IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

REPORTABLE

CASE NUMBER: JR1456/06

In the matter between:

SCHEME DATA SERVICES (PTY) LTD	Applicant
and	
MYHILL N.O, E	First Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
SIMPSON, G	Third Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application for the review and setting aside of the decision of the first respondent acting as commissioner in arbitration proceedings

convened by the second respondent under case number GA37354/03. In his award of 1 June 2006 the first respondent found that the applicant had failed to show "good reasons" for dismissing the third respondent and that it also failed to follow a fair procedure in doing so. He thus awarded the third respondent compensation equivalent to 7 months salary in the amount of R86 100 and ordered the applicant to pay same within 14 days of receiving the award.

[2] The third respondent's employment with the applicant was terminated for operational reasons after 10 years of service. She charged that the applicant had not followed procedure and the first respondent found in her favour. The applicant now seeks to have the first respondent's award reviewed and set aside.

[3] In argument, Mr Snyman for the applicant submitted that since the arbitration hearing, the award and the filing of pleadings in this case, matters have been overtaken by the decision of Acting Justice Nel in *Rand Water v Bracks NO and Others* (2007) 28 2310 (LC) ("*Rand Water*"). In that case, Nel AJ found that in matters which concern the dismissal of a single employee for operational reasons, the CCMA has jurisdiction only where the dispute centres on substantive fairness, and that where the issue to be determined concerns only procedural fairness

the CCMA has no jurisdiction and such matters must be referred to the Labour Court.

[4] It would seem that Mr Snyman contends for the proposition that since the first respondent lacked jurisdiction to arbitrate this matter on the authority of the *Rand Water* judgement, his award ought to be set aside on that ground alone. Mr Snyman pointed out that the *Rand Water* judgement has been followed in numerous rulings of the CCMA. Of course, that is to be expected on authority of the principle of precedent.

[5] Mr AJ Nel (not to be confused with Nel AJ) for the third respondent sought to persuade me that Nel AJ's judgement is clearly wrong. That is the issue I am now called upon to decide.

[6] Neither party indicated what would then happen in the event of a finding that the *Rand Water* judgement was clearly wrong. Nevertheless, it seems to me reasonable and in the interests of justice that in that eventuality I should go on to consider the review application on the grounds advanced. I did not understand Mr Snyman to put all his eggs in the *Rand Water* basket, so that they would either hatch or rot with the basket. He has submitted a comprehensive set of heads of argument replete with references to authorities on why the first respondent's award falls to be reviewed and set aside.

[7] In light of the view I take of this matter, it is not necessary to traverse in detail the factual background from which the dispute here arises. It is in my estimation sufficient to state only the material facts.

Rand Water and the Issue of Jurisdiction

[8] It is my respectful view that *Rand Water* is clearly wrong in law. The Learned Judge reached his conclusion by an interpretative measure. In so doing, the Learned Judge appears with respect not to have heeded his own caveat which he expresses eloquently at paragraph [40] of the judgement thus:

> "It is true that the LRA must be interpreted purposively to give effect to an expeditious resolution of labour disputes. However it is equally true that the concept of a purposive interpretation does not allow the interpreter to ignore the wording of a statute or to place a construction thereon that is not reasonable having regard to the wording."

[9] The Learned Judge is with respect quite correct. The trouble, however, begins when the Learned Judge ventures into what appears to be a conscientious exercise of statutory interpretation, driven, it would seem, by considerations of a desire to spare CCMA commissioners the headache or challenge of dealing with complexities that, according to

the Learned Judge, only procedural issues arising from dismissals on grounds of operational requirements may dish out. In this vein the Learned Judge says (at paragraph [39] of the judgement):

> "It is in my view so that the question whether an employer had substantive cause in support of its decision to retrench employees by reason of its operational requirements is more often than not relatively clear-cut. I do not wish to suggest that one will not encounter instances where the substantive cause for the employer's alleged operational requirements may not be hugely complex and heatedly disputed by the employee or employees and the union representatives involved. It is however in my view more often in respect of the myriad of procedural obligations placed upon an employer that the matter becomes factually intense and significant complexity is introduced, particularly in terms of the facts. It then becomes rather challenging to determine whether the employer had complied therewith or not."

[10] There is, of course, nothing in the Labour Relations Act, 66 of 1995 ("the LRA") that suggests that the determination of procedural fairness in section 189 dismissals of necessity entails navigating through considerably more complex issues than would be the case when determining substantive fairness. I know of no judicial precedent where such a proposition was either decided or given judicial imprimatur by judicial notice being taken of it.

