IN THE COURT OF APPEAL FOR THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Case NO.CACLB-022-08
High Court Case No.MAHL000054-08

In the matter between:

BOTSWANA TELECOMMUNICATIONS CORPORATION **Appellant**

and

BOITUMELO GABAAKE-KAUTA & 41 OTHERS **Respondents**

B.E. Leech (with Ms Makati-Mpho) for the Appellant[i]
Ms M. Molema (with Mr J.C. Salbany) for the Respondents[ii]

JUDGMENT

CORAM: **McNALLY JA**
FOXCROFT JA
HOWIE JA

McNALLY JA.

THE FACTS

1. This case involves a dispute between two parties which I shall call the corporation and the employees. The Botswana Telecommunications Corporation is a statutory body created by Cap.72:02 of the Laws of Botswana. The employees are a group of Senior Heads of Department (Layer C) and middle-management staff (Layer D). They are not unionised and have simply come together to adopt a

common position in this dispute. Some 45 of them are involved, out of a total of 93 Layer C & D managers.

2. The Corporation has, since 2003, been involved in an exercise for the restructuring of itself and the rationalization of its staffing. Whether or not this is being done to facilitate the privatization of the corporation is a question which seems to be irrelevant to the present dispute, though hotly debated.

3. Agreement on staff reductions had been reached with the unions representing lower grade workers. The more senior management staff, non-unionised, were kept informed of developments on an individual basis. A group of them ("the employees") were dissatisfied with this and formed themselves into an ad hoc group, demanding negotiations. The corporation refused to negotiate and refused to recognise the group. Eventually, it was announced to all relevant employees in Staff Circular No.17 of 8 August 2007 that:-

"*a. The Board of Directors had approved the revised structure and the Exit Package to be used in the Staff Rationalisation Scheme;*

b. *Extensive consultations with non-unionised staff had been undertaken and concluded (this is firmly denied by the employees)*

c. *It was anticipated that letters inviting employees to apply for the Exit Package would be issued with effect from 8 August 2007. The closing date for all applications to have been submitted was 21 August 2007.*

d. *The Exit Package document and the Application Form would be attached to the letter inviting employees to apply for the Exit Package."*

4. Following on this, in fact on the very next day, letters went to individual employees. Since the terms of these letters are important I set them out here:-

*"**<u>RE: INVITATION TO APPLY FOR EXIT PACKAGE - YOURSELF</u>***

Reference is made to Staff Circular Number 17 dated August 8th 2007 from the CEO on the staff rationalization process.

This letter constitutes a formal invitation to apply for the voluntary exit package should you be interested in doing so. The invitation does not in any way guarantee that your application will be successful; the Corporation reserves the right to reject applications where Management still requires the services of the applicant in their present role or in a redeployed position

.

Enclosed are the following documents for your perusal:

1. Exit Package Application Form

> 2. *Information on the Exit Package*
> 3. *Staff rationalization implementation roadmap*
> 4. *Mandate of the Appeals Committee.*
>
> *It is worth noting that the decision to apply for an exit package is entirely voluntary.*
>
> *Kindly go through the pack, complete the application form if you wish to apply for the exit package. Staff outstations should submit their applications through the Installation and Maintenance Managers and Heads of Department for Head Office and Francistown.*
>
> *All applications should be submitted no later than 21 August 2007. No applications submitted after the set date will be accepted and considered."*

THE DISPUTE

5. Put simply the dispute is whether or not this letter is an offer, capable of acceptance by the completion and dispatch of the Application Form by those not still required by the Corporation. The employees say that it is. The corporation says it is not, and that the Application Form is the offer which is then capable of acceptance by the Corporation.

6. The significance of the dispute is that the corporation subsequently realized that the VEP was over-generous, withdrew it, and proposed a lesser package. The employees contend that they have "accepted" the "offer" of the first package. There is a contract, they say, and the corporation cannot unilaterally resile from it.

