IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No: CA5/01

In the matter between

MOLAPO TECHNOLOGY (PTY) LIMITED	**Appellant**
and	
CHARNE NICOLE SCHREUDER	**First Respondent**
LANORE ROUX	**Second Respondent**
SHARON JANE BOSHOFF	**Third Respondent**
JACQUELINE ELIZABETH WOOLLEY	**Fourth Respondent**

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal from a decision of the Labour Court in terms of which that Court granted an application brought by the present respondents for certain declaratory orders against the present appellant. In order to deal with the appeal properly, it is necessary to first set out the facts. As no request was made in the Court a quo for any issues to be referred to oral evidence, such disputes of fact as there may be in the papers are to be dealt with on the basis of the approach to be found in **Plascon Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A) at 634 E - 635 C**.

The facts

[2] With effect from the 1st April 2000 the appellant acquired a business known as IUVATEK Electronic Services and its assets from Telkom SA Limited as a going concern. The parties' understanding of the effect in law of that transaction on the contracts of employment of the employees who were employed by Telkom in that business unit is in line with the understanding which appears in the minority judgement in **Nehawu & others v University of Cape Town (2002)23 ILJ 306 (LAC) at 317-348**, namely, that the contracts of employment of the employees employed in a business that is being transferred from one person or company to another are automatically transferred to the purchaser or transferee upon the transfer of the business.

[3] Prior to this transaction , Telkom had offered voluntary retirement packages to employees over the age of 50 who were employed in the IUVATEK business unit. Not enough employees volunteered to be retrenched. After the transaction, the appellant also offered voluntary retrenchment packages to employees who wished to apply for voluntary retrenchment. It did this in consultation with trade unions whose members could be affected. Again not enough employees took this offer up.

The events of the 28th April 2000

[4] On the 28th April 2000 the second respondent was away from work on leave. The first, third and fourth respondents were at work. At some stage on that day the first, third and fourth respondents were called by the appellant's management and told that they were being retrenched with effect from the

30th April 2000. They were informed that they were going to be given letters to this effect later and that, once they had received the letters, they could leave immediately.

[5] The first, third and fourth respondents were subsequently called in individually and given letters of dismissal, their unemployment cards and their certificates of employment. They were informed that they could leave early. The first respondent duly took the appellant up on this offer and left the appellant's premisses soon after receiving her letter of dismissal. The letters of dismissal were to the effect that the addressees were dismissed with effect from the 30th April 2000. In part each dismissal letter read thus: **"Your position has been identified as being redundant and as such your service with the [appellant] will be terminated on 30th April 2000".** As the second respondent was away on leave, she was not given any letter of dismissal on this day. However, her father received a telephone call from the appellant's sectional manager who told him that the second respondent had been retrenched and that she should come in on the 2nd May and collect her documentation.

[6] After the third and fourth respondents had received their dismissal letters and other documentation, they remained on the appellant's premises while waiting for their transport to take them home. Before the third and fourth respondents' transport could arrive, the appellant decided that it was no

longer going to pursue their dismissal and decided effectively to withdraw its decision to dismiss them. This was still in the course of the 28th April.

[7] Pursuant to that decision, there was interaction between the appellant and the third and fourth respondents. There are certain disputes of fact in regard to what happened at this stage of the interaction. On the third and fourth respondents' version, while they were waiting for their transport, they were approached by Mr Van Rooyen at about 15h00 who told them that they were being reinstated and **"instructed"** them to return their dismissal documents. The third and fourth respondents apparently stated that this was **"not funny"**. The appellant admits that a remark to this effect was made by the fourth respondent. On the third and fourth respondents' version they were **"on the verge of tears"** but were taken by Mr Van Rooyen into a certain room from which he telephoned the human resources manager, Mr Donald Peddie, and told the third respondent to speak to him herself.

[8] The appellant denies that the third and fourth respondents were in tears. It also states that the third and fourth respondents indicated that they wished to speak to Mr Peddie to confirm what the true position was. In my view nothing turns on whether it was Mr Van Rooyen or the two respondents who initiated the idea of speaking to Mr Peddie. As to the allegation that the two respondents were in tears, the matter must be dealt with on the basis of the appellant's version. The third respondent then spoke to Mr Peddie. She states that Mr Peddie told her that he did not have time to speak because he had to go to a meeting. She says that she, nevertheless, asked him what was happening as they had been dismissed but had now

been told to hand back the dismissal letters.

