IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: J3729/00

Date: 14 September 2001 (Cur. Adv. Vult.)

In the matter between:

GOLDFIELDS WEST HOSPITAL (Division of Gold Fields Health Service, a joint venture of Kloof Gold Mining Company Limited
Applicant

and

THE COMMISSION FOR CONCILIATION,
1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

JUDGMENT

Revelas J:

1.This is an application for review in terms of Section 145 of the Labour Relations Act 66 of 1995 ("The Act"). The applicant seeks to review an award of the second respondent ("the arbitrator") in terms of which the fourth respondent, the former employee of applicant, was awarded an amount of R31 000 for procedural unfairness being the equivalent of 16,3 months salary and a further amount of R22 800 being the equivalent of 12 months salary for substantive unfairness on the basis of the applicant's alleged unfair retrenchment of the fourth respondent. The amount of R53800 payable to the fourth respondent by the applicant in terms of the award, represents 28,3 months salary.

2.It was undisputed that the applicant had been experiencing serious financial difficulties for some time, particularly during 1998 and 1999 and during the financial year ending 30 June 1999. It incurred operating losses of 29,7 million rand in the West Wits region. As a result of these losses a restructuring exercise was embarked upon in 1998.

3.According to the applicant, the fourth respondent volunteered for retrenchment by completing and signing an

application for voluntary retrenchment. His application was witnessed by both Mr. Eric Noganta and Mrs L T Noganta on 18 January 1999. According to the applicant, the fourth respondent was payed out a retrenchment package of R26 564,37 and his services were terminated with the applicant on 27 January 1999. He was one of 252 employees of the applicant to volunteer for and be retrenched in the period November 1998 to January 1999.

4.Further evidence led before the arbitrator by the applicant was that, there was an agreement between the applicant and the union that only retrenchees who were retrenched on a compulsory basis, were considered for re-employment when jobs became available soon after a retrenchment exercise. As the fourth respondent took a voluntary package he was not eligible for this consideration, even if a promise was made at the time of the retrenchment that he would be considered. The witnesses on behalf of the applicant conceded that the applicant was induced to accept a voluntary package.

5.The applicant also led evidence that the fourth respondent was retrenched after all the necessary consultations had taken place in terms of Section 189 of the Act.

6.The fourth respondent denied that he had accepted voluntary retrenchment. He gave evidence before the arbitration that the applicant had retrenched him because he inquired about his grade and salary. He alleged that the witness to his signature on the voluntary retrenchment application form had already signed the form before he was called in to sign.

7.The arbitrator does not seem to have accepted this version as she merely concluded that " **I battled to see the distinction in this section drawn between a voluntary retrenchees (sic) and compulsory retrenchees because the operate word to me is 'retrenched' whether compulsory or voluntary".**

She further held**:**

he was

enticed by the company. I do not believe that it would be fair for the employer to argue that the fact that the employee accepted a voluntary retrenchment (if indeed he did) should preclude him from being considered for re-employment.

The company failed to adduce evidence at the hearing, proving that indeed the company had good reasons to retrench at the time. This would have helped to rebutt the employees' evidence that he was the only one retrenched or that his retrenchment was not due to the fact that he required about his grade and his salary."

8.This award falls to be set aside for many reasons.

9.The arbitrator exceeded her powers by awarding the fourth respondent 28,3 months' salary as compensation. Section 194 (2) of the Act provides that "**the compensation awarded to an *employee* who's *dismissal* is found to be unfair because the employer did not prove that the reason for *dismissal* was fair reason related to the *employee's* conducted, capacity or based on the employers *operational requirements*, must be just and equitable and in all the circumstances, but not less than the amount specified in sub-section 1, and not than the equivalent of 12 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*"** It is therefore quite clear that the arbitrator exceeded her powers in awarding the fourth respondent more than double this amount. She gives no reason for awarding this amount and for deviating from the provisions of the Act. Perhaps the arbitrator was not aware of the provisions of Section 193.

10.The arbitrator also did not apply her mind to the evidence before her. There was no reason for rejecting the applicant's evidence that approximately 250 employees were retrenched, and simply accepting the evidence that the fourth respondent was the only retrenchee. The large scale retrenchment in the mining industry at the time, was a well known fact. In my view, this should have alerted the arbitrator, to be more cautious before rejecting the evidence (without a proper reason), that such retrenchments took place at the Applicant. She never weighed up the probabilities. The fourth respondent produced no evidence whatsoever to refute the applicant's version that it embarked on retrenchments due to financial difficulties. The arbitrator, in a rather highhanded fashion, simply dismissed the existence of a commercial rationale, because the applicant did not furnish proper documentation.

11.It is quite apparent from the arbitrator's reasoning, that she has limited experience in dealing with retrenchment matters, which is excluded from her jurisdiction in any event. She clearly did not apply her mind when she concluded that there is no difference between a compulsory and a voluntary retrenchment.

12.This brings me to the crux of the matter. In terms of Section 191(5)(b)(ii) of the Act, dismissals relating to the employer's operational requirements, must be referred to the Labour Court for adjudication. Only if there was an agreement between the parties, the matter could be arbitrated by a commissioner of the CCMA. In this case there was no such agreement.

13.In my view, the arbitrator exceeded her powers in by assuming jurisdiction in this matter and awarding compensation in a retrenchment dispute, in breach of the provisions of Section 191(5) of the Act. The

parties did not consent to such jurisdiction expressly or tacitly. She assumed jurisdiction despite the fact that the dispute referred to related to an alleged unfair labour practice in terms of schedule 7 item 2(1)(d) of the Act. The arbitrator was clearly derelict her duties as an arbitrator, by not establishing whether on the jurisdictional facts before her, this was a matter that could in fact be arbitrated.

(See: *Zeuna-Starker Bop (Pty) LTD vs National Union of Metal Workers of South Africa (1999) 20 ILJ 108 (LAC) at 109 to 1010*, *Avroy Schlain Cosmetics (Pty) LTD vs Kok & another (1998) 1901ILJ 336 (LC) at 337 I*) and also:

Rule 9 of the rules regulating practice and procedure in the Commission for Conciliation, Mediation and Arbitration (G.N.R. 245 of 2000).

14.In the circumstances I make the following order:

The award of the second respondent dated 30 June 2000 (Case number: GA60231) is set aside.

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E. Revelas