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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JR 1702/ 09

In the matter between:

CK MAHLAMU	**APPLICANT**
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**1ST RESPONDENT**
A KRIEL N.O	**2ND RESPONDENT**
GUBEVU SECURITY GROUP (PTY) LTD	**3RD RESPONDENT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside a ruling made by the second respondent, to whom I shall refer as 'the commissioner'. In his ruling, the commissioner held that the applicant had not established the existence of a dismissal as required by s 192 of the Labour Relations Act (LRA), and that his claim of unfair dismissal should therefore fail.

The facts

[2] On 27 June 2008, the third respondent employed the applicant as a security officer. Clause 2.1 of the contract reads:

2. Employment period

This employment contract will commence on 2008/10/23, and will automatically terminate on:

A) expiry of the contract between the Employer and the Client alternatively

B) In the event where the Client does not require the services of the Employee for whatsoever reason.

[3] The 'client' is not defined in the agreement but it is common cause that the third respondent was contracted to provide armed escort services to the Bombela Joint Venture at various sites related to the Gautrain project, and that the applicant was engaged on these sites.

[4] During January and February 2009, Bombela advised the third respondent that the armed escort services at the Park, Marlboro Portal and Benrose sites would end, with immediate effect. On 6 March 2009, the third respondent wrote the applicant a letter stating that the Bombela contract had been cancelled and that in the absence of alternative positions, the applicant's services were no longer required. The letter refers specifically to clause 2.1 (B) of the contract, intimating that the contract had terminated automatically on account of the fact that Bombela no longer required the applicant's services.

[5] At the arbitration hearing, the applicant gave evidence as did a Mr. Smith, the third respondent's operations director. Smith confirmed the third respondent's view that the applicant's contract had terminated automatically when Bombela advised the third respondent that it no longer required armed escorts on the sites

concerned. Smith stated further that he had alternative positions available, but that the applicant had refused to accept the lower position that was offered to him. The arbitrator held that the applicant's employment contract specified that the applicant's employment would terminate automatically if for any reason the client no longer required the services of the employee. Since the client had stated that the applicant's services were no longer required, the applicant's employment had terminated automatically and there was therefore no 'dismissal' for the purposes of s 192 of the LRA. On that basis, the arbitrator dismissed the applicant's claim.

The ground for review

[6] The applicant contends *inter alia* that by finding that the applicant had failed to establish the existence of a dismissal, the commissioner committed a reviewable irregularity in the form of a material error of law. The third respondent defends the commissioner's ruling on the basis that the applicant's contract was valid, and that the reason for his termination of employment was the happening of a specified event in the form of a statement by the client that security services were no longer required at the affected sites.

The applicable law

[7] The labour courts have recently had occasion to consider the application of the definition of dismissal to similar contractual provisions. In *Sindane v Prestige Cleaning Services* [2009] 12 BLLR 1249 (LC), this court (per Basson J) held that there was no 'dismissal' when an employee was engaged in terms of a contract that provided for its termination on the happening of a future specified event - the court refers to these as 'fixed term' contracts - i.e. contracts that terminate on the completion, for example, of a project, in circumstances where at the commencement of the employment contract, it is not certain precisely when the project will be completed. In that case, a cleaner had been employed to work

in a shopping mall in terms of a contract the duration of which was dependent on the continued existence of a contract between the employer and its client. When the court held that in circumstances where the client had 'scaled down' the contract by cancelling a contract in terms of which an extra cleaner had been provided, that there was no act by the employer that was the proximate cause of the termination of employment, the situation being no different to that where a person is employed, for example, for the duration of a building project. In other words, to the extent that s 186 defines a dismissal to include *'the termination of a contract of employment by an employer…*", there is no dismissal if the contract terminated by reason of a specified event rather than any overt act by the employer that was the proximate cause of the termination. In coming to that conclusion, the court distinguished the judgment by this court in *South African Post Office v Mampuele* (2009) 30 *ILJ* 664 (LC). In that case, Mampuele, the chief executive officer and a director of the company, was employed in terms of a contract that provided that his employment would terminate 'automatically and simultaneously' if he ceased for any reason to hold the office of director. When the shareholder removed Mampuele as a director, his employer claimed that his employment contract had terminated automatically the moment he ceased to be a director and that there was no 'dismissal' for the purposes of the Act. Ngalwana AJ held that the termination of Mampuele's employment constituted a dismissal, on the basis that his contract could not be construed in isolation from the act of removing him from the board, but also on the basis that the contractual term in issue constituted an impermissible 'contracting out' of the protections against the unfair deprivation of work security established by chapter VIII of the LRA. In this respect, the court relied on the judgment by the UK Court of Appeal in *Igbo v Johnson Matthey Chemicals Ltd* [1986] IRLR 215 (CA).

