IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO:C 24/2000

In the matter between:

SOUTH AFRICAN TYPOGRAPHICAL UNION
(obo JG VAN AS & 6 OTHERS) **APPLICANT**

and

KOHLER FLEXIBLE PACKAGING (CAPE)
a division of KOHLER PACKAGING LIMITED **RESPONDENT**

JUDGMENT

WAGLAY J

[1] The Applicant, a trade union, has brought this application on behalf of 6 of its members who were dismissed by the Respondent on the basis of Respondent' s operational requirements. The Application relates to the alleged failure by the Respondent to pay each of the aforesaid members of the Applicant notice pay in accordance with s 37(1)(c) of the Basic Conditions of Employment Act 1997 (BCEA) and also the alleged failure by the Respondent to properly calculate the severance pay which was payable to 5 of Applicant's aforesaid members.

[2] There is no dispute about the fairness of the dismissal.

[3] Although evidence was led by a number of witnesses for both parties most of the relevant

evidence is common cause, where it is not I shall deal with it where necessary.

[4] The first issue that I need to determine is what is the notice period that Respondent was obliged to give to the 6 members of the Applicant who were dismissed.

[5] The notice of termination of employment that an employer or an employee must give to the other is dealt with in s37 of the BCEA. This section provides

"37(1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than –

a) one week, if the employee has been employed for four weeks or less;

b) two weeks, if the employee has been employed for more than four weeks but not more than one year;

c) four weeks, if the employee –

i) has been employed for one year or more; or

ii) is a farm worker or domestic worker who has been employed for more than four weeks.

2) A collective agreement may permit a notice period shorter than required by subsection (1).

3) No agreement may require or permit an employee to give a period of notice longer than that required by the employer."

(Other subsections are not relevant for the present matter.)

[6] In terms of s 37(1) (c) where an employee is employed by the same employer for a period in excess of one year, such as the Applicant's members herein, the notice that either of them must

give the other is a notice of not less than 4 weeks to terminate the employment relationship. This period of notice is however not peremptory as ss(2) permits an employer and employee representative(s) to agree upon, by way of a collective agreement, to a notice period shorter than the period set out in ss(1). Further the effect of ss(3) is that while an agreement between an employer and employee may permit an employee to give shorter notice to the employer to terminate his services, an employer does not have a similar right.

[7] Applying this section to the dispute – firstly it is common cause that at the time of the dismissal of Applicant's members, -there were two collective agreements concluded between the parties. The first of which is headed "RETRENCHMENT PROCEDURE" which was concluded some 10 years ago and the other headed " SUBSTANTIVE AGREEMENT" which was concluded three months prior to the dismissal of the aforesaid members of the Applicant.

[8] The collective agreement referred to as the "RETRENCHMENT PROCEDURE" provides in clause 3(c) that:

"the company will give the employee one week's notice of termination or cash in lieu thereof"

i.e. where an employee is to be retrenched he or she will only be entitled to one week's notice. The collective agreement referred to as the SUBSTANTIVE AGREEMENT records in clause 3 that:

"the notice period will be one(1) week for all weekly paid employees ".

the same agreement also provides in clause 6 that:

"all other conditions of employment not specified herein will remain as present."

[9] Based on the above agreements Respondent argued that it was entitled to give the Applicant's members herein only one week's notice of termination and in doing so it was not in breach of s37

(1)(c) as one week's notice was permissible in terms of s37 (2) of the Act.

[10] Applicant on the other hand argued that the agreement referred to as the RETRENCHMENT PROCEDURE was agreed to at the time when one week's notice was all the employer was obliged to give its weekly paid employees and should therefore be viewed in its historical context. If I understand its argument, the fact that Applicant agreed to the minimum that was permissible at the time of concluding the "RETRENCHMENT PROCEDURE" agreement I should substitute the four weeks for the one week as, four weeks is what is provided for in the new BCEA. This argument I cannot accept. This Court cannot simply impose terms in an agreement that is not agreed to by the parties. The fact that an agreement may have been concluded between the parties having regard to the prevailing circumstances at the time, the fact that the circumstances may have changed does not give this Court the right to substitute terms that take into account the present prevailing circumstances. The duty is upon the parties themselves to ensure that where an agreement no longer meets the present needs, desires or requirements that they enter into negotiations in respect thereto.

