

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: **JS 753-21**

GAJB 6460-21

In the matter between:

MOTHAPO, JOHANNES AND 19 OTHERS

Applicant

and

FIDELITY SECURITY SERVICES (PTY) LTD

Respondent

Heard : 5 February 2024

Delivered : 16 February 2024

JUDGMENT

NORTON AJ

Introduction

1. The Applicants worked as security guards for Fidelity Security Services ("Fidelity") and were posted at different locations to protect the premises of various Department of Justice and Constitutional Development ("DOJ") buildings, including the Labour Court in Braamfontein.

2. The Applicants commencement dates ranged from 1995, 2008 and 2013 until the termination of their employment on 1 March 2021. Fidelity had contracts with the DOJ which were renewed a number of times – from December 2016 to December

2019; from 16 December 2019 to 31 March 2020; from 1 April 2020 to 30 September 2020; and finally to 28 February 2021.¹

3. Around 10 December 2020 Fidelity wrote to the Applicants as follows,
*“We hereby advise that the Department of Justice Contract, upon which you tender your services, has been extended until the 28 February 2021. In this regard, please take note that we have not been advised of the outcome of the Tender process, and therefore will advise you when the Company has been notified of the outcome...Please take note that should the Company be unsuccessful in the Award of the Contract, or should the Contract be reduced, management will endeavour to consult with the affected employees, and seek possible alternatives to avoid the termination of your employment in terms of the provisions of your contract of employment.”*²

4. The Applicants wages were low, with an average monthly salary being in the region of R4 586.00 at the time of termination. The Respondents admit that the Applicants were paid below the minimum threshold.³

5. Fidelity wrote to the guards in late February and early March 2021 informing them of their impending termination as follows,
“...As you are aware, the company has not been awarded the tender for the Department of Justice sites and the client has cancelled its agreement with Fidelity. We hereby advise that your contract of employment that you entered into with Fidelity Security will be terminated as of 1 March 2021. You will be assisted with the following – UIF and Provident Fund claims...you will need to return your uniform...”

6. The Applicants referred an unfair dismissal dispute to the CCMA on 30 March 2021 describing the reason for dismissal as “unknown”.

¹ Respondent's Heads of Argument, dated 6 February 2024, paragraph 12.3.2

² Pg 48 of the trial bundle.

³ Respondent's Heads of Argument, paragraph 12.3.6

7. Conciliation ensued but the dispute persisted, and the matter proceeded to arbitration. On the 3 September 2021 the arbitrator issued a ruling that she lacked jurisdiction to hear the matter and advised the Applicants to approach the Labour Court for relief. The arbitrator characterised the dispute as one concerning a dismissal for operational requirements.

8. In their Statement of Case before this Court the Applicants submit that Fidelity did not follow section 189 of the Labour Relations Act 1995 (the “LRA”), and that their retrenchments were procedurally and substantively unfair. They sought compensation and severance pay. Presumably the guards did not seek reinstatement as they all found employment elsewhere.

9. Fidelity in its Statement of Response averred that there was no dismissal, simply a termination of a site-specific fixed term contract.⁴

10. Fidelity made reference to clause 3.8 of the contracts which read.

*“Termination of Contract of Employment: The employee specifically accepts that employment with the employer is dependent upon retention by the employer of the service contract of the client at whose premises the employee has been appointed to perform duty...and agrees that should the said client service contract be cancelled or terminated for whatsoever reason ... this agreement may be terminated effective of the date of such termination, cancellation...”*⁵

11. On the 9 February 2023 the parties legal representatives concluded a pre trial meeting. The parties identified the following issue for the court’s determination, *“Whether or not the Applicants were entitled to severance pay and whether there was a retrenchment?”*

12. On 10 February 2023 the matter proceeded before Honourable Justice Van Niekerk. After reading the papers and hearing the parties he ordered:

⁴ Para 6.1 of the Respondents amended statement of claim.

⁵ Pg 59 of the Court file.

