REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / ~~NO~~
(2)	OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3)	REVISED.
.....	**15 MAY 2023**
SIGNATURE	**DATE**

Case No: 36203/20

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **FIRST APPLICANT**

THE MEMBERS LISTED IN "X" **SECOND APPLICANT**

And

SCAW SOUTH AFRICA (PTY) LTD **RESPONDENT**

Neutral citation: *National Union of Metalworkers of South Africa and Others v SCAW South Africa (Pty) Ltd* (Case No 36203/2020) [2022] 484 (15 May 2023)

Summary: High Court – Jurisdiction – Labour matters – Cause of action is based upon the express terms of the written contract of employment between each member and the respondent – High Court has jurisdiction to determine the application.

Labour Law – Contract of employment included a more favourable severance package than provided for in section 41(2) of the Basic Conditions of Employment Act 75 of 1997 – Defence in section 41(4) available to the employer – Applicant's claim bad in law as section 41(6) provides for a specialist statutory dispute resolution dispensation on severance pay – Application dismissed.

ORDER

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1 The application is dismissed with costs.

JUDGMENT

Windell J:

Introduction

[1] This is an application to declare the respondent, SCAW South Africa (Pty) (Ltd) ('the employer'), in breach of the second applicant's ('the members') contract of employment, and an order for the payment of the members' severance pay.

[2] The facts are common cause. On 13 December 2019 the employer dismissed the members from its employment for reasons relating to its operational requirements.[1] The termination letter informed the members that the employer would not be paying the members any severance pay, due to their 'unreasonable refusal to accept the alternative offer of employment' as provided for in s 41(4) of the Basic Conditions of Employment Act, 75 of 1997 ("BCEA"). Section 41(4) states that:

'(4) An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2)'.

[3] Three issues arise in this application: One, whether the high court has jurisdiction to entertain the application. Two, whether the defence in s 41(4) is available to an employer if the claim is pleaded in contract. Three, if s 41(4) is available to the employer, can this court determine the members' entitlement to severance packages as provided for in s 41(6)? In other words, is the claim 'good in law'?[2]

Jurisdiction

[1] Section 41(1) of the Basic Conditions of Employment Act, 75 of 1997 provides that: (1) For the purposes of this section, '**operational requirements**' means requirements based on the economic, technological, structural or similar needs of an employer.

[2] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 95.

[4] Payment of severance pay is governed by s 41 of the BCEA. Section 41(2) provides that an employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to a least one week's remuneration for each completed year of continuous service with that employer. The applicants contend that they do not rely on s 41(2) for the payment of their severance packages, but on an express term of the members' contracts of employment that entitled them to be paid certain amounts upon their retrenchment (including two weeks' severance pay for each completed year of service and an ex-gratia payment also calculated with reference to the terms of service).

[5] The employer contends that the applicants launched the application in the high court, (alleging that their claim is founded purely in contract), only because they are attempting to avoid the jurisdictional requirement of bringing their claim in the Commission for Conciliation, Mediation and Arbitration ("CCMA") or a bargaining council (as required by the BCEA[3]), as well as the application of the employer's defence in s 41(4) of the BCEA . It is submitted that their strategy is fatally flawed because they can avoid neither the jurisdictional hurdle nor the application of s 41(4) of the BCEA. As such, this court lacks jurisdiction to entertain the matter.

[6] In *Gcaba v Minister for Safety and Security and Others*,[4] the Constitutional Court held that in determining whether a court has jurisdiction to entertain a matter, the question in such cases is whether the court has jurisdiction over *the pleaded claim*, and not whether it has jurisdiction over some other claim that has

[3] Section 41(6) of the BCEA.

[4] 2010 (1) SA 238 (CC). See also *South African Maritime Safety Authority v Mckenzie* 2010 (3) SA 601 (SCA) para 7.

not been pleaded, but could possibly arise from the same facts.[5] A claim before a court is, therefore, a matter of fact. In *Makhanya v University of Zululand*,[6] Nugent JA explained as follows:

'[71] Before turning to that explanation there are two observations that I need to make. The first is that the claim that is before a court is a matter of fact. When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'

…….

[95] In this case the claim is for the enforcement of the common-law right of a contracting party to exact performance of the contract. We know this because that is what it says in the particulars of claim. Whether the claim is a good one or a bad one is immaterial. Nor may a court thwart the pursuit of the claim by denying access to a forum that has been provided by law. A claim of that kind clearly falls within the ordinary power of the High Court that is derived from the Constitution and the jurisdictional objection should have failed. The appeal must accordingly succeed.'