[9] According to the respondents Mr Peddie told the third respondent that the respondents' **"papers"** were being **"pulled back"** and they should hand them back. Mr Peddie recalls the third respondent speaking to him and that she asked what was going on. He states that he told the third respondent that their retrenchment was no longer being proceeded with and they should hand the documentation back. The third and fourth respondents then state that they remained adamant that they had been dismissed but that Mr Van Rooyen told them that they were now being instructed to hand the papers back or else they would **"face discipline".** The respondents' founding affidavit then reads: **"Third and fourth [respondents] handed documents back under protest"**. It does not say that, in handing the letters back, they told Mr Van Rooyen that they were doing so under protest.

[10] Mr Van Rooyen denies that he told the third and fourth respondents that they would **"face discipline"** if they did not return the documentation. His version is that the third and fourth respondents handed the documentation back voluntarily. Mr Van Rooyen further states that the third and fourth respondents did not inform him that they were handing the documents back under protest.

[11] In the replying affidavit the respondents only say that, even on the appellants' version, the respondents were instructed to hand the documentation back. They state that the

appellant approached the matter on the basis of an employer giving employees an instruction. They give a general bare denial of the rest of the allegations in the relevant paragraph of the appellants' answering affidavit. This aspect of the matter must be decided on the appellant's version, namely that the third and fourth respondents handed their documentation back voluntarily and that they did not state that they were doing so under protest. This must be the approach because, to the extent that there is any dispute of fact on this aspect, the version of the party which was the respondent in the Court below must prevail. That party is the appellant.

The events of the 2nd May 2000

[12] The first working day after the 28th April 2000 was Tuesday the 2nd May 2000. On that day the first respondent received a message from a neighbour to contact the appellant. She did so and spoke to the switchboard operator who told her that she needed to come to work or else she would **"lose money".** Mr Van Rooyen had instructed the switchboard operator to contact the first respondent and ask her to contact work. According to Mr Van Rooyen he did not want the first respondent to be staying at home when she could be working and earning money since the appellant was no longer pursuing her retrenchment.

[13] The first respondent went to work and was told to go and

see Mr Van Rooyen. Her version and that of the appellant about the content of the discussion that took place between herself and Mr Van Rooyen are substantially similar. She enquired what the position was. Mr Van Rooyen told her that her dismissal was not being proceeded with, that she was still employed by the appellant and that she should return the dismissal documentation. According to the appellant, the first respondent told Mr Van Rooyen that she intended to **"dispute the situation"**. This must obviously include instituting legal proceedings about the situation. She maintained that she had been dismissed and had, as a result, become entitled to certain benefits. The first respondent refused to hand back the dismissal documentation and has never returned it. Mr Van Rooyen stated that she was not entitled to any benefits because she remained in the appellant's employment. Mr Van Rooyen told her that she could do whatever she liked but had to return the documents. She refused to do so.

[14] Thereafter the first respondent telephoned Mr Peddie. She states that he was abrupt and could not explain to her how the appellant could treat the respondents the way it had. She states that he did, however, say to her that she should return the dismissal documents and that this was an instruction. She states that she refused to return the documents and said that she would not be returning to work but would be going home. Mr Peddie does not deny the first respondent's version in this regard. He recalls receiving the first respondent's telephone call. He states that he told her that her retrenchment was not being proceeded with and that, as she was in the appellant's continuous employment, she should return the letter of retrenchment. He recalls the first respondent mentioning that she would be going home. In the light of the fact that the appellant does not deny the first respondent's version of the

content of the conversation between herself and Mr Peddie, the matter must be decided on the basis that the first respondent's version is true. That version includes the allegation that Mr Peddie told the first respondent that the requirement that she hand back the retrenchment letter was an instruction.

