REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PS16/13

In the matter between:

NUM obo THOBELA MILISA AND 53 OTHERS **Applicant**

and

WBHO CONSTRUCTION (PTY) LTD **Respondent**

Heard: **4-5 May 2015**

Delivered: **15 March 2016**

Summary: A clause in a contract of employment which gives the employer the right to dismiss employees at will and in contravention of the Labour Relations Act 66 of 1995 is invalid.

JUDGMENT

LALLIE, J

[1] The respondent built the Hemmingways Hotel and Casino ('the project'). The individual applicants ('the applicants') were amongst the workers who were employed at the project while the building was still under construction. They were employed as general workers on purported fixed term contracts in 2012. In their statement of case, they submitted that their contracts of employment were oral. They were informed by the employee of the respondent who assisted them sign their contracts that they would cease working once the project was completed. However, on 3 December 2012, before the project was complete, they were issued with letters of the termination of their contracts as from 19 December 2012. They submitted that subsequent to their dismissal, the respondent continued with the construction of the project which was scheduled for completion on or about 7 July 2013.

[2] The applicants submitted that their dismissal constituted an unlawful premature repudiation of their fixed term contracts of employment as the respondent was by law not entitled to terminate the contracts before the completion of the project. They also claimed that their dismissal was unfair and in violation of section 189 of the Labour Relations Act 66 of 1995 ('the LRA'). The legal issues that the applicant sought this court to determine were whether the applicants' fixed term contracts were linked to the duration of the project; whether the project was completed when the applicants' contracts were terminated; whether the respondent was entitled to terminate the contracts when it did; whether the applicant's dismissals were lawful; whether the applicant's dismissals were fair; whether the respondent was entitled to dismiss the applicants for operational reasons; whether the respondent had a valid reason for dismissing the applicants; and whether the respondent followed the required procedure before dismissing the applicants.

[3] The respondent denied having dismissed the applicants unlawfully, unfairly or for its operational requirements. It alleged that it employed the applicants on fixed term contracts as concrete workers and general workers in the project whose formal contract for purposes of construction was for the period of September 2011 to 8 February 2013. As the respondent needed different skills at different times, it needed the applicants' skills at the initial stages of

the project and not for the duration of the project. The employment relationship between the parties was terminated on 19 December 2012, owing to effluxion of time and in terms of their written fixed term contracts which stipulated that each individual applicant would remain in employment for 'the duration of his skills requirement on the contract'. Between September and November 2012, the respondent terminated fixed term contracts of about 80 employees as it no longer required their skills. The applicants were the last group of general workers and concrete workers whose skills were required up to 19 December 2012. The respondent retained a group of about 20 to 30 employees who attended to additional functions allocated to the respondent by the client in the first three months of 2013.

[4] The parties reached an agreement on the names of the 18 individual applicants who are properly before court. They are applicants 1,3,4,6,7,9,10,13,14,15,21,22,26,27,32,34,35 and 49 on the list of names of applicants in Annexure "A" to the statement of case. The applicants' attorneys received copies of their contracts of employment after close of pleadings a fact which had an impact in the manner in which their case was presented. The applicants' argument that their contracts of employment would endure until the end of the project is untenable because they conceded having signed the contracts of employment which provide that they would remain in the respondent's employ for the duration of their skills requirement in the project. The applicants argued that their contracts of employment did not constitute fixed term contracts but were maximum term contracts. A fixed term contract endures until the end of an agreed fixed term or the occurrence of a particular event. The applicants relied on *Nkopane and Others v Independent Electoral Commission*[1] where a maximum term contract was defined as an agreement 'that the employment will terminate at the latest on a specified date'. It is common cause that the parties entered into a contract which was for the duration of the applicants' skills requirement on the project. As the contract stipulated that the applicants would work until their skills were no longer required and for as long as the applicants' skills were required, they would continue working for the respondent. The requirement of the applicants' skills

[1] (2007) 28 *ILJ* 670 (LC) at para 64.

determined the duration of their contracts. The applicants' argument that their contracts of employment were maximum term contracts is therefore valid.

[5] The applicants argued that they had been unlawfully and unfairly dismissed by the respondent in violation of the LRA. The respondent denied dismissing the applicants and submitted that the employment relationship was terminated by effluxion of time as their skills were no longer required. The respondent relied on the automatic termination clause of the contract of employment which provides that the contract would endure for the duration of the applicants' skills requirement on the project. Advancing their argument that they had been dismissed, the applicants submitted that a maximum duration contract is terminated before the expiry date only on good cause shown if the employee is in material breach and if such condition is agreed for the employer's operational requirements. The applicants also relied on *Mahlumu v CCMA and Others*[2] where the court referred with approval to the following *dictum* of *SA Post Office Ltd v Mampeule:*[3]

> 'The onus rests on SAPO to establish that the 'automatic termination' clause prevails over the relevant provisions in the Act [referring to section 5] and clause 9.1 of the contract [a clause that established employment for a fixed term five years subject to the employer's right to terminate the contract with due regard to fair labour by practices]. A heavier onus rests on a party which contends that it is permissible to contact out of the right not to be unfairly dismissed in terms of the Act. I am in agreement with the submission made by Mampeule's counsel, supported by authorities, that parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of 'automatic termination' provisions or otherwise because the Act had been promulgated not only to cater for an individual's interest but the public's interest.'

