IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Case No: J532/97

In the matter between:

J C ACKRON	First Applicant
D B LE ROUX	Second Applicant
J M L STEYN	Third Applicant
G F STEYN	Fourth Applicant
T M DAMA	Fifth Applicant
L P ZAAYMAN	Sixth Applicant
A I VAN DER MERWE	Seventh Applcant
J P NEL	Eight Applicant
O V MTEBULE	Ninth applicant

and

NORTHERN PROVINCE DEVELOPMENT CORPORATION	Respondent

REASONS FOR JUDGMENT

REVELAS, J:

[1] In this matter I was required to decide the question of whether the Labour Court had the necessary jurisdiction to adjudicate this matter. The issue came before me as a point in limine, raised prior to the commencement of the trial

proceedings.

[2] The nine applicants in this matter had been employed in senior management positions by the respondent, the Northern Province Development Corporation, which was established in terms of the Northern Transvaal Corporation Act, 5 of 1994. Its establishment was the result of an amalgamation of the former Lebowa Development Corporation, the Gazankulu Development Corporation and the Venda Development Corporation. The applicants were all formerly employed by these corporations prior to amalgamation. The respondent wished to restructure the new corporation and the positions of the applicants became redundant.

[3] At the end of January 1996 the respondent received a directive from the Department of Economic Affairs, Commerce and Industry of the Northern Province directing that:

"All positions at top management level (CEO's, Executive Director General Manager level) be treated as stall as at 1 April 1996 to make way for a new top management."

In other words, the managerial posts had to be filled after 1 April 1996, by new management. A voluntary retrenchment scheme was proposed and later introduced to accomodate the restructuring process. The respondent's aim was to implement the retrenchments by the end of June 1996, but this was not

accomplished in respect of the nine applicants before court.

[4] It is common cause that all the applicants accepted voluntary retrenchment packages which consisted of severance pay and three months salary, including benefits for the three months' notice period which, as it turned out was applicable to the period September, October and November 1996. The retrenchment packages (including the three months'payment) were paid out to each of the applicants on 31 August 1996, the day on which the applicants were no longer required to report for duty. As it was put by the parties, the applicants were "relieved from their duties" as from that date.

[5] The applicants contend that they were employees of the respondent on 30 November 1996 and therefore qualified for an across-the-board increase in salary, which was introduced by the respondent on 4 November 1996, retrospective to 1 April 1996. The increase was applicable to all staff of the respondent who were employees as at 1 November 1996. The applicants claim these increases as part of the relief sought by them in their statement of case before this court.

[6] The respondent argues that the employment contracts between the parties came to an end on 31 August 1996 and

therefore the nine applicants were no longer entitled to the increases introduced on 4 November 1996. The respondent contended that the nine applicants before court were not employees in terms of the Labour Relations Act, 66 of 1995 (hereafter "the Act").

[7] The court mero motu raised a further question of jurisdiction, namely whether the dispute between the parties arose prior to 11 November 1996, the date on which the Act commenced, thereafter.

[8] Item 21 of schedule 7 of the Act provides that:

"(1)Any dispute contemplated in the Labour Relations laws that arose before the commencement of this Act must be dealt with as if those laws had not repealed."

[9] The effect of this provision is that any dispute between employers and employees which arose before 11 November 1996 may not be adjudicated by this court.

[10] On 10 June 1996, the respondent's managing director wrote to each one of the nine applicants, offering them voluntary retrenchment packages, or alternative employment and if unsuccessful with the latter, the further option to

take the voluntary retrenchment package. This offer was made available to the applicants for 60 days from the date of the letter. The option to accept a voluntary retrenchment package had to be exercised before 8 August.

