IN THE LABOUR COURT OF SOUTH AFRICA

Case No. C495/2008

Reportable

In the matter between:

IVAN EBRAHIM	First Applicant
GERALD JOSHUA	Second Applicant
DEREK WYNGAARD	Third Applicant
WILLIAM JANSEN	Fourth Applicant
FINDLAY PEARCE	Fifth Applicant

And

SANS FIBRES (PTY) LIMITED	Respondent

JUDGMENT

GUSH, J.

1. In this matter the Applicants, relying on Section 77(3) of the BCEA applied to this court for order declaring that in terms of their contracts of employment they were entitled to be paid a severance package in accordance with the Respondent's "*Retrenchment/Redundancy Policy"*.

2. The Applicants had all been employed by the Respondent in its IT Department prior to their retrenchment in 2008. When they were retrenched they were paid severance benefits in accordance with the provisions of section 41 of the Basic Conditions of employment Act 75 of 1997 (BCEA). At the time of their retrenchment all the Applicants had been employed in accordance with the same contract of employment. The Applicants' claim was based on their averment that on a proper interpretation of this contract they were entitled to the benefits of an enhanced severance package in accordance with the Respondent's "*Retrenchment/Redundancy Policy"*.

3. At the commencement of the trial the parties, helpfully, filed an "Agreement in Regard to Trial Issues" which agreement recorded that:

"*1. The issues in dispute are:*

1.1 Whether a retrenchment policy applied to the applicants.

1.2 If so,

1.2.1. Which retrenchment policy applies' and

1.2.2. How the applicant's severance packages are to be calculated in terms of such policy.

2. In the event that the Court finds that a severance policy applies to the applicants,

2.1 it shall apply for the entire periods of the applicants' service as used by the respondent for the calculation of their BCEA packages, and

2.2 the Parties shall be given 21 days from the date of judgment to agree on the calculation of the amounts due

to them, failing which the matter shall be placed on the roll to be determined by the Court.

3 The document on pages 4 to 6 of Bundle A is the contract that applies to all the applicants in the relevant respects"

4. The Applicants were, at all times relevant to this matter, known and referred to as "contract employees" and their contract differed from the contracts of employment of the other employees of the Respondent. The other employees were known and referred to as "payroll employees" "staff employees" or "permanent employees" as opposed to "contract employees". In his evidence the First Respondent explained that the Applicants had been referred to as "FTC's" or "fixed term contractors", although the contract was not a fixed term contract.

5. The Applicants based their claim purely on what they averred was a contractual entitlement to the enhanced retrenchment benefit, or as it was described in the Respondent's "*Retrenchment/Redundancy Policy",* an "ex gratia payment".

6. The Applicants claim is dependent firstly upon proving that the following clauses in their contracts of employment viz:

"The terms and conditions of your employment are in accordance with the Basic Conditions of Employment Act ... and as set out hereunder…" and

"Your employment is subject to the Company's Code of Conduct and AECI's Code of Ethics, relevant Company Rules and Procedures as set out on the SANS intranet. …"

being interpreted to mean that they fell within the category of employees who were entitled to the benefit of the Respondent's "*Retrenchment/Redundancy Policy",* and secondly which retrenchment policy applied or in other words what were the terms of the applicable retrenchment policy. Whilst the parties did not deal with the onus in the pre trial minute but merely recorded that the Applicants would begin there is no doubt that the Applicants bore the onus to prove that their contracts entitled them to the benefits of a retrenchment policy and what the terms or benefits of that policy were.

7. The background to the Applicants' status as "contract employees" was that during the course of their employment all the Applicants had elected to change the nature of their employment relationship with the Respondent by becoming what they described as "contract employees". The First and Third Applicants were originally employed by the Respondent prior to 2002 as a "payroll employee" and a "salaried employee" respectively. The Applicants' evidence was that the First and Third Applicants had prior to 2004 elected to become independent contractors. In 2004 due to changes in the labour legislation they had entered into the current contract which had been amended to accommodate these changes in the legislation. The Second Fourth and Fifth Respondents had been "salaried employees" prior to becoming "contract employees" when they signed new contracts of employment in August 2005, February 2006 and March 2006 respectively. These contracts were the same contracts that the First and Third Applicants had signed.

8. The Applicants explained that the reasons for having chosen to become "contract employees" and therefore enter into the specific contracts was that firstly the contract allowed them greater flexibility in their working conditions which specifically included the right to work for other persons for their own benefit whilst still contracted to the Respondent; and secondly it gave them greater flexibility in the way in which their remuneration was calculated and paid. Their remuneration based on an hourly rate for work actually performed and the Respondent did not make any deductions for either medical aid or retirement funding. They were to be responsible for their own provision for medical aid and retirement.

