IN THE LABOUR COURT OF APPEAL OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA52/2018

In the matter between:

KHUM MK INVESTMENTS

AND BIE JOINT VENTURE (PTY) LTD **Appellant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

BOYCE, T N.O. **Second Respondent**

SOLIDARITY obo MARAIS AND OTHERS **Third Respondent**

ESKOM HOLDINGS SOC LTD **Fourth Respondent**

Heard: **7 November 2019**

Delivered: **6 January 2020**

Summary: Employer relying on an implied automatic clause to justify termination of employees' fixed-term contract - court finding that .no provision existed in the employment contract for the automatic termination of the contract in the event that Eskom terminated the contract with employer – further that provision is made in the contract for the automatic termination by effluxion of time. Appeal dismissed with costs.

Coram: Waglay JP, Sutherland JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant ("Khum") appeals against the decision of the Labour Court (Moshoana J) dismissing its application to review the award of the second respondent ("the commissioner"). The issue to be determined is whether the termination of the contracts of the members ("the employees") of the third respondent ("Solidarity") constituted a dismissal as defined in section 186(1) of the Labour Relations Act.[1]

[2] Khum was a special purpose vehicle company established to provide persons to perform the services contained in a professional services contract ("PSA") concluded by Khum with the fourth respondent ("Eskom"). Eskom was Khum's only client. The duration period of the PSA was five years, with a starting date of 14 April 2009 and completion on 13 April 2014. Each task order in respect of the services to be rendered to Eskom had a specific starting and completion date.

[3] Khum recruited 333 persons, including the employees (Messrs Marais, Jacobs and Vorster), to perform the services required by the PSA. It is common cause that the employees entered into fixed term contracts of employment with Khum, referred to as "the Contractor Agreement", which by agreement would terminate on 30 April 2014. The relevant provisions governing the duration of the contract are set out in Clause 3 of the Contractor Agreement which read:

> '3.1 The contractor is hereby appointed as a contractor to the JV (Khum) commencing on 18th June 2012 for the period ending April 2014 of his/her role as….
>
> 3.2 7 (Seven) days written notice must be given by either party should a party wish to terminate this agreement, for any reason whatsoever, save for completion of the assignee's role on the Eskom contract.
>
> 3.3 Should the contractor commit a breach which is deemed material, then 24 (twenty four) hours' written notice will be given to terminate this agreement.'

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[1] Act 66 of 1995.

[4] Clause 2 of the Contractor Agreement, in addition to stipulating the commencement date, provided that the contract would be rendered null and void and of no force or effect, and construed as terminated, if the employee failed or neglected to inform Khum of any circumstances or information relating to issues like state of health, criminal record, credit record or addictions. Clause 6 of the Contractor Agreement included a provision permitting cancellation of the contract in specific instances by the innocent party in the event of breach of contract. These were the only provisions in the Contractor Agreement dealing with the duration and termination of the contract.

[5] The employees only rendered services in terms of task orders to Eskom and their employment was linked to the joint venture project between Khum and Eskom.

[6] Prior to the contemplated completion date of the PSA, in correspondence dated 13 August 2013, 10 October 2013 and 11 October 2013, Eskom notified Khum that certain specified task orders were cancelled with immediate effect. The cancellation notices recorded that no notice period was applicable in respect of the specified task orders.

[7] Khum then issued written notice of termination in terms of the Contractor Agreement to Marais, Jacobs and Vorster. The termination letter to Marais is dated 14 August 2013 while those to Jacobs and Vorster were dated 27 September 2014. The termination letters addressed to Jacobs and Vorster were identical. The relevant part of the letters read:

> ‘In accordance to the terms of the Contractor Agreement (Section 3.2):
>
> A. We hereby exercise the right to put you on notice for the termination of the contract; your last day will be on Wednesday, 30th October 2013…’

[8] The termination letter to Marais read the same, except his last day was stated to be Friday 13th September 2013. The reference to “Section 3.2” in the letters is a reference to clause 3.2, the term of the Contractor Agreement which provided that seven days written notice “must be given by either party should

a party wish to terminate this agreement, for any reason whatsoever, save for completion of the assignee's role on the Eskom contract".

