

SOUTH AFRICA / JUDGMENT

Solutions Group Events v Naude (JR809/24) [2025] ZALCJHB 144 (8 April 2025) [2025] ZALCJHB 144

COURT

Labour Court Johannesburg

BEFORE

Mkwibiso

CASE / FILE NUMBER

JR809/24

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FLYNOTES:

LABOUR – Dismissal – Onus
in disputes –
Employee
must first establish existence of a dismissal before employer is
required to prove its fairness – Commissioner
erroneously
ruled that dismissal had been established merely because employee
alleged it – Directing employer to begin
evidence on
fairness despite genuine dispute over whether termination was
dismissal or contract expiry – Material irregularity
–
Procedural flaw – Award reviewed and set aside –
Matter remitted – Labour Relations Act 66 of 1995, s 192.
IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not
Reportable
Case
No: JR809/24
In

the matter between:

SOLUTIONS GROUP EVENTS
(PTY) LTD
Applicant
and
NAUDE,
CANDICE
First Respondent
COMMISSION FOR
CONCILIATION,
MEDIATION
AND ARBITRATION
Second Respondent
MATUMBA,
RENDANI EWART NOMINE
OFFICII
Third Respondent

Heard:

26 February 2025
Delivered: 08 April
2025
Summary: Unopposed
application – review of arbitration award granting employee 8
months compensation for unfair dismissal
– Whether employment
contract was for a fixed duration or permanent subject to probation –
Employer denying that employee
was dismissed and contending that the
fixed-term contract terminated by effluxion of time

JUDGMENT

MKWIBISO, AJ

Introduction

[1] In this matter the applicant (the employer) seeks an order reviewing and setting aside an arbitration award rendered by the second respondent (the Commissioner), in which it was found that the dismissal of the first respondent (the employee) was substantively

and procedurally unfair and the employee was awarded compensation in the amount of eight months of her salary.

[2] In the award, the Commissioner found that the employee had been employed permanently by the employer and the termination of her employment constituted a dismissal in the absence of valid reasons and without following proper processes.

- [3] The review application, which was filed eight days out of time, complains that the award is reviewable for a number of reasons, one of which relates to the misallocation by the Commissioner of the onus and the duty to begin.

Relevant facts and evidence

- [4] The employer is an events organising entity. During late 2023, it sought the services of someone who would operate as an office administrator and personal assistant to its director.
- [5] On 06 October 2023, the employer sent an email to the employee, stating the following, *inter alia*:

“Dear Candice

We would like to offer you employment at Solutions Group Events as an Office Administrator and Assistant to myself on an initial probationary period of 3 months.

We are able to offer a CTC/gross salary of R27 000 per month”.

- [6] The employee presumably responded to this email, accepting the offer.
- [7] A written employment contract was then subsequently signed by the parties. The heading of the contract read “fixed term contract of employment”.
- [8] Clause 3 of the contract had a sub-heading “fixed-term” and provided the following: “[t]he Employer undertakes to hire the Employee as PA & Office Administrator at Solutions Group Events for a probationary period of 3 months starting Monday 16th October 2023”.
- [9] Clause 12 of the contract provided the following: “this contract shall automatically terminate upon the expiry of the terms of service and dates stipulated above in clause 3. above without either party having to notify the other party”.
- [10] The employee commenced her duties with the employer on 16 October 2023. There was no evidence of the employer having any concerns about her performance.
- [11] There is evidence that during December 2023, the employer was actively looking for another office administrator. The employee discovered this information on the computer used by the employer’s director and took screenshots of that information on that computer. The employee was authorised to use the said computer as the personal assistant of the employer’s director, but the employer contended that she had no permission to access and use that particular information on the computer. The employee contended that these recruitment efforts by the employer were meant to secure her replacement, which was disputed by the employer.
- [12] On 08 January 2024, the parties had a meeting to discuss the employment contract. In the days that followed, the parties then exchanged emails regarding their understanding of the contract. On 09 January 2024, the employee sent an email stating the following:

“Hello Stephanie

Regarding the meeting we had yesterday about my contract and the below grievance I sent to you last week Friday; I would just like to confirm that we have discussed my contract and that my probation period ends on the 16th January 2024; and you confirmed my contract will not be renewed and I will not be hired on a permanent basis, but on a month to month basis after the 16th of January 2024, for 1 (One) to possibly 2 (Two) months, as you said and I will be looking for another job and you will be looking for someone to replace me in my position here at Solutions Group Events”.

