



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR 2608/09

In the matter between:

TRANSNET LTD T/A

TRANSNET CAPITAL PROJECTS

Applicant

and

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION obo

TB MBATHA AND 52 OTHERS

First Respondent

SIPHO DLAMINI N.O

Second Respondent

TRANSNET BARGAINING COUNCIL

Third Respondent

Heard: 30 January 2013

Delivered: 14 June 2013

Summary: In granting compensation an arbitrator may not exceed his or her power in terms of section 193 of the LRA as doing so renders his or her award reviewable. Review in terms of section 145 of the LRA: Dismissal for refusing to sign a fixed term contract.

JUDGMENT

LALLIE, J

- [1] This is an application to review and set aside the arbitration award of the second respondent (the arbitrator). It is opposed by the first respondent.

Factual background

- [2] The applicant employs a number of employees on fixed term contracts, the bulk of which are linked to specific works projects. The duration of the contracts differs with the longest being a year. A number of the individual first respondents had entered into repeated fixed term contracts with the applicant. When they reported for duty on 12 January 2009, the fixed term contracts they had entered into with the applicant had expired. They submitted the necessary documents including forms which had to be signed by their banks and on the 14 January 2009, they started performing their duties. On 20 January 2009 they were issued with contracts of employment which they were required to read, sign and return to the applicant the following day. They sought clarity on the probation and pass/fail clause. On 22 January 2009, the individual first respondents returned the contracts unsigned. Workers who had refused to sign their contracts were not allowed to work. Arrangements were made for alternative labour and the individual first respondents disrupted operations. Police and security guards were called in to restore order. The individual first respondents were paid until the end of January 2009. The applicant denied dismissing or treating the individual first respondents unfairly.

- [3] The first respondent referred an unfair labour practice dispute to the third respondent. The summary of the facts of their dispute is that workers were stopped from working after raising certain issues on their contracts of employment. They sought reinstatement with full benefits. A conciliation was not held and the dispute was arbitrated by the arbitrator who issued an award in their favour:

Grounds for review

- [4] The applicant's first ground for review is that the award suffers from misdirection and defects in relation to the assessment of evidence, interpretation and application of the law. The second ground is based on the arbitrator's failure to conciliate the dispute before arbitrating it in breach of a collective agreement. A further attack is based on the arbitrator's finding which disregarded that the fixed term employment offered by the applicant was subject to the individual first respondents signing contracts of limited duration running from 11 January to 10 April 2009. The applicant submitted that without signed contracts of employment no employment relationship existed, alternatively, the individual first respondents were employed from the date they tendered their services until the time it became apparent that the terms of the offer of the fixed term contracts were not accepted by the individual first respondents. The arbitrator's finding that the individual first respondents report for duty on 26 August 2009 when the fixed term contracts they were offered would have expired on 10 April 2009 was found to be unreasonable by the applicant.
- [5] The applicant submitted that the arbitrator's finding that the individual first respondents be retrospectively reinstated and paid the amount of money they would have earned from the first day that they were not on duty to the last day that they were not working is unreasonable as it disregards the reality that they were offered employment until 10 April 2009. It further does not take into cognizance the payment they received until 28 January 2009.

Evaluation

- [6] It is trite that this court's function in determining whether to interfere with an arbitration award on review is provided for in section 145 (1) and (2) of the LRA. I will firstly consider the applicant's submission that the arbitrator did not arbitrate the dispute which had been referred and suffering from the defect of not having been conciliated.
- [7] The commissioner dealt reasonably with the issue of the nature of the dispute before him. A reading of the record reveals that soon after the

commencement of the arbitration proceedings the arbitrator intimated that the dispute before him was an unfair dismissal dispute. The applicant neither objected nor brought to the arbitrator's attention the true nature of the dispute as it understood it. It only raised that issue in its closing arguments. The commissioner reasonably rejected the argument which was raised after all the evidence had been led on the basis that the arbitrator was dealing with an unfair dismissal dispute. The applicant cannot be allowed to have a change of heart at that very late stage of the proceedings. The arbitrator proffered a reasonable explanation that he exercised his right in terms of the LRA and determined the dispute. The same applies to the applicant's argument that the dispute was not properly before the arbitrator as it had not been conciliated leading to the parties not having an opportunity to attempt to resolve it through conciliation. If the applicant genuinely desired to exercise its right to have the dispute conciliated, nothing prevented it from expressing its desire at the commencement of the arbitration. The law is clear; resolution of disputes through arbitration should not be hamstrung by the failure to schedule conciliations. The arbitration was held more than 30 days after the dispute was referred to the third respondent. It was therefore properly before the arbitrator. Contrary to the applicants submission the collective agreement did not require the conciliation of the dispute before it was arbitrated. Conciliation was therefore no jurisdictional fact.