[9] Jacobs' last working day was 10 October 2013 and he was paid notice pay for October 2013. Vorster's last working day was 10 October 2013 and he was paid notice pay for October 2013. Marais' last working day was 13 September 2013 and he was paid until 13 September 2013.

[10] Solidarity referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on behalf of the employees. Khum argued that the employees were independent contractors and hence that the CCMA lacked jurisdiction to determine the dispute. The commissioner ruled that the employees were employees of Khum and accepted that he had jurisdiction.

[11] At the subsequent arbitration proceedings, Khum submitted that the employees were not dismissed as contemplated in section 186(1) of the LRA. Its argument was premised on the contention that the Contractor Agreements automatically terminated due to the cancellation of the task orders and in terms of the termination clause regulating the relationship between Khum and the employees.

[12] Section 186(1)(a) of the LRA defines a dismissal to mean, *inter alia*, that an employer has terminated employment with or without notice.[2] For there to be a dismissal in terms of this provision there must be an act by the employer that terminates the contract. The employer must engage in an act which brings the contract of employment to an end.[3] Khum contends that Eskom's termination of the task orders constituted an event that terminated the contracts between it and the employees and thus it, as employer, had not engaged in an act terminating employment. It relied on the wording of clause

[2] Section 186(1)(b) of the LRA includes within the ambit of a dismissal a situation where an employer fails to renew a fixed term contract where the employee reasonably expected the employer to renew it or to retain the employee on an indefinite basis. Where the employee has no reasonable expectation of renewal or retention, the expiry of the fixed term contract would result in automatic termination and would not constitute a dismissal. This situation does not apply in the present case because the contract ended prior to the expiry of the fixed term. Khum contends that the Contractor Agreement automatically terminated before the end of the expiry of the fixed term by reason of the cancellation of the PSA.

[3] *Enforce Security Group v Mwelase Fikile and 46 others* [2017] 38 ILJ 1041 (LAC)

3.2 of the Contractor Agreement in support of that contention. The provision, it may be re-called, provided that seven days written notice had to be given when either party wished to terminate the agreement, for any reason whatsoever, "save for completion of the assignee's role on the Eskom contract". The proviso, it was argued, envisaged the automatic termination of employment on completion of Khum's (the assignee's) role in the Eskom contract, which happened when Eskom notified Khum that the various task orders had been cancelled with immediate effect in its letters of 13 August 2013, 10 October 2013 and 11 October 2013.

[13] The commissioner held that the employees had been dismissed as contemplated in section 186(1)(a) of the LRA. He reasoned as follows:

> 'The abovementioned contention by the respondent that the applicants were not dismissed is, with respect, ill-conceived since the said clause 3.2 of the contractor agreement does not stipulate that the contractor agreement (my emphasis) may be terminated "for any reasons whatsoever". Clause 3.2 of the contractor agreement simply makes provision for a mandatory notice period of 7 days which must be given by either party wishing to terminate the agreement "for any reason whatsoever" (besides the completion of the applicants' roles on the Eskom contracts). Stated differently, all that is meant by clause 3.2 of the contractor agreement is that, whatever reason either party may have for wishing to terminate the contractor agreement, 7 days written notice must be given. Clause 3.2 of the contractor agreement therefore, does not provide that the contractor agreement itself may be terminated "for any reason whatsoever" and the respondent remains enjoined, in terms of the LRA, to prove that there was a fair reason for the termination of the applicants' contractor agreements. The respondent, in other words, continued to bear the onus to "prove that the dismissal is fair" (vide Section 192 (2) of the LRA) and clause 3.2 of the contractor agreements does not, by any stretch of the imagination, entitle the respondent to dismiss the applicants without having a fair reason to do so.'

[14] The commissioner held that there was no fair reason for the dismissal, and given Khum's mistaken belief that the contracts had terminated automatically, the dismissals were not preceded by a fair procedure either. He awarded the

employees substantial compensation based on the unexpired terms of their contracts.