[6] In *South African Post Office v Mampeule* (*supra)* and *Mahlamu v CCMA and Others*, the automatic termination provisions were triggered by a third party, however, both decisions are applicable to the matter at hand although the automatic termination provision has been triggered by the respondent. In the

[2] [2011] 4 BLLR 381 (LC) at para 8.
[3] (2010) 31 *ILJ* 2051 (LAC).

contracts of employment, the parties agreed to recognise that provisions of the Labour Relations Act of 1995 as amended from time to time would apply in respect of their contracts. The court in *SAPO* (*supra*) held that parties to an employment contract may not, through an automatic termination provision, contract out of the protection against unfair dismissal. Section 5 (2)(b) of the LRA provides as follows:

> '(2) ... No person may do, or threaten to do, any of the following –
>
> (b) prevent an employee or a person seeking employment from exercising any rights conferred by this Act or from participating in any proceedings in terms of this act; or
>
> (4) A provision in any contract, whether entered into before or after the commencement of *this Act*, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by *this* Act.'

Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed. Section 188 of the LRA provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove the fairness of the dismissal for the employee's conduct, capacity the employer's operational requirements and that the dismissal was effected in accordance with a fair procedure.

[7] The applicants argued, correctly, that the automatic termination provision of their contracts entail a unilateral and subjective assessment by the respondent, which grants it unfettered discretion to decide when the applicants' skills were no longer required. Because of the nature of the duties of a general worker, the decision whether his or her skills are no longer required is subjective. It is common cause that on the applicant's last working day they were told to sign for the letters of the termination of their contracts. Both witnesses for the respondent could shed no light on how the respondent came to the conclusion that the skills of the applicants were no longer required as opposed to the 20-30 general workers who the respondent elected to retain until February 2013. Ms Vumendlini (Vumendlini), who gave

the applicants their letters of the termination of their contracts, led no evidence as to the manner in which the respondent reached the decision that the applicants' skills were no longer required. The evidence of the respondent's second witness, Mr De Klerk (De Klerk), that the applicants' skills were no longer required after 19 December 2012, was inconsistent with its papers that after December 2012, work continued at the project for several months.

[8] The automatic termination provision in the applicants' contracts of employment is invalid as it is in flagrant disregard of provisions of the LRA which preclude employers from terminating employees' contracts at will and in violation of the provisions of the LRA which protect employees against unfair dismissal. The respondent terminated the applicants' contracts of employment without notice thus dismissing them as envisaged in section 186(1)(a) of the LRA. The reason the respondent proffered for the dismissal was that it no longer had work for the applicants. The respondent therefore dismissed the applicants for its operational requirements. When the respondent contemplated dismissing the applicants for its operational requirements, it was required to comply with the mandatory provisions of section 189 of the LRA and ensure that the applicants' dismissal was both substantively and procedurally fair. It failed to do so rendering the termination of the applicants' contracts of employment for the respondent's operational requirements substantively and procedurally unfair.

[9] The applicant sought maximum compensation for unfair dismissal for operational requirements of the respondent which is equivalent to an applicant's 12 months' remuneration calculated at each applicant's rate of remuneration on the date of their dismissal. Section 194 of the LRA requires compensation for unfair dismissal to be just and equitable in all the circumstances. Having considered the submissions made in respect of compensation, I am of the view that the maximum compensation is not just and equitable in the circumstances of the matter at hand. The applicants worked for the respondent for about a year. When they took up employment they were aware that the employment was not permanent. The contract of

Vumendlini who was dealing with accounts was terminated at the end of February 2013. Her undisputed evidence was that she had to finish paper work before leaving the respondent's employ. The date of the termination of Vumendlini's contract forms part of the circumstances which require consideration in determining fair and equitable compensation for the applicants. It is fair and equitable in all the circumstances of this matter to award each applicant compensation which is equivalent to remuneration he would have earned over a period of three months, calculated at each applicant's rate of remuneration on the date of dismissal.

[10] I could find no reason for costs not to follow the result.

[11] In the premises, the following order is made:

11.1 The termination of the contracts of employment of the individual applicants constituted dismissal for the respondents' operational requirements.

11.2 The dismissal of the individual applicants for the respondent's operational requirements was substantively and procedurally unfair.

11.3 The respondent is ordered to pay each applicant compensation equivalent to remuneration each applicant would have earned over a period of three months, calculated at each applicant's rate of remuneration on the date of dismissal.

11.4 The respondent is to pay the applicant's costs.

Lallie, J

Judge of the Labour Court of South Africa

<u>Appearances</u>

For the Applicant:	Advocate Grogan
Instructed by:	Wesley Pretorius & Associates
For the Respondent:	Mr Niehaus of Minnaar Niehaus Attorneys