



ARBITRATION AWARD

Panellist: SB Balkaran

Case No.: GPBC1120/2019

In the ARBITRATION between:

PSA obo SS Myeza

(Union / Applicant)

And

Department of Justice & Constitutional Development (Mtunzini)

(Respondent)

Union/Applicant's Representative:

Union/Applicant's address:

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Respondent's Representative:

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DATE AND VENUE

1. The Arbitration was held on 21 February 2020 at the Department of Justice & Constitutional Development (DoJCD), Mtunzini Magistrate's Court in Kwazulu-Natal. Mr D Govender of the PSA represented the Applicant (Mr SS Myeza). Mr S Masuku, Senior Legal Officer (Pretoria) and Mr TJ Nkambule, Labour Relations Officer (Durban) of the Department of Justice & Constitutional Development, represented the Respondent.

ISSUE IN DISPUTE

2. This matter deals with unfair dismissal in terms of section 191(1), (191)(5)(a) of the Labour Relations Act (66 of 1995).
3. The issue in dispute is whether the Appeal outcome handed down on 10 April 2018 (some 273 days later) constituted a fair dismissal of the Applicant from his permanent position of Administration Clerk at Mtunzini Magistrate Court for a misconduct committed at Pongola Magistrate Court while the Applicant was on a fixed term contract which terminated/expired and ceased to exist on 30 September 2017.
4. In the event the Commissioner finds that the dismissal is applicable to the Applicant's permanent employment, the matter will be set down for the Respondent to prove the fairness of the dismissal.

BACKGROUND TO THE DISPUTE

5. In 2018, Mr SS Myeza ("Myeza"), the Applicant was an Administration Clerk at Mtunzini Magistrate Court. On 10 April 2018, he was dismissed for misconduct, which arose at Pongola Magistrate Court. He appealed the verdict and sanction. The DoJCD implemented the outcome of Myeza's failed Appeal. When the Appeal had been lodged in 2017, Myeza was a Maintenance Investigator on a fixed term contract from 1 September 2014 to 30 September 2017. The contract was renewed on a month-to-month basis. Myeza's last fixed term contract renewal was from 1 September 2017 to 30 September 2017. On 6 September 2017, Myeza attended an official DoJCD interview for a permanent position of Administration Clerk at Mtunzini Magistrate Court. Myeza was successful and commenced duty on 1 November 2017 at Mtunzini Magistrate Court until his dismissal on 10 April 2018.

SURVEY OF SUBMISSIONS

6. The background (supra) details the matter concisely. Myeza had been charged with misconduct for acts of gross dishonesty and transgressing the Code of Conduct. He was found guilty and dismissed on 10 July 2017. He appealed the verdict and sanction. At the interview on 6 September 2017, Myeza declared he had appealed the misconduct verdict and sanction and that the Appeal was pending. The Appeal outcome was eventually pronounced on 10 April 2018 and Myeza was dismissed.
7. The Respondent argued that the Applicant had been appointed in terms of the Public Service Act (1994) and was therefore employed by the state. It is therefore common cause that the court held in **MEC Department of Education Kwazulu Natal v Khumalo and Another**, that in Government, the State is the employer¹, notwithstanding the Applicant's argument in differentiating who the employer was – Pongola Magistrate Court or Mtunzini Magistrate Court. The disciplinary proceedings which commenced in Pongola Magistrate Court followed its natural conclusion at Mtunzini Magistrate Court as the employer was one and the same, the DoJCD. Hence, the

¹ MEC Department of Education Kwazulu Natal v Khumalo and Another 2010 11 BLLR 1174 (LC)

Respondent's view was that Myeza had disclosed the pending Appeal details to the Interviewing Panel **[Annexure 1]**, as he knew it would influence his permanent position with the same employer, if appointed.

8. The Respondent argued although the Applicant's contract expired on 30 September 2017, he had attended the interview on 6-9 September 2017 as a state employee and was deemed to be a permanent employee from the date that the Panel had recommended his permanent appointment "sometimes in September 2017", before his fixed term contract expired. The Respondent argues that ***Wyeth SA (Pty) Ltd v Manqele and Others (JA50/03) [2005] ZALAC 1 (23 March 2005)*** encapsulates the definition of employee in Section 213 (a) and (b) of the LRA and therefore Myeza's fixed term contract seamlessly continued into permanent appointment; hence the employment contract was continuous and the dismissal was fair.

