

NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
CASE NO. JR 1601/06

In the matter between:

ESG RECRUITMENT CC

Applicant

and

COMMISSIONER MAPALO TSATSIMPE N.O.

First Respondent

DISPUTE RESOLUTION CENTRE
A DIVISION OF THE MOTOR INDUSTRY
BARGAINING COUNCIL

Second Respondent

NUMSA obo CORNELIUS ENGELBRECHT

Third Respondent

JUDGMENT

A VAN NIEKERK, AJ

Introduction

- 1 This is an application to review and set aside an arbitration award made by the Second Respondent ("the commissioner"). In her award, the commissioner found that the dismissal of Mr Cornelius Engelbrecht, who was represented by the Third Respondent in these proceedings, was

substantively and procedurally unfair. The commissioner ordered that the Applicant reinstate Mr Engelbrecht, with 6 months' backpay.

- 2 Engelbrecht was employed by the Applicant with effect from 1 January 2005. The Applicant is a temporary employment service, and placed Engelbrecht's services at the disposal of its client, Tyco Trucks Apex. The terms of the contract between the Applicant and its client were such that the client was entitled to object to any assignee for virtually any reason, in which case the client would be entitled to "*cease to utilise such assignee in the execution of the assignment*" and in which case the Applicant would be obliged to provide a satisfactory replacement.
- 3 On 19 October 2005, without giving any reason, Tyco Trucks advised the Applicant that it no longer required Engelbrecht's services.
- 4 On 20 October 2005, the Applicant wrote to Engelbrecht advising him that his contract of employment had come to an end.
- 5 The Applicant contends that in terms of a limited duration contract of employment signed by the parties, Engelbrecht was to be employed "*for the period that his services would be required on the following site: Tyco Apex*".
- 6 The arbitration proceedings commenced with the commissioner enquiring *inter alia*, as to matters that were common cause between the parties. She specifically raised the issue whether dismissal (I assume she meant the existence of a dismissal) was common cause. The Applicant's representative replied "*Jah his contract was ended but he was not dismissed*".
- 7 The commissioner then stated the following:

"Okay I think in terms of Section 1 it states where an employee's contract has been terminated it is also regarded as dismissal but there

are various reasons for dismissal. So one party could be saying yes it was dismissal in terms of the Act and these are the reasons why it happened the way it happened.

Where you say it is not dismissal is where you say he is still employed by us or we are surprised why he is not there; we never said to him go, there is no service or your services are not needed.

So it is common cause that the employee was dismissed but the reasons therefor is something different and you will give me those reasons.(sic)

- 8 In her award, the commissioner records that section 186 of the Labour Relations Act defines a dismissal and immediately notes that it is “*common cause from the evidence led*” that Engelbrecht’s contract was terminated. This, she concludes, makes the termination of his contract a dismissal in terms of section 186. The commissioner then records “*I have, based on the meaning of dismissal as per the LRA, 1995, concluded that the employee was dismissed and the employer’s request that I should dismiss the employee’s case is turned down.*”

- 9 In these proceedings, the Applicant contends that the commissioner failed to place proper weight on the limited duration contract that Engelbrecht had signed, and in particular, the alignment of his contract of employment with the contract concluded between the Applicant and its client. Further, the Applicant contended that the commissioner’s ruling failed to have regard to the cases of *Dick v Cozens Recruitment Services* (2001) 22 ILJ 276 (CCMA) and *April and Workforce Group Holdings (Pty) Limited t/a The Workforce Group* (2005) 26 ILJ 2224 (CCMA). These cases clearly establish that where an employee’s contract contains a resolute condition, freely agreed to, triggered by the client of a temporary employment service, there is no termination of the contract by the employer temporary employment service, and therefore no dismissal. These decisions have not been the subject of any consideration by this Court, as far as I am aware, but they are not uncontentious. It might be argued, as Craig Bosch has done in his recent Article *Contract as a Barrier*

to “Dismissal” 2008 29 ILJ 813 that clauses such as that contained in Engelbrecht’s contract are invalid because they are contrary to public policy, or because they do not reflect the realities of the triangular relationship that is established when an employee is placed on assignment with the client of a temporary employment service. Nowhere in her award does the commissioner canvas these or any other arguments that might justify the conclusion to which she came. Her reasoning, based only as it is on a letter advising Engelbrecht that his contract had terminated begs the question of the existence of a dismissal as defined by the LRA. The commissioner ought to have determined whether or not the fulfilment of the resolutive condition in Engelbrecht’s contract (i.e. the request to his employer that he be removed from the workplace) brought the contract to an end by operation of law or whether, based on arguments as those raised by Bosch, the validity of such a clause ought to be further interrogated.

- 10 In these circumstances, in my view, the commissioner’s conclusion is one to which no reasonable commissioner could come. This is patently a matter that ought to be the subject of more careful consideration and for that reason, I intend remitting the dispute to the Dispute Resolution Centre of the Bargaining Council for hearing before a different commissioner.
- 11 I accordingly make the following order:
 - 1 The commissioner’s arbitration award dated 22 March 2006 is reviewed and set aside;
 - 2 The matter is remitted to the Dispute Resolution Centre of the Motor Industry Bargaining Council for determination before a different commissioner; and
 - 3 There is no order as to costs.

ANDRE VAN NIEKERK,
Acting Judge of the Labour Court

Date of Hearing: 13 March 2008

Date of Judgment: 11 July 2008

APPEARANCES

Advocate for the Applicant: Advocate B M Jackson

Attorneys for the Applicant: Jurgens Bekker Attorney

For the Respondent: E Mutileni