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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CONSOLIDATED FRAME COTTON
CORPORATION LIMITED — Appellant

and

THE PRESIDENT, INDUSTRIAL COURT — 1st Respondent

NATIONAL UNION OF TEXTILE WORKERS — 2nd Respondent

THOKO SHANGE & OTHERS — 3rd to 27th Respondents

CORAM: RABIE, CJ, JANSEN, HOEXTER, JJA, GALGUT et NICHOLAS, AJJA

HEARD: 16 May 1986

DELIVERED: 29 May 1986

J U D G M E N T

NICHOLAS, AJA

This .....

This is an appeal with the leave of the Court a quo against a judgment of THIRION J sitting in the Natal Provincial Division, in which he dismissed an application for a declaration of rights. The judgment is reported (1985 (3) SA 150 (N)).

The application was concerned with the interpretation of S. 43(4)(b) of the Labour Relations Act, 28 of 1956 ("the Act"), and before referring to the facts it will be convenient to set out the relevant statutory provisions.

In terms of s. 35 -

> "35. (1) Whenever a dispute is alleged to exist in any undertaking, industry, trade or occupation in any area, and

the .....

the parties to the alleged dispute are ...

(a) one or more trade unions; or

(b) one or more employees; or

(c) one or more trade unions and one or more employees,

on the one hand, and

(d) one or more employers' organizations; or

(e) one or more employers; or

(f) one or more employers' organizations and one or more employers,

on the other hand (hereinafter referred to as the parties to the dispute), any such party may apply to the Minister in the form and manner prescribed for the establishment of a conciliation board to consider and, if possible, settle the alleged dispute .

.....

(4) If after considering the application and any representations submitted to him by the other party or parties to the dispute ... and any other matters which he considers relevant, the Minister is satisfied -

(a) .....

(a) that, except in the case of an alleged unfair labour practice, a dispute exists in regard to any matter concerning the relationship between employer and employee;

.....

he may, if he deems it expedient to do so, ... or in the case of a dispute concerning, in the Minister's opinion, an unfair labour practice, he shall, subject to the provisions of this section, approve of the establishment of a conciliation board and cause the necessary steps thereto to be taken.

.....

(8)(a) When he approves of the establishment of a conciliation board under this section, the Minister shall determine the terms of reference of the board and the area in respect of which it shall be established. .....

....."

S. 36 provides that a conciliation board shall endeavour to settle by agreement or otherwise the dispute referred

to .....

to it. S. 43 provides:

"43. (1) In this section, the term dispute means a dispute concerning -

(a) the suspension or termination of the employment of an employee or employees or the decision or proposal of an employer to suspend or terminate the employment of an employee or employees; or

(b) a change or proposed change in the terms or conditions of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure; or

(c) an alleged unfair labour practice.

(2) Any party to a dispute who -

(a) refers the said dispute to an industrial council having jurisdiction in respect of the dispute; or

(b) if there is no industrial council having jurisdiction, applies under section 35(1) for the establishment

of a conciliation board in respect of the dispute,

may at the same time or within seven days of the date of such reference or application apply to the industrial court for an order under subsection (4).

(3)

(a) Whenever an application for an order is made in terms of subsection (2) the applicant shall at the same time furnish proof to the satisfaction of the industrial court that a copy of the application has been sent by registered post or delivered to the other party or parties to the dispute, and if there is an industrial council having jurisdiction in respect of the dispute, to the secretary of that council.

(b) The party or parties and the industrial council (if any) referred to in paragraph (a) may within 14 days of the date of the application,

or such further period or periods as the industrial court may from time to time either before or after the expiry of any such period fix, submit sworn written representations to the industrial court in regard thereto and shall furnish the applicant with a copy thereof, and the applicant may within seven days of the receipt of such copy or such further period or periods as the industrial court may from time to time fix, reply to such representations.

(c) .....

(4)

(a) Unless the industrial court on good cause shown decides otherwise, no order may be made under this subsection if the relevant application under subsection (2) was not made within 30 days of the date on which notice was given of the proposed suspension, termination or change or alleged unfair labour practice, or

if no such notice was given, of the date on which the suspension, termination or change took place or the alleged unfair labour was introduced.

(b) After considering the application and any representation submitted to it ... and any other matters which it considers relevant, the industrial court may make an order requiring the employer or employers' organization or employee or employees or trade union, as the case may be, concerned -

(i) in a case referred to in subsection (1)(a), not to suspend or terminate the employment of the employee or employees concerned, or if such employment has been suspended or terminated, to cancel the suspension or to reinstate the employee or employees concerned in his employ on terms and conditions not less favourable to him or them than those which governed his or their employ-

ment prior to such termination; or

(ii) in a case referred to in subsection (i)(b), not to make the proposed change, or if the change has been made, to restore the terms and conditions of employment which existed prior to the change; or

(iii) in a case referred to in subsection (1)(c), not to introduce the alleged unfair labour practice, or if the practice has been introduced, to restore the labour practices which existed prior to such introduction,

and the industrial court may at any time, on the application of a party to the dispute, in respect of which application the provisions of subsection (3) shall apply, withdraw or vary any such order.

