

SOUTH AFRICA / JUDGMENT

## Fidelity Security (Pty) Ltd v Skhosana and Others (JR 1425/2020) [2023] ZALCJHB 268 (2 March 2023)

[2023] ZALCJHB 268

COURT

Labour Court Johannesburg

BEFORE

M Baloyi

CASE / FILE NUMBER

JR 1425/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

### Source record

IN THE LABOUR COURT OF  
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JR 1425/2020

In the matter between:

FIDELITY SECURITY  
(PTY) LTD  
Applicant  
and  
AGNES  
SKHOSANA  
First Respondent  
COMMISSIONER MUKOVHE  
RAVHURA  
Second Respondent  
COMMISSION FOR  
CONCILIATION, MEDIATION  
AND  
ARBITRATION  
Third Respondent

Heard:

10 November 2022  
Delivered: 02  
March 2023

---

**JUDGMENT**

M. BALOYI, AJ

**Introduction**

[1] The termination of the first respondent's contract of employment on account of an instruction from the applicant's client cannot be a dismissal, so says the applicant. The applicant is aggrieved by the decision made in the arbitration award in which the second respondent ruled to the contrary. This forms the nucleus of this application. He effectively made a finding that the first respondent was dismissed by the applicant and went on to declare that

the dismissal was both procedurally and substantively unfair. He ordered the retrospective reinstatement of the first respondent.

[2] The applicant has now approached this Court seeking to review and set aside the arbitration award. The application is opposed by the first respondent. Most of the issues are common cause. The few that are in dispute are dealt with below in accordance with the applicable rules of evidence.

**Background**

[3] The applicant and the first respondent entered into an employment relationship in terms of which the first respondent was appointed as a Security Officer. According to the written contract of employment, the applicant was appointed to perform her duties at one

of its clients' premises, Builders Warehouse, Faerie Glen. The contract was described as site-specific, and the first respondent

served the applicant from the site in question for a period of six years.

[4] It was on 19 May 2020 when the first respondent and one of her colleagues were called and directed to report to the office on 22 May

2020. On their arrival, the applicant did not know how to deal with them and they were as a result advised to report again on 25 May

2020. It was on this day when they were given a notification of removal from the site dated 25 May 2020 with a specific message crafted as follows:

*"The client at Builders Atterbury has requested for Officer Skhosana to be removed from site as he cannot trust her anymore".*

[5] This notification was penned and signed by Ms Aldo Njoro. The first respondent signed in acknowledgement of receipt and one Sam signed as a witness. Furthermore, the first respondent was handed a letter titled 'POSSIBLE TERMINATION OF FIX TERM CONTRACT

OF EMPLOYMENT’ dated 25 May 2020. It is not clear who authored the document as no name appears next to the signature of the author. The first respondent signed in acknowledgement of receipt with the date of 25 May 2020 appearing below her signature. Ms Njoro signed as a witness.

- [6] It is recorded in the letter that consultations were held on 25 May 2020 and the processes and procedures were explained. No alternative positions were offered to the first respondent as there were none

available. Clauses 2.1 and 3.8 of a site-specific contract of employment were referred to in the letter. The letter went further to inform the first respondent that her contract of employment ‘will be terminated on 27 May 2020 at 16h00 unless she submits reasons why it should not be terminated’. The arbitration was mainly about clause 3.8 of the site-specific contract. It is thus necessary to paste the content of the clause as recorded in the applicant’s possible termination letter when the reference was made to it. It was recorded as follows:

*“Clause 3.8 stipulate the process and procedures to the effect of site removals and contract termination. The employee specifically accepts that employment with the Employer is dependent upon retention by the Employer of the service contract of the client at whose premises the employee has been appointed to perform duty in terms hereof and agrees that should the said client service contract be cancelled or terminated for whatsoever reason, or the complement on the contract be reduced or restructured, this agreement may be terminated effective on the date of such cancellation, termination, reduction, restructuring or removal.”*

- [7] It is further necessary to look at clause 3.8 which appears in the first respondent’s contract of employment. It is crafted as follows:

*“The employee specifically accepts that employment with the Employer is dependent upon retention by the Employer of the service contract of the client at whose premises the employee has been appointed to perform duty in terms hereof and agrees that should the said client service contract be cancelled or terminated for whatsoever reason, or the complement on the contract be reduced or restructured, this agreement may be terminated effective on the date of such cancellation, termination, reduction, restructuring or removal. Should the client request the employee’s removal from the contract for whatsoever reason, the employee will be removed from the contract, and be dealt with by the Employer’s Personal Department in terms of due process”.*

- [8] This version of the clause is the one quoted in the second respondent’s arbitration award. The applicant referred to the very same version during the cross-examination of the first respondent. During the said cross-examination, Mr Steenkamp who appeared for the applicant put the applicant’s understanding of the clause to the third respondent as follows:

