IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Reportable

CASE NUMBER: JS 11/2010

In the matter between:

PASCALENE TLANKA CHILWANE Applicant

and

CARLBANK MINING CONTRACTS Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant sought relief arising from his alleged unfair dismissal by the respondent on 13 November 2009. He sought compensation in the sum of R99840.00, which represented two years' wages. The respondent had made an offer to employ him at a site other than the one at which he had been employed, which he rejected. This offer was repeated on the day of the proceedings and again rejected by the applicant. The respondent denies that the applicant was dismissed and alleges that he was employed on a fixed term contract which terminated at the end of a stipulated period.

Background facts

[2] The common cause facts are that:

(a) the applicant was employed on 13 November 2006 by the respondent;

(b) the applicant performed duties as a stock location runner at the respondent's client, Supply Chain Services ("SCS") Jet Park, for three years;

(c) the applicant did not report for work on 13 November 2009 as he attended his brother's funeral.

The applicant's version

[3] In his statement of claim the applicant sets out the following facts on which he relies to establish his dismissal:

(a) He was informed that his contract had expired on 13 November 2009, but although he was at work on 16 November 2009 he was not told that his contract had expired.

(b) He did not sign any contract on 16 November 2009 but simply handed in his late brother's death certificate.

(c) The respondent did not follow the right process to inform him that his work was finished on that day.

(d) He was dismissed during his absence from work from 6 to 15 November 2009 and informed of his dismissal on 19 November 2009. He had not attended work on

17 and 18 November as he had to go to a magistrate to sign documents relating to his late brother's estate.

[4] The applicant confirmed in his evidence that he had requested leave from his supervisor at SCS Jet Park (whom he referred to only as Chris), when he received a message on 6 November 2009 informing him of his brother's death. This leave was approved and when he returned to work on 16 November 2009 he provided Chris with a copy of the death certificate. He signed a leave form which Chris then clipped together with the death certificate. He worked until the end of the day and was paid for that day.

[5] He did not report for work on 17 and 18 November and on 19 November 2009 he reported for work and provided Chris with further documentation confirming that he had been absent on account of attending to matters related to his deceased brother's estate. Chris said he did not know what "*these people"* are doing to him and told him to see the Operations Manager of the site, Craig Morton. When he approached Morton he was shouted at and told "*you are no longer needed here – go to CMC immediately"*. He reported to the respondent's offices on 23 November and he was told that nothing could be done since "*the job came first and family last".*

[6] The applicant denied that he had signed a written contract of employment, although he was unable to explain on what basis he would then have worked at SCS Jet Park for three years. He disputed that his signature appeared on the contract of employment and implied that it may have been forged by the respondent. In cross examination however, he admitted his signature on the contract but alleged that he had:

(a) signed under duress as he was a desperate work seeker;

(b) only been given one page to sign;

(c) not been given a copy so did not understand the terms he was agreeing to.

[7] He further disputed his signature on the reminder notice of 2 October 2009 issued by the respondent, as well as the mutual termination agreement of 16 November 2009. The only signature he admitted was his signature on the pre-trial minute. Despite his denial that he had been employed in terms of a contract of employment which recorded the commencement date as 13 November 2006, he admitted that this start date was correctly reflected in the pre-trial minute.

[8] The applicant further denied that he attended the respondent's offices on 16 November 2009 at all. He denied having been informed by Abel Nsibande that his contract had expired and being offered a contract at another site. He denied the respondent's version put to him that he signed a mutual termination agreement after rejecting the offer of employment and demanding from Nsibande that he be paid what was due to him. His evidence was that he worked until 16:30 on 16 November 2009 without incident and received payment for the day. When he put it to Nsibande in cross examination that he had been paid for working a full day on 16 November, Nsibande pointed out that the sum of R286.99 paid to him and recorded on the mutual termination agreement was in fact payment for his last day of work, namely 13 November 2009. He then became aggressive, suggesting cynically that Nsibande might be confusing him with another employee of the same name. He put it to Nsibande that he had been dismissed despite his authorised absence from work and vehemently denied that he had been absent, badgering the witness to explain what he meant by the term "absent".

[9] The applicant did not lead any evidence other than his own. He indicated that he had not secured the attendance of Chris at the hearing as he was afraid of jeopardising his employment. However, during cross examination he sought a postponement in order to call Chris. This was opposed by the respondent and a postponement was refused by the court after hearing submissions from the parties. The applicant admitted that he had not made any attempts to secure Chris's presence notwithstanding the emphasis placed on this in the pre-trial conference,

which was held before Molahlehi J and who reminded the parties of their obligations to secure the presence of witnesses. The court informed the applicant that he could request that his case be re-opened and that he be given the opportunity to lead further evidence after the respondent had presented its case. He chose not to do so.