- [8] The applicant argued that the arbitrator committed a gross irregularity by disregarding undisputed facts before him. The first of such facts is that the individual first respondents were aware that they were offered fixed term contracts of employment running from 11 January to 10 April 2009 which they refused. The duration of the fixed term contracts is not supported by evidence. Even the applicant could not refer to any evidence supporting its argument. Evidence before the arbitrator was that the individual first respondents were employed by the applicant over a period of years on fixed term contracts of different duration. The applicant's argument that not all contracts were for the same period of time and dependent on the nature of the works contract in which the applicant was engaged, is in variances with its argument that all the

parties were aware of the duration of the fixed term contract that the individual first respondents were offered in January 2009.

[9] The applicant argued that the arbitrator's finding that the individual first respondents were employed on indefinite contracts of employment, or were dismissed unfairly and such dismissal was substantively and procedurally unfair is not supported by the facts before him and therefore unreasonable. This argument is based on the arbitrator's finding that the individual first respondents returned to work on 12 January 2009 to start with the new year's contracts. It is common cause that the individual first respondents were given new contracts of employment which they refused to sign owing to dissatisfaction with certain clauses. They were given an ultimatum to return the signed contracts or face termination of their services. The applicant argued that the refusal to sign the fixed term contracts on the terms on which they were offered meant that the individual first respondents were not employed by the applicant.

[10] The applicant further argued that the arbitrator exceeded his powers and committed a gross irregularity in assuming the power to extend the life of the fixed term contracts of employment when such contracts has already expired. The applicant did not present a substantial, clear and convincing argument on the relationship between the individual first respondents and itself between their first day on the duty in 2009 and the date on which their employment relationship was terminated.

[11] It is common cause that the applicant allowed the individual first respondents to work from 12 to 21 January 2009 without written contracts of employment. Section 213 of the LRA defines an employee as:

'any person excluding an independent contractor who, works for another person or for the state and who receives, or is entitle to receive, any remuneration'. The individual first respondents worked for the applicant between 12 and 21 January 2009. They were remunerated for their work and were therefore employees of the applicant in January 2009.

The starting point for deciding the validity of the applicant's argument that the arbitrator's finding that the individual first respondents were dismissed by the applicant is section 186(a) of the LRA. It provides as follows:

'(i) "dismissal" means that 'An employer has terminated a contract of employment with or without notice'.

- [12] The decision in *Nulaw v Barnard NO and Another*¹ which the first respondents sought to rely on is apposite. It illustrates clearly that an employer who has engaged in acts which bring the contract of employment to an end in a manner recognised by law terminates the contract of employment. It is common cause that the applicant, through its employees unequivocally informed the individual first respondents who were its employees from 12 January 2009 not to return to work without signing the new contracts of employment. The instruction terminated the employment relationship. The arbitrator's decision that the individual first respondents were dismissed by the applicant is therefore reasonable.
- [13] I now consider whether there is merit in the applicant's argument that the arbitrator's finding that the dismissal of the individual first respondents was unfair. In *Biggs v Rand Water*² the court made it abundantly clear that it is unfair to keep employees on fixed term contracts in order to make it easy for the employer to dismiss such employees without complying with the obligations imposed by the LRA in respect of permanent employees.
- [14] It is common cause that a number of the individual first respondents have worked for the applicant for years on consecutive fixed term contracts. It is further common cause that some clauses which influenced the individual first respondents not to sign the contracts for the period commencing in January 2009 are related to probation and pass/fail. Their

¹ [2001] 9 BLLR 1002 (LAC).

