



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN

JUDGMENT

Not Reportable

Case no: D1050/10

In the matter between:-

JACK'S TYRES (PTY) LTD

Applicant

and

A DEYSEL N.O.

First Respondent

L NJAKAZI AND 15 OTHERS

Second to Sixteenth Respondents

MOTOR INDUSTRY BARGAINING COUNCIL

Third Respondent

Heard: 22 February 2013

Delivered: 06 June 2013

Summary: Employer seeking to persuade existing employees to enter into new contracts of employment. Employees refusing – contending that they were dismissed in terms of section 186(1) of the Act. Employer disputes jurisdiction of the bargaining council contending an automatic dismissal in terms of section 187(1)(c). Decision in *NUMSA and Others v Fry's Metals (Pty) Ltd* considered.

JUDGMENT

CHETTY AJ

- [1] The applicant in this matter, a tyre fitment centre, seeks to review and set aside the decision of the first respondent ('the Commissioner') in terms of which the latter ruled that the second to sixteenth respondents were unfairly dismissed and that they should be awarded reinstatement together with back pay. The award which the applicant currently seeks to set aside was handed down on 28 September 2010. This was preceded by an earlier award of the bargaining council in which the commissioner found that the second to sixteenth respondents were not dismissed. The respondents then applied to this Court set aside that award. On 1 April 2010, the Labour Court granted judgment in favour of the second to sixteenth respondents, ruling that the matter be remitted for hearing to the seventeenth respondent, and to commence *de novo* before a new commissioner.¹
- [2] The second arbitration commenced before the first respondent on 9 July 2010. At the commencement of the arbitration proceedings, the applicant contended that the first respondent and the Dispute Resolution Centre ('DRC') – falling under the auspices of the seventeenth respondent - did not have the jurisdiction to arbitrate the matter as it contended that the second to the sixteenth respondents were not entitled to any relief as they had not been dismissed from employment. The issue before the commissioner, as far as the second to sixteenth respondents were concerned, was to determine on the facts, whether there was a dismissal. The matter became more complicated when counsel for the second to sixteenth respondents informed the commissioner that 'what the employer told the employees is that if they didn't sign fixed term contracts they would be dismissed'.² A determining factor in this application is that only before this Court did the applicant contend that the second to sixteenth respondents were dismissed in order to compel them to accept a demand in respect of a matter of mutual interests between employer and employees. If this were found to be the case, the DRC would not have had jurisdiction in the matter as the dismissal would then constitute an automatically unfair dismissal, in respect of which only the Labour Court has jurisdiction.

¹ Judgment in case no. D549/07 by Gush J.

² Arbitration proceedings at 73, line 15-16.

[3] In terms of section 187 of the Labour Relations Act 66 of 1995, an automatically unfair dismissal is defined as:

'(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5⁴⁹ or, if the reason for the dismissal is-

- (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;⁵⁰
- (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee.'

[4] The contention of the second to sixteenth respondents at the arbitration and before this Court is that it has never been their case that their dismissals were automatically unfair and they argued that they never relied on this as a basis for their allegation of an unfair dismissal. The second to sixteenth respondents, further, contended that implicit in the remittal of the matter by the Labour Court back to the DRC was that the bargaining council had the necessary jurisdiction to arbitrate the matter. Mr Broster SC, who appeared for the applicant, however, contended that the earlier decision of the Labour Court is of no moment in these proceedings. It was furthermore, not in dispute that the issue of jurisdiction only surfaced when the matter was remitted for adjudication before the first respondent. While the second to sixteenth respondents may argue that the point as to whether the DRC had jurisdiction to deal with the matter was raised as an afterthought, the applicant's counsel is correct in his submission that jurisdiction is a point of law which can be raised at any stage of the proceedings. To that extent, the background facts giving rise to the dispute are largely common cause, save to the extent where the parties disagree on

whether they had been a dismissal at a particular point in the line of events as they unfolded.