[13] On 11 January 2024, the employer responded as follows:

In response to the below email:

With your contract ending on 16th January 2024 you would be welcome to stay on for a further one month i.e. 30 days thereafter.

In order to keep things clear and concise to your liking, I suggest we formalise it herein as :

Option 1 you are welcome to leave on the 16th January at contract end.

Option 2 you are welcome to stay on for another month/30 days i.e. 17th January – 16th February 2024.

And we leave it at these 2 written options.

This email and our discussion yesterday would form the basis of the understanding and detail would be the same as per the previous arrangement you worked within.

We would need it in writing from you that you understand this arrangement and that you understand and agree it is for the 30 day period discussed with no further expectations or correspondence entered into regarding the terms of the simple 30 day arrangement during the time or repercussions and comebacks in any way thereafter.

Please do let me know your decision on Friday 12th January”.

[14] On 15 January 2024, the employee responded as follows:

“Greetings Stephanie,

The options provided are irrelevant at this stage as the dismissal of myself is your prerogative. You have already sought to interview my replacement well before engaging with me regarding these options; furthermore, I was on a probationary contract with reasonable expectations of continued employment.

The position of Personal Assistant is a permanent position and will exist after my dismissal which you have already decided upon; to recast my dismissal at this stage as a mutual termination is blatantly false.

Therefore, the date of dismissal is your prerogative”.

[15] In response on the same date, the employer stated the following:

Not quite sure what you are aiming to achieve after being here on literally a 3 months contract with all this correspondence? Please state your intention.

As mentioned today, for the record, I have not sought to interview your replacement. I am open to CV's that may work best in the events industry for my requirements – these being expectations I have mentioned to you. The tone of your email and wording in the discussion today in this regard leads me to think what has been viewed on my computers aside from an Administrator meeting slot? I have been used to trusting administrators/assistants on my computers.

As mentioned please don't be so presumptuous that a PA position is a permanent position as it is not and things change regularly here as to needs and requirements at different times.

Your contract was stated as a 3 month fixed term contract – The end of the contract terms are clearly laid out in Point 12. What is not clear we are having to spend time, energy on this back and forth? It's destructive and not doing you any favours.

You haven't been happy with so many things at the company for quite some time now and have clearly verbalised and put in writing – why are you going to all this effort after 3 months one must question..?

I don't understand why you are continually referring to being dismissed? Quite simply it is the end of the fixed term and neither party is even required to notify the other party at the end of the contract.

You refer to prerogatives very often? My Option 1 and 2 stand for you to advise what appeals to you – I don't mind. Why throw it back at me for your own labour issues gain? It's your decision and prerogative too if you'd like to continue an extra month. I just want simple pleasant working arrangements. I am not used to dealing with people in this manner.

And in regards to prerogatives, it certainly is mine to decide what to spend money on and the services from staff members and synchronicity with them that I need in the business and in this demanding events industry and to support me in the way I need.

Why don't you state your case and let's move on”.

[16] On 17 January 2024, the employee referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), and it was ultimately arbitrated by the Commissioner, duly appointed by the CCMA.

[17] During the preliminary exchanges at the arbitration, the employee initially stated that her case was about an expectation of renewal or extension of the employment contract, but upon receiving advice from the Commissioner she changed and said her case was about the unfair termination of her employment contract after the expiry of a probation period. The employer's case, on the other hand, was consistent from the start, namely the parties had

concluded a fixed-term contract of employment that had commenced on 16 October 2023 and ended on 16 January 2024 by effluxion of time. The employer specifically stated that “the end date was not a dismissal, it was the end of ... contract, not dismissal”. However, the Commissioner relied solely on the employee’s averments and determined that a dismissal had been established, which meant the employer had the duty to begin. In this regard, the Commissioner stated the following:

“COMMISSIONER: ... it is alleged that the termination is rendered probation and then the pre-dismissal procedure relating to probation were not followed. So this is what this case has been put before me. They are alleging that the dismissal is to probation. So now, now that they’ve identified what they want me to decide on it means that ... we not going to apply ... a test when we ... when employee is challenging the non-renewal of a fixed-term contract, it means that the dismissal is related to probation, so it’s a dismissal which is in line with Section 192. Then because we have established that there was a dismissal then it means that you as an employer must justify that the dismissal was, was done procedurally and there was ... reason for that, so you need to deal with the procedure and the substance. So the onus is with you and you will be the one to start ...

