THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER: 60/98

In the matter between:

TELECALL (PTY) LTD APPELLANT

and

JOHN LOGAN RESPONDENT

CORAM: **F H GROSSKOPF, SCOTT, PLEWMAN JJA, MELUNSKY and MTHIYANE AJJA**

DATE OF HEARING: **25 FEBRUARY 2000**

DATE OF JUDGMENT: **23 MARCH 2000**

JUDGMENT

Pension fund - Arbitration - Necessity for formulated dispute - Interpretation of fund rules.

PLEWMAN JA

[1] The sole issue in this appeal is whether the respondent, a former employee of appellant and a member of its pension fund, is entitled to have a complaint relating to a decision by appellant as employer made in terms of the fund rules referred to arbitration. The court *a quo* held that he was so entitled and in consequence granted an application for the appointment of an arbitrator in terms of s 12(2) of the Arbitration Act 42 of 1965 (the Act). Appellant, with leave of the court *a quo*, appeals against the order appointing the arbitrator. I am of the view that respondent was not entitled to such an order.

[2] A brief account of the facts is called for. Respondent was a founder member of appellant company and in combination with another person effectively controlled it until 4 January 1994 when all the shares in appellant were acquired by a company Autopage

Holdings Limited. Control, of course, changed. Respondent was at the time both a director and an employee of appellant. He was also a member of appellant's pension fund. He was the seller of a significant proportion of the shares acquired by Autopage. On 31 January 1994 the respondent retired as an employee and on 28 February 1994 resigned as a director. He duly claimed a pension in terms of the pension fund rules. The rules provide two bases for the computation of an employee's pension. One basis is referred to as a standard or "formula" pension and the other an additional or "equi-pension" - the latter being the more generous. Respondent was in consequence of a decision by appellant, as the employer (as now controlled), granted the (lower) formula pension. That is his real complaint.

[3] What should also be recounted is that the present proceedings were only launched after an unsuccessful action in which respondent

sought to establish that appellant had indeed decided to award him the higher pension. Respondent has apparently accepted this defeat but now seeks to pursue his complaint on a different ground.

[4] The retirement benefits to which a retiring employee is entitled are governed by Rule 10. Rule 10.3 provides that if "the balance in a retiring member's individual account is greater than the amount required to purchase his pension" (as was the case) the employee became entitled to either the formula pension or the equi-pension. The decision as to which was to be paid is, in terms of the rule, a matter for the employer. The rule reads:

> "10.3 <u>Balance in Individual Account more than cost of pension.</u>
>
> Should the balance in the Member's Individual Account be greater than the amount required to purchase his pension, either Rule 10.3.1 or 10.3.2 will apply, as shall be decided by the Employer:
>
> 10.3.1 The remainder in the Member's

Individual Account shall be apportioned on an equitable basis, as determined by the Valuator, amongst the remaining Individual Accounts; or

10.3.2 The Member shall receive an additional pension that can be purchased by the remainder in his Individual Account."

[5] It is common cause in these proceedings that appellant decided that rule 10.3.1 was to be applied. In the founding papers respondent asserted that he was aggrieved by this decision "for reasons ... which need not detain the court". He also stated that he was "desirous that the matter be referred to arbitration in terms of rule 3.6" and that he would "in such arbitration furnish detailed reasons for (his) being aggrieved at the decision ...". No factual averments as to why the appellant's decision is assailable in an arbitration are made in the founding papers.

[6] Rule 3 lays down how, and by whom the fund is to be administered. Rule 3.6 is merely one of the sub-rules of this rule. Rule 3.6 reads:

> "3.6 Interpretation of Rules
>
> In all matters relating to the interpretation of these Rules and/or the administration of the Fund the decision of the Employer shall be final and binding on the Principal Officer and the members, provided that such ruling is not contrary to these Rules.
>
> If any party concerned is aggrieved at the decision of the Employer the aggrieved party may refer the matter for arbitration in terms of and in the manner set out in the Arbitration Act No 42 of 1965."