- [5] The background to the matter is that the second to sixteenth respondents were all employed by the applicant in various capacities at its tyre fitment centre. According to the second to sixteenth respondents, they were employed on a permanent basis. The applicant's chief executive officer, Mr Timothy, was apparently advised by the Department of Labour to "formalise" its contracts of employment with its employees. However, the decision of the commissioner records that Mr Jugthaw, the owner of the applicant fitment centre, stated that the applicant was experiencing a time keeping problem and it is for this reason that it was decided that the basic conditions of work had to be reduced to writing and signed by the employees. Mr Jugthaw told Mr Timothy what the problem was, and Mr Timothy had to come up with a solution.³
- [6] Timothy subsequently purchased a manual containing *pro forma* contracts. He contends that he discussed the contracts with each employee, whereas the version of the second to sixteenth respondents is that they were simply handed the contracts, the contents of which were not explained to them, but from which they recognised its intention was to place them on fixed term employment. On their version, Timothy informed them that if they did not sign the contracts by the following day they would be dismissed. The contracts handed to them contained several blank spaces, which the employees were rightly suspicious of. In light of the ultimatum given to them, they approached the DRC for advice and complained that they had been dismissed unfairly. The managing commissioner of the DRC, a Ms Pather, then contacted the applicant and informed them that the second to sixteenth respondents informed her that they had been dismissed. It was agreed that they would be returning to work in an hour. When they returned to work they were told to wait in the change rooms where they remained until 17h00, when they left to go home. On the applicant's version, Timothy stated that approximately 49 (forty nine) employees refused to return to work and required that the contracts be explained to them. This in

³ Pleadings at para 45 of Arbitration award.

itself undermines Timothy's version that he discussed the purpose of the contracts with each employee. If he had done so, there would have been no resistance from that many employees to the new contracts as everyone would have had a clear understanding of its contents. He does agree that when the commissioner from the bargaining council contacted the applicant, it was conveyed to him that the second to the sixteenth respondents complained that they had been dismissed. He denies this contention.

- [7] The next day, the second to the sixteenth respondents returned to work but were confronted by police who informed them that they had received a complaint from the employer of them blocking the driveway to the premises and being disruptive. The second to the sixteenth respondents denied any such allegations and contend that the police were called in to disperse them. What is common cause is that they did not return to work on this day. According to Timothy, he held a meeting with a representative of the union on 4 October 2006 and informed him that if any of the employees who had refused to return to work did eventually return, such employees would be welcomed back but they would have to face a disciplinary enquiry for having participated in an illegal and unprotected strike. None of the second to the sixteenth respondents accepted the offer, and instead had referred a dispute to the seventh respondent earlier on 3 October 2007 contending that they had been unfairly dismissed. In their referral, they summarised the facts of the dispute by stating 'We were asked to sign a fixed term contract we refused and we were dismissed.'
- [8] Despite attempts to resolve the dispute, the matter could not be settled and it proceeded to arbitration. When the matter came before the first respondent, the issue of jurisdiction of the seventeenth respondent's Dispute Resolution Centre to arbitrate the matter was placed in dispute. In the course of his evidence, Timothy was questioned by the commissioner as to whether the second to the sixteenth respondents were dismissed. The following interchange is relevant in determining the issue on review to this Court:⁴

⁴ Arbitration Record (Part 2): p. 50, lines 10-25.

'Commissioner: On what basis are you saying that they still, they are not employed by you if you haven't terminated their employment?

Mr Timothy: Their posts have been filledthey abandoned their posts.

Commissioner: Okay. In the beginning I think I asked some questions about whether or not these employees were dismissed for participating in an unprotected strike, because it worried me whether there's jurisdiction in this matter, because that kind of case is something that needs to be dealt with by the Labour Court. But now from what I hear you say is that they were not dismissed at all, so they could not be dismissed for operation, for participating in a strike. Is that correct or incorrect?

Mr Timothy: They were not dismissed, they just did not return, they dismissed themselves.'

Similarly, the owner of the company, Mr Jugthaw denied ever dismissing anyone. On this aspect of the evidence alone, the respondent's version is that there was no dismissal which took place.