ANALYSIS OF SUBMISSIONS AND ARGUMENTS

9. The Labour Appeal Court in ***County Fair Foods (Pty) Ltd v CCMA & others (1999) 20 ILJ 1701 (LAC) at 1707 (paragraph 11) [also reported at [1999] JOL 5274 (LAC)]***, stated it was "*not for the arbitrator to determine de novo what would be a fair sanction in the circumstances, but rather to determine whether the sanction imposed by the appellant (employer) was fair*".
10. Even if there are valid substantive reasons for a dismissal, an employer must follow a fair procedure before dismissing the employee. Procedural fairness is a "right" of the employee in respect of the actual procedure to be followed during the process of discipline or dismissal. This does not mean that a dismissal effected for misconduct, will be considered automatically fair should the fairness of the dismissal be disputed.
11. The law on fixed term contracts are definitive, foundational and set a precedent. Subsequent to the dismissal on 10 July 2017, the Respondent renewed the Applicant's **Fixed Term Contract [Annexure 2]**, the last of which was from 1 September 2017 to 30 September 2017 as presented as evidence in the parties bundle.
12. This in effect terminated the contractual relationship on termination of the contract, as the Respondent did not renew the contract thereafter.
13. There was a clear termination of the fixed term contract on 30 September 2017.
14. I now deal with the Appeal lodged by the Applicant pursuant to his dismissal on 10 July 2017. It is common cause that the Applicant appealed his dismissal. The Respondent failed to present any contract that confirmed any offer was made in September 2017 to the Applicant.
 - a. An employee found guilty of misconduct may appeal the finding or the sanction or both. Employees must appeal within five working days of receiving notice of the outcome of the hearing from the chairperson. The employer should inform of the appeal outcome as soon as possible in writing. This appeal procedure states that the dismissal only becomes effective on the date that the employee is advised of the outcome of the appeal hearing.
 - b. Departments must finalise the appeal **within 30 days** at paragraph 8.8 of the Disciplinary Code and Procedures for the Public Service (PSCBC Resolution 1 of 2003 with amendments to Resolution 1 of 1999) [my emphasis]
 - c. It is clear and by the Respondent's own affirmation that the Respondent failed to comply with its own rules and only chose to provide the outcome of the **Appeal [Annexure 3]** on 10 April 2018, some 243 days later, instead of the legal imperative, "**must finalise the appeal within 30 days**" which would have fallen within the fixed term contract and well before 30 September 2017.

15. The Respondent was capricious in using the same nomenclature “*in respect of Government, the State is the employer*²” and was aware of Myeza’s appointment as his letter of **Extension of Contract** and his subsequent letter of **Permanent Appointment [Annexure 4]** emanated from the same office – Regional Head (Kwazulu Natal).
 - a. If the State as employer had conducted “due diligence”, firstly it would have noted that an employee who had been dismissed and had appealed the outcome and sanction had applied for a permanent advertised position even indicating his present employer in his **Application for Employment (Z83) [Annexure 5]** dated 1 August 2017.
 - b. Myeza’s disclosure on his DoJCD **Form R4 (HR Recruitment Declaration) [Annexure 1]** on 6 September 2017, should have prompted the Executing Authority to forthwith conclude the Appeal prior to 30 September 2017, which it did not do.
16. Myeza’s application for employment was successful at Mtunzini Magistrate Court and a **Permanent Appointment** letter (Ref: S/A 27852661) dated 9 November 2017 was issued and that the “*appointment was conditional, pending positive verification of your qualifications with South African Qualifications Authority (SAQA) and that your vetting results by the State Security are also positive*”. As per **Employment Contract - Annexure A [Annexure 6]** referred to in the aforementioned letter of **Permanent Appointment**, paragraph 3 deals with the **Termination of Appointment** (reaching prescribed retirement age; premature retirement; discharge in terms of Section 17; voluntary resignation; death).
17. Since the Permanent Appointment was with effect from 1 November 2017, section 17 of the PS Act would be prospective and not retrospective.
18. In this matter (GPBC1120/2019), the Respondent argues that there is no difference between the two contracts of employment and the only difference is the terms and conditions of employment; but the State remains the employer. The Respondent has attempted to proffer a dialetheist or a veridical paradoxical³ view that the statements are both true and false and self-contradictory. The law of non-contradiction is a rule of logic. It states that if something is true, then the opposite of it is false. Either there is a difference between the two contracts of employment or there is no difference between the two contracts of employment. Any other difference will automatically invoke a differentiation.
19. However, the Respondent offers a controversial legal precedent in **Wyeth SA (Pty) Ltd v Manqele and Others (JA50/03) [2005] ZALAC 1 (23 March 2005)** which Nkabinde AJA unequivocally states at [2] that, “*The facts of this case... give rise to interesting and controversial points of law.*” Notwithstanding the controversy, Nkabinde AJA adds:

