REPORTABLE

Case Number : 126 / 98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between :

TREVOR BAUDACH **Appellant**

and

UNITED TOBACCO COMPANY LTD **Respondent**

Composition of the Court: **Grosskopf, Olivier, Scott, Streicher JJA and Melunsky AJA**

Date of hearing: **22 May 2000**

Date of delivery: **30 May 2000**

S U M M A R Y

Unfair labour practice - employer misrepresenting to employee that his position had become redundant - agreement to accept package in full and final settlement not binding.

J U D G M E N T

PJJ OLIVIER

[1] This is an appeal against the judgment of Froneman J in the Labour Appeal Court ("the LAC"), upholding an appeal by the present respondent, the United Tobacco Company ("UTC"), against a judgment by the Industrial Court in favour of the appellant, Trevor Baudach. The appeal is with leave of the court *a quo*. It is properly before us by virtue of item 22 (4) of Schedule 7 to the Labour Relations Act 66 of 1995 ("the LRA of 1995"), which provides that any pending appeal from the decision of the LAC to this Court in terms of ss 17 C and 64 of the previous Labour Relations Act 28 of 1956 ("the LRA of 1956") must be dealt with as if the last-mentioned Act had not been repealed.

[2] Baudach was employed by UTC for a period of 26 years, from 1969 until 1995. Immediately prior to his dismissal, which gave rise to the present litigation, he held a senior position in UTC as the regional manager of Kwazulu Natal. On 23 November 1994 he was summoned by letter from the head office of UCT in Johannesburg to attend a meeting there on 28 November 1994. He had no inkling of the reason for the request. At the meeting he was informed that his services were no longer needed by UTC because, due to the restructuring of its trade marketing department, his position, as regional manager had become redundant. He was offered

a settlement package and told that if he did not accept this package the usual retrenchment procedures would apply. It is common cause that the said package would leave him in a much better financial position than would normal retrenchment.

[3] On the same day a UTC letter was handed to him, confirming the "consultation" on that day between himself and Mr John Greenleese (the National Trade Marketing Manager), Mr P Fourie (the Human Resources Director) and Mr J Vos (the Divisional Manager).

> The relevant part of the letter reads as follows :
> "The Company, over the past year has experienced a marked and dramatic decrease in its performance due to depressed and decreasing sales volumes. The Company, from an economic point of view and out of necessity has been forced as a result to restructure its trade marketing department. After much deliberation and consideration it is with regret that the Company must advise that your services have become incompatible with the Company's future needs in Trade Marketing.
>
> The Company, without prejudice to its rights and <u>in full and final settlement of the termination of your services</u> is prepared to offer to yourself a retrenchment package of R292 943,95 being in respect of the following :
>
> 1 Three months notice pay effective 1 January 1995;
> 2 Full annual bonus in respect of 1994 and 1995;
> 3 All outstanding leave pay due to yourself;

4 All employment benefits up and until 31 March 1995."

(My emphasis)

[4] Baudach requested time to consider the matter and returned to his home in Durban. In December he received a further letter from UTC dated 14 December 1994, confirming that

> " ... your position within the Company has become incompatible with the Company's future needs in Trade Marketing and that your position within the said department has become redundant.
>
> Pursuant to the said consultations [*i.e.* those in November 1994], we hereby confirm that your contract of employment will terminate on 31 December 1994. The Company in full and final settlement of the termination of your services, shall pay yourself the following redundancy package : ..." (My emphasis)

Details of the package were then given.

[5] At the foot of the page there appears the following stipulation :

> "I, T. Baudach, confirm receipt and acceptance of the redundancy package offered to myself by United Tobacco Company Limited and confirm that the same is in full and final settlement of all claims arising out of the termination of my employment with United Tobacco Company Limited. I am signing this agreement on a free and voluntary basis." (My emphasis)

Baudach signed this note on 18 December 1994.