- [9] The issue on which the application for review in this Court hinges is based on the applicant's contention that the first respondent committed a gross irregularity in determining, on the basis of the evidence before him, that the seventeenth respondent's Dispute Resolution Centre had the necessary jurisdiction to hear the dispute. The reason for this assertion is the applicant's contention that the termination of the second to the sixteenth respondents' services constituted an automatically unfair dismissal, directed to compel the employees to accept a demand in a matter of mutual interest. In the context of the present application, the demand posited by the employer was that the employees sign new contracts of employment, and only if they did, they would be allowed back at work. In this regard, Mr Broster referred to the decision of

the first respondent,⁵ which records that Mr Timothy informed the second to the sixteenth respondents not to commence working unless they signed the *pro forma* employment contracts. Those employees who did not sign the forms could not start work, and should leave the premises. The option given to the employees, it was submitted by counsel, was clear – they could sign the contracts and start work, or else leave the premises. When Timothy met with the union representatives on 4 October 2010, in his opinion he still entertained the notion that the first second to the sixteenth respondents could return to work – but only if they agreed to face a disciplinary enquiry relating to their participation in an unprotected strike.

- [10] In analysing the evidence before him, the first respondent made certain conclusions which ultimately informed his decision in finding that the second to the sixteenth respondents were dismissed within the meaning of section 186(1) of the Act, and that their dismissal was not for the purposes as contemplated in terms of section 187(1)(c) of the Act. The following extracts from the award are relevant to the enquiry as to whether the conclusion reached by the commissioner was a decision which a reasonable commissioner could come to, based on the evidence before him:

'51. After considering all the evidence I find that it is more probable than not that what the respondent attempted to do was to bring its employees under the impression that it had reduced the existing terms and conditions to writing and that it was requiring the employees to acknowledge that those were the existing terms and conditions of employment by signing the written documents. The case that the applicants sought to make out was that the respondent instructed them to sign a document which was incomplete in that it contained certain blank spaces where dates were supposed to be inserted. The documents further had a heading which read "fixed term contracts of employment" which led to them questioning the respondent's bona fides. Their case was that it was unreasonable of the respondent to require them to sign such documents and that they were entitled to refuse to sign such documents. This was especially so in light thereof

⁵ Arbitration award at para 21.

that the basic terms and conditions of their employment were regulated by the MIBCO Main Collective Agreement.

52. The respondent did not contend that it in any way required of the applicants to accept a demand in respect of a matter of mutual interests. Its case was that it believed that it was a legal requirement that signed written contracts of employment had to be in place and that it required of its employees to sign such contracts in order to comply with the law. According to Mr Jugthaw his idea was that the existing basic conditions of employment had to be reduced to writing and acknowledged by the employees. He was not aware that some of the documents had the heading "fixed term contracts of employment" and was not aware why the applicants were required to sign such documents. Mr Timothy's version that he thought that it was a legal requirement that employees should sign a fixed term contract of employment in respect of the first six months of their employment was highly improbable and it was more probable than not that there was a sinister motive behind him requiring the employees to sign the document which was intended to be used in cases where there was a genuine need to enter into an employment contract for a limited period. It was not in dispute that the documents which the applicants were required to sign had blank spaces where dates could be filled in after the document was signed. The documents could later be completed in such a way that it suited the respondent and it is more probable than not that this was what was intended.

53. I therefore find that the DRC has jurisdiction to arbitrate the dispute.'

[11] Mr Broster contended that the reasoning of the commissioner was inherently flawed in as much as he provided no explanation as to why he did not consider the dispute between the parties to be one of mutual interest. On the facts before him, counsel submitted that he could only find that the second to the sixteenth respondents were dismissed for refusing to accept a demand from the applicant to sign contracts of employment, which he contended were matters of mutual interest, therefore falling squarely within the realm of an automatically unfair dismissal as contemplated for in section 187(1)(c) of the Act. Accordingly, the commissioner ought to have concluded that the Labour Council and not the

DRC had jurisdiction to adjudicate the matter. Grogan⁶ however points out that to be hit by section 187(1)(c), a dismissal for a specified purpose need not be preceded by an actual lock out.

‘Dismissal of individual employees who refuse to accept a particular demand made by their employers also falls within the scope of this provision provided that the demand relates to a matter of mutual interest between employer and employee. ...Dismissal of employees who refuse to accept demands or instructions which the employer is lawfully entitled to make are therefore not covered by section 187(1)(c). For the dismissal to fall under that section the demand(s) with which the employees refused to comply must relate to changes which the employer wishes to make but has no legal right to make without the employee’s consent. The threat of dismissal contemplated in this section is a threat aimed at compelling the employees to give such consent.’