(c) The industrial court shall not make any order as to costs in respect of any proceedings brought before it under this section, save on the ground of unreasonableness or frivolity on the part of a party

to a relevant dispute.

(5) When making an order under subsection (4) the industrial court shall fix the date from which the order shall operate and may make it retrospective to a date not earlier than that on which the employment of the employee or employees was suspended or terminated or on which the terms or conditions of employment were changed or on which the alleged unfair labour practice was introduced.

(6) An order made by the industrial court under subsection (4) shall prevail over any contrary provisions in any law or wage regulating measure and shall, unless it is withdrawn sooner, remain operative -

(a) until the dispute has been settled by the industrial council or the conciliation board concerned or, if it is referred or is required to be referred to arbitration or to the industrial court for determination, by an award or determina-

tion, as the case may be; or

(b) until the industrial council or conciliation board concerned, as the case may be, informs the industrial court that it failed to settle the dispute and has decided not to refer the dispute to an arbitrator or to arbitrators and an umpire or to the industrial court; or

(c) until the expiry of a period of 14 days from the date of the Minister's decision not to approve of the establishment of a conciliation board,

whichever event occurs first: Provided that no such order shall remain operative for longer than 90 days from the date of commencement fixed by the industrial court under subsection (5), unless the industrial court of its own motion or on application extends that period by periods not exceeding 30 days at a time.

(7) If an order is made in respect of any matter referred to in subsection (1)(a), an employer who pays to an employee the

remuneration which would have been due to the employee in respect of his normal hours of work had his employment not been suspended or terminated shall be deemed to have complied with the order.

(8) .....

(9) ....."

Consolidated Frame Cotton Corporation Limited ("CFCC"), is a member of the "Frame Group" of companies, which carry on business as manufacturers of textiles in various parts of Southern Africa. The group employs a total of about 30 000 workers. During March 1984 CFCC and its associated companies announced, in notices posted at their mills in Pinetown and New Germany, a decision to retrench some of their employees. In pursuance of this decision, CFCC terminated the employment of a number of employees during the period 23 March to 29 March 1984.

Alleging inter alia that a dispute existed between them and CFCC concerning such termination, the National Union of Textile Workers, a registered trade union, and some of the dismissed employees who were members of the Union, applied to the Minister of Manpower under s. 35 of the Act for the establishment of a conciliation board to consider and, if possible, settle the dispute. Thereafter the applicants made an application to the industrial court in terms of s. 43(2) of the Act. They alleged that the retrenchments were unfair, and asserted that a dispute existed between the applicants and CFCC concerning

> "1. an alleged unfair labour practice within the meaning of section 43(1)(c) of the Act;
> and/or

2. the termination of employment of employees within the meaning of section 43(1)(a) of the Act."

They sought an order inter alia "in terms of section 43(4)(b)(i) of the Act, reinstating (the individual applicants) in their employment upon the same terms and conditions as those that prevailed prior to their dismissal aforesaid, pending the resolution of this dispute as contemplated by section 43(6) of the Act, such order(s) to be made retrospective .."

CFCC filed sworn written representations in terms of s. 43(3)(b), in which it stated that it had been advised

> "that reinstatement in employment in terms of section 43 of the Labour Relations Act is not a remedy available to an employee who has been retrenched by reason of his redundancy, for the

reason .....

reason that the position in which, were reinstatement possible, he would be reinstated no longer exists".

It stated that it was applying to court for a declaratory order to this effect, and for an interim interdict prohibiting the industrial court from hearing or otherwise being seized of the application to it pending the outcome of the application for a declaratory order. In the circumstances CFCC did not deal with the allegations made by the Union and the individual employees.

CFCC then instituted the application for a declaration of rights by a notice of motion dated 5 July 1984. The first respondent was the President, Industrial Court; the second respondent was National Union of Textile Workers;

and .....

and the remaining 25 respondents were the individual applicants in the application to the industrial court. CFCC sought an order inter alia

"2.1 declaring that reinstatement in employment in terms of section 43 of the Labour Relations Act, 1956 as amended is not available as a remedy to an applicant whose employment with the respondent in such proceedings under the said section 43 has been terminated by reason of his dismissal for redundancy, where the employer is unwilling to re-employ such an applicant;

2.2 declaring that the Industrial Court is not empowered to grant reinstatement in employment of a retrenched worker in proceedings under section 46(9) of the Act;

2.3 interdicting and restraining the first respondent from being seized of an application purporting to have been brought before the Industrial Court against the

applicant .....

> applicant by the second to twenty-seventh respondents for the reinstatement in employment of the third to twenty-seventh respondents in terms of section 43 of the said Act."

In his judgment THIRION J posed "the real question to be decided in (the) application" as follows:

> "... whether it is competent for the industrial court under s. 43 (4)(b)(i) to order an employer to reinstate in his employ an employee whose employment has been terminated by the employer because of the employee's redundancy, i.e. because the employer does not have work for the employee and therefore does want to continue employing him."

