

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C698/01

DATE: 1-3-2002

In the matter between:

**CLIVE MOORE & 35 OTHERS LISTED IN
ANNEXURE "A" HERETO** Applicant

and

TELKOM SA LIMITED First

Respondent

MERGING EMPOWERMENT GROUP LTD Second

Respondent

DYNAMIC CABLES SA (PTY) LTD Third

Respondent

CORPORATION 31 (PTY) LTD Fourth

Respondent

SHAWN CHRISTIANSEN Fifth

Respondent

DYNATECH (PTY) LIMITED Sixth

Respondent

JUDGEMENT

WAGLAY, J:

1. This is an application to review and set aside the decision of the fifth respondent sitting as a Commissioner. The decision which applicants seeks to set aside and review is that the first respondent be removed from the list of respondents in respect of the dispute referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") by the applicant under case number WE40258. The applicants further seek an order that the fifth respondent issue a certificate in terms of section 135(5)(a), which includes as a respondent the first respondent herein.
 2. The relevant facts raised in dispute are as follows: The applicants herein (here there is a dispute as to whether or not all the applicants are properly before this Court) referred a dispute to the CCMA for conciliation citing four parties as the employer party. The first of which is the first respondent, Telkom SA Ltd; the other three parties are: second respondent - Merging Empowerment Group Ltd ("MEG"); third respondent - Dynamic Cables SA (Pty) Ltd and the fourth respondent - Corporation 31 (Pty) Ltd.
13. Under the nature of the dispute the applicants indicated that the dispute related to severance pay and provided a summary of the facts

relating to the dispute, stating that the "*claim is for payment of the severance benefit by Telkom SA Ltd ("Telkom") in terms of its policy and/or practice applicable as at April 2000, alternatively for severance pay calculated in accordance with section 35 of the Basic Conditions of Employment Act ("BCEA") read with section 41 of the BCEA by the three other listed employers and further alternative prayers*".

14. In the summary, applicants record that on 1 April 2000 the first respondent sold one of its divisions (which I shall refer to as "Uvatek") in which they were employed as a going concern to the second respondent and that this sale took place with their knowledge. They further stated that at least 12 months preceding the sale Uvatek hardly had any work. However representations were made to the applicants by the first respondent to the effect that they were not at risk of being retrenched by the second respondent; and if they were retrenched they would receive the same retrenchment benefits that would be payable by Telkom (first respondent). Furthermore, the first respondent had rejected their request that they be retrenched rather than transferred to the second respondent.

15. About two weeks after the transfer the applicants received notice from the second respondent of its intention to commence consultation with a view to reducing staff by reason of its operational

requirements. The employees now employees of the second respondent were offered voluntary severance package. All of the applicants accepted and applied for the voluntary severance package this was then paid to them and they were retrenched on 31 May 2000. This is a dispute about the calculation of the severance amount.

16.The second respondent has since been transferred to a third and possibly to the fourth, and, it appears, now possibly to the sixth respondent. Furthermore, applicants record that the dispute arose on 1 April 2000, alternatively 1 June 2000, or alternatively thereafter. In the section of the referral that require the applicants to spell the outcome they require, applicants record the following:

"1. To determine entitlement of applicants to severance pay.

2. Order payment in terms of Telkom SA's policy and of practice.

17.Determine the dispute relating to the correct calculation of the severance pay."

18.Under additional information, applicants records that the legal issues relate to section 197 and Schedule 7(2)(1)(b) of the Labour Relations Act and section 41 and section 35 of the Basic Conditions of Employment Act. This referral was only made on 12 December 2000. The matter came before the fifth respondent for conciliation at which

conciliation the first respondent raised the point that it should not be cited as a party as the business division in which applicants were involved was sold as a going concern to the second respondent and as such there existed at the time of applicants dismissal no relationship between applicants and it.

19. Arguments were presented by both sides and the Commissioner found that the first respondent should not be cited as a respondent. The fifth respondent records the determination as follows:

"The applicants have not been able to justify why Telkom SA Ltd should be cited as a respondent party. Consequently I find that they have no claim against Telkom in respect of the employment relationship as it was dealt with within the realms of section 197 and at the time of the dispute the employer and employee relationship with Telkom had been terminated.

Telkom SA Ltd is accordingly struck from the list of respondents."

The fifth respondent then issued a certificate of non-resolution, excluding first respondent as a respondent.