- [12] It was further submitted on behalf of the applicant that the commissioner, having correctly raised the spectre of the lack of jurisdiction by virtue of the dismissal falling into the parameters of section 187(1)(c), erred when after reaching the conclusion that he did have jurisdiction, to proceed to hear the merits of the dispute. The commissioner deemed that this was a prudent course to follow as the evidence on the merits and the issue of jurisdiction were “intertwined”. In response, Mr Schuman for appeared for the second to sixteenth respondents pointed out that at the outset what is imperative to keep in mind is that the applicant denied the existence of a dismissal.⁷ Both parties were in agreement that the question of jurisdiction, in the context of section 187(1)(c), had to be decided objectively on the facts before the arbitrator. In *SA Rugby Players Association and Others v SA Rugby (Pty) and Others*,⁸ the court held that the issue was

⁶ Dismissal, Juta, at 105–6.

⁷ See Arbitration Record, p.79, lines 9-10 where Mr Gopal, the applicant’s representative states: ‘Mr Commissioner may I just say at the end that we’re actually disputing dismissal.’

At lines 20-23, Mr Gopal reiterates this view where he states: ‘No, Mr Commissioner, my instructions are that the Applicants were just requested to sign the contracts, but no sanction was given to them for failing to adhere or comply with that instruction.’

⁸ (2008) 29 ILJ 2218 (LAC) at para 41.

'simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CMA had no jurisdiction irrespective of its finding to the contrary.'

This view is consistent with the submission on behalf of the second to sixteenth respondents that the issue of jurisdiction needs to be determined on the version of the employees, in respect of facts proven before the arbitrator. The reason for this, as counsel for the second to sixteenth respondents contended, is that the applicant has in fact no version of record regarding the dismissal, and now seeks to opportunistically make out a case based on a particular interpretation or nuances of the evidence of the employees. This is evident from the opening statements at the arbitration where the applicant's representative persistently denied that it had dismissed the employees. There was no mention made of a dismissal to compel them to accept a demand on a matter of mutual interests. I agree with the employee's counsel that argument was constructed only after the matter reached this Court.

- [13] As regards the applicant's argument that the arbitrator committed an irregularity in dealing with the issue of jurisdiction as well as delving into the merits of the matter, counsel for the employees pointed out that this was not pleaded as a ground of review by the applicant.⁹ Moreover, it was submitted that the commissioner's decision to hear the evidence both on the issue of the dismissal and on the issue of jurisdiction was an entirely reasonable approach as the

⁹ See *CUSA v TAU Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) where Ngcobo J stated at paras 67-68 'Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play.'

evidence which he would have heard in regard to one would be apposite in respect of the other. It was, however, contended that it is an entirely reasonable approach to determine whether there was a dismissal in the first instance, and then to consider whether the dismissal fell within the ambit of the bargaining council and ultimately whether it was unfair. The first respondent's decision to deal with the arbitration in that manner is clearly spelt out in the following passage from his award:

'8. The issue for decision was whether the applicants were unfairly dismissed and, if so, what relief is to be awarded. It was particularly in dispute whether the dismissals occurred. Whether the DRC had jurisdiction to arbitrate the dispute was a further issue that needed to be decided.'¹⁰

[14] Mr Schuman cited the example of a constructive dismissal as being an instance where the employer contends that there was no dismissal because the employee elected to terminate the employment relationship. In this type of scenario, the arbitrator must first determine whether a dismissal occurred in the first place in order to ascertain whether the CCMA or bargaining council has jurisdiction. Having done so, if a dismissal is found to have taken place, the arbitrator would be perfectly entitled, on the basis of the same evidence, to pronounce on the merits. Section 138 (1) of the LRA provides that:

'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'

I agree that the evidence in both enquiries would be very much the same and I am unable to find that there was any irregularity committed which would render the decision of the arbitrator to be set aside.

