THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 633/18

In the matter between:

DUMISANI YEKO **Applicant**

and

RED MINING SOUTH DEEP (PTY) LTD **Respondent**

Heard: **22 March 2022**

Delivered: **25 March 2022**

Summary: A referral in terms of section 191 of the Labour Relations Act, 1995. Where a fixed term contract ends – there is no dismissal – unless the provisions of section 186(1)(b)(i) or (ii) of the LRA are shown to exist. Undergoing a retrenchment process was unnecessary in the circumstances where a fixed term contract of employment would have ended on its own terms.

Having terminated employment due to operational requirements, the employer was obliged to justify the fairness of that dismissal. Where a contract with a client ends, an employer has a commercial rationale to dismiss for operational requirements. Dismissal being a measure of last resort and a selection criterion being agreed upon, a dismissal is substantively fair. Where section 189A of the LRA applies, section 189A (18) prevents this Court from enquiring into the procedural fairness of the dismissal. Held (1): The dismissal of the applicant is substantively fair. Held (2): The applicant's claim is dismissed. Held (3): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191[1] of the Labour Relations Act[2] (LRA). The respondent, Red Mining South Deep (Pty) Ltd (Red Mining), dismissed the applicant following a loss of the rail maintenance and upgrading contract (rail contract) with South Deep Joint Venture and Gold Fields Operations (Pty) Ltd. The applicant, Mr Dumisani Yeko (Yeko) was employed in the position of artisan assistant with effect from 14 May 2015. He was appointed to service the rail contract. His employment was for a fixed term and was to end when the rail contract was terminated by the client or had come to an end. On 1 March 2017, Red Mining terminated the employment of Yeko and termed that a "retrenchment".

[2] Aggrieved by the termination, Yeko referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and alleged an unfair dismissal. Conciliation failed to resolve the dispute. On or about 18 September 2018, Yeko referred the dispute to this Court for adjudication.

Background facts and evidence

[3] Red Mining provides various mining services to mines. During 2015, Red Mining was awarded a two-year contract to do rail maintenance and upgrade for a joint venture inside the Goldfields Fields Operations mine. Resultantly, Yeko was employed as an artisan assistant for that rail contract. As indicated earlier, his employment was for a fixed period tied to a happening of an event.

[1] Section 191(5)(b)(ii) – *"the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-based on the employer's operational requirements."*
[2] Act No. 66 of 1995, as amended.

As required by the rail contract, on 3 November 2016, the joint venture gave Red Mining a 60 days termination notice. The contract was to terminate on 3 January 2017.

[4] On 9 November 2016, Red Mining issued a section 189(3) of the LRA notice, advising the National Union of Mineworkers (NUM) that it shall be engaging in a section 189A process. Yeko was not a member of the NUM. He received an individual notice to the section 189A process. On that same day, a meeting was held between NUM and Red Mining. *Ex facie* the consultation minutes, it is not apparent that Yeko was part of that meeting. Nevertheless, it was agreed that on 10 November 2016 there would be a mass meeting. It was further agreed that all rail maintenance employees, which included Yeko, should be given a 30 days termination notice with effect from 11 November 2016.

[5] An entity known as Flint Construction (Flint) was awarded the rail contract in December 2017. As a result, Flint interviewed employees of Red Mining who applied for positions, including Yeko. Yeko was unsuccessful. On 12 November 2016, Yeko was notified that his employment would end on 15 December 2016, owing to the termination of the rail contract. Yeko refused to sign in acknowledgement of receipt of the termination notice. Later on, he relented and signed the notice. In view of the fact that there was a need to clear the haulage and load the mud, Yeko was verbally informed that his employment would be extended for clearing purposes.

[6] On 28 February 2017, Yeko was notified that effective 1 March 2017, he would be stopped from entering the mine premises. Yeko considered that his dismissal.

