

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D642/98**

Heard : 1 July 2002

Delivered : 1 July 2002

Revised :19 August

2002

In the matter between:

DOUGLAS V NGUBANE

Applicant

and

SPRAY FISHING (PTY) LTD
Respondent

BEFORE THE HONOURABLE MS JUSTICE PILLAY

ON BEHALF OF APPLICANT

MR BUTHELEZI

ON BEHALF OF RESPONDENT

MR B DENNY

TRANSCRIBER SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

PILLAY J

1. By agreement, this matter proceeds only on the point *in limine*, which is dispositive of the entire matter. The question I am required to determine is whether the applicant was permanently employed or employed in terms of a fixed term contract. However, pursuant to discussions with the parties in chambers I am also required to determine whether the employment contract still subsists.
2. The facts were that about December 1996 the applicant was invited by the respondent to serve on its vessel as a second engineer during December and January 1996. The applicant accepted. He asked if he could be permanently employed as he was getting on in years. He testified that the respondent had assured him that he would be permanently engaged.
3. The respondent's version is that the assurance given to the applicant was that he would be employed beyond December and January 1996, the most unpopular of sailing periods, if his performance and conduct were satisfactory. The applicant

was offered further voyages after the December and January voyage.

4. At the end of 1997, he was offered another voyage, which he accepted. However, he failed to arrive on the date the vessel sailed off. The respondent made other arrangements. His failure to honour his commitment to undertake that voyage was not held against him as he had just returned from a three-month voyage at sea.
5. The respondent issued the applicant with a letter dated 30 January 1998 (*Exhibit A4*), advising him that it did not have a position for him at that stage and that his salary would cease on 31 January 1998. He was also informed that he would be contacted again if his services were required. The applicant did not receive that letter immediately as he had changed residence without informing the respondent. When he inquired about not receiving his salary for February, he learnt of the letter and that he would no longer be paid.
6. It was submitted for the applicant that based on the initial discussion between Mr Walsh, the managing director of the

respondent, and the applicant, the former undertook to employ the latter permanently. For the respondent it was submitted that the letter of appointment, *Exhibit A1*, and the conditions of employment prevailing in the trawling industry were such that permanent employment was not economically feasible and therefore not the practice. This was, so it was submitted, reinforced by the provisions of sections 103 and 106 of the Merchant Shipping Act No 57 of 1951 (the “MSA”), which also governed the applicant's employment.

7. Both parties proceeded with the matter without taking issue as to whether this Court has jurisdiction. I intend to deal with the matter as if it does have jurisdiction.

8. Of particular note are the following provisions of section 103 of the MSA, which also applies to fishing boats referred to in section 106 thereof:

"S103: The following provisions shall apply to agreements with the crew of a foreign-going South African ship:

- (f) separate agreements may be made for each single voyage or an agreement (in this Act referred to as a running agreement) may be made to extend over two or more voyages;
- (g) a running agreement shall not be for a longer period than one year,

but if the period for which the agreement was entered into expires while the ship is not in a port in the Republic, the agreement shall continue in force until the ship is again in a port in the Republic: Provided that the agreement shall not continue for more than three months after the expiration of the period for which it was entered into unless the seamen concerned agree thereto in writing."

9. Subsection (f) permits separate agreements for each voyage.

This implies that contracts of employment are linked to the voyages. It was further submitted that employment on a vessel is in terms of the articles. It commences and terminates on completion of the articles. The articles refer to the agreement between the respondent and the crew in terms of the MSA.

10. Contracts of employment in the trawling industry are of a special kind. When employment commences, terminates or is suspended, depends, in my view, from all the circumstances including the terms of the articles, the contract of employment and the law and practice in the industry.

11. Section 103 of the MSA creates a right and a protection for employees in the industry. The right is to a

written contract of engagement i.e. the articles. The protection is that the employment at sea is limited to one year, and may be extended only with the consent of the employees. It also protects the employer by limiting the obligation to provide work at sea to that agreed upon in writing in the articles.

12. The critical clauses of *Exhibit A1* provide as follows:

"The company may at its sole discretion continue monthly payments to you on a casual basis when you are not signed on. Such payments may be in the nature of a compensatory salary or an advance. However, this does not constitute monthly employment and the company is entitled to give you notice at any time of its election that your employment will cease forthwith.

Please note that you are required to sign the articles and additional clauses applicable, and should you break such articles your commission entitlement immediately falls away solely at the discretion of the company.

All personnel can, in addition, apply to join the company's medical aid, pension and group life schemes."

13. *Exhibit A* however, developed the relationship between the parties beyond the articles. The fact that the respondent could give "notice at anytime of its election that his (sic) employment will cease," confirms that the

employment relationship continued even when the applicant was “not signed on” a voyage, that is after the expiry of the articles. This inference is fortified by the option that personnel can join the respondent’s benefit schemes. The availability of medical, pension and group life schemes indicate that a relationship longer than a year was contemplated. Whether the applicant exercised the option of any of these benefits, is not evident.

14. The contract of employment created mutual obligations that the parties bore towards each other. These included the payment of the equivalent of the basic salary at the employer's discretion. Furthermore, there was a reciprocal commitment to call back and report for duty whenever a voyage had to be undertaken. The contract of employment was such that different terms applied when the applicant was on a voyage and when he was not.

15. *EXHIBIT A1* also corroborates the evidence for the respondent about the discussion when the applicant was first engaged in December 1996.