[15] In regard to issue of whether the bargaining council had jurisdiction to hear the matter, it was submitted, must be determined on the version of the employees

¹⁰ Arbitration award at para 8.

who state at various parts of the record that they were dismissed because they refused to sign the fixed term contracts presented to them by the applicant.¹¹ The applicant does not deny that it presented the applicant's with new contracts to sign. It contends that they could sign the forms and only then would they be permitted to return to work. What is equally relevant is that on the employees' version they were dismissed on 27 September 2006 when they refused to sign the contracts of employment handed to them. Mr Schuman further submitted that it is important to have regard to the intention of the employer at the time when the dismissal, according to the employees, took place. On their version, they refused to sign the contract and were told in those circumstances, they were dismissed.¹² That was the version they also reported to the commissioner at the bargaining council. It was irrelevant, as I understood the argument, of what the employer's position was after the dispute had already been referred to the bargaining council. It is common cause that when Mr Timothy met with a delegation of the employees and the union on 4 October 2006, the dispute had already been referred to the bargaining council.

- [16] As set out above, the applicant's contention is that that the employees were presented with an option to either sign the contracts or face dismissal. Only if they signed the contracts would they be allowed to return to work. On this basis, the applicant contends the matter is taken outside the realm of a section 186 dismissal dispute and placed within the context of an automatically unfair dismissal under section 187. In substantiation of the argument as to why the dismissal of the second to sixteenth falls within section 186 rather than section 187, counsel for the employees referred to the decision of Zondo JP in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of South Africa and Others*¹³ where the employees were dismissed for failing to accept a demand related to a change in their shift patterns. The Court made the following observation which is apposite to the circumstances of the present case:

¹¹ Transcript at 30; line 23-4; 31, lines 18-25; 32, lines 1-3; and 33; lines 9-14.

¹² Record at 95, lines 1-4.

¹³ 2003 (24) ILJ 133 (LAC) at para 35.

[35] The respondents' case, as sought to be made out in the founding affidavit, was contained in par 45 of the founding affidavit. Par 45 reads:-

"I have been advised and respectfully submit that the proposed dismissals would be unfair and unlawful. The [appellant] is proposing to dismiss the second and further [respondents] as a result of their failure to agree to changes to their terms and conditions of employment. It is submitted that this action of the [appellant] constitutes a step to compel a demand and, if implemented such dismissal would be an automatically unfair dismissal in terms of section 187(1)(c) of the Act".

That is the only paragraph in the founding affidavit in which the respondents stated what the basis was for their challenge of their proposed dismissals. It also needs to be pointed out that the respondents did not either in par 45 or anywhere else in the founding affidavit allege that, in dismissing the second and further respondents, the appellant sought to compel them to agree to the changes it was proposing. Instead, the respondents allege in the second sentence of par 45 that the appellant was proposing to dismiss the second and further respondents "as a result of their failure to agree to changes to their terms and conditions of employment". That is not the same as to allege, as the respondents should have alleged if they sought to base their case on section 187(1)(c), that the appellant sought to effect the dismissals in order to compel them to agree to its proposals.'

[17] Zondo JP distinguished between the situation prior to dismissal when an employee is told to sign a new contract or face dismissal. Once an employee opts not to acquiesce to the demand, the dismissal becomes final. That aspect is further elaborated on in *Fry's Metals* where the Court held that:

[27] In my view what was said by the Industrial Court in *Game Discount World* in respect of a lock - out dismissal under the definition of a lock - out under the old Act, namely, that such a dismissal cannot be final and irrevocable, applies with equal force to the provisions of sec 187(1)(c) of the Act. In order to fall within the ambit of sec 187(1)(c) a dismissal must have as its purpose the compulsion of the employees concerned to accept a demand in respect of a matter of mutual interest between

employer and employee. If a dismissal is not for that purpose, it falls outside the ambit of sec 187(1)(c).

- [28] A dismissal that is final cannot serve the purpose of compelling the dismissed employee to accept a demand in respect of a matter of mutual interest between employer and employee because, after he has been dismissed finally, no employment relationship remains between the two.¹⁴

In light of the facts before the arbitrator, counsel for the second to sixteenth respondents submitted that the intention of the employer was simply that if the employees did not sign their contracts, they were dismissed. The relationship between the parties had been severed and it immaterial of what employer sought to contend after the dismissal had been effected or after they had been contacted by the bargaining council.