[15] When determining the amount of compensation, the commissioner appeared to take no account of the fact that in terms of clause 3.2 of the Contractor Agreement Khum could have lawfully terminated the contracts on seven days' notice "for any reason whatsoever", including the cancellation of the task orders. The Contractor Agreement was not a fixed term contract terminable only by the effluxion of time. It could be terminated on notice. Be that as it may, the commissioner awarded compensation equivalent to the amount that would have been paid had the contract run for its fixed term. He directed Khum to pay the following amounts: Jacobs R490 656; Vorster R394 850, 40; Marais R538 483, 59.

[16] In the Labour Court, Khum persisted with only one ground of review, namely that the employees had not been dismissed because their contract had automatically terminated. It abandoned its earlier contention that the employees were independent contractors and took no issue with the findings of substantive and procedural unfairness or the amount of compensation. The Labour Court upheld the commissioner's jurisdictional finding as correct. It agreed with the commissioner that Khum had in fact dismissed the three employees when it issued the termination letters terminating their contracts with notice. At that point, Khum had not assumed that the contracts were automatically terminated. The Labour Court held further that clause 3.2 of the Contractor Agreement in any event did not provide for automatic termination in the event of the termination of the PSA.

[17] On appeal, Khum again limited its grounds of appeal to the claim that the Labour Court erred in not finding that the employees were not dismissed because the fixed term contracts had terminated on the occurrence of a specific event, namely the cancellation of the task orders by Khum's only client Eskom, being the specific project for which the employees had been recruited. The essential question then is whether the terms of the Contractor Agreement provided for automatic termination in the event of the task orders being cancelled by Eskom.

[18] The proviso to clause 3.2 of the Contractor Agreement does not explicitly deal with automatic termination. Clause 3.2 is concerned primarily with the notice period upon which the contract can be terminated in instances other than the contract ending through the effluxion of time at the conclusion of the fixed term in April 2014. It provides that the contract can be terminated for "any reason whatsoever" on 7 days' notice. The proviso to clause 3.2 merely allows for summary termination without notice when the reason for the termination is "the completion of the assignee's role on the Eskom contract". The meaning of the proviso is clear and unambiguous. The language does not permit an interpretation that the contract automatically would terminate on the completion of the assignee's role, it merely stipulates that the seven day notice period will not be applicable in that event.

[19] That interpretation is supported not only by the plain meaning of the language of clause 3.2 but also the intra-textual context. Clause 3.2 is an alternative to automatic termination of the contract through the effluxion of time on expiry of the fixed term as provided for in clause 3.1. The express overall intention in relation to the termination of the contract was for the contract to expire automatically through the effluxion of time on expiry of the fixed term in terms of clause 3.1, but to permit also the alternatives of terminating on seven days' notice for any reason whatsoever and for even lesser notice in the two instances contemplated in clause 3.2 and clause 3.3, respectively the completion of the assignee's role on the Eskom contract (no notice) and a material breach of contract (24 hours' notice).

[20] Hence, the express provisions of clause 3 of the Contactor Agreement contemplate four instances of termination of the contract: i) automatic termination by the effluxion of time at the end of April 2014; ii) termination on seven days' notice for any reason whatsoever; iii) termination without notice on completion of the assignee's role on the Eskom contract; and iv) termination on 24 hours' notice on a material breach of contract. No provision is made for the automatic termination of the Contractor Agreement in the

event that Eskom terminated the PSA.[4] In that event, clause 3.2 required either no notice or seven days' notice when terminating for that reason. The letters of termination served on the employees in fact gave much longer notice.

[21] Khum argued further that at the very least it was a tacit term in the Contractor Agreement that the recruitment and deployment of the employees at Eskom was in terms of the PSA and reliant on the issuing of task orders by Eskom. It maintains that all the circumstances surrounding and relating to the contract[5] indicate that the parties had automatic termination in mind even though they did not express it in the written instrument. It in effect submitted that a common unexpressed term permitting automatic termination could be inferred from the surrounding circumstances.

