IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

CASE NO JS594/07

In the matter between:

DAVID SINDANE **APPLICANT**

and

PRESTIGE CLEANING SERVICES **RESPONDENT**

JUDGMENT

AC BASSON, J

1] The Applicant in this matter is Mr. David Sindane (hereinafter referred to as "the Applicant"). The Respondent is Prestige Cleaning Services (Pty) Ltd (hereinafter referred to as "the Respondent").

2] It was common cause that the Applicant was employed by the Respondent as a cleaner from 1 June 2002. Although the Applicant

disputed the date of termination of his employment, it is clear from the pre-trail minutes and the other documentation that the date of termination was 30 April 2007 and not 30 April 2006. It is, in any event, not in the interest of the Applicant to accept that he was dismissed a year earlier as this will only give rise to jurisdictional issues such as the late referral of the dispute to the CCMA which will effectively mean that this Court may not be able to hear the dispute. I must also point out that I fail to understand why the Applicant disputed the date of termination as it was patently clear from all the documentation and the evidence.

3] The Applicant alleged that he was dismissed and that the reason for his dismissal was operational requirements (retrenchment). The Respondent alleged that there was no "*dismissal*" as his contract of employment was terminated when the (cleaning) contract with the client Menlyn Piazza was reduced. The cleaning contract with the client was not terminated but only reduced or scaled down as the client no longer needed the cleaning services of the Applicant (and another employee) at the waste bin area. It was common cause that the Applicant had refused to sign certain documents that were handed to him upon the termination of his contract. I will refer to these documents hereinbelow. There was some dispute about the amount of salary which the Applicant received but, in light of my decision, it is not necessary to decide that issue. I should also point out that the Applicant also claimed 24 months' compensation despite the fact

that he did not allege an automatically unfair dismissal.

Fixed term eventuality contract of employment

4] The Applicant was employed on 1 June 2002 (the contract was signed on 4 June 2002) in terms of a so-called *"Fixed Term Eventuality Contract of Employment*". In terms of this agreement the period of employment between the parties was for a definite period of employment terminating at the termination of the contract which currently exists between the client (to whom cleaning services was provided) and the Respondent (the service provider of the cleaning services). It was not in dispute that the Applicant had previously worked as a cleaner for an auditor's firm until he was removed from that position and placed in another cleaning position with Menlyn Piazza. It was the evidence of the Respondent that the previous client had requested the removal of the Applicant after an alleged incident involving his behaviour. It is not necessary for purposes of this judgment to dwell on the reasons for his removal. Suffice to point out that the Applicant was removed and placed in another temporary position for about five weeks. Thereafter on 20 November 2006 the Applicant signed another "*Fixed Term Eventuality Contract of Employment"* with similar terms in respect of the duration as the one signed years earlier and to which reference was made. In terms of this (new) contract the Applicant was placed as a cleaner at Menlyn Piazza.

5] It was common cause, as these papers were annexed to the Applicant's own papers, that the Respondent received a letter on 27 March 2007 from the managers of Menlyn Piazza. In terms of this letter the Respondent was informed that the contract for the extra cleaner at the so-called waste bin area was cancelled "*as from today*" (meaning as from 27 March 2007).

6] Mr. Leon Swart (hereinafter referred to as "*Swart*") for the Respondent testified that he took the letter of 27 March 2007 up with the writer of the aforementioned letter and that he explained to them that it was unfair to have given the Respondent such a short notice as it was unfair to the cleaners who were placed at Piazza. Following this conversation a further letter dated 30 March 2007 was received by the Respondent in terms of which it was confirmed that the contract for the extra cleaner for the waste area was cancelled. I must also point out that it was the evidence of Swart that one extra cleaner actually referred to two cleaners as the service that was required had to be rendered on a 7 day basis. The Applicant would work 4 days (from Monday to Thursday) and another employee will then take over from Friday to Sunday. Swart then explained that that was the reason why two employees (namely the Applicant and a one Paul) both had to be removed from the cleaning contract. This was denied by the Applicant and it was his evidence that he was the only one who worked there. On the probabilities I can, however, find, no reason to reject the evidence of Swart who had intimate knowledge of the employment

operations and the requirements of the contract with Piazza.

7] It was further common cause that Sindane was given a letter dated 1 April 2007 informing him of the fact that his employment contract would be terminated as a result of the fact that the contract with Menlyn Piazza was scaled down. The letter further stated that two employees will be affected namely the Applicant and Paul. The Applicant was further informed that the contract will likely come to an end in April 2007. The Applicant, although admitting that he received this letter, stated that he only received it on 30 April 2007, which was the last day of employment.

