REPUBLIC OF SOUTH AFRICA

Case No 168/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

WESTERN CAPE EDUCATION DEPARTMENT First Appellant

MINISTER OF EDUCATION Second Appellant

and

KAREN JEAN GEORGE

Respondent

CORAM: Mahomed CJ, Howie, Olivier, Zulman et Streicher JJA

DATE OF HEARING: 19 March 1998

DATE OF DELIVERY: 27 March 1998

JUDGMENT

/HOWIE JA:. . .

HOWIE JA:

Before October 1995 a legally married woman employed in the public service whose husband was not permanently medically unfit for paid employment was not entitled to the public service house owner allowance. That was laid down by a provision in the Public Service Staff Code and applied, by way of personnel administrative measures promulgated by the Minister of Education, to teachers. This piece of unwarranted discrimination notwithstanding, Karen George (to whom, although she is no longer a party to the litigation, I shall refer as "respondent") applied for the allowance. She is, and was at all material times, a legally married teacher in the employ, in a permanent capacity,

of the two appellants, being the Western Cape Education Department ("the Department") and the Minister. But for her being married she would have been entitled to the allowance.

The application was submitted in October 1994. The Department refused it on the ground that she was married. In November

1994 respondent took the matter to the Education Labour Relations Council ("the Council"), declaring a dispute. The Council was established by the Education Labour Relations Act, 146 of 1993 ("the ELRA").

At a meeting in December 1994 of the Council's dispute committee it was agreed between the Department and respondent that she should approach the Public Service Commission with the request that it recommend a departure from the discriminatory provision in question on the ground that hers was an exceptional case. This the Commission was empowered by the Public Service Staff Code to do. Respondent made the suggested approach but the Commission declined to assist. Its written response reads thus:

> "1. The Commission considered the case of Mrs George, but indicated that it does not see its way clear to furnish a recommendation for a deviation from the existing prescripts.
>
> 2. Pertaining to married women's participation in the Home

Owner Allowance Scheme in general, it has to be pointed out that the relevant scheme is an existing service benefit and as such any amendment(s) to it can only be effected if; after negotiations in this regard, agreement is reached thereon between the employer and employee organisations. During recent negotiations the State as employer declared its willingness to put aside R0,4 billion as part of a salary and service benefit improvement package to address gender disparities with regard to the Home Owner Allowance Scheme with effect from 1 April 1995. Thus far agreement on the package could not be reached.

3. In the circumstances, married women's participation in the Home Owner Allowance Scheme is sub judice being a matter of mutual interest that can only be dealt with by means of negotiations."

The negotiations, I should mention, were between the State and the South African Democratic Teachers' Union, of which respondent was a member.

In March 1995 the Council wrote a letter to respondent recording that as the dispute had not been resolved the Council had, in

terms of its constitution, to be deemed to have failed to settle it. Accordingly it was open to respondent, so she was informed in the letter, to refer the dispute for determination by the Industrial Court in terms of s 18 of the E L R A. That she did. The proceedings were opposed by appellants but the Industrial Court found in her favour. The order it made was as follows:

> "1. The respondents' refusal to accord to the applicant the benefits of the house owner allowance scheme on the grounds that she is a married woman whose husband is not medically unfit to obtain paid employment is held to constitute an unfair labour practice.
>
> 2. Subject to paragraph 4(a) hereof the respondents are jointly and severally directed forthwith to accord to the applicant the house owner allowance benefits to which she would be entitled had she been an unmarried female or a married or an unmarried male.
>
> 3. Subject to paragraph 4(b) hereof, the respondents are furthermore jointly and severally directed to pay to the applicant a compensatory amount equivalent to the benefit

which she would have received, had she been a recipient of the house owner allowance from the date that the Public Service Commission declined to recommend a deviation from existing prescripts, namely 30 January 1995 until the date that routine monthly payment of the benefit commences pursuant to paragraph 2 hereof.

4. (a) Nothing in paragraph 2 hereof shall preclude the respondents from procuring compliance with that paragraph by way of a reconsideration or renewed consideration of the applicant's request to be treated as an exceptional case in terms of paragraph 8 of Chapter DAX of the Public Service Staff Code.