<u>THE FINDING OF THE COURT A QUO</u>

7. The learned judge a quo found in favour of the corporation in this regard. The court found there was no offer in the letter of 9 August, and thus no contract. The judgment, at p25, reads :-

> *"It is clear that the 9 August 2007 letter is an invitation for Applications to submit offers in the form of applications (for) the VEP."*

And later:

> *"The Applicants' argument that the Respondent sent the aforementioned letter with the intent to be bound by any acceptance cannot stand given that the letter expressly provided that the agreement was subject to the approval of Respondent."*

8. Curiously, having made this finding the learned judge backed away from it and decided, by reference to s.25 of the Employment Act, the doctrine of unfair labour practice and the principle of legitimate expectation, that the corporation was nonetheless bound to the original more generous package. I will revert to a consideration of this reasoning later in this judgment. Suffice to say for the moment that this is the reason why the employees found it necessary to lodge a cross-appeal, not against the result, which was in their favour, but against the reasoning of the learned judge. This is impermissible - see ***<u>Ngubane v. S.A. Transport Services 1991 (1) SA</u> 756 (A) at 772 D-E***

I will ignore the cross-appeal.

THE INVITATION

9. The invitation, set out in paragraph 4 above, is, on the face of it, no more than an invitation to make an offer. The employees' argument is founded on the last sentence of the second paragraph. They contend that the corporation, by defining the circumstances in which applications would be rejected, was affirming that in all other circumstances the applications would be accepted.

10. Even if that is so, and I am not convinced that it is, I do not think it is sufficient to indicate any more than a willingness to enter into a contract. It is a question of animus contrahendi. I find helpful, though not precisely in point, the comment in Christie on Contract 5th Edition, at page 33:-

> "*A statement intended to induce another to enter into negotiations with a view to arriving at a contract may vary between a simple request to state his views, as in* ***Biloden Properties (Pty) Ltd v. Wilson*** ***1946 NPD*** *736 at 748, and a statement of one's own views with an invitation to discuss them, as in* ***Ferguson v. Merensky*** ***1903 TS 657.*** *In the latter case a statement of willingness to sell certain farms and of the selling price was held not to be an offer…."*

And see ***Wasmuth v. Jacobs*** ***1987 (3) SA 619 at 633.***

11. To my mind the opening words of the second paragraph of the letter of 9 August 2007 are wholly inconsistent with an intention to contract. I refer to the words:-

"This letter constitutes a formal invitation to apply for the VEP should you be interested in doing so.

The invitation does not in any way guarantee that your application will be successful…"

The letter is what is says it is - an invitation to apply. To this extent I agree with the learned judge a quo. The letter was not an offer. The application was not an acceptance. There was no contract.

<u>THE REASONING OF THE COURT A QUO</u>

12. I turn then to consider how the court a quo managed to circumvent its original, and, with respect, correct finding that there was no offer and acceptance and thus no contract.

13. The learned judge relied on the passage in the letter of 9 August 2007 to which I have referred in paragraph 9 above. The judgment reads, at the foot of page 26 and over the page, as follows:-

"Furthermore, the terms of the agreement attached to the application state that 'management reserves the right to turn down applications where the corporation still requires

the services of the applicant.' Respondent was limited by the terms of its own invitation for applicants' offer and was therefore not free to reject applicants' applications at will. This term was offered and accepted by applicants through application for the package."

14. I take this to mean that there was a binding and enforceable agreement to contract, or pactum de contrahendo, as to which see Christie op.cit at p.37. In ***Hirschowitz v. Moolman*** 1985(3) SA 739 (A) at 765 I. Corbett JA (as he then was) said:-

"A pactum de contrahendo is simply an agreement to make a contract in the future."

15. What I think the court is saying is "There was no offer to contract in the letter of 9 August 2007, but there was a binding offer to accept any offer made by the employees "unless the corporation required the services of the applicants in their present role or in a redeployed position." My difficulty with this reasoning is that, in the circumstances of this case, it is saying the same thing in different words. If the corporation did not intend to contract, then by the same reasoning it had no animus contrahendi to enter an agreement to contract.