[7] The applicants' pleadings contain the legal basis of the claim under which they have chosen to invoke this court's competence and are the determining factor.[7] The applicants' cause of action is not based upon the minimum severance pay which is prescribed by the BCEA. Instead, their cause of action is based upon the express terms of the written contract of employment between each member and the employer (which provides for a contractual entitlement to severance pay in excess

[5] At para 75.
[6] 2010 (1) SA 62 (SCA).

[7] *Gcaba v Minister for Safety and Security and Others* para 75.

of that prescribed by s 41 of the BCEA). This court, therefore, has jurisdiction to determine the application.

Is the defence in section 41(4) available to the employer?

[8] The applicant submits that s 41(4) only provides an employer with a statutory defence to a statutory cause of action based upon s 41(2) of the BCEA. It is submitted that s 41(4) of the BCEA has no application where the employee's cause of action is based upon the express terms of his or her contract of employment. As the applicants do not rely upon s 41(2) of the BCEA, but seek specific performance of an express term of the members' contracts of employment, s 41(4) of the BCEA is not applicable and does not provide the employer with a defence to the claim.

[9] To bolster their argument, the applicants rely on s 4(c) of the BCEA. This section provides that a basic condition of employment constitutes a term of any contract of employment except to the extent that a term of the contract is more favourable to the employee than the basic condition. The applicants contend that because the members' contracts contain provisions more favourable than the statutory minimum severance pay entitlement under s 41(2), their claim is founded purely in contract, with the result that they are not hit by s 41(4).

[10] Firstly, one of the purposes of the BCEA is 'to give effect to and regulate the right to fair labour practices conferred by s 23(1) of the Constitution'.[8] Section 23(1) of the Constitution provides that 'everyone has the right to fair labour

[8] Section 2 of the BCEA.

practices'. This right applies to both the employer and the employee. (See *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others*.[9]) I agree with counsel for the employer, Mr Bham SC, that the provisions of the BCEA must therefore be construed in a manner that recognises that the employer's interests are also at play, and not only those of employees to whom protections are extended by the BCEA. The severance pay provisions in s 41 are no exception.

[11] Secondly, s 4(c) only serves to, (a) ensure that a basic floor of rights applies to all employees, even if no provision is made for such rights in an employment contract; and |(b) recognise that more favourable terms may be extended to employees by their employers. The current matter is a good example of the interplay between s 4 (c) and s 41(2). Section 41(2) obliges an employer to pay severance pay of at least one week's remuneration per completed year of service. When an employer and an employee enter into an employment contract, and a severance package is not provided for in the contract, the severance package provided for in s 41(2) will, in terms of s 4(c), automatically form part of the employment contract. The employee's 'entitlement' to a severance package in that instance is not found in contract, but in s 41(2). But, s 41(2) only provides for the minimum that is payable. The employer, may, of course, pay more. And this is what occurred in the current matter. The members' contracts of employment included a clause providing for the payment of a severance package that is more favourable than what is provided for in s 41(2). The minimum amount payable under s 41(2) is therefore not payable to the members, but the more favourable amount agreed upon in the contract of employment. The *entitlement* to a severance

[9] 2003 (3) SA 1 (CC) paras 36 to 40.

package, whether it is demanded under s 41(2) or under a contract of employment, however, still remains subject to the provisions of s 41, which includes the qualification in s 41(4).

[12] This interpretation of ss 41(2) and 41(4) gives effect to the employer's right to fair labour practices by excluding liability on its part in the event of an employee's unreasonable refusal to accept an offer of alternative employment which would avoid the retrenchment. An agreement to pay an amount of severance pay higher than the minimum can never serve to exclude, from application, the protection afforded to employers in s 41(4). The applicants' construction of s 41 would lead to absurd results because it would deprive the employer of the protection afforded to it in s 41(4), on the basis of the employer having been more generous than it was statutorily obliged to be, in agreeing to a higher severance pay rate than the minimum. Such a construction would be contrary to the underlying purposes of the BCEA. It would disincentives employers from offering employees severance pay which is higher than the statutory minimum, for fear of losing the protection in s 41(4). This is inimical to the objective of protecting employees' interests, and of giving effect to the right to fair labour practices.

[13] This interpretation afforded to s 41, is also in accordance with a number of cases in which the CCMA and bargaining councils entertained severance pay claims in excess of the minimum of one week per completed year of service, under s 41(6), which provides:

‘If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to-

(a) a council, if the parties to the dispute fall within the registered scope of that council; or

(b) the CCMA, if no council has jurisdiction'.