(b) Once it is ascertained, the amount payable in terms of paragraph 3 hereof is to be deposited to the credit of the applicant's home loan account with the financial institution which holds as security for such account, the first mortgage bond registered over the immovable property, being Erf 7918, Brackenfell, and situate at 44 Palm Close, Northpine, Cape.

5. The respondents are jointly and severally directed to pay the applicant's costs of the determination proceedings, on the Supreme Court scale, and for the purpose of functions performed by Mr Dodson which would in that context have been the province of counsel, costs shall be taxed as if junior counsel of middle standing had been briefed.

6. Should any obstacle in the implementation of the terms of

this determination be encountered, which either party considers would have the effect of frustrating its purport or intent, then such party shall be entitled to set the matter down for further hearing on reasonable notice to the other/s, with a view to such variation of the terms of the determination as may be reasonable."

That order was made on 13 October 1995. Appellants then appealed to the Labour Appeal Court. Subject to a presently irrelevant alteration to the Industrial Court's order, the Labour Appeal Court dismissed the appeal but granted appellants leave to appeal to this Court.

Subsequent to the grant of leave appellants and respondent concluded a settlement agreement reading as follows (references to the "abovementioned Court" being references to this Court):

"The parties hereto have agreed to settle their dispute on the following basis, as they hereby do:

1. Respondent will, on signature of this agreement, instruct her attorneys to file an appropriate notice withdrawing her opposition to the Appellants' appeal and advising the

abovementioned Court that she will abide its decision.

2. The Appellants will, on signature of this agreement, instruct their attorneys to withdraw their appeal in respect of the costs orders handed down in Respondent's favour in both the Industrial Court and the Labour Appeal Court.

3. In the event that the abovementioned Court upholds the decision of the Labour Appeal Court, the Respondent waives her claim to the compensatory amount which the Appellants were ordered to pay her.

4. The Appellants will pay the Respondent's party-and-party costs, as taxed or agreed, in respect of the proceedings in the Industrial Court, the Labour Appeal Court and the abovementioned Court. In respect of the abovementioned Court, the costs to which the Respondent will be entitled shall not exceed R10 000.00 (exclusive of Value Added Tax)/'

The respective withdrawal notices in compliance with the terms of paragraphs 1 and 2 of the settlement agreement were duly filed and appellants pursued their intention to appeal on such issue or issues as remained.

9 Two days before the hearing of this matter counsel for appellant was requested to prepare argument on the question in limine whether the appeal was not liable to dismissal in terms of s 21A of the Supreme Court Act, 59 of 1959.

The relevant subsections of that section provide as follows:

> "(1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
>
> (3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs."

In supplementary written argument in support of the contention that the appeal should proceed in the ordinary course, appellants' counsel drew attention to the salient contents of an agreement

Θ reached by the parties to the Council. The agreement was published in

Government Notice R1635 contained in Government Gazette 16778 on 27 October 1995, that is to say, shortly after the Industrial Court's order. Pertinent to the present matter was the provision in the agreement of a resolution that with effect from 1 October 1995 the personnel administrative measures embodying the discriminatory provision in question were to be amended and the provision removed. We were not informed that the amendment had in fact been effected but the argument in limin.e proceeded on the clear understanding that this was indeed so.

Accordingly, the upshot of the Council resolution and the pre-appeal agreement reached by appellants and the respondent was, with one exception, to resolve any possible dispute arising from the orders made by the two courts below. More particularly, as from 1 October 1995 respondent became entitled to the housing allowance, thereby achieving the sole purpose with which she declared a dispute and

launched the litigation in the Erst place. The outstanding issue which remained for possible adjudication by this Court was therefore the finding in para 1 of the Industrial Court's order, namely, that, in effect, refusal of the allowance on the ground of the discriminatory provision was an unfair labour practice.

