

LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case: P544-09

In the matter between:

G R THABETHE & 2 OTHERS

Applicants

and

LAMPRECHT PROPERTIES (CC)

First Respondent

JUDGMENT

LAGRANGE, J:

Introduction

[1] On the face of it, this matter was a claim of unfair retrenchment, though the main thrust of the applicants' complaint was that their employment ought not to have terminated on 17 October 2008 but on 12 December 2008. Before addressing the merits of the claim, a preliminary issue needs to be addressed.

The status of the applicants

[2] The four applicants who are party to these proceedings are Messrs G R Thabeta, C Zulu, Q Khumalo and F Ndlovu. The applicants have been

representing themselves in this matter. Only the first three mentioned applicants attended the hearing of the matter. Mr Thabeta said Mr Ndlovu was unable to attend. The difficulty this presents is that Mr Ndlovu had not signed any power of attorney specifically authorising anyone else to represent him in the matter. Accordingly, insofar as his claim is concerned it is struck of the roll, owing to his non-appearance.

The nature of the case

[3] The applicants claim that they were unfairly retrenched by the respondent, a close corporation. The respondent, a building contractor, admits it did not consult with the applicants before their employment was terminated, but claims they were all employed as painters on fixed term contracts, which were sanctioned by the Building Industry Bargaining Council. The employer maintains that the applicants' contracts of employment terminated in accordance with the fixed term specified therein and, as a result, there was no need for it to have consulted with them in terms of section 189 of the Labour Relations Act, 66 of 1995 ('the LRA').

The factual issues

[4] Mr R Erasmus, a member of the close corporation and a project manager, gave evidence for the employer. Mr Thabetha gave evidence for the second and third applicants and with the consent of Mr Zulu and Mr Khumalo presented argument on behalf of all of them.

[5] It is common cause that the applicants were employed by the respondent as painters on construction sites in Jeffreys Bay. In particular, on 25 June 2008 they were engaged on limited duration contracts linked to two project sites known as Dromedaris and Look Out. These contracts were due to expire on 12 December 2008, or upon completion of the work at the sites in question. As it happened the respondent ceased work on those sites on 17 October 2008. A week before the respondent informed the applicants that their contracts would end on 17 October 2008.

[6] The pertinent terms of the limited duration contracts entered into between the parties read as follows:

"1. The employee shall be engaged for the purposes of such work on the following construction site: Dromedaris / Look Out.

2. The contract of employment shall be for a maximum of 24 weeks/months from 25.06.08 - 12.12.08, alternatively until the completion of the construction on site Dromedaris/Look Out.

3. On the completion of the period or construction on the site as stated above, this contract shall automatically terminate and such termination shall not be construed as being a retrenchment but shall be the completion of the contract."

(emphasis added)

[7] All the contracts were signed by the three applicants on 25 June 2008, the same day the contracts commenced.

Mr Thabetha's evidence

[8] Thabetha testified that before the conclusion of the contracts in question the applicants had been engaged under another contract. He claims that it was explained and accepted by the applicants that the contract concluded in June would be the last contract. He accepted that the Dromedaris and Look Out sites were separate but were being developed in parallel. Work on the Look Out site began when the work on Dromedaris site was half complete. Once work had been finished on the Dromedaris site, work on the Look Out site continued. He did not agree that there was no work continuing on the Look Out site, but conceded this was based on gossip he had heard. The normal sequence of

operations at a site was that building work would take place followed by plastering and then paintwork.

[9] It was put to Thabetha that, on the Look Out site, the work ended in October because none of the housing units were being sold and the developer could not continue building at that stage. Thabetha was adamant that, even if units were not selling, work on the Look Out site did continue and an outside contractor was used to finish the painting work. Thabetha disputed the employer's contention that work on the Look Out sites only resumed in the new year: he maintained that work on the site continued throughout November and December 2008. When pressed as to how he knew of this, he referred to 'rumours' he had heard that work was continuing. He could not deny that it would have been more expensive for the respondent to use subcontractors to do painting work than to continue using the applicants. Thabetha also confirmed that it was the applicants' expectation that they would work until 12 December 2008.