9. The grounds upon which applicants seek to set aside the determination is the following:

1. The Arbitrator exceeded its powers in making the determination he did because there was no evidence before him to the effect that

applicants agreed to have the terms and conditions of employment transferred as part of the sale agreement between first and second respondents.

2. That first respondent made representations which induced applicant not to vigorously oppose their transfer to the second respondent.

3. That his determination was ultra vires his powers because he is not enjoined to enquire whether or not there is a dispute between the parties.

4. That in any event applicant had a dispute in terms of Schedule 7 Item 2(1)(b) of the Act against the first respondent and that is, that the first respondent committed an unfair labour practice against the applicant.

10. Firstly, it is preposterous to suggest that the Commissioner, faced with conciliation, must issue a certificate irrespective of whether or not there is a dispute before him. How is a Commissioner to resolve a dispute if there is not one? Must he then just issue a certificate? While the Commissioner at conciliation makes no finding on the merits of a dispute, he or she is entitled to ensure:
- (1) that the dispute before him is one over which he has jurisdiction;
 - (2) the right parties are before him.

If either of the above instances are answered in the negative, he must expressly refuse to issue a certificate. The refusal to issue a certificate would imply that the party raising the dispute will not be able to pursue the next procedural step in the dispute resolution process. This is the right way to handle the matter. The purpose of conciliation, therefore, is not only an attempt to try and resolve a dispute, but where the wrong parties are before the Commissioner, the matter should be brought to an end there. In the circumstances once the first respondent raised the issue that it should not be cited as a party, it raised the issue of jurisdiction which the Commissioner (fifth respondent) was required rightly to enquire into and determine. This he then did.

11. The next issue is how did he arrive at his determination? Here the applicant argued that no evidence was led at the hearing, only argument presented. This is so and it is wrong to make a finding relating to facts in the absence of any evidence. Findings, however can be made on facts which are common cause and since the arbitration process is not a formal process, parties do not have to expressly place on record what they agree to as common cause-their arguments or statements may clearly indicate facts which are not in dispute. In this matter what the Commissioner had before

him, which was not disputed and is now confirmed by the applicants, is the following:

1. They worked for Uvatek, which was a division of first respondent.
2. That the division was sold as a going concern to second respondent.
3. The effective date of transfer was 1 April 2000.
4. Weeks later consultations were held with them by second respondent in relation to their possible retrenchment.
5. All of them accepted voluntary severance package and terminated their employment on 31 May 2000.

From the evidence it was sufficient for fifth respondent to come to the conclusion which he did. While it is true that he also considered other issues, these considerations do not tarnish the decision. The issue really is the one that once the business entity - Uvatek - was sold and transferred as a going concern, all of the applicants rights and obligations vis à vis first respondent were transferred to the second respondent. The second respondent then fell into the shoes of the first. There is, therefore, no reason why first respondent should be detained as a respondent in the proceedings where applicants seek a determination about the severance package.

12. The applicants on the one hand, argue that they never consented to the transfer and in fact sought from first respondent to retrench them, which first respondent refused. On the other hand they argued that before the transfer, representations were made to them by the first respondent, on which they relied and therefore they accepted the transfer and these representations were false. In the majority decision of the Labour Appeal Court in the matter of NEHAWU v UCT & Four Others unreported case CA12/2000 it was held that where the whole or part of a business trade or undertaking - such as was the case in respect of Uvatek- is transferred as a going concern, as happened here, the consent of the employee is not required.

20. In the circumstances the applicants in this matter could not have objected to being transferred to the new employer. This then brings the applicants' allegation that it has a dispute as provided for in Schedule 7 Item (2)(1)(b) of the Act which deals with unfair labour practice, as against the first respondent. While it is correct that it referred to the above section as one of the relevant "legal issues" the claim that it actually referred for conciliation and for which it sought a certificate is a dispute about severance pay specifically and not an unfair labour practice dispute. If its claim was about unfair labour

practice, what did it seek for the conciliation to achieve? Having regard to what is recorded in the application and the referral itself there is nothing even vaguely possible to be interpreted to mean that there was a dispute about an unfair labour practice.

21. For all of the above reasons I am satisfied that the decision of the fifth respondent is not one which is open to interference by this Court. I have, because of the above, decided not to consider the other issues raised, particularly by the first respondent relating to the issue of whether or not all of the applicants were properly before this Court. With regard to costs, the papers filed by the first respondent have not been of any assistance to this Court. In the circumstances I am not prepared to make any order with regard to costs.

22. In the circumstances I make the following order:

The application is dismissed.

WAGLAY, J