



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 364/11

In the matter between:

PHILLEMON MMAPHUTHI MABOTJA

Applicant

and

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

First Respondent

GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Second Respondent

FJ VAN DER MERWE NO

Third Respondent

Heard: 10 January 2012

Delivered: 01 March 2012

Summary: Review – temporary employee - employee disputing temporary status of his employment and claiming to be employed for indefinite term – employer`s policy required temps to sign fixed term contract – employee dismissed for persistent refusal to sign fixed term contract - award confirming employee`s temporary status and that his dismissal for refusing to sign fixed term contract not unfair, upheld on review

JUDGMENT

MARCUS, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act 1995 to review and set aside the award dated 3 February 2011 issued by the Third Respondent under the auspices of Second Respondent under case number GPBC 1088/2009, dismissing the Applicant's claim that he was unfairly dismissed by the First Respondent on 1 November 2009.

Background

- [2] Applicant ("employee") was employed by First Respondent ("employer") in January 2004 as an assistant clerk (temporary) to the Magistrates Court Kempton Park. The temporary status of his appointment was confirmed in the document approving his appointment as one of four "temps" (see Documents bundle 90). Although Applicant's case at Arbitration rests on a denial of his temporary status and his insistence that from its inception, his employment with First Respondent was of a permanent or indefinite nature, and not temporary or of limited duration; it appears the division between permanent and temporary staff categories was one well known to and accepted by the staff and their unions at First Respondent, the procedure for obtaining a permanent post being a complex one commencing with a formal application for the post, followed by an interview and selection process, and the appointment of a candidate which, inter alia, requires the approval of the regional department head. There is little doubt the present Applicant Mr Mabotja was aware of the distinction between the permanent and temporary

staff categories, having himself undergone the process of applying and being interviewed for a (permanent) senior clerk post in July 2008. It seems his application was unsuccessful owing to question marks concerning the validity of certain documents and information in his CV and doubts about his competence for the post.

- [3] Following the employer's circular of 15 June 2006 issuing new guidelines on the conditions of appointment of temporary staff at First Respondent, 'temps' like the Applicant were, in terms of the circular, now required to conclude fixed term contracts of up to a maximum of one year's duration. This requirement was extended to all temporary staff including the Applicant. When Applicant's contract came to an end in 2006, he referred a dispute over his termination to arbitration. According to First Respondent, the dispute was settled by the conclusion of a written settlement agreement duly signed by the Applicant as tabled at Bundle 62, which records that the Applicant will be re-appointed into his former post "and will re-occupy his post as a temporary employee as it was before his termination" with effect 20 November 2006.
- [4] Applicant denies concluding a written settlement agreement or that the signature on the settlement agreement at p62 is his. He also denies his handwriting, followed by his signature, appearing on the following page (bundle 63) on what is apparently the last page of a contract dated March 2009, which contract it is common cause the Applicant refused to sign. It is common cause that in response to management demands following the 2006 settlement, for Applicant to sign a fixed term contract as required by the 2006 circular if he wished to continue to be allowed to perform work for the First Respondent as a temporary official, Applicant has persistently refused to do so, thereby creating an impasse which culminated in a meeting with the Director of Human Resources van Loggerenberg around August 2009 "with two witnesses present to explain to him the importance of signing the fixed term contract and that if same is not done, his employment shall be

terminated. I urged him to speak to his union representatives and gave him five days to get back to me and sign the fixed term contract which he still did not do. This led to the First Respondent terminating his employment". Applicant's failure to respond to van Loggerenberg's ultimatum for him to sign the contract, led to his employer on 30 September 2009 giving Applicant 30 days notice in writing of the termination of his employment to take effect on 31 October 2009; this after he was "given many chances to sign the fixed term contract".

