IN THE LABOUR COURT APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO.: JA37/2002

In the matter between:

NKANYISO EUSTACE BUTHELEZI APPELLANT

And

MUNICIPAL DERMACATION BOARD RESPONDENT

JUDGMENT

JAFTA AJA

[1] On 24 January 2000 the respondent appointed the appellant as a deputy manager in charge of its financial operations. The contract of employment between the parties was for a fixed term of five years, running from 24 January 2000 to 23 January 2005. On 22 November 2000 the respondent gave the appellant a notice of retrenchment. The notice stated*, inter alia,* that the respondent had embarked upon an institutional restructuring process in terms whereof certain positions could be rendered redundant. The notice gave detailed reasons for the proposed restructuring and stated that the appellant's post was one of the three posts which could be redundant. The notice invited the appellant to respond to the proposal made therein and furnish the respondent by not later than 27 November 2000 with alternative suggestions to his possible retrenchment.

[2] On 24 November 2000 the appellant responded to the notice by requesting an extension of time within which he was required to make proposals for alternatives to the proposed retrenchment. He also asked for certain information. He was granted an extension of time up to 30 November to make his proposals. Meanwhile the appellant had instructed a labour consultant to act on his behalf in the matter relating to the proposed retrenchment. The consultant addressed a letter to the respondent suggesting that there be a consultation meeting to deal with the matter. The respondent agreed that the parties meet on 6 December 2000 to consider alternative proposals from the appellant. At that meeting the appellant placed his proposals before the respondent which were considered and discussed by the parties.

[3] The respondent invited the appellant and another employee to apply for a different vacant post within its structure. On 11 December 2000 the appellant and Mr Hillary Monare (the other employee) were interviewed for the post. The appellant was unsuccessful while Mr Monare was appointed to the post.

[4] On 13 December 2000 the appellant was served with a notice of dismissal with effect from 28 February 2001 but he was required to vacate his office with immediate effect and return the keys thereto to the respondent. In that notice the appellant was further informed that the respondent did not require his services as from 13 December 2000. A dispute arose between him and the respondent about the fairness of the dismissal. He referred that dispute to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA"**) for conciliation. When conciliation became unsuccessful, the appellant approached the Labour Court for the adjudication of the dispute and sought reinstatement together with payment of compensation.

[5] The matter came before Brassey AJ in the Labour Court. In that Court the appellant argued that the termination of his employment contract was substantively unfair by virtue of

the fact that the parties had concluded a fixed – term contract of employment and that the respondent could not terminate such contract for operational requirements during its currency. The respondent disputed the contention that the appellant had been employed on a fixed – term contract of employment. However, the Court a quo found that such agreement had been concluded by the parties. The Court a quo also concluded that the appellant's dismissal was substantively unfair. It reasoned that the appellant's dismissal during the currency of the fixed–term contract rendered it substantively unfair. But it went on to find the dismissal to have been, in other respects, substantively fair. For example, the *Court a quo* found that, since the respondent had a fair reason to restructure its business, the appellant's retrenchment was, in this respect, substantively fair. The *Court a quo* also concluded that the dismissal was procedurally unfair but "**not by reason of the manner in which the restructuring was executed nor by reason of the manner in which [the appellant] was selected for retrenchment, but by reason of the manner in which his dismissal was effectuated which was unfair and constituted an invasion of his dignity.**"

[6] Although the *Court a quo* fount that the dismissal was substantively unfair, albeit to a limited extent, it concluded that the appellant was not entitled to compensation claimed in respect of the period following the date on which he had allegedly committed an act of misconduct which, in the opinion of the *Court a quo*, could have entitled the respondent to dismiss him. In this regard reference was made to "**scurrilous accusations**" allegedly made by the appellant against the respondent. The *Court a quo* held that, since the appellant had committed an act of misconduct prior to the date on which the dismissal became effective (28 February 2001), he was not entitled to any compensation. As a result the appellant's claim for compensation was dismissed with costs. With the leave of the *Court a quo*, the appellant now appeals against the whole judgement and order issued by that Court.

The appeal

[7] In essence, the appellant contended that the dismissal was substantively unfair

because the respondent had no right in law to terminate the fixed term contract of employment between them prior to the expiry of its term even if there were operational requirements which could have justified a termination of contract for an indefinite period. He also argued that the *Court a quo*, having found that the dismissal was substantively and procedurally unfair, should have awarded him compensation. He further contended that the *Court a quo* erred in finding that his retrenchment complied with the requirements of s 189 of the Labour Relations Act 66 of 1995 ("**the Act**"). On behalf of the respondent these contentions were disputed and it was submitted that, where there are operational requirements that would justify a dismissal, an employer is entitled to dismiss an employee even if his contract of employment is for a fixed term. It was submitted on behalf of the respondent that there was a fair reason for the dismissal of the appellant which were based on the respondent's operational requirements. It was further submitted on the respondent's behalf that in any event, even if the dismissal was unfair, the Court a quo's decision that the appellant should not be awarded any compensation was justified and correct.

