REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN CAPE TOWN

JUDGMENT

Case no: C649/2012

In the matter between:

CLOUD HAMANDAWANA **Applicant**

and

DISPUTE RESOLUTION CENTRE **First Respondent**

GOLDSCHMIDT *N.O.* **Second Respondent**

SA COACH & TRUCK (PTY) LTD **Third Respondent**

Date of hearing: 30 October 2013

Date of Delivery: 5 November 2013

Summary: (Review – Ruling on dismissal – Arbitrator's finding that employee employed on a fixed term basis upheld notwithstanding failure of employee to sign fixed term contract-Basic Conditions of Employment Act is neutral on permanent or fixed term nature of employment)

JUDGMENT

LAGRANGE, J

Introduction

[1] In this matter the arbitrator concluded that the applicant had not been dismissed and therefore the question whether or not the dismissal was fair did not arise. The applicant seeks to overturn this finding on review.

Evidence before the arbitrator

[2] The evidence as summarised by the arbitrator was the following:

2.1 The applicant was employed as a paint shop assistant in August 2011 and his employment ended nine months later on 30 April 2012. The respondent employer claimed that this was a result of the termination of a fixed term contract.

2.2 Two fixed term contracts or four months and three months respectively with a gap of six or seven weeks between them were produced in evidence. The evidence of the general manager was that the first contract was explained to the applicant but he refused to sign it. In the interval between the end of the first fixed term contract and the commencement of the second, the applicant's employment was extended during the year end shutdown owing to a lot of last-minute work coming in. The applicant was amongst 10 employees whose employment was extended during this period.

2.3 The applicant denied he had received the first contract, but he handed it back unsigned. On both versions of the contract it was recorded that the applicant had refused to sign it. Although he did not sign the second contract, he was given a copy of it. He was also reminded in the presence of the human resources officer and foreman that his contract would expire at the end of April.

2.4 The applicant’s foreman also confirmed that he gave the applicant his contract, requested him to sign it after reading it, and that he refused to do so. He also confirmed having a discussion with the applicant about the termination of his contract in April. The firm’s Human Resources officer

also testified that she went through the contract with the applicant on 23 March 2012 and explained its implications to him.

[3] In analysing the evidence the arbitrator concluded that:

3.1 The evidence showed that the reason for him being placed on a fixed term contract had been explained to him and he was aware of his employment status. Moreover, evidence that he refused to sign a second contract was corroborated and he accepted the evidence of the human resources manager;

3.2 Various attempts were made to inform the employee about his contract and his status but he either refused to understand or refused to accept that he was not employed permanently.

3.3 Both the written contracts clearly stipulated periods of employment and stated they were fixed term contracts.

3.4 Consequently, the employee was not dismissed but his contract had simply expired.

[4] The arbitrator set out his analysis of evidence and argument thus:

> *"The employee has attempted to argue that his dismissal was unfair on the basis that he was a permanent employee. Had not signed a contract of employment, but that there was a verbal agreement that he had been permanently employed. If indeed the employee is correct that he was a permanent employee, then his dismissal would have been substantively and procedurally unfair as there would be no good reason for his dismissal, and no fair procedure affecting the dismissal. However, the evidence clearly shows this is not to be the case. Theart, general manager, explained the reason the employee was placed on a fixed term contract, and was adamant the employee was made aware of his employment status. He testified that the employee refused to sign his second contract. Witten, the foreman, supported Theart's testimony that the employee refused to sign his contract. De Klerk stated that she explained in detail to the employee the contents of his contract, and that it would expire at the end of April.*
>
> *I am less convinced and satisfy the various attempts were made to inform the employee about his contract and his employment status. He either refused to*

understand (or did not understand because he did not read the contract, or refused to accept that he was not a permanent employee

both contracts, submitted as evidence, clearly stipulate the period of employment. It is also clearly stated that it is a fixed term contract. There was thus no discrepancy about the employee's employment status and for how long his employment would last. The contract is not signed because the employee refused to sign them. The employee was not dismissed: his employment terminated as a result of his fixed term contract expiring."

Grounds of Review

[5] The applicant cited the following grounds of review in his founding affidavit, which he chose not to supplement:

5.1 He was deprived of the opportunity to present witnesses to testify to the fact that he had a permanent contract of employment.

