REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D01/07

Reportable

In the matter between:

WISEMAN BHEKISISA MKHIZE **Applicant**

and

UMHLANGA SPAR **Respondent**

Heard: **16 September 2011**

Delivered: **16 April 2012.**

Summary: **Automatically unfair dismissal – s197 protected rights of employee – employer forcing employee to sign a new contract of employment.**

JUDGMENT

Cele J

Introduction

[1] This is a claim of an automatically unfair dismissal of the applicant by the respondent. The applicant contended that the respondent attempted to compel him to accept a demand in respect of a matter of mutual interest, thus contravening section 187 (1) (c) of the Labour Relations Act (LRA)[1]. The

[1]Act Number 66 of 1995.

applicant further contended that his terms of employment were protected from changing to the worse by section 197(4) of the Act when there was a transfer of the business as a going concern. The respondent disputed the alleged dismissal by saying that the applicant resigned from his employment. The respondent averred that the terms and conditions of employment, as set out in the contract of employment of the applicant, were not less favourable than those under which he was previouslyemployed by the respondent.The respondent conceded that the applicant's years of service at the respondent were transferred to its current owner.

Factual background.

[2] The applicant commenced his employment with the respondent sometime in 1983. In 2006 he held the position of Perishable Merchandiser in respondent's shop, reporting to a Mr Gansen, floor Manager. The ownership of the business changed at various intervals. When the previous owner of the respondent, Bamford Retail Stores CC was liquidated, Spar Head Office took over the shop and appointed Mr Mark Anderson to manage it for about 6 months. During that time voluntary retrenchment packages were offered and given to some staff. The applicant applied for a package but it was denied.

[3] On 21 June 2005 Mr Mark Anderson purchased the franchise through his close corporation, Andgov Trading Deals CC. On 20 September 2005 Mr Anderson required of his employees to sign a fixed term contract of employment with effect from 21 June 2005 to 20 September 2005. He said that he copied the practice from his previous employer Makro as he was not at that time aware of the provisions of the Act regarding the transfer of contracts of employment. All employees signed the new contract except the applicant. Two dissimilar documents were produced by the parties as being the contract which each said was given to the applicant to sign. The one produced by the respondent is a letter of one sentence and it then outlines the terms and conditions of employment which but for leave and sick leave are similar to those outlined in applicant's document. The one sentence on respondent's contract reads:

> 'I have pleasure in confirming your appointment in the abovementioned position with effect from 21 June 2005'

The first part of the document produced by the applicant, whichis also contained on page 3 of bundle 1 of documents produced by the respondent, is a letter, the main part of which reads:

> 'PERIOD: From 21 June 2005 to 20 September 2005
>
> We have pleasure in confirming the above contract position.
>
> We are delighted at the prospect of having you as part of the team at Umhlanga Spar and look forward to the positive contribution, which we are confident you will make.
>
> A total commitment to providing or contributing to customer satisfaction is of paramount importance to all members of the Umhlanga Spar team. At Umhlanga Spar we recognize that our primary purpose is to satisfy and keep our promises to our customers. Your membership of the team is, therefore, conditional upon your full participation in our drive towards excellence in customer satisfaction in the broadest sense.
>
> This letter constitutes an offer of Employment in the Umhlanga Spar store and the main terms and conditions of this offer are outlined in the Addendum attached hereto.
>
> Welcome to the Umhlanga Spar team. We trust that our relationship will be happy and mutually beneficial.'

[4] After the three-month period aforesaid, new permanent contracts of employment were prepared for all employees.In October 2005 those contracts were distributed to all employees, including the applicant.All employees, except the applicant and anemployee known as "Juluka", signed the contract. The first paragraph of the letter of appointment reads:

> 'I have the pleasure in confirming your appointment in the abovementioned position with effect from 21 June 2003.'

[5] A meeting was held in November 2005 with the applicant as to the reasons why he had not yet signed his contract. He indicated that it was with his lawyer. Subsequent to this, upon an audit by SARS, it was drawn to Mr Anderson's attention that two of the contracts had still not been signed. He was informed that, from the applicant's point of view, the contract of employment was still with his attorney.Julukasaid he did not understand the contract which was in English.