Substantive unfairness

[8] The *Court a quo's* finding to the effect that the parties had concluded a fixed – term contract of employment is of critical importance to the adjudication of this appeal. That finding was not challenged on appeal. This is significant because the enquiry into the substantive fairness of the dismissal should proceed from the premise that the parties had entered into a valid fixed – term contract of employment which was intended to endure until January 2005 but was prematurely terminated in December 2000 by the respondent, allegedly on grounds of operational requirements.

[9] The first question that arises in the present matter is whether the respondent was entitled to terminate the employment contract between it and the appellant when it cancelled it. There is no doubt that at common law a party to a fixed – term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract

by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate of a fixed – term contract of employment prematurely in the absence of a material breach of such contract by the other party.

[10] Faced with the common law position as stated above Mr Fabricius, who appeared for the respondent, argued that *the Court a quo* did not appreciate the inroads made by the Act into the common law. To illustrate his point, Mr Fabricius referred to the case of **National Automobile and Allied Workers Union v Borg – Warmer SA 1994(3)SA 15 (A).** In that case the Appellate Division observed that the Labour Relations Act 28 of 1956 had altered the common law by recognising the relationship between an employer and an employee beyond the termination of the contract of employment under the common law. In developing his argument Mr Fabricius submitted that the Act has made significant inroads into the common law by enlarging the definition of a dismissal to include a situation where an employee reasonably expected an employer to renew a fixed – term contract on the same terms but the employer renews it on different terms or refuses to renew it. He submitted further that this magnanimity of the Act in relation to employees as demonstrated by the extended definition of the word "**dismissal**" should equally apply to employers. He contended that a failure to do so would amount to inequality and unfair discrimination which

are outlawed by s 9 of the Constitution. He also contended that the common law rule referred to in paragraph [9] above should be developed in terms of s 39(2) of the Constitution so as to create a lawful remedy for an employer whose business requires restructuring during the currency of a fixed-term employment contract. He submitted that to do this was necessary in order to ensure fairness to employers because otherwise they would be precluded from dismissing employees who are on fixed term contracts even when there are sound operational requirements warranting such dismissal.

[11] The answer to Mr Fabricius' argument is a simple one. His argument is based on the premise that the rule that parties to a fixed term contract should be held to such contract for the duration of the term of the contract in the absence of any material breach of the terms of such contract is unfair to an employer who wants to restructure his business before the expiry of the term of such contract. If we are unable to uphold this premise, then the very foundation of Mr Fabricius' argument falls away. I have no hesitation in concluding that there is no unfairness in such a situation. This is so simply because the employer is free not to enter into a fixed term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If he chooses to enter into a fixed term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materializes. The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in the exercise of that choice.

[12] It is true that labour legislation (including certain provisions of the Act) has amended the common law in certain respects. However, it has not amended the general principles that a fixed term contract may not be cancelled unilaterally during its currency in the absence of a material breach of such contract. The case of Borg-Warner and the provision in sec 186 which renders a failure to renew a contract of employment in certain circumstances to be a

dismissal are only illustrations of the amendment of the common law in the specific areas with which they are concerned and nothing more. To uphold Mr Fabricuis' submission would mean that the Act has amended the common law in regard to the principle under discussion. Generally, our courts have declined to interpret a statute as taking away existing rights unless that was the purpose intended by the legislature and that is expressed in clear and unambiguous terms in the statute itself. In **SA Breweries Ltd v Food & Allied Workers Union and Others 1990(1) SA 92 (A) Smalberger JA** said in part at 99F:

"There is a presumption against the deprivation of, or interference with, common law rights, and in the case of ambiguity an interpretation which preserves those rights will be favoured …"

[13] Although in **SA Breweries Ltd** the Court was concerned with interpreting the Labour Relations Act of 1956, the principle it affirmed regarding the application of the presumption to interpretation of statutes still applies. The presumption was recently applied in construing the provisions of the Act in **Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA)**. In this case Nugent AJA (as he then was) rejected the argument advanced by the appellant to the effect that in codifying the rights and remedies in chapter 8, the current Labour Relations Act (Act 66 of 1995) deprived employees of the common – law right to enforce the terms of a fixed – term contract of employment. The learned Acting Judge of Appeal (with the concurrence of **Howie JA, Marais JA** and **Mpati JA)** said at paragraphs [16]-[18]:

