FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

NOT REPORTABLE ECJ no: **183**

PARTIES: **QUENTIN SCALLAN v CADBURY (PTY) LTD**

REFERENCE NUMBERS -

- Registrar: **1232/05 (SECLD)**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court:

DATE DELIVERED: **28 August 2007**

JUDGE(S): **JANSEN J**

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Applicant(s)/Appellant(s): **ADV R BUCHANAN S.C.**
- for the accused/respondent(s): **ADV REDDING S.C.**

Instructing attorneys:

- Applicant(s)/Appellant(s): **RUSHMERE NOACH INC**
- Respondent(s): **PADGENS STULTINGS**

CASE INFORMATION -

- *Nature of proceedings* :

- *Topic*:

- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No.: 1232/05

FORM A

Date delivered: 28/08/07
In the matter between:

QUENTIN SCALLAN **Plaintiff**

and
CADBURY (PTY) LTD **Defendant**

JUDGMENT (NOT REPORTABLE)

JANSEN J:

This is an action for payment of so-called severance benefits which the plaintiff claims he was entitled to when he resigned from the defendant, Cadbury. The onus is on the plaintiff to prove the terms of the contract upon which his claim was based.

The plaintiff took up employment with Cadbury on 1 April 1984. A couple of promotions followed and eventually the plaintiff occupied the position of Group Purchasing Manager of Cadbury, stationed in Port Elizabeth. The plaintiff at the time had to report to one Mr Ross, who was the financial director of Cadbury. A meeting of all senior managers of Cadbury was held in Johannesburg during April 2004. At that meeting an integration of Cadbury and Bromor was announced. It was announced that Cadbury intended to effect an integration and consolidation of the personnel in the Bromor Foods and Cadbury's own business. It was further announced that the head office of the new consolidated business would be in Johannesburg. All directors and senior managers of Cadbury had to move to Johannesburg. It was accepted that the position of various employees would be affected. A notice on a Cadbury Bromor letterhead under the heading "Redundancy" was posted on Cadbury's integration newsroom site.

It is the plaintiff's case, as it appears from the pleadings, that the notice offered certain severance benefits to the affected employees, including the plaintiff, and that the plaintiff accepted the terms of the notice and the benefits

contained therein and, therefore, became contractually entitled to such benefits. It is an essential component of the plaintiff's case that he was an affected employee as envisaged by Cadbury in the notice. This notice announced that redundancy packages would be paid to all people who were affected by the integration. This notice further sets out in paragraph 2 the severance benefits that would be received by affected employees. Paragraph 3 of the notice provides that the "annual incentive plan" would only be paid in February 2005 irrespective of the employee's termination date. It was thus clearly envisaged that affected employees may leave before the end of February 2005. Paragraph 9 deals with disqualification and in essence provides that affected employees would not be entitled to severance benefits if employment is terminated because of misconduct or inadequate or unsatisfactory performance. The plaintiff was not disqualified under this paragraph. Paragraph 10 of this notice provides that retrenchment packages would only be paid to affected employees upon their termination or separation of the company. Paragraph 11 of this notice reads as follows:

> "Should an affected employee be offered employment during their retention or notice period, the Company will allow the employee to terminate his/her services from the Company provided that:
>
> 11.1 his/her severance package will be revised to reflect the earlier termination date;
> 11.2 he/she will not qualify for the pro-rate AIP, if one is declared;
> 11.3 he/she will not qualify for the pro-rata thirteenth cheque, if applicable."