[11] Having thus determined that "more often . . . significant complexity" arises in the determination of procedural fairness in section 189 dismissals, and warning of the dangers of departing from statutory wording and placing unreasonable constructions thereon in the guise of purposive interpretation, the Learned Judge with respect launches into an exercise of precisely that of which he warns and reaches the conclusion that he does. At paragraph [41] the Learned Judge says:

> "The court is enjoined, when interpreting a statutory instrument, to give effect to all the words in the statute. If it was the legislature's intention that if one employee only is dismissed by reason of an employer's operational requirements, then the CCMA will have jurisdiction, the relevant section clearly need not have contained the words 'following a consultation procedure in terms of section 189'. It must accordingly be determined what the legislature intended by the insertion of these words. Having regard to the fact that the word 'following' may mean either 'subsequent to' or 'after' as well as bearing in mind that the phrase 'in terms of' means 'in conformity with', it follows that the phrase 'following a consultation procedure in terms of section 189' could be interpreted to mean 'subsequent to or after a consultation process in conformity with section 189'."

[12] With respect, the construction thus put on section 191(12) of the LRA by the Learned Judge cannot be correct. It is in fact patently wrong not least because it seems to suggest, by its excision of an entire clause from

the section, that no consultation is required where only one employee is sought to be retrenched.

[13] Section 189 of the LRA deals with the procedure that must be followed upon the dismissal of "one or more employees" for reasons based on the employer's operational requirements, and section 189(1)(d) requires consultation with an affected employee. In these circumstances, it is not clear why the Learned Judge should take the view that the legislature's intention in section 191(12) was to confer jurisdiction on the CCMA only where no consultation is required as depicted by the clause "following a consultation procedure in terms of section 189".

[14] On a plain reading of section 191(12), it does not permit of the construction placed on it by the Learned Judge. The section reads:

> "If an employee is dismissed by reason of an employer's operational requirements *following a consultation procedure in terms of section 189* that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court."
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> (My italics)

[15] The Learned Judge reaches the jurisdictional finding by excising or severing the italicised clause from the section. There is no need for that because the plain wording of the section is clear and it is this: an

employee who is dismissed for operational reasons is free to refer the dispute – whether founded on procedural fairness or substantive fairness or both – either to the CCMA or to the Labour Court. This option is given force also by section 191(5)(b)(ii) of the LRA to the same effect. That plain meaning does not give rise to any absurdity and the Learned Judge has not suggested that it does. So why tamper with it?

[16] Moreover, interpretative aides such as excision or notional severance, striking down and reading in become useful, and are usually invoked by the Courts, only where the plain meaning of the statutory provision would result in constitutional invalidity. These interpretative aides are usually invoked by our Courts in such circumstances with a view to saving the statutory provision in issue from a declaration of constitutional invalidity. Such an exercise is embarked upon not *in vacuo* but with a view to granting an appropriate remedy (pursuant to section 38 of the Constitution) that is just and equitable (as the Courts are enjoined to do by section 172(1)(b) of the Constitution) (see, for example, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at paragraphs [61] – [88]).

[17] The Constitutional Court has had this to say about the appropriate remedy of the severance of words from a statute:

> "The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible."

(*National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at paragraph [74])

[18] In *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) the Constitutional Court reiterated the reasoning of Ackermann J in the *Gay and Lesbian Equality* case and said the following about statutory interpretative tools (at paragraph [57]):

> "Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential. There is no single formula. In appropriate cases it may be necessary to delete words from a provision and read in other words to make the provision consistent with the

> Constitution, where the deletion of the words alone would result in the declaration of invalidity to an extent greater than that required by the Constitution."

[19] In *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) the Constitutional Court (per Ngcobo J writing for the entire Court) cautioned against judges playing a legislative role in these terms:

> "A court should be reluctant to read in or sever words from a provision if to do so would require the court to engage in the details of lawmaking, a constitutional activity that is assigned to legislatures. Similarly, where curing a defect in the provision would require policy decisions to be made, reading-in or severance may not be appropriate. So too where there are a range of options open to the Legislature to cure a defect. This Court should be slow to make choices that are primarily to be made by the Legislature."

[20] The Learned Judge in *Rand Water* did not proceed from the premise that section 191(12) of the LRA is constitutionally offensive, and thus that the notional severance of the clause he excises from it is an appropriate remedy to rescue the section from a declaration of unconstitutionality. It does not appear from the judgement that this was an argument that was advanced before him either. In the circumstances, the Learned Judge's legislative foray was with respect not only uninvited but also mistaken.

The result is an undesirable and, with respect, dangerous precedent of the suffusion of legislative function by judicial musings of what the judiciary would rather the law was.

[21] It is for the Legislature, not the Labour Court or any other Court, to decide where individual employees dismissed on grounds of the employer's operational requirements should refer their disputes in that regard. The LRA clearly gives such employees a choice of approaching either the CCMA (or bargaining councils) or the Labour Court. It is not for the Labour Court to decide that procedural issues in section 189 dismissals are too complex for the CCMA or bargaining councils to handle, and so decree that such issues be referred only to the Labour Court. That is a policy decision that only the Legislature must make. Clearly the Legislature does not think procedural issues in section 189 dismissals of individual employees are too complex for CCMA or bargaining council commissioners. That is why it enacted sections 191(5)(b)(ii) and 191(12) of the LRA. If the Legislature should reconsider the issue, then it is expected that it will amend the LRA accordingly. Judges cannot permissibly amend legislation for it.