[6] On 9 January 2006, the applicant was issued with a notification of a disciplinary enquiry scheduled for 11 January 2006 in relation to certain insolence and insulting behaviour towards one of his supervisors.One of the issues was that the applicant had complained about his working conditions, in front of customers. He attended the hearing. He was reminded that his contract of employment contained a confidentiality clause, upon which the applicant stated that he had not signed his contract and that it was still with his lawyer.According to the respondent, it also emerged during this hearing that the applicant had invited the respondent to fire him and that he no longer wished to work for the respondent. He was given a final written warning.

[7] Following the hearing, on 11 January 2006, Mr Anderson phoned MsBev Chetty of the Department of Labour to enquire as to what he should do about the applicant not signing the contract. He was advised to give the applicant a letter to sign a contract within two days, failing which an enquiry would be held.Still on 11 January 2006, Anderson addressed a letter to the applicant instructing him to sign his contract of employment and to return it within 24 hours.The letter pointed out that he had been requested on three occasions to sign the contract.It informed him that if he did not sign the contract, an enquiry would be conducted against him and that he would no longer be in the respondent’s employment. The applicant still failed to sign the contract of employment.

[8] On 16 January 2006, the applicant was issued with a further notice to attend a disciplinary enquiry on 19 January 2006, regarding his failure to sign the contract of employment. The enquiry on 19 January 2006 was attended by

both Mr Anderson who chaired it and kept the minutesand Mr Briggswho was the complainant.

[9] The minutes of the meeting recorded that the applicant spoke to the Department of Labour.Theystated that it was decided that there was no need for the enquiry to continue and a discussion was held with him. Mr Anderson asked the applicant what parts of the contract he disputed. The applicant only mentioned sick leave. The applicant further mentioned that his floor manager was "different", but he could not elaborate. The applicant was then asked to sign the agreement but he still refused and he walked out of the office.

[10] On the following day the applicant arrived at the work place. He left work with a letter issued by Mr Anderson. There is a live dispute pertaining to the circumstances under which the applicant left his working place He never returned to work again, instead he referred an unfair dismissal dispute for conciliation and thereafter for trial. The letter issued to him reads:

> '20 January2006
>
> Re: Outcome of discussion – 19/01/2006
>
> This letter serves to confirm our discussion regarding you not wanting to sign your letter of appointment/contract.
>
> You were issued with your contract on the 4th July 2005. We continued to request that you sign and return your contract. You said you had given it to your lawyers. On the 21st September 2005 we again requested the contract. You said it was still with your lawyers. On the 11th January 2006 we again requested it, again told me it was with your lawyer. You then had a discussion with Brian and told him you will not sign it. We called you in and you still refused to sign. I then had a discussion with Department of Labour and they instructed me in accordance to my actions(sic).
>
> We issued you with a letter giving you appropriate time to sign and return contract. When this time had lapsed you were called in and asked why you have not signed. You informed us that you will still not sign it. We then issued you with a letter informing you attend an enquiry as to why you do not want to sign your contract. In the enquiry you were again asked if there was anything

wrong with the contract. You finally answered saying it was different to your previous contract. We explained that all business owners operate differently? You said that the sick leave, but you were not specific. (sic)

We explained our clause is in accordance to the Sectional Determination Act and calculated accordingly.

I asked if there was anything else you disagreed with. You went on about Gansen having changed. This had nothing to do with the matter at hand.

You were finally asked if you had any intensions to sign. You said you will not sign and walked out of the office.(sic)

Based on the outcome there is no longer an employment relationship between us with you opting not to sign. Unfortunately you are as from today no longer in our employ.

This is not a dismissal as you have chosen not to sign the contract and have terminated your employ on your behalf.'