[15] The first respondent then had a further verbal exchange with Mr Van Rooyen. Her version and that of the appellant on this aspect converge in all material respects. The first respondent continued with her attitude that she would not return the dismissal documents and maintained that she had been dismissed and that she believed that, as a result of the dismissal, she had become entitled to the payment of certain benefits and that she would go home.

[16] Mr Van Rooyen told her that, if she went home when she was required to be at work, she would be disciplined. The first respondent then states the following in par 34 of the founding affidavit:

> **"I really did not know what to do. Like the other [respondents] I am not in a position to have no income. I was also extremely concerned about the threat of discipline as it was clear to me that what was being conveyed was that I would be dismissed for misconduct and would not receive any severance pay".**

[17] A further interaction occurred involving the first respondent, Mr Van Rooyen and a shopsteward. The first respondent states that, faced with this difficult situation, she spoke to her shopstward who, after speaking to Mr Van Rooyen, advised her that she could reserve her rights and return to work. She then states that she returned to work under protest. The appellant does not deny any of these allegations. It admits

that Mr Van Rooyen told her that, if she left her work without permission, she would face disciplinary action. The appellant states that the first respondent told Mr Van Rooyen that she intended taking the matter further. The appellant states that the first respondent then returned to work and continued to work.

[18] On the respondents' version the second respondent attended at the appellants premises at about 09h45 on the 2nd May. She was called in by Mr Van Rooyen who told her that her retrenchment had been "pulled back" and she was going to continue working. The respondents' founding affidavit then states: **" [Second respondent] adopted the same position as we had."** As the position which the first respondent had adopted was not entirely the same as the position which the third and fourth respondents had adopted, one does not know precisely what the position is that the second respondent must be taken to have adopted when it is stated in the founding affidavit that she adopted the same position as the first, third and fourth respondents.

[19] The appellant's version with regard to the second respondent is that the second respondent together with her father attended at the appellant's premises on Tuesday the 2nd May 2000. Mr Van Rooyen informed both of them that the appellant was no longer proceeding with the retrenchment of the second respondent. Mr Van Rooyen said to them that the second respondent remained in the appellant's employment.

The appellant states that Mr Van Rooyen gained the impression that both the second respondent and her father were happy with the fact that her employment had not been terminated and that she continued in the appellant's employment. The appellant states that thereafter the second respondent resumed her duties and has remained in the appellant's employment since then.

[20] On or about 15 May 2000 there was a work-related braai. At this braai the respondents indicated to Mr Hart, who is chairman of the appellant, that they were unhappy about the appellant's purported withdrawal of their dismissal. Mr Hart apparently maintained that the dismissal had been withdrawn and the respondents continued to be in the appellant's employment. However, he also stated that, if the respondents wanted to leave the appellant's employ on their own, they could do so but, in that event, they would not be entitled to severance pay or any other benefits. The respondents also pointed out to Mr Hart that there was no work for them to do in the appellant's workplace and that all they were doing was sitting around and doing odd jobs like moving tables and chairs. The respondents believed that the appellant was treating them in this manner in order to drive them into resigning from its employment so that their departure would not entail any liability on the appellant's part in respect of any benefits. The appellant denies that the respondents have no work to do. It states that they are all gainfully employed by it and are performing duties which are consistent with and are required in the positions in which they are employed. It goes on to detail the duties which they perform. This part of the matter must be decided on the basis of the appellant's version.

Proceedings in the Labour Court

[21] The respondents were aggrieved by the appellant's conduct. Accordingly, they brought an application to the Labour

Court for an order declaring that their contracts of employment had been terminated by the appellant on the 28th April 2000 due to the redundancy of their positions and/or the reorganisation undertaken by the appellant and that they were entitled to payment of severance pay and costs in the event of opposition. The appellant opposed the application. The Labour Court found in favour of the respondents and granted the declaratory orders sought plus costs against the appellant. With the leave of the Court a quo, the appellant now appeals to this Court against that judgement and order.