[22] The scheme of the LRA is such that employment-related disputes must be conciliated and arbitrated by the CCMA or bargaining council with the minimum of legal formalities (*section 138(1)* of the LRA). The idea

is that such disputes must be resolved reasonably expeditiously, equitably and with minimum fuss and posturing that sometimes goes with litigation in the Higher Courts. The effect is that indigent parties are not non-suited or otherwise prejudiced simply because they cannot afford a lawyer; and disputes are brought to finality much quicker than would be the case in the ordinary courts. That is why there is a stipulated time period within which a dispute must be referred to the CCMA. In the case of unfair dismissal referral must be made within 30 days of dismissal or of the final decision in that regard being made by the employer following an internal disciplinary process (see *section 191(1)(b)(i)* of the LRA). In the case of unfair labour practice referral must be made within 90 days of the conduct constituting unfair labour practice or of the date on which the employee became aware of such conduct (*section 191(1)(b)(ii)* of the LRA). That is why there is no appeal against the CCMA's award, and an aggrieved party has 6 weeks within which to seek to review the CCMA's award in the Labour Court (*section 145(1)* of the LRA).

[23] In the result, *Rand Water* cannot stand. It is my respectful view that the judgement in that case is plainly wrong on a plain reading of section 191(12) of the LRA. It is thus my view that the first respondent had jurisdiction to arbitrate the dispute in this case.

The Review on the Merits

[24] The test for the review of awards of the CCMA is now settled. What this Court needs to determine is whether the decision reached by the first respondent is one that a reasonable decision-maker could not reach on the same facts and evidence (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC at paragraph [110]). In other words, the standard is now one of reasonableness. If the answer is in the affirmative, then the award falls to be set aside.

[25] The grounds of review in section 145(2) of the LRA are now "suffused" by this constitutional standard of reasonableness. That does not mean, in my respectful view, that the section 145(2) review grounds are to be regarded as having been washed away by the reasonableness standard. The better approach is that the section 145(2) review grounds must be construed with the reasonableness standard as their backdrop.

[26] Mr Snyman has referred me to numerous authorities on applicable principles. It seems to me the determination of this matter centres on one issue and that is whether the applicant, in its engagement with the third respondent, consulted with her on the issue of an alternative position in order to avoid retrenchment. The applicant says it never

raised the issue of an alternative position because there was none, and in any event the third respondent was not interested in one. This latter averment was sheer conjecture.

[27] Section 189(3) is peremptory in its requirement that the applicant consults with and discloses to the third respondent all relevant information including "the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives". The purpose for embarking on a section 189 process is to engage in a meaningful joint consensus-seeking process with a view to reaching agreement on appropriate measures aimed at, among other things, avoiding dismissals (*section 189(2)(a)(i)* of the LRA). Discussion of possible alternative positions is one such appropriate measure and failure to do so is not conducive to a "meaningful joint consensus-seeking process".

[28] The applicant says the third respondent waived her right to an alternative position. But one cannot waive a right the existence of which one is not aware.

[29] In my view, the first respondent was quite reasonable in finding that the third respondent might well have accepted the alternative position had it been presented to her, thus avoiding retrenchment. That is after all what

the section 189 process is intended to achieve. The first respondent said the following in this regard (at paragraph 26 of the award)

> "The retrenchment of the [third respondent] was thus at least procedurally unfair. As the [third respondent] may have accepted an alternative job with the [applicant] after considering all the options it is impossible to say that there was a good reason for her retrenchment."

[30] This approach is not dissimilar to that adopted by the Labour Appeal Court in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at paragraph [37] where the court said:

> "The failure to consult the appellant on known alternatives does not affect or detract from the existence of a valid or genuine commercial rationale for retrenchment. It only affects his selection. The selection of an employee for retrenchment does not only impact on the procedural purpose of consultation but also on its substantive purpose. This is so because failure to consult on known alternatives leaves open a possibility that the affected employee might, contrary to the employer's belief, have accepted the undisclosed alternative to his or her retrenchment. If he or she would have, then it follows that he or she would not have been retrenched and the decision to retrench him or her would therefore be both procedurally and substantively unfair notwithstanding the existence of a genuine business rationale therefor."

[31] On the facts, the third respondent was not even invited to discuss alternatives to retrenchment. That is fatal to the applicant's case.

Finding

[32] In the result, I can find no just cause for upsetting the first respondent's award on the review grounds advanced by the applicant as "suffused by" the reasonableness standard.

[33] The application is thus dismissed with costs.

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Ngalwana AJ

Appearances

For the applicants:	*Mr Snyman*
Instructed by:	*Snyman Attorneys*
For the respondents:	*Mr AJ Nel*
Instructed by:	*Dean Caro and Associates*
Date of hearing:	*03 December 2008*
Date of judgment:	*05 December 2008*