[11] The actual offer was contained in a subsequent letter dated 20 June 1996. This letter, which was also sent to all the applicants by the managing director of the respondent, contained a document setting out "the principles and formula(e)" in terms of which the severance packages were to be calculated. The relevant part of the letter reads as follows:

"In terms of the offer to you, you must exercise your option before 8 August 1996. The actual termination date will be 31 August 1996 unless your request to be relieved of your duties at an earlier date is approved or the Corporation requires you to stay on for a longer period. In the latter instance you will be consulted before a final decision is made. Should you be interested in a post that is to be advertised later during the process, you can apply for an extension of the 60 day period. The application must be in writing and submitted to the head of the Human Resource Department in your region. To avoid any uncertainty in this regard you are requested to submit the application at least 14 days prior to the expiry of 60 day period (8 August 1996)."

[12] The last paragraph of this letter advises:

"Please take note that the final calculation may change depending on certain factors, for example leave taken in the interim period. The package will be paid out in full and final settlement of claims".

It is rather significant that the first paragraph of the proposed retrenchment offer, entitled: "principles and formula(e)", describes payment for the notice period as:

"Payment equal to a three month notice of termination of service. The payment is to be made in lieu of notice. Notice pay <u>includes all benefits applicable</u> to a particular post".(my underlining)

[13] Then the severance benefits are listed.

[14] The nine applicants all accepted the offer contained in the managing director's letter dated 20 July 1996.

[15] The first applicant wrote to the managing director on 22 July 1996. In his letter he says <u>inter alia</u>:

"I hereby wish to accept your kind offer of release from the services of the Corporation."

In other words, he does not exercise his right to accept the offer subject to any qualifications set out in the letter of 20 June 1996. It is an unequivocal acceptance of the offer.

[16] In a second letter dated 29 July 1996, following a

meeting between himself and the managing director of the respondent, the first applicant wrote another letter to the managing director, wherein he advises that he will be pursuing “other avenues” and expressed the view that he had been marginalised during the preceding 12 months on the basis that he belonged to a different "ilk". Based on the oral evidence that was led in Court, “ilk” meant that he was an employee of the previous regime. At this stage it would be instructive to point out that it is also the case for the applicants that they were discriminated against as a group and that the respondent refused to pay them an increase introduced on 4 November 1996 on the arbitrary and discriminatory basis. As they belonged to a certain group they were treated differently from the other employees. The first and fifth applicants testified that the respondent wanted the nine applicants off the premises by 31 August 1996 based on the aforesaid. In this very same letter the first applicant informs the managing director as follows:

"**As I also intimated in response to your suggestion, I would be available on a month to month basis <u>after my date of termination on 31 August 1996</u> and initially on 30 September 1996. But possibly <u>thereafter as well</u>.**"(my underlining)

[17] The aforesaid indicates that there was no agreement between the first applicant and the respondent that the first

applicant would work during November 1996. The same applies to the other applicants. The first applicant, who gave evidence in respect of the points raised in limine, told the court that irrespective of the date of termination referred to by him in his letter (namely 31 August 1996) he always regarded himself as an employee until 30 November 1996 and regarded this as the date on which the employment contract ended. Therefore for the month of November 1996 he was an employee and qualified for the increase implemented on 4 November 1996. This was essentially the argument for all the applicants, not only the first applicant.

[18] The first applicant testified that he was asked, together with the fourth applicant, to perform one specific function for the respondent during November 1996. As far as I understood the first applicant's evidence, he did not perform his day to day duties during November 1996. He was approached to do a specific task. This is consistent with his letter of acceptance. The applicants' statement of case indicates that not all of the applicants rendered services after 31 August 1996. The first and fifth applicants were the only applicants who testified.

[19] The fifth applicant also testified that he regarded himself as being employed until 30 November 1996. On 20 June

1996 the fifth applicant also accepted the offer made to him on 10 and 20 June 1996. He confirmed, in writing, that he would vacate his offices by 31 August 1996. He further testified that he was permitted to keep his petrol card until 30 November 1996. This was of course a benefit he was entitled to in terms of paragraph 1 of the "principles and formula(e)". In my view the fifth applicant had the use of this card until the end of November because it was practically impossible to pay out this benefit on 31 August 1996. This fact in itself, does not indicate that the employment contract was still in force until 30 November 1996.

