



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not reportable
Case no: JR 1760/12

In the matter between:

MILLING TECHNIKS (PTY) LTD

Applicant

AND

MOHLALA, MAPUTLE N.O.

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

MNZANA, TSHEPO & ANOTHER

Third Respondent

Date heard: 19 December 2014

Date delivered: 03 February 2015

JUDGMENT

VAN DER MERWE AJ

Introduction

- [1] This is a Review Application in which the Applicant seeks the review and setting aside of the First Respondent's ("the arbitrator") arbitration award in terms of Section 145 of the Labour Relations Act 66 of 1995, as amended.
- [2] The matter concerns the termination of limited duration contracts of employment which, according to the Applicant, constitutes termination by agreement. The Applicant submitted that the fact that the employees' work had come to an end, and as a result, their contracts were terminated, does not render such termination a dismissal.
- [3] The Third and Fourth Respondents ("the employees") were employed by the Applicant on limited duration contracts as general workers on a project with the Project name being recorded as N8-8. The Project address is recorded as being "Kimberly to Campbell".
- [4] The Applicant relies in this review application on clause 1.2 of the limited duration contract which reads as follows:
- ‘1.2 No completion date for employment under this contract can be provided and the EMPLOYEE accepts this condition irrevocably and agrees to Limited duration employment for an undetermined period until terminated as set out in clause 8 of this contract - consequently the EMPLOYER is not in a position to offer permanent employment and is able to offer employment of a temporary nature only for as long as there is work for which the EMPLOYEE was employed on this project (the project as per description on the reverse page) and may even be for only a portion of the time it takes to complete the whole project. The Employee shall under no circumstances have any expectation of being employed for the full period of the project.’

- [5] A further relevant clause in the limited duration contract is to be found in clause 1.3 which states the following:

‘1.3 Should any unforeseen circumstances arise, the EMPLOYER reserves the right to implement Section 189 of the Labour Relations Act 1995 (as amended).’

- [6] The Applicant operates a road construction and civil engineering business and both the Third and Fourth Respondents were employed by the Applicant on 17 January 2015 on this N8-8 project.

- [7] The official start of the project was 4 October 2010 and planned completion was 3 June 2012.

- [8] On 8 November 2011 the Applicant issued written notices to the employees in which it stated that:

‘Due to the work volumes on the Campbell and Schmidtsdrif project (NRA N 008-080-2009-1) decreasing, your services will no longer be required, therefore on approximately 30th November 2011, your employment will end.’

- [9] On termination of their employment the employees referred an unfair dismissal dispute to the CCMA.

- [10] The employees contended at the CCMA arbitration that their contracts were prematurely terminated and that other employees were employed in their positions. They disagreed with the notice of termination that stated that work volume had decreased because other persons were employed in their positions. The fact that other "new" persons were employed by the Applicant was not disputed by the Applicant. The Applicant's version that was put to the employees at the arbitration was that the Applicant had the right in terms of the contract to do whatever it wanted to including terminating the employees' employment and to employ someone else instead.

- [11] The Applicant contended at the arbitration that the section between Schmiddrift and Campbell was intensive maintenance work while the section between Schmiddrift and Kimberly was that of road rehabilitation. The project started from Campbell because the maintenance work is easier than road rehabilitation. Individuals from Campbell were employed to render services between Campbell and Schmiddrift. There were approximately 5 kilometres of work due to be completed on the section and this remaining portion allegedly required specialised skills. There was also work left between Schmiddrift and Kimberley and this too required specialised skills.
- [12] The Applicant argued that in terms of the limited duration contract, the period for which the contract remained is determined by the occurrence of a specific event/task and did not depend on a specific date and as such were not time based but task based. The Applicant denied that the employees were dismissed.
- [13] The arbitrator held that if the parties intended to contract for a portion of the project, they would have done so by stating the portion or part in question to which the employees were to be employed for. It would be unfair to terminate employment on an unknown portion or one that had not been agreed to in advance. According to the arbitrator this would encourage arbitrariness and give the employer an absolute right to dismiss employees even for unfair reasons. Nothing precluded the Applicant from stating the portion in question and the employees agreeing to work such portion.
- [14] The arbitrator continued to find in paragraph 23 of the award that:
- ‘The N8-8 project still continues and the applicants were employed to render services in that project. In essence, his testimony (referring to the evidence of company) corroborates the applicants' testimony that work continued in the section in which they were employed. The only difference being that as he testified that the work left in that section required specialised skills. I cannot agree with his testimony that he did not know the work that was performed by

the applicants and was not at the site when the new employees were engaged to replace the applicant to the same work. Furthermore, the respondent (referring to the company) could not advance a reason as being (sic) decrease in work volumes and still appoint new persons to do the same work as the applicant had been doing.'

[15] With regards to clause 8 of the contract the arbitrator found that none of the situations listed in clause 8.1 were applicable in this termination. The arbitrator added that the wording of clause 8 in providing for termination for any cause whatsoever was "too broad and was capable of abuse by the employer."¹

[16] The arbitrator concluded his award by finding that the Applicant had dismissed the employees when it terminated their contracts of employment on 30 November 2011 and that the termination was procedurally and substantively unfair. The arbitrator awarded the employees six months remuneration as compensation.

Review Proceedings - Incomplete Record

[17] It is clear from the above introduction that the wording of the limited duration contract is pivotal to this review.

[18] The Applicant however failed to place the complete limited duration contracts of the employees before this court. Only the first two pages of a limited duration contract are included in the record as pages 112 and 113. Only clauses 1 to 7.1 of the contract appear on page 113, upon enquiry by this court, it became clear that page 3 of the limited duration contract, also referred to as the "reverse page", was not included in the record. It is clear from a reading of the record and the award that the said "reverse page" was indeed part of the CCMA proceedings.

