

**IN THE LABOUR COURT OF SOUTH AFRICA
PORT ELIZABETH**

CASE NO: P 54/08

In the matter between:

**NATIONAL UNION OF MINEWORKERS
OBO A Z JONGILANGA**

First Applicant

ALFRED JONGILANGA

Second Applicant

and

CIVIL & GENERAL CONTRACTORS CC

First Respondent

G VAN DER WESTHUIZEN

Second Respondent

JUDGMENT

LALLIE AJ

- [1] The second applicant is a builder. On 2 July 2001 he commenced working for the first respondent on a fixed term contract which expired on 26 January 2003. On 27 January 2003 he entered into another fixed term contract of employment with the first respondent. On 11 March 2004 the second applicant was given a document by Mr Snyders (Snyders) the

general foreman of the first respondent. The document purports to be the second applicants' confirmation of his resignation as a member of the National Union of Mineworkers (NUM). The applicant refused to sign the document and on 24 May 2004 the applicant received a notice of the termination of his contract of employment on the grounds that it had expired. He was given an option of either working the notice period or payment in lieu of notice.

- [2] In these proceedings the applicants seek an order declaring the second applicant's dismissal automatically unfair on the grounds that the second applicant was dismissed for refusing to resign as a member of NUM when ordered to do so by the first respondent.
- [3] The second applicant explained that after joining the NUM in 2003 his working conditions became unpleasant. Mr Van Der Westhuizen (Van Der Westhuizen), the second respondent's managing member told him that he did not like people who were trade union members. Even Snyders made his employment intolerable by calling him names, insulting him and criticizing the quality of his work in the presence of his fellow employees. In 2004 he was given a lot of warnings which he refused to sign as they were unwarranted.
- [4] The applicant testified that although his last contract was for a year it was terminated after 3 months. He stated that he was not given reasons for the non-renewal of his contract but was just told that he was not going to be employed any more although work was still available. He insisted that he lost his job because he had joined a trade union.
- [5] Referring to the document confirming his resignation from the NUM, the applicant stated that Snyders and Popie told him that if he signed it he

would be given a permanent position. He refused as union officials had advised him not to sign any document from the first respondent. Another reason for not signing the document was that it was written without his consent. He took the letter to the office of the Commission for Conciliation Mediation and Arbitration (CCMA) where he was advised to take it to his union organizer.

[6] Van Der Westhuizen denied having told the second applicant that he did not like people who joined trade unions. He had accepted the existence of trade unions although he did not encourage employees to join the. The second respondent's NUM membership was therefore not an issue to the respondents. He explained that the document given to the second applicant was a standard document given to all employees who wanted to terminate their union membership. It was created to solve the first respondent's problem of having to pay union subscriptions not deducted from employees who had not resigned in writing as trade union members. He denied that the first respondent victimized employees for trade union membership.

[7] Van Der Westhuizen further explained that the first respondent had no reason to rid itself of union members. It had no reason to target the second applicant whose trade union membership had no effect on it. He insisted that the second applicant's contract of employment was terminated with other employees' contracts because their fixed term contracts had expired and there was no more work to give them. Their trade union membership played no role as the decision to terminate contracts affected unionized and non-unionized employees.

[8] Section 5 (1) of the *Labour Relations Act 66 of 1995* (**LRA**) protects employees against discrimination for exercising the rights the **LRA** confers

on them. Section 5 (3) of the **LRA** precludes people from advantaging or promising to advantage employees in exchange for those employees not exercising any right conferred by the **LRA** or not participating in any proceedings in terms of the **LRA**. Section 4 (1) (b) grants every employee the right to join a trade union subject to its constitution. Section 187 (1) of the **LRA** declares dismissal contrary to section 5 of the **LRA** automatically unfair.

- [9] In *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) the Labour Appeal Court set out the test to determine whether it has been proved that a dismissal is automatically unfair as follows:

"In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal."

- [10] It is common cause that the second applicant and the first respondent entered into two fixed term contracts of employment. The first was signed on 2 July 2001 and the second on 27 January 2003. Although the second applicant testified that the duration of the second contract was a year I accept the respondents' version that the subsistence of the contract depended on the completion of the task for which he was employed. The second contract provides that it would expire on completion of the contract for which the second applicant was employed. I am satisfied, based on the second applicant's evidence that he understood the notion of fixed term contracts which expired on completion of a specified task.