[11] Applicant' s further argument appears to be that I should disregard the said agreement and I should do this on the basis that it is no longer current and in any event the Respondent has by its actions failed to have any regard to the said agreement. Firstly I see no basis upon which I can find that the RETRENCHMENT PROCEDURE Agreement is no longer current. It exists and the Respondent regards it as binding. A party cannot unilaterally decide to withdraw an agreement properly concluded. I am not in the circumstances prepared to simply disregard the said agreement. The fact that Respondent may not have complied in terms thereof in specific instances also does not , in my view, mean that the agreement has lapsed. So long as the agreement exists and the parties have not agreed to cancel such agreement, I believe that the

agreement continues to remain in force – while I accept that there may be circumstances which evinces that an agreement is no longer binding upon the parties this clearly is not so in the present matter particularly if one has regard to the substantive agreements that were concluded between the parties in September 1998 i.e. some three months before the dismissal of the Applicant's members referred to herein or the later agreement concluded in September 1999 both of which specifically provide that those conditions of employment agreed to by the parties and not dealt with in the substantive agreement remain in force.

[12] Respondent also argued that notwithstanding the notice period stipulated in the 'RETRENCHMENT PROCEDURE" agreement in the SUBSTANTIVE AGREEMENT concluded between it and the Applicant, 3 months prior to the dismissal, it was agreed that the notice period shall be one week. In this regard the evidence on behalf of the Respondent was that it brought to the attention of the Applicant that the BCEA which was still to come into force at the time required that the notice period should be 4 weeks. Notwithstanding such advice Applicant insisted that the notice period should be one week and it agreed thereto. The evidence tendered on behalf of the Applicant was that the notice period referred to in the SUBSTANTIVE AGREEMENT only related to notice that an employee was obliged to give to an employer and not what the employer was to give the employees. If I accept Applicant's version then the notice period referred to in the "RETRENCHMENT PROCEDURE" Agreement would fall away and the Respondent bound to give notice in terms of s37 (1)(c) of the Act. This would be so because the substantive agreement provided that only the conditions which were not dealt with in the substantive agreement would continue to remain in force. Notice period then being amended in the substantive agreement meant that the new arrangement would be in force between the parties. The Respondent however disputes the Applicants version denying that there was any discussion that the notice period was applicable in favour of the employees only and persists that the document properly records the

agreement arrived at between the parties.

[13] Where parties have decided to reduce their agreement to writing the rules of interpretation that apply to the interpretation of that agreement is firstly that the written document must be accepted as the sole evidence of the terms of the agreement. In **Johnson v Leal 1980 (3) SA 927 (A)** the Court held at 943B:

"It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial form seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract…"

[14] Applying the aforestated principle to the present matter I do not believe that I am entitled to accept evidence that would alter the recorded terms contained in the agreement particularly since the contractual provisions disputed is plain and unambiguous. "The notice period will be one week for all weekly paid employees" admits of only one interpretation: that the contracts of weekly paid employees are terminable on one weeks notice. The language does not admit of an interpretation limiting it to notice given by employees, but excluding notice given by the employer. There is in the circumstances no textual basis for holding that this notice period applied only to employees giving notice.

[15] Applicants argument that it would make no sense for it to prejudice its members' rights by agreeing to a shorter notice period is without merit because by the same token it is also unlikely that an employer would agree to a lopsided approach whereby an employee can leave on one week's notice but it must give 4 weeks notice.