8] The Applicant was handed a further letter also dated 1 April 2007 to the effect that the Menlyn Piazza contract has been reduced and that his services will come to an end on 30 April 2007. The Applicant also refused to sign this letter and also testified that he only received this letter on 30 April 2007. The Applicant was also given a letter with a heading "Consulting Checklist". This letter records two consultation meetings on 3 April 2007 and 17 April 2007. Again the Applicant refused to sign this letter. In his evidence he also denied that he was consulted. The person who conducted these two consultations could not give evidence as he has already left the employment of the Respondent under unhappy circumstances.

Was there a "dismissal"?

9] The first question which has to be considered is whether or not there was a "*dismissal*" as contemplated by section 186(1)(a) the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA"). The Respondent argued that there was no dismissal as the contract of employment makes provision for the simultaneous termination of the employment contract of the Applicant when the Respondent's cleaning contract with a client terminates or when it is reduced. If this argument is to be accepted it would mean that an employer may make the termination of a contract of employment dependent upon a future circumscribed or specific event, such as the termination of another contract. When this event takes place the contract of employment will automatically come to an end. This in turn may give rise to the argument that there has not been a "*dismissal*" of the employee by the employee.

The decision in: SA Post Office Ltd v Mampeule [2009] 8 BLLR (LC)

10] I referred counsel for the Respondent to the decision in *SA Post Office Ltd v Mampeule* [2009] 8 BLLR (LC) (hereinafter referred to as "*SAPO"*) and requested him to file supplementary heads of arguments and address this Court on whether or not this Court should not find in light of the *SAPO*-decision that the Applicant in the present matter has been "dismissed" by the employer. Counsel for the Respondent subsequently filed comprehensive and very helpful heads of argument.

11] In the SAPO matter the facts were briefly as follows: SAPO sought a

declaratory order that the termination of a certain Mr. K Mampeule's (hereinafter referred to as "KM") employment, as a direct result of his removal on 21 May 2007 from SAPO's board of directors, does *not* constitute a "*dismissal"* for purposes of section 186(1)(a) of the LRA. This proposition was founded on a term of KM's contract of employment with SAPO, read together with SAPO's Articles of Association, to the effect that his removal from SAPO's Board gave rise unavoidably to the automatic and simultaneous termination of his employment contract with SAPO.

12] KM was appointed as SAPO's Chief Executive Officer on a 5-year fixed term contract. In terms of the said contract of employment the employment relationship could be terminated on any of four grounds, namely: (i) automatically upon expiry of the 5-year period; (ii) incapacity resulting from poor work performance or ill-health; (iii) misconduct; or (iv) SAPO's operational requirements. The Minister of Communications suspended KM pending a forensic audit into his conduct. Subsequent thereto KM was removed as a director of SAPO pursuant to the provisions of section 220 of the Companies Act No 61 of 1973 ("the Companies Act"), arising from a resolution tabled by the Minister of Communications for KM to be removed as a director. The day after the meeting when KM was removed as a director, the chairperson of SAPO's Board formally informed KM in writing that following his removal from SAPO's Board, his employment contract has terminated automatically and simultaneously with his removal as a

director.

13] Counsel for SAPO argued that SAPO did not terminate KM's contract of employment. It was argued that the termination of KM's contract of employment came about as an automatic and simultaneous result of his removal from SAPO's Board. Thus, it was KM's *removal* from SAPO's Board by operation of a contractual term that brought about the termination of his employment contract, and not by virtue of a deliberate act on the part of SAPO to sever the employment relationship. As such, it was argued by counsel for SAPO that there was no dismissal of KM by SAPO.

14] Ngalwana AJ ruled that KM was indeed dismissed[1] by SAPO, *inter alia* for the following reasons: (i) Clause 9 of KM's employment contract read together with the Articles of Association of SAPO introduced a fifth ground upon which KM's contract of employment could be terminated, that being upon his removal from SAPO's Board as a director. (ii) Any act by an employer which results, directly or indirectly, in the termination of an employee's contract of employment constitutes a dismissal within the meaning of section 186(1)(a) of the LRA**.** (iii) The employment contract of

1 The Court held as follows: *"[28]I do not agree. In my view any act by the employer which results, directly or indirectly, in the termination of the employee's contract of employment constitutes a dismissal within the meaning of s 186(1)(a) . That is why the LRA recognizes the concept of constructive dismissal (s 186(1)(e) of the LRA). I do not want to be understood as saying what happened here constitutes constructive dismissal. I am not saying that. The point I make is that a dismissal does not come about only when the employer tells the employee 'you're fired'. Thus, when the minister removed the respondent from the applicant's board of directors, thereby triggering an automatic and simultaneous termination of his contract of employment with the applicant, she effectively dismissed him. With that there can be no quarrel."*