16. In the context, *Exhibit A4* meant that there was no voyage to which the applicant could be assigned. The respondent terminated the discretionary salary, that is, the monthly payment made when the applicant was not signed on, because of difficult economic circumstances. Furthermore, there was a large pool of skilled labour available and the vessels had undergone a major refit. That was not challenged by the applicant. *Exhibit A1* authorised the respondent to terminate such payment.

17. What then is left of the rights of the parties in terms of the contract of employment, *Exhibit A1*? Without the payment of a normal or discretionary salary, the respondent's obligations are whittled down to merely offering the applicant a voyage whenever it arises. If it had any obligations in terms of the benefit schemes, it would be obliged to continue to fulfill them, subject to the rules of such schemes. Whilst being paid either a normal or discretionary salary, the applicant was not permitted to work on any vessel other than those belonging to the respondent. If the applicant accepted employment elsewhere whilst he was receiving a discretionary salary, it could be withdrawn. By inference, he would not be barred from

taking up employment with another employer if he received no remuneration at all. The original contract of employment is therefore substantially weakened when the remuneration is withdrawn. In these circumstances, I conclude that the full terms and conditions of the contract are suspended until they are revived or terminated.

18. Mr *Denny* submitted, somewhat tentatively, that the employment contract ceased when the applicant was not at work as the discretionary payment was not remuneration. I do not agree. The discretionary payment was a term of the employment contract. It is also a practice that exists for the mutual benefit of the employer and the employee operating in the industry. The employer has the advantage of having secured the kind of skilled labour it requires and the employee has some security of employment when not at sea.

19. Mr *Denny* also submitted that the discretionary payment was not remuneration but a benefit which may be claimed under Schedule 7 of the unfair labour practice jurisdiction of the Labour Relations Act No. 66 of 1995 (the “LRA”). I assume that he made this submission in the

alternative as it would otherwise contradict his previous submission that there was no contract of employment. I also infer from this submission that Mr *Denny* accepts that the LRA applies to the employment contract.

20. As a discretionary payment, it could potentially be withheld or not be made regularly. It was also not a direct *quid pro quo* for services rendered. The discretionary payment was therefore a benefit.

21. The withdrawal of the benefit *per se* was not challenged by the applicant in his pleadings. It is not an issue to be determined in this dispute, which is about the alleged unfair dismissal of the applicant. The applicant chose not to proceed for relief in terms of Schedule 7. However, from his evidence, it would seem that his primary concern was the non-payment of the benefit and leave pay, not the dismissal. This suggests that the applicant understood and accepted the nature of his employment.

22. *Exhibit A4* was not in the circumstances a letter of

dismissal. It varied the terms of the contract of employment by suspending the remuneration of the applicant as it was entitled to do in terms of *Exhibit A1*. The stage at which the employment contract comes to an end depends, as I said, on all the circumstances.

23. In this case, it is common cause that the applicant was offered a further voyage at the end of 1997. He did not take up the offer. It was also common cause, in the sense that it was not challenged in cross-examination, that he could not be found after his discussion with Mr Walsh in February.

24. The content of the discussion with Mr Walsh in February is in dispute. The applicant alleges that he was chased away. Mr Walsh testified that that was not so. I find on the probabilities that Mr Walsh's version is more likely. I say so because it is consistent with *Exhibit A4*, which preceded the discussion in February. Furthermore, Mr Walsh had sent a message asking the applicant to see him. The respondent might also have had need for the applicant's services at some future time and it served no purpose to burn its bridges with him. There seemed to be no reason for Mr Walsh to chase the

applicant away. It is not the respondent's case that it terminated the applicant's contract of employment when and because he failed to report for a voyage after having undertaken to do so. In terms of *Exhibit A1*, it would have been entitled to terminate "instantly in the event of failing to report on duty at the time specified by the Company's representative." If Mr Walsh was angry or irritated by the applicant to such a degree that he might have wanted to chase him away, then he was more likely to have dismissed him instantly for not reporting for duty.

25. The applicant's conduct in not taking up the further voyage and not making himself available for further voyages could imply that he elected to terminate the employment relationship. That is another aspect which was canvassed in the hearing before me. Whether there are further circumstances that might impact on whether the employment relationship subsists, may yet emerge from a full ventilation of all the issues. However, that is a matter that the parties can pursue hereafter.

26. In the circumstances my findings are as follows:

(i) The applicant was employed indefinitely (in terms of *Exhibit A1*) to undertake voyages for fixed periods in terms of the articles

(ii) The applicant was entitled to a salary whilst he was on a voyage.

(iii) He was not entitled to a salary but a benefit when he was not on a voyage.

(iv) The respondent withdrew the discretionary payment (or benefit) which applied to the period when the applicant was not on a voyage. Whether the withdrawal of the benefit was fair or not is not a matter before me.

(v) On the evidence before me the respondent did not terminate, but suspended the contract of employment.

(vi) *Exhibit A4*, relied upon by the applicant does not, in the context of the trawling industry, amount to evidence of termination of the applicant's employment.

(vii) As to whether the applicant terminated his employment by his conduct, that appears *prima facie* to be the case, on the limited evidence before me. It is the applicant who failed to tender his services even before the respondent withdrew the salary. It is a matter for the parties to pursue if they so wish.

(vi) There is no order as to costs.

PILLAY D, J