

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

LABOUR APPEAL COURT:

Case No: JA15/98

Case No: JR1/98

MINISTER OF LABOUR

First

appellant

THE DIRECTOR GENERAL OF LABOUR

Second

appellant

and

SCHOEMAN, JOHANNES CORNELIUS BOSMAN

First respondent

THE PRESIDENT OF THE INDUSTRIAL COURT

Second

respondent

MR A E JACOBS N.O.

Third

respondent

ADV M GROBBELAAR N.O.

Fourth

respondent

ADV JM JACOBS N.O.

Fifth

JUDGMENT

- [1] The repeal of the Labour Relations Act, No 28 of 1956 (“the Act”) gave rise to a great deal of anxiety amongst the members of the industrial court. They feared that they might lose their jobs as the projected new Labour Relations Act made no provision for the industrial court. Mr Schoeman, the first respondent herein, a senior member of the industrial court, moved by that fear, addressed a letter to the Director General of Labour, second appellant, on 10 June 1996, demanding that the Department of Labour should provide him with suitable job security or, in lieu thereof, his remuneration until he reached the age of 66 years.
- [2] When his demand was not met, on 5 July 1996 he applied for the establishment of a conciliation board under section 18 of the Public Service Labour Relations Act, 1994 (“the PSLRA”). When no board was established within 10 days as required by the PSLRA, he referred the dispute to the industrial court on 2 August 1996. The essence of his complaint in the court below was that the Minister of Labour, the first appellant herein, and the second appellant had failed to consult timeously with him over the future course of his career. He sought, in the main, an order requiring the appellants to provide him with work security consistent with his career and status until he

reached the age of 66 years. In the alternative, he sought compensation.

[3] The appellants raised, as a *point in limine*, the defence that the first respondent was not an employee within the meaning of the PSLRA. On the merits, the appellants maintained that they had complied with such duty as was imposed on them by the dictates of fairness to consult with the members of the industrial court over their careers.

[4] The *point in limine* came before Messrs du Plessis and du Plessis AMM, and was dismissed on 30 April 1997. On 11 August 1997 the application came before a panel of three members of the industrial court (Mr A Jacobs and Mesdames M Grobbelaar and JM Jacobs) for a decision on the merits. After hearing evidence, the court handed down its judgment on 6 February 1998 holding that “the conduct of [appellants] in creating a situation of redundancy without proper or any consultation with the applicant was unfair and constituted an unfair labour practice.” The court awarded the first respondent compensation in the sum of R1,027,000,00 together with costs.

[5] The present appeal is against both the judgments on the *point in limine* and on the merits and against the award of compensation. The first respondent has cross-appealed against the award of compensation.

[6] The appellants also seek an order reviewing and setting aside the decision of

the industrial court on the grounds of appearance of bias. The appellants say that the perception of bias is created by the tone and content of the judgment read in the context of the circumstances under which the hearing proceeded and the manner in which the hearing was conducted. These circumstances include the fact that a member of the court complained before other members of the same court that members of the court, including one of those members who had to decide the matter (i.e. the permanent member), had been treated unfairly and the fact that the witnesses who gave evidence on behalf of that member were members of the same court, including the president of that court.

[7] The first respondent and two of the members of the court *a quo* oppose the application for review on various grounds. However, in the view I take of the appeal, it is not necessary to decide the review.

[8] Apart from the question of the appropriateness of the compensation awarded, two issues arose in this appeal, namely:

- (a) Is the first respondent an employee within the meaning of the PSLRA?
- (b) Did the Department consult timeously and properly with the members of the industrial court, including the first respondent, in respect of the phasing out of the industrial court?

[9] A negative answer to the first question will dispose of the appeal and render it

unnecessary to decide the second question.

[10] For the industrial court to have jurisdiction in respect of the dispute referred to it by the first respondent under sections 18 and 24 of the PSLRA, it was necessary for the first respondent to establish that he was an employee within the meaning of section 1(xi) of the PSLRA. That section defines “employee” to mean:-

“an officer or employee as defined in section 1(1) of the Public Service Act, and includes, for the purposes of sections 18, 22(2)(a), 23, 24 and 25, as well as section 22 in so far as it pertains to the said sections, a person who was such an officer or employee, but does not include -

- (a) a person employed in terms of an Act other than the Public Service Act or the Correctional Services Act, 1959 (Act No. 8 of 1959); and
- (b) a person whose salary and conditions of employment are determined according to general education policy in terms of section 2(1)(b) and (2) of the National Policy for General Education Affairs Act, 1984 (Act No 76 of 1984);”

[11] The appellants contend that the first respondent falls within the exclusion in paragraph (a) in that he is a person employed in terms of the Act which is “an Act other than the Public Service Act or Correctional Services Act”.

[12] The industrial court is a creature of the Act. It was created by section 17(1)(a) of the Act. In terms of section 17(1)(b), members of that court “shall be appointed by the Minister”. Members are appointed “on such conditions as [the Minister] may with the concurrence of the Minister of Finance determine”. (Section 17(1)(c)). Members of the industrial court are, therefore, appointed in terms of the Act. They are, as a consequence, “persons employed in terms of an Act other than the Public Service Act”. They are not, therefore, employees within the meaning of section 1(xi) of the PSLRA.