The appeal

The Jurisdictional points

[22] It appears that in the Court a quo the Court raised the question whether or not it had jurisdiction in respect of this matter. The appellant had not in its answering affidavit taken the point that the Court a quo did not have jurisdiction in the matter. However, it appears from the judgement of the Court a quo that in response to the question raised by the Court a quo , it was argued on behalf of the appellant that the Court a quo lacked jurisdiction to deal with this matter on the basis that what the respondents wanted was severance pay and that, in the light of sec 41(6) of the Basic Conditions of Employment Act, 1997 (**"the BCEA"**) the Commission for Conciliation, Mediation and Arbitration (**"CCMA"**) had jurisdiction to arbitrate it and the Labour Court had no jurisdiction in respect

thereof. Sec 41(6) reads:-

> **"If there is a dispute only about the entitlement to severance pay in terms of this section the employee may refer the dispute in writing to -**
>
> **(a) a council if the parties to the dispute fall within the scope of that council or**
> **(b) the CCMA if no council has jurisdiction".**

[23] The Court a quo held that it had jurisdiction to deal with this matter. In support of this finding it relied on s41(10) and s77(3) of the BCEA. Sec 41(10) reads:-

> **"If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount."**

Sec 77(3) reads:

> **"(31) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."**

[24] The Court a quo rejected the appellant's reliance on sec 41(6) for the contention that it did not have jurisdiction in respect of the matter. It effectively held that sec 41(6) refers to a situation where the dispute is only about the entitlement to severance pay. It found that this matter was not only about entitlement to severance pay. It said that the dispute related to a dismissal based on the employer's operational requirements as well.

[25] On appeal it was argued on behalf of the appellant that the Court a quo had erred in finding that it had jurisdiction in regard to this matter. The one basis advanced in support of this contention was that there had been no referral to conciliation of any dispute about an alleged unfair dismissal. This argument is based on the provisions of s191(1) which are to the effect that, if there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute for conciliation to a council, if the parties to the dispute fall within the registered scope of the council, or, to the CCMA if there is no such council. I think the answer to this argument is that the dispute that sec 191(1) requires to be referred to conciliation is a dispute about the fairness of a dismissal. In this matter there is no dispute about the fairness of a dismissal. Accordingly the appellant's contention in this regard falls to be rejected.

[26] Another basis advanced in support of the contention that the Labour Court did not have jurisdiction was that the second declaratory order sought by the respondents concerned an entitlement to severance pay which dispute, so continued the argument, ought to have been referred to the CCMA for arbitration. The appellant did not specify any statutory provision in support of this contention. The only statutory provision that I can think of which it could seek to rely upon is that of sec 41(6) of the BCEA which has been quoted above. That section refers to a case where the dispute is only about **"the entitlement to severance pay in terms of this section..."**

[27] Unlike the Court a quo I am not certain that it can be said that the dispute between the parties in this matter is not a dispute only about the entitlement to severance pay. However, I do not consider it necessary to express a definitive view on this aspect of the matter. There is another basis on which the argument can be disposed of. In my view, if the appellant seeks to rely on sec 41(6) to contend that the Labour Court had no jurisdiction in respect of this matter, the appellant should satisfy the Court not only that this dispute is only about the entitlement to severance pay but also that the entitlement to severance pay is **"in terms of this section"** as prescribed in s41. I say this because the severance pay that sec 41(6) refers to is said to be one **"in terms of this section."** It seems to me that where the severance pay that is claimed is not in terms of s41 but is in terms of a contract or the Rules of a Pension Fund, it cannot be said that the claim is for the payment of severance pay **"in terms of"** sec 41.

[28] In this matter not only did the respondents not rely on sec 41 for their claim for severance pay but, in fact, they categorically stated in their founding affidavit that they sought severance pay and benefits in terms of the Rules of the Telkom Pension Fund which was the second respondent in the Court a quo. They even attached to the founding affidavit copies of certain pages of the Rules of the Pension Fund which they said contained provisions which applied to them as retrenches. Furthermore, in the appellant's own letter of the 8th June 2000

addressed to the respondents' attorney there is an indication that the appellant's understanding was also that the respondents were seeking to claim **"termination of service benefits"** from the Telkom Pension Fund. In the second paragraph of that letter the appellant wrote: **"We have also notified the Telkom Pension Fund administrators that only on official notification from ourselves of the termination of any of our employee's services should they conduct any termination of service benefits calculations and not on the request of any of our employees or their representatives."** Dealing with its understanding of the purpose of the respondents' application in the Court a quo the appellant had this to say in par 4.7 of its answering affidavit:-

