



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C209/2013

In the matter between:

MIGUEL LARA HERNANDEZ

Applicant

and

**THE DEPARTMENT OF TRANSPORT AND
PUBLIC WORKS**

First Respondent

**W.F.MARITZ N.O.
GPSSBC**

Second Respondent

Third Respondent

Date heard: 26 August 2015

Delivered: 2 February 2016

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed review application. The applicant seeks to review and set aside an arbitration award under Case number GPBC 8/2011. The second respondent (the arbitrator) found that: “The respondent had shown that the termination of the contract of the applicant was fair and the application is dismissed.”

[2] The relevant background to the dispute between the parties at arbitration is as follows:

2.1 On 13 October 2009, the South African Government entered into a Bi-National agreement with the Government of Cuba on the employment of Cuban Technical advisors. The purpose of the Agreement is recorded in its Article 3 i.e. “to provide a framework to enable the Republic of South Africa, through its NDPW¹ and relevant PDWPW², to utilise the technical Advisors identified by UNECA³ to provide technical assistance in the construction sector.”

2.2 Articles 5 and 6 of the Bi-National agreement contain provisions regarding the general requirement of fixed term contracts of employment. These provide as follows:

“Article 5- General Requirements for Fixed –Term Contract of Employment

(1)(a) In addition to the usual terms and conditions of a fixed-term contract of employment, in terms of the domestic law in force in the Republic of South Africa, the contract of employment applicable to the Technical Advisors employed in terms of this Agreement shall contain the minimum terms and conditions set out in ANNEXURE A.

(b) It shall be a condition of every fixed-term contract of employment referred to in this Article that the domestic law in force in the Republic of South Africa shall apply to the said contract of employment and that the Parties shall consent to the jurisdiction of the courts of the Republic of South Africa in respect of any legal proceedings arising therefrom.

¹ National Department of Public Works

² Provincial Department of Public Works

³ Cuban company providing technical assistance

(2) Individual contracts signed by the Technical Advisors and the relevant PDPW shall comply with all the provisions contained in this Agreement.

(3) The Parties agree that this Agreement shall not be deemed and construed so as to provide any right to the technical Advisors to claim citizenship or permanent residence in the Republic of South Africa.

ARTICLE 6 – Special Condition of Fixed-Term Contract of Employment

(1) It shall be a condition of every fixed-term contract of employment referred to in this Agreement that such contract of employment shall be contingent upon the subsistence of this Agreement and that such contract of employment shall come to an end, ipso facto, on termination of this Agreement in accordance with Article 13.

(2) No provisions contained in this Agreement shall preclude the PDPW or Technical advisors employed in terms of this Agreement from terminating the fixed term contract of employment entered into pursuant to this Agreement in accordance with its terms and conditions relating to termination. Such termination shall be in accordance with domestic law in force in the Republic of South Africa.

(3) Every fixed-term contract shall include a provision that the contract may be terminated at the request of the Government of Cuba, with reasons being given for such a request. In such instances the Government of the Republic of Cuba shall endeavour to provide an alternate Technical Advisor to continue with a specific project.

2.3 The contract of employment between the applicant and the Western Cape Government provides in paragraph 2.8 and 2.9 thereof that:

“2.8 This Contract of Employment is contingent upon the subsistence of the Agreement between the Government of the Republic of Cuba on the employment of Cuban technical advisors.

2.9 The terms and conditions of both Annexure A and Annexure B of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Cuba on the employment of Cuban technical advisors is hereby incorporated into this agreement and forms an integral part hereof. The agreement is attached marked Annexure "B".

2.4 Clauses (k) and (l) to ANNEXURE B of the Bilateral Agreement read as follows:

"(k) the contract shall stipulate the grounds for termination, which in addition to the permissible grounds under South African domestic law, shall also include a reasonable request from the Government of the Republic of Cuba to terminate the contract.

(l) subject to the provisions of Annexure C (g), if the contract of employment is terminated before the end of the contract period on grounds upon which a fixed-term contract may be terminated by law, according to the national legislation of the Republic of South Africa or, if it is terminated at the request of the Government of the Republic of Cuba, the Party which caused the termination shall bear the costs of the return of the Technical Advisor to Cuba;"

2.5 Annexure C (g) of the Bilateral Agreement reads:

"(g) if any fixed term contract is terminated due to the Technical Advisor's misconduct and in accordance with the domestic law in force in the Republic of South Africa, or if it is terminated at the request of the Government of Cuba, the costs arising from the completion of the exit formalities and the purchase of his or her return flight ticket to the Republic of Cuba shall be for the UNECA's account, which shall also be responsible for replacing such Technical Advisor within thirty (30) days of such dismissal in accordance with the provisions of this Agreement."

