THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1351/19

In the matter between**:**

SOLIDARITY OBO WA SWART	**Applicant**
and	
KUSILE CIVIL WORKS JOINT VENTURE	**First Respondent**
COMMISSIONER MOHINI SOMAN *N.O*	**Second Respondent**
BARGAINING COUNCIL FOR THE ENGINEERING INDUSTRY	**Third Respondent**

Heard: 19 May 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 07 July 2022.

Summary: Review application – whether the employee was dismissed or his employment terminated *ex contractu* – parol evidence rule does not prevent evidence on contractual context and purpose from being adduced.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this review application, the applicant (Solidarity) impugns the arbitration award issued by the second respondent (arbitrator) under case number CCEI 12-15 dated 7 February 2019. The arbitrator found that Mr Willem Swart's (Mr Swart) employment contract terminated *ex contractu* and as such he was not dismissed as contemplate in terms of section 186(1)(a) of the Labour Relations Act[1] (LRA).

[2] This matter is coming to this Court for the second time. Previously it served before my late brother Steenkamp J. He reviewed and set the arbitration award which was in favour of Solidarity and referred the matter back to the third respondent for a hearing *de novo.* It is clear from his judgment that the issues for determination were limited to those outlined in the pre-arbitration minute concluded by the parties. Firstly, the arbitrator had to decide whether Mr Swart had been dismissed or whether his contract of employment terminated *ex contractu*. Secondly, if she found that indeed Mr Swart had been dismissed, then to determine whether the dismissal was procedurally and substantively unfair. The arbitrator understood the task at hand and dealt only with first issue as her finding in that regard was dispositive of the matter.

Pertinent facts

[3] Mr Swart was employed by the first respondent, Kusile Civil Works Joint Venture (KCWJV), a joint venture between four different companies, on a fixed term contract of employment with effect from 2 June 2010. He held the position of Safety Manager. KCWJV was contracted by Eskom to perform civil works at Kusile Power Station (Kusile).

[4] Sadly, Mr Swart's contract of employment is not drafted with clarity as to the date or event that would lead to its termination. In terms of clause 1.3.7 of the contract of employment, the "*end date*" is defined as "*the date of automatic expiration of the appointment referred to in item 10 in Annexure A or the termination of the project/assignment for which the employee has been appointed as reflected in item 7 of Annexure A, whichever occurs first*"[2]. It is common cause that item 7 in

[1] Act 66 of 1995, as amended. Section 186(1) (a) defines dismissal as "*an employer has terminated a contract of employment with or without notice*".
[2] See: Fixed Term Employment Contract, Bundle B, p 4.

Annexure A to the fixed term contract which deals with the project or assignment is blank. While item 10 of Annexure A refers to the end date as the "KCWJV Completion".[3]

[5] This matter then turns on the interpretation of the fixed term contract of employment, particularly the "end date" or "KCWJV Completion". Solidarity's contends that the end date or KCWJV Completion had not been reached when Mr Swart's employment was terminated. As such, it impugned the termination of Mr Swart's employment on 30 June 2015 as an unfair dismissal and accordingly referred a dispute to the third respondent.

[6] KCWJV, on the other disputes that Mr Swart was dismissed and contends that his employment terminated in accordance with clause 1.3.7 read with Annexure A, item 10, on the end date, being the KCWJV Completion.

Arbitration proceedings

[7] Mr Swart testified that his understanding was that KCWJV Completion meant that his employment would terminate when the joint venture was dissolved or abolished. This was so because Mr Van Wynard, the person who headhunted him, had assured him during the pre-engagement discussions. The scope of the project was never discussed with him when he was recruited nor at any stage of his employment.

[8] KCWJV's case, on the contrary, was that, even though the fixed term contract of employment is silent on the scope of the project, it could easily be discerned from the tender specification document. On 5 December 2008, Eskom awarded the Kusile Power Station Civil Main Works (Main Civil Contract or Package P10) to KCWJV. The scope of the main civil works that had to be performed under the Main Civil Contract mainly encompassed bulk works or structures; being the Boiler House, Auxiliary bay, Turbine Plant, Service Ducts, Trenches and Tunnels, Earthing Mat, Services Slabs and Paving, tanks and Auxiliary Foundation, Terrace Coal and Ash

[3] See: Annexure A, Bundle B, p 13.

