- [13] The above conclusion is strengthened by the fact that, in terms of the agreement of sale (at paragraph 2.6 thereof), the first respondent was to offer “voluntary retirement packages” to employees who are more than 50 years of age as at the effective date. Further, the said agreement of sale provided (at paragraph 12.6.2 thereof) that, after the effective date, the number of the employees who have accepted the said package shall be calculated and the seller shall pay to the purchaser an amount equal to the packages of the employees who did not take the package.
- [14] What was contemplated here was therefore not (in the true sense of the word) retrenchment packages but retirement packages to be offered to on a voluntary basis to the said employees of the business that was being sold by Telkom SA Limited. It is not a probable inference to be derived from the fact that these employees were offered retirement packages on a voluntary basis that the employer contemplated dismissing them.
- [15] It also appears from the minutes of the meeting of 29 March 2000 (*supra*) that the second respondent (Molapo (Pty) Limited) was also of a mind to offer packages to those employees who did not see their way open to

remain in its employ. Again, it is not a probable inference that the second applicant intended dismissing such employees. After all, it is clear that such offer was made for the voluntary acceptance of such “package” on the initiative of the employees themselves.

- [16] It can further be noted that the transfer or sale of the business to the second respondent was indeed consulted upon with the applicant by Telkom (Pty) Limited.
- [17] The gist of the applicant's case was that the employer consulted in the context of a retrenchment dismissal and therefore the statutory duty of section 189 of the LRA had to be complied with.
- [18] I reiterate that I am not persuaded (not even on a *prima facie* basis) that either the first respondent or the second respondent was engaging in a retrenchment exercise when the voluntary packages were offered to the employees concerned. There is simply no proof on the papers that their dismissal was being contemplated by either respondent-employer.
- [19] It would appear further from the relief claimed (that I have not quoted in full) that the said employees felt aggrieved that they did not have a proper opportunity (time frame) within which to accept the said voluntary retirement packages.
- [20] The first respondent (and, as I understand it, also the second respondent) made an offer to the employees concerned in open Court today that they could accept the voluntary retrenchment packages up until 14 April 2000 and that the first respondent will consider itself to be bound by such acceptance. Further, those employees who have already accepted the voluntary packages may decide not to accept the packages and indicate such by 14 April 2000.
- [21] Further, it is clear that, if there was any harm suffered by the said employees in not accepting these retirement packages or “benefits” (as it was also referred to in the papers before Court), there is also an alternative remedy available to them to allege that, in providing these benefits, the first respondent had acted unfairly. This may, in other words, constitute a claim on the basis of a residual unfair labour practise (see schedule 7, part B, item 2(1) (b) of the LRA).
- [22] Further, in terms of section 197 of the LRA, when a business is transferred as a going concern, the effect in

terms of section 197 of the LRA is that all rights and obligations of the “old” employer is transferred to the “new” employer in circumstances such as those of the present matter.

[23] In the event, any rights that the employees may have had against the old employer can also be exercised in regard to the new employer and any possible harm that they may suffer because of the transfer is thereby greatly diminished.

[24] In conclusion, it is my view that the applicant has failed to show that any of the rights of the employees concerned have been *prima facie* infringed. I reiterate that especially their right to be consulted in terms of section 189 of the LRA has not been shown to be infringed which (as it appears also from the relevant relief claimed - quoted above) is the main thrust of the applicant’s case.

[25] In the event, the application stands to be dismissed, for this reason alone, and I thus need not deal any further with the other contentions in regard to the fact that there may not have been the necessary urgency in bringing the application or any irreparable harm suffered.

[26] I have not been addressed on the issue of costs and, given especially the undertaking of the two respondents to negate any possible harm that the applicants may suffer in regard to the voluntary retirement package (see paragraph [19] above), I believe that it is only fair that costs should follow the result.

[27] I make the following order:
The application is dismissed with costs.

Basson, J

31 March 2000

ex tempore