IN THE LABOUR COURT OF LESOTHO LC/REV/331/06

HELD AT MASERU

IN THE MATTER BETWEEN

BEN HEQOA APPLICANT

AND

BROWNS CASH & CARRY 1ST RESPONDENT
THE ARBITRATOR – C. T. THAMAE 2ND RESPONDENT

JUDGMENT

Date : 16/09/09
Review – Arbitrator misconstrued the issue he is called upon to decide – This resulted in arbitrator dismissing the referral of applicant on basis of irrelevant facts and considerations – Held that such constitutes the award grossly unreasonable and as such reviewable – Retrospectivity as a rule undermines the principle of legality – Exemption from obligation to pay severance pay – The exemption can only be applied prospectively as retrospectivity is not authorized by the Labour Code which is the one that authorizes granting of exemptions – Applicant awarded payment of severance pay withheld by virtue of retrospective application of an exemption.

1. This review application is concerned with a single issue of alleged gross unreasonableness of the award of the learned Arbitrator Thamae. The facts are common cause. On the 9th December 2004 the applicant tendered a one month notice of termination of his employment which would end on the 8th January 2005.

2. It is applicant's contention that at the time of his resignation he was entitled to severance pay in terms of section 79(1) of the Labour Code Order 1992 (the Code) which provides:

> *"(1) An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive, upon termination of his/her services, a severance payment equivalent to two weeks wages for each completed year of continuous service with the employer."*

It is common cause that the applicant had completed seventeen years with the 1st respondent. Accordingly, *prima facie* he qualified for severance pay in terms of this section.

3. It is further common cause that on the 28th December 2004, the 1st respondent applied to the Labour Commissioner for exemption from the effect of section 79(1) of the Code. The exemption was sought in terms of section 8 of the Labour Code (Amendment) Act 1997 (the Act) which provides:

> *"8 The Principal Law is amended in section 79 by inserting the following after sub-section (6)*
> *"(7) Where an employer operates some other separation benefit scheme which provides more advantageous benefits for an employee than those that are contained in sub-section (1) he may submit a written application to the Labour Commissioner for exemption from the effect of that sub-section."*

The Labour Commissioner duly granted the 1st respondent an exemption on the 16th February 2005. By this time applicant had already served his notice and separated with the 1st respondent.

4. Pursuant to the said exemption the 1st respondent declined to pay applicant his severance pay which he was claiming in terms of section 79(1) of the Code. Applicant's contention was that at the time that he tendered his resignation and indeed at the time that his resignation took effect, the 1st respondent had not yet been exempted from the effect of section 79(1). He contended

that he thus qualified to be paid his severance pay in terms of the provisions of the Code.

5. When the divergent views of the parties could not be reconciled, applicant approached the DDPR. Conciliation failed and the dispute was referred to arbitration. Applicant contended as earlier indicated that the exemption could not apply to him because it was granted after his resignation had taken effect. He argued further that the exemption did not apply retrospectively.

6. The 1st respondent's response to applicant's contention was lengthy but very difficult to comprehend. The long and short of it can be found at page 6 of the record of the arbitration proceedings. This is how Mr. Makeka for the 1st respondent put it:

> *"The gist of this matter is whether the employer has formed a scheme that would enable him to pay an employee upon resignation as he is obliged to under section 79 which deals with severance pay. This scheme began a long time ago not on the 28th December which is the date on which he (applicant) suggests it should begin because this is the date on which the application was lodged. What we are saying is that when the Labour Commissioner examines the scheme and finds that it is provided, it cannot be said it commences on the day that the letter is issued because the scheme already existed. All it shows is the state of affairs that one person receives more money than the other even before an exemption is done. Now if it is suggested that it will only be operational subsequent to the issuing of the letter is the same as saying that the scheme will only operate for a day because what is approved is the scheme not a letter. Therefore it cannot be suggested that the letter suggest when to commence because if we are to say that, that would mean that the letter has to commence when the scheme is operational."*

7. With respect to the representative of the 1st respondent, he seems to have missed the point, alternatively he is distorting the argument advanced on behalf of the applicant. The applicant is not suggesting that the scheme should commence operation on the day the letter of the Labour Commissioner is issued. His argument does not come anywhere near such a suggestion. He is not questioning the date of commencement of the scheme either. Infact the records of the employer can always be looked into to determine when the scheme commenced operation. However that was not the issue that was before the learned arbitrator.

8. The issue that is raised by arguments advanced on behalf of the applicant concerns the effective date of the exemption granted by the Labour Commissioner to the 1st respondent. Can it be said the exemption applies to claims that arose before the 16th February, or only those that arose after it was granted? This is the issue that faced the learned arbitrator.

9. Unfortunately, the learned arbitrator misconstructed the issue. He understood the issue to be *"about the timing of the application for exemption from the effect of section 79(1)."* He then proceeded on this wrong premise and concluded that *"the only appropriate time would be when the intention to resign and separation date has been agreed between the parties."* With respect this was a total misdirection, for the applicant was not challenging the time, as much as he was concerned about the effective date of the exemption regard being had to the date it was granted. This is clearly a gross misdirection which calls for interference with the award of the learned Arbitrator.

10. The learned Arbitrator went on to deal with factors that he felt the Labour Commissioner ought to consider in deciding whether to grant the exemption sought or not. He opined that it would not make sense for the Commissioner to exempt employees from provisions of section 79(1) whenever employees joined the scheme as the factors upon which exemption is to be made are liable to change over employee's period of employment.

