THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 668/2013
Not Reportable

In the matter between:

AIR TRAFFIC AND NAVIGATION SERVICES COMPANY **APPELLANT**

and

CHRISTIAAN DAVID ESTERHUIZEN **RESPONDENT**

Neutral citation: *Air Traffic and Navigation Services v Esterhuizen* (668/2013) [2014] ZASCA 138 (25 September 2014)

Coram: Lewis, Tshiqi, Theron and Wallis JJA and Fourie AJA

Heard: 5 September 2014

Delivered 25 September 2014

Summary: Contract – Interpretation – Contract must be interpreted by determining the parties' intention having regard to its context and purpose – sensible meaning to be attributed.
Contract of employment – Fixed term contract – Termination by resignation before the expiry of the fixed term constitutes a breach.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Tuchten J sitting as court of first instance):

1 The appeal is upheld with costs, including those of two counsel.
2 The order of the high court is set aside and replaced with the following:
'The defendant is ordered to pay to the plaintiff:
(a) the sum of R427 843;
(b) interest on this amount at a rate of 15.5 per cent per annum, calculated from the date of summons to the date of payment.
(c) costs of suit.'

JUDGMENT

Theron JA (Lewis, Tshiqi and Wallis JJA and Fourie AJA **concurring):**

[1] At issue in this appeal is the liability of the respondent, Mr Christiaan David Esterhuizen, to the appellant, Air Traffic and Navigation Services Company, for breach of contract, following upon the premature termination of his employment with the latter.

[2] The appellant is the sole provider of air traffic, navigation and associated services within South Africa. The company's operations include the training of licenced air traffic controllers and technical staff. The company has, over a number of years, experienced a significant outflow of air traffic controllers to other air traffic navigation service providers (especially in the Gulf region), which do not train specialist technical staff, but instead attract trained staff from companies such as the appellant, by paying extremely competitive rates. The

appellant introduced a scheme, called the retention scheme, to retain key and critical skills. The evidence was that the appellant had spent vast sums of money training its staff, and suffered significantly when staff, once trained, leave the company. It suffered, both in terms of its capital investment in training staff and in the smooth operation of the company.

[3] The retention scheme functioned by way of offering a substantial financial reward to eligible employees, for as long as they remained in the appellant's employ for the agreed period, whilst at the same time acting as a deterrent to premature resignations. The total benefit payable in terms of the scheme to each employee was calculated in advance, based on projected increases and paid to employees monthly. Employees had a choice of whether or not to participate in the scheme.

[4] The respondent had initially been employed by the appellant from 1994 until 1999. In 2006 the respondent (once again) became employed by the appellant as a Principal Air Traffic Controller. The employment contract concluded between the parties stipulated that after the expiry of the three months' probationary period, either party could terminate the agreement on one month's notice.

[5] The respondent elected to participate in the retention scheme and to this end, on 10 April 2007, the parties entered into a written agreement recording the terms of the respondent's participation in the scheme. The material terms of the agreement were that: (a) the respondent would receive monthly retention payments in addition to his normal remuneration as an incentive to remain in the employ of the appellant; (b) the respondent agreed to remain in the appellant's employ for a fixed term of four years from 1 April 2007 to 31 March 2011; and (c) the respondent's employment contract would be amended to reflect the terms

of the agreement: more particularly, the notice period would be substituted with a clause preventing the termination of employment by either party during the fixed term. The agreement also provided for the consequences that would follow upon a breach of its terms.

[6] On 30 May 2008, the respondent tendered his resignation, effective from the end of June 2008. By letter dated 30 May 2008, the appellant asserted that such resignation constituted a breach of the retention agreement and called upon the respondent to remedy the breach within seven days, failing which it might cancel the agreement and claim payment of all amounts already paid under the agreement, alternatively, the outstanding balance 'in terms of the remainder of the agreement'. The respondent did not withdraw his resignation and the appellant cancelled the agreement. The benefit the respondent would have derived under the scheme over the four year period amounted to R584 162. As at the date of his resignation, he had been paid R156 319.

[7] The appellant caused summons to be issued out of the North Gauteng High Court. Its main claim was based on a breach of the agreement. It claimed payment of the sum of R427 843, being the monthly incentive amounts it would have paid to the respondent for the period July 2008 until 31 March 2011, but for the latter's resignation. Although the appellant, in its amended particulars of claim and in the alternative, claimed repayment of the retention amounts it had already paid to the respondent, it did not pursue this claim at the trial. It similarly did not pursue its alternative damages claim.

