IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

Reportable

CASE NUMBER: D358/12

In the matter between:

MWELASE FIKILE AND 46 OTHERS	**APPLICANT**
and	
ENFORCE SECURITY GROUP	**FIRST RESPONDENT**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)	**SECOND RESPONDENT**
COMMISSIONER G GERTENBACH	**THIRD RESPONDENT**

Heard: 26 February 2015

Delivered: 31 July 2015

Summary: Review application – terms of a contract of employment - whether it was permissible to contract out of the right not to be unfairly dismissed as provided by the LRA - test was whether the subject of the right was intended to

be its sole beneficiary - if others had an interest in the existence of the right, such right, could not be waived - so too if the interests of the public were served by the conferment of the right – award unreasonable.

JUDGMENT

Cele J

Introduction

[1] The Applicants seek an order to review and set aside the arbitration award dated 18 March 2012 issued by the Third Respondent in this matter as a commissioner of the Second Respondent. Accordingly it is an application in terms of section 145 (2) of the Labour Relations Act,[1] (the LRA). The First Respondent opposed the application and the relief sought by the Applicants.

The Factual Background

[2] The facts of this matter are by and large common cause. The First Respondent is a private security service provider and is registered as such in terms of the Private Security Industry Regulations Act.[2] It entered into contracts with its various clients and employed registered security officers for this purpose. The First Respondent managed all aspects of the services rendered by the security officers it employed through its management structures which included inspectors, site supervisors and managers.The First Respondent placed persons on a temporary basis at various sites of its clients.

[3] The applicants were all employed by the First Respondent on a written contract of employment and had been employed at Boardwalk Shopping Centre ("Boardwalk"). Clause 3.2 with clauses 3.2.1 and 3.2.2 of the contracts of

[1] Act Number 66 of 1995.
[2] 56 of 2001.

employment sought to regulate terms or conditions of employment by stipulating that:

> 3.2 The period of employment will endure until the termination of the contract which currently exists between BOARD WALK or its successors (hereafter referred to as the Client) and the COMPANY.
>
> 3.2.1 The Employee agrees that he/she fully understands that the Company's contract with the Client might be terminated by the Client at any cause or might terminate through effluxion of time and that in consequence hereof the nature of the Employee's employment with the Client/s and that the Employee's contract of employment shall terminate at any time as and when either of the events predicated occurs. In such event this contact shall automatically terminate. Such termination shall not be construed as a retrenchment but as a completion of contract.
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> 3.2.2 The Employee agrees that he/she fully understand that the Client has the right to demand the removal of the Employee for any reasons whatsoever. In these circumstances the employee expressly agrees that in the event of being assigned another posting which contractual obligations determine a different wage then he/she agrees to be deployed and compensated at that particular rate of pay".

[4] On or about 30 September 2011, Boardwalk cancelled their contract with the First Respondent and gave them notice that the contract would come to an end on 1 October 2011. Then on 4 October 2011 the First Respondent informed the Applicants in writing that Boardwalk had cancelled the contract with the First Respondent and that, in accordance with their contracts of employment, their contracts would terminate on 30 October 2011. The Applicants indeed stopped working for the First Respondent on 30 October 2011.

[5] The Applicants' trade union advised the First Respondent that, in terms of section 189 of the Act, it was under an obligation to retrench the Applicants and that the Applicants were therefore entitled to receive severance pay. The First Respondent refused to retrench the Applicants. The applicants referred an unfair dismissal dispute for conciliation. When the dispute could not be resolved, they referred it to arbitration. The Third Respondent was appointed to arbitrate the dispute and the chief findings he made are essentially that:

1. the Applicants were employed on indefinite contracts of employment;
2. such contracts could be cancelled by the employer giving the required or reasonable notice of termination when the employee's services were no longer required or on completion of a the project which the employee had been engaged or on fulfilment or coming into being of a condition of employment;
3. the cancellation of the contract by Boardwalk with the First Respondent led to the automatic termination of the employees' contracts of employment; and
4. The employees could not in fairness or law, claim entitlement to any form of compensation and the referral was subsequently dismissed.

Submissions

[6] The applicants' submission is that the Third respondent did not apply his mind to what the rights of the employees who were on indefinite contracts of employment. The question then is essentially whether the Third Respondent considered the principal issue before him, evaluated the facts presented at the hearing and came to a conclusion that is reasonable.[3] At the heart of the issue is the question whether the automatic termination clauses in the Applicants' contract of employment is not in conflict with the protection afforded by the

[3] *Goldfields Mining SA (Pty) LTD v CCMA* [2014] 1 BLLR 20 (LAC).

Constitution[4] and the LRA to any employee. In the present instance clause 3.2.1 of the Applicants' contracts of employment provides that the contracts shall terminate at any time and that such termination shall not be interpreted ***as a retrenchment*** (my emphasis) but as a completion of the contract. This clause certainly has the effect of denying the Applicants the right to challenge the fairness of the employer's conduct and to enforce any of their rights in terms of section 189 of the LRA. According to the applicants this amounts to a violation of the provisions of section 5 (2) (b) of the LRA. According to the First Respondent the automatic termination clause fell within the exception provided in section 5 (4) of the LRA.

