

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**CASE NO.: DA10/2001**

In the matter between

BEACON SWEETS & CHOCOLATES**APPELLANT**

and

THUNGAVALOO ARMUGEN**RESPONDENT**

JUDGMENT

Nicholson JA

The respondent was employed by the appellant as a Stores Manager from 15 January 1953 to 31 August 1977 a period of forty-four years. During May 1997 the appellant embarked on what it termed a restructuring exercise which involved the introduction of new work methods, changes to the organisation of work and redundancy of certain positions. The appellant resolved to consult with the staff who would be affected and considered alternatives to redundancy including retirement/voluntary redundancy and the payment of severance packages. Acceptance of an application was limited to persons over the age of 55 years and was subject to the approval of the board of directors who considered criteria such as skills, length of service and age.

A bulletin was issued during June 1997 calling for volunteers for early retirement or redundancy but no mention was made that no person working their last year of service

before retirement would not be considered. The respondent was interviewed by Martin Birtwhistle during May 1997 and indicated that he wanted to apply for a voluntary severance package. The benefits that the respondent would have received had his application been successful were calculated on a document and totaled R130 682.

The respondent was not given a severance package by virtue of the fact that he was due to retire at the end of August 1997. A letter was written by his attorney on 16 February 1998 in which respondent alleged that he was offered a package as mentioned and that he accepted such sum. What was clearly alleged in the letter was an agreement between the appellant and respondent that he would be paid out the said sum. The letter evinces some uncertainty thereafter as it states 'Client had a discussion with you and you promised to make good on the package after the September budget and you also indicated that the company would do something for him as he had served your company for 44 years'.

The appellant replied by letter on 20 February alleging that the claim was refuted and that respondent retired at the normal retirement age. The document was a 'guideline' and did not constitute an offer and no monies were due to him.

He declared a dispute with the appellant alleging that the appellant had committed an unfair labour practice by not paying him the agreed severance package. Attempts at conciliation before the Commission for Conciliation, Mediation and Arbitration (CCMA) having failed the dispute was referred to a commissioner, second respondent herein for arbitration. The commissioner heard the evidence of respondent, who testified on his behalf and Birtwhistle and Steven Evans, who testified on behalf of the appellant.

It is important to ascertain the precise issue that was subject to arbitration. The arbitrator found that what was referred was an unfair labour practice which related to section 196 of the Act. Although the respondent referred to an unfair labour practice he relied on section 196(9) and the issue in dispute was the payment of severance pay 'as agreed'. In his evidence respondent referred to the fact that his attorney had referred to section 196(9) in advising him of his rights. In argument at the conclusion of the evidence in the arbitration the respondent again referred to section 196(9).

The relevant subsections of section 196 of the Labour Relations Act 66 of 1995 provide as follows:

“(1) An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, unless the employer has been exempted from this subsection.

6) If there is a dispute only about entitlement to severance pay in terms of this section, the employee may refer the dispute to-

- (1) a council, if the parties to the dispute fall within the registered scope of that council; or
- (2) the Commission, if no council has jurisdiction.
- (8) The council or the commission must attempt to resolve the dispute through conciliation.
- 9) If the dispute remains unresolved, the employee may refer it to arbitration.”

The Commissioner who arbitrated the matter concluded that in order for the respondent to qualify for severance pay in terms of Section 196 he had to prove that he had been dismissed for reasons based on the employer’s operational requirements. The Commissioner went on to hold that where an employment contract came to an end as a result of an agreement there was no dismissal and he relied on the case of *Kynoch Feeds (Pty) Ltd vs CCMA and Others* (1998) 19 ILJ 836 (LC) 849 G. He held further that no dismissal took place where an employee had reached the normal or agreed retirement age.

The arbitrator held that ‘at best for the [respondent] he and [appellant’s] management agreed that he would retire earlier than February 1998 and that in return for retiring earlier the applicant would be paid a severance package which included notice pay, an *ex gratia* payment and severance pay. If this is accepted, the contract of employment had come to an end by agreement and the [respondent] had not been dismissed. The [respondent] would therefore even on his own version not be entitled to severance pay in terms of section 196(4). It follows that section 196 does not require the dispute to be resolved through arbitration.’