5.2 As a result of being prevented from leading such evidence, the arbitrator's conclusion was flawed. Interpreted in the language of review proceedings, I take this to mean that the arbitrator prevented material evidence being led which he ought to have taken account of and which would have resulted in a different conclusion.

5.3 The arbitrator's conclusions were ones that no reasonable arbitrator could have reached on the evidence before him.

[6] Having perused the transcript of the enquiry, I could find no evidence that the applicant was deprived the opportunity of calling his own witness. In fact he was allowed to call Mr Chamboko as his witness after the employer had already closed its case. Since there is no evidence that the arbitrator limited the evidence that could be led, it cannot be said that the arbitrator prevented the admission of relevant evidence. As it happens, the applicant's representative wisely abandoned the first two grounds of review and only pursued the third.

Can the court consider the applicant's remaining ground of review?

[7] In his founding papers, the applicant provided no reasons why the arbitrator's conclusion was one that no reasonable arbitrator could have reached. As such,

this ground of review should not be considered as the respondent had no way of knowing what the factual basis for it was until it received the applicant's heads of argument.

[8] The Labour Appeal Court made it clear in the unreported case of ***Comtech (Pty) Ltd v Commisioner Shaun Molony N.O. & Others*** **(Case no DA 12/05, dated 21 December 2007)** that, it is not acceptable for a party to simply relate conclusions of law in the founding papers for a review application. A party must set out the factual grounds on which it seeks to base a particular ground of review. It might be excusable to state limited grounds of review in less detail in a founding affidavit, but once an applicant has the record of proceedings it must then make up for any deficiencies in the founding affidavit and set out the factual basis for its grounds of review in full.

[9] In this instance, the applicant did not file any supplementary grounds of review, in order to elaborate on the bald statement in his affidavit that "(t)here was no rational connection between the evidence and the findings of the arbitrator which [was] unreasonable in the circumstances." He also did not lay a factual foundation for the grounds set out in the founding affidavit, despite having legal representation by that stage. On the approach of the LAC in the *Comtech* case, no factual basis was provided for the review application. It was only in his heads of argument that the applicant set out a basis for his claim for the first time.

[10] Strictly speaking therefore, the applicant's last ground of review had not been properly substantiated in his founding papers and did not have to be considered. Nevertheless, in the event I am wrong in dismissing the application for failing to set out the factual averments on which the third and only remaining ground of review was based, I will briefly consider the argument raised.

The merits of applicant's third ground of review

[11] In essence there is no real factual dispute, but the applicant contends that the arbitrator reached a conclusion no reasonable arbitrator could reach in finding that even though he refused to sign any fixed term contract, which meant that there was no consensus on the fixed term or indefinite (so-called 'permanent'

employment) nature of his employment, the arbitrator then simply decided that the employment relationship was of a fixed term nature as claimed by the employer. The applicant essentially argues that this conclusion was irrational because there was no consensus on the term of the employment contract.

[12] Instead, the arbitrator ought to have accepted, in the absence of such consensus, that it must have been indefinite employment relationship because that is the 'default' legal status of an employment relationship as determined by the provisions of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA'), in particular s 83A. This argument implicitly attributes deeming powers to the BCEA in such circumstances, because it expressly avoids relying on consensus as the basis for deciding the length of employment.

[13] The pertinent provisions of s83A state:

> "***83A presumption as to who is an employee***
>
> *(1) a person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of contract, if any one or more of the following factors is present:*
>
> *(a) the manner in which the person works is subject to the control direction of another person;*
>
> *(b) the person's hours of work are subject to the control or direction of another person;*
>
> *(c) in the case of a person who works for an organisation, the person is a part of that organisation;*
>
> *(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;*
>
> *(e) the person is economically dependent on the other person for whom the person works or render services;*
>
> *(f) the person is provided with tools of trade or work equipment by the other person; or*
>
> *(g) the person only works for or render services to one person...."*

[14] The effect of the provision is to create a rebuttable presumption that someone is an employee if one or more of the above conditions are met. It could not really be disputed that the applicant met one or more of the criteria mentioned. The respondent never denied employing the applicant but just disputed the tenure of his appointment. Assuming for the moment that the applicant was employed by virtue of the operation of section 83A of the BCEA, that still does not determine whether he was engaged for a fixed period or on an indefinite basis. Mr Kathemba, who represented the applicant, did not make any reference to any other specific provisions of the BCEA that might dictate the employment period of an employee by default.