[43] “In my view the words in the definition of ‘employee’ in s 213 of the LRA, when given their ordinary and grammatical meaning, become ambiguous and inevitably result in manifest hardship and absurdity when read in conjunction with other provisions.....

[44] Section 186 does not provide that the other party must already be or have been an employee when dismissal takes place.....

[44] I have alluded to and the remarks by Justices O’Regan and Ngcobo, *supra* and

[45] I am of the view that this Court is thus entitled to depart from such a literal and ordinary construction and extend the literal construction of the definition as including a person who has concluded a contract of employment, which is to commence at a future date. Common sense, justice and the values of the Constitution would, in my view, best be served by extending the literal construction to include such a person...

Grogan ‘Employment Law’ Vol 19 part 3 pp 15-17 opines that ‘had the contract not been repudiated, the-would be employee would have become an employee.’ Grogan

² MEC Department of Education Kwazulu Natal v Khumalo and Another

³ Veridical Paradoxical - A basic theory is taken to a logical but apparently absurd conclusion.

continues to draw an analogy between a person in the position of Manqele and unborn children.

[50] *The whole tenor of progress in labour law is to fair labour practices and justice for employees and employers and away from a narrow construction of the word “works”. Although the word is in the present tense, in common parlance we often say of a person who has left A to work for B that he now works for B even though he has not actually commenced his duties.*

[51] *The narrow construction totally ignores the phrase ‘is entitled to receive any remuneration’ which, in my view, means that such a person has not yet commenced actually working but when he does so he will be entitled to pay. It does also mean someone who is never paid but has commenced working but that would seem to me to be a rather more strained construction. It seems to me that the legislature, when defining the word “employee” was striving for simple language and not drastically changing the definition.*

[52] *The conclusion this Court arrives at is that the definition of employee in s 213 of the LRA can be read to include a person or persons who has or have concluded a contract or contracts of employment the commencement of which is or are deferred to a future date or dates.*

20. As per the foregoing, I have interrogated the **Wyeth SA (Pty) Ltd v Manqele and Others** Labour Appeal Court judgement against the issues in dispute “whether the dismissal in respect of misconduct committed at Pongola Magistrate (Court) while the applicant was on contract, is applicable to the applicant’s permanent employment at Mthuzini Magistrate (Court)” and find the Applicant’s argument compelling that the **Wyeth** case is “distinguishable” to Myeza. The Applicant was dismissed on appeal for a matter whilst on fixed term contract which had terminated on 30 September 2017 and with a clear break and separation before he had commenced his permanent appointment on 1 November 2017; albeit that he had received his letter of appointment on 9 November 2017. The Respondent’s argument in **Wyeth** is negated as “a contract of employment which is to commence at a future date” was actually contradicted as he commenced (1 November 2017) before his letter of appointment arrived (9 November 2017).
21. It therefore makes sense that the dismissal, which was based on the misconduct in Pongola, had lapsed due to the termination of the fixed term contract and the employer/employee relationship had ended by the efflux of time.
22. On interrogating Myeza’s letter of permanent appointment at Mtunzini Magistrate Court, it is clear that Myeza had not misconducted himself at Mtunzini Magistrate Court, there is no alliance nor any residual to the Pongola matter, and therefore section 17 of the PS Act is not applicable *vis-à-vis* the Appeal outcome.
23. In light of the foregoing, it is evident that the dismissal is not applicable to Myeza’s permanent appointment at Mtunzini Magistrate Court and there is no reason to set the matter down for the Respondent to prove the fairness of the dismissal.
24. Having cognisance of the Respondent’s argument citing:

