

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO 27 OF 2001
(Previously Court of Appeal Civil Appeal No. 37 of 1998)

IN THE MATTER OF:

BOTSWANA MEAT COMMISSION

APPELLANT

AND

**RICHARD MOETI
GEORGE ABOTSENG**

**1ST RESPONDENT
2ND RESPONDENT**

**B.B. Tafa FOR THE APPELLANT
D.B. LEBURU FOR THE RESPONDENTS**

J U D G M E N T

**CORAM: TEBBUTT Ag. J.P.
 ZIETSMAN J.A.
 PLEWMAN J.A.**

PLEWMAN J.A.:

This appeal concerns the rights of the two respondents who are employees of the appellant, the Botswana Meat Commission (B.M.C.). Appellant is a statutory body created in terms of the Botswana Meat Commission Act (Cap: 74:04). It is of some importance that the evidence now before this Court (adduced in a manner to be presently discussed) established that appellant is not a government department

but a wholly independent concern which determines the terms and conditions of its contracts with persons employed by it.

The nature of the present dispute can be very briefly stated because the complete history of the matter is set out in the judgment of this Court in January 2000. All that need be said is that in 1990 appellant undertook a programme of modernisation of its power stations. One consequence of this upgrading was that some twenty-five of its employees became redundant and liable to retrenchment. Respondents are two of the workers so affected. At the time they were employed on a wage grade described as "A3 Notch 1".

A decision was taken, in consultation with respondents and their union, to re-deploy them, if this could be done, in other posts in appellant's installations. The only posts which could be found for respondents were ones on a lower grade than A3 Notch 1 - that is in posts in which the wage was lower than that which respondents had received as workers on the grade A3 Notch 1. Their transfer was made on the basis of what is described as the "personal right rule". This was an arrangement which ensured the continued payment of their former wage notwithstanding the fact that they were transferred to posts on a lower grade. The mechanism devised (the personal rights rule) was one intended to freeze the wages of an employee transferred in this manner until the wages of the lower grade had increased over time, to be the same as the wage being paid to such employee at the

time of redeployment and transfer. Wages at BMC were at the time increased annually by an increment made in January (which was performance based) and an increment made in April (which was based on a rise in the rate of inflation.) In the years 1992 to 1996 appellant accorded neither increment to respondents. Respondents did not challenge the non-payment of the January increases but contended that they were entitled to the April increases. This was the matter in dispute.

The matter comes before this court again in the following way:

The dispute was first dealt with by the Industrial Court in 1996. That Court then held in appellants' favour. Its decision was appealed to this Court and this Court (as indicated above) gave its decision in January 2000. It held that the Industrial Court had misdirected itself as to the issue before it. After pointing out that respondents did not question either the existence or the objective fairness of the rule and that they questioned only the meaning of the rule and its application to the respondents, the judgment continues:

“The court a quo, however took it, and I think erroneously, that what it was called upon to decide was the intrinsic fairness of the personal right rule”.

This is indeed what the Industrial Court had done holding that the personal right rule was fair. This Court, however, held that the question posed by the parties for

decision by the Industrial Court was simply one of interpretation so as to determine the scope of its application.

This Court (on the evidence then on record) said further that there was evidence to show that the April increments were different from the January increments. It therefor set aside the Industrial Court's Order and directed it, using its investigative powers if it was necessary to do so, to determine not the objective fairness of the personal right rule but the proper interpretation or meaning of the rule.

In the result there was a further hearing before the Industrial Court. Respondents were content to rely on the evidence already on record but appellant led additional evidence and the court itself called the Director of Public Service Management. I need not refer to this in any detail because in argument before us it was common cause that BMC was not, as had been suggested at the original hearing, obliged to follow any government policies and therefore not obliged to follow the government policy in paying the April inflation increments. That, in fact, is what the Industrial Court in its second judgment held. It said:

"The Court finds that BMC was and is not obliged to follow any government policies and therefore BMC was and is not obliged to follow any government policy in paying the April inflation increments."

That being the case it would seem that the observation by this Court in its earlier judgment that if the Industrial Court were to determine that the personal right rule

entitled BMC to withhold not only the January increment but also the April increment (that is, that it was not bound to follow the government's policy with regard to inflationary increases) the present appellant "must succeed" applies. Since that is just what the additional evidence showed (and indeed, as set out above, what the Industrial Court found) it should have followed that the Industrial Court would find in appellant's favour. But this is not what happened. Instead in consequence it made a determination in the following terms:

"1.) The scope of the personal right rule should not have included the April increments of applicants (that is present respondents) while they were on personal right."

What this means is that while the January increment could be excluded in the computation of respondents wages the April increment had to be included.

As was pointed out by Mr. Tafa, on behalf of appellants, the Industrial Court has again misdirected itself. In its second judgment it records that the investigation it had been directed to make by this Court was one "into the objective fairness or otherwise of the application of the (personal right) rule to the April increases, based on inflation."

It is manifest that this is a fresh misdirection. That is precisely what this Court enjoined it not to do. It was requested by this Court to determine if the BMC was

obliged to follow any government policy in respect of the payment of the April increments and not whether BMC's personal rights rule was fair or not.

Instead it embarked upon an enquiry as to whether it was fair for BMC to apply the personal right rule also to the April increments. In its judgment the Industrial Court said this:

"The question is whether the Respondent was correct in the way it applied the personal right rule to the April increments or to put it in Labour Law terminology, was it fair for the Respondent to apply the personal right rule also to the April increments."

After a lengthy discussion on the history of inflation – based increments and what it envisaged the purpose of the April increments to be, the Industrial Court found as follows:

"On a fair interpretation of the personal right rule, the Court consequently finds that the scope thereof should not include the April inflation increments."

In fact the entire problem can be easily (and shortly) solved. Letter of 8 January 1991, addressed to all BMC employees affected, makes it clear that respondents "hourly rate" was not to change until respondents' new post was upgraded to give an hourly rate equal to that paid to respondents, that is the wage in their previous posts.

The material position of the letter reads:-

"Your current position of ... is on A3 wage grade. As your hourly rate is above your positions wage grade you will remain on personal right. This means that your hourly rate will not change until your position is graded higher."

What respondents contend for would change their "hourly rate". In the absence of any legal compulsion on BMC to change that rate in accordance with inflation, as the Industrial Court correctly found, respondents' hourly rate would on a contractual basis remain at its original level until the condition envisaged by the personal right rule brought wages being paid to the fellow workers in similar positions into parity with respondents' wages.

I am of the view that the appeal must succeed. The order I make is: -

1. The order and determination of the Industrial Court dated 5 July 2001 is set aside.
2. There is substituted therefore the following "The applicants claims are dismissed."

It was not suggested that the Industrial Court's original Order as to costs should be altered but respondents are ordered to pay the appellant's costs of appeal.



C. PLEWMAN
JUDGE OF APPEAL

I AGREE:



P.H. TEBBUTT
ACTING PRESIDENT

I AGREE:



N.W. ZIETSMAN
JUDGE OF APPEAL

DELIVERED IN OPEN COURT THIS 30TH DAY OF JANUARY 2002.