For personal reasons the plaintiff decided not to leave Port Elizabeth to join the new venture in Johannesburg. He conveyed that decision to Mr Ross. Despite that decision the plaintiff was requested by Cadbury to apply for the position of procurement manager in Johannesburg with Cadbury. He submitted a CV, completed the application forms, and went for an interview. During that interview the plaintiff made it known that he was also looking for alternative employment. The plaintiff testified that he had been advised at the time that if he left the employment of Cadbury before an agreed time he would lose his benefits. He nevertheless had the blessing of Mr Ross and Mr

Pretorius, who in the meantime had been promoted as the plaintiff's senior at Cadbury, to look for alternative employment. Mr Ross agreed to supply him with letters of credential. Subsequent to the interview the plaintiff directed a letter dated 30 September 2004 to Mr Pretorius which reads as follows:

"Willie,

Thank you for the open discussion yesterday as well as the previous inter-action with regard to the Business' desired plans and needs and my personal position within the business. I would like to confirm that we both understand my position after some 21 years with Cadbury of not being able to relocated to JHB (which has being made clear to you from the start of all possible re-structuring debaters) and that the best personal business position for myself would be to take the package as offered by Cadbury / Bromor and for me to explore other avenues in Port Elizabeth. In order for me to achieve this I have passed my CV out and are awaiting some commitment on offers.

Can we confirm our discussions that I leave at the end of May 2005 or February 2005 and that I have the option to forfeit my leave or take unpaid leave to start at any new venture on the 1st Jan 2005 if the option arose, further more would it be permissible for me to contribute to the Medical Aid (full allocation if need be) through to end May 2005 so that I do have the pensionable cover as the future is never certain."

An immediate response was not forthcoming from Mr Pretorius, which prompted the plaintiff to send an e-mail in the following terms to Mr Pretorius.

"Hi Willie

I still have not had a formal reply from you in terms of our discussion and the changes that precipitated my resignation with special reference to what I qualify for in terms of my letter of intent and final letter of signation (*sic)* which was at your request. I do feel that we should resolve all issues before I leave, also thank you for the compensation of being able to take leave when the factory closes."

Mr Pretorius replied on 5 October 2004 with the following e-mail:

"Thanks for the honest and open approach. I will be 100% open within the next two weeks which will make things a lot easier for us. Can we agree to finalise matters within the next three weeks?"

According to the plaintiff it was no secret that he was, as he put it, with his CV in the market, applying for other employment. A position with Willard's Batteries in Port Elizabeth was a possibility, but he also submitted an application for a position to Woodlands Dairy in Port Elizabeth. This application was successful, and he was offered a position as export manager. Woodlands put some pressure on the plaintiff to indicate whether he was accepting the offer or not. This Woodlands offer was discussed by the plaintiff with Mr Pretorius and Mr Ross. According to the plaintiff Mr Pretorius was very upset about the possibility of him taking up employment with Woodlands because he would then, as it was put by Mr Pretorius to him, be joining the enemy. A heated discussion followed during which discussion Mr Pretorius said to him that he would forfeit his benefits if he resigns. In spite of that, the plaintiff directed a letter to Mr Pretorius, dated 19 October 2004, terminating his employment at Cadbury in the following terms:

> "I write to you will great regret that after some 20+ years with Cadbury, the newly announced consolidation to take place in Johannesburg places me in a position that I unfortunately cannot make myself available for any new job title, due to my personal responsibilities which I have made known to you for sometime now.
>
> Taking my age and current good health into consideration, one of the better options open to me to fulfil my responsibilities to my family is to seek new employment in Port Elizabeth and it is on these grounds that I tender my resignation as per my previous memo of intent to you with my last day being 31st December 2004.
>
> I will always be indebted to Cadbury for it's full understanding and support over the past 20+ years and the many business opportunities my role as a senior manager allowed me to participate in. The same understanding goes to the Board of Directors in their interpretation of

what benefits I will qualify for under these changing times which precipitated my position.

Thank you could go on forever for those who know me will certainly know what I mean, so just a very special THANK YOU for some very special years and my good wishes go to the new team on this consolidated journey of the future."

A week later Mr Pretorius replied.

"Quentin,

It is possibly a stupid thing to complement someone on their resignation letter but your words did stir something inside. There is nothing me with my broken English can add. As communicated I am very glad we got over the mudheap and can focus on a very intense two months ahead. Also that your integrity is without doubt given that Woodlands only approached you a week ago exactly. There are also no doubts about the integrity of your involvement with the milk guys with the red devil heart – insofar that Cadbury will not be compromised. We will rely heavily on you even though we don't pay you anymore and I know that you will keep some things in our own head.