- [18] The dismissal which was referred to the bargaining council was a dismissal in terms of section 186. It is the employer who seeks to couch it as an automatically unfair dismissal and to take it out of the jurisdiction of the bargaining council. It is pertinent to note observations of Ngcobo J in *CUSA v Tao Ying Metal Industries and Others*:¹⁵

'In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that the parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration... The dispute between the parties only emerges once all the evidence is in.

What is also curious is that the applicant, neither in its main or supplementary heads of argument do not mention the *Fry's Metals* judgment, which is instructive in this particular case. In his argument, Mr Broster accepted that this review can be determined on the basis of the distinction articulated by Zondo

¹⁴ Id at paras 27 and 28.

¹⁵ 2009 (2) SA 204 (CC) at para 66.

JP between a dismissal which is final in effect and a “lock-out” dismissal which is effected in order to ‘compel the employees to agree to a demand which would result in the dismissal being withdrawn.’¹⁶

- [19] The fundamental problem facing the applicant in this Court is that they now argue that they dismissed the second to sixteenth respondents over a matter of mutual interests. If the employees were prepared to sign their contracts, they would have been taken back in employment. On that basis, the applicant relies on a section 187(1)(c) dismissal in terms of which the Labour Court and not the bargaining council ought to have adjudicated on the matter. When one considers this version in relation to the evidence at the arbitration, it is difficult to reconcile the two. When asked to explain the case of the applicant at the arbitration, Mr Gopal, the applicant’s representative informed the arbitrator when the employees refused to sign the contracts they were asked to remain in the change rooms, where after they decided to leave and report to the bargaining council that they had been dismissed. Mr Gopal expressly states that:

‘Mr Timothy explained to the person on the other side that the Applicants had never been dismissed and they are to report to work immediately and to commence work.’¹⁷

It is only before this Court that the applicant’s now contend that the second to sixteenth respondents were dismissed within the context of section 187(1)(c).

- [20] Mr Schumann is most probably correct in his assumption that the applicant presumably obtained advice from someone who suggested that they get their employees sign contracts with significant areas left blank, which could be then be conveniently completed at a later stage with the end date of a fixed term contract, especially where the employer wishes to rid itself of a particular employee. Mr Schumann further contended that even if the arguments raised above were to fail, the applicant has still not managed to prove that the dismissal was effected for the purpose of compelling the employees to accept a

¹⁶ *Fry’s Metals* (supra) at para 31.

¹⁷ Record at page 76, line 15-17

demand of a matter of mutual interests. The latter term usually refers to matters of collective bargaining, typically issues of wages or benefits, and which are not arbitrable. On the applicant's version, the matter of "mutual interests" which they sought to compel the employees to accept was the new fixed term contracts. Counsel submitted that a demand to agree to a new contract can never amount to a demand over a matter of "mutual interests". In *University of Pretoria v CCMA and Others*,¹⁸ the Labour Appeal Court considered the issue of an employee employed on the basis of having a series on a fixed term contracts. The employee decided to apply for a permanent position and failed, where after she was offered a further fixed term contract. The applicant declared a dispute contending that she had a reasonable entitlement to permanent employment. In his judgement, Davis JA held that a fixed term contract was a "different form of employment" from a permanent contract. The Court stated the following on this issue:

[20] The facts of this case illustrate this distinction. Third respondent enjoyed seven fixed term contracts prior to her application for a permanent position. In this case, she chose, to put her hat in the ring for a permanent appointment. In other words, her own conduct illustrates the distinction between the expectation of the renewal of a fixed term contract and another form of contract, in this case a permanent post. Had she not been offered a further fixed term contract, then depending on the evidence, she could be entitled to proceed in terms of s186(1)(b). That would, however, not be a case based, as is this one, on a different form of employment, being a permanent contract.'

[21] The above decision clarifies that the imposition of a new type of contract has everything to do with a new form of employment than a type of dismissal contemplated under section 187(1)(c). Similarly in *Marneweck v Seesa Limited*,¹⁹ the court held that an attempt by an employer to impose a different form of contract on an employee was an overt act repudiating the previous contract and a dismissal for the purposes of section 186(1)(a). Counsel submitted that the demand of the applicant in this case that the employees

¹⁸ 2012 (33) ILJ 183 (LAC) at 20.

