THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

Not Reportable

Case No JR1063/21

In the matter between:

EMPACT GROUP (PTY) LTD	**Applicant**
and	
MALOPE, L N.O. (As Commissioner)	**First Respondent**
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
NUMSA obo DANILE MALATJIE AND 70 OTHERS	**Third Respondent**

Heard: 19 November 2024

Delivered: 17 January 2025

JUDGEMENT

ORR, AJ

[1] This is an application to review and set aside an arbitration award made by the first respondent (the Commissioner). The Commissioner found that the applicant (Empact) was obliged to pay one month's notice pay to its employees (the employees) represented by the third respondent (NUMSA).

Background

[2] No evidence was led at the arbitration. The parties presented argument on the basis of documents. The facts, which were all common cause, were as follows:

2.1. Empact rendered catering services to Anglo Operations Ltd (Anglo). The employees were engaged in providing these services to Anglo;

2.2. The service agreement between Anglo and Empact was due to expire on 31 December 2020;

2.3. The service agreement contained a force majeure clause. Anglo invoked this case on 30 March 2020 in response to the national lockdown implemented as a result of the Covid-19 pandemic. As a result, the employees were placed on an unpaid layoff founded on supervening impossibility of performance;

2.4. On 28 October 2020 Anglo gave Empact notice that the service agreement would not be extended or renewed but would be terminated. This led to Empact commencing consultations with the employees as envisaged in section 189 of the Labour Relations Act[1] (LRA) and ultimately the dismissal of the employees for operational requirements. The employees were paid severance pay;

2.5. The employees contended that they were entitled to be paid notice pay and accordingly instituted a claim in terms of section 73A of the Basic Conditions of Employment Act[2] (the BCEA). The Commissioner found for the employees and made the award which is now the subject of this review. The Commissioner's award was based entirely on her interpretation of the notice provisions of the BCEA, so it is those provisions which must now be considered.

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[1] No. 66 of 1995.
[2] No. 75 of 1997.

<u>The BCEA and Notice</u>

[3] Section 37 of the BCEA creates a statutory entitlement to notice not only for employees but also for employers. Specifically, the various subsections of section 37 address the following issues:

3.1. Subsection (1) sets out minimum notice periods depending on the length of time which an employee has been employed;

3.2. Subsection (2) addresses the extent to which collective agreements can alter notice provisions;

3.3. Subsection 3 provides that notice periods for employers and employees must be the same;

3.4. Subsection 4 provides that notice must normally be given in writing unless an employee is illiterate;

3.5. Section 5 provides that notice cannot be given during, or run concurrently with, a period of leave;

3.6. Section 6 provides that nothing in this section affects the right of a dismissed employee to challenge the lawfulness or fairness of a dismissal, or party to terminate without notice for any legal cause.

[4] Nothing in section 37 addresses payment during a notice period and the section certainly does not create any statutory right to be paid during the notice period. This is because payment during notice would be governed by normal contractual principles. As long as an employee tenders services during the notice period they are entitled to payment for those services, provided the employer does not have some contractual defence to the tender.

[5] Section 38 of the BCEA effectively provides an employer with a means to buy themselves out of the notice period. Section 38(1) allows an employer to pay an employee instead of giving notice, the amount to be paid being the equivalent of what that employee would normally have earned during that notice period. Section 38(2) addresses the situation where an employee gives notice, and the employer

waives any part of that notice. The employer remains liable for payment of the entire period of notice unless the parties agree otherwise.

[6] The position as far as notice is concerned is therefore the following:

6.1. A contract of employment must be terminated, whether by employee or employer, on written notice (subject to the employee being literate);

6.2. The period of notice cannot be shorter than the minimum periods set out in the BCEA and must be the same for employers and employees;

6.3. Notice may not be given or run concurrently with leave;

6.4. Payment during a notice period is determined by normal contractual principles;

6.5. An employer may choose to make payment to an employee in *lieu* of giving notice, such payment to be the same as that which the employee would have earned had notice been given.

<u>The Award and the Review</u>

[7] As is apparent from paragraphs 15 and 23 of the award the Commissioner accepted that notice had been given the employees as submitted by Empact. Once this was accepted by the Commissioner the only question left for her to determine was whether, in terms of normal contractual principles, whether Empact was required to pay the employees.

[8] Empact contended that they were not required to pay the employees during the notice period, despite their tender of services. Empact was not obliged to accept that tender due to supervening impossibility of performance. The supervening impossibility of performance resulted from the COVID-19 pandemic and Anglo invoking the force majeure clause in the service agreement.

