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**IN THE LABOUR COURT OF SOUTH AFRICA**

BRAAMFONTEIN CASE NO: JR1619/01

2002-09-13

In the matter between

**ESKOM** Applicant

and

**Dr R MARSHALL & OTHERS** Respondents

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**J U D G M E N T**

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**LANDMAN J:**

1. On 5 July 2001, Commissioner B Dorman of the CCMA delivered an award in a dispute between Eskom and Dr Marshall, an employee of Eskom. The commissioner found that:

(a) Eskom committed an unfair labour practice in terms of item 2 (1) (b) of the Seventh Schedule to the Labour Relations Act 66 of 1995.

(b) Eskom=s conduct was substantively and procedurally unfair.

(c) Eskom is ordered to pay the sum of R732 011,81 to Dr Marshall within ten days of receipt of the award.

(d) Eskom is ordered to pay interest on the abovementioned amount at the rate of 10% per annum from 31 August 1999 to date of payment.

(e) Eskom is ordered to pay Dr Marshall=s costs of the arbitration

on the Magistrates= Court scale, including the costs of the hearings held on 29 and 30 May 2001 as well as the costs of consultation and preparation.

2. Eskom has launched an application in this court. It seeks the following relief:

(a) Condonation of the late filing of this application.

(b) Declaring that the arbitration award, issued by the commissioner under the auspices of the CCMA, is a nullity in that the CCMA lacked jurisdiction to determine the dispute between Eskom and Dr Marshall.

(c) In the alternative, an order reviewing and setting aside the award of the commissioner.

(d) Costs.

3. The application for condonation sets out a reasonable explanation for the delay and related matters. It was granted. Mr Pretorius SC, (with him Mr S A Boda), appeared for Eskom. He submitted, inter alia, that the commissioner lacked jurisdiction to arbitrate the dispute under item 2(1)(b) of the Seventh Schedule to the LRA as the dispute did not concern the unfair conduct of an employer relating to Athe provision of benefits to an employee.@

4. It is perhaps just as well to quote the provisions of the item at this stage:

A(a) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving - - -

(b) 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.@

In **Legal Aid Board v John NO** [1998] 4 BLLR 400 (LC), the applicant on review, raised for the first time the issue of the arbitrator's jurisdiction to decide a matter under item 2(1)(b) of the Seventh Schedule. The court held that although the matter was not pertinently raised before the arbitration as it was an issue of jurisdiction, it did not preclude the applicant from raising the issue at the stage it reached the Labour Court.

5. It follows that Eskom is entitled to raise the jurisdictional point, in the review application, or as a separate self-standing application. The authorities are trite that a court of law or a tribunal that issues an order where it has no jurisdiction to do so, acts *ultra vires*. The result is that the order is a nullity. **See Immelman v Keller** 1903 20 (SC) 623 and **Visser v Van den Heever** 1934 CPD 315.

6. If I find that the commissioner lacked jurisdiction to determine the dispute, the award that he rendered, is a nullity and Eskom would be entitled to the relief sought. The commissioner viewed the dispute as one relating to a benefit. The commissioner concluded that the failure of Eskom to pay or afford Dr Marshall, a separation package was unfair.

7. The principal submission made on behalf of Eskom is that the commissioner had no jurisdiction to determine the dispute under item 2(1)(b) as the dispute was not one relating to the provision of benefits to an employee. It was contended that the refusal by Eskom to pay or provide a separation package was simply not arbitrable as it concerned a matter of mutual interest.

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8. Dr Marshall applied for separation benefits in terms of Eskom's Corporate Guideline Policy on Separation. This policy was merely a guideline. It did not create any contractual entitlement on the part of an employee to a separation package. The material terms of the separation package policy included the following:

"1 **Purpose**

Separation packages will be considered for the following purposes:

$ To attain affirmative action and employment equity targets;

$ To address the problem of unplaced employees.

2. **Separation Benefits**

The following benefits and conditions apply to employees who voluntarily apply for a separation package and to whom separation benefits are granted:

2.1 Early retirement.

2.2 Cash Settlement.

3. **Exclusions**

Separate packages will not be available to:

$ Employees in scarce job categories.

4. **Approval**

Application for separation packages must be motivated to and approved by the relevant Group Executive Director."

9. It is common cause that the policy was amended. In terms of clause 6, the granting of packages was not to be right or privilege and was said to be entirely within the prerogative of Eskom.

10. Dr Marshall applied for a separation package. During July 1999 the Executive Director turned down his application down. Mr Pretorius submitted that (a) at no time did Dr Marshall contend that he had a contractual right to a separation package in terms of his contract of employment; (b) nor did he contend that he had a statutory entitlement to a separation package; and (c) he did not claim an entitlement to it in terms of any collective agreement binding upon the parties.