> **"The purpose of the application appears to be an attempt by the [respondents] to obtain the payment of a severance pay from the [appellant] notwithstanding their continued on-going employment with the [appellant]. It is further apparent that the application is motivated by an attempt by the [respondents] to obtain certain payments from the Telekom Pension Fund of which they are members, which payments would arise if their services were terminated by the employer as defined in the rules of the Telkom Pension Fund 'as a result of the abolition of his post or a reorganisation of the employer's activities.'**

> **This may result in a liability by the [appellant] to the Telkom Pension Fund which it could ill afford at a time when it is attempting to transform the business it acquired into a viable entity."**
>
> In the light of all of this I am of the opinion that the appellant has failed to show that the respondents' claim falls within the ambit of sec 41(6) of the BCEA. In my view that section cannot apply when it cannot be said that the dispute is about the entitlement to severance pay in terms of that section and that it is only about severance pay.

[29] One of the sections on which the Court a quo relied in support of its finding that it had jurisdiction was s41(10) of the BCEA. Sec 41(10) provides that **"(i)f the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount."** It is noteworthy that s41(10) refers to a situation where the Labour Court is **"adjudicating a dispute about a dismissal"** and not to case where it is adjudicating a dispute **"about the fairness of a dismissal"** which is the phrase used in s191(1) of the Act. It appears to me that there is significance to be attached to the fact that in sec 41(10) the phrase used to describe the dispute is **"dispute about a dismissal"** and not the phrase **"dispute**

about the fairness of a dismissal” as used in sec 191(1) of the Act. The significance is the recognition that dismissal cases which the Labour Court may adjudicate are not confined to those where the dispute is about the fairness of a dismissal and that there are other dismissal cases which the Labour Court may adjudicate where the fairness of the dismissal is simply not in issue. Dismissal disputes that fall under the former category would be those contemplated in sec 191(5)(b)(ii) of the Act whereas dismissal cases that fall under the latter category would include those dismissals where the issue is whether the dismissal complies with the requirements for the termination of a contract of employment prescribed by s37 of the BCEA.

[30] With regard to the latter category of dismissal disputes, the Labour Court has exclusive jurisdiction in terms of s77(1). Sec 77(1) reads: **“Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 48, 49, 90 and 92.”** Within the context of a dispute about whether a particular dismissal complied with the notice requirements of s37 of the BCEA and, if the dismissal was due to a reason based on the employer’s operational requirements, there could also be a dispute about whether the employee is entitled to severance pay. In such a case one question that can arise is whether the Labour Court would have exclusive jurisdiction in terms of sec 77(1) to deal with such

dispute or whether it would have jurisdiction to deal with such a dispute in terms of its concurrent jurisdiction that it shares with the civil courts in terms of s77(3) in any matter concerning a contract of employment. If it would have the concurrent jurisdiction that it shares with the civil courts in terms of sec 77(3), the High Court would also have jurisdiction in respect of such dispute. However, if it had its jurisdiction by virtue of sec 77(1), its jurisdiction would be exclusive and the High Court would not have any jurisdiction in respect of such a dispute.

[31] It seems to me that the purpose of s41(10) is to ensure that, when the Labour Court is adjudicating a dispute concerning a dismissal for operational requirements, it also has jurisdiction to dispose of the issue of severance pay within the context of such dispute whatever the issues are in respect of such dismissal dispute. The mischief that sec 41(10) sought to prevent is a situation where the Labour Court would have jurisdiction to deal with a dismissal dispute which does not involve the fairness of a dismissal but have no jurisdiction to deal with the issue of severance pay connected with that dismissal. The intention was to ensure that, if a dispute relates to a dismissal for operational requirements and severance pay is an issue in the dispute, the Labour Court would have jurisdiction to deal with both the dismissal dispute as well as the issue of severance pay. Had it not been for a provision such as sec 41(10), the Labour Court might not have had jurisdiction to deal with the issue of severance pay in a dismissal dispute where the dispute is about, for example, the lawfulness or

validity of a dismissal for operational requirements which the Labour Court would have jurisdiction to deal with in terms of its civil jurisdiction conferred by s77(3) but not about the fairness of the dismissal.

