IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Cape Town)

Case No : C153/97

In the matter between :

R R GAYLARD Applicant

and

TELKOM SOUTH AFRICA LTD Respondent

REASONS FOR JUDGEMENT

REVELAS J :

[1] The applicant, who is fifty-four years old, had been in the respondent's employ for approximately thirty years. In his statement of case he avers that in terms of the rules of the pension fund of which he was a member, employees between the ages of fifty and fifty-five years old, may retire with the respondent's consent and thereafter at will.

[2] The applicant further states that he became disgruntled with his position and decided to retire from the respondent and persue a career in the specialised field in which he had been an employee. It was also his case that his status was continuously "amended" without proper consultation, even though his "salary and other conditions of employment weren't amended" (my underlining).

[3] The applicant's statement of case also states that "due to the intolerable position, he(the applicant) was in, based on the restructuring of the respondent without proper consultation, he decided to submit his resignation and retire." (My underlining) It is also pointed out in these papers that if the applicant retired he would be paid out a lump sum which would be beneficial from a tax point of view and also for his dependants.

[4] The applicant avers that he is entitled to the payment of the cash equivalent of his accumulated leave on the grounds set out in section 12 (4) (a) of the Basic Conditions of Employment Act, No 3 of 1983,(hereafter "the BCEA") as well as on the grounds of resignation. Section 12 (4) (a) of the BCEA reads as follows:

(4)Upon termination of an employee's employment his employer

shall pay to him–

(a) his full remuneration in respect of any leave which accrued to him but was not granted to im before the date of termination of his employment; and...”

The applicant also attached a *nolle prosequi* certificate to his papers.

[5] The applicant alleges in his statement of case that he in effect retired and that the resignation was merely a mechanism to obtain a more favourable investment income.

[6] The applicant also contends, in the same statement of case, that his resignation was a constructive (“construction”) dismissal by reason of the “unilateral change(my underlining) to the applicant’s managerial status.”

[7] The applicant states further, still in the same statement of case, that he had been made redundant without “proper and fair discussion” as to alternative employment. He had therefore been retrenched and is accordingly entitled to severance payment in terms of section 196(1) of the Labour Relations Act, No 66 of 1995(hereafter “the Act”).

[8] The applicant also makes mention in his statement of case that he would be relying on item 2 (1) (b) of schedule 7 to the

Act, which relates to residual unfair labour practices. The applicant however does not set out any grounds for any unfair labour practice in his statement of claim.

[9] The applicant seeks the following relief from this court:

"6.1 Payment of all accumulated leave standing to the applicant's credit on 31 July 1997;

6.2 Declaring the respondent guilty of an unfair labour practice in terms of schedule 7;

6.3 Further and/or alternate relief;

6.4 Costs of suit on a High Court Scale (as contemplated in section 158(1)(a) (iv) of the Act read with rule 24). "

[10] The matter came before me as a point *in limine* raised by the respondent, who argued that the Labour Court does not have the necessary jurisdiction to hear the matter. The respondent argued that the Labour Court does not have jurisdiction to hear the matter because there was in fact no dismissal and the dispute before the court, is about a contractual claim which the Labour Court cannot adjudicate nor may the Commission for Conciliation, Mediation and Arbitration (hereafter the "CCMA") arbitrate this dispute.

[11] In his referral of the dispute to the CCMA, the applicant described the dispute as :" **refusal to pay out accumulated leave on termination of contract of employment** " and then characterized the dispute as one relating to schedule 7, item 2(1) (b).

In the same referral form (for 7.11) the applicant states: **"I retired after 38 ½ years continuous service age 54. The retirement took the form of a resignation in order to receive more beneficial pension benefits. The company refuses to pay out accumulated leave pay of 206 days to the value of R 147 557-00, claiming that this could only be paid out in the case of retirement or in pension, although the company did agree to allow my early retirement."**

[13] The outcome desired by the applicant in his referral is described by him as follows : **"To be paid accumulated leave pay standing to my credit on 31 July 1997"**

[14] The applicant, in his pleadings, has pleaded a resignation, a retirement, a retrenchment, a resignation premised on unilateral action and constructive dismissal. The applicant has also characterised the dispute between himself and the

respondent as a residual unfair labour practice in terms of Schedule 2 (1) (b) of the Act. The application is brought on several grounds, listed in a shotgun fashion. The main allegations are generally incompatible with each other. I don't intend to deal with each shortcoming in the applicant's statement of claim. In some respects, it would be premature to pronounce thereon.

[15] The crucial question is whether the Labour Court can entertain the applicant's claim for R 147 557-00 as accumulated leave pay. This dispute is the dispute which was referred to the CCMA by the applicant. Furthermore, the applicant's claim is based on the employment contract between the parties which the applicant seeks to enforce.

[16] To determine whether the applicant is entitled to the sum he claims, would call for the adjudication of a dispute about the interpretation or application of the contract of employment. In terms of sections 24(1) and (2)of the Act disputes over the interpretation or application of a collective agreement must be referred to arbitration.

The Labour Court is not given the jurisdiction to adjudicate such disputes. The Act also does not provide for the Labour Court to adjudicate disputes about the interpretation of individual employment contracts, such as the one relied upon by the applicant.

[17] The Basic Conditions of Employment Act, No 97 of 1997, which is not in force yet, contains the following addition, in section 77(3) thereof, which its predecessor, the Basic Conditions of Employment Act No 3 of 1983, does not:

"77(3) The Labour Court has concurrent jurisdiction with all civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

[18] This amendment supports the view that this court has no jurisdiction to adjudicate a dispute arising from a contract, such as remuneration. This section would not have been introduced if the court previously had such jurisdiction.

[19] The applicant also seeks a declarator to the effect that the respondent is guilty of an unfair labour practice as to the payment of a benefit.

[20] Item 2 of Schedule 7 of the Act reads as follows :

" 2. RESIDUAL UNFAIR LABOUR PRACTICES

(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and employee, involving–

(b) the unfair conduct of the employer relating to the promotion,

demotion or training of an employee or relating to the provision of benefits to an employee; ” (my underlining)

[21] In my view accumulated leave pay is not a benefit . In du Toit et al “The Labour Relations Act of 1995" (2nd Edition) at page 444 the opinion is expressed that the term “benefit” in the employment context may include a range of rights enjoyed by a beneficiary employee but excludes such rights as the right to be paid.

[22] In *Schoeman and another v Samsung Electroncs SA (Pty) Ltd (1997) 19 BLLR 1364 LC* a strict approach was adopted as to the scope of item 2(1)(b)of the residual unfair labour practice. In this matter I found that the commission component of remuneration is not a benefit. If the term “benefit” is so generously interpreted so as to include any advantage or right in terms of the employment contract, even wages, item 2(1)(b) would all but preclude strikes and lock-outs. This was plainly not what the legislature had in mind. Therefore, wages and salaries, in other words remuneration, should be excluded from the term “benefits”. In the same vain, accumulated leave pay should also be excluded as it is nothing more than remuneration based on the contract between the parties.

[23] This court therefore has no jurisdiction to adjudicate this

claim.

[24] In this matter I believe that it would be inappropriate to award costs against the applicant.

It is ordered that:

The applicant's claim is dismissed.

E REVELAS

DATE OF JUDGEMENT : 15 MAY 1998

:MICHAEL BAGRAIM

Instructed by : MICHAEL BAGRAIM & ASSOCITES

FOR THE RESPONDENT : J M J MACROBERT

Instructed by : HEROLD GIE & BROADHEAD INC

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