[22] The submission is not sustainable for two principal reasons. Firstly, tacit terms are unexpressed provisions of the contract derived from the common intention of the parties as inferred not only from the surrounding circumstances but also from the express terms of the written contract.[6] Therefore, before a tacit term may be imported into the contract, it is necessary to examine the express terms of the contract; and a tacit term should not be readily imported when the express terms specifically address the matter in question. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms, reliance on the surrounding circumstances to alter the clear meaning or to broaden the ambit of the

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[4] Khum placed reliance upon various decisions in the Labour Court in support of its contention that automatic termination was envisaged by the terms of the Contractor Agreements. The Labour Court correctly distinguished these cases and held Khum's reliance upon them to be misplaced. In *Enforce Security Group v Mwelase Fikile and 46 others* [2017] 38 ILJ 1041 (LAC), this court upheld a claim of automatic termination. However, the express provisions of that contract unambiguously provided that the employee's employment with the employer and its duration was "totally dependent on the duration of the Company's contract with the Client/s and that the Employee's contract of employment shall automatically terminate. Such termination shall not be construed as retrenchment but a completion of contract." On appeal in this court, Khum referred also to *dicta* of the Labour Court in *Pecton Outsourcing Solutions CC v Pillemer N.O. and Others* [2016] 2 BLLR 186 (LC) to the effect that the substance of the reason for termination over its form may be decisive. That is not entirely correct. The issue is whether the contract permits for its automatic termination on specified grounds. In any event, in that case too, the contract expressly and unambiguously provided for automatic termination where the contract between the employer and the client was cancelled.

[5] See *Barnabas Plein and Company v Sol Jacobson and Son* 1928 AD 25 at 31 – 32

[6] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531-532

express term may not be justified.[7] In the present case, the term sought to be imported by Khum would significantly vary the terms of clause 3 which expressly provide for one particular instance of automatic termination (on expiry of the fixed term) and termination by notice in other instances. Importing a tacit term catering for automatic termination by events other than the expiry of the fixed term would involve implying such a term into the contract in contradiction to the express term allowing automatic termination in the specific limited circumstances envisaged in clause 3.1.

[23] Secondly, a tacit term allowing automatic termination on cancellation of the task orders is not necessary to give business efficacy or functionality to the contract. A tacit term can only be implied into a contract if it is necessary in the business sense to give it efficacy;[8] and courts should not do so unless there arises from the express language of the contract and the surrounding circumstances such an inference that the parties must have intended the term in question and hence the court is necessarily driven to the conclusion that it must be imported.[9] In this case, any need to terminate the contract in the event of Eskom cancelling the PSA was adequately provided for by permitting Khum to cancel on operational requirements grounds without notice, provided it acted fairly in terms of section 189 of the LRA.

[24] Moreover, the manner in which Khum in fact terminated the contracts by the letters of termination giving the employees more than one month's notice was consistent with an understanding that notice by the employer was in fact required. The conduct of Khum, being part of the surrounding circumstances, is inconsistent with the notion that a term allowing for automatic termination on grounds other than the expiry of the fixed term was within the actual contemplation of the parties at the time of the conclusion of the contract or they would have agreed to such had the officious bystander at that time suggested its express inclusion in the contract.[10] Additionally, and perhaps

[7] *Union Government (Minister of Railways) v Faux Ltd* 1916 AD 105, 112; and *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) 615D.
[8] *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592, 605
[9] *Union Government (Minister of Railways) v Faux Ltd* 1916 AD 105, 112
[10] See *Wilkins v Voges* 1994 (3) SA 130 (A) 136I; and *Techni-Pak Sales (Pty) Ltd v Hall* 1968 (3) SA 231 (W) 236-237.

decisively, the provisions of clause 4.4 of the Contractor Agreement stipulate that “no party shall be bound by any express or implied term, representation, warranty, promise or the like not recoded herein, whether it induced the contract and/or whether it was negligent or not.”

[25] In the result, the conclusion is inescapable that clause 3 of the Contractor Agreements did not allow for automatic termination of the contact in the event of Eskom cancelling the task orders. When Khum issued the letters of termination to the employees it terminated their employment with notice and its conduct fell within the definition of a dismissal in section 186(1)(a) of the LRA. The decision of the commissioner to assume jurisdiction on that basis was correct and the Labour Court did not err in upholding it. The appeal accordingly must fail.

[26] In the premises, the appeal is dismissed with costs.

JR Murphy

Acting Judge of Appeal

I agree

B Waglay

Judge President

I agree

R Sutherland

Judge of Appeal

APPEARANCES:

FOR THE APPELLANT: Adv. F Venter & M Deyl

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