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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR 536/01

2002-09-05

In the matter between

MINISTER OF ENVIRONMENTAL AFFAIRS Applicant

and

P H STRYDOM Respondent

J U D G M E N T

NGCAMU J: The applicant in this matter seeks to have the award of the first respondent be reviewed and set aside in terms of Section 145 of the Labour Relations

Act.

The award was issued on 16 March 2001 under the auspices of the General Public Service Bargaining

Council. The second respondent is employed by the applicant as an assistant director with the bureau.

On 19 April 1996 an agreement between the state as the employer was entered into with the Trade Union in terms of which the employee organisations agreed to the right to bargain in all the public service.

It was therefore agreed that a voluntary severance package, known as the VSP, be implemented from 1 May 1996. The objectives were to provide a mechanism which would facilitate the right sizing of the public service and create room for the absorption of super numerary officials within the various departments. The other objective was to reduce the number of the public servants Clause 1(a) of this document provides:

"All personnel may volunteer for severance packages in order to create room for the absorption of super numerary officials in other programmes/departments/administrations subject to the interest of the state and also taking into account the interest of the officials/departments/administrations and decide which officials may be allowed to have the

severance under this provision. In the case of key personnel the executing authority should, after consulting the relevant official, also consider utilising the mechanism of postponing the date of termination of service for a period not exceeding 18 months to allow for suitable successions."

The second respondent applied to be granted the VSP. His application was declined. The application for the others who applied were granted. The reason given for the refusal of the second respondent's application was that those who applied and granted the package were nearing retirement.

The applicant applied again when he was nearing retirement. His application was again refused.

The second respondent then declared a dispute for unfairly practice in respect of the alleged inconsistency with regard to the application of collective agreement on voluntary package.

The Conciliation did not resolve the dispute. The dispute was then arbitrated. Following the arbitration the first respondent issued an award in which he found the department guilty of having committed an unfairly practice and ordered that the pre-arbitration agreement be enforced in terms of which the second respondent is to be granted the voluntary

service package and that the department had to consult with the second respondent in terms of the collective agreement.

This is the award which is the subject of the review.

The applicant raised several grounds of review on which it relies for the review of the award. The applicant has raised a jurisdictional point as its first ground of review. It contends that the arbitrator did not have jurisdiction to entertain the dispute brought by the second respondent.

It was submitted that the dispute concerned is not an unfairly practice as defined in Schedule 7 of the Labour Relations Act 66 of 1995 but that of mutual interest.

The second point is that the General Public Service Sectorial Bargaining Council under whose auspices the arbitration was conducted, did not have jurisdiction.

The second jurisdictional point was not pursued during the argument, although not specifically abandoned by the applicant. I will accordingly not deal with this point.

It was further submitted that the decision on the VSP lies with the Minister.

The applicant did not argue this jurisdictional point during the arbitration hearing. Furthermore, on page 4, line 17 to 21 of the arbitration record, the following is recorded:

"COMMISSIONER: Prior to the matter being recorded an informal discussion was held where certain points *in limine* were raised by the respondent. After discussion between both sides, the respondent withdrew both points *in limine*. Is that correct, Sir?

MR MOGANEDE: That is correct."

It has been submitted that the points *in limine* were the points raised which the applicant intended to raise regarding the jurisdiction. It appears from the record that these points were in fact not pursued during arbitration.

It therefore follows that the applicant accepted the jurisdiction of the commissioner. He accepted the jurisdiction during the Consilliation of the dispute. A certificate issued, recorded the dispute "as alleged in consistence with regard to the application of collective agreement on voluntary package". The applicant accepted the certificate and did not raise any issue.

The dispute then went for arbitration. The arbitrator derives his authority from the certificate

of non-resolution. If one of the parties is disputing the jurisdiction, that party has to approach the court to have the certificate declared null and void. If the applicant did not raise the jurisdictional issue at the Consiliation and during arbitration, it cannot now in review attack the jurisdiction of the arbitrator. The arbitrator was entitled to arbitrate as the certificate had not been declared null and void.