[32] There is no requirement in the BCEA or the Act that, where the entitlement to severance pay is part of a dispute about a dismissal for operational requirements that is not alleged to be unfair, such dispute must be referred to conciliation first before the Labour Court can have jurisdiction to deal with it nor is there a requirement that such dispute must be referred to arbitration. The requirement for the referral to conciliation is provided for in the case of a dispute about the fairness of a dismissal (sec 191 of the Act) and where the dispute is only about an entitlement to severance pay (s41(6)-(8) of the BCEA. The only provision in the BCEA that requires a dispute relating to severance pay to be referred to arbitration is s41(6) but that provision requires that the dispute be only about entitlement to severance pay in terms of section 41. That is not the case here.

[33] I have already indicated above that the Court a quo also relied on sec 77(3) to conclude that it did have jurisdiction. It is not necessary to quote sec 77(3) as it has already been quoted above. On appeal the appellant sought to get around sec 77(3) by contending that this matter was not one concerning a contract of employment whereas sec 77(3) related to a matter **“concerning a contract of employment”**. On behalf of the appellant it was contended that this matter was one concerning whether a dismissal had occurred. The distinction that the appellant sought to make between a matter that concerns a dismissal and one that concerns a contract of employment does not assist it in any way. A dismissal dispute is a matter concerning a contract of employment but a matter concerning

a contract of employment is not a dismissal dispute.

[34] In conclusion I am satisfied that, upon a proper consideration of the provisions of the BCEA, the Labour Court did have jurisdiction to deal with this matter either under sec 41(10) or sec 77(1) or (77(3)) of the BCEA. Accordingly the appellant's contention that the Labour Court did not have jurisdiction must fail.

The merits

[35] The next question for determination is whether the respondents were dismissed. If they were dismissed, there is no doubt that they were dismissed for operational requirements as contemplated by the provisions of s 41(2) of the BCEA. Whether or not the respondents were dismissed depends on whether or not the interaction between the appellant and the respondents after the issuing of letters of dismissal by the appellant had the effect of preventing the dismissal from taking effect. As the second respondent was not issued with a dismissal letter, the question of whether or not she was dismissed depends on the effect of the interaction which took place between herself and the appellant after the appellant's decision to dismiss her had been conveyed to her. For convenience I shall deal first with the case of the third and the fourth respondents thereafter with that of the second respondent and, finally, with that of the first respondent.

The third and fourth respondents

[36] After the third and fourth respondents had been given letters of dismissal but before they could leave the appellant's premises, the appellant decided to withdraw their dismissal and

that of the other respondents and to continue to employ them. The appellant conveyed this decision to the third and fourth respondents at about 15h00 on the 28th April. In terms of their dismissal letters the third and fourth respondents' dismissal was going to take effect on the 30th April 2000. At the stage that the third and fourth respondents were told by the appellant that it was withdrawing its decision to dismiss them, they could have taken the attitude that they had been dismissed and were not prepared to continue in the appellant's employment and refuse to do so. If they did not take that attitude, they could accept the appellant's withdrawal of its decision to dismiss them and agree to continue in the appellant's employment. Furthermore, they could return to work under protest or with a reservation of their rights in respect of the appellant earlier decision to dismiss them. In the latter case they would have had to inform the appellant of the basis on which they were seeking to return to its employment because, if they did not do so, the appellant would have been justified in thinking that they had accepted its decision to withdraw the dismissal. This could lead to the appellant acting on this basis to its prejudice.

[37] The third and fourth respondents' version is that they went back to work under protest. This is disputed by the appellant. As already stated above, they do not say that they informed the appellant that they were returning to the appellant's employment under protest. What was required of the third and fourth respondents if they wanted to reserve their

rights was an unequivocal protest. An unarticulated mental reservation is not effective. (see **Hendricks v Barnett 1975(1) SA 265(N) at 769 G-H** and the cases referred to therein.) The matter must be decided on the basis that the third and fourth respondents did not reserve their rights and that they did not act under protest. In those circumstances I am of the opinion that, although it is correct that an employer is not entitled withdraw a dismissal unilaterally once the decision has been conveyed to the employee, (see the as yet unreported decision of this Court in **University of the North v Franks & others**, case no JA11/01 handed down on 29 May 2002), he can do so with the consent or acquiescence of the employee. Consent may be given either expressly or by implication.