[6] As a result of further calculations and tax implications, it was agreed that the second letter should be withdrawn and it was replaced with one from UTC head office (signed by Fourie) dated 31 January 1995. It provided that Baudach's employment would terminate on 31 March 1995; set out amended package figures; and requested Baudach, "should the above arrangement be acceptable to you", to sign an acceptance provided for at the end of the letter which reads :

> "I, Trevor Baudach hereby confirm my acceptance of the above termination payments in full and final settlement of monies owing to me by United Tobacco."

Baudach signed the acceptance on 7 February 1995 and returned the letter, so countersigned, to UTC headquarters.

[7] Baudach left the employment of UTC on 31 March 1995 and the termination payments as set out in the third letter were paid to him. Notwithstanding these facts, Baudach brought an application in September 1995, in terms of s 45 (a) of the LRA of 1956, in the Industrial Court at Durban against UTC, alleging that the termination of his employment was both substantively and procedurally unfair. He prayed for orders :

1 declaring his dismissal by UTC with effect from 31 March 1995 be an unfair labour practice;

2 that he be reinstated in his former position; and

3 that compensation in an amount to be determined by the Industrial Court for the "loss of any benefits, damages and sentimental damages" be paid to him by UTC.

[8] In reply to the application UTC pleaded on the merits and also filed a special plea to the effect that the matter had been settled by the acceptance of UTC's offer when Baudach signed the "full and final settlement" stipulations as set out above.

[9] At a pre-trial conference Baudach's legal representatives delivered a reply to the special plea, averring that the circumstances under which the respondent signed the acceptance was unfair "in particular because [UTC] misrepresented to the applicant that his post had become redundant when in truth it had not." The alleged misrepresentation was also relied on in support of Baudach's claim that his dismissal was substantively unfair.

[10] At the pre-trial conference a further important step was taken, when Baudach made it clear that he no longer sought reinstatement, but only compensation for his unfair dismissal. And in the course of his opening address, the legal representative of Baudach indicated that it was not the latter's intention to claim the setting aside of his acceptance of the benefits

paid out to him, but to set them off against the larger amount to which he was entitled as compensation for his unfair dismissal.

[11] The trial proceeded before the Industrial Court, presided over by Dr H Grobler assisted by two assessors, on the basis set out above. Baudach as well as Fourie testified, the latter on behalf of UTC.

[12] It soon transpired that the cause of Baudach's complaint was that he had accepted the termination of his employment and the package offered him because he believed the representations made by UTC that his retrenchment was a *fait accompli* as the position held by him had become redundant, whereas he learned, towards the end of February 1995 or early in March 1995, that in fact his job had not become redundant. A young woman, Mrs Zita Hanson, had been appointed in his place as acting regional manager in Kwazulu Natal and she was later replaced by another young woman who was appointed as regional manager. He obtained the last-mentioned information towards the middle of March 1995. His evidence was that he was never informed that his position (which was represented to him as being redundant) would in fact continue to exist.

[13] Baudach also testified that he would have reached the pensionable age with UTC a mere 28 months after the termination of his services

and that, had an alternative position been offered to him with UTC, he would seriously have considered accepting it to safeguard his pension. Although UTC was a very big organisation, he was never given the choice of another position. Under these circumstances he accepted the package and signed the acceptance.

[14] In the course of Fourie's evidence it transpired that the real reason for terminating Baudach's employment was that UTC had decided that there was a need for change in the marketing division in Kwazulu Natal. They needed someone who was "far more aggressive, dynamic, has more leadership than he had, at that time. And it was appropriate to change the person in that position." Fourie later admitted that UTC was not dealing here with a case of retrenchment or redundancy but with Baudach's "incompatibility" or "unsuitability" and his "leadership style"; he was not "dynamic" and had a low "energy level". It was also stated by Fourie that Baudach was in fact informed during the meeting in Johannesburg, mentioned above, that he was unsuitable for the position he held. This evidence is in conflict with that of Baudach and is inconsistent with the reasons advanced in the three UTC letters.