[7] In justifying the dismissal, Red Mining tendered the testimony of Mr Werner Prinsloo (Prinsloo) who is the operations manager of Red Mining. He entered employment with Red Mining in 2009. He confirmed the fixed term

employment of Yeko, and the fact that his employment was linked to the rail contract. He further confirmed that the rail contract ended on 3 January 2017 after Red Mining was given a 60 days' notice of termination. He testified that about 120 employees were affected by the loss of the rail contract. Flint, the successful tenderer employed almost 43 of the affected employees. Yeko was interviewed by Flint and was not successful. In cross-examination, he disputed an assertion by Yeko that Red Mining employed about 53 of the affected employees. He testified that as and when positions became available in the other production contract, in liaison with the trade union, some of the affected employees were re-employed for that contract, which was mainly a mining contract as opposed to the rail contract, which was more of an engineering contract.

[8] Yeko testified in his own case and did not call any witnesses[3]. His main gripe-giving rise to the alleged unfairness is that new employees were hired within the three months of his termination and he was overlooked. In addition, he contended that Red Mining retained employees with lesser service and he was terminated. He persisted that it was only 14 of them out of the 120 affected employees that were terminated. About 53 employees remained in employment despite the termination of the rail contract. His testimony was strenuously disputed. With regard to the new employees, the position of Red Mining, as set out in the pre-trial minute, is that there was a labour compliment increase in another project and the retrenched employees were contacted by it together with the trade union. With regard to employees with lesser service, the position is that those employees were working on the other shafts that were not affected by the termination of the rail contract.

<u>The applicable legal principles and evaluation</u>

[3] He claimed that some of the potential witnesses were still employed by Red Mining and they feared reprisal if they were to testify. Although Yeko continued unrepresented in the trial, he was duly assisted by the *pro bono* office until the last minute when a *pro bono* attorney withdrew due to lack of instructions. That being the case, Yeko should have sought assistance with regard to the subpoena of those potential witnesses.

[9] There is no dispute in this matter that the employment contract of Yeko was fixed. It was linked to the existence and continuation of the rail contract. It is common cause that on 3 January 2017, the rail contract was terminated. The termination of the rail contract spelled the automatic termination of Yeko's employment with Red Mining. The employment contract provided that "*Your fixed term contract will be ended when RED Mining Services South Deep contract for which you have been appointed, comes to an end or is terminated by the client*".

[10] In law, a fixed term contract terminates either by effluxion of time or by a happening of an event. The termination is automatic and does not require a notice of termination by any of the parties. Such automatic termination does not amount to a dismissal within the meaning of section 186(1) of the LRA. It is not Yeko's case that he reasonably expected Red Mining to renew the contract or retain him in employment on an indefinite basis (section 186(1)(b)(i) or (ii) of the LRA). If that was his case, section 191(5)(a)(iii) of the LRA requires that that type of a dismissal, since he will not know the reason for his termination, be arbitrated by the CCMA.

[11] On application of the law as espoused above, it was not necessary for Red Mining to have given a section 189(3) of the LRA notice nor to have followed the section 189A process. By 3 January 2017, the employment of Yeko would have terminated, which termination does not constitute a dismissal within the meaning of section 186 of the LRA. However, the actions of Red Mining sought to terminate the contract prematurely. By 12 November 2016, it notified Yeko that on 15 December 2016, the employment would cease. This amounts to a dismissal within the meaning of section 186(1)(a) of the LRA.

[12] However, it is apparent on the facts of this case that on 15 December 2016, the dismissal did not take effect. In terms of section 190(1)(a) of the LRA, a date of dismissal is the date on which the contract of employment terminated or the date on which the employee left the services of the employer. On 15

December 2016, Red Mining terminated the employment contract; however, Yeko left the services of Red Mining on 1 March 2017. Therefore, the date of dismissal of Yeko is 1 March 2017. By that date, had Red Mining not terminated the contract prematurely, the employment contract would have terminated on its own terms.