[8] In the judgment of the Labour Appeal Court in the same matter, reported as SA *Post Office Ltd v Mampuele* (2010) 31 *ILJ* 2051 (LAC), the court upheld this court's ruling that Mampuele had been dismissed. The court distinguished the *Igbo* judgment, but appears to have taken the same view of contractual

terms that amount to a 'contracting out' of the statutory protection against unfair dismissal. In this regard, the Labour Appeal Court made specific reference to s 5 of the LRA (a provision not specifically relied on by Ngalwana AJ in coming to the conclusion that he reached) and regarded a proper interpretation of s 5 as definitive. Patel JA, writing for the court, said the following about clause 8.3 of the contract, which provided for an automatic termination of the contract if Mampuele ceased to hold the office of director:

> *The onus rests on SAPO to establish that the 'automatic termination' clause prevails over the relevant provisions in the Act* [referring to s 5] *and clause 9.1 of the contract* [a clause 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* (at paragraph 23).

On the facts, the court found that SAPO had failed to offer a clear explanation as to why the 'automatic termination' clause had been triggered. In these circumstances, the court held, the overwhelming inference was that SAPO's conduct was designed to avoid its obligations under the LRA. Section 5 of the LRA therefore trumped the 'automatic termination' provision of the contract.

[9] In the present matter, the third respondent relies on the cancellation of the service agreement by Bombela as the specified event giving rise to the automatic termination of the applicant's contract. That being so, it seems to me that the

facts of this case are not materially dissimilar to those in *Mampuele* - in both instances, the 'automatic termination' provisions were triggered by a third party - in Mampuele's case, the shareholder, in the present case, the client.

[10] In the present instance, the upshot of the commissioner's award is that the applicant's security of employment was entirely dependent on the will (and the whim) of the client. The client could at any time, for any reason, simply state that the applicant's services were no longer required and having done so, that resulted in a termination of the contract, automatically and by the operation of law, leaving the applicant with no right of recourse. For the reasons that follow, and to the extent that the commissioner regarded this proposition to be the applicable law, he committed a material error of law that must necessarily have the result that his ruling is reviewed and set aside.

[11] The starting point is s 185 of the LRA - every employee has the right not to be unfairly dismissed. The LRA was, of course, enacted to give effect to the right to fair labour practices guaranteed in section 23(1) of the Constitution (section 1(a) of the LRA). The right not to be unfairly dismissed (section 185) is essential to this constitutional right (*NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) at para 42); indeed, it is one of its most important manifestations (*Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (A) at para 32). The right not to be unfairly dismissed serves to protect the vulnerable by infusing fairness into the contractual relationship and in doing so, is consistent with the main purpose of labour law (*Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at paras 72, 74).

[12] It is trite that the LRA must be purposively construed in order to give effect to the Constitution (see section 3(b) of the LRA). Accordingly, section 5 (and the other sections of the LRA mentioned below) must be interpreted in favour of protecting employees against unfair dismissal, as this is one of the objects of the Constitution.

[13] Section 5 of the LRA deals with the 'protection of employees and persons seeking employment'. Section 5(2) (b) provides:

> *'… no person may do, or threaten to do, any of the following ... prevent an employee … from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act'* (own emphasis).

Section 5(4) provides in turn:

> *'A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of … this section is invalid, unless the contractual provision is permitted by this Act'* (own emphasis).

[14] Following the Labour Appeal Court's decision in *Mampuele*, the question that arises in this matter is whether the 'automatic termination' provisions in the contract fall foul of section 5(2)(b) and whether, in terms of section 5(4), they are invalid. The issue raised in this case enjoys a significance beyond the direct interests of the parties. Contracts between temporary employment services (TESs or labour brokers) and their employees often incorporate 'automatic termination' clauses, typically providing that the contract between the TES and its employee terminates automatically if and when the TES's client no longer requires the services of the employee, for whatever reason. (See the discussion by Craig Bosch '*Contract as a barrier to "dismissal": the plight of the labour broker's employee*' (2008) 29 *ILJ* 813)).