KM permitted automatic termination as alleged by SAPO. The question is whether that is permissible in law. The Court referred to the English Court of Appeal Case of *Igbo v Johnson Matthey Chemicals Ltd* [1986] IRLR 215 (CA). The Court found that the terms of KM's employment contract cannot neatly be construed in isolation from SAPO's act of removing KM from the Board. Effectively, had the Minister of Communications not removed KM from the Board, his employment would not have terminated. The removal of KM as a director triggered, proximately or effectively, the termination of his employment. The effective cause of termination of KM's contract of employment was thus clearly the Minister's removal of him from SAPO's Board.

15] The Court held that the automatic termination clause is impermissible and cannot rightly be invoked to stave off the clear and unambiguous effect of the Minster's overt act and concluded that the termination of KM's contract of employment pursuant to a contractual term in his employment contract read together with the Articles of Association of SAPO are impermissible in their truncation of the provisions of Chapter 8 of the LRA, and possibly even, the concomitant constitutional right to fair labour practices. Provisions of this sort, militate as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, are incapable of consensual validation between parties to a contract by way of waiver of the rights so

conferred.[2]

16] It is accepted that apart from a resignation by an employee (unless constructive dismissal is claimed consequent to resignation), an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in section 186(1) of the LRA, and more particularly, in terms of section 186(1)(a). These circumstances include the following: (i) The death of the employee; (ii) The natural expiry of a fixed term employment contract entered into for a specific period, or upon the happening of a particular event, e.g. the conclusion of a project or contract between an employer and a third party. In the first instance, if the fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) (subject to what is stated below in respect of

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2 The Court held as follows*: "[33] The respondent's counsel say if it were permissible, then the entire B provisions of chapter 8 of the LRA, and the constitutional right to fair labour practices, could be easily circumvented. This could be achieved, so the argument goes, by including a clause in every employee's contract that his employment will terminate automatically on the occurrence of some or other event, for example, a prescribed act of misconduct or incapacity. There is much to be said for this submission. Such clauses are eminently undesirable in the labour relations context. The progressive disciplinary measures for which schedule 8 to the LRA makes provision would be rendered otiose and the labour relations clock in this country would have been turned back some three decades."*

the remedies provided for by the LRA to an employee who has signed such a contract) constitute a "*dismissal*", as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. The same holds true for a fixed term employment contract linked to the completion of a project or building contract. These fixed term employment contracts are typical in circumstances where it is not possible to agree on a fixed time period of employment, i.e. a definitive start and end date, as it is not certain on what exact date the project or building contract will be completed, and hence, the termination date is stipulated to be the completion date of the project or building contract. Similarly as in a fixed term employment contract with a stipulated time period, when a fixed term employment contract linked to the completion of a project or building contract terminates, such termination will not (necessarily) be construed to be a dismissal as contemplated in section 186(1)(a). Thus, the contract terminates automatically when the termination date arrives, otherwise, it is no longer a fixed term contract (*SA Rugby (Pty) Ltd v CCMA & Others* (2006) 27 *ILJ* 1041 (LC) at 1044 par 6)[3]. It must, however, be pointed out

3 The Court in this matter, however, acknowledged that the provisions of section 186(b) of the LRA provides for a remedy where the employer does not renew a fixed term contract. See my comments in respect of this remedy: "*[6]At common law, an employment contract for a fixed-term terminates automatically upon the expiry of the period unless the parties agree, expressly or tacitly, to renew it. (See Brassey Employment and Labour Law vol 3 A8: 9.)*
[7]Section 186 however changed this. As authoritatively stated in Fedlife Assurance Ltd v Wolfaardt 2002 (1) B SA 49 (SCA) at 58; (2001) 22 ILJ 2407 (SCA), s 186(b) 'extends the meaning of "dismissal". By enacting s 186(b), parliament 'intended to bestow upon an employee whose fixed-term contract has run its course a new remedy designed to provide ... compensation ... if the employer refuses to agree to renew the contract where there was a reasonable expectation that such would occur' (at 59). The use of the word 'bestow' is instructive: it indicates that the rights and remedies created by s 186(1)(b) arise ex lege, by virtue of the

that the LRA does provide a remedy to an employee who have entered into fixed term employment contracts as referred to in section 186(1)(b) of the LRA in terms whereof an employee, who 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, can claim a dismissal occasioned thereby. In such a case the *"act"* of the employer which is the failure or refusal to renew the fixed term employment contract on the same or similar terms, or to renew it at all is the proximate cause of the dismissal. Furthermore, an employee who has entered into a fixed term employment contract is not without remedy in terms of the LRA or the common law, if the employer unfairly or unlawfully terminates the employment contract of the employee for reasons related to misconduct, incapacity or operational reasons, prior to the natural expiry of the fixed term employment contract.