[20] The fifth applicant further testified that on one occasion during November he was requested to accompany some of the respondent's officials to persons he formerly knew and worked with in his capacity as an employee of the respondent. The purpose behind the request was that the fifth applicant had to introduce the officials as they would work with each other in future. He stated that on this particular day he believed that he was there in his official capacity and as an employee.

[21] In deciding the question as to whether the applicants were employees of the respondent on 30 November 1996, the

following factors are significant:

[22] The employment relationship between the parties in this matter was terminated by agreement. The applicants were not dismissed and therefore there was no termination of services for operational requirements. The only dispute between the parties is the question of the size of the severance package paid out to them. It is a monetary claim based on contract. On 28 November 1996, the applicants became dissatisfied with the amount paid to them on 31 August 1996 and took issue with the respondent.

[23] It is quite apparent from the evidence led by the first and fifth applicants, as well as the applicants' statement of case, that after 31 August 1996 none of the applicants continued with their duties as before. The applicants were being replaced by other employees in the period thereafter. The evidence of the first and fifth applicants was that the nine applicants had to be off the premises because they were not welcome as a group. In my view, the respondent for this reason, also wanted to terminate the employment contract on 31 August 1996. The fact that the applicants were still relieved of their duties but were paid their salaries until 30 November 1996 and some of them would still render services from time to time, does not mean that they remained

as employees after 31 August 1996. Quite the contrary seems to be the case. My impression was that, as a form of assistance to the transitional and restructuring process, some of the applicants (only three) still performed functions on an ad hoc basis, but no longer in terms of the original employment contract. The whole nature of the contract between the applicants and the respondent changed after 31 August 1996. In my view, the employment contract was novated by the new retrenchment agreement.

[24] The applicants agreed to the terms of the voluntary retrenchment before 8 August 1996. In accepting the the offer made to them, the applicants also accepted its terms. The retrenchment "formula and principles" attached to the respondent's letter dated 20 July 1996, merely makes reference to a "notice period". Its purpose was clearly to stipulate that the applicants would be paid three months salary in addition to severance pay. It was clearly part of the package. The letter specifically refers to the **"termination"** date as **31 August 1996.** That is how the respondent viewed it at the time and how the applicants accepted it. No mention was made of 30 November as a date of significance in the retrenchment offer or the "principles and formula(e)." Not even the first applicant's letter gives any indication that 30 November 1996 might be the termination

date. The fifth applicant makes mention of 30 November in his letter of acceptance, but only insofar as a certain cash payment was concerned. This payment was in any event paid out to the fifth applicant on 31 August 1996.

[25] Once the employment relationship had ended on 31 August 1996, the applicants were in my view, no longer employees for purposes of the Act.

[26] The question of the size of the severance package was finalised on 31 August 1996, although the applicants were paid until 30 November 1996. The subsequent dispute about the increases and how it affected the severance packages, emanated from the termination of employment which took place by agreement on 31 August 1996. Therefore the dispute may have arisen on the latter date which is prior to 11 November 1996, which precludes it from the jurisdiction of this court.

[27] The date on which the dispute arose may also have been after 11 November 1996, for instance on 28 November when the respondent refused the applicants' request to pay them the increases. At this stage however, their claim was a purely contractual claim over which this court has no jurisdiction.

[28] 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."

[29] This amendment supports my view that this court has no jurisdiction to adjudicate a dispute about a contractual claim. This section would not have been introduced if the court previously had such jurisdiction. This view was also held in the case of *Gaylard v Telkom C153/97 (unreported).*

[30] In the circumstances, the point in limine is upheld.

[31] I am not inclined to grant a costs order against the applicants. It may be that they are successful against the respondent in another court.

[32] It is ordered :

The point in *limine* is upheld and the applicants' claim is dismissed.

E REVELAS

Date of Hearing: 25 May 1998

Date of Judgment: 26 May 1998

On behalf of the first to fourth Applicants :

ADV. J LE ROUX
Instructed by : CORRIE NEL Inc

On behalf of the fifth to ninth Applicants:

Mr C Nel
OF CORRIE NEL Inc.

On behalf of Respondent:

Mr K Mahlase
OF MAHLASE, NONYANE-MAHLASE