[10] He did concede the other two applicants did obtain work after their work for the respondent came to an end as a result of an arrangement between the respondent and a Mr J Koen in terms of which they were engaged on what Mr Grobler described as 'piecemeal' work on a project of Mr Koen's known as the Boneyards project. Thabetha did not work on this project.

Mr Erasmus's evidence

[11] Mr R Erasmus was a member of the close corporation and a project manager. He said that the work at the Look Out site had to stop earlier because no units had been sold. Subsequently, two or three units were sold in December 2008 and work resumed at the sites the following June. He said that finishing work, stopped at the Look Out site but structural work still continued because subcontractors had been engaged for that. When work ceased at the Look Out site in October 2008, the painting team had already applied a first and second coat of paint. However, the painting work was only completed at the end of February 2009, when the company used a contractor.

[12] When questioned by Thabetha why a subcontractor had been engaged to finish the painting job, Erasmus responded that the contracts with the applicants had already expired the previous year. He explained that the original termination date of 12 December 2008 came from a bar chart setting out timelines of building projects, but because there were no sales they could not finance further work. He agreed with Thabetha that the contract did not talk about the sale of units, nor was that discussed when the contracts were concluded. Erasmus disputed that the applicants were forced to sign the contracts and said they were allowed to take them home, but preferred the company to keep the copies at the office.

Argument

[13] In argument, Thabetha said that the crux of the complaint was that they had been recruited in Johannesburg and it was very difficult to find alternative work there in the space of five days. He felt that the notice given to them had been inadequate and they should have been given at least 30 days notice before the contract was terminated.

[14] Mr Grobler, who appeared for the respondent argued that it seemed as if the claim pursued by the applicants was a contractual one whereas the claim before the court was a claim of unfair retrenchment. The central issue he submitted was whether the contracts did come to an end on 10 October 2008. In interpreting the contract he argued that it would be meaningless to interpret the phrase "the completion of the construction" to have been a reference to all construction work irrespective of whether or not the painting work on all the sites had been completed. The respondent submitted that the phrase should be interpreted to apply to the particular construction work which the applicants were engaged in, namely painting. The respondent argued that, as far as the applicants were concerned, their construction work effectively ended when they stopped painting in mid-October 2008.

[15] Thabetha did not dispute that it made sense to interpret the contracts in such a way that if employees had finished the task they were engaged to

perform, there was no reason for them to remain on site after that. However, his contention was that in the case of the painting work the job was not finished, so they should have remained in employment.

Evaluation

[16] On the Limited evidence available it appears that work on the construction sites did not proceed as expected. In terms of the timelines of the building project, the work ought to have been completed by 12 December 2008. Work had to be halted before the completion of the housing units on the sites, because of a lack of working capital which the developer had hoped to recoup from sales of the units. Had sales gone according to expectations, the applicants would most probably have continued with the painting work until that work was expected to have been completed in mid-December. At the time when they were told the work had come to an end in early October, it could not be said that the painting component of the construction work had been completed. What in fact had happened is that the employer had decided for its own financial reasons to put the project on hold until conditions improved. When conditions eventually did improve, the employer was able to complete the project the following year.

[17] In effect, the employer seeks to argue that the contracts of employment came to an end by virtue of the second part of clause 2 of the contracts, namely

that they terminated automatically because the applicants work on the sites had been completed. If that provision of the clause could not be invoked, then the dismissals which occurred in mid-October cannot be said to have simply been an automatic consequence of the operation of the contracts.