You will be sorely missed ... But I am happy for you that you don't have to go sit at home an (*sic)* do crossword puzzles, wear pajamas (*sic*) and listen to the radio during office hours.
We will have some more tears over the next few weeks.

Please give the green light to pass your note on to Pieter Scholtz – My surname spelt wrong though.

Rgds
Willie"

In a letter on a Cadbury letterhead dated 26 October 2004 Mr Pretorius addressed the plaintiff as follows:

"Thank you for submitting your application for consideration for the following position:

- Procurement Manager

and for taking the time to complete the interview process.

As communicated earlier, the interview process for the positions has been completed and we regret to inform you that you have not been successful in acquiring the position that you applied for.

I am glad that we managed to arrive at a sensible position for both parties. Your value to the business over the last 21 years has been immense and I would like to thank you for that.

I wish you every success in your future endeavours."

On 10 December 2004 Mr Pretorius per e-mail advised the plaintiff that his resignation resulted in him forfeiting his benefits:

> "Madelene will contact you to get together next Fri afternoon in JHB as discussed. I would appreciate if you can send me a mail with the harder business issues that needs discussion so that we can keep it short and rather have an informal discussion.
>
> Wrt. the qualifying issue. Unfortunately the final position is that given your resignation the rules have to dictate and therefore you forfeit the following:
> AIP bonus (you will not be employed by end Feb 2005)
> Retrenchment package (you have resigned)
>
> > Retirement medical aid (you will not be employed on your 55th birthday)
>
> The rules wrt. the share option allocation does however offer slight compensation."

It was contended on behalf of Cadbury's that the plaintiff has to show that the redundancy notice was an offer to employees which was intended to create legal relations if accepted, and that the plaintiff accepted the offer, and that the plaintiff's employment terminated within his notice period. It was submitted on behalf of Cadbury that the plaintiff was unable to prove any of the aforesaid requirements.

An employee has under labour legislation an obligation to make severance payments in the event of a retrenchment and an obligation under section 189 of the Labour Relations Act of 1995 to set out what payment it intended to make as severance payment. It was submitted on behalf of Cadbury that the notice was nothing more than a notice in terms of section 189 and that it was never intended to be an offer to affected employees. It was further submitted on behalf of Cadbury that the plaintiff never communicated the acceptance of an offer to the management of Cadbury. It was lastly submitted that the plaintiff failed to prove that his employment terminated within his notice period.

The phrase "*affected employees*" was not defined in the original redundancy notice. It was suggested on behalf of Cadbury that the original notice must be read with an "Addendum to Retrenchment Guidelines" which was made available to employees to provide clarity on retrenchment guidelines. In this addendum "*affected employee*" was defined as "*an employee whose position has either been eliminated combined/consolidated into one role or changed significantly*". On the plaintiff's uncontradicted version of the facts he, without any doubt, fell within the terms of this definition. All directors and senior managers of Cadbury had to move to Johannesburg after consolidation. The plaintiff applied for the only available position to him after consolidation, namely procurement manager, and was not successful. The plaintiff

conveyed to his superiors that he for personal reasons did not want to move to Johannesburg. On his version that was accepted by Cadbury. It was no secret that the plaintiff was looking for alternative employment. There can be no doubt at all that he falls squarely within the definition of affected employee. It further appears to be common cause that the plaintiff was offered alternative employment by Woodlands Dairy. That brings him within the ambit of clause 11 of the notice quoted above. There can also be no doubt at all that the plaintiff was offered the alternative employment during his notice period. "*Notice period*" is defined in the addendum as follows:

> "**Notice Period:** Is the period of time that parties (employer and employee) to an employment contract provide notice to each other in the event that either party wants to terminate the contract. The notice period is stipulated in an employee's employment contract usually at the start of the employment relationship."