11. These considerations are clearly irrelevant to the issue that the applicant wanted to have determined. However, it was on the basis of their application that the applicant's referral was dismissed. A decision based on irrelevant facts and considerations as is the case *in casu* is grossly unreasonable as such it constitutes a reviewable irregularity. Gross unreasonableness has been held to constitute a ground for interference by the court where it amounts to proof that the person on whom discretion was conferred did not apply his mind to the matter." (See Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 1997 Juta & Co. p.939). *In casu* the Arbitrator did not apply his mind to the issue advanced by the applicant for determination.

12. Coming now to the issue that the learned Arbitrator was called upon to decide but failed to do so. As Fuller in his book, The Morality of Law; rev. Ed. 1969 at p.53 said:

> *"law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose. To ask how we should appraise an imaginary legal system consisting exclusively of laws that are retroactive, and retroactive only, is like asking how much air pressure there is in a perfect vacuum."*

The general rule of thumb is that retrospectivity undermines the principle of legality. Thus section 16 of the Interpretation Act 1977 provides that every Act shall:

> *"(a) be published in the gazette;*
> *"(b) come into operation on the expiration of the day next preceding the day of its publication or if it is provided…. that such Act shall come into operation on some other day, then it shall come into operation on the expiration of the day next preceding that other day."*

In short this means that the Act shall commence operation a minute after midnight of the day immediately preceding the day on which the Act is published in the government gazette.

13. It is clear from this section of the Interpretation Act that statutes are meant to apply prospectively. This principle was recognized and applied in the Zimbabwean case of Pretorius .v. Minister of Defence 1981(1) SA1174 at 1777H where Fieldsend CJ held that there is:

> *"(a) well recognized principle relied upon in the Colonial Sugar Refining Co. Ltd. .v. Irving 1905AC 369 at 372 that statutes will not be held to take away existing rights retrospectively unless they so provide expressly or by necessary intendment. Such a principle applies with increased force where, as here a right is created by a statute and is purported to be taken away by subsidiary legislation made under that statute which gives no specific power to legislate retrospectively."*

In Benator NO .v. Worcester Court (Pty) Ltd 1983(4) SA 126, Van Den Heever J interpreted a clause identical to section 16 of our interpretation Act as follows:

> *"In terms of both this section and of the common law a statutory enactment as a rule binds the subjects of a state only after they have been informed of the legislative's commands…. That promulgation is a vital precursor to effectiveness appears from the authorities listed in Steyn Uitleg Van Wette 5th ed. at 180 n.192. See also Hallo and Kahn, The SA Legal System and its Background at 37, 168 – 172." (P.133C).*

14. This case is very much identical to the case of Pretorius supra. Applicant has a right to severance pay which is created by section 79 of the Code. However, section 8 of the Act empowers the Labour Commissioner to take away that right by exempting a deserving employer from the obligation to pay severance pay. The Act does not however, empower the Labour Commissioner to exempt employers retrospectively. Indeed the Labour Commissioner did not even purport to exempt 1st respondent retrospectively. It is the 1st respondent itself with the subsequent approval of the 2nd respondent that sought to give the exemption a retrospective application.

15. That is irregular in as much as it is contrary to the enabling statute which does not authorize retrospectivity. In his book Administrative Law, 1996 Juta & Co. p.355 Lawrence Baxter has this to say about retrospectivity:

> *"There is a strong presumption in South African Law (by the same token in Lesotho Law) that legislation is not intended to operate with retrospective effect or in such a manner as to interfere with existing rights and liberties. This presumption applies equally to legislation that authorizes administrative action… Express or clearly implied authority will be necessary if a public authority wishes to take action which alters legal relations with retrospective effect."*

In the absence of an express exemption, the legal relations between applicant and the 1st respondent as of the 8th January 2005, when they parted were that applicant qualified for both severance pay and benefits payable in terms of the provident fund.

16. It is common cause that proceeds of the provident fund would be payable in terms of the rules of the fund. As for severance pay, its payment ought to be made in terms of the provisions of the Code which govern when such moneys are due and payable upon termination of the contract. Clearly 1st respondent deliberately withheld payment of the severance pay in anticipation of the exemption which they had applied for. This was wrong, as that act was contrary to section 84 of the Code which provides:

> *"In every case in which employment has been terminated for a reason other than dismissal all wages, including overtime pay and allowances additional to basic pay, shall be due on the last day of employment and shall be payable not later than the following working day…."*

By holding onto applicant's severance pay until on the 16th February when it purported to implement the exemption on applicant, the 1st respondent acted contrary to the above quoted

section. By that time his severance pay ought to have long been paid to him.

17. The 1st respondent excercabated the illegality by purporting to implement its exemption to a case of the applicant which predated its granting. The exemption could only apply from the day it was granted and not backwards. This is what the 2nd respondent would have found had he applied his mind to the issue that he was called upon to arbitrate. As we said he went on a tangent and considered irrelevant matters. For these reasons the award of the 2nd respondent is reviewed, corrected and set aside. In its place it is substituted an order that the 1st respondent shall pay applicant the severance pay due to him in terms of section 79(1) of the Code within 30 days of the making of this order. There is no order as to costs.

THUS DONE AT MASERU THIS 28th DAY OF OCTOBER 2009

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU — I CONCUR
MEMBER

L. MATELA — I CONCUR
MEMBER

FOR APPLICANT: MR. MATOOANE
FOR RESPONDENT: MR. MACHELI