The issue

[11] Court is called upon to determine whether the respondent dismissed the applicant and if so, the circumstances of such a dismissal. If court finds that the applicant walked out of his employment and that there was no dismissal that will be the end of the dispute premised on unfair dismissal. The applicant has raised the issue of an outstanding salary, a matter that was not pleaded. The issue of victimization was neither pleaded nor properly traversed during the trial and no reference will consequently be made to it.

Evidence on disputed issues.

Applicant's version

[12] In respect of thenew contract of employment, hesaid as they were busy doing their daily activities, a white lady came and handedto each employeea document and ask them to sign it when they found time such as during lunch break. He tookthat document away with him home seeing that he was not happy with the way it was handed to them because they were not called into a

meeting as it was the case with the previous contract. So he felt he had to peruse it thoroughly at home. He noticed that it was dissimilar to the one that they had signed before. For instance, in the first one, the boss had even mentioned to them that it was an ongoing contract as he had taken over a previous working relationship.However in thecontested terms, there was nothing which stipulated any permanent status of the employment relationship.

[13] He agreed that he had the same annual leave, the same working hours, same notice for termination of contract, same workplace and the same salary. He said he took the contract home on the day he received it. His neighbours advised him to have it looked at by the CCMA in town and they would confirm for him if it was necessary to sign such a contract. At the counter at CCMA, the officials clarified and explained everything in his particular language and then he came to notice things that put him in an awkward position. From all the deliberations that were carried out between himself and the CCMA, it became apparently clear that when he produced the two different contracts to them, the contract in question left much to be desired.He said that the CCMA people were the first ones to alert himagainst signing the contract as hestood to losehis service of 20 plus years.In all the hearings that he was summoned to by the respondent, his reluctance to sign the contract would be discussed and he would place the same reasonby maintaining that the contracts were dissimilar.He said that during lunch times when the workers would discuss the contracts, all of them would produce a uniformed contract that oppressed or forcedthem to a three months fixed contract as opposed to a permanent contract.Heinsisted that Mr Anderson was always reluctant to explain thecontractduringthe inquiries or hearings. Mr Anderson would say it was similar to the one that was issued by the previous employer and he wouldnot entertain the request to go through it and to clarify it in details.

[14] Upon looking on the second page of the document, he noticed that it was written to be a three months contract. Further, he was taken aback by the condition that they were not supposed to share their remuneration information with fellow employees. There was a specialised way of searching,that is

polygraph test, that was being introduced upon signing the contract, whereas he was aware that there were cameras or CCTV's all over which were sufficient with regards to searching.

[15] What also puzzled himwas that it was expected of the employees to work in excess of their normal working hours. He said that the normal procedure would be, if the boss requiredone to work overtime he would request one and indicate to him or her how much longer he or she would have to work and likewise promise to pay overtime in respect thereof. The new contract stated: 'When given daily tasks are not completed due to insufficiency from an employee, you will be required to complete that task and no overtime is due.' That too he said was dissatisfactory in the sense that there was no agreement reached between themselves as staff and management. It was just imposed upon them. As to why the employer would want to be discussing a contract in January 2006 that ended on 20 September 2005 the applicant said was because that contract became the basis of the misunderstanding between the manager and himself when the manager instructed him to do the work of an absent person whereupon he asked the manager how it came about that he was given an instruction to act in that person's stance. The manager said that he could instruct him as it was contained in his contract which he had signed.

[16] Page 5 of the proposed contract he said had the first sentence which read: 'I have read and fully understand and accept the terms and conditions of service contained in the above letter of appointment and addenda. I attach my signature to this document willingly and of my own accord.'For his part, he said that he did not sign it because there was no agreement reached nor any clarification of the contract that was entered in between the parties.

[17] As to what transpired on 19 January 2006, the evidence of the applicant was that, after the discussion on that day, he was instructed go back to his workstation so that the respondent could discuss the issue with his CCMA consultant or legal adviser. He duly complied and he worked a full day and then signed out as usual. He denied that a contract of employment was placed on the table for him to sign. He denied that Mr Briggs attended the hearing on that day.