[13] The conclusion this Court reaches is that Yeko was dismissed. In any event, dismissal was never placed in dispute. In terms of section 192 of the LRA, once a dismissal is established, the *onus* is on an employer to prove that the dismissal is fair. In demonstrating the fairness of the dismissal, Red Mining relied on its operational requirements. Yeko admitted that there was a general need to retrench because the rail contract was terminated. Axiomatically, Red Mining had shown a commercial rationale to terminate employment – loss of a service contract or business. Regard being had to the testimony of Yeko and his case as outlined in the pre-trial minute, his case is that there was no need to retrench him specifically because (a) Red Mining still had vacancies where he could have been placed in order to avoid his dismissal due to termination of the rail contract; or (b) on application of *last in, first out* (*LIFO)* selection criterion, he should not have been dismissed. Instead, other employees with lesser service should have been dismissed.

[14] With regard to those contentions, Red Mining made it clear in the consensual document – pre-trial minute - that the vacancies arose in another department after the dismissal of Yeko. Inasmuch as the *onus* lies with an employer to justify the dismissal, where an employee alleges that vacancies existed before a dismissal happens, the evidentiary burden lies with an employee to demonstrate the existence of such vacancies. Prinsloo testified that at the time of dismissal, the only available vacancies in the rail maintenance contract were those created by Flint after it was awarded the rail contract. Red Mining did not have control over those vacancies and could not have used them to avoid the dismissal of Yeko. In order to avoid a dismissal, those vacancies must be in the control of the employer effecting a dismissal due to operational

requirements. Yeko speculated that 53 vacancies existed and those vacancies were filled without considering him. Prinsloo in rebuttal of that speculative evidence clearly testified that Red Mining did not have those 53 vacancies. This Court is not satisfied that there were vacancies that could have avoided the dismissal of Yeko. The rail contract on which he was appointed in the first place was awarded to Flint. He was interviewed by Flint and he failed to secure employment.

[15] This is not a case where section 197 of the LRA could have been employed. Red Mining lost a contract. It did not transfer its rail contract to Flint as a going concern. Of course, Flint was not obliged to take Yeko into employment once it was awarded the rail contract. There seems to be a *lacuna* in the LRA. In my view, technically Flint took over the business or service of Red Mining. Unfortunately, section 197(1) defines "transfer" to mean the transfer of a business by one employer (old employer) to another employer (the new employer). I have no doubt in my mind that the rail contract is a business or service. However, it moved from the hands of Red Mining not by a typical transfer but by Red Mining losing a contract that employed Yeko and others. Actually, where short term services vacillate from one business to another by way of tenders being won and lost, such, in my considered view, is not materially different from one business selling its business or part thereof to another business. If section 197 were to be expanded to situations, where a client awards a business or service to another company, much to the chagrin of another company, social justice will, in my view, be served. One of the stated purposes of the LRA, in section 1, is, amongst others to advance economic development and social justice. The purpose of section 197 is to protect individual contracts of employment and ultimately job security. A *lacuna* I spot creates an opportunity for companies like Gold Fields joint venture to weaken the job security of employees. At the end of the day, Gold Fields is the consumer of the services on the rail maintenance. It is the main benefactor. The fact that it can use companies through a tendering system to achieve its labour needs, without it being affected, as an old or new employer is worrying. It is no different to the labour brokerage situation in substance. They only differ in form. In fact, there was nothing to have prevented Gold

Fields to directly hire Yeko and others to work on the rail maintenance or upgrade, even if it is for a limited duration. Section 198B (3) of the LRA makes provision for a limited duration employment. The fact that Gold Fields opted for outsourcing, places it on the same footing as temporary employment services situation. This Court is acutely aware of the raging debate that the so-called second-generation outsourcing being brought under the wing of section 197 somewhat stifles outsourcing as a legitimate business method. However, it may be ideal for the legislature to find means and ways to curb the apparent defeat of the LRA.