Third Respondent's Award

- [5] The Commissioner rejected Applicant's claim that he was from inception employed on a permanent or indefinite basis; hence Applicant's persistent refusal to sign the fixed term contract. In my view this finding reached by the Commissioner in rejecting Applicant's claim of unfair dismissal, is not only not reviewable, it is the only conclusion a reasonable arbitrator could have come to. Applicant does not dispute the initial document approving his appointment as a temp in 2004. He also knew of the difference between permanent and temporary appointments in the Department, he himself having (unsuccessfully) made application for a permanent post in 2008. His very referral of the present dispute to the Second Respondent, commences with the following words, 'on the 2004, I have employed with the Dept of Justice as a temporarily employment until now and I was unfairly dismissed without notice.'

In refusing to sign a contract in March 2009, Applicant writes on the last page of the contract, 'I am not refuse to sign but I am not contract employee, I am temporarily employee', followed by what purports to be Applicant`s signature (bundle 63).

- [6] Although the Applicant is now disputing the handwriting and signature at bundle 63 to be his, this seems to be in conformity with the tactics continuously adopted by the Applicant when faced with documentary evidence destructive of or conflicting with his denial that he was a

temporary employee, of simply denying the signature (or handwriting at p63) on the document to be his. Thus whilst at page 28 of the Record, Applicant, in his testimony at the Arbitration, freely acknowledges the handwriting and signature at bundle 63 acknowledging his temporary status to be his, a few lines further down at the bottom of page 28, he is recorded as denying his authorship of the handwriting and his signature at p 63, thus directly changing his version of a few moments earlier conceding the writing was his. Then, having realised that the contents of the settlement agreement tabled by the Respondent at Bundle 62, are destructive of his version that he would not sign a fixed term contract because he is not a temporary employee, Applicant seeks to overcome this difficulty by denying the signature on the settlement at p 62 is his, notwithstanding that this signature appears to be very similar, if not identical with his purported signature on the following page (63), which handwriting and signature Applicant initially acknowledged during his testimony to be his. At page 63, Applicant, in his own handwriting, unequivocally represents himself to be a temporary employee.

- [7] If all this is not sufficient for Third Respondent to accept that the signature on the Settlement at p 62 belongs to the Applicant, Applicant himself then addressed a letter to First Respondent dated 20 July 2007 in which he admits having signed the Settlement at p 62 (see bundle p 85). In admitting signing the Settlement, he also purports to express surprise in the letter that he was now being asked to sign a three months contract; yet clause 2 of the Settlement Agreement records that the Applicant will be re-appointed into his former post of Administration clerk "and will re-occupy his post as a temporary employee as it was before his termination". In line with the tactics adopted thus far, the letter of 20 July 2007 being highly inconvenient to his contention that he was a permanent employee, Applicant once again seeks to deny authorship of the letter and signature at p 85.

[8] I have little doubt no reliance whatsoever can be placed on these denials of his signature by the Applicant and that the Commissioner's acceptance that Applicant signed the Settlement Agreement at p 62 was justified and indeed was the only conclusion he could reasonably have come to, as was his rejection of Applicant's case that he was employed on a permanent or indefinite basis and was not a temp. The Commissioner was also correct in accepting van Loggerenberg's testimony that the letter of 29 January 2005 relied on by applicant to evidence his appointment on a permanent basis, was not a letter of appointment at all. It was issued for statutory purposes in order to establish his authorisation to handle court processes as required by law. The Commissioner was also correct in accepting van Loggerenberg's testimony that the 37% service benefits in Applicant's pay slip were those paid to temporary or contract workers, not permanents.

[9] There are no grounds to review Third Respondent's conclusion that Applicant was not a permanent employee and that he was not unfairly dismissed following his persistent refusal to sign the fixed term contract.

[10] I make the following order:

It is ordered that:

1. The application for the review of the Third Respondent's award dated 3 February 2011 in terms of section 145 of the Act is dismissed.
2. I make no order as to costs in the review.

Marcus, AJ

Acting Judge of the Labour Court

LABOUR COURT

Appearances:

For the Applicant: Adv L. Maunatlala

Instructed by E.S. Makinta Attorneys

For the Third Respondent: Adv N. Nharmuravate

State Attorney

LABOUR COURT