IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO. D239/98

In the matter between

PUREFRESH FOODS (PTY) LTD Applicant

and

ADVOCATE L DAYAL First Respondent

MERVYN ROSCHER Second Respondent

JUDGMENT

JAMMY,AJ

[1] This is an application in terms of section 145 of the Labour Relations Act 1995 ("the Act") in which the applicant seeks an order reviewing and setting aside the ruling made by the first respondent, in arbitration proceedings in the Commission for Conciliation, Mediation and Arbitration on 12 March 1998 under case number KN8108.

[2] That ruling was that, consequent upon his undisputed retrenchment by the second respondent, "the employee is entitled to severance pay".

[3] The following material facts are common cause:

3.1. In terms of an agreement concluded in 1996 between the applicant and Clover SA Ltd ("Clover"), the applicant sold to Clover certain of its business operations.

3.2. That transaction, and certain subsequent concomitants, necessitated a reduction in the staff complement of the applicant and consequent retrenchments.

3.3. Negotiations between the applicant and Clover in the context of the sale were held in an effort by the applicant to procure the employment by Clover of the employees being retrenched and in due course, discussions were held regarding the possible employment by Clover of the second respondent.

3.4. Following an interview conducted by Clover representatives with the second respondent, he was

offered the position of motor mechanic with that company-the same position as that which he had held with, but at a better salary than that paid to him by, the applicant.

3.5. The offer was accepted by the second respondent on 3 September 1997, and by agreement between the applicant and Clover, the termination date of the second respondent's employment with the applicant was anticipated and he was released to commence work with Clover on 8 September.

3.6. The second respondent was informed by letter dated 5 September 1997 that "due to the fact that the company has secured you alternative employment, you will not be entitled to receive a severance package".

[4] It was that refusal of severance pay which was disputed by the second respondent and eventually referred to arbitration before the first respondent. The core finding of the first respondent which is the substance of this application, is stated in her arbitration award in the following terms:

> "It is the employer's contention that it was instrumental in procuring the position with the new employer in that it advised the employee that a position was available with the new employer and that it arranged an interview with the employee. This is confirmed by the new employer in the letter dated 13 October 1997.
> The letter states clearly that the employee was interviewed for "possible placement", and that he proved to be a suitable candidate.
> This does not amount to an offer of employment by the employer.
> There was in fact no offer in definite terms, capable of acceptance that was made to the employee by the employer.
> The offer of employment to the employee was made by the new employer.
> In terms of section 196 (3) the offer of alternative employment must be made by the retrenching employer if that employer is to be absolved of the duty to make severance payment to retrenched employees.
> The employee is therefore entitled to severance pay from the employer.

[5] The first respondent's ancillary finding that the second respondent's contract of employment with the applicant was not transferred to Clover as contemplated by section 197 of the Act, is not now in dispute.

[6] Sections 196 (1) and 196 (3) of the Act read respectively 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 the** provisions of this subsection.

(3) An *employee* who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay in terms of subsection (1).

[7] Arguing for the applicant, Mr. A. Redding submitted that those provisions must be interpreted in the context of the fundamental legal principle that legislative enactments are presumed to be intended to leave the common law unaltered as far as possible. Prior to the 1995 Act, there was no legislated or other entitlement to severance pay for any retrenchee. The question whether a failure or refusal to pay it might in certain circumstances constitute an unfair labour practice within the ambit of the Labour Relations Act of 1956 was a contentious one, but the issue ceased to be of any application or relevance with the enactment of section 196 (1) of the present act.

[8] The purposive rationale of sections 196 (1) and 196 (3) when read together, evidences a clear intention on the part of the legislature, he argued, - when regard is had to the employment objectives of section 189, - to "reward" a retrenching employer for procuring alternative service for persons thereby affected. That reward, in the form of relief from the added financial burden of severance pay, is no less appropriate, he inferred, where the employer procures acceptable alternative employment for the retrenchee with another employer, than where it is offered by the employer himself and is unreasonably rejected. It cannot have been the intention of the legislature that a retrenched employee who accepts a viable offer of immediate alternative employment, should be financially better off than would have been the case had retrenchment not been imposed upon him.

[9] The language of section 196 (3) is unambiguous. A retrenched employee forfeits the right to severance pay provided for in section 196 (1) and to which he would ordinarily be absolutely entitled unless the retrenching employer is exempted from the obligation to pay it, if the employer **unreasonably refuses** an offer made by **that employer** of alternative employment either with that employer or with any other employer.

[10] For the section to apply in its literal terms, three requirements must be satisfied. They are that:-

10.1. -there must be an offer of alternative employment either with the retrenching or another employer;

10.2. -that offer must emanate from the retrenching employer; and

10.3. -the offer must be refused and such refusal must be unreasonable.

[11] It was the absence, on the undisputed facts in this matter, of the second of those elements which formed the basis of the first respondent's finding that the second respondent was entitled to severance pay in terms of section 196 (1). The applicant, whilst instrumental in the procurement of an offer of employment by Clover to the second respondent, was not the offeror. That, as far as the first respondent was concerned, was the end of the matter. There was no issue of unreasonable rejection since there was no offer as contemplated by the section at all, and the second respondent was entitled to be paid.

[12] Whilst the inapplicability of the literal terms of the section is not disputed, it is the first respondent's conclusion that that entitlement is an absolute consequence thereof, that is challenged by the applicant as an unjustifiable failure to have regard to the purpose and legislative intention of section 196.

[13] What is clearly intended, the applicant submits, is the protection of employees against loss of employment in circumstances not attributable to them, not only by ameliorating the financial consequences to them, but by introducing a consequence to the employer which will ensure that the retrenchment exercise is not lightly embarked upon.