[18] He said that he returned to work on the following day and continued with his routine duties.At about 12h30 he was called by Mr Anderson whothen simply handed the letter of 20 January 2006 to the effect that he was no longer in the employ of the company.The letter was enveloped.He simply took it and put it in his pocket. He took his price gun and went on to price the eggs and whilst doing that, Mr Briggs came, manhandled himand said:'You no longer have to be working and the employment relationship is finished.' The applicant tried to walk through the front door butMr Briggstold him that he was not entitled to use it and he pointed him to another door. He said there was nothing untoward about being handed the letter.If he were being dismissed, he would expect to see a package of his notes so that package should be thicker than just a letter.

[19] Upon the commencement of his action he went to the Department of Labour and told them that his company saidit was dismissing him but said he was not going to be given any UIF benefits. Hewas asked if he was paid at all and he reported that he had not been paidand was told to go and ask for his salary. As he went to his workplace for that salary, Mr Briggs took notes, put them together and he started filling in a payslip and asked him to sign on the dotted line.The applicantqueried his payslip being filled in by hand.He decidedto check the whole thing and then queried what had been done,sayinghe was not going to sign that document. Mr Briggstold him that he was not going to get his pay.His final pay was neverpaid to him by the company.

[20] He went back to the Department of Labour where he was given a set of UIF claim documents which hetook back to the company to fill in.When he was firedhe was told that he would not be entitled to any UIF benefits.Once the forms were completed and submitted he receivedUIF benefits. Heasked to have all the payments due paid over to himself, including the December overtime pay as well as the January salary which hesaid he did not get sincehe had been fired. His monthly salary as reflected in a pay slip was R2 460.00. Heasked to be compensated for the time lost and to be reinstated. He said that he had not been able to get alternative employment.There was never a stage whenhe wished to be dismissed from the company, taking into

account that Mr Anderson had himself indicated that he had faith in him, in the sense that they could proceed to build up the company together. The Indian manager who was trying to drive a wedge between him and Mr Anderson would say things about him which were not true.

Respondent's version

[21] Mr Anderson said that when the voluntary retrenchment were offered by the Spar Group to certain employees, the applicant unsuccessfully applied for it with the result that he thereafter frequently expressed anger at not being granted such voluntary retrenchment.

[22] Mr Anderson said that the contract of employment relied on by the respondent, with a one paragraph letter, appearing on pages 4 to 5b of bundle 1, was handed to every employee at Umhlanga Spar, around 21 September 2005. He said that all that the contract had was a probation period of three months which by the time the contract was handed to the employees, had already passed in any event.He said that he issued this document to his staff because he was also initially given three months period when he purchased the business.He together with a lady who worked at the shop explained the contents of the contract to each employee. In about November 2005, the Department of Labour came and did an audit at their premises.They discovered that there were two contracts of employment which had not been filed back from the employees. One was of the applicant. At that time Mr Anderson was under the impression that all employees had signed and returned their contracts. On or about 21 November 2005, Mr Anderson together with a manager had a meeting with the applicant to discuss why he had not signed his contract aspointed out by the Department. In those discussions that he had, it was the contract at page 4 to 5b of bundle 1 that was on the table in the meetings with the applicant.

[23] Mr Anderson saidthat he gave the applicant that contract but he gave him a new contract.At that meeting he made a note on the contract of employment that was there for discussion, that the applicant said thathe gave his contract to his lawyer andhe was waiting for thelawyer's input. The applicant said that

he noted something wrong regarding the sick leave provision.

[24] Mr Anderson also said that on about 21 December 2005, after they had been visited by the South African Revenue Services, SARS,it was discovered that the applicant had not submitted his contract. SARS officials gave him two weeks within which to sort out the problem and he was told that if the problem was not resolved, inspectors from the Department would be sent. They again approached the applicant and asked if he had signed the contract, to which he replied that it was still with his lawyers.The next probe on the issue arose in a disciplinary enquiry held against the applicant on 11 January 2006 pertaining to some insolent and insulting behaviour towards his supervisor.The applicant was on that day given 24 hours within which to return a signed contract.Still he did not comply.