[15] In terms of section 29 (1)(m) of the BCEA, an employer is obliged to provide employees with written particulars of employment when they commence working, which include amongst other details: "the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;..." emphasis added). This subsection implies no statutory preference for indefinite employment contracts over fixed term contracts, but is neutral on the question leaving it for the parties to determine.

[16] I am not satisfied that a case can be made out on the basis of the provisions of the BCEA that the Act deems indefinite employment to be the normal type of employment relationship in the absence of a written agreement stating otherwise. The third respondent's in-house counsel, Ms Van Der Walt, argued on the basis of the decision in ***MEC for the Department of Health, Eastern Cape v Odendaal & Others*** **(2009) 30 *ILJ* 2093 (LC)** that either it could be said that no contract of employment came into existence because the applicant did not sign the contract, or his employment terminated on 30 April 2012, by consent when the contract came to an end. The applicant argued that this case was distinguishable from his own. It is true that in *Odendaal's* case, the employee, a district surgeon, argued that his pre-existing conditions of employment continued to apply in the absence of him agreeing to the changes implemented by the employer, whereas the applicant in this matter contends that his employment always was permanent because he never agreed to it being fixed term. In *Odendaal's* case, the employer also refused to pay the

employee when he would not assent to the new terms of employment, whereas in this case both parties performed their reciprocal obligations.

[17] For the sake of contextualising that decision and because of the statement of relevant contractual principles contained in the judgment of Basson J, it is useful to set out the following passages from the judgment in full:

> *"[49] Historically at least it has been accepted that the contract of employment signalled the commencement of the employment relationship between the employer and the employee. Once the two contracting parties have agreed on the core elements of the employment contract which is an agreement that the employee will place his or her labour at the disposal and under the control of the employer in exchange for some form of remuneration, the employment relationship will be created. Influences such as globalization, the introduction of social legislation and collective bargaining which all have a profound impact on the employment relationship have, however, forced courts and academic writers to rethink the role of traditional contractual principles in the employment relationship and more in particular, the interaction between traditional contractual principles and applicable legislation. This debate has led some academic writers to opine that the employment relationship is a status relationship rather than a contractual relationship and that it is the employee's status that determines his obligations and his remuneration.[4] It has even been stated that since the advent of the LRA this new framework of c legislation signalled the demise of the contract of employment. Although it accepted that the contract of employment has taken on a more hybrid quality as a result of the fact that labour and social legislation as well as collective bargaining often supersede, expand and in many instances limit the rights and obligations of the respective contracting parties (particularly in order to protect the employee who is, in most instances, the vulnerable contracting party), the conclusion of the contract of employment nonetheless, in my view, signifies the commencement of the employment relationship. It would therefore follow that the termination of the contract of employment would also signify the end of the employment relationship.*
>
> *[50] The impact of the LRA on the common-law employment contract is particularly significant in circumstances where the employer wishes to terminate the employment contract through a dismissal. Although it is in terms of contractual principles lawful (and sufficient) to terminate a contract of*

employment by giving the other party the required contractual notice, it is, however, trite in the labour law context that the lawful termination of the contract of employment does not necessarily mean that the termination of the employment contract is also fair. Labour legislation has therefore supplemented the common-law principles regulating the termination of a contract of employment with the import of the requirement of fairness. The

requirement of a 'fair' termination does not, however, imply that employers need not adhere to the requirements in respect of the lawful termination of the contract of employment. From the aforegoing it therefore does not appear that the LRA has overtaken the common law in respect of the termination of the contract of employment although, as already indicated, it is accepted that the fairness principles embodied in the LRA have soften the harsh effects a mere lawful termination of the contract may have. It does seem that it may safely be stated that the fairness requirements embodied in the LRA operate - at least in respect of the termination of the employment contract - alongside the contractual principles regulating the termination of the contract of employment (see, in general, Amazulu Football Club and Hellenic Football Club).