[15] The misrepresentation as to the reason for Baudach's dismissal

apparent from the said letters - that Baudach's position had become redundant - was fully exposed when it was admitted by UTC in the pre-trial minutes that his position had never become redundant and that it was filled by other persons after his employment terminated.

[16] The Industrial Court found in favour of Baudach on the basis that his services were terminated in pursuance of a purported retrenchment and that he had been misled into believing that his services were being terminated on the basis that his position would disappear in the course of a restructuring exercise.

It is also implicit in the judgment of the Industrial Court that the misrepresentation was committed intentionally. It was said by the President:

> "In view of the fact that there were no grounds on which to terminate [Baudach's] services, and because [UTC] had ostensibly acted over hastily, it would appear that it was decided to style his dismissal as a retrenchment - which it clearly was not."

This, coupled with the lack of proper consultation, led the court to find that Baudach's dismissal was substantively and procedurally unfair, and to grant him compensation in the amount of R276 625,00 with costs.

[17] UTC successfully appealed to the LAC. In the course of his judgment Froneman J held that the factual findings of the Industrial Court were justified. But, he said, the Court had not dealt in express terms with the issues raised in the special plea; they had been rejected by implication, for reasons that are not apparent. The learned judge then stated that the first question that arises from the special plea is whether Baudach's claim in the Industrial Court was not, in essence, a claim for damages based on misrepresentation, and, if so, whether that court had jurisdiction to entertain the claim.

[18] The learned judge then dealt with the argument of Baudach's legal representative that the misrepresentation in the present case constituted an unfair labour practice as envisaged by s 1 of the L R A of 1956, *viz* any act or omission which has or may have the effect of unfairly affecting any employee or prejudicing his employment opportunities or work security. He also referred to the argument that the legal effect of Baudach's acceptance of the termination payments must be overridden by the equitable jurisdiction of the Industrial Court and should therefore effectively be ignored.

[19] Firstly Froneman J relied on a dictum by Van den Heever JA in

National Automobile and Allied Workers Union (**now known** as **National Union of Metal Workers of SA**) ***v Borg-Warner SA (Pty) Ltd*** (1994) 15 ILJ 509 (A) at 518 B - C, F - H). Van den Heever JA, after saying that the termination of an employer-employee relationship did not terminate the relationship envisaged by the LRA of 1956 merely because the relationship had ended in common law, concluded however by saying : " ... when both parties so agree, or when equity permits, the relationship does come to an end". These concluding words, in Froneman J's opinion, applied to the present case.

Froneman J then said that the question is whether the consensual termination of the contractual relationship also amounted to a termination of the employment relationship itself. In the present case, he said, the express terms of Baudach's acceptance of the termination benefits admits of no reasonable construction other than that his employment relationship would come to an end; that the payments were in respect of the termination of the employment relationship; and that these payments constituted a full and final settlement of monies owing to him by UTC arising from the termination of his employment relationship with UTC.

[20] It follows, so the learned judge reasoned, that when Baudach

instituted his claim in the Industrial Court, he was no longer an employee in terms of the LRA of 1956, unless he proved that his acceptance of the termination benefits was not binding. The learned judge held that he expressly chose to do exactly the opposite, namely to abide by his acceptance of these benefits. In so doing, the learned judge said, he had placed himself beyond the jurisdiction of the Industrial Court's unfair labour practice jurisdiction. "He cannot," observed the learned judge, "have his cake and eat it."

[21] For the reasons that follow I am in respectful disagreement with the learned judge *a quo.*

From the very beginning of the litigation Baudach based his claim on the concept of unfair labour practice. He relied this on two grounds, firstly the misrepresentation (discussed above), and, secondly, the lack of consultation.