Department of Agriculture & Rural Development: Limpopo Provincial Government v Phooko N.O and Others (JR2007/17) [2019] ZALCJHB 190 (2 August 2019)

SASSA v Nehawu and others C233/14”

Arends and others v SALGBC and others [2015] 1 BLLR 23 (LAC)

It behoves that there must be a **stated case** in the absence of oral evidence, absence of which there is no arbitration and an award issued without hearing evidence is a nullity and it is susceptible

to review. Rabkin- Naicker J states, “I fail to comprehend how a dispute which hinges on the fairness of the conduct of an employer can be decided (**in the absence of a stated case**) without parties giving oral evidence. In order to answer a legal question an arbitrator must receive evidence and/or be furnished with a stated case. Arbitrators are warned not to simply approve this approach.

25. In **National Union of Mineworkers and Others v Hartebeesfontein Gold Mining Company Ltd. (57/86) [1986] ZASCA 41 (27 March 1986)** clarifies the meaning of a stated case. When the matter was called, the Court raised two preliminary questions: Was "the document" in the form of a special case? Did it contain all that a case stated.....should contain? In **Mozley & Whiteley's Law Dictionary** ,(7th ed.) a "Special Case" is “A statement of facts agreed to on be-half of two or more litigant parties, and submitted for the opinion of a court of justice as to the law bearing upon the facts so stated.” **Stroud's Judicial Dictionary (4th ed.)** states that "A special case is a written statement of the facts in a litigation, agreed to by the parties, so that the court may decide these questions according to law ... It is also known as a case stated. " In **Department of Correctional Services v The GPSSBC and Others (JR 625/17) [2018] ZALCJHB 415 (29 November 2018)** “...In the absence of oral evidence, there must be a stated case absence of which, there is no arbitration.
26. The parties entered held a Pre-Arbitration Meeting on 21 February 2020 on their volition and the appointed representatives concluded a **Pre-Arbitration Minute [Annexure 7]**. The Pre-Arbitration Minute stated the following:
 - a. Introduction
 - b. Appointed Arbitrator
 - c. Settlement
 - d. Nature of the Dispute
 - e. Common Cause Issues
 - f. Issues in Dispute
 - g. Issues to be Decided
 - h. Relief Sought
 - i. Documents
 - j. The Onus of Proof
 - k. Duration of the Hearing
 - l. Interpreter
 - m. Dates of the Hearing
 - n. Signatures, Date and Venue
27. The parties agreed that matter will be dealt with by submitting heads of argument. The parties submitted their written submissions by email and both parties were afforded extension of time as requested and by mutual consent. Both parties were afforded the right to reply.
28. The matter was dealt with as a stated case.
29. As per paragraph 7 of the Pre-Arbitration Minute, it is clear that the dismissal was applicable to the Pongola Magistrate Court and not applicable to the applicant's permanent matter at Mtunzini Magistrate Court. Therefore, the matter will not be set down for the Respondent to prove the fairness of the dismissal.

RULING

30. The dismissal was both procedurally and substantively unfair.
31. The sanction by the Department of Justice and Constitutional Development (DoJCD) to dismiss the Applicant (Mr SS Myeza) is dismissed.

32. The Department of Justice and Constitutional Development (DoJCD) is ordered to reinstate Mr Myeza with retrospective effect from 10 April 2018 on the same terms and conditions of employment applicable at dismissal.
33. The Department of Justice and Constitutional Development (DoJCD) is to implement this award within 30 days of receipt
34. The Department of Justice and Constitutional Development (DoJCD) is to calculate and pay Mr Myeza's salary and benefits from date of dismissal to date of reinstatement.
35. I make no order as to any further costs.

Signed and dated in Durban on this 1 June 2020.

A handwritten signature in black ink, appearing to be 'Sanjay Balkaran', written over a faint circular stamp or watermark.

Sanjay Balkaran
Panellist