9. The Respondents maintained that the contract signed by the Applicants specifically and intentionally excluded any reference to a retrenchment policy and therefore did not entitle the Applicants to an enhanced severance benefit. It was for that reason that the contract referred expressly to the BCEA and excluded any reference to policies. The contract, according to the Respondent, intentionally referred to the BCEA and accordingly the Applicants were only entitled to the benefits of provided for in Section 41 of the BCEA. The Respondent further averred that not only was the policy that the Applicants relied upon, not applicable to "contract employees" but in any event it was not the relevant policy in force at the time that the retrenchments took place in February 2008.

10. All the Applicants gave evidence. Whilst their evidence differed in certain non material respects what was common cause their evidence

was the fact that the time each one had elected to enter into the contract they had not discussed their entitlement to any severance package and specifically not canvassed whether or not such a policy applied to contract employees. The First Respondent said that he was never told that the retrenchment policy would not apply, nor had he discussed the relevance of the significance of the absence of any reference to "policies" in the contract. The Second Respondent's evidence was that he didn't think at the time that he would lose his retrenchment benefits although the issue was not canvassed. Third Respondent was refreshingly candid and said that whilst he had noticed the reference to the BCEA he had not considered its relevance. Neither had he considered whether he was entitled to the benefits of a retrenchment policy prior to retrenchment process commencing. In similar vein the Fourth Respondent said he was not aware that he would lose any benefits and at the time of signing the contract did not think about retrenchments. Likewise the Fifth Respondent did not consider the implications of being retrenched as a contract employee at the time of signing his contract and that it was only when the retrenchment process commenced that he considered the issue and the applicability of the retrenchment policy.

11. The Applicants confirmed firstly that the purpose of the contract was to allow them to perform services for reward for other entities and that the Respondent would therefore only pay them for the actual hours that they worked for the Respondent. Secondly that the basis of the calculation of their hourly rate gave them greater financial flexibility. The new contract provided that their remuneration structure, unlike the

Respondent's salaried employees, was purely an hourly rate and apart from complying with the required statutory deductions such as income tax the Respondent did not make any other deductions, such as for retirement funding or for medical aid membership.

12. The Applicants maintained that when it became clear that a retrenchment process was about commence they had referred to the policies which appeared on the Respondent's intranet and concluded that they were, by virtue of their contracts of employment entitled to the benefits of the "*Retrenchment/Redundancy Policy"* and in particular the "ex gratia payment". It appears however from the documentation contained in the agreed joint bundle that the Applicants only raised the issue at the time of the consultation process and the issuing of retrenchment letters in January and February 2008. At that time the Applicants were apparently relying on fairness as opposed to a contractual entitlement to the benefit of the policy.

13. The Applicants were aware of the fact that their contract, unlike the contracts of the salaried employees referred specifically to the BCEA. First Applicant, in an email to the Respondent during the retrenchment process in February 2008, confirmed that the Applicants were

> *""contract employees" – regulated by the BCEA"*

and recorded that:

> *"We understand that our conditions of employment are regulated by the BCEA, but also, that this defines the bare minimum that the company is legally entitled to pay out as a severance package under the prevailing circumstances.*

Comparing employee Categories 1[Payroll Employee] and 2 [Staff Employee] below, one of the few common conditions of employment is the application of the SANS' Retrenchment Policy – specifically the Ex- Gratia Payment Model. By excluding Category 3 [Contract Employees- the Applicants], your stance is hardly "fair to all our employees" in our view"

14. Two witnesses gave evidence on behalf of the Respondent. The first witness had been a senior member of the Respondent's IT department where all the Applicants had worked and too was no longer employed by the Respondent. He had been the pioneer and architect of the independent contracting arrangement adopted by the Respondent to accommodate the IT employees. He was of the opinion that as an independent contractor he had not been entitled to severance benefits and when the contract was changed, in 2004, he regarded the entitlement to the benefits of the BCEA and in particular the severance pay to have been a bonus. He was adamant that it was never intended that the contract employees' contract would include the "*Retrenchment/Redundancy Policy"* and therefore they were not entitled to the "ex gratia payment".

