Sneller Verbatim/HDJ

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS506/01

2002-10-22

In the matter between

H GERSBACH Applicant

and

CELLVEC ELECTRONICS Respondent

J U D G M E N T

REVELAS J:

1. The applicant was dismissed by the respondent on 3 January 2001 due to the alleged operational requirements of the respondent. He referred a dispute about an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration, ("the CCMA" or "the Commission").
2. Conciliation took place on 12 February 2001, according to the applicant. The respondent raised an objection

in limine to the effect that on the certificate of outcome the dispute was not resolved or remained unresolved and was a nullity. The respondent relied on the following facts:

1. 1. 3. On 22 January 2001 the respondent received a written notice from the CCMA to attend a conciliation meeting. The applicant received the same notice to attend and did attend on that day, namely 12 February 2001.

4. On 24 January 2001 the respondent, without notifying the applicant, requested a postponement of the conciliation because the date did not suit the respondent's labour consultant. He had made other arrangements for the day.

5. On 5 February 2000 the labour consultant wrote a further letter to the CCMA, requesting a new conciliation date.

6. On 6 February the respondent received a notice from the CCMA, advising that the date for conciliation was scheduled for 22 February 2001. The respondent alleges that it understood this to be the new conciliation date, allocated as a result of or in response to its request for a postponement.

7. However, on 8 February 2001 the respondent received a fax from the CCMA, being a copy of the respondent's

letter dated 24 January referred to above, on which the following handwritten remarks are made at the bottom of the letter:

"RECEIVED

2001/02/08

We only received it today. Someone has to come and argue postponement on 12/02/01 at 13h30."

8. Respondent said he ignored this letter and argued that the handwritten notice was clearly an error. It is common cause between the parties that the second note emanated from the CCMA.

1. 9. In the interim, the applicant had, as it alleged, attended a conciliation meeting at the CCMA on 12 February 2001, in the absence of the respondent. A certificate to the effect that the dispute remained unresolved was issued on this occasion.

10. The respondent argues that this certificate is a nullity because on 22 February 2001 the respondent represented by an employee, appeared at a conciliation meeting at the CCMA and a conciliation ruling was made to the effect that the applicant had abandoned the dispute.

11. The respondent's argument has no merit. Firstly, it was conceded that some administrative error was

committed by the CCMA in its handling of the matter. However, the approach adopted by the CCMA to notify the respondent that it must argue the postponement at the CCMA's offices is quite correct. The CCMA is an institution which carries a heavy burden in terms of the amount of disputes which are conciliated by it and arbitrated under its auspices. Chaos is bound to ensue if conciliations and arbitrations were arranged, only to be postponed by unilateral postal request. The reason for not permitting unilateral postponements per postal request is quite obvious.

12. Rule 17 of the Rules of the CCMA provides for postponements. According to Rule 17(1) postponements will be granted without the need for the parties to appear if both of the following conditions are met:

1. **"1. All the parties to the dispute in writing to the postponement; and**
2. **The request for the postponement is received by the commission more than ten days prior to the scheduled date of arbitration."**

13. Rule 17(2)(a) of the Rules of the CCMA provides that a formal application in writing, for a postponement is necessary if the parties do not agree, whether or not an arbitration should be postponed, or when the request for the postponement is made within ten days of the

scheduled date of the arbitration, and (b) the application is to be served before the scheduled date for the arbitration.

14. The Commission must decide whether to grant the request for postponement on the written document presented, or whether to convene a formal hearing. One would assume that a further requirement should be, in the latter instance, that there should be service of the request on the other party. This basic requirement was not met in this case.

15. The applicant has contended that the same rule should apply to the postponement of conciliation meetings. I agree with that contention. I believe that the rule regarding postponements should also be strictly applied to conciliation meetings, since that is the first stage which a dispute comes to the attention of the employer party and the CCMA.

1. 16. In this matter the respondent did not even have the courtesy to notify the applicant of its application for a postponement or of the second meeting where it obtained the certificate referred to. The latter certificate is relied upon by the respondent as the one nullifying the former certificate.

17. The respondent also further argued that since the certificate of outcome is referred to by the applicant

as **"incorrect"**, (there is a note to that effect written on the certificate), it is a further reason to regard it as a nullity. The applicant explains that this was done insofar as the description of the dispute is concerned. The conciliator noted that the dispute concerned the unfair dismissal of the applicant, whereas the applicant referred a dispute concerning a dismissal for operational requirements to the CCMA.

18. The applicant correctly contends that he is not bound by the description of the dispute by the CCMA and that he bears the *onus* to refer the dispute to the correct forum for adjudication. In *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers' Union and Others* (1998) 19 LJ 260, the Labour Appeal Court held that the Labour Court and the CCMA should inquire into the jurisdiction to determine an unfair dismissal.

19. In *Vusa v Waverley Blankets Ltd* 2000 21 ILJ 1910, CCMA, a commissioner found that an arbitrator is not bound by the designation of the dispute and that it must have regard to the real nature of the dispute.

1. 20. The Labour Appeal Court also found that the parties are not bound by categorisation of the dispute and that it is for the court to ascertain whether the essential quarrel between the parties has been conciliated. The legal characterisation of the

particular set of factors for this purpose is irrelevant. (See: *National Union of Metal Workers of SA and Others v Line Drive Technologists (Pty) Ltd and Another* 2000 ILJ 142 LAC.)

21. In the afresaid matter the Labour Appeal Court held that the parties are not bound by the conciliator's description of the dispute and the allegation of another reason for dismissal does not introduce any new dispute.

22. So much for the complaint about the incorrect description.The respondent's argument in that regard also has no merit.

23. The respondent has not bothered to plea to the applicant's statement of claim but instead has raised the above disingenuous point *in limine,* which, in my view, is nothing more than a delaying tactic. On the respondent's papers it acted on the advice of a labour consultant. The applicant suffered as a result thereof. The respondent accepted such advice at its peril and should face the consequences thereof and pay the costs of the applicant on a punitive scale.

24. Therefore I make the following order:

1. The point *in limine* raised by the respondent, (Cellvec Electronics), is dismissed with costs on a scale as between attorney and client.

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E. Revelas