IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

D41/18

Not Reportable

In the matter between:

ZIKHULISE CLEANING, MAINTENANCE AND TRANSPORT CLOSE CORPORATION (CC)	**APPLICANT**
and	
THABO J. SITHOLE & 166 OTHERS	**FIRST RESPONDENTS**
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**SECOND RESPONDENT**
HUMPHREY NDABA N.O.	**THIRD RESPONDENT**

HEARD: 09 JUNE 2022

DELIVERED: 22 June 2022

JUDGMENT

B. Purdon AJ

Introduction:

[1] The Applicant brings this application in terms of Section 145 of the Labour Relations Act seeking to review an arbitration award dated the 10th of December 2017 made by the Third Respondent under the auspices of the Second Respondent.

Background:

[2] The dispute referred to the Second Respondent was in terms of Section 41 of the Basic Conditions of Employment Act, in which the First Respondents (167 erstwhile employees of the Applicant) claimed statutory severance pay which they allege to be due to them. The Third Respondent proceeded to award them severance pay.

[3] It is common cause that the Applicant is in the business of *inter* alia, constructing low-cost housing, in terms of agreements concluded from time to time with the Ethekweni Municipality and/or the Department of Human Settlements.

[4] The agreements were concluded subsequent to the successful award of tenders issued by Ethekweni Municipality and/or the Department of Human Settlements. The tenders are awarded in respect of a "phase", that is, a specific project within a specific locality within a "township".

[5] This particular case occurs in the context of the building of low-cost houses in various sections of Umlazi Township.

[6] The Applicant has during the period 2012 to 2014 been awarded various housing tenders, the last of which was awarded in June 2014. Certain of the contractual periods are overlapping.

[7] Documentary evidence was put before the Second Respondent which evidence the nature of the agreements between the Applicant and the Municipality.

[8] It was a term of the agreements between the Applicant and the Municipality that for specific phases of the projects, the Applicant was required to employ local residents.

[9] It was the evidence of the Applicant's witness Derrick Sibongiseni Ntombela (**"Ntombela"**) that these employees were employed on fixed-term or limited duration contracts to carry out or assist in carrying out certain functions relevant to the building of the houses in that particular section or ward.

[10] Of importance to this matter, the evidence is that once the housing projects in that specific phase was completed, the employment of those persons being local residents was terminated. The employment contracts only endured for the period of each phase.

[11] Examples of such contracts of employment were put up, including *in casu* an agreement between the Applicant and one of the individual Respondents, one Lethiwe Nonhlanhla Ngidi.

[12] That contract provides in the preamble clause:

> *"The parties hereby enter into an employment contract in terms of which the Employer will employ the Employee as a labourer (capacity) at Umlazi (site address) with effect from 25-10-2012 (commencement date) until termination in accordance with clause 7 or due to operational requirements such as end of project phase (termination date)".* (Court's emphasis).

[13] The last of a series of contracts between the Applicant and the Municipality was completed on the 12th of December 2014, albeit that following a subsequent award of tender, the Applicant resumed construction in Umlazi Township in respect of another project phase during 2016.

[14] It was accordingly the Applicant's contention at the arbitration that the employees were employed on fixed-term contracts and were therefore not due severance pay.

[15] Four witnesses testified on behalf of the individual Applicants who conceded that that they had not been dismissed nor retrenched.

[16] That much is recorded by the Second Respondent at paragraph 62 of his award where he states:

> *"The four witnesses chosen by Applicants testified that no one had told them that they were dismissed or retrenched. Only Fisiwe* (one of the individual Applicants) *told the arbitration that they were given letters showing that they were temporarily retrenched".* (sic)

[17] The Second Respondent in his analysis of the evidence states at paragraph 73 of the award:

> *"In my view the 2002 amendments to the BCEA were brought to assist employees who were encountering a situation of financial distress of their companies which is beyond their control to go to sunset with a similar relief applicable to those who were retrenched. Applicants, although not subjected to sequestration found themselves in exactly the same predicament as those subject to the effects of sequestration. Their employer had real tender problems which were only sorted out in June 2016. This problems had nothing to do with any fault on the part of the employer because she ultimately got the tender. She asked for time to sort her problems out. The employees obliged and waited until June 2015 although as well this problems were not due to any fault on their part. In my view waiting for 11 to 13 months without an income is a long period. In the circumstances a literal interpretation of section 41(2) will be inappropriate and will defeat the objectives of the 2002 amendments. I am therefore inclined to interpret Section 41(2) purposively to embrace all the 237 employees who are similarly circumstanced as those under sequestration to be covered. I therefore conclude that 167 employees referred to in annexure A of this award are entitled to severance pay. The remaining 69 employees are not entitled to severance pay because they had not completed a full year's service".*

[18] This "view" of the Third Respondent is manifestly incorrect in law. It constitutes a reviewable defect in the award.

[19] Of further significance to these proceedings is the evidence of the Applicant's witness Ntombela who testified in chief as follows:

> *"They were all employed under EPW projects, which is in full Extended Public Works project, whereby on a monthly basis we will submit the data to Human Settlement to show how many residents are in that area will be employed on a month how many (inaudible)".* (My emphasis).

[20] This evidence was not challenged in cross examination, and accordingly stood uncontested.

[21] Further evidence led by the Applicant during the arbitration proceedings was that the UI19 unemployment forms that were issued to some, if not all of the individual Respondents, recorded the termination of their employment as being due to the expiry of fixed-term contracts.

[22] A number of the individual Respondents accordingly claimed unemployment benefits on this basis.

[23] Despite this evidence, the Third Respondent found the employment contracts did not terminate.

[24] In so doing, the Third Respondent committed a gross irregularity, by making a finding that is not supported by the evidence properly before him and failing to consider the material evidence that was also properly before him.

[25] Further, the Third Respondent's perhaps well meaning, but impermissible reading in Section 41(1) the provisions of Section 41(2) of the Labour Relations Act, by asserting that the situation *in casu* was analogous to sequestration, is, as observed, a gross irregularity constituting a serious error of law. Section 41(2) has no application to the instant set of facts.

[26] The facts of the matter, and indeed the relevant provisions of the Basic Conditions of Employment Act do not justify such "purposive interpretation".

[27] As the unchallenged evidence of Ntombela was that the individual Respondents were employed on the extended Public Works programme, the employment therefore of the individual Respondents is in terms of the Ministerial Determination 4 on Extended Public Work Programmes as published in Government Gazette No. 35310 of the 4th of May 2012.

[28] That determination provides at Section 3.5. and 17.2. that severance pay is not payable to employees so employed.

[29] Given the egregious misinterpretations of the law, the award falls to be reviewed and set aside.

[See inter alia:

- ***NUMSA v Assign Services (Casual Workers Advice Office) (CWAO) & Another as [2017] 10 BLLR 1008 (LAC)***
- ***Head of Department of Education v Mofokeng & Others [2015] 36 ILJ 2802 (LAC)]***

Order:

Accordingly the Court makes the following order:

[1] The arbitration award rendered by the Third Respondent under the auspices of the Second Respondent and dated the 10th of December 2017 is reviewed and set aside.

[2] The award is substituted with the following award:

"The Applicant's claim is dismissed".

[3] There is no order as to costs.

B. Purdon AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Bongani Mgaga, Garlicke & Bousfield Inc.

For the First Respondent: Advocate RM Luthuli instructed by Hellen Ililo Attorneys