¹⁹ 2009 (30) ILJ 2745 (LC).

accept new fixed term contracts constituted an act of repudiation by the employer of the contracts that the employees were on at the time when the employees refused to comply with the demand. To the extent that the second to sixteenth respondents were being asked to forego their benefits as permanent employees and sign new fixed term contracts (apart from the issue of the blank spaces on the contracts), I agree with Mr Schumann's argument that this constituted an act of repudiation by the applicant of the employment contracts of the employees. On this basis, the repudiation would constitute a dismissal falling within section 186(1)(a) of the Act.

- [22] Having carefully considered the facts set out in the record as well as the submissions of counsel weighed against the authority of Zondo JP in *Fry's Metals*, I am of the view that the arbitrator was correct in reaching the decision that he did in concluding that the second to sixteenth respondents were dismissed when they refused to accede to the employer's demand to sign new fixed term contracts to replace their existing permanent contracts. Although, the arbitrator did not necessarily consider the aspect of repudiation, I find the argument persuasive that the conduct of the applicant in compelling the second to sixteenth respondents to accept terms of employment substantially more tenuous to those that they already enjoyed, to constitute an act of repudiation. This would have constituted a dismissal in terms of section 186(1)(a).
- [23] The second to sixteenth respondents were dismissed in September 2006, having referred their dispute to the bargaining council in early October 2006. The issue of jurisdiction was only raised before the second arbitration in July 2010. After that decision in favour of the second to the sixteenth respondents, the present review application was launched. The applicants have had to endure a long wait before this matter was eventually heard. There is nothing in the version of the second to sixteenth respondents that casts any doubt on their version.²⁰ When he was questioned as to whether a dismissal occurred, Mr Njakazi, testifying on behalf of the union, succulently articulated the version of the employees:

²⁰ Record Transcript at 38.

'Yes, on the day when I refused to sign the contract and he told me that a person that refused to sign the contract is not welcomed here he is dismissed.'

On the other hand, the applicant never contended at the arbitration that it dismissed the second to sixteenth respondents in order to get them to agree to the new fixed term contracts. On the contrary, it contended that it never dismissed the employees and that they simply left their work premises. On a balance of probabilities, I am satisfied that the version of the applicant before this Court that it dismissed to accept a demand on a mutual interests, is highly improbable and, furthermore, inconsistent with the statements advanced on its behalf by the witnesses and its representative at the arbitration. It was perhaps a well crafted argument which by all accounts only surfaced in the supplementary heads of argument of the applicant. Unfortunately for the applicant, the legal argument was not supported by the factual circumstances required to sustain such a defence. The Supreme Court of Appeal in *National Union of Metalworkers of SA and Others v Fry's Metals (Pty) Ltd*²¹ stated in confirmation of the decision of the LAC:

'The LAC's solution to the conundrum of the statutory concepts was thus to assign a distinctive meaning to 'dismissal' in s 187(1)(c), and then to restrict this category of automatically unfair dismissals to those effected for the purpose of inducing employees to change their minds regarding the employer's demand. On this approach, only conditional dismissals can fall under s 187(1)(c), and it is this that distinguishes them from the broader category of dismissals where the employer – irreversibly – 'has terminated' the employment contract. Dismissals intended to be and operating as final – not, in other words, reversible on acceptance of the demand – can thus never have as their reason 'to compel the employee to accept' that demand. They will therefore not be automatically unfair. In such cases, the only factual inquiry confronting a court is the employer's reason for effecting the dismissal: once compulsion to accept the disputed demand (with ensuing reversal of the dismissal) is excluded, no further inquiry into the nature or categorisation of the demand is required'

²¹ *Fry's Metals* at para 56.

[24] For the reasons set out above, I, accordingly, find the arbitrator's decision was correct in law as well as being a decision which another decision maker, acting reasonably, could come to on the same facts,

[25] I accordingly make the following order:

1. The application is dismissed with costs.

Chetty, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate L B Broster SC

Instructed by Forster Attorneys

For the Second to

Sixteenth respondents Advocate P H N Schumann

Instructed by: Brett Purdon Attorneys.

LABOUR COURT