¹ Paragraph 23 of the CCMA award, record p 119.

- [19] This court is thus presented with an incomplete record of the CCMA proceedings.
- [20] The missing "reverse page" is also material to the determination of this review application. Clause 1.2 of the limited duration contract (quoted above) refers to clause 8 and the same clause 1.2 also states that the description of the project is contained on the "reverse page" of the contract. In my view it will not be possible to properly interpret the relevant clause on which the Applicant relies being clause 1.2 of the limited duration contract without the missing "reverse page".
- [21] Upon enquiry by this court, the Applicant's representative argued that the Applicant, in its review application, will not be relying on any clauses contained on the reverse page of the contract and submitted that I can determine this review application without considering the reverse page of the contract by merely taking note of the recordal on page 12 of the record of proceedings being that clause 8.1 "says that the employee fully understands the employee's contract (the project), which is now Camble Kimberley, uh with its client may be terminated and or revised, uh but... (inaudible) from time to time and for any cause whatsoever, or terminate through the passing of guy (sic), or the completion of the scope/part of work."
- [22] This proposition by the Applicant is problematic. The record of the review application is incomplete. It is true that sometimes, in the absence of a complete record, the courts have been robust in determining the matter on the available information. But these instances are limited to where the "irregularity may be so patent from the award that a record might not be necessary" or because there was no "material dispute of fact going to the very heart of the review."²

² See *Shoprite Checkers (Pty) Ltd v CCMA* (2002) 23 ILJ 943 (LC) at par 11, *Ram Hand-to-Hand Couriers v National Bargaining Council for the Road Freight Industry* C174, 2007 and *Lifecon Special Health Services (Pty) Ltd v CCMA et al* DA 15/02.

[23] In my view, this review is not an exceptional circumstance and required a complete copy of the limited duration contract. The missing "reverse page" clearly described the project as per 1.2 of the contract and it also contained some of the offending wording that the commissioner relied upon to find that the contract wording of "termination for any cause whatsoever" was "too broad" and being "a termination reason capable of abuse by the employer."³

[24] The Applicant was obliged to place a complete record before this court and in the absence thereof, this court is in no position to properly adjudicate the review application before it and the review application should on this ground alone be dismissed.⁴

Review Proceedings

[25] Notwithstanding the difficulty of being faced with an incomplete record and if this court was to determine the review application in a robust fashion on the available information without the "reverse page", as suggested by the Applicant's representative, I in any event find no merit in the review application.

[26] The proper test to apply on review in these circumstances is not whether the award was one which a reasonable decision maker could have reached, or whether the award is susceptible to review on the grounds listed in Section 145(2)(a) of the LRA, but rather to assess whether, on the objective facts placed before the arbitrator, the employees discharged the onus of proving a dismissal.⁵

[27] I agree with the arbitrator that if the parties intended to contract for a portion of the project, they would have done so by stating the portion or part in

³Paragraph 23 of the CCMA award, record p 119.

⁴ See *Metalogic Engineering and Manufacturing CC v Fernandes and Others* (2002) 10 BLLR 985 (LC).

⁵ See *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others* (2008) 9 BLLR 845 (LAC).

question to which the employees were to be employed for. This would have been a task based limited duration contract similar to what was the case in *National Union of Metalworkers of SA v SA Five Engineering (Pty) Ltd and Others* (2007) 28 ILJ 1290 (LC) where the termination of employment was linked to a specific event.

- [28] Clause 1.2 of the limited duration contract is drafted in general terms and, in my view, does not bring about a limited duration contract of employment for a portion of the project. The relevant wording reads that "consequently the EMPLOYER is not in a position to offer permanent employment and is able to offer employment of a temporary nature only for as long as there is work for which the EMPLOYEE was employed on this project (the project as per description on the reverse page) and may even be for only a portion of the time it takes to complete the whole project."
- [29] Moreover the objective fact that the Applicant employed other employees after the termination of the employment of the employees in this matter and that these "new" employees were employed in their positions, in my view, confirms that the Applicant terminated the relevant employee's employment prematurely.
- [30] It was also submitted by the Applicant's representative that clause 1.3 of the limited duration contract was not applicable because the termination of the employees' employment contracts in this instance was foreseeable and that clause 1.3 of the contract only applied to "unforeseen circumstances". If this is indeed correct it means that the Applicant was from the outset able to agree with the employees on the exact portion of the project that would have brought about the termination of employment on completion of that portion. The contract appearing on page 113 of the record does not reflect such an agreement.
- [31] I was referred to the unreported decision by Fourie AJ in *Maquabayi Construction and Truck Hire (Pty) Ltd v CCMA and others* JR 102/11 dated 10 October 2013 but I am not persuaded that the facts of that judgment can

be compared with the facts in this review. The employees in the *Maquabayi* decision were in fact employed on limited duration contracts as general labourers on the portion of roadwork's in the Delareyville area with the extent of their employment dependent on the completion of certain sections of work. In addition, the epicentre of that review related to the question of whether a legitimate expectation on the part of the employees had been created after the contract termination date. That case also dealt with the review of an award where the arbitrator reinstated the employees as permanent employees regardless of the fact that the contracts of employment were clearly for a limited duration.

Conclusion

[32] In the circumstances, I make the following order:

32.1 The Applicant's Review Application is dismissed.

32.2 There is no order as to costs.

G van der Merwe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: D W Morgan

For the Respondent: Unopposed