[3] It was common cause that the reason for the termination of the contract of employment was not misconduct on the part of the applicant. On 15 November

2009, UNECA sent a letter to Jacobs, Executive Manager: Corporate Services of the respondent informing him that the Ministry of Construction of Cuba had decided to 'finish' the contract of the applicant and informing him that arrangements had been made for him to return to Cuba on 19 November 2009. The applicant testified that he had had a serious disagreement with the local representatives of UNECA regarding remittance of his earnings to Cuba. The applicant believed that as Cuba was not a party to his employment contract with the respondent, his disagreement with UNECA would not affect the contract.

[4] The grounds of review in the founding papers boil down to the following: that the Arbitrator "committed a misconduct" in that in his analysis of the dispute, he failed to make certain findings, more particularly on whether the clauses arising from the Bi-National Agreement and incorporated into the employment contract were valid and binding and enforceable in South African law. It is submitted in the founding papers that it is trite that a fair reason in South Africa for termination 'cannot be an unlawful instruction from a foreign sovereign.' Further it is questioned how a procedure going no further than simply the handing over of a dismissal letter could be considered a fair procedure.

[5] Mr van der Schyff for the applicant argued that insofar as the Bi-National Agreement purports to permit a lawful "no fault" termination of a contract as contended by First Respondent and found by Second Respondent, the finding stems from a material misdirection of the law which constitutes a gross irregularity justifying the setting aside of the award.

[6] The arbitrator did not venture to make a finding (as contended for on behalf of the applicant in the arbitration) that the employment contract, including as it did the possibility of a no fault termination on the say-so of the Cuban government, was contra bonos mores. He found rather that:

"I accept that the respondent was entitled to regard the terms of the agreement as binding on it and with, to my mind, the fact that the applicant was also contractually bound the reference to an event (the termination notice of Cuba) appeals to me and I find that the termination of the contract was fair."

Evaluation

- [7] The arbitrator did not have the jurisdiction to consider whether the Bi-National agreement itself is constitutionally sound or against public policy. It is clear from the contents of the employment contract signed by the applicant, that it was contingent on the existence of the Bi-National Agreement between South Africa and Cuba. There is no indication that either of the parties to the dispute at the arbitration sought to join UNECA to the proceedings. One can only surmise the reasons for this. It may well have been of assistance to the arbitrator had this been done. This is more especially the case given that a special condition of the Bi-National Agreement was that the termination of the contract on the instance of the Cuban government, must be for good reason.
- [8] In deciding whether the award stands to be reviewed I am mindful of the words of Zondo JP as he then was, when he stated that
- ' . . . It seems to me that . . . there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend — at least not solely — upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'⁴
- [9] In *casu*, the arbitrator's reasoning was based on his acceptance that the employment contract ended on the happening of an event i.e. the event being the

⁴ *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC) at paragraph 102

intervention by the Government of Cuba in terms of the Bi-National Agreement. A further reason which the arbitrator could have relied on for his decision is found in Clause (k) of ANNEXURE B of the Bi-National Agreement, which provides that “(k) the contract shall stipulate the grounds for termination, which in addition to the permissible grounds under South African domestic law, shall also include a reasonable request from the Government of the Republic of Cuba to terminate the contract.” (My emphasis)

- [10] The proviso of a ‘reasonable request’ gives an employee such as the applicant, and an employer such as the first respondent, a measure of protection against arbitrary repatriation of the employee. In other words, it must be reasonable for such a measure to be taken by the Cuban Government. It was the applicant’s own evidence that he reneged on his obligation to repatriate all but the equivalent of 400 US dollars of his salary to Cuba. He further told the representative of UNECA after a very heated argument, that he was not going to pay the money to be repatriated to Cuba but pay ‘all his obligations’ with his salary and “afterwards you can do what you want to do”.
- [11] In my view, in the unique circumstances of this matter, and on a proper reading of the agreements in question, the question as to whether the Cuban Government’s request was a reasonable one goes to the substantive fairness of the termination of the employment contract. Bearing in mind applicant’s own evidence at the arbitration referred to above, the outcome of the arbitration was well within the bounds of reasonableness. I therefore find that the award stands to be upheld. I do not intend to make a costs order in this application given that the applicant is an individual. I make the following order:

Order

1. The application is dismissed.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Jerome van der Schyff instructed by Brink & Thomas Inc

First Respondent: Andre Coetzee instructed by the State Attorney.