[8] The respondent raised a number of defences in his plea. Relying on clause 6.1 of the agreement, he alleged that if he resigned prematurely, he would be indebted to the appellant only for the retention payments already paid to him. He also alleged, inter alia, that clauses 6 and 10 of the agreement were mutually

destructive, alternatively, void for vagueness, further alternatively, that clause 10 constituted a penalty provision which was subject to the Conventional Penalties Act 15 of 1965. This last mentioned defence was not pursued. The high court (Tuchten J) dismissed the appellant's claim with costs and the appellant now appeals, with the leave of the high court.

[9] The question is essentially whether the respondent, in consequence of his resignation, is liable to repay the incentive amounts the appellant would have paid to him had he not resigned. That in turn is dependent on the interpretation of the retention agreement. The intention of the parties, as it emerges from the language they have used, is the determining factor in problems of contractual interpretation. In *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*, Lewis JA stated that a court must 'examine what the parties intended by having regard to the purpose of their contract'.[1] To determine the intention of the parties, the nature, character and purpose of the contract must be established. This is ascertained from the language used, read in its contextual setting and in the light of any admissible evidence.[2]

[10] The purpose of the agreement is to be gleaned from the following clauses:

'2.3. The Company is also committed to the growth of its capacity in order to ensure that it will be able to handle the expected increase in aircraft movements and provide a seamless world class service.

2.4. In order to ensure that the Company is able to grow its capacity to achieve its objectives in clause 2.3 above, it is necessary to retain employees in certain job categories.

[1] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) para 25.

[2] *Swart en 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* 2008 (6) SA 654 (SCA) para 23; *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *Ekurhuleni Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 13; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

2.5. The Company has therefore designed the Scheme, which is applicable only to certain employees in the Company, in terms of which the Employee will receive a Retention Payment in addition to the Employee's remuneration.
2.6. The Company and the Employee have therefore agreed to enter into this Agreement in terms of which the Employee hereby freely and voluntarily agrees to remain in the employment of the Company for the Fixed Term and to continue indefinitely thereafter.
2.7. In exchange for this undertaking, the Company will provide the Employee with a Retention Payment which will result in the Employee enjoying additional financial compensation.'

It was common cause between the parties that the purpose of the retention agreement was to retain employees in certain job categories for fixed periods.

[11] The appellant's main argument was that the premature unilateral termination of the retention agreement by the respondent, by way of his resignation, amounted to a breach. The breach accordingly triggered the provisions of clause 10.2, in terms of which the respondent became liable to the appellant, at the election of the latter, for repayment of what he had actually received under the scheme or what he would have received had he continued in the appellant's employ for the fixed term. Clause 10, which deals with a breach of the agreement and its consequences, provides:

'10.1. If the Employee breaches any provision of this Agreement, the Company shall be entitled, but not obliged, to give written notice to the Employee requiring the breach to be remedied within 7 (seven) days of the date on which the notice was given to the Employee.
10.2. If the Employee fails to remedy the breach within 7 (seven) days of receipt of written notice from the Company calling upon the Employee to do so, then without further notice, the Company may:
10.2.1. Cancel the agreement and claim payment of all the amounts paid thus far in terms of this agreement; alternatively claim the full balance then outstanding in terms of the remainder of the terms of this agreement which will immediately become due and payable forthwith and without demand to the Company.
10.2.2. … at its election proceed on the basis of this Agreement or on the basis of any other cause of action.'

[12] It was contended by the appellant that, in order to achieve the purpose of the scheme (that the employee remain in its employ for the agreed period) that in the event of a premature resignation, an employee could end up owing the appellant an amount in excess of what he had actually received under the scheme. According to the appellant, this was exactly what the parties sought to achieve by clause 10.2.1 of the agreement. The election afforded to the appellant by the clause achieves this. If the employee had served for more than half the four year period the appellant could reclaim what had been paid up to the date of the breach. If the employee had served less than half the four year period the appellant could elect to claim the balance for the period outstanding.