[51] Having briefly set out the interaction between the statutory principles and the common-law principles when terminating the employment contract through a dismissal, it now needs to be assessed whether or not an employment relationship can come into being without the existence of a contract of employment. Put differently, can an employment relationship exist without the conclusion of a contract of service? Although a dismissed employee after the decision by the Constitutional Court in Chirwa v Transnet Ltd & others_no longer has the option of proceeding with a common-law remedy for contractual damages based on a breach of contract with the result that the dismissed employee is obliged to follow the dispute procedures as set out in the LRA for dismissal disputes, the Constitutional Court has nonetheless made an important statement regarding the importance of the contract of employment as the source of the power to terminate the contract of employment. The court held as follows:

> *'[The] source of the power is the employment contract between [the parties]. The nature of the power involved is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the [employee's] contract of employment, it was exercising a contractual power.'*

That the contract of employment is important also appears from the decision in Member of the Executive Council, Department of Roads &

Transport, Eastern Cape & another v Giyose where the court pointed out that the common-law contract of employment should be developed in such a way that it conforms with the constitutional right to fair labour practices. (See also Fedlife Assurance Ltd v Wolfaardt.)

[52] In conclusion: The contract of employment (although influenced by labour legislation, collective bargaining and the constitutional imperative of fair labour practices) remains the basis of the employment relationship. See also Grogan:

'In spite of legislative intervention in the employment relationship, the common law of employment remains relevant. Generally, labour legislation applies only to parties to contracts of employment. That relationship A remains regulated by the common law to the extent that legislation is inapplicable.'

Did an employment contract exist between the parties after June 2004?

[53] I have already referred to the fact that it was common cause that Odendaal had refused to sign the new contract . I have also referred to the fact that Odendaal was adamant that because he did not consent to the new contract , the old contract still applied to the employment relationship between him and the department. There are several difficulties with this contention. The new contracts envisaged by the change in operational requirements were implemented on 1 June 2004. Although it is not permitted in terms of the common law unilaterally to amend the terms and conditions of employment, it is accepted that an employer may after a proper consultation process implement changes to conditions of service in accordance with its operational needs. In the present case the implementation of the new contractual dispensation was accepted by all the district surgeons except for Odendaal and three others who had declined to accept the new contract which imposed new conditions of service. It is important to point out that there is nothing on the papers to suggest that a dispute about the unilateral amendment of conditions of service has been referred to the bargaining council in terms of the provisions of the LRA. It is also common cause that Odendaal has never registered any objection to the proposed changes nor has he ever suggested any alternatives in respect of the proposed amendments during the consultation process. In fact, there is no explanation before this court for Odendaal's refusal to sign the new contract . For purposes of this judgment it is accepted that the new contractual dispensation constituted a radical departure from the old dispensation although I must once again point out that the rationale or necessity for the new dispensation has never been placed in

dispute by Odendaal nor has a dispute been referred to the bargaining council. I am thus satisfied that the amended contract came into being on 1 June 2004 and was applicable on all district surgeons (including Odendaal). Under the common law an employer who unilaterally amends the terms of the contract of employment will be in breach of contract . This will in turn entitle the employee to cancel the contract or to seek damages or sue for specific performance. The provisions of the LRA, however, provide for the possibility of a unilateral variation of terms and conditions of employment in certain circumstances. In terms of s 64(4) of the LRA the issue of contractual variations is made the subject of collective bargaining. In terms of this section c employees or a trade union may refer a dispute over a unilateral amendment to a bargaining council or the CCMA in order to require the employer not to implement the unilateral variation for the duration of the consultation period. If the employer refuses to comply, or where the conciliation period lapses, the employer may implement. The employees may, however, resort to strike action to resist the unilateral change or to force the employer (through strike action) to restore the status quo. In the present case there is no suggestion on the papers that the s 64(4) process has been followed. In fact, as already pointed out, the contracts of all the district surgeons were substituted by the new contracts after the employer had consulted with all the district surgeons.

In summary:

(i) Firstly, it was not disputed that the department had a valid economic rationale for implementing radical changes to the health system in the province.