THE RELEVANCE OF OTHER CONSIDERATIONS

16. The learned judge, in setting out the issues to be resolved, put the following as the first issue:-

"whether Botswana Telecommunications company (sic) violated section 25 of the Employment Act by failing to properly notify and consult with Layer C and D Managers

regarding the staff rationalization and retrenchment exercise."

SECTION 25

17. The section requires in subsection (2) that:-

> *"without prejudice to the other provisions of this part in relation to the giving of notice, when an employee forms an intention to terminate contracts of employment for the purpose of reducing the size of his workforce, he shall forthwith give written notice of that intention…."*

18. There is no doubt that notice was given. As to consultation, there is no actual provision in the section demanding consultation. However, in ***Mokaya v. Morteo Condotte (Pty) Ltd*** ***1994 BLR 394 at 399-400*** , De Villiers J in the Industrial Court said, under the heading "Procedural Fairness":-

> *"The fact that the court has found the said retrenchment to be substantively fair is by no means the end of the story. The court wants to emphasise, and cannot emphasise it enough, that the contractual right to terminate employment must be clearly distinguished from the exercise of that right and the procedure followed in so doing."*

I pause here to point out that we are not in this case concerned with retrenchment but with a Voluntary Exit Package. The employees were not obliged to accept the package, which, even in its reduced form, was more generous than outright retrenchment. They were all fixed term employees, being offered more than the balance of their contracts.

19. The court continued:-

> *"The employer must consult with such employees or their representatives at the earliest opportunity. The reason for such consultation is threefold. Firstly, for the parties to seek ways of avoiding or averting the need to terminate the employee's employment. Secondly, if retrenchment proves unavoidable, then the parties should consult on a fair selection criterion,*
>
> *and thirdly consult on ways of alleviating the hardships caused by such retrenchment, eg. A reasonable severance package, possible alternative employment elsewhere, time off to seek alternative employment elsewhere, etc."*

20. I am not sure why these considerations have been treated as arising in the context of s.25 of the Employment Act. I would find it easier to bring them in under the heading of "legitimate expectation" which I deal with below. There are two categories of legitimate expectation - the substantive and the procedural. The former arises when employees have a legitimate expectation that they will receive a particular benefit. The latter, and I would think more common, situation is one where the employees have a legitimate expectation that they will be consulted before a decision is made to reduce or eliminate that benefit. The

present case falls squarely into the latter category, if a legitimate expectation indeed existed.

21. The only relevant question on which there was minimal and probably inadequate consultation in the present matter was the size of the VEP. It appears that the employees themselves considered the initial VEP as "quite generous" - see the minutes of the meeting of 20 August 2007, item 7. Subsequently, the directors, probably under pressure from its major shareholder (the Botswana Government) decided it was too generous, and by then there was very little opportunity for further consultation. However, the employees were informed in advance of the final decision being taken. At that stage there could in practice have been very little meaningful consultation. The corporation was not obliged to negotiate, but only to consult - see Mokaya, above at 400 D.

22. All in all, I am not satisfied that there was any injustice or unfair labour practice resulting from the alleged failure to consult, as opposed to inform, the employees about the reduced VEP. And I point out that subsequent events have shown that consultation would have been to no avail. The employees have taken the attitude, as a matter of law, that the corporation was bound by the earlier package. That is not a matter that could have been resolved by consultation.

LEGITIMATE EXPECTATION

23. The doctrine of legitimate expectation was introduced into South African Law in **Administrator Transvaal & Others V. Traub & Others 1989(4) SA 731 (A).**

It has been accepted in the law of Botswana - **Barclays Bank vs Bank Employees Union (1995) BLR 10 (Ind.Ct)**; **Peloewetse & Others v. Permanent Secretary to the President & Others (2000) BLR 79 (CA); Molemoeng & Others v. Botswana Meat Commission (2005) 2 BLR 118 HC.**

24. The case of Molemoeng above is instructive because it is in many ways similar to the present case, but in essential features different. The applicants were to be retired early from the Botswana Meat Commission, a statutory body. A circular to staff announced, *inter alia,* an Exit Package which was set out in detail. It was said to be "permanent and continuous". However, after a while, and after some employees had benefited from it, the Commission decided it was too expensive. They did not advise the applicants of this. But when the applicants applied to retire they were told there was a new and lower package.