[13] The respondent, on the other hand, contended that in terms of clauses 6 and 8 of the retention agreement, should he resign prematurely, he would be indebted to the appellant only for the retention moneys already paid to him. Clause 6, to the extent here relevant, provides:

'Recovery of Retention Payments

6.1. It is hereby agreed that if the Employee's services are terminated due to:

6.1.1. resignation;

6.1.2. misconduct;

6.1.3. poor work performance; or

6.1.4. failure to meet and retain the necessary professional accreditation and licensing (Rating and Validation) to perform his/her own functions;

then the Employee shall … truly and lawfully be indebted to the Company for all the Retention Payments already paid in terms of the Agreement . . . .'.

[14] Clause 8 sets out a framework for the repayment of the retention moneys. Clause 6 is on the face of it inconsistent with clause 10. It appears to provide that, should the respondent's services be terminated due to resignation, he would be obliged to repay only the retention moneys he had already received as at the date of his resignation. The difficulty lies in understanding what is meant by the

respondent's services being terminated due to resignation. The respondent contended that resignation meant a unilateral act on his part and that the provisions of clauses 6 and 10 were ambiguous and mutually destructive. He argued that termination (by resignation), as provided for in clause 6, was not intended to constitute a breach.

[15] The word 'terminated' in clause 6.1 is ambiguous: it may refer to termination by virtue of a right to give notice under the agreement or a deliberate breach by one party amounting to a repudiation of the agreement. In this respect the agreement is incoherent and confusing, but clarity emerges when one reads all four sub-clauses, from which it is apparent that the termination of the employee's services to which it refers is a termination at the instance of the employer, ie, the appellant. If the word 'resignation' in clause 6.1.1 is taken to encompass the situation where an employee has a bona fide reason to resign, and such resignation is accepted by the employer, then clauses 6 and 10 can be read together without any conflict. Where the resignation of the employee is accepted by the employer, the repayment procedure set out in clause 8 would be triggered. This is the only interpretation which makes the agreement coherent, particularly having regard to the primary purpose of the agreement, namely, to retain the service of specialist employees such as the respondent.

[16] An interpretation to the effect that the word 'resignation' in clause 6.1.1 refers to a unilateral act by an employee and not a breach of the contract, would lead to the absurdity that clause 10 of the agreement, which deals with any breach of the contract, would be superfluous and in fact have no practical meaning at all. This could never have been the intention of the parties. In the exercise of interpreting documents, courts are slow to impute superfluity to a document and an interpretation which has this effect should not readily be

accepted.[3] The preferred approach is to give some effect rather than no effect to the words.[4] Wallis JA in *Bothma-Batho* pointed out that '[a] sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'.[5] Having regard to the purpose of the agreement, it is clear that it must be the appellant's prerogative whether or not to accept a resignation as termination as contemplated in clause 6.1 or consider it a breach under clause 10. It is evident from the letter dated 30 May 2008 that the appellant regarded the respondent's resignation as a breach of the retention agreement.

[17] A contract of employment is generally entered into for a fixed period or for an indefinite period. Where no date has been fixed upon which the contract will terminate, it will continue indefinitely until terminated or will be terminable by either party on the giving of notice.[6] In such a contract, resignation is a unilateral act permitted by the specific terms of the contract for bringing the contract to an end.[7] When the contract is for a fixed period, none of the parties has the right to terminate the contract prior to the expiry of the fixed period.[8] Cheadle AJ in *Lottering v Stellenbosch Municipality*[9] endorsed this principle in the following terms:

'If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation.'[10]

And later,

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[3] *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery* (*Pty*) *Ltd & others*1984 (1) SA 61(A) at 70B-71A.
[4] R H Christie and G B Bradfield *The Law of Contract in South Africa* 6 ed (2011) at 229.
[5] Paragraph 10. *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 26.
[6] See generally M J D Wallis *Labour and Employment Law* para 33 at 5-10; *Tiopaizi v Bulawayo Municipality* 1923 AD 317; *Lawsa* 2 ed Vol 13 Part 1 para 94.
[7] *Lottering & others v Stellenbosch Municipality* (2010) 19 LC and 12 BLLR 1306 (LC); 2923 (LC) (7 May 2010) para 20; *Rustenburg Town Council v Minister of Labour & others* 1942 TPD 220; *Potgietersrust Hospital Board v Simons* 1943 TPD 269 at 274; *Rosebank Television & Appliances Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T) at 302.
[8] *Lawsa* para 94.
[9] *Supra*.
[10] Paragraph 14.