[16] Strictly speaking, if the tender was re-awarded to Red Mining, there would not have been a need to dismiss Yeko and others. It may well be the case that Gold Fields joint venture realized that there was a big head count on the rail contract and such makes the rail contract to be expensive. The only solution was to terminate the contract of Red Mining and recall the tender for a more lean and frugal labour component. The issue I am raising troubled the Labour Court in the matter of *SVA Security (Pty) Ltd v Makro (Pty) Ltd and others*[4]. The Labour Court relying on the judgment of *Aviation Union of South Africa & Another v South African Airways (Pty) Ltd and Others*[5] reached the following conclusion:

> "[29] To reiterate, only the service contract was taken over in this case, and not the applicant's business. The applicant is at liberty to continue with its business by providing similar services to other potential clients. The fact that some of the applicant's employees were taken over as a consequences of the intervention of Makro in this case cannot be indicative of a transfer. To hold otherwise would lead to untenable results in that if every time a mere contract of service is taken over by a new service provider, and the latter would be required to take over all the employees from the old service provider on the basis that a section 197 transfer has taken place, this would then imply that the old service provider can simply wash its hands off its employees after

[4] (J720/17) dated 3 May 2017.

[5] [2012] 3 BLLR 211 (CC).

> losing a contract. Clearly this scenario could not have been anticipated by the drafters of section 197 of the LRA, in view of its purpose, which is to safeguard security of employment."

[17] I fully agree with the view that the drafters did not anticipate the scenario of loss of contracts. However, I do not agree that untenable results will ensue. In my view, all that is required is to extend the scope of section 197 of the LRA. Courts have not been able to give the section an interpretation that will encapsulate the scenario. Thus, legislative intervention may be a solution. The Courts in Canada seem to have taken a similar approach as the one taken in *Aviation Union* and *SVA Security*. In an arbitration matter of *SNC Lavalin O&M Logistics Inc v Unite Hire Local 47*[6], Arbitrator Lyle observed as follows:

> "[59] …The only connection between SNC and Civeo is that Civeo hired 69 employees that SNC terminated. These employees were not "sold, leased, transferred or merged". No other aspect of SNC's operations passed to Civeo. If Alberta legislature intended to deem employment continuous whenever a new contractor hired employees of the previous contractor, it could have passed a provision similar to s. 10 of the Ontario Act. It did not do that. I am unable to stretch the language of s. 5 to capture these circumstances."

[18] The only instance where the LRA seem to curb the practice outlined earlier occurs in section 200B of the LRA. In terms of the section, an employer includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purpose of the LRA. Unfortunately, in this matter, the provisions of this section have not been raised by Yeko to bring into the fold Gold Fields joint venture as an employer as well.[7] Had section 200B been raised by Yeko, an opportunity would have arisen for this Court to firstly consider whether Gold Fields Joint Venture was an employer

[6] 2020 CanLii 26916.

[7] See: *Masoga and another v Pick n Pay Retailers (Pty) Ltd* (2019) 40 ILJ 2707 (LAC).

and secondly, to consider whether it is jointly and severally liable for any failure to comply with the obligations of an employer, in this instance, Flint.

[19] If prior to the termination of the rail contract, the contract was appropriately manned, by the employed labour component, this Court fails to understand the reason and logic why Flint did not rehire everyone including Yeko. This being an atypical section 197 scenario, in my view, Flint would have concluded an agreement contemplated in section 197(2) read with (6) of the LRA to deal with whatever operational challenges it would face by rehiring the terminated employees. This would not have left Red Mining out of the occasion if section 197(8) is considered. I take a view *en passant* that Flint should have employed Yeko as well. Its failure may constitute some form of discrimination in terms of the Employment Equity Act[8] (EEA)[9]. Sadly, Flint was not joined in these proceedings. The interests of justice would have been better served if Flint was joined as well as Gold Filed joint venture.

[20] Having said that, of relevance in this matter is that Red Mining was faced with operational requirements (loss of business), which justifies the fairness of the dismissal of Yeko and others. It can only justify the dismissal of Yeko using those operational requirements. There was nothing that would have saved the dismissal of Yeko. The rail contract ended, inevitably, the employment of Yeko had to end.