25. The High Court held that they were entitled to the higher package on the ground of legitimate expectation. The two features which distinguish this case from the present one are:-

1. The original and higher package was publicly announced to be an entitlement for those who took early retirement;
2. At least 4 employees had already benefited from this arrangement.

There was no such commitment and no such course of conduct in the present case.

26. The essence of the doctrine when it concerns procedure, is that the audi alteram partem principle should be applied, not only in cases where the decision affects the liberty, property or existing rights of the individual concerned, but also where his or her legitimate expectations are concerned. The doctrine was, at least initially, confined to the sphere of administrative law, where the one party was a public or statutory body. The present is such a case. Compare **National Development Bank v. Thothe** (1994) BLR 98 (CA) at 105 B.

27. It is important to remember that the alleged legitimate expectation in the present case was an expectation to be heard or consulted before an adverse decision was made. That is in accordance with the submission of counsel in paragraph 11 of his heads of argument. So the question here is not "Did they have a legitimate expectation that they would receive the more generous VEP?" It is "Did they have a legitimate expectation to be consulted before the decision was taken to reduce the VEP?" Moreover "consulted" means "consulted" and not "invited to negotiate."

28. I have already concluded, in paragraph 22 above, that the alleged failure fully to consult the employees in relation to the reduction of the VEP was not serious enough to warrant a finding that there was an injustice or unfair labour practice. As I indicated earlier, in paragraph 18 above, we are not dealing here with retrenchment but with voluntary exit packages. There was not anything

significant to consult about, given that the issue, as it transpired, was whether the corporation could lawfully reduce the size of the package.

29. I would also say that the employees' entitlement was to be given the opportunity to make representations. They were invited to do so in a letter from the corporation dated 21 January 2008. They took the opportunity, not to address the issue of the alteration of the original package, but to contend that there had been repudiation of the contract. The corporation's attitude was that it could not give an undertaking not to change the original VEP. Then came the second VEP which invited applications and which was, in effect the threatened variation. In the circumstances the employees did have the opportunity to make representations.

30. Finally, it seems to me that one has to consider the remedy available to the employees if their contention were correct. The court cannot "punish" the corporation by ordering it to be bound by a contract which as a matter of law did not exist. At best for the employees the court could order the corporation to recall its decision to reduce the package and to enter into further consultations with the employees. No such order was sought. In present circumstances nothing would be achieved by such consultations.

31. I have come to the conclusion, therefore, that insofar as the employees had a legitimate expectation to be consulted at the stage when the reduced VEP was put forward, the lack of consultation was due as much to the confrontational attitude

which they adopted as to any lack of willingness on the part of the corporation, under pressure from its shareholders, to consult. One cannot help but feel some sympathy for the disappointment which must inevitably have been felt by the employees. The corporation may consider in the interests of good human relations, that it will be appropriate not to press for the payment of costs. On the other hand the court cannot deny costs to the victor.

32. Accordingly, the following order is made:-

1. The appeal is allowed, with costs.
2. The order of the High Court dated 6 June 2008 is set aside.
3. In its place the following is substituted: -

"The application is dismissed with costs."

DELIVERED IN OPEN COURT AT LOBATSE THIS 30TH DAY OF JANUARY 2009

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N. J. McNALLY
JUDGE OF APPEAL

I agree: ……………......................
J.G. FOXCROFT
JUDGE OF APPEAL

I agree: …………………………………..
C.T. HOWIE
JUDGE OF APPEAL

[i] Collins Newman & Co. Attorneys for the Appellant
[ii] Salbany & Torto Attorneys for the Respondents