[16] If, as Applicant claims, the notice period was not intended to be reciprocal why did it not then insist on having this spelt out in the agreement? Furthermore despite the Applicant being aware that the Respondent did not "share its understanding " of the intention of the notice period clause in the 1998 substantive agreement it made no attempts to rectify this "misunderstanding" in the substantive agreement it concluded with the Respondents in 1999 if anything the 1999 agreement reinforces the notice period as recorded in the 1998 agreement.

[17] In the circumstances and in respect of the notice period claim by the Applicant I am satisfied that the notice given by the Respondent to the members of the Applicant before this Court was in compliance with the BCEA and Applicant claim in respect thereof is dismissed.

[18] With regard to the calculation of the severance pay Applicant, referring to the definition of remuneration as provided in the BCEA, argued that shift allowance that is payable to an employee forms part of the remuneration and must in the circumstances be included in the severance pay that is payable to an employee, employed on shifts, as part of his/her weekly remuneration.

[19] The BCEA defines remuneration as follows:

"remuneration means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the state and "remunerate" has a corresponding meaning."

In terms of this definition any monies paid to an employee including a gratuity forms part of the employee's remuneration. If severance pay is to be calculated on the basis of this definition the members of the Applicant who were paid shift allowances can rightly claim for the severance pay to be calculated by including the amount they received as a shift allowance.

[20] The above definition of remuneration is not however decisive in determining how severance pay is to be calculated. s 35 of the BCEA specifically provides how remuneration and wages are to be calculated for purposes of severance pay. For purpose of the present dispute the relevant subsection – s 35(5) – provides as follows:

"(5) For the purpose of calculating an employees annual leave in terms of section 21, notice pay in terms of section 38 or severance in terms of section 41, an employee's remuneration-

(a) includes the cash value of any payment in kind that forms part of the employee's remuneration unless the employee receives that payment in kind; but

(b) excludes

(i) gratuities

(ii) allowances paid to an employee for purposes of enabling an employee to work; and

(iii) any discretionary payment not related to an employee's hours of work or work performance."

[21] The exclusions referred to in s 35 (5)(b) although part of remuneration in terms of the definition of remuneration as provided for in the Act is specifically excluded for purposes of calculating severance pay. The exclusion listed above does not include shift allowance as shift allowance does not constitute a gratuity nor a discretionary payment unrelated to the employees terms of work or work performances neither is it an allowance paid to an employee for purposes of enabling an employee to work. I say this because a shift allowance which is often regarded as an inconvenience allowance is in fact a premium that an employer pays an employee for the discomfort of working irregular hours. I believe such pay can be viewed as a premium because in essence it is no different to a premium that a employee would pay to obtain the services of an auditor as opposed to a bookkeeper or add to the salary of a director who might be entrusted with a more stressful aspect of the enterprise. The fact that ordinarily monthly paid staff are not as a

matter of practice given an allowance while working shift which is labelled as a shift allowance does not mean that in calculating their salary no consideration is given to the inconvenience such an employee will have to suffer as opposed to a person performing similar task during ordinary working hours. In the circumstances shift allowance is nothing other than part of an employees remuneration and therefore does not and cannot fall within the exclusions referred in s 35(5) (b) of the Act.

[22] Having determined that in calculating the severance pay the employer is obliged to include the shift allowance due, Applicant's case is that since there was agreement between the parties that severance pay of 2 weeks for every completed year of service will be paid the Respondent be ordered to pay to 5 of its members listed in the application the shift allowance component of their remuneration.

[23] Respondents opposition to Applicants claim is based on the premise that I am not entitled to grant the order sought by the Applicants because Applicant has based its claim in terms of s41(2) of the Act and since this section only provides for severance pay equal to one weeks remuneration for every completed year of service, the fact that the members of the Applicant on behalf of whom Applicant is before the Court have received in excess of the amount provided for in the section they are not entitled to any relief.