[7] The Third Respondent did summarize his understanding of the applicants' case and he had the following to say:

> "The gist of the Applicant's case is that the contract entered into by its members should be regarded as *indefinite contracts of employment* which should have been terminated in terms of section 189 of the Labour Relations Act 66 of 1995 (as amended) (LRA) and that the dismissals were unfair because the Respondent had failed to consult in terms of the said section. Moreover, that the Employees were entitled to be paid notice pay and severance benefits.[5]

[8] It was submitted by the First Respondent that the Applicants' contracts of employment were fixed term eventuality contracts where the end of the fixed term was defined by the occurrence of a particular event, that is, the termination of the Boardwalk contract. To the extent that the Commissioner found otherwise, such finding was said to be at odds with the wording of the contract of employment. According to the First Respondent it is trite that in those circumstances, there is no dismissal when the agreed or anticipated event

[4] The Constitution of South Africa 1996.
[5] See paragraph 6 of the award.

materializes subject to an employee's rights in terms of Section 186(1) (b). The Applicants were said not to be seeking to rely on the provisions of Section 186(1) (b). I am indebted to both counsel in this matter for their submissions, but I have been persuaded by those made by counsel for the applicants for the approach in the resolution of issues in this application.

Evaluation

[9] In *Mahlamu v CCMA & Others*[6] the court had to decide whether it was permissible to contract out of the right not to be unfairly dismissed as provided by the LRA. The court held that the test was whether the subject of the right was intended to be its sole beneficiary. If others had an interest in the existence of the right, such right, it was held, could not be waived; so too if the interests of the public were served by the conferment of the right. The Applicants are individual employees, as security officers they are indeed lay persons and are unacquainted with the interpretation of legislation and therefore regarded as incapable of defending themselves without legal representation. The public has an interest in ensuring that such persons are not exploited and as such, their rights may not be waived.

[10] In *South African Post Office v Mampeule*[7] this court per Ngalwana AJ dealt with the validity of an automatic termination clause in a contract of employment. The court held that automatic termination provisions 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. The court further held that these provisions are contrary to public policy as statutory rights conferred on employees for benefit of all employees and are incapable of consensual validation. On appeal the court *a quo*'s decision was upheld and the Labour Appeal court went further to state that:

[6] (2011) 4 BLLR 381 (LC)
[7] [2009] 8 BLLR 792 (LC); (2009) 30 ILJ 664 at paragraph 46

> "The onus rests on South African Post Office to establish that the 'automatic termination' clause prevails over the relevant provisions in the Act (referring to section 5 of the LRA) and the clause the of the contract that established employment for a fixed term of five years subject to the employer's right to terminate the contract with due regard to fair labour practices. A heavier onus rests on a party which contends that it is permissible to contract out of the right not to be unfairly dismissed in terms of the Act. I am in agreement with the submission made by Mampuele's counsel, supported by authorities, that parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of 'automatic termination' provisions or otherwise because the Act had been promulgated not only to cater for an individual's interest but the public's interest."[8]

[11] Therefore, it follows from the authority in *South African Post Office v Mampeule* that any contractual provision that infringes on the rights conferred by the LRA or Constitution is not valid, and even though the employee might be deemed to have waived his or her rights, such waiver is not valid or enforceable. In this matter, it follows that by finding that the cancellation of the contract between Boardwalk and the First Respondent led to the automatic termination of the employees' contracts of employment, the third respondent committed a material error of law by failing to apply his mind to the relevant provisions of the LRA, namely, sections 5(2) (b), 5(4) and 185. The Third Respondent found that the Applicants were employed on indefinite contracts of employment. This finding is not assailed in this review application. He then came to the conclusions that the employees' contracts were automatically terminated and that the employees were not entitled to compensation. In the premises, the award of the Third Respondent stands to be reviewed and set aside as a decision which a reasonable decision maker could not have reached.

[12] In their founding affidavit[9] the applicants said that their trade union advised the first respondent to retrench the applicants and to give them the severance pay

[8] *SA Post Office Ltd v Mampeule* [2010] 10 BLLR 1052 (LAC) at paragraph 23
[9] See paragraph 9.

when the contract between the first respondent and its client ended. The need for retrenchment appears to be beyond dispute. Whether some of the applicants' employment could have been saved by sacrificing employees with shorter service working for other clients remains a mystery. The first respondent was said to have refused to embark on retrenchment proceedings. Also, the first respondent said that it offered employment to the applicants in Durban and they declined the offer. Richards Bay, where the applicants were employed and Durban are two places far apart to commute daily. A period of more than three and a half years since their dismissal, calculated from 30 October 2011, has elapsed. There are 47 applicants involved in this matter. Taking these and other considerations into account, it is not reasonably practicable for the first respondent to reinstate or re-employ the applicants. Compensation is appropriate. In addition each applicant is entitled to so much severance pay as is to be calculated on the basis of his or her years of experience with the first respondent and in terms of the contract of employment. No such evidence is before me. This can be resolved by further evidence at arbitration.

Order:

1. The arbitration award of the third respondent in this matter is reviewed and set aside. The termination of the Applicants' employment constituted a dismissal for the purposes of the LRA.
2. The dismissal of each applicant by the first respondent was substantively and procedurally unfair.
3. The first respondent is ordered to compensate each applicant in an amount of money equivalent to six months' remuneration, calculated at the applicant's rate of remuneration on the date of dismissal.
4. Further, the first respondent is ordered to pay so much of severance pay as each applicant is entitled to in terms of the contract of employment or in terms of the law.

5. The payment of compensation and severance pay is to be made within 21 days from the date of this order, but not later than 24 August 2015.
6. In the event that parties are in dispute about any payment to be made under 1 and 2 hereinabove, that dispute is to be referred to the second respondent which is to appoint a commissioner, other than the third respondent, to hear such evidence and to issue an award in relation thereto.
7. No costs order is made.

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Cele J

Judge of the Labour Court of South Africa.

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APPEARANCES:

1. For the Applicants: Ms Q.Majam

   Instructed by Tomlinson Mnguni James Attorneys.

2. For the First Respondent: Ms L Naidoo.

   Instructed by Millar and Reardon Attorneys.