

**IN THE LABOUR COURT OF SOUTH AFRICA****Revised/Reportable****CASE NO:**

C341/00

**DATE:**18-5-2001

In the matter between:

**B M PAMA & OTHERS**

First and Further Applicants

and

**COMMISSIONER FOR CONCILIATION**

First Respondent

**MEDIATION AND ARBITRATION**

Second Respondent

Third Respondent

**J U D G M E N T****PILLAY, J:**

1. This is a review of an award of the second respondent, the Commissioner. The third respondent had sold the business as a going concern to Biz Africa. Despite the fact that the written agreement of sale did not provide for the employees being employed by Biz Africa they were all re-employed on the same terms as their employment with the third respondent. Their employment occurred substantially through the negotiations between the third respondent and Biz Africa, and in discussions with the applicants. The applicants, however, received no severance pay. An arbitration on the issue proved unsuccessful for the applicants. The arbitration proceeded on the limited basis as to whether the third respondent should have paid severance pay to the applicants in terms of section 41(6) of the Conditions of Employment Act No. 75 of 1977 (the "BCEA").
2. Precisely on what grounds the award was being challenged was not apparent from either the founding papers or the applicants' heads of argument. Mr Pama clarified

from the bar that the applicants were relying on sections 145(2)(a)(i) and (ii) that is , misconduct by the Commissioner in that he had committed a gross irregularity in the proceedings. Section 41 of the BCEA provides:

"(2) *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 calculated in accordance with section 35.*

(3) .....

(4) *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 sub-section (2)."*

It was submitted for the applicants firstly, that as they had not refused alternative employment they should not be denied severance pay. By accepting alternative employment they could never have disintitled themselves to severance pay. Secondly, the offer of alternative employment had to be made by the third respondent . As the offer emanated from Biz Africa, the third respondent had not complied with sub-section 41(4).

3. In dealing with the last point first, it is clear that an employer engaged in restructuring is unlikely to be in a position to offer alternative employment, especially if the business is sold. Furthermore, as the alternative employment may be with "*that employer or any other employer*", the legislature clearly contemplated that technically the offer of employment may emanate from another employer. The dismissing employer would have complied with sub-section (4) if it facilitated the employment with the new employer (***Bronn v University of Cape Town 1999(4) LLD 209 CCMA***).

4. Turning to the first argument it would appear that a strict interpretation of sub-section (4) could lead to the conclusion that severance pay is not forfeited if alternative employment is accepted. This interpretation may be fortified by the use of the word "*must*" in sub-section (2). However, applying a purposeful approach sub-section (4) also lends itself to the interpretation that as an incentive for employers to find employment for employees and for employees to take up employment, severance pay should only be payable if there is no offer of alternative employment or if the refusal of alternative employment is reasonable. What ever construction is placed on subsection (4), there are fundamental policy questions at issue.

5. At least four policy options emerge:

1. Severance pay may be the employee's reward for loyalty to the employer. It is payment for years of service. It may be an undetermined but a determinable amount, which forms part of the employee's patrimony which should be payable on dismissal for operational reasons.
2. Severance pay may be compensation for unemployment.
3. It may also be an incentive for continuous employment.
4. A combination of the foregoing options which need not be mutually exclusive.

Which ever option the Commissioner selected would not amount to an error of law amounting to so gross an irregularity as to be either misconduct or reviewable on any other basis. Nor was it a mistake amounting to misconduct by the Commissioner. All four options can possibly be deduced from section 41. The Court in ***Pure Fresh Foods (Pty) Ltd v (indistinct) & Another 1995(5) B LLR 518 LC*** came to a similar conclusion when refusing to review and set aside an award. As it transpired the social partners have since selected option 4, that is a combination of options 2 and 3 above when the National Economic Development and Labour Council (NEDLAC)

published the Notice of the Code of Good Practice on Dismissal based on Operational Reasons in General Notice 1517 of 1999. It provides as follows at paragraph 11:

*"If an employee either accepted or unreasonably refused to accept an offer of alternative employment, the employee's right to severance pay is forfeited. Reasonableness is determined by a consideration of reasonableness of the offer of alternative employment and reasonableness of the employee's refusal."*

The first part of the enquiry into reasonableness is about objective factors such as remuneration, status and job security. In the second leg of the enquiry the employee's personal circumstances play a greater role.

7. It does not mean that by this policy election the social partners would encourage or tolerate employers who periodically dismiss and re-employ employees merely to evade the accumulation of severance pay. Section 197 provides for the protection of employees who are transferred. Tenure of service is recognised in terms of section 197(4) which provides :

*"A transfer referred to in subsection (1) does not  
interrupt the employee's continuity of employment.  
That employment continues with the new employer  
as if with the old employer."*

86. In the circumstances the Court dismisses the application for review with costs.

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**PILLAY, J**