IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: **JS 614/06**

IN THE MATTER BETWEEN:

ZIETSMAN, A J **FIRST APPLICANT**

DE VILLIERS J P D **SECOND APPLICANT**

VAN COLLIER, R **THIRD APPLICANT**

AND

TRANSNET LIMITED **RESPONDENT**

JUDGMENT

MOLAHLEHI J

Introduction

1] The applicants Mr Zietsman, Mr Jacobs De Villiers and Mr Van Collier filed a statement of case in terms of Section 77(3) read with Section 77A (e) of the Basic Conditions of Employment Act No 75 of 1997 read with Rule 6 of the Rules of the Labour

Court.

2] The respondent, Transnet Limited opposed the applicants' statement of case. However, the parties agreed subsequent to the filing of the response to the statement of claim not to lead evidence, the facts being common cause. The parties agreed to argue the legal issues based on the agreed facts.

3] The issue for determination is whether the calculation of the severance pay by the respondent should have included the dealer bonuses of each of the applicants as provided for in the Dealer Bonus Scheme.

The background facts

4] It is common cause that the applicants who were dismissed for operational reasons by the respondent participated in the bonus scheme agreed to with the respondent.

5] In terms of the bonus scheme, bonuses were paid on a six monthly basis and were paid at a pre-arranged scales and conditions. Any amendment to the bonus scheme would take effect in the period following the amendment.

6] It is also common cause that the applicants received each the severance pay after their dismissal on 30 March 2006. The severance pay was calculated on the basis of two weeks for every completed year of service.

7] The complaint of the applicants is that the respondent incorrectly calculated the severance pay in that it excluded their bonuses from the calculation of the severance pay.

8] The applicants claimed that had the respondent factored into their severance pay their bonuses the total amount due to each of them would have been higher than what the respondent paid as severance pay.

The legal issues arising from the facts

9] Payment of severance pay is governed by s41(2) of the BCEA which provides as follows:

" (1) .....

(2) An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements or whose contract of employment terminates or is terminated in terms of section 38 of the Insolvency Act,

1936 (Act No. 24 of 1936), 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.

10] Section 35 of the BCEA provides for the calculation of remuneration and wages, based on the number of hours the employee ordinarily works. Subsection 5 specifically provides:

> *"(5) (a) The Minister may, by notice in the Gazette, after consultation with the Commission and NEDLAC, determine whether a particular category of payment, whether in money or in kind, forms part of an employee's remuneration for the purpose of any calculation made in terms of this Act."*

11] In exercising powers given to him in terms of s35(5), the Minister, published in government notice number GN 691 of 23 May 2003, the schedule indicating payments that are included in an employee's remuneration for the purposes of calculating pay for severance pay in terms of s41 of the Act. In terms of this notice certain items are excluded from remuneration for the purpose of calculating severance pay. Amongst others the

discretionary payments not related to an employee's hours of work or performance does not form part of the remuneration for the purpose of calculating severance pay.

12]The respondent argued that the case of the applicants was based purely on the basis of the Act and not on contract, and therefore the case must be approached on the premises of interpreting s41 of the Act. In this regard the respondent argued that the two weeks payment was an amount which was greater than one week required by s41 of the Act.

13]The applicants contended that the dealer bonus was not excluded by terms of item 2(e) of the Minister's determination as it forms part of the remuneration for the purpose of calculating severance pay.

14]On the other hand, the essence of the respondent's case was that because they had paid severance pay exceeding one week, as required by s41 of the Act they had complied with the provisions of the Act and therefore it was not compulsory to include the bonuses in the calculations of severance pay.

15]In *SA Typographical Union o.b.o Van AS & Others v Kholer*

Flexible Packaging (Cape) (A Division of Kohler Packaging Ltd (2001) 22 ILJ 22 1892 (LC), the Court held, in dealing with a similar issue, although different on the facts, that there was in fact an agreement between the parties that the two weeks severance pay had to be calculated in accordance with s35 (5) of the Act because that was what the parties were required to do in terms of their agreement. In a case where the parties have not agreed on the formula or method to use in calculating the severance pay the Court held that:

> "29 In the absence of an agreement the parties to that effect the Court cannot simply on the basis of an agreement to pay two weeks severance pay for every year of completed service assume that the two-weeks period has to be calculated as submitted by the applicant especially where payment of two weeks' severance will amount to more than the minimum statutory provisions."

16]The principle in the *SA Typographical Union case* was followed in *Telkom (PTY) LTD v Commission For Conciliation, Mediation & Arbitration & Others* (2004) 25 ILJ 1492 (LC). In this case Pillay J after concluding that the phrase *"at least in s41(2)"* mean it could be more than one week, held that:

> "The reference to "in terms of this section" restricts the

court and a commissioner to make a determination only in terms of the statutory minimum or an agreement, if there is one. In my view if the rate, formula or method of calculation is agreed the court or a commissioner may enforce it, even if it is more than a week per year of service."

17] It was no t disputed in this case that had the applicants been paid one week of each year of completed service they would have each received; first applicant R93102.00; for the second applicant R191968-89; and for the third applicant R587454.00. The amount paid by the respondent to the respective applicants exceeded the amount that would have been paid had the payment been limited to one wide as provided for in terms of s41, the Act.

18] In my view, where the employer pays more than what s41 of the Act requires, s35 (5) calculation would not apply unless as was in the case of *Mamabolo v Manchu Consulting CC* (1999) 20 ILJ 1826 (LC), the parties agreed that the s35 (5) calculation should apply.

19]The applicants having received more than what is provided for in s41 of the Act and in the absence of an agreement to use the formula provided for in s35, I am of the view that the respondent has complied with the requirement of the Act. The case of the applicants was not based on contract nor was there evidence that the agreement to pay two weeks of each year of completed service incorporate the formula provided for under s35 (5) of the Act.

20]In the premises the applicants' claim is dismissed with cost.

MOLAHLEHI J

DATE OF HEARING : 21 JUNE 2007

DATE OF AN ORDER : 21 SEPTEMBER 2007
DATE OF THE TYPED JUDGMENT:

APPEARANCES

FOR THE APPLICANT: ADV G J ROSSOUW

INSTRUCTED BY: SCHICKERLING, BOWEN & HASSELINK INC.

FOR THE RESPONDENT: C TODD OF BOWMAN GILFILLAN