It will be convenient to distinguish between the first sentence or part of the rule and the second. I will identify these two parts simply as the first and second part respectively. Counsel for the respondent based his argument on the second part of the rule.

[7] Appellant's argument (at least its main argument) was simply that no dispute is formulated in the founding papers and that in those circumstances no arbitration proceedings could be entered upon. Respondent's counsel contended that the "width" of rule 3.6 allowed a reference to arbitration provided that a party is "aggrieved" without any further formulation of the dispute which existed (so it was argued) and that the rule, in its terms, applies to a decision such as that made by appellant.

[8] It may well be that in given circumstances appellant's main ground could dispose of a reference. In this case, however, a more extensive review of the facts is called for. Crucial to the appeal is the need to interpret rule 3.6. As a starting point one must have regard to the relief which respondent sought (the appointment of an arbitrator) and then attempt to ascertain whether such a remedy is provided for

or can be entertained in terms of the rule.

[9] Respondent (in express terms) seeks to invoke the provisions of s 12 of the Act. Section 12(1)(a) (so far as is relevant) provides:

> "Where -
> (a) in terms of an arbitration agreement ... the reference shall be to a single arbitrator and all the parties to the reference do not, after a dispute has arisen, agree in the appointment of an arbitrator;
> (b) ....."

[10] For a matter to be referred to arbitration the dispute must be one falling within the meaning of that word when used in the Act. In terms of the Act "arbitration proceedings" means "proceedings ... for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement". "Arbitration agreement" means "a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a

matter specified in the agreement ...".

[11] In *Words and Phrases Legally Defined* 2nd Ed arbitration is defined as "... a reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person ... other than a court of competent jurisdiction". In a note relating to the usage of the word arbitration in New Zealand it is said "It is essential, in order to constitute a 'reference' or 'submission' to arbitration that there appear in the instrument either expressly or by necessary implication, the intention of the parties that there shall be an inquiry in the nature of a judicial enquiry, and that their respective cases shall be heard and a decision arrived at upon the evidence adduced by the parties". This would seem also to be the accepted South African usage. In *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 302 at p 304 E-G Didcott J said:

> "Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise. It includes *Re Carus-Wilson and Greene* (1887) 18 QBD 7 (CA); *London and Lancashire Fire Assurance Co v Imperial Cold Storage and Supply Co Ltd* (1905) 15 CTR 673; *King v Harris* 1909 TS 292."

See also *Mustill and Boyd Commercial Arbitration* 2nd Ed (1989) p 46. In short a dispute for the purposes of the Act is one in relation to which opposing contentions are or can be advanced.

[12] I conclude that before there can be a reference to arbitration a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there can not be an

arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word "dispute". If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered upon.

[13] If one attempts to allocate to the second part of rule 3.6 a separate and independent purpose (as respondent's argument would require) one is still faced with the difficulty posed by rule 10.3. The question would be what meaning is to be given to the words "as shall be decided by the employer".

[14] The real problem is that the rules as a whole and particularly rule 3 have been poorly drafted. Rule 3.6 is certainly difficult to understand. Its construction should, in my view, be approached as

follows. It should be borne in mind, that the rules (as a whole) are rules of a fund which is registered under the Pensions Act of 1956 and which is a body corporate and a legal persona distinct from its members (and necessarily also distinct from appellant). Its operation is controlled by the Pensions Act and regulations made thereunder. Other than as may be provided in its rules, it is not subject to appellant's control in any respect. The most significant feature of the rules (for present purposes) is the fact that provision is made therein for the appointment of a principal officer who is obliged to perform specific duties set out in rule 3. One such duty is to ensure that the fund is properly registered and that its structure is approved of by the Commissioner of Inland Revenue. It is also clear that it is through the principal officer that the fund acts and he is charged (in terms of rule 3.3.8) with the general administration of the fund and the management

of its business. The fund's business is, obviously, the payment of pensions to its members - though the actual payment is made by an insurance company contracted to the fund. The employer is obliged in terms of rule 3 to employ a person as principal officer. It must also, of course, make monthly contributions to the fund in respect of each employee but no administrative duties are allotted to the employer.