[13] That the employment contract which the first respondent concluded with the Department of Labour incorporates, by reference, certain features of the Public Service Act, matters not. In terms of section 17(1)(c) of the Act, the Minister may determine the conditions of employment to be applicable to members of the industrial court. What the Minister did was merely to determine that certain provisions of the Public Service Act will be applicable to the employment of the first respondent in accordance with section 17(1)(c) of the Act. The incorporation, by reference, of certain provisions of the Public Service Act does not make the appointment of the first respondent one in terms of the Public Service Act. Indeed the contract of employment expressly states that the first respondent “dien kragtens artikel 17”.

[14] The first respondent, who appeared in person, contended that he is an

employee as defined in the PSLRA. As I understood the argument it proceeded on the basis that the phrase “but does not include” qualifies, and, therefore, applies to former employees. And so, he argued, the exclusionary clause has no application to persons who are still in employment. The first respondent was constrained to concede that had the phrase “and includes, for the purposes of sections 18, 22(2)(a), 23, 24 and 25, as well as section 22 in so far as it pertains to the said sections, a person who was such an officer or employee,” been omitted from the definition, he would have been hit by the exclusionary clause. He contended, however, that the inclusion of this phrase requires that the remainder of the definition be given an interpretation which it would otherwise not have had.

- [15] There are a number of considerations militating against this argument. Upon a proper construction the section does not lend itself to the interpretation contended for. The section contemplates two classes of employees, namely, those who are still in employment and those who were but are no longer in employment because they may have been dismissed but are challenging their dismissal. It makes both these classes of employee subject to the same qualifications, namely, that they must not have been employed in terms of statute other than the Public Service Act or the Correctional Services Act. Had the exclusionary clause been intended to apply to former employees only, the legislature would surely have used the past tense in subparagraphs (a) and (b) and not the present tense as it did.

[16] Apart from the foregoing, if the exclusionary clause were to apply to former and not present employees, an anomaly would result. A member of the industrial court would be an employee as defined in the section while still in employment. Once the same member leaves his/her employment, he would cease to be an employee as the exclusionary clause would then be applicable as he would be a person employed in terms of an Act other than the Public Service Act or the Correctional Services Act. Yet the very purpose of including former employees within the definition of an employee was to protect former employees who might have a cause for complaint against their former employer. The legislature could not have intended such an anomalous result.

[17] I conclude, therefore, that the first respondent is not an employee within the meaning of section 1(xi) of the PSLRA. The industrial court had, as a consequence, no jurisdiction to determine the alleged dispute. The *point in limine*, ought to have been upheld.

[18] In view of the conclusion I have reached on the point *in limine*, it is not necessary to decide the second issue. A necessary consequence of upholding the appeal is the dismissal of the cross-appeal.

[19] Mr Brassey, who, together with Mr Van der Riet, appeared on behalf of the

appellants, pressed for the costs of the review against the first respondent. Mr Vorster, who appeared on behalf of the fourth and the fifth respondents, did not ask for costs.

[20] It is trite that the award of costs is a matter which is largely within the discretion of the court. In regard to the costs of the issues which have not been decided, the court may, in the exercise of its discretion either direct that neither party pay such costs or award those costs to the party who was substantially successful. ***Read v South African Medical and Dental Council 1949 (3) SA 997 (T) at 1026-1028***, and ***BEF Pty Ltd, Cape Town Municipality and others 1990 (2) SA 337 (C) at 346B-347D***. In the latter case, Grosskopf J, as he then was, after reviewing the relevant authorities, concluded at 347B:

“The principles, therefore, are that I may either order the costs of the undecided issues to be costs in the cause and to be paid by the substantially unsuccessful party, or I may, if the circumstances warrant make a special order that neither party pay costs of unresolved issues.”

[21] It seems to me that there is no reason both either in principle or logic why the principles applicable to an award of costs on unresolved issues should not be applicable to the award of costs in regard to review proceedings which were not decided. Where the court is called upon to decide both the review and an

appeal, and the court takes a firm view of the appeal, the court cannot be required to determine the review merely in order to settle liability for costs. In my view the court has a discretion either to order that the costs of the review be costs in the cause or to make no order in respect thereof.

[22] Relevant considerations in the present case include the following: counsel for the appellants did not seek an award of costs against the fourth and fifth respondents; the appellants would in any event have brought the review proceedings with or without the opposition by the first respondent; the opposition by the first respondent did not significantly increase the costs; having regard to the fact that the appellants rely, for their review, on perceived bias as opposed to actual bias, I cannot, without deciding the review, conclude that the first respondent's opposition to the review proceedings was without merit; and not having decided the review, I am unable to say which side is right.

[23] In all the circumstances I conclude that justice and fairness require that no party be ordered to pay the costs of the review proceedings.

[24] As for the costs of the appeal, the general rule that the costs should follow the result must apply.

[25] In the event, I make the following order:

- (a) The appeal is upheld and the order of the industrial court is set aside and there is substituted therefor the following order:
- (1) The point *in limine* is upheld.
 - (2) The application is dismissed.
 - (3) No order is made as to costs.
- (b) No order is made on the application for review.
- (c) The first respondent is ordered to pay the costs of the appeal and the cross-appeal, such costs to include the costs consequent upon the employment of two counsel.

Ngcobo AJP

I agree,

Kroon JA

I agree,

Conradie JA

Date of hearing: 16 February 1999

Date of judgment: 23 February 1999

Appearances:

For the appellant: MSM Brassey SC, (with him JG Van der Riet) instructed by
Cheadle Thompson & Haysom

For the first respondent: Adv JCB Schoeman (appeared in person)

For the fourth and fifth respondent: L. Vorster SC instructed by the State Attorney