[15] Whether or not contractual terms such as that under consideration in the present instance undermine the legislative purpose of recognising and protecting the right to security of employment, and the extent of the protection granted by provisions such as s 5 of the LRA, arose in *Igbo v Johnson Matthey Chemicals Ltd*

(*supra)*. Although *Igbo* was distinguished by the Labour Appeal Court in *Mampuele* because the former dealt with an employee's rights before and after a contractual amendment, *Igbo* establishes a principle that is particularly relevant to the present case, given the similarities in the wording of the respective legislative provisions. The facts were as follows. In response to Igbo's request for extended holiday leave, the parties entered into a holiday agreement, which provided that if Igbo failed to return to work on the appointed day, 'your contract of employment will automatically terminate on that date'. In the event, Igbo did not return to work on the appointed day, and the company took the view that her employment was terminated in accordance with the provisions of the holiday agreement. In the ensuing unfair dismissal claim, the Industrial Tribunal, applying the judgment of the EAT in *British Leyland (UK) Ltd v Ashraf* [1978] IRLR 930 (EAT), held that there was a consensual agreement which operated to terminate Igbo's employment and that there had been no dismissal in law. The EAT dismissed Igbo's appeal. On appeal to the Court of Appeal, the court held that both the lower courts had erred, overruled *Ashraf* and concluded that Igbo had been dismissed.

[16] The court referred to section 140 of the Employment Protection (Consolidation) Act, 1978, which provides:

> (*1) Except as provided by the following provisions of this section, any provision in an agreement (whether a contract of employment or not) shall be void in so far as it purports –*
>
> *(a) to exclude or limit the operation of any provision of this Act; or*
>
> *(b) to preclude any person from presenting a complaint to, or bringing any proceedings under this Act before, an industrial tribunal.*

The court summarised Igbo's case as being that '*the provision for automatic*

termination of the contract on failure to return to work has the effect of excluding or limiting the operation of ss 54 and 55 of the [EPA]'. As the court noted, section 54(1) provides that '*every employee shall have the right not to be unfairly dismissed by his employer*', and section 55(2) (a) that an employee will be treated as dismissed if his contract is '*terminated by notice or without notice*'.

[17] In response to the company's contention that the termination of employment had been consensual, the court held:

> *If the [company's] contention is correct, it must follow that the whole object of the [EPA] can be easily defeated by the inclusion of a term in a contract of employment that if the employee is late for work on the first Monday in any month, or indeed on any day, no matter for what reason, the contract shall automatically terminate. Could it be said that such a provision does not limit the operation of ss 54 and 55? In our judgment it could not. Such a provision would vitally limit the operation of s 54(1), for the right not to be unfairly dismissed would become subject to the condition that the employee was on time for work on the first Monday in each month, or every day, as the case might be'* (at paragraph 17).

The court went on to hold:

> *… it is impossible to avoid the conclusion that the provision for automatic termination had the effect, if valid, of limiting the operation of the sections. It was therefore void by virtue of s 140. In our judgment Ashraf's case was wrongly decided and must now be overruled. We add that, in substance, the effect of the automatic termination provision is the same as if it had said in terms "in the event of failure to return to work on 28 September, termination of the employee's employment on that ground shall not constitute dismissal under s 55", or "shall not give rise to any claim for unfair dismissal". Any such provision would without doubt have been void as limiting the operation of the sections. We can see no ground for saying that a provision which has the like effect does not limit such operation'* (at paragraph 19).

In conclusion, the Court of Appeal held:

> *In the final analysis the question to be determined is whether a provision for automatic termination upon failure to report for work on one specified future date, introduced by way of variation of a subsisting contract of employment, has the effect of limiting the operation of ss 54 and 55. To hold that it does not is not in our judgment possible when the effect is to convert a right not to be unfairly dismissed into a conditional right not to be unfairly dismissed'* (at paragraph 21).

[18] There are obvious and close parallels between the applicable English legislation and the LRA, and given the injunction to interpret the LRA to give effect to its primary objects and in compliance with the Constitution, the reasoning that underpins the *Igbo* judgment is all the more compelling.

[19] As the 'automatic termination' provisions in the contract fall within the section 5(2)(b) injunction, the remaining question is whether they can be saved from invalidity on account of the exception contained in section 5(4), which provides that limiting contractual provisions are 'invalid, unless the contractual provision is permitted by [the LRA]'. Accordingly, in order to bring itself within the exception, the employer must prove that the automatic termination provisions are permitted by the LRA. What this boils down to is whether it is permissible to contract out of the right not to be unfairly dismissed in the LRA. In his commentary on section 5, Brassey (*Commentary on the Labour Relations Act.)* states as follows:

> *A distinction has to be made between the statutory rights that can and cannot be waived. So much is to be inferred from … sub-s (4), which is prompted by a recognition that the waiver of some rights is competent and seeks to put the rights in ss 4 and 5 beyond renunciation. … Deciding which rights can be waived is ultimately a matter of statutory interpretation: the test, unsurprisingly, is whether*

> *the subject of the right is intended to be its sole beneficiary. If others have an interest in the existence of the right, it cannot be waived; so too if the interests of the public are served by the conferment of the right'* (at A2-11 (RS 2, 2006)).