As regards the misrepresentation, his case was, at least impliedly, that the misrepresentation had a dual effect: it amounted to an unfair labour practice and entitled him to resile from the agreement of settlement (according to both well-known common law principles and principles of unfair labour practice). In bringing the action for reinstatement

alternatively for compensation and by tendering to have the amount already received taken into consideration in calculating the *quantum* of the compensation, he at least impliedly resiled from or lawfully rescinded the settlement agreement, whether by virtue of the common law or as an incidence of the unfair labour practice. In the light of the finding of the Industrial Court that the misrepresentation was committed intentionally, he was entitled so to do, and his claim was rightly upheld in the Industrial Court (see also for analogous cases ***Unilong Freight Distributors (Pty) Ltd v Muller*** 1998 (1) SA 581 (SCA) especially at 591 I - 592 B, (a case of duress); ***Mediterranean Woollen Mills v South African Clothing and Textile Workers' Union*** 1998 (2) SA 1099 (SCA) especially at 1103 D-J, (a case of misrepresentation)).

[22] It follows that the alleged settlement agreement could not validly be raised by UTC as a defence. For the purposes of the LRA of 1956 he was entitled to be treated as an ex-employee and, by fiction law, as if the labour relationship between UTC and himself were still *in esse*. The Industrial Court had jurisdiction to deal with his claim, which was for compensation by virtue of the LRA of 1956, and not a common law claim for damages, as the learned judge *a quo* thought.

[23] The Industrial Court was correct in finding that UTC had committed an unfair labour practice against Baudach. The misrepresentation was clearly the cause that induced Baudach to accept the settlement. It was, *per se*, an unfair labour practice. Furthermore, there was no proper and honest consultation with Baudach, explaining to him in what respect his services were unsatisfactory and affording him an opportunity to counter the allegations. Nor was he given an opportunity to improve on his past performance; nor was he offered an alternative position in the company. What in truth was an unfair dismissal was clothed as a retrenchment.

[24] The Industrial Court as trial court awarded Baudach a sum in compensation after hearing all the evidence. The amount claimed was not seriously contested, except for an amount of R5 600,00, which was deducted from the claim. In this Court no convincing argument was advanced as to why the award should be interfered with.

[25] Three applications for condonation were presented to this Court, two by the appellant and one by the respondent. The only application that was contested was one by the appellant. His attorneys were late in lodging the Notice of Appeal in this Court, in delivering the record of appeal and in providing security for costs. It transpired that the appeal was timeously

prepared and a notice of appeal was forwarded to the correspondents of the appellant's attorneys in Bloemfontein. Before the notice could be lodged with the Registrar of this Court, the appellant's attorney was informed by various members of the staff of the Registrar of the new LAC that the appeal had to be prosecuted in that Court and not in the Supreme Court of Appeal. All this occurred shortly after the LRA of 1995 had come into effect. Apparently there was confusion in the office of the Registrar of the new LAC about the effect of that Act and the transitional provisions. The attorney erroneously followed the advice given him by the said members of staff of the new LAC.

[26] In my view, the attorney's explanation is *bona fide* and acceptable. Having regard also to his strong case on the merits, the appellant's failure to comply with the prescribed time limits should be condoned. All three applications should therefore be granted. As to the costs of the applications, the appellant ought to pay the costs of the first-mentioned application, but on an unopposed basis only. The opposition to it was not warranted. In the other two applications, each party should pay its own costs.

[27] The following order is made :

1 The appeal succeeds with costs.

2 The judgment and order of the court *a quo* are set aside and replaced with the following order :

"1 The appeal is dismissed with costs, and

2 The order made by the Industrial Court in this matter is reinstated."

3 The appellant's application for condonation of his failure to lodge his Notice of Appeal within the prescribed time limits and his failure to deliver the record of the appeal and to provide security timeously is granted. The costs of the application on an unopposed basis are to paid by the appellant.

4 The appellant's application for condonation of his failure to attach the order granting leave to appeal to the Notice of Appeal and of the incorrect citation of this Court in the heading on the record of appeal is granted; each party to pay its own costs.

5 The respondent's application for condonation of the late filing of its opposing affidavit in the application mentioned in par 3

hereof, is granted; each party to pay its own costs.

P J J OLIVIER JA

<u>CONCURRING</u> :
GROSSKOPF JA
SCOTT JA
STREICHER JA
MELUNSKY AJA