After careful consideration of the meaning of the word "reinstate" as used in s. 43(4)(b), the learned judge came to a conclusion adverse to CFCC.

That .....

That conclusion was challenged by CFCC in this appeal.

In summary, CFCC's argument is this. Retrenchment is termination of employment in consequence of the abolition of the post held by the person retrenched. To reinstate means to restore to the post occupied before the termination of the employment. In a case of retrenchment, reinstatement is impossible because the post no longer exists. The legislature could not have intended the industrial court to order the impossible. Hence in such a case the industrial court has no power to order reinstatement.

The correctness of the first two propositions is fundamental to the argument.

The first proposition seems to be a piece of special

pleading. To retrench in the present context means to cut down, to reduce, the numbers of the work force because of redundancy - a superfluity of employees in relation to the work to be performed. Retrenchment does not necessarily involve the abolition of "posts": the employer may merely lay off a number of his employees. And I do not think that the employees concerned in this case can realistically be regarded as incumbents of "posts": they are unskilled manual workers, earning a wage of some R50 to R60 per week.

For the second proposition counsel for CFCC relied on the ordinary meaning of the word "reinstate", and referred in this connection to cases decided in the United Kingdom (namely, Hodge v Ultra Electric, Limited (1943) K.B.

462 at 465,466; William Dixon,Limited v Patterson 1943 SC 78 at 85, 92, 95; and Jackson v Fisher's Foils, Ltd (1944)1 All E.R. 421 (K.B.D.)) and to a dictum of HATHORN AJ in Bramdaw v Union Government 1930 NPD 57 at p. 78). It was said in those cases that the natural and ordinary meaning of "reinstate", as applied to a person who has been dismissed, is to put him back into the same job or position which he occupied before the dismissal, on the same terms and conditions. And it was said in Jackson (supra) at 424 F, that

> "... an employer, who is directed to reinstate in his employment a person whom he has dismissed, is not complying with that direction by putting that person upon the pay roll and nothing else."

(See also p. 425 G.)

The .....

The primary rule in the construction of statutes is that the words and expressions used must be interpreted according to their natural, ordinary or primary meaning. No less important is the rule that they must be interpreted in the light of their context, including "the matter of the statute, its apparent scope and purpose, and, within limits, its background". See Jaga v Dönges NO & Another 1950 (4) SA 653 (A) at 662, per SCHREINER JA.

An order under s. 43(4)(b) aims at bringing about the restoration of the status quo ante the termination, the change in the terms or conditions of the contract of employment, or the introduction of the alleged unfair labour practice, as the case may be. One of the objects is to eliminate

the disadvantage under which an employee would labour if he were obliged to negotiate against the background of a fait accompli. Having regard to this object, it matters not, in a case falling under ss. 4(b)(i), that his "post" has ceased to exist, or that the employer has no work available for him. What is contemplated is that he should be reinstated in his employment, in the sense of the contractual relation between master and servant. This appears too from the Afrikaans text of the Act, which uses the words "die betrokke werknemer weer in sy diens te herstel".

In the case of an employee such as the individual applicants, the contractual relation does not entail that he occupy a post or that he should be given work to do.

"Prima facie a man who is employed at a wage is entitled only to his wages. The employer is not bound to supply ..

supply him with work, but merely to pay him his wages and the employee has no complaint if he is given no work to do." (per BRISTOWE J in Faberlan v McKay and Fraser 1920 WLD 23 at pp. 26-27. Cp. Johannesburg Municipality v O'Sullivan 1923 AD 201 at p. 206; Stewart Wrightson (Pty) Ltd v Thorpe 1977(2) SA 943 (A) at p. 951 G-H. And s. 43(7) provides that an employer is deemed to comply with an order for reinstatement if he pays to an employee the remuneration which would have been due to the employee in respect of his normal hours of work had his employment not been terminated.

CFCC argued that because s. 43(4)(b)(i) makes grave inroads on the rights of the employer to terminate

the .....

the employment in terms of the contract of employment, it should be restrictively interpreted.

It is true that this provision gives the industrial court Draconian powers, the exercise of which may have far-reaching consequences, even, possibly, affecting the viability of an employer's undertaking. That does not mean, however, that the provision should receive a restrictive interpretation. In entrusting the powers to a quasi-judicial body, which it was contemplated would have special skills and knowledge in the field of labour relations, the legislature must be presumed to have intended that the powers would be exercised reasonably and equitably, and with due regard to the interests not only of the employees but also

of .....

of the employers.

In my view, therefore, the argument on behalf of CFCC must be rejected: the fact that an employee has been retrenched does not mean that "reinstatement", as that word is used in s. 43(4)(b)(i), is impossible. THIRION J's conclusion was clearly correct.

The appeal is dismissed with costs.

H C NICHOLAS, AJA

RABIE, CJ
JANSEN, JA
HOEXTER, JA
GALGUT, AJA
} Concur