[11] On 11 March 2004 the second applicant received the document confirming his resignation as a member of NUM which he refused to sign and on 28 May 2004 he was given a month's notice of the termination of his contract on the grounds that his contract had expired. The applicants' case was that the first respondent had dismissed the second applicant in a manner that is automatically unfair in that he was dismissed for refusing to resign as a member of his trade union NUM.

[12] It was the applicant's version that on 10 March 2004 the first respondent and the second applicant entered into a fixed term contract of employment which should have expired on completion of the contract for which he was employed. According to this version, the following day the second applicant was forced by the first respondent to resign as a member of NUM. He was given a typed resignation document which had already been signed by his foreman Snyders and Pompie who both signed as witnesses. As a result of refusing to sign the document he was given, on 28 May 2004, a month's notice of the termination of his employment contract. The reason given for the termination of his contract was that it had expired. The respondents insisted that the second applicant's contract of employment was terminated owing to its expiry.

[13] The respondents submitted that the contract of employment which was purportedly signed on 10 March 2004 was fraudulent as it was fabricated. The contract looks as though it has been tampered with. The fax number is typed below the telephone number. However, below the fax number another telephone number is superimposed over the e-mail address. Unlike the other two contracts whose validity is not in dispute, it has not been signed by the second applicant. The second applicant's evidence under cross-examination was consistent with the respondents' version in that he denied knowledge of the contract. He further denied ever

receiving it and stated that he did not know how it became part of the bundle. No evidence was led to prove that in making the concession the second applicant was either mistaken or confused. The second applicant and first respondent therefore never entered into a third fixed term contract. In the circumstances the applicants' version that the second applicant was given the document confirming his resignation from NUM a day after the second applicant and the first respondent had entered into a third fixed term contract of employment is not true.

[14] The existence of the document confirming the second applicant's resignation as a member of NUM was not in dispute. Van Der Westhuizen explained under cross-examination that the resignation document was created after Mr Mzwana (Mzwana), an official of NUM, told the first respondent that NUM needed written proof when employees resigned from being trade union members. The resignation document was then given to any employee who wanted to resign as a trade union member. Snyders testified that the second applicant requested the letter of resignation as a NUM member. Having signed as a witness that the second applicant wanted to resign from NUM he gave it to second applicant who took it home. He denied promising the second applicant permanent employment as he lacked authority to fulfill such a promise. He conceded having spoken to the second applicant about his poor work performance and giving him a warning for sub-standard work. He stuck to his version that trade union membership did not influence the way he treated the second applicant even under vigorous cross-examination.

[15] Snyders denied insulting the second applicant or treating him badly for being a trade union member. He was not even aware that he was a trade union member. It is common cause that he started speaking to the second applicant about his unsatisfactory work and giving him warnings

even before he joined NUM. Although the second applicant testified that he lost his job because he joined the union he added that it was his opinion that he was not given another opportunity to work because he had joined a trade union. It was also his evidence that he was not given reasons for the non-renewal of his contract.

[16] When the applicants' version that the second applicant was targeted because of his union membership was challenged the second applicant complained bitterly about the way Snyders ill-treated him, criticizing the quality of his work, belittling him and calling him names in the presence of his co-employees. What came out strongly from the second applicant's evidence was his alleged ill-treatment by Snyders. The reason for the non-renewal of his contract changed for being for unknown, joining a trade union, refusing to resign as a trade union member and being targeted for victimization for being the only qualified brick layer. One is forced to wonder at the need to base the applicants' case on a fabricated fixed term contract of employment because dismissing an employee for refusing to resign as a member of a trade union is sufficient to found a claim for an automatically unfair dismissal. There was no need to fortify the claim with lies.

[17] The applicants attempted to create an impression that the second applicant was given employment on 10 March 2004, a day later he was forced to resign from being a NUM member and when he refused his fixed term contract was terminated. They were unsuccessful because their version was not supported by evidence instead evidence proved that the applicants resorted to fabrication because they had no grounds for their claim. They therefore failed to produce sufficient evidence to raise a credible possibility that an automatically unfair dismissal had taken place.

[18] No evidence was adduced justifying the citation of the second respondent as a party in these proceedings. The claim against the second respondent is therefore dismissed.

[19] In the circumstances the following order is made:

1. The first and second applicants' claim against the first and second respondents is dismissed;
2. No order is made as to costs.

LALLIE AJ

Date of hearing : 28 February to 1 March 2011

Date of Judgment : 04 May 2011

APPEARANCES

FOR THE APPLICANTS : Mr Bengaqula
NATIONAL UNION OF MINeworkERS

:

FOR THE RESPONDENT : Mr Unwin
CHRIS UNWIN ATTORNEYS