



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 2319/17

In the matter between:

JBC ROOF COVER (PTY) LTD

Applicant

and

MBONGENI MOTSOENENG N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
(NO)**

Second Respondent

ADRIAAN JOHANNES DIEDERICKS

Third Respondent

Heard: 21 November 2017

Delivered: 15 December 2017

Summary: (Review – dismissal – jurisdiction - agreement to engage employee permanently after three months' probation - misrepresentation of fixed term agreement as probation contract – signed agreement not encapsulating employment contract – dismissal occurring in any event before expiry of fixed term – dismissal established – dismissal procedurally and substantively unfair)

JUDGMENT

LAGRANGE J

Background

- [1] This is an application to review an arbitration award in which the 3rd respondent, Mr A J Diedericks, ('Diedericks'), was held to be unfairly dismissed and reinstated with six months' back pay. The applicant contends that the arbitrator incorrectly found that Diedericks had been dismissed when in fact his three-month fixed term contract had merely come to an end. As the dispute essentially concerns whether or not Diedericks was dismissed or whether his employment came to an end as a result of the expiry of his fixed term contract of employment, the standard of review is an objective one rather than a matter of reasonableness.
- [2] Diedericks signed a "(TEMPORARY) Employment Agreement" on 8 February 2016 in terms of which he was employed as a Quality Controller. Other provisions of the agreement which are pertinent read:

"TEMPORARY CONTRACT

The employee agree (*sic*) and understand that this is only a temporary position. He will only work for the company from 8-02-2016 until 8-5-2016.

...

Termination of employment

Either party can terminate this agreement with immediate effect because this (*sic*) is a casual worker."

- [3] The stance of the applicant was that the agreement encapsulated all the terms of Diedericks's employment contract and that when the period of the contract expired, the employment relationship terminated by agreement. There was also no expectation of further employment. Consequently, no dismissal took place. As a result of adopting the view that Diedericks' employment with it was entirely governed by the agreement, the applicant decided at the outset that it did not intend calling any witnesses in rebuttal of Diedericks' evidence.

- [4] Diedericks' case was that he had expected to be permanently employed and the 3 month agreement was merely intended to cover a probation period. In any event, he had received a letter of termination, ending his employment on 28 April 2016 on two weeks' notice. At the arbitration his legal representative made it clear that he only sought compensation, not reinstatement. He also contended that his dismissal was procedurally unfair because no procedure was followed. Further, his dismissal was also substantively unfair because no reason for the letter of termination on 28 April was provided, other than to refer to the termination provision in the agreement (cited above) which provided that termination could be effected immediately.
- [5] Diedericks' evidence was uncomplicated. He had left his former permanent employment to take up the quality controller position at the applicant. He was interviewed by the owner of the applicant, Mr J Conradie ('Conradie') for the position. The owner told him that "I can see that you know what you're talking about, you've got expertise, I want to use you, I need you. He said you will be put on a 3 months' probation period, after which you would be employed permanently. He said this is a permanent position because I asked him. I told him specifically I can't leave my permanent job for a temporary job and he said Adriaan, I want to make you part of my business." On that understanding, Diedericks resigned from his existing permanent job to take up employment with the applicant, only because the new appointment offered better remuneration. Diedericks had been engaged with his previous employer for two years and after the termination of his service with the applicant had been re-employed by that employer.
- [6] He had been given the agreement when he commenced working by Ms A Smit ('Smit'), whom he described as "the admin human resources representative" of the applicant. She told him that there was a probation period of 3 months after which he would be employed permanently. He testified that he queried the three month contract, but was told that, that was the applicant's contract for probation so he signed it. Diedericks did not dispute the terms of the written agreement, but said on his first day of employment by the applicant he had no reason not to trust Smit's

clarification. Despite the terms of the agreement he felt that they were subject to that clarification. He did not seek to amend the agreement because he did not want to introduce an element of mistrust into his new employment.

- [7] His employment ended when he was called back to the applicant's office and was given "the resignation letter" by Smit, who told him that his "work has been terminated" and he must leave immediately.'

Evaluation

- [8] The essence of the dispute between the parties is that the applicant decided to stand for by what was in the written agreement as representing the entire contract between the parties, whereas Diedericks contended that the contract was that, it had been both agreed with the owner of the business and confirmed by Smit's representations that the written agreement should merely be construed as a probationary contract, and that he would be permanently employed thereafter.
- [9] Critically, even though Smit was present in the arbitration she was never called to rebut Diedericks's version of her representations, nor was his version about his interview with the owner contradicted. Consequently, on the evidence, the only version is Diedericks' version. In effect, that version is that there was an oral agreement he would be employed permanently after serving a probation period and that notwithstanding the wording of the written agreement he was asked to sign, that agreement simply was intended to cover the probation period.
- [10] It appears that the applicant took the view that the agreement constituted the exclusive memorial of the contract of employment and that it could ignore any representations made which induced Diedericks to sign it. However, the applicant did not take the precaution of including a provision in the agreement to the effect that the agreement encapsulated all the terms of the employment contract and that nothing else was agreed to unless reduced to writing and recorded in the contract, or words to that effect.