(ii) Secondly, it was not disputed that the process (of imposing new contracts) was preceded by a proper consultation process that involved Odendaal .

(iii) Thirdly, Odendaal gave no indication during the consultation process that he was unhappy with the process or the proposed changes. Odendaal also submitted no alternatives or suggestions to the department during the consultation process.

(iv) Fourthly, no dispute in respect of a unilateral change of conditions of service has been referred to the bargaining council nor did Odendaal institute proceedings to enforce his old contract.

[54] In the light of the aforegoing I am thus satisfied that a new contractual dispensation for district surgeons in the province replaced all previous contracts as from 1 June 2004. This conclusion is also supported by the documentation and correspondence which preceded the implementation of the new contract in terms of which it is made clear that the old dispensation (and the old contracts) would be replaced by the new contracts as from 1 June 2004. Odendaal's view that the old contract amounted to an unlawful and unilateral amendment of his conditions of service can therefore not stand in the light of the aforegoing. Secondly, his argument that the old contract continued to govern the employment relationship can equally not stand in the light of the aforegoing. Having accepted that a contractual relationship did exist between the parties, it will therefore be necessary to decide the second issue, namely whether or not Odendaal was constructively dismissed. I will return to this issue hereinbelow.

Odendaal's repudiation of the new contract of employment

[55] In the light of the fact that the new contract of employment amended or replaced the old contracts , Odendaal's conduct in refusing to sign the amended contract and tender his services in terms of the new contract , amounted to a repudiation of his (new) contract of employment.

[56] It is accepted that, once an employer and an employee conclude a contract of employment, the employer must accept the employee into employment and provide him or her with the contractually agreed work. An employer is therefore obliged to allow the employee to perform his or her service in accordance with the agreed contract of service (see Toerien v Stellenbosch University). Where an employee, however, refuses to tender his or her services in terms of the contract of employment, it follows that the employer will have no reciprocal duty to remunerate the employee. In the present case the department refused to pay Odendaal his remuneration because Odendaal refused to sign the new contract and refused to tender his services in terms of the new contractual dispensation. I will return to the legal principles in respect of and the legal consequences of a repudiation of a contract in more detail ... herein below. Suffice to point out the repudiation of a contract entitles the innocent party to either terminate the contract or to enforce the contract. An employer who implements changes in accordance with its operational needs may thus elect to terminate (by way of a dismissal) the contract of employment of an

employee who rejects the changed terms and replace him or her with another employee who is prepared to work in accordance with the needs of the business."[1]

(emphasis added)

[18] Was the arbitrator's conclusion irrational when he decided in the absence of the applicant signing the written contract, he was nonetheless employed on a fixed term basis? I do not think it was an arbitrary decision by the arbitrator for the following reasons:

18.1 Notwithstanding his failure to sign the contract, the applicant did engage in an employment relationship;

18.2 The BCEA did not create any presumption about the nature of that relationship;

18.3 The only offer of employment made by the employer was one of fixed term employment and there was no evidence of any oral agreement, express or tacit, to enter into an employment relationship on a different basis;

18.4 The applicant not only bore the onus of proving a dismissal, but as he was claiming the existence of an indefinite employment relationship, the onus lay on him to adduce evidence in support of that and all he could point to was his failure to sign the contract, in the face of the respondent's continued insistence whilst he was working that he was employed for a fixed term, even though he had not confirmed it in writing.

18.5 The employer confirmed its understanding of the fixed term nature of the employment contract with the applicant before it was due to expire and the applicant did not respond to that by treating the employer's action as repudiation of the indefinite contract which he claimed to be working under.

[19] In the circumstances, it seems reasonable to conclude that even if the contract was not signed, the only basis on which the applicant was employed was on the terms offered, which entailed a fixed term of employment. Even if another interpretation of the evidence is possible, it certainly cannot be said that the

[1] At 2007-2117 (footnotes omitted).

arbitrator's conclusion was one no reasonable arbitrator could have reached on the evidence before him.

Order

[20] The review application is dismissed.

[21] No order is made as to costs.

ROBERT LAGRANGE

Judge of the Labour Court

Appearances:

For the applicant: V B Kathemba of R K Reid Attorneys

For the third respondent: R L van der Walt.