[15] With that background I return to the question as to what meaning is to be given to the words in rule 10.3. It is a phrase which, so far as I have been able to determine, is used only in one other sub-rule. That is rule 5.2 which covers the employer's right to dissolve the fund and empowers the employer to decide whether the winding-up procedures provided for in rules 5.1.1 or those found in 5.1.1.3 are to be followed. (It is unnecessary to examine these in greater detail.) It is clear that the employer is required, in this context, to make an

election. There are in fact a number of other rules which involve the employer's consent or determination such as rules 5.1.14, 5.1.3, 9.21 and 10.5.3 but they do not, of themselves, resolve the question which arises in relation to rule 3.6 in this case.

[16] Counsel were *ad idem* that rule 10.3 confers a discretion on appellant, in relation to pension payments payable to any particular member, to direct that either rule 10.3.1 or 10.3.2 be followed. That being common ground the only question which remains is whether or not that is an unfettered discretion or one subject to restraints or limitations. Here counsel were at odds.

[17] The court *a quo* held that the rule conferred a discretion on appellant but stated that that discretion was not "entirely free". With respect to the learned judge it is extremely difficult to appreciate just what that phrase means or on what it is based. The rules specify no

restraints on the employer's choice. There are also no circumstances to imply any limitations to appellant's discretion and there is certainly no material before the Court which would, in any event, enable it to formulate a set of restraints. Nor, if one has regard to the structure of the fund, have any circumstances been suggested for supposing that the choice of either one or the other payment would enure to the benefit of the appellant itself. I am of the view, on a consideration of all the circumstances to which I have referred, that the discretion is, as the words themselves suggest, an unfettered discretion in the nature of an election.

[18] What the wording of 10.3 shows is that the second part of rule 3.6 cannot be read as respondent's counsel would have it. It would, in any event, seem more logical to read the sub-rule as a whole. When so reading the rule the first part can be construed as referring to

disputes between the principal officer and members in relation to which the employer (as arbiter) makes a ruling while the second part would then refer back to a decision made under the first part. This construction would also be consistent with the use of the definite article "the" before the word "decision". If the second part was intended to be of general application one would have expected a word such as "any" to be used. In effect the rule so read provides for an independent arbitration as between the principal officer and the member in which the employer's decision is reconsidered. Any other reading of the second part would imply that what is the exercise of an unfettered discretion is to be over-ridden. This would be analogous to the situation discussed in *Kruger v The Master and Another NO, Ex Parte Kruger* 1982 (1) SA 754 (W) (at p 759C) and in this Court in *Shenker v The Master and Another* 1936 AD 136 (at p 146/7). A

further consequence of a suggestion that a decision made under rule 10.3 was arbitrable between the employer and a member would be that an arbitration relating to the administration of the fund would proceed not with the party vested by the rules with the administration of the fund but with a person who has an unfettered power to deal with a particular issue. If one accepts that the employer's discretion is unfettered what would there be for the arbitrator to decide?

[19] I am satisfied that underlying the respondent's application is a misunderstanding of rule 3.6. What is clear is that a decision in terms of rule 10.3 is not an arbitrable decision in an arbitration as envisaged by the Arbitration Act. This conclusion renders it unnecessary to consider whether or not there is a "formulated dispute" in the strict sense. That question is secondary and follows naturally from a determination of what the nature of the decision in terms of rule 10.3

is.

[20] In my view the court *a quo* erred in holding that the appellant's discretion was not "entirely free". (It should be observed that fraud or *male fides* has not been alleged or even suggested.) It follows that no arbitrator should have been appointed.

[21] The appeal then succeeds with costs. The order of the court *a quo* is set aside and there is substituted therefor an order that the application is dismissed with costs.

C PLEWMAN JA

CONCUR:

GROSSKOPF JA)
SCOTT JA)
MELUNSKY AJA)
MTHIYANE AJA)