[9] The Commissioner rejected this contention. I quote her reasoning in this regard in full:

"24. As correctly stated by the respondent, Anglo American cancelling the contract it had with it, created a supervening impossibility of performance in terms of not being able to provide the applicants with work, hence the respondent resorted to retrenching the employees.

25. The respondent argued that the supervening impossibility of performance not only affected its ability to provide work to the applicants but also affected its obligation to pay. To support this argument, the respondent relied on the above cited case law which states that a debtor can be excused from its liability to pay in the event of supervening impossibility of performance.

26. Regarding the case that was relied upon, I have the following remarks to make; firstly, common law is not stagnant, it is forever evolving based on the current needs of the society in question. Secondly, where a specific field is governed by a piece of legislation, then the legislation will trump the application of common law. The reason being that statutory law or legislation, is created to address specific prevailing circumstances that need to be regulated by the law in order to bring both clarity and protection for the parties involved.

27. The Basic Conditions of Employment Act and the Labour Relations Act, among other statutes, were promulgated to regulate the labour market and filed in this country. Therefore, the provision in Section 37 and 38(1) of the BCEA will trump any common law that applies generally. Consequently, the case law cited cannot be used by the respondent to excuse its liability to pay the notice pay."

[10] In summary then the Commissioner found as follows:

10.1. Empact had given notice to the employees;

10.2. The cancellation of the service contract by Anglo had created a situation of supervening impossibility of performance;

10.3. Notwithstanding this the provisions of section 37 and 38(1) of the BCEA trump the common law defence of supervening impossibility of performance and Empact is required to pay the employees for the notice period.

[11] Although the Commissioner refers to the common law evolving, suggesting that the contractual defence of impossibility of performance has changed, she refers to no authorities in this regard. In any event it is clear from her award that it is based on her finding that the provisions of section 37 and 38(1) of the BCEA “trump” the common law, and not some finding that impossibility of performance is no longer a defence in contractual law.

[12] The Commissioner has misconstrued the provisions of section 37 of the BCEA. As set out in detail above section 37 does not create a statutory right to be paid during a notice period. Payment during a notice period is governed by normal contractual principles, provided an employee tenders their services they are entitled to payment. If the Commissioner’s view was correct then an employee having been given notice, could refuse to tender services during that notice period and still insist on payment. This is clearly incorrect and nothing in section 37 of the BCEA suggests that this is the case. An employee’s entitlement to payment during a notice period arises out of a contractual obligation to pay in response to a tender of services, not by operation of law in terms of section 37 of the BCEA. It is for that reason that an employee who has tendered their services during a notice period, but has not been paid, can claim payment unless the employer has a contractual defence, such as supervening impossibility of performance.

[13] As the Commissioner herself seems to realise section 38(1) cannot be of any application in the matter before her because she has found that notice was given to the employees. Section 38(1) only applies where notice is not given and provides a mechanism by which an employer can buy themselves out of giving notice.

[14] Once the Commissioner had made the findings, firstly, that Empact had given notice and, secondly, that the cancellation of the service contract by Anglo had given rise to supervening impossibility of performance, she could not come to any other conclusion, but that Empact was not obliged to make payment to the employees. No other reasonable conclusion could be reached.

[15] In opposing the review NUMSA does not take issue with either of these two findings. They are not referred to in the answering affidavit nor were they mentioned

in either the Heads or oral argument. I must therefore accept that the Commissioners findings on these two issues are non-contentious. NUMSA's opposition to the review focuses largely on the Commissioner's findings on the effect of the provisions of the BCEA and particularly section 38(1) and suggests that the interpretation which the Commissioner came to is one which a reasonable decision maker could reach. For the reasons set out above I do not agree. I re-iterate that the only reasonable decision that the Commissioner could have come to was that Empact was not required to pay the employees during their notice period due to supervening impossibility of performance.

[16] It follows that I must review and set aside the award. The parties were *ad idem* that the matter should not be referred back to the Commission for Conciliation, Mediation and Arbitration (CCMA) but that I should determine the dispute myself. I agree. It seems to be accepted by all the parties that notice was given by Empact and that the cancellation of the service contract by Anglo gave rise to supervening impossibility of performance. In those circumstances no point would be served by remitting the matter to the CCMA as the only conclusion that can reasonably be reached is that there was no obligation on the part of Empact to pay the employees during the notice period.

[17] Both parties agreed that there should be no order as to costs.

[18] In the premise, the following order is made:

<u>Order</u>

1. The arbitration award issued by the first respondent under the auspices of second respondent under Case Number GAJB2012-21 is reviewed and set aside and for it the following is substituted:

   1.1 The claim for payment by the applicant is dismissed.

2. There is no order as to costs.

C. Orr

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	R Orton of Snyman Attorneys
For the Third Respondent	:	X Mnyandu (NUMSA Union official)