[18] In order to rely on the alternative basis for the automatic termination of the contract, which is a conditional one, the employer had to demonstrate at the very least that the condition had been met. It argues that for all intents and purposes the condition had been met because the applicants work on the Look Out site had been "completed" when it decided to suspend operations. The Shorter Oxford English Dictionary describes the noun 'completion' as follows:

"1. accomplishment, fulfillment. 2.gen. The action of or an act of completing, the condition being completed."

The difficulty with the employer's argument is that the painting work that was a component of the construction work on the sites was clearly not finished. In order to reconcile the termination provision in the contract with the factual circumstances, the respondent must necessarily contend that the phrase 'until the completion of the construction on sites' also included a situation in which it simply decided not to finalise the construction work at any particular point in time. In effect, this would mean even though the contract was expected to last until

mid-December, the employer could simply decide not to continue with work and thereby bring the contract to an end.

[19] It is questionable whether the contract as it stands can even support an interpretation that the phrase 'completion of the construction on the sites' applied narrowly to the particular work in which the applicants were engaged and not to the projects as a whole. But the interpretation of the phrase which the employer's case depends on requires an even more unusual and narrow interpretation of the phrase to even include circumstances in which the painting work was clearly incomplete, but the employer decided to suspend that activity for an indeterminate period of time.

[20] On an ordinary interpretation of the contentious phrase, it seems to me that the contract cannot sustain the employer's version that the applicants' contracts of employment terminated automatically when it decided not to complete the painting work on the sites. Consequently, the termination of the applicant's services with effect from 17 October 2008 was in fact a dismissal and not a termination by agreement. Furthermore, it was clearly a dismissal for operational reasons and it is common cause that no consultation procedures were followed. It also appears clear that there was a genuine economic reason at the time for not continuing with the construction work. As such, I must accept that the employer did have a genuine operational reason for ending the applicants'

employment. However, that did not relieve it of the duty to attempt to try to mitigate the consequences, nor did it relieve it of its duties to consult with them.

[21] It appears that the respondent did make some attempt to find alternative employment for the applicants with another contractor, but it is unclear from the evidence whether this was offered to all the applicants and to what extent it amounted to an adequate alternative to the work they had with the respondent.

[22] In view of the above, I conclude that the applicants were retrenched and that their retrenchment was procedurally unfair, because of the lack of consultation which resulted from the employer having taken the view that it was entitled to regard the termination of service as an agreed termination which flowed automatically from the terms of the contract.

Remedy

[23] In considering a remedy for the failure of the employer to consult, account must be taken of the fact that when the contracts were concluded, it was not envisaged that the contract would lead to the permanent employment of the applicants. When they concluded the contract in June neither party could have reasonably believed that it was probable the applicants would be employed beyond mid December 2008. Accordingly, any discussion or consultation about

their retrenchment in October 2008 would have occurred in the context of an understanding that the employment relationship was not been expected to endure indefinitely. In the circumstances, it is appropriate that compensation for the failure to consult should take cognizance of the limited scope of their employment relationship. Consequently, I believe that an award of six weeks' remuneration would be sufficient to compensate them for the procedurally unfair termination of their employment in terms of section 189 of the L RA.

Order

[24] In the circumstances, the termination of the Messrs G R Thabetha, Q Khumalo and C Zulu's services on 17 October 2008 was a procedurally unfair dismissal for operational reasons.

[25] The respondent must pay each of the applicants mentioned in paragraph 24 above, an amount equivalent to six weeks' remuneration at the respective rates they were being paid when their services were terminated on 17 October 2008, namely:

- a. G R Thabetha - R 5,100-00 (five thousand one hundred rands)
- b. Q Khumalo - R 5,250-00 (five thousand two hundred and fifty rands)
- c. C Zulu - R 5,250-00 (five thousand two hundred and fifty rands)



R L AGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 1 December 2010

Date of judgment: 26 October 2011

Attendance:

For the Applicants: (in person)

For the Respondent: Mr M Grobler instructed by Van der Walt Attorneys.

LABOUR COURT