...

COMMISSIONER: All right ... all right so you may, you may start, I’ve referred to Section 192, I have to read on the record for the purpose of emphasis. All right so in terms of Section 192 of the Labour Relations Act sub-section 1 states that “in onus in dismissal dispute in any proceedings concerning any dismissal ...” so this is one of the dismissal “...the employee must establish the existence of the dismissal”. Now when the employer is able to prove or it’s common cause that there was a dismissal, in this instance termination of contract with or without notice ... surely you have agreed as common cause that on the 17 her contract of employment was termination, so that alone is an establishment of the dismissal. Sub-section 2 refers to “if the existence of dismissal has been established the employer must prove that the dismissal is fair”. Now that puts the burden to the, to the respondent”.

[18] The employer opted to make an opening statement before leading evidence. Once again, the employer emphasised that there was no dismissal:

“RESPONDENT REPRESENTATIVE: All right so firstly Mr Commissioner thank you for the opportunity. In terms of the matter in hand ... we intend on leading evidence to show that there was a fixed-term contract that was entered into between the applicant ... and the respondent. The period of this contract was for three months. We intend to give evidence to show that the word probationary was used out of context and for all apparent purposes this agreement was a fixed-term contract. We further will give evidence to, to show that this was reiterated in email communication with the applicant that there was no intention but for this to be a fixed-term contract and as a gesture there was an extension of one month given in terms of this contract of which the applicant ... turned this down. Accordingly the ... by virtue of this contract and the Clause 12 there is no requirement to give notice in terms of the termination date and the employment contract came to an end on the 16th of January 2024”.

- [19] The employer then began, as had been directed by the Commissioner and presented the evidence of its Director, Ms Moss. The employee thereafter testified. In their testimonies, both Ms Moss and the employee spent a considerable amount of time trying to prove their respective cases that a dismissal existed or did not exist. Essentially, Ms Moss testified that she employed the employee on a three months fixed-term contract, which commenced on 16 October 2023 and expired on 16 January 2024. The employee, on the other hand, testified that despite the contents of the written agreement between the parties, Ms Moss had informed her to not worry as the contract was simply a standard document and she would be employed on a permanent basis subject to a three months' probationary period. The employee also testified that a new contract was supposed to be signed in the event that the parties were both happy with one another after the probation period. Further, the employee stated that Ms Moss had informed her that all her contracts were of a fixed-term nature and the employee tried to explain to Ms Moss that a fixed-term contract must have a beginning date and an end date.
- [20] The Commissioner issued his award on 20 March 2024. In the award, the Commissioner identified the issue to be decided as whether the employee's dismissal was procedurally and substantively fair, and the appropriate remedy in the event of a finding of unfairness. The Commissioner then summarised the testimony of the employer's witness, which was in line with the employer's opening address. Thereafter, the Commissioner summarised the employee's testimony, including the employee's testimony that Ms Moss had informed her that all her standard contracts were fixed-term contracts and that she had tried to explain to Ms Moss that a fixed-term contract must have a start date and an end date. The Commissioner also referred to the employee's testimony under cross-examination where she had stated that she had signed her employment contract knowing that its heading said "fixed-term contract".
- [21] In his analysis, the Commissioner noted that the employer's case was that there was no dismissal. The Commissioner found that the heading of the employment contract said "fixed-term contract", which was different from the body of the contract as it had no start and end date and it referred to probation. The Commissioner further referred to clause 12 of the contract which required a thirty days' termination notice and found that such a notice was normally given to permanently employed employees, with reference to section 37(1) of the Basic Conditions of Employment Act[1].
- [22] As stated above, the employer challenges the Commissioner's award on review and one of the grounds of review advanced by the employer is that the Commissioner incorrectly allocated the duty to begin. It is unnecessary to set out the other grounds of review in light of the conclusion I reach below.

Analysis

[23] Condonation for the late filing of the review application ought to be granted. In determining this issue, I have had regard to the degree of delay, the explanation for the delay, the prospects of success and the general interests of justice. The review application was filed eight days out of time, which is not a significant degree of delay. The explanation for the delay is reasonable. The prospects of success, which are addressed below, are good.

[24] Section 192 of the Labour Relations Act[2] provides the following:

“192. Onus in dismissal disputes.

- (1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
- (2) If the existence of the dismissal is established, the employer must prove that the dismissal was fair”.