'In a fixed term contract, a notice to bring the contract to an early end is a repudiation because it does not in itself constitute a contractually permissible act of termination. Being a repudiation, the employer has an election to hold the employee to the contract or to accept the repudiation and cancel the contract.'[11]

This court has held that a premature termination of a fixed term contract of employment gives rise to a claim for damages for breach of contract.[12]

[18] Clause 5 of the agreement is of particular relevance. In terms of this clause the parties agreed to delete the clause dealing with the notice period in the employment contract and replace it with a clause that the employment contract 'is not terminable by either party prior to the expiry of the Fixed-Term Period'. The effect of this was that the respondent waived his common law right to terminate the contract on notice and was precluded from resigning prior to the expiry of the fixed term. In exchange for so waiving his right, he received retention payments from the appellant.

[19] The respondent's primary obligation was to remain in the employ of the appellant for the fixed term. Clauses 2.6, referred to in paragraph 10 above, and 3.2.4, which provides that continued participation in the scheme is dependent on the employee 'remaining exclusively in the employ of the Company until the expiry of the Fixed-Term' support this conclusion. The premature termination of employment was contractually impermissible and amounted to a breach of the respondent's obligations under the retention agreement.

[20] The agreement was poorly drafted and contained conflicting provisions. The high court pointed out that there were gaps in it. However, an examination of the entire contract, having regard to its purpose, yields a clear meaning.[13]

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[11] Paragraph 20.
[12] *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) para 18.
[13] *Swart en 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C; *Akasia Road Surfacing (Pty) Ltd en 'n ander v Shoredits Holdings Ltd en andere* [2002] 3 All SA 117 (A) para 7; *Masstores Pty) Ltd v Murray*

Bearing the purpose of the contract in mind, the words 'remainder of the terms of this agreement' should be interpreted to refer to the remaining period of the agreement and not the contractual provisions of the agreement, as found by the high court. The interpretation by the high court rendered clause 10.2 meaningless, a consequence which should, if at all possible, be avoided.[14] The high court's finding in this regard cannot be sustained.

[21] Finally, it was contended by the respondent that, at all material times during the negotiation and conclusion of the retention agreement, it was agreed between the parties that should the respondent resign before the expiry of the fixed term, he would only be liable for repayment of the retention payments he had actually received. In support of this contention he relied on a document prepared by the appellant, titled 'ATNS Retention Frequently Asked Questions', dated 16 March 2007. The evidence was to the effect that prior to the introduction of the retention scheme, employees, including the respondent, had certain concerns regarding the operation of the scheme. The appellant subsequently prepared the 'Frequently Asked Questions' document. One of the questions recorded in the document was, 'What happens if I breach the retention agreement?' The recorded answer was: 'If you [breach] the retention agreement you will be required to pay back all monies earned as a result of your participation in the retention scheme'.

[22] Mr Pieter Marais, called as a witness by the appellant, testified that the question and answer document had been distributed prior to finalisation of the contract and a consultative process was followed whereby the proposed standard agreement underwent several changes, based on input received from employees and the trade union. The respondent signed the retention agreement on 10 April

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Roberts Construction (Pty) Ltd & another 2008 (6) SA 654 (SCA) para 23; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 13.

[14] See para 16 above.

2007 and that was the only contract that came into existence between the parties. It is trite that when a person signs an agreement, he or she is taken to be bound by the ordinary meaning and effect of the words which appear above his or her signature (*caveat subscriptor*).[15] The 'Frequently Asked Questions' document was misleading and may have constituted a misrepresentation. However, the respondent did not plead misrepresentation and neither did he seek rectification of the agreement.

[23] Order:

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the high court is set aside and replaced with the following:

'The defendant is ordered to pay to the plaintiff:

(a) the sum of R427 843;

(b) interest on this amount at a rate of 15.5 per cent per annum, calculated from the date of summons to the date of payment.

(c) costs of suit.'

[15] *Burger v Central South African Railways* 1903 TS 571 at 578; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A; *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 1.

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L V THERON

JUDGE OF APPEAL

APPEARANCES

For Appellant:	H Woudstra SC with P Le Roux Theron Instructed by: Hlatshwayo Du Plessis Van der Merwe Nkaiseng, Pretoria Symington & De Kok, Bloemfontein
For Respondent:	W F Wannenburg Instructed by: C R Bothma & Jooste, Pretoria Peyper Sesele Attorneys, Bloemfontein