[14] That objective is negated if the right to severance pay is absolute unless the employer is exempted from paying it or the strict letter of section 196 (3) has no application.

[15] It is in her failure to take those factors into account in her interpretation of the provisions of section 196(3) that the first respondent, it is contended, committed either a gross irregularity or, in reaching an unjustifiable conclusion, exceeded her constitutionally constrained powers, thereby rendering her award reviewable within the ambit of section 145 of the Act.

[16] The issue of gross irregularity was examined by the Labour Appeal Court, as it was then constituted, in ***Ventersdorp Town Council v President, Industrial Court and Others***: ***(1992) 13 ILJ 1465***

in which the court, at page 1476, referred with approval to the *dicta* in *Ellis v Morgan 1909 TS 576,* a decision of the full bench of the then Transvaal Supreme Court which held that:-

> ".....an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

[17] There was no question, in my view, based on the acknowledged facts of this matter, of the first respondent having acted in any manner or respect which can justifiably be said to have been grossly irregular and indeed, that contention was not pursued by Mr. Redding with any great vigour.

[18] Whether or not she may be held to have exceeded her powers by reaching a conclusion which was constitutionally unjustifiable, must be examined in the light of the *dicta* in:

> ***Carephone (Pty) Ltd v Marcus N.O and Others (LAC),***
> ***Case No. JA 52/98***

At paragraph 20 of the judgment, Froneman DJP said this-

> "The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable; that the arbitrator must be impartial and unbiased; that the proceedings must be lawful and procedurally fair; that the reasons for the award must be given publicly and in writing; that the award must be justifiable in terms of those reasons; and it must be consistent with the fundamental right to fair labour practices."

[19] That the conclusion reached by an arbitrator in compulsory arbitration proceedings under the Act may not, on one or another assessment, be correct, will not necessarily render it not justifiable. That principle is succinctly expressed in,

Johannesburg City Council v Chesterfield House
1952 (3) SA 809 (AD) at 825

where, at page 825 Centlivres C.J., in reference to the compensation court as it was then constituted, said this:-

> "That court was entitled to and bound to decide the legal issues involved and even if it came to a wrong decision in law we cannot in review proceedings set its decision aside on that ground alone."

adding, at pages 825/6;

> "There being no appeal from a decision of a compensation court, a court of law is not a court of appeal from a compensation court, and it can, according to South African law set aside the decision of such a tribunal by way of review only on some recognised ground. A mistaken view that the appellant was not in law entitled to compensation is not such a ground."

[20] Whilst such an error may be the subject of appeal, the distinction between that process and review was highlighted in the **Carephone** judgment *(supra),* at paragraph 32:-

> "But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal. According to the *New Shorter* Oxford English Dictionary 'justifiable' means "able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible.' It does not mean 'just', 'justified' or 'correct'. On its plain meaning the use of the word 'justifiable' does not ask for the obliteration of the difference between review and appeal. Neither does the LRA itself: it makes a very clear distinction between reviews and appeals."

and again, at paragraph 36 and 37, as follows

"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.

Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers, such as 'reasonableness', 'rationality', 'proportionality' and the like (Cf. e.g. Craig, *Administrative Law,* above, at 337-349; Schwarze, *European* Administrative Law, 1992 at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA."

[21] Whilst the basis of the applicant's contention that the first respondent's finding is wrong in law may be persuasive, it is at least, on the respondent's counter-submissions in that regard, debatable. Section 196(1) of the Act is peremptory, Mr. Rall, representing the second respondent, submitted. Whilst an employee who unreasonably refuses a viable offer of alternative employment is disentitled to the prescribed, or any, severance payment, it does not follow as a necessary concomitant that an employee who accepts an offer of alternative employment is not entitled to it. The applicant cannot source its argument on the law as it stood prior to the enactment of the LRA. The express and unambiguous provisions of section 196 are definitive of the right to payment and the only circumstances in which it is not now absolute. There was no obligation or requirement on the part of the second respondent to direct her enquiry beyond those parameters.

[22] That issue however is not one which, in my view, I am required to determine in these proceedings. The first respondent's reasons for her finding are clearly and unambiguously stated in her award. They satisfy in every respect, the imperatives defined in the **Carephone** case to which I have referred. Whether she is right or wrong in her conclusions is irrelevant to the issues to be here decided, unless, if she is mistaken in law, the result is the perpetration of an injustice. In that regard, the *dicta* in the unreported Labour Court case of:-

University of the North v Nthombeni and Another: Case No. J630/97
at paragraph 28, page 11,

have relevance:-

> "It is open to this court in terms of Section 145 to review the awards of the Commission even where a *bona fide* mistake of fact or law is committed only where it can be shown that as a result thereof an injustice has been perpetrated. Where no injustice has been occasioned by such a mistake, the award is immune to legal challenge in terms of section 145. An injustice is perpetrated where it is shown that a party was deprived of a fair hearing or that the Commissioner did not apply his mind to the matter before him, either by ignoring direct evidence before him, or relying on evidence not placed before him."

[23] Neither of those criteria are applicable in this matter and for those and the other reasons which I have stated, I have concluded that the first respondents' award is not one properly subject to review in terms of section 145 of the Act I accordingly make the following order:-

The application is dismissed with costs.

B.M.JAMMY

ACTING JUDGE OF THE LABOUR COURT

Date of hearing:	17 February 1999
Date of judgment:	26 February 1999
For the applicant:	Adv. A.L.S. Redding
For the respondent:	Adv. A.J. Rall