11. In **Hospera & Another v Northern Cape Provincial Administration** (2000) ILJ 1066 (LAC), the court considered whether an employee was entitled to secure payment of an acting allowance under the provisions of Item 2(1)(b); more particularly whether such an allowance was a service benefit as contemplated in this item. The court found that, as there was no contractual entitlement to the allowance, nor a collective agreement or any statutory entitlement to such an allowance, the employee could not have secured such an allowance in terms of item 2(1)(b). The *ratio* of the judgment appears at pages 1069-1070. It reads:

"It appears to me that the legislature did not seek to facilitate, through item 2(1)(b), the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(1)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give to him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1)(b). It simply sought to bring under the residual unfair labour practice jurisdiction disputes about benefits to which an employee is entitled *ex contractu* (by virtue of the contract of employment or collective agreement) or *ex lege* (the Public Service Act or any other applicable Act.)"

12. The court concluded that to allow an employee to obtain a benefit in terms of this item, where the employee was not entitled to it, either *ex contractu* or *ex lege*, would inevitably be a fundamental subversion of the collective bargaining process. See page 1070F-G.

13. Counsel for Dr Marshall, pointed out that in the present proceedings, Eskom, now represented by different attorneys than those that represented it before the commissioner, was arguing that the dispute was not arbitrable and on the basis that the commissioner did not have the jurisdiction to make the award. It was pointed out that, despite the fact that it clearly appears from the minute of the pre-arbitration hearing, Eskom did not contest that the dispute related to the provision of benefits to an employee as contemplated by item 2(1)(b). However, it was properly conceded that Eskom is entitled to raise the question of jurisdiction in this court, but Eskom is not permitted to contest the relevant issues of fact that were not in contention before the commissioner.

14. The submission is made that Eskom did not contend, before the commissioner, that it

was entitled to refuse to consider applications altogether or that all employees were not entitled to apply. Its case was that in the case of so-called E-band applicants in the transmission group (which included Dr Marshall), the decision to grant or refuse an application was solely in the discretion of the executive director. It was submitted, that once it is accepted that Eskom was obliged to consider applications for the separation benefit, then it follows *ex lege* or by implication from the provisions of items 2 and 3 of the Seventh Schedule, that Eskom was bound to deal with the applications fairly i.e., in terms of a fair procedure and on fair substantive grounds. It was also submitted that, although Eskom had retained the discretion to grant or refuse an application, it could not do so without adherence to the rules of natural justice. Neither could it exercise its discretion arbitrarily or capriciously or in a manner that was inconsistent as between different applicants.

15. It was strongly argued that the *dictum* in the **Hospera** case, which I have cited above, does not detract from the fact that the CCMA had jurisdiction to arbitrate the present dispute. It was boldly submitted that Dr Marshall had a right *ex contractu,* arising from the terms and conditions of his contract of employment, to apply for the separation benefits. It was also stressed that therefore Dr Marshall had a right *ex lege*. This, it was contended, obliged Eskom to address Dr Marshall's application in terms of a fair procedure and to decide it on fair substantive grounds.

16. Having regard to the facts as they are set out on the papers, as defective as the record may be, I can find no basis for the contention that Dr Marshall had a right *ex contractu* to the separation package.

17. It was submitted that the *dictum*, in the **Hospera** case, relating to a right *ex*

*contractu* or a right *ex lege* is entirely *obiter*. The **Hospera** case, so it was argued, was decided on the basis of very specific provisions of the Public Service Labour Relations Act. The facts that served before the LAC are not similar to the facts of the present case. If, in the **Hospera** case, there had been a written policy providing that employees in acting positions could apply for, and be granted acting allowances, it is submitted the employer would have been bound to consider those applications and to decide them on the basis indicated above.

18. The submission is also made that the interpretation, which Eskom wishes to give to the **Hospera** judgment, means that there must be a contractual or statutory right. But, it is submitted, that if the relief is one to which an applicant is entitled to, in terms of a contractual or statutory right, the issue of fairness would be irrelevant. The jurisdiction created by items 2 and 3 would be emasculated. It is further contended that the LAC did not deal with the case where, absent a right to apply for certain non-monetary benefits, e.g., a housing benefit or a protective clothing benefit or a transport benefit, certain employees were granted the benefit while others, in identical positions, were not.

19. In labour law there are two poles: disputes of right and disputes of interest. They rarely meet and their attainment is normally dissimilar. The LAC in the **Hospera** case, considered that a benefit, contemplated by a residual unfair labour practice was situated on the pole occupied by an antecedent right to a benefit. This right arises *ex contractu, ex lege* or through a collective agreement. The LAC, correctly concluded that the other pole, disputes of interest, were not contemplated by the concept, ie a situation where no benefit exists but the applicant seeks to establish a benefit. Such disputes relate to matters of mutual interest and are properly the subject of negotiation on an individual or collective level.

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20. However, in my view there is middle ground between the poles. This is the position occupied by a spes as regards the enjoyment of a benefit. This spes could be described, in the words of E Riggs 1988 (36) *American Journal of Comparative Law* 395, as a private interest of a status less than a legal right. The spes must be more than a hope or a wish. It must be, in modern parlance, a legitimate expectation to a benefit. Importantly this benefit (some advantage or privilege as comprehended by the normal concept of a benefit) must be a concrete one which exists. It must be an ascertainable advantage or privilege which has been created by the employer concerned; or one which the employer has declared it will consider conferring upon employees.