See in this regard *Fidelity Guards Holdings (Pty) Ltd v Eksteen NO and Others* 2000 12B LLR 1389 LAC.

I t was argued that this matter can be distinguished from the *Fidelity Guards* as that case dealt with another issue. In my view there are no basis for distinguishing the present case from the *Fidelity Guards* case. I therefore reject this argument in that the certificate issued by the commissioner is the first step for any arbitration. It therefore does not matter what the dispute was. The dispute in the present matter was the same as the one in *Fidelity Guards.*

I accordingly reject the applicant's contention that the arbitrator did not have any jurisdiction to entertain this dispute.

It was also argued on behalf of the applicant that the decision to grant the severance package lies with

the Minister concerned. It was therefore submitted that the granting of the VSP is not a benefit or a right to any employee. The implications of this submission is that the arbitrator did not have jurisdiction and again on this point, this was not raised before the commissioner when the matter was arbitrated.

It was never at any stage suggested to the witnesses or in argument before the commissioner that he had no jurisdiction with regard to a decision regarding the VSP.

On the contrary, both parties participated in the arbitration and approached the dispute as an unfairly practice. The applicant created a special arrangement in terms of which employees could volunteer to have their services terminated.

This dispute which the second respondent referred for consiliation and arbitration related to the inconsistency in the application of the collective agreement on voluntary package. In other words, the dispute related to the manner in which the agreement was applied. The agreement, in my view, when applied created a benefit to the employee. This, in my view, brings the dispute within the ambit of item 2 of Schedule 7, which defines an unfairly practice as

involving:

"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."

The benefit would therefore, in my view, include an advantage afforded to the employee.

The applicant referred me to the case of *Schoeman and Another v Samsang Electronics SA (Pty) Ltd* 1997 18 IFJ 1098. That case dealt with the remuneration and the court found that the benefit does not include the remuneration. This case is accordingly, in my view, not relevant.

I was also referred to the case of *Gaylard v Telkom SA Ltd* 1998 19 ILJ 1642 LC. In my view, this case does not assist the applicant. This case dealt with the payment of accumulated leave pay and therefore it is not relevant to the case where a dispute involves the agreement relating to the payment of the voluntary severance pay.

However, in *Imperial Cold Storage and Supplying Company Limited v Field* 1993 14 ILJ 1221 LAC, a case decided under the 1956 Labour Relations Act, the court at page 1229, paragraph A to F stated the following:

"The point remains that to the extent that the fairness requires payment of a retrenchment package over and

above the application of other guidelines, including fair prior notice of retrenchment, there is no reason why the Industrial Court should not be able to determine this and where appropriate, the amount of such severance package under the unfairly practice jurisdiction."

This question was also dealt with in the matter of *Burman Katz Attorneys v Brandt NO and Others* 2001 22 ILJ 128 LC. This case was referred to by the applicant.

This case, however, illustrates the fact that the commission cannot decide the dispute concerning the severance pay. In my view, whether that question arises from the provisions of the Basic Conditions of Employment Act, Section 196 of the Labour Relations Act, or arising from the collective agreement, it does not matter.

The fact that the Minister has the final say with regard to the granting of the VSP does not mean that its decision cannot be challenged in an unfair practice is found to exist. The employee has a right not to have an unfairly practice visited upon him. In this case I also refer to the *Imperial* matter referred to above at page 1228, paragraph A–B.

In the light of what I have said above the

arbitrator can force compliance with the collective agreement to resolve an injustice perpetrated upon the employee.

It is therefore my view that the arbitrator was entitled to deal with this matter and deal with the collective agreement that had been entered into by the parties.

Another point raised, was the inconsistency. It was submitted on behalf of the applicant that there was no evidence supporting the inconsistencies and that the second respondent considered that there were no inconsistencies.