[24] Respondents argument is that only where the parties have agreed on the statutory minimum severance pay or where there has been no agreement an employer is obliged to pay its retrenched employees remuneration as provided for in s41(2). In the present matter since the Respondent has paid in excess of the statutory minimum how Respondent arrived at the amount of severance pay is irrelevant and cannot found a basis for a claim in terms of the Act.

[25] Insofar as Respondent states that Applicant has based its claim in terms of s 41(2) and Applicants members who are before this Court received in excess of the statutory minimum Respondent is correct.

[26] Referring to s 41(2) which provides

"An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with s 35."

Respondent contends that this section does nothing more than establish a "floor" ; a statutory minimum severance benefit. It does not purport to regulate anything more. With the use of the words " at least one week's remuneration" seen in the context of the remainder of the paragraph the legislature achieves the purpose of setting a basic minimum severance payable whilst not detracting from the freedom parties may have to pay and receive more than one weeks remuneration per every completed year of service. Whilst I do not disagree with Respondents contention it is its further submission based on the above contention that is problematic. According to Respondent to entertain Applicants claim is to entertain a claim for increased severance pay. This is not so. What Applicant seeks is that since 2 weeks severance pay had been agreed upon, the severance pay which Respondent was obliged to pay the Applicants members was the amount calculated in terms of the Act.

[27] In light of the above Applicant seeking the relief as it does cannot be said to be inappropriate. By basing its claim in terms of s 41(2) of the BCEA it does not seek for payment as provided for by the section but seeks that the calculation provision contained therein be interpreted and be given effect to.

[28] Respondents argument is however that there had been no agreement between the Applicant and Respondent with regard to the severance pay that would be payable. The evidence of Wessels on behalf of the Respondent was that Respondent was bound to its policy of paying 2 weeks severance for every completed year of service. Respondents evidence was also that such severance pay in practice did not include shift allowance being added to the calculation but was limited to the basic wage. Wessels evidence was further that this practice stemmed from the belief that shift allowance was an inconvenience allowance and was therefore not required to be added to the weekly wage when calculating the severance pay. While this may have been the practice it is evident that the practice related to an era preceding the BCEA. Whether or not such practice was to continue to apply I do not know. The evidence tendered by De Wet for the Respondent, who chaired the final consultation meeting relating to the retrenchment, was that there was a difference of opinion between the Applicant and the Respondent on whether or not shift allowance should be included in calculating the severance pay and it was left at that with the Respondent being of the opinion that shift allowance was not required to be included in terms of the BCEA while Applicant being of the opinion that it did.

[29] However although there is no evidence that Respondent was not prepared to pay in excess of the 2 weeks wages excluding shift allowance it does not mean that the Court can on that basis decide that the amount payable by the Respondent is the amount calculable in terms of s35(5). To do this the Applicant must satisfy this Court as Respondent properly argues that there was in fact an agreement between the parties to calculate the 2 weeks severance pay according to the said section. There is no evidence before me that in fact there was an agreement to this effect. Although De Wet states that there was a difference of opinion as to the import of s35(5) this did amount to an admission by the Respondents that this section was applicable in calculating the

severance pay. In the absence of an agreement between the parties to that effect this Court cannot simply on the basis of an agreement to pay 2 weeks severance pay for every year of service assume that the 2 week period has to be calculated as submitted by the Applicant especially where the payment of 2 weeks severance will amount to more than the minimum statutory provisions. This claim of Applicant is consequently also dismissed.

[31] With regard to costs, after giving the matter some serious consideration I believe that because of the newness of the Act and also that this appears to be the first matter before the Court on the points raised that there be no order as to costs.

[32] In the circumstances the application is dismissed and there is no order as to costs.

WAGLAY J

01.11.2000

Appearance for the Applicants: J Whyte of Chennells Albertyn Attorneys

Appearance for the Respondent: Adv M Janisch instructed by Cliffe Dekker Fuller Moore