

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NUMBER: J1599/99

and J2435/99

In the matter between:-

SECURITY 21 PROTECTION SERVICES (PTY) LIMITED Applicant

-and-

CCMA

First Respondent

IKE NGWENYA, N.O.

Second Respondent

TRANSPORT AND GENERAL WORKERS' UNION Third Respondent

J. MOKAEANE

Fourth Respondent

Z. LEBAKENG

Fifth Respondent

P. MOTLOUNG

Sixth Respondent

A. KHUNONG

Seventh Respondent

P. CHIBASE

Eighth Respondent

JUDGMENT

FRANKLIN AJ

1. This is an application for the review of an arbitration award handed down by the Second Respondent in his capacity as a CCMA Arbitrator (“the Arbitrator”). The application is opposed by the Third to Eighth Respondents (hereinafter collectively “the Respondents”), on the grounds set out in a document headed “*Notice to Oppose Application on Review to Statement in terms of Rule 6(3) of the Rules of the Labour Court*”. I deal below with the status of that document. In addition to their opposition to the review application, the Respondents also seek

an order that the arbitration award be made an order of this Court.

2. The review application was filed eighteen days outside the six-week period prescribed by Section 145(1)(a) of the Labour Relations Act, 66 of 1995 (“the LRA”). The Applicant seeks condonation of this late filing, which this Court has the power to grant:

Queenstown Fuel Distributors CC v Labuschagne N.O. & Others 2000(21) ILJ 166 (LAC).

3. An explanation for the delay in filing the review application is given at paragraphs 12 to 23 of the founding affidavit.

There the Applicant’s managing director sets out the various steps taken by it in reaction to the award. These involved the taking of advice, deciding to review the award, and the preparation of the review application itself. The explanation given is open to the criticism that a portion of the period of delay is left unexplained. Nonetheless, having regard to the period of delay, the fact that the case for attacking the defects in the award is cogent, and the consideration that to allow the award to stand would result in a miscarriage of justice, I have concluded that condonation should be allowed. The reasons for these conclusions appear from what is set out herein.

4. The facts material to the review application, as they appear from the Applicant’s founding affidavit, are in summary these.

a. The Applicant provides specialized security and protection services to a number of clients in terms of written agreements which are subject to varying periods of notice. As a result, the Applicant is operationally obliged to employ guards on fixed term contracts which mirror the period of duration of the agreements concluded with its respective clients. The fixed term contracts concluded between the Applicant and its employees therefore

terminate if and when the agreement between the Applicant and the client to which the relevant guards have been deployed, terminates. The Fourth to Eighth Respondents (“the employees”) were employed by the Applicant upon the terms of the specimen agreement attached to the papers as annexure “FJB2”, at Thames Wire & Cable, a division of Winding Wires (Pty) Limited (“Thames”). The fixed term contract describes the contract period as being “*until such time when contract is terminated*”.

b. On 23 January 1998, Thames notified the Applicant of the termination of its agreement with the Applicant with effect from 20 February 1998. As a result, the Applicant sent to each employee an identical letter dated 28 January 1998 in the following terms:

“TERMINATION OF CONTRACT

We have been informed by Thames Wire & Cable (Pty) Ltd. that their contract with us will be terminated on 21 February 1998 at 06:00.

With regret we have to inform you that your contract with Security 21 will be terminated on the same date.

You are herewith requested to report at 32 Smuts Avenue office on Monday 23 February 1998 to arrange for possible continued employment. If no suitable employment can be found, please hand in your uniform as soon as possible thereafter so that your salary can be finalised for payment on Friday, 27 February 1998.”

c. In a later letter dated 30 January 1998, Thames gave notice of termination of the contract as from 16h00 on the 30th of January 1998. The Applicant nonetheless paid the employees up until 20 February 1998.

d. On 29 January 1998, at an ordinary monthly meeting which took place between the Applicant and the Third Respondent (“the union”) which represents, *inter alia*, the employees, the termination of contracts between the Applicant and two of its clients, Thames and Suncrush, were discussed. Minutes of that meeting are attached to the founding affidavit (annexure “FJB6”). The relevant portion of the minute is to this effect:

“1. CONTRACT TERMINATIONS

1.1 Suncrush

The company has been notified of the termination of the contract with Suncrush. The required notices of termination of employment have been issued to all employees concerned. The chairman stated that it had already been decided that alternative employ would be found for those effected. As from Monday 02/02/98 those guards will be re-allocated on an ad-hoc basis until suitable posts can be found for them. All employees at the site successfully underwent polygraph tests.

1.2 Thames Wire & Cable

Once again all employees at the site were issued with the required notices of termination of employment. The Chairman stated that the contract is terminated effective 21/02/98. The guards were also polygraph tested however with mixed results which indicated that some guards may have been implicated in dishonesty. The contract was lost due to unsatisfactory job performance.