The plaintiff's evidence was that the notice period stipulated in his employment contract with Cadbury was one month. The plaintiff's letter of resignation was dated 19 October 2004 and handed to his immediate superior shortly thereafter. The plaintiff gave more than one month's notice of his intention to leave the employment of Cadbury at 31 December 2004. "*Termination date*" is defined in the addendum as the agreed date of departure from the company. It was the plaintiff's uncontested evidence that it was agreed between himself and his superiors and in particular Mr Pretorius that he would leave the employment of Cadbury on 28 February 2005. That date is confirmed by subsequent correspondence emanating from Cadbury

and in particular from a certain Mr Scholtz, a senior human resources official of Cadbury. It was further the uncontested evidence of the plaintiff that during discussions he had with Mr Pretorius it was mentioned that Woodlands Dairy wanted the plaintiff to start his new employment as soon as possible. It was at the urging of Mr Pretorius, acting on behalf of Cadbury, that the plaintiff wrote the letter of resignation dated 19 October 2004. It is further clear from the evidence of the plaintiff, which was not disputed by Cadbury, that all the dealings he had with Cadbury and from correspondence directed by the plaintiff to Cadbury that he had acted on the basis of what was contained in the retrenchment notice. The impression is created from later correspondence that the plaintiff was denied the severance package because he was not formally declared an affected employee. That is utter nonsense. The evidence overwhelmingly shows that the plaintiff was an affected employee and that it was as such accepted by Cadbury and in particular by Mr Pretorius. This excuse not to pay severance benefits to the plaintiff was not even mentioned by Mr Pretorius in his e-mail dated 10 December 2004.

Cadbury raised an exception to the plaintiff's Particulars of Claim. This exception was argued before Pickering J. His judgment on the exception was handed down on 25 May 2006. On page 5 of the unreported judgment the learned Judge said the following:

> "A retrenchment process may also result in a consensual termination of the employment relationship upon agreed terms and the redundancy notice read as a whole is reasonably capable of bearing this construction well. In this regard is appears from clause 11 in particular that the severance package would be available under certain circumstances to affected employees who left defendant's employ on their own accord upon being offered alternative employment elsewhere."

I am in respectful agreement with the views expressed by the learned Judge. In my view, it has been proved that the retrenchment process initiated by Cadbury resulted in a consensual termination of the employment relationship upon agreed terms between the plaintiff and Cadbury. I am further of the view that it has been proved by the plaintiff that he is entitled to the severance package.

Only the plaintiff gave evidence about the *quantum* of his claim. His total claim is for an amount R439 136,00. On his calculation, which appears on page 31 of the plaintiff's bundle "A", he claims an amount of R269 095,00 under the heading "Redundancy Pack". This calculation was based on the plaintiff's basic salary at December 2004 taking into account two weeks per year of completed service as provided for in the third column of paragraph 2 of the redundancy notice. The plaintiff's evidence in this regard is uncontradicted. In addition to that the plaintiff claims an amount of R170 041,00 for the AIP bonus which benefit is reflected in the fourth column of paragraph 2 of the notice. My interpretation of paragraph 11.2 of the notice quoted above, however, is that the plaintiff is not entitled to a *pro rata* AIP bonus. The plaintiff was furthermore during cross-examination referred to the provisions of paragraph 1 of Cadbury's Plan Rules which reads as follows:

> "**Eligibility**
>
> The 2004 AIP applies to you in your present capacity and will be based on your annual Base Salary ("salary") at the rate prevailing at the end of Period 13, 2004 unless otherwise agreed. You will only be eligible for an AIP award if you are employed at the end of Period 2, 2005."

It appears from the plaintiff's evidence that he could not come up with any explanation as to why he is entitled to claim the said amount for the bonus. It is also my interpretation of paragraph 1 of the plan that the plaintiff's termination of his employment at Cadbury's by the end of December 2004 disqualifies him from the said bonus. He was no longer employed at the end of period 2, 2005, which was February 2005.

In the result, I grant the plaintiff an order in the following terms:

1. Payment of the sum of R269 095,00.

2. Interest on the above sum at the legal rate as from 1 January 2005 to date of payment.

3. Cost of suit together with interest thereon at a legal rate calculated as from a date fourteen (14) days after date of taxation to date of payment.

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J C H JANSEN

JUDGE OF THE HIGH COURT