[38] This matter must be determined on the basis of the appellant's version where there is a dispute of fact. That version is that the third and fourth respondents agreed to the withdrawal of the dismissal and that their continuation in the appellant's employment was voluntary, without any reservation of rights and was not under protest. In these circumstances the legal position is that, with their consent or acquiescence, the third and fourth respondents' dismissal was withdrawn before the 30th April which is when the dismissal was going to take effect. Accordingly, no dismissal took legal effect in respect of the third and fourth respondents. As their dismissal was withdrawn before it could take effect, the third and fourth respondents were not dismissed. As they were not dismissed,

they are not entitled to severance pay or any benefits for which dismissal is a condition. Dismissal is certainly a condition precedent to entitlement to severance pay in terms of sec 41 of the BCEA. They were, therefore, not entitled to any declaratory order in the Court a quo and their application should have been dismissed.

The second respondent

[39] As already stated above, the second respondent was not at work on the 28th April. She was not given any letter of dismissal. However, the appellant telephoned and left a message with the second respondent's father to inform the second respondent that she had been retrenched and should come and collect her documentation. Her father conveyed this information to the second respondent. The appellant did not inform the second respondent prior to the 30th April that it was withdrawing the dismissal. In those circumstances the dismissal took effect in law on the 30th April.

[40] On the 2nd May the second respondent and her father proceeded to the appellant's premises. They met with Mr Van Rooyen. If there is a dispute of fact between the second respondent's version and that of the appellant about what occurred on that occasion, it is once again on the appellant's version that the matter must be decided. On the appellant's version Mr Van Rooyen informed the second respondent and

her father that the appellant was no longer proceeding with the second respondent's retrenchment. He told them that the second respondent remained in the appellant's employment; that the second respondent accepted what was conveyed to her, went back to work and has continued in the appellant's employment ever since.

[41] It seems to me that the most plausible conclusion to be drawn from the interaction that took place between Mr Van Rooyen and the second respondent on the 2nd May is that they intended to, and, in fact did, revive the contract of employment that had existed between the appellant and the second respondent prior to the 30th April and had ended on that date. In those circumstances, although the second respondent had been dismissed with effect from the 30th April 2000, the dismissal only lasted upto the 2nd May. The second respondent can, therefore, not be entitled to severance pay that is based on sec 41 of the BCEA because in law that dismissal no longer stands.

The first respondent

[42] I now come to the case of the first respondent. As already stated above, on the 28th April 2000 the first respondent left the appellant's premises soon after she had been given her letter of retrenchment. The appellant did not before the 30th April contact her and tell her about its decision to withdraw her

dismissal. The 30th April was the date on which, according to the appellant, the dismissal would take effect. She returned to the appellant's premises on the 2nd May. By then the dismissal had taken effect in law.

[43] The first respondent's case is distinguishable from the case of the rest of the respondents in the sense that for all intents and purposes the appellant does not deny the first respondent's version. She alleges that she was not prepared to agree to the withdrawal of her dismissal. She says that the appellant told her that she would be disciplined if she was not at work when she was expected to be at work. The appellant has admitted that this was said to her. She has alleged that she told the appellant that she would declare a dispute and the appellant has admitted this. She has said that she initially took the attitude that she would go home and not resume work but she got advice from a shopsteward that she could agree to return to the appellants employment but do so under protest and reserve her rights. She alleges that her return to work was under protest. The appellant has not placed her version in this regard in dispute.

[44] She said that she would take the matter further and the appellant did not voice any objection to her going back to its employment on this basis and she did take the matter further to obtain clarity. In this regard it may be appropriate to mention that, when the first respondent stated that she was returning to the appellant's employment under protest and with a reservation of her rights, the appellant had a right to reject these conditions and insist that she return to work without any reservation of rights. It could have done this if it felt that it could not afford the uncertainty that this would create in the employment relationship. But, if it did not feel that this prejudiced it in any way, it could allow her to continue in its

employment on the basis of such reservation of rights. The appellant raised no objection to this and actually allowed her to continue in its employment on that basis.