15. The Respondents second witness, also an erstwhile employee of the Respondent, had been employed in the Human Resources Department as a human resource consultant. She explained that the terms and conditions of the contract employees were materially different from the payroll and staff, or salaried employees. These differences included that the Applicants contracts were specifically subject to the BCEA as

distinct from the more favourable conditions enjoyed the salaried employees; they were not paid a set monthly salary but were paid per hour only for each hour actually worked; and they were not confined to rendering services to the Respondent only but were entitled to perform services for reward for other employers. She also explained that the Respondent's retrenchment policy changed with each retrenchment process and that most certainly the policy in force at the time of the retrenchment of the Applicants did not apply to them. She endeavoured to explain what changes had been made to the policies over the period in question. She averred that the Applicants' contracts specifically excluded the Respondents retrenchment policies. In particular she explained that the intranet policy which was available on the intranet at the end of October 2007 was not applicable to the 2007/8 retrenchments. The Respondent had amended it in anticipation of the commencement of the consultation process but that it also specifically excluded the Applicants.

16. The Applicants remained adamant that the applicable policy was that which was available on the Respondent's intranet at the end of October 2007 policy and that this policy should have been applied to their retrenchment in calculating their severance pay.

17. The policy which appeared on the Respondent's intranet set out in detail how the "ex gratia payment" was to be calculated. The calculation was based on a determination of the employees "normal remuneration" or "retirement funding remuneration" to which a specific formula was applied. The "*Retrenchment/Redundancy policy*" specifically provided

that the basis of the enhanced benefit calculation was "normal remuneration" whereas the Applicants' contracts did not provide for "normal remuneration" but only stipulated an hourly rate for services actually rendered.

18. Both the Applicants' and the Respondent's witnesses gave evidence regarding whether or not it was possible to apply the formula set out in the "*Retrenchment/Redundancy Policy"* to the Applicants' contract in order to calculate the quantum of the "ex gratia payment".

19. The Respondent's evidence was that the policy could not be applied as it required as a fundamental basis for the calculation the determination of a retrenchees "normal remuneration" or "retirement funding remuneration". The Respondent's argument was that as the Applicants were employed on an hourly rate only for hours actually worked and that as they were able to tailor their working hours to suit their personal requirements which included the right to perform services for reward elsewhere for outside entities, they did not work set hours and therefore it was not possible to determine what their "normal remuneration" was. They did not receive "normal remuneration", as opposed to the salaried employees.

20. The Applicants maintained that it was possible to determine their normal remuneration. In support thereof they referred to a document in the bundle headed ***"HOURLY PAID (PAYROLL AREA 4) Remuneration Package Specification – Post Restructuring) Rev 1a of 04-01-30).*** [The Applicants fell under the category ***"HOURLY PAID***

(PAYROLL AREA 4)"] This document included a clause headed "**Normal Remuneration (NR)**". The Applicant's suggested that this was evidence that the Applicants did in fact receive "normal remuneration" and that accordingly it was possible to establish what each Applicant's "normal remuneration" was. The Respondents answer to this submission was that the reference to "normal remuneration" was merely a reference to a figure used in the calculation of the Applicants' hourly rate.

21. A careful consideration of the clause itself does not support the Applicants' contention. The wording and context of the clause supports the Respondent's explanation that the reference to "normal remuneration" in the document was a reference to a notional figure used to establish the hourly rate to be included in each individual contractor's contract.

22. The evidence regarding which was the relevant and applicable policy and whether or not it could be applied is, however, only relevant if a "*Retrenchment/Redundancy Policy"* applied to the Applicants' contracts and that they were contractually entitled to the enhanced benefit.

23. The parties agreed in the "Agreement in Regard to Trial Issues" that the primary issue to be decided was "*whether a retrenchment policy applied to the applicants",* and in argument confirmed that the only basis for determining this issue was by having regard to the contract itself and the interpretation thereof in order to ascertain whether or not a retrenchment

policy constituted a term and condition of the contract. The Applicants did not rely on any of the provisions of the Labour Relations Act (LRA) regarding retrenchments nor did they allege unfairness in the process adopted by or the decision of the Respondents. Surprisingly, it was not the Applicant's case that the Respondent had unfairly refused to pay them the "ex gratia payment" but they chose to rely solely on a contractual entitlement to the enhanced package.

24. The relevant clauses of their contracts are:

"The terms and conditions of your employment are in accordance with the Basic Conditions of Employment Act (hereinafter "The Act") and as set out hereunder.

...

General

...

7.3 Your employment is subject to the Company's Code of Conduct and AECI's Code of Ethics, relevant Company Rules and Procedures as set out on the SANS intranet. ..."

