IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No. **JR 1614/2002**

In the matter between

TECHNIKON SOUTH AFRICA
Applicant

and

MOJELA, SAMEUL P First Respondent

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent

MR RALEFATANE Third Respondent

JUDGEMENT

GAMBLE, AJ:

1. The first respondent was employed by the applicant on a fixed term contract which was to terminate automatically on 30 March 2002. The first

respondent was to render research services to the applicant in terms of that contract. In addition, he was to assist with the marking of exam scripts in terms of certain other separate contracts concluded with the applicant.

2. On 28 November 2001 the professor under whom the first respondent worked held a cocktail party at which she unexpectedly announced the imminent departure of the first respondent. Of course, this was some 4 months premature.

3. The third respondent rightfully regarded this a s a dismissal and lodged a complaint with the second respondent ("the CCMA") on 20 December 2001. In the prescribed Form 7.11, which accompanied the complaint, the first respondent claimed '*reinstatement and compensation*'.

4. The applicant investigated the circumstances surrounding the first respondent's departure and on 10 December 2001 it informed him in writing that it was looking into the matter.

5. During January 2002 the applicant was of the view that the first respondent's termination of employment "may have been unfair" (it did not say whether this was either substantively or procedurally or both) and on 28 January 2002 it informed the first respondent both verbally and in

writing that he had been reinstated and that he was to recommence duties the following day.

6. The first respondent did not return to work on 29n January 2002 but, rather, he attended a conciliation meeting convened by the CCMA. This meeting was held pursuant to the referral of the unfair dismissal dispute as set out in paragraph 3 above.

7. It is not clear whether the first respondent informed the CCMA conciliator of his reinstatement the previous day. On the probabilities it seems he did not. In any event, the conciliator issued a certificate of outcome on that day reflecting that the matter remained unresolved.

8. Thereafter the first respondent refused to return to the applicant's employ. He did, however, receive payment of his outstanding remuneration up to 28 January 2002.

9. On 30 January 2002 the first respondent then referred the dispute to arbitration. The relief, which he sought in the referral form, was *"compensation until end of contract".*

10. An arbitration was duly convened before the third respondent ("the

arbitrator") on 19 August 2002. After hearing the evidence of various witnesses the arbitrator issued an award on the same day in which he found that the first respondent's dismissal was both procedurally and substantively unfair. He awarded the first respondent 12 months compensation at the rate of R3400 per month.

11. The applicant now seeks to review the arbitration award on a variety of grounds. The application was duly served on each of the respondents, none of whom has elected to oppose.

12. Mr. Olivier, who appeared for the applicant, contended that the arbitrator's reasons in the award were not justifiable in relation to the evidential material before him at the arbitration and that he failed to properly consider the evidence led at that hearing.

13. I agree with Mr. Olivier that the arbitrator's reasoning is seriously flawed, both in relation to the evidence and the legal conclusions drawn therefrom.

14. In a brief discourse on the law of contract the arbitrator found that the applicant's offer to reinstate the first respondent constituted a "new offer of employment" by the applicant, which the first respondent was entitled to refuse or to accept. The following passage (using the *ipsissima verba* of the

arbitrator and the citation of the parties as they were before him) illustrates the arbitrator's lack of understanding of the basic tenets of employment law:

> *" An offer without acceptance is not contract. In casu, employment relationship was terminated by respondent. Same respondent made an offer of employment to the applicant who decide to reject such offer because he was already dismissed. He has a choice of accepting or repudiating the offer. For respondent to withdraw dismissal, does not invalidate the applicant's dispute. It would be incorrect to say that a party is entitle to terminate and re-enforce contract as it please".*

15. I do not believe that much need be said about this proposition of law other than to observe that it precludes an employer from ever correcting its ways and affording a dismissed employee the primary remedy under the Labour Relations Act ("the LRA").

16. A further error in the award relates to the arbitrator's finding that the applicant's offer of reinstatement should have been unconditional. While the applicant's written communication to the first respondent of his reinstatement clearly implies that he is to be reinstated (and not re-

employed) with full benefits, the arbitrator found that the evidence before him demonstrated that *"the respondent stated that reinstatement was with a condition of back pay. If he did not accept the offer he was not supposed to accept the back pay."* In the circumstances the arbitrator was of the view that the reinstatement was conditional.

17. Finally, the arbitrator's reasoning in relation to the compensation payable to the applicant is seriously flawed.

17.1. In the first place, he found that, but for his dismissal, the applicant would have been remunerated for a further four months and that this constituted his actual patrimonial loss. However, the arbitrator did not take into account the "back pay" received by the first respondent upon his reinstatement.