[14] In *Secker v Beacon Sweets & Chocolates (Pty) Ltd (Secker)*,[10] the arbitrating commissioner had to consider whether s 41 of the BCEA applies to disputes over agreed severance packages or is restricted to a failure and/or refusal to pay the statutory minimum in terms of s 41(2). The commissioner found that the CCMA has jurisdiction under s 41(2) to determine a dispute regarding the failure and/or refusal of an employer to pay an agreed severance package, and that s 41 does not restrict the CCMA's jurisdiction to the statutory minimum under s 41(2). It was further held that the 'entitlement' to severance pay in terms of s 41, which can form the subject of a claim justiciable by the CCMA, 'derives either from the Act or an agreement, whether collective or individual'. The words 'at least' in s 41(2) were held to 'suggest... that s 41(1) contemplates or includes in its embrace disputes about payments other than the statutory minimum'. This conclusion was endorsed by the Labour Court in *Telkom (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*,[11] wherein it was held that:

'[11] Section 41(6) provides: "If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to a council or the CCMA". The reference to "in terms of this section" restricts the court and a commissioner to make a determination only in terms of the statutory minimum or an agreement if there is one. In my view if the rate formula or method of calculation is agreed the court or a commissioner may enforce it even if it is more than a week per year of service."(Own emphasis.).

[15] The applicants' reliance on *Zietsman & Others v Transnet Ltd* [12] and *Sibanye Gold Ltd v Commission for Conciliation, Mediation & Arbitration & Others,*[13] in support of their argument, is therefore misconceived. Both judgments dealt with

[10] *Secker v Beacon Sweets & Chocolates (Pty) Ltd* 2000 21 ILJ 2767 (CCMA).
[11] *Telkom (Pty) Ltd v CCMA* [2004] 8 BLLR 844 (LC).
[12] (2008) 29 ILJ 779 (LC).
[13] (2021) 42 ILJ 2467 (LC).

s 35(5), that provides for the calculation of remuneration and wages, based on the number of hours the employee ordinarily works. In *Zietsman*, the Labour Court found that s 35(5) did not apply to the calculation of the amount of severance pay due to an employee under a contract of employment which provided for more severance pay than the statutory minimum under s 41(2). The court reasoned that such a payment is a payment made pursuant to the agreement, and not pursuant to the provisions of the Act. The dictum in *Zietsman* does not assist the applicants as it dealt with the *calculation* of severance pay and found, (correctly in my view) that the *calculation* should be done in terms of the contract and not in terms of the BCEA.[14] In *Sibanye* the parties had concluded a retrenchment agreement which provided that severance pay and notice pay were to be calculated on the basis of the employee's basic salary. In the arbitration, the commissioner proceeded to apply s 41(2) to the matter by *calculating* severance pay in the manner provided for in s 41(2). The court expressly distinguished the issue that it was dealing with (i.e, an entitlement to an acting allowance in the context of calculating remuneration), from that in *Telkom v CCMA* (i.e. the enforcement, under s 41, of a severance pay claim above the statutory minimum). The court concluded that the commissioner had misconstrued the enquiry when he disregarded the binding agreement between the parties which evidently ousted the application of s 41 of the BCEA. The court therefore recognised that the principle in *Telkom v CCMA*, to the effect that s 41 applies in severance pay claims above the statutory minimum, holds good - and did not deviate from it.

[16] Consequently, the applicants' *entitlement* to severance pay is founded in s 41(2) and if the employment contract provides for a more favourable severance

[14] See also *SA Typographical Union obo Van As & others v Kohler Flexible Packaging (Cape) (A Division of Kohler Packaging Ltd)* (2001) 22 ILJ 1892 (LC) para 17.

package than what is provided for in s 41(2), the calculation of the severance pay must be done in terms of the contract. The wording of s 41(4) is therefore capable of being interpreted as having application to private contracts dealing with severance pay and the distinction the applicants seek to draw between contractual severance pay arrangements and the provisions of the BCEA on severance pay, is not sustainable. The two are not mutually exclusive — and the statutory regime on severance pay, including s 41(4), remains applicable even if there is an agreement on enhanced severance pay amounts.

The implication of s 41(6)

[17] Before approaching this court, the applicants first referred the dispute about the entitlement to severance pay to the Engineering Industries Bargaining Council ("MEIBC") in terms of s 41(6) of the BCEA. They, however, withdrew the dispute from the MEIBC, when they 'realized that its members' claims did not relate to the statutory minimum'. Although the applicants agree that a dispute in relation to whether an employee is entitled to severance pay under s 41(2) must be referred to the CCMA (or a bargaining council — if one exists), they submit that a dispute in relation to an entitlement to severance pay under an express term of the contact of employment need not be referred to the CCMA.