12.1. that the Applicants withdraw their claim as it relates to a claim for unfair dismissal in terms of section 189 and 191 of the LRA

12.2. that the Applicants be granted leave to amend their Statement of Claim to reflect a claim for unpaid severance in terms of section 41 of the BCEA, as well as any claim for subsequent statutory monies

13. The Applicants subsequently did amend their Statement of Claim seeking an order for payment of severance pay, leave pay and monies for uniforms deducted from their salaries.

14. The matter was set down for a 2 day trial on 5 and 6 February 2024. The parties legal representatives approached me, proposing that the matter be argued on the papers, and that the hearing of oral evidence would not be necessary. I agreed with the proposal and furthermore ordered the parties to address on affidavit the following issues:

14.1. Whether or not the Applicants were entitled to payment as per section 198D10(a) of the LRA effective from 1 January 2015.⁶ If so entitled, the quantum of the payment;

14.2. Whether or not the Applicants are entitled to Notice pay, and if so entitled, the quantum of this amount

15. The dispute about Leave Pay was referred by order of the court to the CCMA for determination.

The Applicant's submissions

16. The amended pleaded case states:

16.1. At all material times the Applicants were employees as defined by the Labour Relations Act and were permanently employed by the Respondent.⁷

⁶ *An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) (working on a specific project of limited duration) for a period exceeding 24 months, subject to the terms of any applicable collective agreement, pay the employee on the expiry of the contract one weeks remuneration for each completed year of the contract ...*

⁷ Paragraph 6.1

16.2. The Applicants seek an order from the court “*directing the Respondents to pay their severance pay for completed years of service, leave pay and monies for uniforms that were deducted from their salaries.*”

17. The deponent to the applicant’s affidavit stated as follows,

17.1. “*At all material times, myself and the other Applicants were employees as defined in the LRA and employed on a succession of fixed term agreements, the Applicants herein are entitled to payment as per section 198B(10)(a) of the LRA effective from 2015.*”

17.2. “*My income was R4586.04 therefore my 7 years service from 2015 amounts to 7 weeks remuneration at R7 766.35...The other Applicants (save for the 9th applicant) are all calculated on the same basis....*”

17.3. “*The Applicants are entitled to notice pay in the amount of R4 686.04.*”

The Respondent’s submissions

18. The Applicants abandoned their claim for unfair dismissal. That was the only dispute however referred to conciliation.

19. No dispute pertaining to claims for severance pay (in terms of section 41 of the BCEA); statutory monies (in terms of section 73A or 77(1) of the BCEA) or remuneration in terms of section 198B(10)(a) of the LRA has been referred to conciliation before the CCMA. Even if so conciliated all such disputes are subject to arbitration as the dispute resolution mechanism, and not adjudication by the Labour Court.

20. With respect to the claim for severance pay the Respondent submits that:

20.1. The Labour Court has no jurisdiction to hear the dispute as such a dispute must be entertained in the CCMA or Bargaining Council and proceed through the processes of conciliation and arbitration.

20.2. Whilst the Labour Court has jurisdiction to hear a dispute about severance pay, it must be in conjunction with a determination about the fairness of a

dismissal for operational requirements. That is however no longer a dispute before this Court.

20.3. There was no dismissal, simply a termination of a fixed term contract,

21. With respect to a payment in terms of section 198B of the LRA the Respondent submits:

21.1. The Applicants have never invoked section 198B of the LRA in their pleaded case.

21.2. Section 198B does not in any event apply to employees employed in terms of a fixed term contract which is permitted by a collective agreement.⁸ The Applicants were subject to the Main Collective Agreement concluded in the National Bargaining Council for the Private Security Sector ("NBCPSS").

22. With respect to a claim for Notice Pay the Respondent submits:

22.1. that the Applicants are not entitled to notice pay, as they were informed approximately 3 months prior to the termination of their contracts that their employment was coming to an end on 1 March 2021.