The circumstances sketched above could not but move counsel for appellant to the realistic, and ready, concession at the outset of his argument at the hearing that the setting aside of para 1 of the Industrial Court's order would have no practical effect or result as between appellants and respondent. He therefore settled on the following submission as the be-all and end-all of his argument. Even if no practical effect or result was to be achieved as between the parties, a practical result could be achieved in other respects. He suggested two. The first was that appellants would be freed from the stigma of having been found to have perpetrated an unfair labour practice. The second was the

opportunity open to this Court to lay down the principle - if I understood counsel's formulation correctly - that where the subject matter of an alleged unfair labour practice (not involved in or related to an alleged unfair dismissal) is the focus of negotiations between an employer and the union to which the complainant employee belongs (here, the negotiations referred to in the Public Service Commission's letter quoted above), it is legally incompetent, during the currency of such negotiations, for the employee to take the unfair labour practice allegation to the Industrial Court or for that Court to pronounce upon it.

I shall assume, without deciding, that the practical effect or result referred to in s 21A is not restricted to the position inter partes and that the expression is wide enough to include a practical effect or result in some other respect.

As regards the first suggested practical result - that appellants would be found not to have committed an unfair labour practice

- nothing on the record or said in argument tends to show that the mere existence of the Industrial Court's finding per se has or has had a deleterious effect on the State's or the Department's ability to attract or retain staff. If appellants have indeed harboured any unexpressed fears in that regard, and if indeed that finding engendered employee resentment, the State's readiness to eradicate discrimination and the eventual agreement removing the discriminatory provision concerned must surely have altered the situation entirely. In fact, events since the Industrial Court's order have completely overtaken and overshadowed the impact of that order. Any employee in respondent's position would nowadays no doubt say "What if an unfair labour practice was found? The position is quite different now - equality has been achieved". To litigate with the motive to clear one's name is understandable. However, nothing demonstrates in this case that a finding that there was no unfair labour practice, whilst it might constitute subjective solatium for appellants,

4 would bring about any objectively discernible practical advantages for

them or anyone else whether in the labour relations sphere or at all.

As to the submission that a judgment could be given providing a practical guideline for the solution of similar legal questions in future, the following considerations point the other way. The legislation applicable to this case, the E L R A, was repealed by the Labour Relations Act, 66 of 1995, which came into force in November 1996. This statute has vastly restructured labour relations law. It is not necessary for the purposes of this judgment to summarise the innovations and changes introduced. Suffice it to say, by way of example, that, unlike the E L R A, the new statute contains no definition of unfair labour practices (except in transitional provisions contained in Schedule 7) and no express right of any employee, like that conferred by s 5(1)(f) of the E L R A, to be protected against such defined unfair labour practices. That alleged right was the cornerstone of respondent's case in the courts

below. Quite apart from whether those courts decided the case correctly, her resort to litigation was rights-based and independent of what her union was seeking to achieve in negotiations with appellants. The position would not be comparable under the new statute. Ostensibly similar future problems would have to be decided under that statute. And on their own facts, what is more.

On the further assumption that despite the absence of any issue between the parties circumstances might conceivably create a practical need for this Court to express its view on a particular point of law - perhaps on a matter of wide public interest or urgency or to resolve conflicting High Court decisions - no such need exists here.

Finally, it is desirable that any judgment of this Court be die product of thorough consideration of i a forensically tested argument from both sides on questions that are necessary for the decision of the case. Any judgment on the issue formulated by appellants' counsel

6 would be obiter and based on argument heard from only one side.

The cumulative consequence of all these factors is that no practical effect or result can be achieved in this case. No other reasons were suggested why the appeal should not be dismissed in terms of s 21 A. This is therefore a proper case in which to order such dismissal.

As to costs, all questions on that subject were resolved by what I have called the pre-appeal settlement agreement.

It remains to reiterate the warning expressed in the matter of Premier van die Province Mpumalanga en 'n Ander v Stadsraad van Groblersdal (case 103/96 in this Court, judgment delivered on 25 March 1998) that practitioners keep the provisions of s 21A in mind not only at the stage of an application for leave to appeal but also thereafter.

The appeal is dismissed.

C T HOWIE

MAHOMED CJ) OLIVIER JA) ZULMAN JA) concur
STREICHER JA)