[11] The so-called parole evidence rule has been characterised in the following terms:

“Despite its difficulties, it serves the important purpose of ensuring that where the parties have decided that their contract should be recorded in writing and that such contract shall be the sole, complete record of their agreement, their decision will be respected, and the resulting document, or documents, will be accepted as the sole evidence of the terms of the contract. As it was expressed by Corbett JA, in *Johnston v Leal*:

‘It is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract . . .

To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered.”¹

The learned authors go on to state:

“One does not need a very fertile imagination to see how, necessary as the rule is, it can lead to injustice if rigorously applied, by excluding evidence of what the parties really agreed. It has therefore been the courts’ constant endeavour to prevent the rule being used as an engine of fraud by a party who knows full well that the written contract does not represent the true agreement. In the nature of things, this endeavour to achieve a fair result without destroying the advantages inherent in written contracts has led to some decisions that are difficult to reconcile. Perhaps the best way to look at the rule is to see it as a backstop that comes into operation only in the absence of some more dominant rule, giving way to the rules concerning misrepresentation, fraud, duress, undue influence, illegality or failure to comply with the terms of a statute, mistake, and rectification. If it did not do so, none of these rules would apply to written contracts, which would be absurd. In all such cases, of course, the burden is on a party who has signed a written contract to displace the maxim caveat subscriptor by proving lack of the necessary animus”²

[12] In the circumstances, it seems more probable than not that Diedericks was offered permanent employment by Conradie subject to a probation period

¹ Bradfield et al, *The Law of Contract in South Africa*, 7th ed, 2016, Butterworths at 227.

² *Op cit* 228.

and despite the terms of the written temporary employment contract, it was represented to him that the contract was merely to cover the probationary period. It was on the basis of that representation and the discussions he had with the owner that he signed the agreement despite its terms on which he had specifically sought and obtained clarity. The fixed term contract argued for by the applicant was also at odds with what the undisputed evidence of what Conradie had said to Diedericks. Moreover, his own conduct in terminating his permanent employment with his former employer after the interview with Conradie supports the inference that he was offered permanent employment subject to probation. In the circumstances, the temporary employment agreement did not accurately capture the terms of his employment and to the extent that the applicant sought to argue that it could rely on it, it sought to rely on a document which in truth did not reflect the terms of Diedericks' employment.

[13] Therefore, properly construed the end of the fixed term period would have brought Diedericks' probationary status to an end, but not his employment unless there was some other overt act by the employer ending it. In fact, this is what happened, as the applicant gave Diedericks written notice of his termination prior to the end of the fixed term period and tendered to pay two weeks' notice pay, covering a period that extended beyond the fixed term period. Thus, even if Diedericks had been employed on a fixed term contract, it did not end at the expiry of that term but was terminated before it had elapsed.

[14] Consequently, I am satisfied that Diedericks was dismissed on 28 April 2016. Further, as no reason was given for his dismissal nor was any procedure followed associated with such a reason, his dismissal was substantively and procedurally unfair.

Relief:

[15] I agree however with the applicant that the arbitrator plainly erred when he ordered the reinstatement of Diedericks as his representative had made it clear that he was not seeking reinstatement. Accordingly, that portion of the relief and the award of back pay associated with the retrospective

reinstatement must be set aside. That also requires a fresh consideration of the appropriate relief in the form of compensation.

- [16] Having regard to the fact that the dismissal was both procedurally and substantively unfair and that the applicant did not dispute the representations made to Diedericks, but also that the applicant's employment by the applicant was of short duration and the applicant was fortunate enough to regain his former employment 4 months' remuneration as compensation would be appropriate.

Order

- [1] The arbitration award of the first respondent dated 17 October 2016 issued under case number GAJB12031-16 ('the award') is reviewed and set aside only to the extent that he reinstated the third respondent and awarded six months back pay.
- [2] Paragraph 67 of the award is renumbered as paragraph 63 and paragraphs 62 to 66 inclusive of the award are substituted with the following paragraph:
62. The respondent, JBC Roof Cover (Pty) Ltd, must pay the applicant compensation in the amount of R 50,000 (fifty thousand rands) being equivalent to four months remuneration at the time of his dismissal.
- [3] The applicant must pay the third respondent the amount stipulated in the substituted paragraph 62 of the award, within 10 days of receipt of this judgement.
- [4] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

C Higgs of Higgs Attorneys

THIRD RESPONDENT:

In person

LABOUR COURT