17.2. Having found that the first respondent's actual loss of income was the equivalent of four months' remuneration, the arbitrator then went on to consider compensation payable in respect of his finding that the dismissal was procedurally unfair. The arbitrator found in this regard that twelve months' remuneration was fair even though only nine months had passed since dismissal.

17.3. It does not appear that the arbitrator considered the amendments to the provisions of section 194(1) of the LRA, which had come into force on 1 August 2002 at all in making his award. This section afforded him a complete discretion in relation to compensation, limited only to a maximum of twelve months' remuneration. Fouldien & Others v House of Trucks [2002] 12 BLLR 1176 (LC).

17.4. In fact the arbitrator gave no reasons at all for awarding the maximum amount of compensation, whether under the old or new section 194(1). His conclusions are as follows:

"It should not make a difference as to whether or not contract have been renewed. The issue is that at the time of termination there still existed an employment relationship between the parties, which should have been respected. Failure to adhere to Schedule 8 of the LRA renders the procedure irregular. It is fair that the applicant be awarded compensation based on procedural defect."

17.5. Finally in calculating the compensation payable to the first respondent, the arbitrator has not properly considered the evidence before him. Under the heading "Back ground Details" in his award, the arbitrator found that the first respondent earned ±R3200 – R3800 per month. The evidence of the first respondent however, was that he earned between R2800 and R3600 per month. He went on to explain that

his salary varied because he was only paid for the number of days which he actually worked in any given month.

18. In the light of the aforegoing, I am satisfied that the arbitration award falls to be reviewed in accordance with the principles determined by the Labour Appeal Court in cases such as Carephone (Pty) Ltd v Marcus N.O. & Others (1998) BLLR 1093 (LAC) and Shoprite Checkers (Pty) Ltd v Ramdan N.O. (2001) 22 ILJ 1603 (LAC).

19. On the evidence before me it seems as if there may have been room for an argument that the arbitration should not have been conducted because the matter had effectively been settled by the applicant's offer to reinstate the first respondent. However, Mr. Olivier argued (correctly in my view), that the point had not been properly taken in the CCMA proceedings and that it would not be appropriate to approach the matter on that basis.

20. Mr. Olivier then argued that this court should approach the case along the lines of the decisions of the Labour Appeal Court in Johnson & Johnson (Pty) Ltd v CWIU (1998) 12 BLLR 1209 (LAC) and Mkonto v Ford & Others (2000) 7 BLLR 786 (LAC). Accordingly, it was contended that where the employee refused to take up a reasonable offer of reinstatement the employer should not be saddled with an obligation to

pay compensation.

21. There was scant evidence before the arbitrator about the reasons for the first respondent's refusal to resume employment when the offer of reinstatement was made. The high-water mark in his evidence under cross-examination was the following:

> " *and why did you not report to us after you have received it? …No because I was afraid to call you. Why? … Because I feel that my matter is now in the hands of the CCMA, I give you chance to solve the matter, but you failed to solve the matter."*

The first respondent also stated, in rather vague terms, that he no longer trusted the applicant and that he was afraid that the applicant was going to "*treat [him] very bad".*

22. In my considered view, the first respondent has not proffered a satisfactory explanation as to why he did not take up the offer of reinstatement. I am left with the distinct impression that he was more interested in a financial settlement than reinstatement – that much appears from the relief sought at arbitration (see paragraph 9 above).

23. The employer in the present case appreciated the error which its staff member had made in dismissing the employee for no apparent reasons and without any hearing. It endeavoured to remedy that wrong by offering the first respondent the primary remedy under the LRA: unconditional

reinstatement.

24. The approach to be adopted in this, matter was well summed up by Conradie JA in Mkhonto's case, supra, at page 772 and 11:

"I propose exercising the discretion conferred by section 194(1) of the Act myself. It is in the interest of fairness that this trifling dispute, which has already gone far further than it should have, should not be allowed to go further still. The appellant's refusal to accept the reinstatement offer was grossly unreasonable. There are doubtlessly cases where the circumstances of an unfair dismissal are so degrading that it would not be fair to expect an employee to accept an offer of reinstatement. This is not such a case. The appellant did not indicate that her remaining in the third respondent's employ for two months after having been told of her dismissal caused her any anguish".

25. In the circumstances I make the following order:

1. The arbitration award handed down by the third respondent in his capacity as Commissioner under the auspices of the second respondent, under case number GA 29288/02 dated 19 August 2002 is hereby reviewed and set aside and substituted by the following " The

first respondent is not entitled to any compensation arising out of his dismissal by the applicant on 28 November 2001".

2. There is no order as to costs.

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P.A.L. Gamble

(Acting Judge of the Labour Court)

Date of hearing: 11 July 2003

Date of Judgment: July 2003
For the Applicant: Mr. J. Olivier of Brink Cohen Le Roux & Roodt Inc.
For the Respondent: No appearances