17] In am in agreement with the argument that the SAPO case is distinguishable from the present matter for the following reasons. (i) The reason for the removal of KM as a director in the SAPO case, and consequently the termination of his employment contract, was directly related to alleged misconduct on his part, pursuant to which he was provided with no opportunity to contest the fairness of the termination of

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express provisions of the LRA, described in this judgment of the Supreme Court of Appeal as an Act that 'has created an elaborate and in many respects innovative legal framework for the regulation of the relationship between employers and employees' (at 55). In the judgment, the section is referred to as s 186(b), as it then appeared in the LRA. Subsequently, by Act 12 of 2002, the section was amended, so that the numbering became s 186(1)(b) . Somewhat surprisingly, the Fedlife case was not referred to in either of the heads of argument."

his employment contract. It is trite in our law that an employee who is charged with misconduct has the right to the *audi alteram partem* (see *inter alia* section 188 (1) and (2) of the LRA and the Code of Good Practice: Dismissal Schedule 8 to the LRA). I agree that an employee cannot be deprived of the normal remedies in such circumstances. (ii) The reason for the termination of KM's employment contract was not linked to a particular period, or as is applicable in this case, an eventuality, which gives automatic rise to the termination of the employment contract, as contemplated and being applicable to fixed term employment contracts. (iii) The termination of the employment contract of KM in the SAPO case was not applicable or linked to the *natural expiry* of his fixed term employment contract being reached, through for instance the first ground stated in his employment contract, by which his employment contract would be terminated, that being automatically upon the expiry of the 5-year period; (iv) There was no consideration to be had in the SAPO case as to whether the termination of the contract with a third party client, or downscaling, as was the case in respect of the Applicant in this matter, resulted in the *"due completion of the contract between the parties"*, as provided for in clause 4.2.1 of the fixed term employment contract between the Applicant and the Respondent in the present matter. (v) The facts in the *Igbo*-case are entirely different and distinguishable from this case and have no application to the term and/or termination of a fixed term employment contract on the basis and for the reasons applicable in this

case. In the *Igbo*– case the employee did not return from annual leave in time. Where an employee does not arrive back in time from annual leave, family responsibility leave or maternity leave, etc., the employer must address such conduct in terms of his/her employment contract and applicable labour law principles and legislation. The fact that the employer in the *Igbo*- case drew up a contract which provided that if the employee failed to return to work on the appointed day of return, his contract of employment would automatically terminate on that date, is of no consequence. It is certainly an implied term, if not an express term, that an employee should return to work on the date scheduled for his/her return after leave. However, should the employee not return, the employer can clearly not deem it that the employment contract has automatically terminated, as there could be a variety of reasons for the employee not to have returned to work, e.g. illness, accident, imprisonment, etc. Moreover, if the reason for not returning is misconduct, the employer must address that in terms of the requirements of fairness as set out in the LRA and the Code of Good Practice.

18] I therefore find in light of the above that the Applicant was not "*dismissed*" as contemplated by the LRA. The claim therefore falls to be dismissed on this point alone.

19] However, in the event that I am wrong in my conclusion in respect of the

question whether or not there was a dismissal, I am nonetheless persuaded on the evidence that the dismissal (if there was one) was substantively and procedurally fair. It was confirmed by the Applicant in his cross-examination of the Respondent's witness and the evidence of the witness of the Respondent, as well as the documents before the Court, that two meetings took place between the Applicant and the Respondent at which time the Applicant was duly informed of the scaling down of the contract with the client of the Respondent, which in turn would result in the employment contract of the Applicant being terminated as contractually stipulated. At these meetings, the Applicant was duly presented with the opportunity to make representations in respect of the termination of his employment contract, and furthermore, although the Respondent was not obliged to do so, the Respondent attempted to find an alternative position for the Applicant.

20] In the event I find, in the alternative that the dismissal of the Applicant was substantively and procedurally fair. Taking into account considerations of fairness, I make no order as to costs.

Order

In the event the following order is made:

1. The claim is dismissed.

2. There is no order as to costs.

AC BASSON, J

Date of proceedings: 6 August 2009

Date of judgment: 28 August 2009

For the Applicant: Mr Sidane: In person

For the Respondent: Adv JH De Villiers Botha. Attorneys: Unknown