Events of 19 January 2006

[25] A disciplinary enquiry was scheduled for 19 January 2006 to deal with the refusal of the applicant to return a signed contract of employment. Mr Briggs attended as the complainant and Mr Anderson captured notes of the hearing as the Chairperson. Only two issues were raised by the applicant as reasons for contending that the contract was different from the initial one signed by employees with the previous shop owners. Those were the sick leave and the floor manager, Mr Gansen's changed attitude. From the side of the respondent, there was no change on the sick leave as it was regulated by Government legislation. The applicant then walked out of the discussion which was in progress. It had lasted for about 5 to 10 minutes. Mr Anderson then told Mr Briggs that he had to go even though they had not completed what they set out to do. He had another meeting to attend.Before leaving the shop Mr Anderson went to do shopping for his wife. He met Mr Briggs who reported to him that the applicant had left his working place.

[26] Mr Hiruchand Bastew otherwise known as Baboo was the Assistant Manager perishable goods at the shop of the respondent. During the time of 14h00 to 15h00 he was working at the Receiving end of the shop, attending to deliveries. He saw the applicant, who had bought a newspaper,as he would

often do before going home. The applicant came to sign off and exited the shop through the receiving point. Mr Bastew assumed that the applicant was going home when he was supposed to be working with perishables.

[27] Mr Briggs confirmed the various times that the applicant was asked to return a signed contract and that he failed to do so. He confirmed having attended the disciplinary hearing of 19 January 2006 against the applicant and that it was decided to convert it to a discussion. The applicant said that the contract was different from the initial one on the sick leave provision. He was told that the provision was in terms of the government legislation. He also complained about a changed attitude of Mr Gansen but failed to substantiate his claim. The applicant then left the meeting which had lasted for about 15 minutes. He went to take his jersey and a newspaper and left the shop from the receiving end without completing his shift.

Events of 20 January 2006

[28] Messrs Briggs and Bastew reported for duty at 06h00 as usual and the rest of the staff came in at different times. The applicant was to report either at 07h00 till 16h00 or at 08h00 till 17h00. At about 08h00 the applicant was seen by Mr Briggs sitting on a bench next to the chemist close to the respondent's shop, without reporting for duty. According to Mr Bastew the applicant signed on for duty on 20 January 2006 and signed off. Upon re-examination however, he changed and said that he first saw the applicant sitting on the bench and did not see him sign on or off.

[29] On 20 January 2006 Mr Anderson first went to his shop in Pinetown and he proceeded to the Umhlanga branch at about 10h30 to 11h30. He found the applicant sitting on a bench opposite the chemist. He asked the applicant as to what was happening and the applicant said he came to collect his money. Mr Anderson went passed the applicant to the shop book- keeper known as Hubetjie. Both sat down and calculatedan amountof what was to be paid to the applicant.

[30] Mr Anderson then used the notes he compiled on the previous day todraft a letter which he thereafter asked Hubetjie to type (as per paragraph 10 hereof).

He thereafter signed it but had not carefully read it. He also explained to Mr Briggs what was going on and asked him to call the applicant in. The applicant came in and he never complained of having been manhandled by Mr Briggs, which allegation was also denied by Mr Briggs. The applicant showed no intention of wanting to work. He appeared frustrated and wanted his package. According to Mr Anderson the latter was given to the applicant, he opened it and dropped it's envelop on the floor. According to Mr Briggs Mr Anderson read the letter out for the applicant in English and handed it to him. The applicant made no request for an explanation on the letter.Instead he walked out of the office and never came back to tender his services.

[31] Mr Briggs took the manner of deserting his post as abscondingbut he did not consider it necessary to initiate disciplinary actions against him.After the dismissal dispute had been conciliated, the applicant came to the shop to ask for his pay. He was presented with a pay slip with an endorsement "full and final settlement", which was to be understood to refer to"full and final settlement of his salary for that particular month and his leave pay. The applicant refused to accept payment under those conditions and he left.