*“And the process was to consult you. I put it to you that this clause means that we will consult you. We will show you the removal from the client (the request). The removal letter is on your Bundle A, pages 1,2 and 3. We consult with you. We follow a fair process. We tell you why you were removed and because of that your contract will be terminated if there is no alternative that we can give you. I put it to you. Is that what you agreed to.”*

- [9] It deserves mention that in paragraph 20 of the founding affidavit, the clause is quoted with the exclusion of the last sentence as set out in the first respondent’s contract of employment. The

missing part should read:

*“Should the client request the employee’s removal from the contract for whatsoever reason, the employee will be removed from the contract, and be dealt with by the Employer’s Personal Department in terms of due process.”*

- [10] Prior to deciding on the merit of the dispute, the second respondent had to deal with two applications for his recusal. He dismissed them and the reasons for his rulings are incorporated in the arbitration award. The applicant demonstrated a challenge to these rulings in the additional grounds pleaded in the supplementary affidavit. There is no prayer for the review of these rulings in the notice of motion. The applicant did not amend its notice of motion when filing the supplementary affidavit. As the papers stand, there is no application for the review of the rulings before this Court. This part of the matter was not even pursued during argument. The Court will therefore not labour into this. Focus is thus placed on the merit of the matter.
- [11] The grounds upon which the applicant relies are heavily rested on the second respondent’s failure to apply his mind to the relevant issues, specific reference was repeatedly made to clause 3.8. Furthermore, the relief of reinstatement was not competent since the dispute before him was not founded on a dismissal. Put another way, there was no unfair dismissal dispute before the second respondent.
- [12] In opposition, the first respondent maintains that there is no basis for the review of the arbitration award as it is not unreasonable and denied that the second respondent failed to apply his mind. The applicant failed to specifically point out any wrong committed by the first respondent to suggest that she could not be trusted any longer.

#### Evaluation

- [13] Whether the first respondent was dismissed, is without a doubt a jurisdictional issue. If the factors surrounding the dispute suggest that there was no dismissal, the Commissioner will have no jurisdiction to decide on the merits of the matter. This will signal the end of the matter. If the surrounding factors point to the existence of a dismissal, the Commissioner is legislatively bound to hear and determine the matter on its merits. In this matter, after hearing evidence from both parties, the second respondent made a finding that there was a dismissal. With this finding made, he went on to decide the matter on its merits. To be

precise, once the hurdle of establishing the existence of the dismissal is crossed, the onus shifts on the employer to prove the fairness of the dismissal (the applicant in this matter).

[14] It clearly appears in this matter that this review application is firmly founded on a jurisdictional issue. In *Fidelity Cash Management Service v CCMA and Others*[1] it was held that “if the CCMA had no jurisdiction in the matter, the question of reasonableness of its decision would not arise.”

[15] The Labour Appeal Court in *Enforce Security Group v Fikile and Others*[2] found the arbitrator’s application of the reasonableness test in a review of jurisdictional matters as an incorrect one and held as follows:

*“[16] The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties’ dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding. To the extent that the court a quo found that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner.”*

[16] The above approach was followed in *Bidvest Prestige Services (Pty) Ltd v Lebea No and Others*[3] where the Court had this to say:

[12] To the extent that there was a dispute as to whether or not the termination of the contracts of employment by virtue of the automatic termination constituted a dismissal as defined in section 186(1) of the Labour Relations Act, the test on review as correctly pointed out on behalf of the parties is that of correctness, and not reasonableness. This test was reiterated by the LAC in *Enforce*.

[17] In *Mahlamu v Commission for Conciliation, Mediation and arbitration and Others*[4] the Court reviewed and set aside a jurisdictional ruling in which the arbitrator found that the termination of employment based on a contractual provision of automatic termination on the will (and the whim) of the client did not amount to dismissal as it happened by operation of law. The following was said:

*“[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”.

[18] In *SA Post Office Ltd v Mampeule*[5] the Labour Appeal Court confirmed a decision of this Court that invoking the automatic termination clause without a clear explanation

for such termination amounted to dismissal and held:

*“[23] The onus rested on SAPO to establish that the ‘automatic termination’ clause prevails over the relevant provisions in the Act and clause 9.1 of the contract. 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 Mampeule’s counsel, supported by authorities, that parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an 17 employee whether through the device of ‘automatic termination’ provisions or otherwise because the Act has been promulgated not only to cater for an individuals interest but the publics interest (see Brassey – Commentary on the Labour Relations Act at A2-9 and A211 ; SA Eagle Insurance Co Ltd v Bavuma 1985 (3) SA 42 (A) at 49G-H; Bafana Finance Mabopane v Makwakwa [2006] ZASCA 46; 2006*

(4) SA 581 (SCA) para 10 and *Denel (Pty) Ltd v Gerber* [2005] 9 BLLR 849 (LAC) at 24). The court a quo was thus correct when it held at para 46 that: ‘Provisions of this sort, militating as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an

individual, are incapable of consensual validation between parties to a contract by way of waiver of the rights so conferred.”