[45] In the light of the above I conclude that the first respondent was dismissed with effect from the 30th April and that the reason for her dismissal was the one given by the appellant in her letter of retrenchment, namely, redundancy. Her return to the appellant's employment did not affect any of her rights as she returned to work under protest. She clearly wanted to protect her interests pending whatever she intended to do including the institution of these proceedings. She did not want to fall between two stools. She would have fallen between two stools if she had not returned to work and was dismissed for misconduct because, then, she would not have been entitled to severance pay and she would not have kept her job.

[46] That the first respondent was dismissed and her dismissal did take effect in law does not necessarily mean that she is entitled to any severance pay that is provided for in terms of sec 41 of the BCEA. This is so because the appellant has offered to withdraw her dismissal and reinstate her. The first respondent has reserved her rights pending the exhaustion the litigation process. Once that process has been completed, she will have to make up her mind about that offer within a reasonable time. She will not be entitled to severance pay if she rejects the offer of reinstatement or if she unreasonably refuses an alternative employment by the appellant (sec 41(4)

of the BCEA). This is certainly the case in so far as the severance pay that the first respondent may seek is based on sec 41 of the BCEA. In so far as she may seek other benefits based on, for example, contract or other arrangements and not on sec 41, obviously whether or not she is entitled to such benefits will depend on whether she satisfies the requirements that she must satisfy in terms thereof before she can be entitled to the benefits. This is so because an employer and employee are entitled to enter into different arrangements provided that such arrangements are not left favourable to the employee than those provided for in the BCEA. In the result I am of the view that the first respondent is entitled to a declaratory order to the effect that she was dismissed with effect from the 30th April 2000 due to redundancy so that she knows where she stands. She, however, not entitled to a declaratory order to the effect that she is entitled to severance pay in terms of sec 41 of the BCEA.

Costs

[47] The Act requires that any order of costs that this Court makes must be one that meets the requirements of law and fairness. What order of costs would meet the requirements of law and fairness in this matter? It seems to me that the appellant is entitled to its costs as against the unsuccessful respondents and the first respondent is entitled to her costs as against the appellant.

Order

[48] In the result I make the following order:.

1. (a) The appellant's appeal against the order made by the Court a quo that the first respondent was dismissed with effect from the 30th April 2000 by the appellant is dismissed.

(b) The appellant's appeal against the order made by the Court a quo that the first respondent is entitled to severance pay is upheld.

(c) The appellant is ordered to pay the first respondent's costs on appeal.

2. (a) The appellant's appeal against the declaratory orders made by the Court a quo that the second, third and fourth respondents were dismissed by the appellant with effect from the 30th April 2000 and are entitled to severance pay is upheld.

(b) The second, third and fourth respondents are ordered to pay the appellant's costs on appeal jointly and severally, the one paying the others to be absolved.

3. The order of the Court a quo is set aside and replaced by the following order:

"(a) (i) The first applicant's application for a declaratory order that she

was dismissed by the first respondent with effect from the 30th April 2000 succeeds in part and is dismissed in part.

(ii) The first applicant's application for a declaratory order that she is entitled to severance pay is dismissed.

(iii) It is hereby declared that the first applicant was dismissed by the first respondent with effect from the 30th April 2000 due to the redundancy of her post.

(iv) The first respondent is ordered to pay the first applicant's costs.

(b) (i) The second, third and fourth applicants' application for declaratory orders that they were dismissed by the first respondent with effect from the 30th April 2000 and that they are entitled to severance pay is dismissed.

(ii) The second, third and fourth applicants are ordered to pay the first respondent's costs jointly and severally, the one paying the others to be absolved."

ZONDO JP

I agree.

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WILLIS JA

I agree.

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VAN REENEN AJA

Appearances

For the Appellant	Mr Carr
Instructed by	Bowman Gilfillan
For the Respondent	Mr R Lagardie
Instructed by	Murphy Wallace Slabbert
Date of Judgement:	8 August 2002