[20] Along similar lines, in his commentary on section 199 of the LRA, which provides that contracts of employment may not disregard or waive collective agreements or arbitration awards, Brassey (*supra)* states:

> *The constant and abiding principle is that statutes take precedence over contracts where they conflict. The problem is to decide whether a conflict exists, for a statutory provision can, without relinquishing its dominant status, countenance its own variation or waiver by agreement. ... Whether it does is always a matter to be determined upon a construction of the specific provision, but the general rule is that a provision can be waived or abandoned unless it is also designed to serve the public interest. Since the public has an interest in ensuring that the weak are not exploited, provisions cannot be waived if they are intended for the special protection of those who cannot effectively protect themselves.*
>
> *Employers are generally regarded as strong enough to fend for themselves, but not employees – at least, not when they act merely as individuals – and, as a result, they seldom have the power to waive or abandon rights that have been given to them by the legislature. The present section, by giving collective agreements and awards precedence over the employee's contractual undertakings, illustrates the principle. Its application is evident in a line of cases that make it clear that an employee cannot contract out of his protection against unfair dismissal or renounce his right to bring such a claim. ... Each case, it must be stressed, must be individually considered, but as a rule of thumb we can say that employers can make an agreement varying or waiving their rights under the Act but employees cannot do so by means of individual consent'* (at A9-6 to A9-7 (RS 6, 2006)).

[21] These passages are clear authority for the fact that the parties to an employment contract cannot contract out of the protection against unfair

dismissal afforded to the employee whether through the device of 'automatic termination' provisions or otherwise.

[22] In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is precisely the mischief that section 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in section 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.

[23] This is not to say that there is a 'dismissal' for the purposes of s 186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. This is what I understand the ratio of *Sindelane* (*supra*) to be - that ordinarily, there is no dismissal when the agreed and anticipated event materialises (to use the example in *Sindelane*, the completion of a project or building project), subject to the employee's right in terms of s186 (1) (b) to contend that a dismissal has occurred where the employer fails or refuses to renew a fixed term contract and an employee reasonably expected the employer to renew the contract. In other words, if parties to an employment contract agree that the employee will be engaged for a fixed term, the end of the term being defined by the happening of a specified event, there is no conversion of a right not to be unfairly dismissed into a conditional right. Without wishing to identify all of the events the occurrence of which might have the effect of unacceptably converting a substantive right into a conditional one, it seems to me that these might include, for example, a defined act of misconduct or incapacity, or, as in the present instance, a decision by a third party that has the consequence of a termination of employment.

[24] Although neither party referred to the decision, Boda AJ recently held that any clause in a contract of employment that allows a labour broker's client to

undermine the right not to be unfairly dismissed is against public policy. The facts of that case are distinguishable, since it did not concern a situation where the respondent's client no longer required the employee's services for economic reasons. However, the principle that was recognised and applied by Boda AJ is consistent with the principle applied in the present instance, and I associate myself with his reasoning.

[25] It follows that by finding that the applicant's contract had terminated automatically when Bombela advised the third respondent that the applicant's services were no longer required, the commissioner committed a material error of law. His award therefore stands to be reviewed and set aside (see *Stocks Civil Engineering (Pty) Ltd v Rip NO & another* [2002] 3 BLLR 189 (LAC)), and substituted by a ruling to the effect that the termination of the applicant's employment constituted a dismissal for the purposes of the LRA. To the extent that the reason for the applicant's dismissal is one related to the third respondent's operational requirements (a matter over which this court has jurisdiction), I intend to make an order to the effect that the applicant has 30 days from the date of the order to refer a dispute to this court. Alternatively, if the provisions of 191 (12) apply, the applicant is may refer any dispute about the fairness of his dismissal to arbitration under the auspices of the CCMA. Finally, there is no reason why costs should not follow the result.

I accordingly make the following order:

1. The ruling made by the second respondent on 29 May 2009 is reviewed and set aside, and substituted by the following:

   "The applicant was dismissed by the respondent."
2. The applicant is granted leave to refer any dispute concerning the fairness of his dismissal for reasons related to the third respondent's operational requirements to this court within 30 days of the date of this order; alternatively, to refer the dispute to arbitration under the

auspices of the first respondent should the provisions of s 191 (12) apply.

3. The third respondent is to pay the costs of these proceedings.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application 12 November 2010
Date of judgment 30 November 2010

For the applicant: Mr Mphepya Legal Aid South Africa
For the third respondent: Adv F Venter instructed by J de Beer Inc.