[19] In this matter, the applicant’s case from the onset solely rested on a jurisdictional point. Its cross-examination of the first respondent coupled with the versions put was confined to this aspect. It only came during the testimony of Ms Njoro that the reason for the removal of the first respondent was precipitated by her failure to follow instructions. Ms Njoro did not recall the nature of the instructions when asked to reveal the details. She only stated that the instructions in question were discussed during the consultation with the first respondent. This part of the respondent’s case was disputed by the first respondent. The second respondent found no merit in this explanation. He went on to conclude that if this was the case, disciplinary action was the option available to the applicant.

[20] Now that the Court is faced with the determination of the correctness of the second respondent's decision, it is therefore of utmost importance to look at the material placed before the second respondent as if it was the Court that was asked to determine the jurisdictional issue[6]. It is common cause that:

20.1 The first respondent's employment was terminated, and was terminated by the applicant.

20.2 The applicant relied on an automatic termination clause applicable to a site-specific contract.

20.3 The applicant declared that it did not have an alternative position available for the first respondent.

20.4 The first respondent's contract was to be terminated on 27 May 2020 should she not submit representations on why it should not be terminated.

20.5 The first respondent did not submit any representations.

[21] What appears to be in dispute is whether this termination constitutes a dismissal or not and whether fair procedures were followed. The conduct of the applicant when attempting to justify the invoking of the automatic termination clause raises concerns. There are overwhelming indications that the applicant was at all times aware that it was dismissing the first respondent when invoking the automatic termination clause. In the possible termination letter, the applicant elected to quote an automatic termination clause to a site-specific contract that is different from the one appearing in the first respondent's contract of employment. The same happened in the founding papers of this application. What the applicant was trying to avoid are the pre-termination procedures which it has no record of. Furthermore, the alleged consultation, which the first respondent disputed, could not be proved by Ms Njoro.

[22] The cumulative effect of the above is that the applicant terminated the employment of the first respondent as set out in section 186(1)(a) of the Labour Relations Act[7]. The termination was effected on notice. In terms of the possible termination letter the first respondent was informed that her

contract of employment will be terminated on 27 May 2020. It deserves mention in passing that the notice is not even in compliance with section 37 of the Basic Conditions of Employment Act[8] given the fact that she had served the applicant for more than a year.

[23] With no reason given as to why the first respondent could not be trusted by the applicant's client, there is no other label to be attached to the termination of the first respondent's contract of employment than dismissal. The attempt to raise non-compliance with the instructions was found by the second respondent to be meritless. This Court will not even interrogate the claims because they were belatedly raised during the applicant's case. They were not put to the first respondent during her cross-examination. What is extensively canvassed in the grounds of review about Ms Njoro's reasons is of no consequence.

Consequently, the case brought by the applicant ended on a jurisdictional point.

[24] Since the Court finds no reason to interfere with the decision of the second respondent that the first respondent was dismissed, it remains the duty of the applicant to prove the fairness of the dismissal. A case presented by the applicant does not by any account take the direction of proving the fairness of the first respondent's dismissal. Even in the applicant's grounds of review, the second respondent is accused of awarding reinstatement as if there was an unfair dismissal dispute before him. As pointed out above, the applicant's case was entirely focused on a jurisdictional issue. On this note, the Court will once again not interfere with the decision of the second respondent that the first respondent's

dismissal was both procedurally and substantively unfair. The review application is under these circumstances bound to fail.

#### Costs

[25] With this Court noting that the arbitration award restored the employment relationship, it will not be in the interests of the law and fairness to make a cost order when upholding the arbitration award.

[26] In the premises, the following order is made.

#### Order

1. The application is dismissed.
2. There is no order as to costs.

M Baloyi

Acting Judge of the Labour Court of South Africa

#### Appearances:

For the applicant: Mr Atchesen of Hinrichsen Attorneys For the first respondent: Mr C Meyer (SASLAW pro bono office)

[1]

[2008] 3 BLLR 197 (LAC) at paragraph 101.

[2]

(2017) 38 ILJ 1041 (LAC) at para 16.

[3] (2021) 42 ILJ 377 (LC) at para 12. See also: Pecton Outsourcing Solutions CC v Pillemer No and Others

(2016) 37 ILJ 693 (LC) at para 16; Mohajane v Emfuleni Local Municipality and Others (JR 338/20) [2022] ZALCJHB 32 (16 February 2022) at para 7.

- [4] (2011) 32 ILJ 1122 (LC) at paras 22 and 23.
- [5] (2010) 31 ILJ 2051 (LAC) at para 23.
- [6] See: Trio Glass t/a The Glass Group v Molapo No (2013) 34 ILJ 2662 (LC) at paragraph 22, the Court held: “The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.”
- [7] No. 66 of 1995.
- [8] No. 75 of 1997.
- 

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZALCJHB/2023/268.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/fidelity-security-pty-ltd-v-skhosana-and-others-unknown-topic-alcjhb-2023>

Prepared on 12 October 2026 · Esheria