[18] However, during the hearing of this application the applicants argued that even if ss 41(2) and 41(4) of the BCEA applies, the employer did not make an offer of alternative employment to each of the members, but only made a general proposal which entailed 54 members being retrenched with the remaining members continuing to be employed on less favourable terms. As a result, so it was argued, there was no unequivocal offer of definite employment made to any employee.

[19] Although this argument is a new case not foreshadowed in or supported by the evidence in the affidavits, I am not convinced that the entitlement to severance pay and concomitant with that, the question whether the refusal to accept it was unreasonable, can be determined by this court. That is because s 41(6) of the BCEA specifically provides for a bargaining council or the CCMA to determine severance pay disputes. This specialist statutory dispute resolution dispensation on severance pay, applies to severance pay claims both for the statutory minimum severance pay amount as per the BCEA, and for contractually agreed amounts in excess thereof. The applicants cannot avoid the jurisdiction of the CCMA by alleging that if a better deal has been struck in a contract for severance pay then the high court has jurisdiction to decide the entitlement to severance pay. This is unsustainable.

[20] In *Secker* the commissioner, in dealing with the CCMA's jurisdiction to determine a dispute regarding the failure and/or refusal of an employer to pay an agreed severance package, said the following:

'Section 41 is the only section that deals exclusively with severance pay. Interestingly, it is the Labour Court's jurisdiction that is qualified in that *it* may deal with the issue of severance pay if it is also adjudicating a dispute about a dismissal for operational reasons. It appears that, giving effect to an important purpose of the Act ie that of ensuring the speedy, inexpensive and effective resolution of disputes in the CCMA, this less formal, less costly and quicker body is meant to deal with all severance pay disputes which can be determined on the basis of statutory or contractual entitlement. This purpose is frustrated if the CCMA is to have no jurisdiction in severance pay disputes just because they are distinguished by arising from an agreement. Neither will the purposes of the Act be served should such simple disputes be referred to the Labour Court. There is nothing inherently difficult about the kinds of disputes I have described,

especially since the CCMA is deemed capable of arbitrating reasonably complex disputes regarding, for instance, the interpretation and application of collective agreements as well as certain dismissals.

The argument that disputes about severance pay agreements such as the present one, are matters for the civil courts, in my view, untenable. A dispute about the payment of an agreed upon severance amount exists within the 'jurisdictional milieu' of labour law. It is a labour dispute, not a civil matter, properly decided by whatever structures are brought into being by the LRA, which I have found above to be the CCMA in this instance.'[15]

[21] I agree with the views expressed in *Secker*. In *Chirwa v Transnet Ltd and Others*, [16] the Constitutional Court recognised that the Labour Relations Act 66 of 1995 created a specialised set of forums and tribunals to deal with labour and employment-related matters. Ngobo J explained it as follows:

'[102] It [the LRA] establishes an interlinked structure consisting of, among others, various bargaining councils, the CCMA, the Labour Court and the Labour Appeal Court. It also creates procedures designed to accomplish the objective of simple, inexpensive and accessible resolution of labour disputes, which is one of the purposes of the LRA. In this scheme the role of the CCMA and the exclusive jurisdiction of the Labour Court are vital. The Labour Court does not itself generally hear disputes as a court of first instance. But neither does the CCMA have exclusive jurisdiction as against the Labour Court. The Labour Court sits as a court of first instance in certain matters. And in some cases it does so after conciliation has been unsuccessful. The dispute resolution scheme of the LRA is therefore all-embracing and leaves no room for intervention from another court.'

[22] In the same vain, Skweyiya J remarked that:

'[47] The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with all aspects

[15] 2000 ILJ p2771at A-G.
[16] 2008 (4) SA 367 (CC).

of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes.'

[23] Viewed in this context, s 41(6) of the BCEA created a specialist statutory dispute resolution dispensation to determine an employee's entitlement to severance packages. The applicants were bound to pursue their dispute through this bespoke and specialist dispute resolution dispensation.

[24] In the result the following order is made:

1 The application is dismissed with costs.

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L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG
(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 May 2023.

APPEARANCES

Counsel for the applicants: Advocate L. Spiller

Attorney for the applicants:	Cheadle Thompson & Haysom Inc
Counsel for the respondents:	Advocate A. Bham SC
Attorney for the respondent:	Wilken Incorporated
Date of hearing:	6 February 2023
Date of judgment:	15 May 2023