The respondent's version

[10] The respondent led the evidence of Abel Nsibande, the respondent's Operations Director and who had been in its employ for twenty years. He confirmed that the applicant had been employed in terms of a written contract signed by the parties on 13 November 2006, and which provided for its automatic termination on 13 November 2009. He described the process engaged in by the respondent in connection with the over twenty thousand employees contracted by the respondent, and confirmed that given the size of its workforce it was imperative that every employee had to be on a written contract of employment. He confirmed further that he had been present in 2006 when the applicant signed his contract, and that the applicant had himself completed the personal details part of the contract. Morton and Nelson Sithole were also present and signed as witnesses. The terms of the contract were explained to the applicant by Nsibande and he was given the opportunity to ask questions, but had none. He pointed out to the court his signature on behalf of the respondent on the contract, as well as that of the applicant's and the two witnesses. He referred to his handwritten annotation on the contract confirming that the applicant's identity document had been verified and he was to be placed at a pharmaceutical client for a fixed term of three years.

[11] Nsibande testified that on 2 October 2009 he issued the applicant with a "notice of termination of fixed term contract", which he used as a standard form to remind employees of the expiry date of their contracts. The notice confirmed that the applicant's contract of employment would terminate on 13 November 2009, and he explained this to the applicant and he signed it, following which Nsibande appended his signature as a witness.

[12] On 16 November 2009 the applicant reported to the respondent and Nsibande had a short discussion with him confirming the expiry of his contract and offered him employment at another client. The applicant demanded that he be placed at SCS Jet Park, failing which he should be paid "all that was due to him". It was not possible for the respondent to dictate to its client when they should employ contractors and he could not influence the client to re-employ the applicant at the same site. The parties then signed an "agreement of mutual termination of contract of employment" confirming that the employment of the applicant had terminated and that he would be paid the sum of R286.99 for his last day's work.

[13] Nsibande's evidence was that the applicant was attempting to mislead the court by disputing his signature on every document he is alleged to have signed in connection with his employment.

Analysis of evidence and submissions

[14] The applicant appeared to be under the impression that he had been dismissed for absence from work despite his absence being authorised by his supervisor. This would justify his anger at what would, had those been the facts, undoubtedly have been an unfair dismissal. However, his version was diametrically opposed to that of the respondent's on every material issue, and in these circumstances I am entitled to reject his version on the probabilities. His repeated denials that he had signed the contract, reminder notice and mutual termination agreement are completely implausible, apart from being at odds with the evidence of Nsibande. It is inconceivable in this day and age that an employee would work at a

client without a contract and without incident for three years only to be summarily dismissed for authorised absence from work. In any event, his disputed signature on the respondent's documents is almost identical to the admitted signature on the pre-trial minute. It is highly inconceivable that his signature on every document would have been forged. Nsibande was, furthermore, an impressive and credible witness and a longstanding senior manager of the respondent who would have little motive to fabricate evidence.

[15] It is therefore clear on the facts that the applicant was on a fixed term contract which specified an expiry date and that it terminated automatically on the expiry date without any proximate cause from the employer. The termination of a fixed term contract in these circumstances does not constitute a dismissal. The applicant's evidence in relation to his absence from work or whether or not this had been authorised by Chris is therefore immaterial. He was not dismissed for being absent from work. It is an unfortunate coincidence for the applicant that the termination date coincided with the date of his absence on account of attending the funeral of his brother.

[16] Insofar as the applicant appeared to suggest that he had not understood the terms of his contract, this is itself implausible. He was an articulate and boisterous witness who would not likely have agreed to terms he did not understand. In any event, having rejected his version on the fabricated signatures, he is deemed to have consented to the provisions pertaining to his fixed term contract by the principle of *caveat subscriptor.*

[17] In regard to costs it is significant to note that the applicant was paid up until the last day of his contract although he had not been at work on the day. The employer reminded him of the expiry of his contract and offered him a new contract, which he rejected. Although the respondent would have been entitled to absolution from the instance at the end of the applicant's case, the respondent's counsel opted not to seek absolution given that the applicant was unrepresented. The respondent

also waived its reliance on a provision that the mutual termination agreement was in full and final settlement of the dispute. The contract of employment moreover provided for private dispute resolution, which would have avoided the costs of litigation. The respondent's case was that the applicant was reminded of this provision by Morton on 16 November 2009 and again at the CCMA proceedings, but he persisted with his referral to this court. On these facts the respondent is entitled to its costs.

[18] Therefore, since the applicant has not established the existence of a dismissal as required by section 192 (1) of the Labour Relations Act 66 of 1995, the following order is made:

The applicant's claim is dismissed with costs

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Bhoola J

Judge of the Labour Court

Date of hearing: 29 July 2010

Date of judgment: 13 August 2010

Appearance:

The applicant represented himself.

The respondent was represented by Advocate F Venter instructed by Van Gaalen Attorneys