25. The parties were at idem that in answering the first question viz "*Whether a retrenchment policy applied to the applicants"* was dependent solely upon the interpretation of the Applicants' contract and in so doing it was required to apply the parol evidence rule

26. In DELMAS MILLING CO LTD v DU PLESSIS 1955 (3) SA 447 (A) the court in dealing with the parol evidence rule held the following:

"Where although there is difficulty, perhaps serious difficulty, in interpretation but it can nevertheless be cleared up by linguistic treatment this must be done. The only permissible additional evidence in such cases is of an identificatory nature; such evidence is really not used for interpretation but only to apply the contract to the facts. ... If the difficulty cannot be cleared up with sufficient certainty by studying the language, recourse may be had to 'surrounding circumstances' i.e. matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements). ... But this does not mean that if sufficient certainty as to the meaning can be gathered from the language alone it is nevertheless permissible to reach a different result by drawing inferences from the surrounding circumstances. Whether there is sufficient certainty in the language of even very badly drafted contracts to make it unnecessary and therefore wrong to draw inferences from the surrounding circumstances is a matter of individual judicial opinion on each case. (page 454 F to 455 B)

27. This approach has consistently been applied in our law. See **TOTAL SOUTH AFRICA (PTY) LTD v BEKKER NO 1992 (1) SA 617 (A)**

"What is clear, however, is that where sufficient certainty as to the meaning of a contract can be gathered from the language alone it is impermissible to reach a different result by drawing inferences from the surrounding circumstances ... The underlying reason for this approach is that where words in a contract, agreed upon by the parties thereto, and therefore

common to them, speak with sufficient clarity, they must be taken as expressing their common intention."(page 624 I to 625 A)

and **KPMG CHARTERED ACCOUNTANTS (SA) v SECUREFIN LTD AND ANOTHER 2009 (4) SA 399 (SCA)**

First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) Phipson on Evidence (16 ed 2005) paras 33 - 64).

Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background

circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See Van der Westhuizen v Arnold 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another 2008 (6) SA 654 (SCA) para 7.) (page 409 F to 410 B)

28. It was clear from the evidence that the Applicants' contracts differed significantly from the standard salaried employee contract ("standard contract". Some of these differences are material in interpreting the meaning of the Applicants contract. They serve to place the Applicants contracts in "*context*". These differences are:

24.1. The applicants' contracts provide that *"The terms and conditions of your employment are in accordance with the Basic Conditions of Employment Act",* whereas there is no similar provision in the "standard contract";

24.2. The Applicants' contracts are made "*subject to the Company's Code of Conduct and AECI's Code of Ethics***, *relevant Company Rules and Procedures*** *as set out on the SANS intranet.",* whereas the "standard contract" is subject to "***Company <u>Policies</u> and Procedures and the company rules****..."* (My emphasis);

24.3 The "standard contract" contains a clause which deals with avoiding conflict of interest and prohibits the employee from performing work for remuneration outside the service with

SANS without prior permission whereas according to the Applicants' their contracts were specifically designed to ensure that they could perform outside work for remuneration; and

24.4. The "standard contract" refers specifically to "*normal remuneration*" whereas the Applicants' contracts specify under the heading "Remuneration" that they would be paid at a rate "*per hour of service rendered to the Company"*

29. In the light of these differences and having regard to the parol evidence rule the meaning of the words used in the Applicants' contracts is clear. As was held in **TOTAL SOUTH AFRICA (PTY) LTD v BEKKER NO (supra)** " *where sufficient certainty as to the meaning of a contract can be gathered from the language alone it is impermissible to reach a different result by drawing inferences from the surrounding circumstances"*

30. The inclusion of the reference to the BCEA in the Applicants' contracts (given its omission from the "standard contract") can only be interpreted to mean exactly what it says viz that the that the *terms and conditions of ... employment are in accordance with the Basic Conditions of Employment Act".* It matters not that this act only regulates minimum standards; the clause in the contract simply makes those minimum standards applicable to the Applicants. If there was an agreement to improve those minimum conditions then the contract would have expressly provided for more favourable conditions. The Respondents "*Retrenchment/Redundancy policy*" provided for a substantial enhancement of the severance benefit for those to whom it

applied and being more favourable would apply as provided for in Section 4(c) of the BCEA.

31. The question which then arises is whether the clause viz "*Your employment is subject to the Company's Code of Conduct and AECI's Code of Ethics, relevant Company Rules and Procedures as set out on the SANS intranet."* can be interpreted to mean that the enhanced benefit of the "*Retrenchment/Redundancy policy*" was part of their contracts and that accordingly their contracts contained a term which was *"more favourable to [them] than the basic condition of employment"* Section 4(c) of the BCEA.

32. The Applicants' contracts are distinguishable from the "standard contract" in that unlike the "standard contract" it makes no reference to "policies" but only to "rules and procedures". It was not suggested at any stage that the parties had by common mistake omitted the reference to "policies". In those circumstances the only conclusion that can be drawn is that the parties had intentionally left out the reference to "policies" and that in so doing intended that the contract would not be subject to any of the Respondent's policies.