22.2. The Respondent argues further that even assuming that the Applicants were entitled to notice pay, they earned below the minimum threshold, and would be required to refer a dispute to the CCMA, which would ultimately be the subject of arbitration as contemplated in section 73A(1), (4) and (5) of the BCEA.⁹

Discussion and analysis

⁸ Section 198B(2)(c) of the LRA

⁹ 73A(1) *Despite section 77, any employee or worker as defined in section 1 of the National Minimum Wage Act, 2018, may refer a dispute to the CCMA concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or collective agreement.*

...

(4) *The CCMA must appoint a Commissioner in terms of section 135 of the Labour Relations Act, to attempt to resolve by conciliation any dispute that is referred to the CCMA in terms of subsection (1).*

(5) *The CCMA must commence the arbitration of a dispute contemplated in subsection (1) immediately after certifying that the dispute remains unresolved in terms of section 135(5).*

23. The Applicants withdrew their unfair dismissal claim in February 2023, (pertaining to an unfair retrenchment), presumably on the strength of the evidence that the employees were contracted on fixed term contracts linked specifically to the DOJ contract with the Respondent. A termination of a fixed term contract in these circumstances would not amount to a dismissal.

24. The Applicants persisted with 3 disputes: relating to Severance Pay; Notice Pay and another species of potential payment which was that contemplated in section 198B(10)(a) of the LRA. (As mentioned earlier the dispute about outstanding Leave Pay has been referred to the CCMA)

25. Regrettably for the Applicants the Labour Court cannot come to their assistance – principally because this court lacks jurisdiction to adjudicate upon such matters.

26. In this case the Labour Court is not determining the fairness of a dismissal for operational requirements of the Applicants, and may not therefore determine a dispute about severance pay. The Labour Court may only determine a dispute about severance pay whilst determining a dispute about the fairness of an operational requirement dismissal. Section 41(10) of the BCEA reads,

“If the Labour Court is adjudicating a dispute about a dismissal based on the employer’s operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employees may be entitled and the Court may make an order directing the employer to pay that amount.”

27. Absent the Labour Court’s determination about the fairness of a retrenchment, employees disputing their entitlement to, or quantum of severance pay must proceed to the CCMA for conciliation, and if that is unsuccessful then arbitration.¹⁰

28. The Respondents argue that the Applicants were notified almost 3 months prior to the termination, that their contracts were coming to an end on 1 March 2021. Although I am not satisfied that this notice was clear (it was expressed as a

¹⁰ Section 41(6), (8) and (9) of the BCEA.

possibility, and a possible warning of termination), a dispute about such payment or entitlement must be made to the CCMA, and not to the Labour Court.

29. Section 73A(1),(4) and (5) of the BCEA entitles poorly paid employees such as the Applicants to refer disputes about a failure to pay any amount owing in terms of the National Minimum Wage Act, a contract of employment or collective agreement to the CCMA. Higher paid employees may refer their disputes to the Labour Court, High Court, or subject to their jurisdiction, the Magistrates Court or Small Claims Court.¹¹

30. With respect to the 198B(10)(a) possible payment, that is defeated by section 198B(2)(c) as the employees are subject to the collective agreement of the Bargaining Council for the Private Security Sector, which makes no such provision. Compounding the Applicant's difficulties is the jurisdictional issue which arises once again – and that is that a dispute about Section 198(B) must be channelled to the CCMA or a bargaining council as contemplated in section 198(D)(1) of the LRA.

31. Regrettably all of this is cold comfort for poorly paid security guards who worked for many years protecting DOJ sites. Should they wish to continue to pursue any monetary dispute, then the CCMA or bargaining council should be their next port of call.

32. In the circumstances I make the following order

Order

33. The Applicant's action is dismissed.

34. There is no order as to costs.

D Norton
Acting Judge of the Labour Court of South Africa

¹¹ Section 73(A)(2) of the BCEA.

Appearances

For the Applicant : Mr Cameron Meyer

For the Respondent : Mr Ross Atcheson

LABOUR COURT