21. Although legitimate expectation is better known in the context of a fair hearing or procedure in administrative law, it also has application as regards substantive matters. Corbett CJ in **Administrator Transvaal v Traub & Others** 1989 (4) SA 731 (A) at 756H-J quotes the following remarks of Lord Fraser in **Council of Civil Servants Unions & Others v Minister for the Civil Service** [1984] 2 ALL ER 935 (HL) at 943J-944A:

> A But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law... Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from *the existence of a regular practice which the claimant can reasonably expected to continue*.@

Corbett CJ says at 758D-F:

"As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonable expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken. (As Prof Riggs put it in the article to which I have referred (at 404):

> *The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations.=*

22. I find support for the view, that a legitimate expectation to a benefit or advantage is sufficient to constitute a residual unfair labour practice (if unfairly refused) in the unfair labour practice relating to promotion. An employee who aspires to promotion, does so with regard to an existing opportunity or vacancy or post. The employee in question may have a right to promotion, although this would be rare. But generally, the employee may merely have a legitimate expectation that, if he or she meets the requirements and beats the competitors, he or she will be promoted. In the same vein, a residual unfair labour practice relating to unfair conduct involving training opportunities, similarly does not require, in my opinion, an antecedent right, to be trained. A legitimate expectation to be considered for an established training programme presented by the employer or on behalf of an employer, would suffice.

23. The judgment of Jammy JA in **Transnet Ltd v CCMA & Others** (2001) 22 ILJ 1193 (LC) par. 20 which relies on the decision in **Hospera** appears to be to the contrary. The award handed down by CCMA Commissioner Maritz in **Public Servants**

**Association o.b.o. Geustyn v Provincial Administration: Western Cape** (2000) 21 ILJ 700 (CCMA) sets out an approach which in my opinion provides support for the view which I have taken. At 703 A-H Commissioner Maritz says:

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"The meaning of >benefits= was considered in a judgment of the Labour Court in the matter between *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* 1997 18 ILJ 1098 (LC).

With reference to *The Concise Oxford Dictionary* (6th ed) a >benefit= is defined as an >advantage or an allowance to which a person is entitled under insurance or social security (sickness, unemployment, supplementary benefit) or as a member of a benefit club or society=.

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In the particular case it was succinctly held that a benefit referred to something extra, apart from remuneration, which may or may not have been covered by the condition of employment.

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In the circular already referred to, which is headed >Application of the special initiative whereby serving officials are afforded the option to request that their services be terminated on a voluntary basis= the objective of the administrative action, which it regulates, is given as the right-sizing of the public service. In a further circular dated 28 October 1996 interim measures to be adopted by departmental administrations in respect of vacancies occurring as a result of the introduction of the special initiative, are dealt with.

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In this regard a number of directives were given. Officials leaving who had been held additional to the establishment and officials in posts that were to be abolished in terms of the rationalization were not to be replaced. Posts vacated as a result of the policy could be filled by supernumerary personnel. Posts that could not be so

filled could not be vacated in terms of the policy unless another post of a comparable monetary value was abolished. Further exceptions related to the filling of posts to promote representativity.

It is clear from the above that the package was to induce officials to agree to a separation and that it contemplated that they should be adequately rewarded to compensate them for leaving a secure position and, in a manner of speaking, joining the unemployed.

It seems to me that the benefits included in the package were not in any way a *quid pro quo* for >services rendered= within the meaning of that term and the judgment referred to but that the package was clearly an >extra= to the conditions of employment: an addition to serve as an inducement to terminate that employment.

In the circumstances the voluntary package, although based on the remuneration package of the employee as at the termination of the contract, is a benefit as contemplated in item 2(1)(b) of schedule 7 of the Act and the CCMA has jurisdiction to resolve the dispute."

24. The LAC's decision in **Hospera** is binding on me, not simply as a matter of precedent, but also in terms of the Labour Relations Act. As Dr Marshall does not have a contractual right to the resignation or separation package, I must find that the commissioner had no jurisdiction to arbitrate the dispute; even though he had been led by Eskom to believe that he had such jurisdiction. The award is consequently a nullity and must be declared to be so.

25. In view of Eskom's role, in agreeing that the issue in dispute fell within the

jurisdiction of the CCMA, or at least in not contesting it, it would be unfair and unjust to award costs against Dr Marshall.

26. In the premises therefore:

1. The award made by Commissioner Dorman dated 5 July 2001 is declared a nullity.

2. There is to be no order as to costs.

SIGNED AND DATED AT BRAAMFONTEIN THIS 17 th DAY OF SEPTEMBER 2002.

A A Landman
Judge of the Labour Court

05 September 2002

13 September 2002

Advocate P Pretorius S C and Mr S A Boda instructed by Dison Ndlovu Attorneys

nt Advocate F G Barrie instructed by Brink Cohen Le Roux & Roodt Inc.