[21] With regard to the selection of Yeko and the application of *LIFO*, the contention of Red Mining is that the employees that Yeko compares himself with were employed in another shaft, which was unrelated to the rail contract. That project required different skills and at the time of the dismissal of Yeko, there were no vacancies in that project. It would not have been possible to apply *LIFO* in respect of the rail contract because everyone was terminated.

[8] Act No, 55 of 1998, as amended.

[9] See Para 30 of *SVA Security.*

Yeko was employed in that contract and not the other contract that required mining skills as opposed to engineering skills.

[22] On the conspectus of the evidence before Court, bumping, which is what Yeko is effectively suggesting was not going to be possible. Section 189(2)(b) of the LRA requires the consulting parties to attempt consensus on the method for selecting the employee to be dismissed. This imperative allows a consulting party to suggest amongst others vertical or horizontal bumping. It is apparent from the consultation minutes that NUM, probably a majority union, was happy with the non-application of *LIFO* given the termination of the rail contract. Section 189(7) of the LRA obligates an employer to select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties. Only when there is no agreed criteria, would a Court consider whether the selection criterion is objective and fair. The undisputed consultation minutes reflect the following:

> "NUM: How many people are going?
> Man: All the people on Rail Maintenance as this is the contract notice we have received. We are not successful on the tender.
> NUM: All people on Secondary and Rail Maintenance are Red Mining people so need to look at *LIFO* etc.
> Man: It is the rail maintenance contract has been stopped and these are the people that are affected.
> NUM: …
> Man: …
> NUM: Requested a caucus
> Thank you for the caucus. …We are happy. No problems.
> Agreed…
> All Rail Maintenance employees will be given their 30 days' notice as from 11 November 2016…" (Own Emphasis)

[23] It is apparent from the undisputed minutes that an agreement was reached that *LIFO* shall not be applied to secondary maintenance employees but all

rail contract employees shall be selected for dismissal. The technicality abound in this matter is that at the meeting where an agreed selection criterion was reached, Yeko was not present. It is common cause that Yeko was not a member of NUM. It is also common cause that it was only in January 2017 that Yeko attended a consultation meeting. It is also common cause that in that meeting all employees were sent to Flint for interviews. It is undisputed that a section 189A process was undertaken. Section 189(1)(a)-(d) of the LRA spells out in a pecking order who has to be consulted. It has been resolved that where a majority trade union has been consulted, there is no need to consult with the individual employees or minority trade unions[10].

[24] On application of the majoritarian principle, the agreement reached by NUM binds Yeko. Accordingly, the agreed selection criterion was that of selecting all the rail contract employees. The version by Yeko that only 14 employees were selected for dismissal is rejected as being false. It is inconsistent with other uncontested objective evidence. For instance, the interview list demonstrates that about 74 employees were interviewed by Flint. If only 14 employees were to be dismissed, it would be nonsensical for Flint to interview almost 74 employees.

[25] To the extent that Yeko suggests that he was not properly consulted over the selection criterion, the unfortunate part for him is that in terms of section 189A(18)[11] of the LRA, this Court is prevented from determining a procedural fairness dispute in these proceedings.

[26] For all the above reasons, Yeko must fail in his quest. His dismissal is substantively fair. His claim must be dismissed

[10] See: *Association of Mineworkers and Construction Union and others v Royal Bafokeng Platinum Ltd and others* (2020) 41 ILJ 555 (CC).

[11] Section 189A (18) "*The Labour Court may not adjudicate a dispute about procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191 (5) (b) (ii)".*

[27] In the results the following order is made:

Order

1. The dismissal of Yeko is substantively fair.
2. The claim of Yeko is dismissed.
3. There is no order as to costs.

G. N. Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr D Yeko in Person.
For the Respondent:	Mr J Nel
Instructed by:	Keet Attorneys, Potchefstroom.