"**[16] In consideration whether the 1995 Act should be construed to that effect it must be borne in mind that it is presumed that the Legislature did not intend to interfere with existing law and a fortiori not to deprive parties of existing remedies for wrongs done to them. A statute will be construed as doing so only if that appears expressly or by necessary implication. While the advent of the Constitution, and s 39(2) in particular, has not had the effect of prohibiting entirely the use of the presumption against legislative alteration of the existing law (whether common law or statute) when interpreting a statute which is less than clear, it nevertheless limits its field of**

application. The same is true of the presumption against the deprivation of existing rights. To illustrate: where a statute is ambiguous as to whether or not an existing law or right has been repealed, abolished or altered and the existing law or right is not in harmony with the spirit, purport and objects of the Bill of Fights' there would appear to be no justification for invoking such presumption. But where the existing law or right is not unharmonious the presumption will still find application. ***The continued existence of the common- law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed term contracts of employment is not in conflict with the spirit, purport and objects of the Bill of rights*** **and it is appropriate to invoke the presumption in the present case.**

[17] ***The 1995 Act does not expressly abrogate an employee's common- law entitled to enforce contractual rights nor do I think that it does so by necessary implication*****. On the contrary there are clear indications in the 1995 Act that the Legislature had no intention of doing so.**

[18] The clearest indication that it had no such intention is s 186 (b), which extends the meaning of 'dismissal' to include the following circumstances:
'(A)n employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.'

It is significant that although the Legislature dealt specifically with fixed-term contracts in this definition it did not include the premature termination of such a contract notwithstanding that such a termination would be manifestly unfair. The reason for that is plain: ***The common law right to enforce such term remained intact.***

And it was thus not necessary to declare a premature termination to be an unfair dismissal. The very reference to fixed term contracts makes it clear that the Legislature recognized their continued enforceability and any other construction would render the definition absurd." [Emphasis added]

[14] Without a clear indication from the Act that the legislature intended to alter the common law rule relating to a premature termination of a fixed – term contract during its currency, it cannot be contended that the Act has such effect. This view accords with the presumption referred to above which can, however, be rebutted by the legislature in clear and unambiguous terms (**cf Casely NO v Minister of Defence 1973(1) SA 630(A) at 640 A-D**).

[15] The contention by Mr Fabricius that it is inconsistent with the Constitution not to accord employers the right to terminate fixed – term contracts of employment for operational requirements while employees have in their favour the enlarged definition of dismissal has no merit. I also find no substance in the argument that the common law rule, which says an employee under a fixed – term contract of employment is entitled to enforce it, should be developed in terms of s 39 (2) of the Constitution. Mr Fabricius did not specify which section of the Constitution is in conflict with an employee's common law right to enforce a fixed – term contract of employment which has been terminated prematurely by the employer. In this regard the arguments advanced by the respondent are seriously undermined by the interpretation of the Act which was adopted in **Wolfaardt's** case (supra). In that case Nugent AJA stated instructively that the common – law right to enforce prematurely terminated fixed – term contracts of employment was not in conflict with the spirit, purport and objects of the Bill of Rights and went on to say that such right remains intact. In the circumstances I conclude that s 39 (2) of the Constitution cannot be invoked in the present matter because the common – law rules we are dealing with here are consistent with the spirit, purport and objects of the Bill of Rights.

[16] In the light of the aforegoing I conclude that the respondent had no right in law to terminate the contract of employment between itself and the appellant. Accordingly, the termination of such contract before the end of its term was unfair and constituted an unfair dismissal. The dismissal was accordingly substantively unfair in the fullest possible sense. I say in the fullest possible sense because the *Court a quo* qualified its finding that the dismissal was substantively unfair by saying that it was unfair in certain respects but in other respects it was substantively fair. The qualification was wholly unjustified. In the light of the conclusion I have reached on the substantive fairness, the question of procedural fairness becomes academic in this matter. The operational requirements, if any existed, did not in law give the respondent the right to terminate the contract of employment between the parties.

Compensation

[17] The *Court a quo* found that the appropriate compensation to redress substantive unfairness was an amount equivalent to the remuneration the appellant would have been paid for the balance of the contract period less the amount he obtained from other employment. It calculated such amount to be equivalent to three months' pay on the basis that the appellant obtained a better paying job from another employer three months after his dismissal. However, the Court eventually came to the conclusion that the appellant was not entitled to such compensation because he had made certain "**scurrilous accusations**" against the respondent.

