



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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NUMSA and Others v SCAW South Africa (Pty) Ltd (1416/2024) [2026] ZASCA 126 (29 September 2026)

The Supreme Court of Appeal (SCA) partly upheld an appeal against an order of the Gauteng Division of the High Court, Johannesburg (the High Court) which dismissed a claim for payment of severance pay. The High Court granted leave to appeal.

The claim arose from SCAW South Africa (Pty) Ltd (SCAW) 's decision, in October 2019, to shut down one of its divisions. SCAW consulted with the National Union of Metal Workers of South Africa (NUMSA) and the employees it represented, as required by the provisions of the Labour Relations Act 66 of 1995 (LRA). SCAW offered employment on certain conditions as an alternative to retrenchment in December 2019. It was not accepted. SCAW then issued retrenchment notices to the employees, stating that they would not be paid the severance pay provided for in their contracts of employment. In February 2020, NUMSA and the employees referred a dispute to the Metal and Engineering Industries Bargaining Council (MEIBC), in terms of s 41(6) of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

NUMSA subsequently withdrew the referral to the MEIBC. In November 2020, NUMSA and the employees launched an application in the high court claiming payment of the severance pay due to them in terms of their contracts of employment. The letters of appointment issued to the employees provided for severance pay in excess of the minimum prescribed in s 41(2) of the BCEA. SCAW opposed the application on the basis that the employees had forfeited their entitlement to severance pay because they had unreasonably refused the offer of alternative employment, as contemplated in s 41(4) of the BCEA. The employees contended that s 41 of the BCEA did not apply because their claims were based on their contracts of employment and not the provisions of the BCEA.

The high court rejected the contention that s 41 of the BCEA did not apply. It held that it had the necessary jurisdiction to adjudicate the claims. It further held that the BCEA imposed basic conditions of employment in all contracts of employment to which it applied. The obligation to pay severance arose under s 41(2) of the BCEA and, therefore, s 41(4) applied. SCAW was entitled to rely upon the fact that the employees had unreasonably refused an offer of alternative employment. However, the High Court held that s 41(6) created a specialist form of dispute resolution to deal with disputes relating to employees' entitlement to severance pay. The high held that it was not able to adjudicate that dispute. It therefore dismissed the claims.

The central question before the SCA concerned the application of s 41 of the BCEA to a claim based on the terms of an employment contract. There was no challenge to the High Court's ruling regarding its jurisdiction to adjudicate the claims. The SCA examined the language and purpose of s 41 of the BCEA. It held that the BCEA's primary purpose was to incorporate basic conditions of employment into contracts of employment to provide minimum protections for employees. It achieved this purpose by

stipulating those conditions in all relevant employment contracts to which the BCEA applied. The stipulated conditions applied unless the contract provided a term more favourable to the employee. The SCA stated that employer – employee relations are by their nature contractual. This is so whether or not a basic condition of employment is imported into the employment contract.

The SCA held that s 41(2) of the BCEA imposed a general obligation upon employers to pay severance in the event of a dismissal for operational reasons and stipulated the minimum payment due. The stipulation of the minimum amount payable applied, unless the employment contract provided for a more favourable payment. In this case, the agreement on which the employees relied did not impose an obligation to pay severance. It merely stipulated an amount above the minimum provided by s 41(2) of the BCEA. Section 41(2) itself imposed the obligation to pay.

The SCA held that s 41(4) served important purposes, including providing an incentive for employers to find alternatives to retrenchment and to prevent job losses. This accords with the objectives sought to be achieved by s 189 and 189A of the LRA. The forfeiture of an entitlement to severance pay in the event of an unreasonable refusal of alternative employment also accords with this objective. The SCA held that the phrase ‘in terms of subsection (2)’ as used in s 41(4) was not restricted merely to a claim for payment of the prescribed minimum severance pay. It confirmed the high court’s ruling that s 41(4) of the BCEA applied to the claim.

The SCA expressed doubt that s 41(6) was mandatory for dispute resolution. It pointed to the use of the term ‘may’ in the subsection and the provisions of s 73A and s 77(3) of the BCEA. These suggested that an employee has a choice of forum in which an entitlement to severance pay might be adjudicated. The SCA stated, however, that it did not need to decide the issue because it was dealing with a defence SCAW raised to the claim for payment. If the high court had jurisdiction to adjudicate the claim for payment it also had the jurisdiction to decide a defence to such claim in which reliance was placed on a provision of the BCEA.

The SCA then considered whether the High Court could adjudicate the claim and the defence on what was before it. The employees had premised their case upon the fact that s 41 did not apply. SCAW had alleged that the refusal of the offer was unreasonable. Neither party had put up any facts upon which the reasonableness of the refusal could be adjudicated. SCAW had stated that it was not a matter that could properly be resolved in motion proceedings. The High Court had dismissed the claims on the basis that the dispute required resolution in terms of s 41(6) of the BCEA. It therefore did not exercise a jurisdiction that it had.

The High Court dismissed the claims. The dismissal order constituted a finding against the employees. The SCA considered that if the high court had exercised its jurisdiction to adjudicate the defence it would have found that neither the employees nor SCAW had put up sufficient evidence upon which the matter could be decided. In such circumstances, the proper order would have been the equivalent of an order of absolution. The SCA found that rule 6(6) of the Uniform Rules provided for an equivalent order. The court could make no order on the application while nevertheless making an order for costs.

The SCA therefore set aside the high court’s order dismissing the application and replaced it with no order on the application. It held that the High Court’s cost order was appropriate in light of the approach adopted by NUMSA and the employees. Because the partial success on appeal was insubstantial as to the central issues, the SCA ordered the appellants to pay the appeal costs.

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