The question of re-employment of those guards will be addressed at the next meeting. T.G.W.U. will advice Security 21 of a suitable date before 21/02/98 (action P. Masupa).”

e. None of the employees in the present application were employed at the Suncrush site. The union did not revert to the Applicant as agreed for a follow-up meeting in relation to the Thames employees, and none of the employees presented themselves on Monday 23 February “to arrange for possible continued employment” as contemplated in “FJB4”.

f. Approximately four months later, on 17 June 1998, the union referred to the CCMA a dispute on behalf, *inter alia*, of the employees in this application. The dispute was said to be about “*unfair dismissal of Zacharia Lebokeng, Paul Moutloun and other seven guards. After the client have terminated the contract with the company. (Security 21).*” In paragraph 5 of form LRA7.11, it was stated that the dispute had arisen on the 10th of June 1998.

5. In a very brief award, the Arbitrator deals in one paragraph with an “*analysis of evidence and argument*”, and on the strength thereof found that the dismissal of the employees was unfair. It is apparent from his award that the

Arbitrator based that conclusion on a finding that the parties had concluded an agreement for the employment of the employees, and that such agreement superseded the termination clause of the employees' fixed term contracts. That finding is demonstrably incorrect and based upon the situation pertaining to the Suncrush, and not the Thames, employees. In the case of the former group, the minutes of the meeting of 29 January 1998 record that "*it had already been decided that alternative employ would be found for those effected*". The situation was different for the Thames employees in respect of whom, according to the minutes, there was no question of an undertaking to employ them at other sites.

6. The Applicant has raised a number of grounds upon which it contends the award should be reviewed and set aside.

a. The first relates to the question of the jurisdiction of the CCMA to have entertained the dispute at all. The employees' employment was terminated with effect from 21 February 1998. However, in their form 7.11 referral to the CCMA, they alleged that the dispute arose on 10 June. That allegation (the Applicant asserts) was factually incorrect, and if the correct date (21 February 1998) had been taken into account, the union's referral of the dispute to the CCMA was outside of the 30-day time limit prescribed by Section 191 of the LRA. In the absence of condonation for that delay, so the Applicant argues, the CCMA lacked jurisdiction to entertain the dispute.

b. The second point also concerns a matter of jurisdiction. It is to the effect that the dispute alleged by the union in the form 7.11 related to termination of the employees' employment for operational requirements, a matter for this Court, and not the CCMA: Section 191(5)(b) of the LRA.

c. Apart from the jurisdictional points, the Applicant also attacks the award on its merits. Having regard to the conclusion which I have reached on the merits of the Arbitrator's award, it is unnecessary for me to deal with

the points relating to the Arbitrator's jurisdiction.

7. As I understand his award, the Arbitrator bases his finding of unfairness upon the proposition that the Applicant had agreed to place the employees in alternative employment and/or that an expectation of continued employment had been created. It is clear that these conclusions were manifestly incorrect. What the Arbitrator did was to confuse the situation of those guards stationed at Suncrush with those stationed at Thames. It is apparent from the minutes of the meeting of 29 January 1998 that the Applicant undertook to find alternative employment for employees engaged on the Suncrush site, but that no agreement or expectation of continued employment existed in respect of the employees engaged on the Thames site. Only the possibility of alternative employment was raised, but this never eventuated. That being so, no factual basis existed for a finding of an unfair dismissal, and the basis that was relied upon by the Arbitrator was fundamentally wrong. The Arbitrator's award is in the result not justifiable in relation to the reasons given for it, and falls to be reviewed and set aside:

Carephone (Pty) Ltd v Marcus N.O. & Others (1998)19 ILJ 1425 (LAC);

Shoprite Checkers (Pty) Ltd v Ramdaw N.O. & Others (2001)22 ILJ 1603 (LAC).

8. Quite apart from the aforesaid, the Arbitrator also reinstated the employees, who had previously been employed on fixed term contracts, on terms and conditions of employment which appear to be of unlimited duration.

9. The version of events relied upon by the union and the employees is set out in the document entitled "*Notice to Oppose Application on Review to Statement of Claim in terms of Rule 6(3) of the Rules of the Labour Court*" referred to in paragraph 1 above. I am unable to take account of that version since it is not on oath as is required by Rule 6(4): a fundamental point correctly taken by the Applicant.

10. Since the review application is successful, the application by the union and the employees to have the award made an order of Court must fail.

11. In my view, this is one of those cases where it would be appropriate for this Court to substitute its decision for that of the Arbitrator: if the Arbitrator had relied upon the correct portion of the minutes of the meeting of 29 September, it is inevitable that he would have found for the Applicant. Little point would then be served in referring the matter back to him. The Applicant also submitted that if no reliance is placed by the Court on the Respondents' "*answering papers*", no costs order should follow. I agree.

12. In the result, I make the following order:

a. The Applicant's late filing of its review application under case number J1599/99 is condoned.

b. The arbitration award dated 5 February 1999 under case number GA36685 is hereby reviewed and set aside.

c. The termination of the employment of the Third to Eighth Respondents is found to be fair.

_____A.E. FRANKLIN SC

Acting Judge of the Labour Court

For the Applicant:

Mr M. Van Rensburg of
Webber Wentzel Bowens

For the Third - Eighth Respondents:

Mr P. Masupha of
the Third Respondent

Date of Judgment:

4 September 2001