33. The Applicants contended that on the Respondents intranet the Respondent drew no express distinction between "rules", "procedures", "codes", "guidelines" and "policies". It was further argued that certain policies did in fact apply to the Applicants and accordingly the "*Retrenchment/Redundancy policy*" should apply. The difficulty with this argument is that the court is simply required to apply the parol

evidence rule' in interpreting the contract and this evidence relating to the application of other policies by the Respondent to the Applicants despite the specific exclusion of a reference to policies in the contract amounts to evidence of "surrounding circumstances" and is therefore inadmissible. It is not evidence that can be said to *"contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification..."* DELMAS MILLING CO LTD v DU PLESSIS (Supra).

34. What is admissible, in that it is relevant to "contextualise" the contract, is the evidence surrounding background to the contract and in particular the difference between the "standard contract" and the Applicants' contract dealing with an employee's obligation to the Respondent. The evidence established firstly that the contracts signed by the Applicants were designed specifically to provide flexibility in both remuneration and to relieve the Applicants of the usual employee's obligation to provide services exclusively to the employer and in accordance with laid down specific working hours. This is to be contrasted with the specific terms set out in the "standard contract". The import of this, in contrast with the "standard contract" is that the Applicants were paid only when they rendered services to the Respondent as opposed to receiving a set monthly salary or "normal remuneration" in exchange for rendering services exclusively to the Respondent during fixed working hours. The Respondent's "ex gratia payment" was paid *"... in recognition and appreciation of the employee's service contribution to the Company."* and was calculated by reference to length of service. In

the Applicants' case it is unclear as to how their length of service would be calculated in these circumstances.

35. In considering whether, in the context of severance pay, the retrenchment policy was applicable to the Applicants were, it is relevant that the ex gratia payment constituted but a part of the severance benefit payable to employees when retrenched. Under the heading *"10.1 Retrenchment",* in the policy the Applicants aver is a term and condition of their contract, the benefits to which employees are entitled are listed. In each instance the benefit to which the retrenched employee is entitled, couples the ex gratia payment with the employee's entitlement to the benefits arising from their membership of either the pension or provident fund. It must be noted that one of the express purposes of the Applicants in becoming contract employees was to avoid the obligation to be members of the Respondents retirement funds so that they could enjoy the freedom to provide for their retirement as they saw fit. Accordingly none of the Applicants were members of either fund and would not have been entitled to the entire severance benefit as recorded in the policy.

36. In so far as the retrenchment policy referred to and required as a basis for the determination of an employee's ex gratia payment, the quantam of the employees "*normal remuneration*" it is relevant that the Respondent's *"standard contract"* specifies exactly what the employees "*normal remuneration*" and *"retirement funding remuneration*" is, as opposed to the Applicants' contract which

stipulates only an hourly rate. If the Applicants' remuneration was considered "*normal remuneration*" their contracts would have said so.

37. I am therefore satisfied that as "*there is sufficient certainty in the language of ... [the] contracts",* given the express omission of any reference to the contract being subject to the Respondent's policies and the differences between the Applicants' contracts and the Respondents *"standard contract"* the Applicants were not contractually entitled to the benefits of the Respondents "*Retrenchment/Redundancy policy*", in whatever form as the policy did not constitute a term and condition of their employment. Therefore the answer to the first issue to be determined viz *"Whether a retrenchment policy applied to the applicants"* is no.

38. Both the Applicants and the Respondent led extensive evidence regarding the actual policy that was applicable at the time. This evidence is only relevant if it was necessary to determine which policy applied. As the applicants' had elected to rely solely on their contractual rights, issues of fairness are irrelevant. The fairness (or lawfulness) of the conduct of the Respondent, the niceties of the distinctions they sought to apply between the various retrenchment policies and the questions surrounding their right of the Respondent to unilaterally change its policies may have been relevant had the dispute been differently framed. However as the dispute was confined to an interpretation of the contract and as the contract did not provide for a right to the benefits of a retrenchment policy this evidence is irrelevant.

39. Having found that no retrenchment policy applied to the applicants the balance of the issues to be decided fall away. In the circumstances I make the following order:

The Applicants' application is dismissed with costs

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GUSH, J.

Date of Hearing	:	10th- 11th March and 10th - 11th May 2010
Date of Judgment	:	23rd July 2010.

Appearances

For the Applicants	:	Advocate P Kantor,
Instructed by	:	Irish Inc Attorneys.
For the Respondent	:	A Niewoudt of Deneys Reitz Inc.