² [2003] 24 ILJ 1957 (LC).

common feature is that they threatened job security of employees who have worked for the applicant for years. The definition of the employee in the LRA is instructive. It does not distinguish between employees who have signed a contract of employment and those whose contracts are only verbal. It also does not differentiate between employees employed in terms of fixed term contracts and those whose contracts are of unlimited duration. Other than the inherent differences in their contracts, employees on limited duration contracts should enjoy equal protection by the LRA and their rights should not be diminished because of the regime of their contracts. Employers cannot be allowed to use fixed term contracts to get rid of their employees easily and with impunity. Had the individual first respondents not been on fixed term contracts, the applicant could not have instructed them to accept new terms and condition of employment or face dismissal. I therefore conclude that the arbitrator's finding that the individual first respondents were unfairly dismissed is reasonable as no fair reason exist for their dismissal which was not preceded by a fair procedure.

[15] The applicant submitted that the award the arbitrator granted is unreasonable. The award provides as follows:

'Accordingly, I make the following determination:

- (1) "The respondent is ordered to reinstate all the 53 Applicant Employees retrospectively. The Applicants should report for duty on the 26th August 2009.
- (2) The Applicants shall be so employed by the Respondent as if they were on the original contract/agreement with the respondent. All the time frames as contemplated in the original agreement shall be recognized by both parties. This means that the Respondent shall be entitled to terminate or renew the contracts as and when the time and/or even as contemplated by the agreement arrives.
- (3) The Respondent is further ordered to pay all the 53 Applicant Employees the amount of money they would have earned from

the first day that there were not working to the last day that the were not working.

(4) I am required to quantify the back-pay as contemplated by Paragraph 3, but the details of what each Applicant Employee earned was not provided to me during the proceedings. The parties are ordered, therefore, to provide this information within fourteen (14) days from the date of receipt of this award, after which quantification will be made in this regard.

(5) I make no order as to costs”.

[16] The applicant's argument is based on its submission that the arbitrator committed a gross irregularity by extending the life of fixed term contracts which had expired.

[17] Section 193 (a) of the LRA requires an arbitrator who has found a dismissal unfair to order the employer to reinstate the employee from the date not earlier than the date of dismissal. The arbitrator reinstated the individual first respondents from the date of their dismissal. His decision is not unreasonable because the applicant elected to pay the individual first respondents remuneration from 12 to the end of January 2009. The period they were paid for exceeded the 22 January which was their last day of duty. It cannot later reprobate and require the first respondents to earn that money. The arbitrator's decision is consistent with the applicant's decision. He could not in his award take away the money from the individual first respondents. The applicant's submission that the arbitrator failed to apply his mind in reaching this finding has no merit.

[18] In paragraph 2 of the award the arbitrator orders the applicant to further employ the individual first respondents on fixed term contracts with similar terms and conditions as the original contracts/agreements. This paragraph and the reinstatement order are mutually exclusive because reinstatement means putting a dismissed employee back in the job that employee held prior to dismissal on the same terms and conditions. In

this regard see *Equity Aviation Services (Pty) Ltd v CCMA and Other*³. By reinstating the individual first respondents the arbitrator put them in the position of being employees who had reported for duty and worked for few days after the expiry of their fixed term contracts, waiting to enter into new fixed term contracts as they had done in the past.

[19] The arbitrator did not apply his mind when drafting paragraph 2 of his award. He refers to the 'original contract/agreement', it is common cause that the individual first respondents and the applicant had entered into a number of fixed term contracts of varying duration. There was a duty on the arbitrator to state unequivocally the contract/agreement he is referring to in paragraph 2 of his award and to give reasons for basing his findings on it. The power of an arbitration award is in its implementation. The award forms an important part of the arbitrator's finding. It also gives direction to the parties as it tells them what needs to be done, by when and by which party subsequent to an unfair dismissal finding. The arbitration award falls short as it is not drafted in clear language. An arbitration award which lacks clarity because of the manner in which it has been drafted cannot be implemented and is unreasonable.

[20] The applicant sought a costs order against the first respondent. In terms of section 162 (1) a costs order may be made according to the requirements of law and fairness. Although I have made an order in the applicant's favour, the award has been couched in unclear terms which gave the respondent reason to oppose this application. The respondent therefore did not act unreasonably in opposing this application. In the circumstances granting a costs order will not be appropriate.

[21] In the premises the following order is made:

21.1 The arbitration award issued by the second respondent under case number TOKISO/T9/028 is reviewed and set aside.

[22] The matter is remitted to the third respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

³ [2008] 12 BLLR 1129 (CC)

Lallie, J

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Advocate Van As

Instructed by: Bowman Gilfillan Attorneys

For the first Respondent: Advocate TA Boda

Instructed by: Cheadle Thompson & Haysom Inc

LABOUR COURT