[18] The *Court a quo* reasoned that the "**scurrilous accusations**" would have entitled the respondent to dismiss the appellant for misconduct which meant that the appellant's dismissal could have been justified. The Court found that the accusations were made in an affidavit deposed to by the appellant on 11 February 2001 and filed in support of a condonation application lodged at the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") when he referred the dismissal dispute to that body for conciliation. The *Court a quo* dealt with this issue in an ambivalent manner and stated:

"At common law Buthelezi would be entitled to damages in the amount of three months' pay. I am not sitting as a common law court but sitting to consider the question of compensation under the statute. What I discover is that if he had continued in employment after the middle of December he would in any event have been justifiably dismissed for misconduct in February by reason of the allegations that he made in the application for condonation. That, though it is based on a set of speculative or rather hypothetical premises, is nonetheless, it seems to me, an appropriate way to consider what should be the moment at which (sic) at claim based on compensation should properly be valuated. In those circumstances he gets nothing at all so far as the equation with damage for breach of contract is concerned because he has got everything he might otherwise have been entitled to, he having been paid until well after 11 February."

[19] I am unable to uphold the *Court a quo's* refusal to award compensation to the appellant. Firstly, the conclusion that the appellant could have been justifiably dismissed for misconduct was based on speculation. Furthermore, the appellant having alleged in his statement of claim that his dismissal was unlawful because it did not comply with the terms of the employment contract which permitted only a dismissal for misconduct, the respondent did not plead that the dismissal was justified by the appellant's alleged misconduct pertaining to averments made in the condonation application. Nor did it place evidence before the Court a quo showing that it could have dismissed the appellant for such averments. In fact in his testimony the respondent's chairperson did not regard the allegations as sufficiently serious to have warranted a dismissal.

[20] At the hearing of this appeal the parties were in agreement that the appellant could only be entitled to compensation equivalent to three months' salary because he was employed elsewhere at a better salary three months after his dismissal. This proposition is consistent with the approach adopted in **Meyers v Abrahamsom 1952(3) SA 121(C).** In

that case **Van Winsen J** laid down the correct approach for computing damages for a premature dismissal in the following terms at 127E:

"The measure of damages accorded such employee is, both in our law and in the English law, the actual loss suffered by him represented by the sum due to him of the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment."

As both parties were agreed that this would be the correct approach, I propose to give effect to it.

[21] There remains the issue of the purported cross- appeal lodged by the respondent. Although no order was issued by the Court a quo against the respondent, it filed a "**cross-appeal**" against the f**indings** made by that Court on substantive and procedural unfairness and the finding that the respondent had committed *iniuria* and insulted the appellant in his dignity. The only order made in this matter was the one dismissing the claim with costs.

Appeals against judgements or orders of the Labour Court, which include cross-appeals, are regulated by s 166 of the Act. The relevant portion of the section reads as follows:

"(**1) Any party to any proceedings before the Labour Court may apply to the Labour Court for leave to appeal to the Labour Appeal Court against any final judgement or final order of the Labour Court."**

[22] It is quite plain from the wording of s 166(1) that appeals and cross-appeals can only be noted and prosecuted against final judgements or orders. There can be no appeals against reasons or findings in a judgement (**cf Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) and De Vos v Cooper and Ferreira 1999 (4) SA 1290 (SCA) at paragraph [17]).** The decision in **De Vos** dealt with s 20 of the Supreme Court Act 59 of 1959 which is couched in words similar to s 166(1) of the Act. In my view the purported cross – appeal should be struck off the roll with costs. In the result the appeal

must succeed.

[23] In the premises the following order is made:

[1] The appeal is upheld with costs.

[2] The cross-appeal is struck off the roll with costs.

[3] The order of the Court a quo is set aside and replaced with the following order:

"(a) **The applicant's dismissal on 13 December 2000 is declared to have been substantively unfair.**

(b) The respondent is ordered to pay to the applicant an amount equivalent to three months' salary calculated at the rate of his pay at the time of his dismissal.

(c) The respondent is ordered to pay the applicant's costs."

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JAFTA AJA

I agree.

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ZONDO JP

I agree.

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DAVIS AJA

Appearances:

For the appellant	:	Adv. L. A. Cook
Instructed by	:	Lebea & Associates
For the respondents:		Adv. H. J. Fabricius SC
Instructed by	:	Macrobert Inc.
Date of judgment	:	22 September 2004