What the arbitrator was saying in his award was that he as arbitrator only acquired the power or right to determine whether severance should be paid was in circumstances which revealed that there had been a dismissal. In other words he concluded that if there was no dismissal he had no jurisdiction in terms of the section to arbitrate the matter nor grant any relief pursuant thereto.

The arbitrator then went on, in his award, to consider whether the appellant committed an unfair labour practice, more especially in terms of item 3(4)(b) read with item 2(1)(b) of schedule 7 of the Act, which relates to unfair conduct in the provision of benefits.

Without making a definite finding the arbitrator assumed in favour of the respondent that the failure to pay him the benefits in accordance with an agreement would constitute such unfair conduct.

The arbitrator analysed the evidence and found that it was improbable that the appellant would pay out the severance pay where an employee was in his last year of employment before retiring. In addition the arbitrator found that on the evidence the board of directors were required to approve the package. There was no proof that this had taken place. The arbitrator found that the respondent did not become entitled to severance as a result of an agreement between him and the respondent.

The respondent had testified that he was told he could work until February 1998 but had foregone that opportunity on the basis that when he retired in August of the previous year he was entitled to the severance package I have referred to. The arbitrator considered the question whether the respondent did not have a claim for the difference between what the respondent would have earned until February 1998 and what pension he received for that period.

The arbitrator found that this was not a dispute about severance pay and that, because no such dispute had been referred to conciliation or arbitration and evidence had not specifically directed to that question, he could not deal with such in his award. He added that he had made the above comments on the basis that they would be of assistance to the parties to resolve the dispute by agreement.

An application for a review of the arbitrator's decision was brought in terms of section 145 of the Act on the sole ground that the arbitrator exceeded his powers by arbitrating the dispute in as much as that, given the nature of the same, the arbitrator did not have power to do so.

The Labour Court found that once the arbitrator had found he had no jurisdiction he should have not made any further findings in the matter. The Labour Court held that the arbitrator was not called upon to decide the unfair labour practice which was not an issue in the arbitration.

It is correct that the respondent relied on section 196 in his referral although he spoke of an unfair labour practice. In *Naude and Another vs Fraser* 1998 (4) SA 539 (SCA) 539 at 563 Schutz JA held at page 563 E -G:

“It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet.

One of the numerous manifestations of the fundamental principle is the sub-rule that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on...”

It seems to me that the reference to an ‘unfair labour practice’ was not intended to bring the matter within the purview of schedule 7. The attorney was in all probability referring to the cause of action brought in the old Industrial Court. No reference was made to schedule 7 and the evidence was not directed at determining whether there was unfair conduct on the part of the employer in withholding a benefit from the respondent. It follows that the arbitrator was not entitled to deal with any issue apart from whether the respondent fell within the purview of section 196.

The Labour Court held that the finding that there had been no agreement concerning the payment of severance closed the door on any further proceedings in any other forum. The award was set aside with costs on that basis.

I am not satisfied that the Labour Court was correct in so holding. The ordinary rule is that judicial decisions ordinarily stand until set aside on appeal or review but to such rule there is the exception that a decision which is given without jurisdiction may be disregarded without the necessity of a formal order setting it aside. See *Mkhize v Swemmer and others* 1967(1)SA 186 (N) at 197 C-E and *Winter v Administrator-in-Executive Committee South West Africa* 1973(1)SA 873 (AD) at 886 H-887A.

It follows that in such instances the plea of *res judicata* would not stand in the way of the present respondent seeking relief in some other forum or notionally in the same forum with a different cause of action.

In my view the following order must be granted.

1. The appeal is upheld with costs.
2. The order in the Labour Court is set aside and replaced with the following order

‘The application is dismissed with costs’.

I agree.

ZONDO JP

I agree.

MOGOENG JA

Appearance for Appellant: Adv P Schumann instructed by Ditz Incorporated.

Appearance for Respondent: Adv SM Govender instructed by Sugan Reddy and Company.

Date of hearing: 14 May 2002.

Date of judgment: 6 December 2002