The second respondent set out the names of the people who were granted severance packages and this was not disputed. The applicant, however, has not challenged the findings of the arbitrator regarding the inconsistencies. Allegations were made that there was no evidence to support such a finding.

The examination of the award shows that the inconsistency was found by the arbitrator on the failure of the employer, the department, to consult the employee. It was submitted on behalf of the applicant that the consultation was required if the application for the severance package was accepted, and therefore no consultation was required.

It was further submitted that consultation with the respondent did take place. In my view, these two submissions are inconsistent with each other. It can either be that consultation took place or did not take place.

There is no evidence that the second respondent was consulted regarding his application before it was refused and in fact, it was not submitted on behalf of the applicant that such consultation did take place.

The applicant, however, submits that the consultation could take place after the granting of the severance pay, whereas the arbitrator is of the view that it should take place as the application is considered. This, in my view, is a difference in the interpretation of the clause of the agreement and it is therefore my view that the award cannot be reviewed on the basis of a wrong interpretation given by the arbitrator on the clause relating to the consultation. Whether the interpretation is correct or wrong, it is not for the court to decide.

Another reason for finding inconsistency was that the first application was refused on the basis that the respondent was not close to retirement, when in fact others were given severance package on the basis that they were close to retirement and this was not applied

in respect of the second respondent.

The second application was refused because a new approach had been adopted which was in fact a shifting of the goal post. The respondent was not given any reason for such a refusal. These reasons set out by the arbitrator have not been challenged by the applicant. In my view, the arbitrator set out his reasons based on the evidence presented. He concluded that the conduct of the respondent was arbitrary, inconsistent and unfair.

This conclusion has not been challenged by the applicant in this review. I therefore have to accept that the first respondent gave fair reason for his findings.

It was also argued that there were no reasonable expectations given to the second respondent. It was submitted that the Minister did not promise anything to the respondent. It was further submitted that there is nothing in the agreement saying that people nearing retirement should be allowed the VSP.

This submission is correct, but it overlooks the fact that the respondent was advised that the others were granted SVP because they were nearing retirement and in fact, they did get VSP on the basis of this.

When it came to the second respondent this did not

apply. The respondent, in my view, reasonably expected that when he was nearing retirement he would also be considered in granted a severance package. His expectations were reasonable and were created by the employer and therefore the shifting of the goal post caused an unfairness on the part of the second respondent.

I therefore cannot find anything wrong in the arbitration award with regard to the reasonable expectation found by the arbitrator.

Another point raised was that the second respondent wanted a *mandamus* and that the commissioner had no power to order it and also that there were no requirements set out by the second respondent.

Again this point it was never raised before the commissioner that the second respondent wanted a *mandamus* which the commissioner could not grant.

Be that as it may, this argument runs contrary to the pre-arbitration agreement reached by the parties, that if the finding is made in favour of the second respondent, the respondent would be entitled to be granted the VSP. I therefore fail to understand the submission because it was agreed that if such a finding is made against the applicant, the VSP would then follow.

Why this was agreed if the commissioner had no power to order it, escapes my mind. I do not want to think that the applicant was not *bona fide* when it engaged in the arbitration proceedings. The commissioner, in my view, ordered what the parties had agreed in the pre-arbitration agreement, in the event of a finding in favour of the respondent.

I therefore reject the submission that the second respondent wanted a *mandamus* which arbitrator could not grant. In my view, that was agreed by the parties before the arbitration.

In the light of the above, I cannot find any defect in the award. In my view, the award is justified for reasons given. The award may seem unreasonable in the eyes of the applicant for reasons submitted. It was contemplated by the law makers that some awards may be unreasonable but still be allowed to stand, as long as they are justifiable for reasons given.

In the present case I am satisfied that the reasons given by the arbitrator do justify the award given. In the circumstances the review cannot succeed in respect of all the grounds raised by the applicant.

I accordingly make the following order:

The application for review is dismissed.

The applicant is ordered to pay the cost.