[25] In *Pikitup Johannesburg (SOC) Limited v Muguto and Others (Pikitup)*,[3] a commissioner had during arbitration proceedings ruled that the employer must commence with the leading of evidence despite the fact that the existence of dismissal was in dispute. The Court held the following:

“[27] ... In my view however, irrespective of the circumstances of the case, the question of the duty to begin and discharging the onus in dismissal disputes is a statutory requirement imposed by the provisions of section 192 of the LRA. Those provisions cannot be circumvented for the sake of convenience or expedience.

[28] ... if in arbitration proceedings the issue of a dismissal is common cause, an employer representative who is also its witness should for obvious reasons lead his/her evidence first before all the other witnesses are called. That evidence like any other should be subject to the normal rules of evidence. Equally so, where the fact of a dismissal is in dispute, the employee alleging the dismissal, whether self-represented or not, must lead evidence first to demonstrate that indeed a dismissal took place.

[30] There is a dispute as to whether the Commissioner had compelled Langa to testify first, or whether as the Commissioner had stated in the award, that Langa had offered to begin. The record of proceedings however indicate that the parties reached agreement on who should begin. In my view however, that dispute is inconsequential, as in line with the provisions of section 192 of the LRA, it was for the Commissioner to simply remind the parties what their statutory obligations were in regard to the issue of onus, and to give direction in regards to the duty to begin irrespective of the constraints (if any) Langa was faced with.

- [31] To the extent that the Commissioner first heard the evidence of Langa when the duty to begin and to discharge the onus in regards to the dismissal was on Muguto, there can be no doubt that the Commissioner clearly misconceived the question of onus, and committed a gross procedural irregularity, which on its own rendered the award reviewable. That irregularity prevented Pikitup from having its case fairly heard, or prevented a fair trial of the issues”.
- [26] In the current matter, the Commissioner made a ruling that dismissal had been established, despite the fact that dismissal was in dispute. He then directed the employer to begin in order to prove the fairness of the “disputed” dismissal. One would expect that under these circumstances the Commissioner would then guide the parties to not dwell on whether or not there was a dismissal and to focus on the fairness or unfairness of the dismissal. However, when both parties presented their respective cases, they focused heavily on whether or not their employment contract was a three months’ fixed-term contract or a permanent contract subject to a three months’ probationary period, with the understanding that if it was a three months’ fixed-term contract it would mean that it expired after three months and there was no dismissal.
- [27] The Commissioner’s ruling at the outset of the proceedings that dismissal had been established merely because the employee was alleging the existence of dismissal was in breach of section 192 of the Labour Relations Act, which placed the onus on the employee to establish or prove by way of evidence the existence of dismissal. The ruling seems to have been designed purely to ensure that the employer begins, in circumstances wherein the employee should have began, which is simply shambolic. The presence of a dispute regarding the existence of dismissal meant that a trial had to take place into the existence of dismissal and the employee had the duty to begin.
- [28] On the authority of Pikitup, the Commissioner misconstrued the issue of the onus that is regulated by section 192 of the Labour Relations Act when he directed the employer to begin despite the presence of a genuine dispute regarding the existence of dismissal. This breach of statute constitutes a gross irregularity that on its own justifies the setting aside of the award on review and the remittal of the matter for a fresh arbitration before a different commissioner.
- [29] The newly appointed commissioner would do well to hear evidence on both the existence of dismissal and the fairness of dismissal all in one go and to render one outcome covering both issues to the extent necessary, in the interests of the speedy resolution of this matter, provided the employee is required to begin as the burden is on her to establish the existence of dismissal before an inquiry into the fairness of the dismissal.

Costs

- [30] The application was not opposed and as such there should be no order as to costs.
- [31] In the premises, the following order is made:

Order

1. The late filing of the review application is condoned.
2. The arbitration award under case number GAJB1286-24 dated 20 March 2024 is reviewed and set aside.
3. The unfair dismissal dispute between the applicant and the first respondent is remitted to the second respondent for an arbitration hearing de novo before a commissioner other than the third respondent.
4. There is no order as to costs.

VG Mkwibiso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv A.J. Nel

Instructed by:

Darran Ledden Inc

For the First Respondent: No appearance

- [1] No. 75 of 1997
- [2] No. 66 of 1995.
- [3] Pikitup Johannesburg (SOC) Limited v Muguto and Others (2019) 40 ILJ 2829 (LC); [2019] 10 BLLR 1146 (LC) at para 27.

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