Analysis

[32] While it remained common cause between the parties that the employment of the applicant by the respondent came to an abrupt end on 20 January 2006, there is a live dispute about whether such termination was a dismissal. In terms of section 192 (1) of the Act the applicant had to prove the existence of the alleged dismissal. The versions of the parties on the events of, and those that followed the meeting of 19 January 2006 until the morning of 20 January 2006 are so materially contradictory that they cannot co-exist. Yet it is from these events that the probabilities of whether there was a dismissal largely depend.

[33] The single evidence of the applicant is simply that he left the meeting on 19 January 2006 and proceeded to his working station until the end of his shift. On the following day he reported for duty as usual until Mr Briggs called him to Mr Anderson's office where he was given a letter dated 20 January

2006.This version is sharply contradicted by that of the respondent's witnesses who said that the applicant left the meeting, went to his work station and was seen leaving his post early without permission, carrying a newspaper and his jersey. On the following day he did not report for duty. Instead he sat on a bench and when Mr Anderson arrived, the applicant demanded his package from him, making it abundantly clear that he no longer wanted to tender his services.

[34] The letter of 20 January 2006 issued by the respondent to the applicant becomes relevant as evidential material. Both parties relied on it in support of their cases. The first and the last three paragraphs read:

> 'Re: Outcome of discussion – 19/01/2006
>
> This letter serves to confirm our discussion regarding you no wanting to sign your letter of appointment/contract.
>
> …….
>
> …….
>
> You were finally asked if you had any intensions to sign. You said you will not sign and walked out of the office.(sic)
>
> Based on the outcome there is no longer an employment relationship between us with you opting not to sign. Unfortunately you are as from today no longer in our employ.
>
> This is not a dismissal as you have chosen not to sign the contract and have terminated your employ on your behalf.'

[35] There clearly is no doubt that when Mr Anderson handed the letter to the applicant he was communicating a decision which the respondent had taken against a person it regarded as its employee at that very moment. The decision taken was that: 'Based on the outcome there is no longer an employment relationship between us with you opting not to sign. Unfortunately you are as from today no longer in our employ...'

[36] If the intention of Mr Anderson was to communicate in writing that the employment relationship with the applicant terminated because the applicant resigned or absconded from his employment, he certainly would have said so in his letter. He deliberately chose not to. Resignation and abscondment are serious acts by an employee which once communicated to the employer it calls for a reaction from such an employer.

[37] When the letter is seen against what the applicant probably did between 19 and 20 January 2006, the letter is reconcilable with the version of the applicant, to the exclusion of that of the respondent. The probabilities of this matter do not favour the version that the letter was written to an employee who was found sitting on a bench and who thereafter demanded his salary package. If the applicant had behaved as described by the respondent, he would have made it very easy for the employer to facilitate the termination of employment. There would have been no need for Mr Anderson to revert to events of the previous day.

[38] There are further pointers that the version of the applicant is favoured by a balance of probabilities. Mr Bastew was a hopeless witness in an attempt to say that the applicant left his post early on 19 January 2006. He could not explain why he remembered the events of 19 January 2006 as opposed to events of other days he was challenged on. His initial evidence was that the applicant signed on and off as usual on 20 January 2006, a version presented by the applicant. During re-examination he contradicted his own version without explaining why.

[39] When the applicant returned to demand his outstanding salary pay, he was presented with a pay slip written: “Full and final settlement.”The explanation that the phrase was used in all pay slips is highly improbable in the circumstances. The applicant came to collect his pay. If the phrase was in common use he would have accepted its use as a common practice. In his evidence he denied the used of the phrase and he said there was a book where they signed for the receipt of their salaries. That evidence was never challenged and is accepted.

[40] I conclude therefore, that it is the respondent who terminated the employer/employee relationship which subsisted between the parties until 20 January 2006. The next probe turns on whether such termination was a dismissal. The applicant referred to the letter of 20 January 2006 as a dismissal letter. Section 186 (1) of the Act defines a dismissal to,*inter alia,* mean:

> a) 'An employer has terminated a contract of employment with or without notice.
> b) …..
> c) ….
> f) An employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.'

[41] It has always stood as common cause between the parties that even before the respondent was taken over by Mr Anderson, in terms of section 197 of the Act, there was a valid written contract of employment between the applicant, as one of the employees, and the respondent. A refusal by the applicant to sign a new contract of employment had the result that the parties were still bound by that old contract. What Mr Anderson did on 20 January 2006 was to terminate that contract of employment without notice, as it was effective immediately. It has therefore been shown that the respondent dismissed the applicant. The next probe turns on the fairness of such a dismissal. The onus here rests on the respondent, section192 (2) of the Act states as follows:

> '(2) if the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

[42] No effort was ever made by or on behalf of the respondent to lead evidence to prove the fairness of the dismissal. The last two paragraphs of the heads of argument submitted on behalf of the respondent put this issue beyond doubt as they read:

> ‘Bearing in mind that the onus is on the Applicant to prove that he was dismissed, it is submitted that the Applicant has fallen woefully short of proving dismissal. If he has not proven that he was dismissed, then there is no need for an enquiry as to whether such dismissal was automatically unfair. On this latter issue, given that the very contract on which Applicant seeks to rely is not in fact the contract which he was asked to sign, and which is not materially different to his existing contract of employment, there can be no basis for alleging an automatically unfair dismissal.’
>
> In such circumstances, the Applicant's claim falls to be dismissed with costs.’

[43] In his evidence the applicant identified the disparities in the new contract he was called upon to sign, see paragraphs 14 and 15 hereof. Page 1 of the contract he was asked to sign contains congratulatory words for his appointment with effect from 21 June 2003. In 2005 the applicant was speaking of having had experience in the region of 20 years with the respondent. That evidence was never challenged. The contract had a probation period of three months. It was never explained what this provision was doing in a contract of a person of about 20 years of experience.

[44] The consequence is that the applicant was able to show that the respondent attempted to compel him to accept a demand in respect of a matter of mutual interest, thus contravening section 187 (1) (c) of the Act when his terms of employment were protected from changing to the worse by section 197(4) of the Act.

[45] The applicant seeks to be accorded the primary relief of reinstatement permitted in terms of section 194 of the Act. Court has an obligation to also consider the delay there has been in this matter since the date of dismissal and therefore, the practicability of a reinstatement. It needs to be pointed out though, that the financial loss experienced by the applicant cannot be adequately compensated by the maximum prescribed compensation in terms of section 194 of the Act. This matter was initially set down for a default judgment on 16 March 2007 as it was then unopposed. On 3 June 2008 the respondent was granted condonation for the late filing of its statement of defense. Trial only started on 22 June 2009. Between 2009 and 2011 the

matter was delayed between the parties. At some stage a transcript had to be obtained. In my view reinstatement ought not to be declined on the basis of the trial related delay. The nature of the job done by the applicant is not of a technical nature as to make reinstatement impracticable. To mitigate the financial position of the respondent, interest payable will be limited to the salary which was due and payable as on 20 January 2006.

[46] The following order shall issue:

1. The respondent is ordered to reinstate the applicant from the date of dismissal, that is, 20 January 2006, with no loss of earnings and/or benefits which the applicant was entitled to. Such outstanding salary is to be paid to the applicant on 23 April 2012.
2. The applicant is to report for duty on 23 April 2012 at 08h00.
3. The respondent is to pay costs of this application.
4. The respondent is ordered to pay interest of any salary that was outstanding to the applicant as on 20 January 2006, to be calculated from 20 January 2006. Interest of any payment ordered in paragraph 1 of this order begins to run from 23 April 2012.

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Cele J.

Judge of the Labour Court.

APPEARANCES:

FOR THE APPLICANT: Mr Jafta of Jafta Incorporated.

FOR THE RESPONDENT: Mr Forster of Forster Attorneys.