Conveyors, Fabric Plant and Air Quality Control System Plan (the project). The details of the project are recorded as common cause in the pre-arbitration minute.[4]

[9] The agreed contract amount was R2.8 billion and comprised 391 000 cubic meters of concrete (cubes) broken down to 371 000 cubes, being main works and 20 000 cubes being re-access work. The commencement date of the Main Civil Works Contract was 8 December 2008 and the estimated time for completion was June 2013. It is not disputed that owing to the size of the main civil works, the project was termed a mega-project and a significant number of resources, including skilled staff, were required to work on the project. KCWJV appointed a number of employees on fixed term basis, including Mr Swart.

[10] It was KCWJV's evidence that the duration of the fixed term contracts of employment of its employees was based on an event, being the completion of the main civil works. It contended that when Mr Swart was appointed, the only project it had been contracted for by Eskom was main civil works, which were concluded on 30 June 2015. As a result, all employees who were on fixed term or limited duration contracts (LDC) of employment, including Mr Swart, were demobilised on 30 June 2015.

[11] The arbitrator accepted KCWJV's evidence and found that:

> '64 "KCWJV Completion" must therefore be interpreted in light of the above as the intention of Eskom and the Respondent [KCWJV] in contracting is central to the reason why the Applicant [Mr Swart] was employed on an LDC. Eskom clearly intended for the Respondent [KCWJV] to perform the main civil works at Kusile and the Respondent [KCWJV] entered into LDCs with its employees for the purpose of performing the main civil works at Kusile. The Applicant [Mr Swart] was appointed as safety manager at Kusile for the duration of the period that it took to finalise the main civil works at Kusile. The Applicant [Mr Swart] has not shown that "KCWJV Completion" relates to the dissolution of the Respondent [KCWJV].

[4] See Pre-Arbitration Minute, Documentary Records of the Arbitration Proceedings: First bundle, p 1.

Le Riche confirmed that there are no Respondent [KCWJV] employees at the site presently.

65 The Respondent [KCWJV] has shown that the main civil works ended by 30 June 2015 and notices were handed to all LDC employees that their contracts would automatically terminate at that date. Their contracts therefore ended when the main civil works were completed and the completion of the main civil works constitutes the end date of their contracts.'[5]

Ground of review

[12] Solidarity contends that the award is reviewable in terms of section145 subsections (1) and (2) of the LRA, *inter alia*, on the following grounds:

12.1. The arbitrator failed to arrive at a decision based on all relevant evidence properly placed before her;

12.2. The arbitrator failed, in relation to her duties as the arbitrator, to responsibly and fairly apply her mind to crucial issues placed before her;

12.3. The arbitrator failed to consider material facts and/or issues and ignored relevant and crucial evidence going to the crux of the matter and the credibility of KCWJV's witness;

12.4. The award is wrong in law and not based on applicable legal principles relevant to the process of interpretation of contracts and the principles dealing with extrinsic evidence.

[5] See: Arbitration Award, Pleading Bundle, pp 69-20.

[13] To the extent that the arbitrator only pronounced on the first issue pertaining to whether Mr Swart was dismissed, the review test is correctness and not reasonableness.[6]

Evaluation

[14] As mentioned above, the question at issue in this matter is the contractual interpretation, particularly, the role of the surrounding circumstances and the nature of the evidence that can be considered. In *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni),*[7] the Supreme Court of Appeal (SCA) reaffirmed the correct approach as follows:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract

[6] See: *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd & others* (2019) 40 ILJ 1539 (LAC) at para 5; *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 ILJ 2337 (LAC) at para 29; *South African Rugby Players' Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby Pty Limited v South African Rugby Players Union and Another* [2008] 9 BLLR 845 (LAC) at para 41.

[7] 2012 (4) SA 593 (SCA) at para 18.

for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Emphasis added)

[15] In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*[8] (*Capitec Bank*), the SCA aptly expounded the approach articulated in *Endumeni* which was subsequently endorsed by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*[9] *(University of Johannesburg)*. It was stated:

'[39] … the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties to the contract intended. In a passage of some importance, the Constitutional Court sought to clarify the position as follows:

> "Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses". It is also true that "to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible". I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court

[8] 2022 (1) SA 100 (SCA) at paras 39-42.
[9] 2021 (6) SA 1 (CC) at paras 64-68.

dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight."[10]

[40] This seeks to give a very wide remit to the admissibility of extrinsic evidence of context and purpose. Even if there is a reasonable disagreement as to whether the evidence is relevant to context, courts should incline to admit such evidence, not least because context is everything. The courts may then weigh this evidence when they undertake the interpretative exercise of considering text, context and purpose.

[41] The Constitutional Court in *University of Johannesburg* also recognised the parol evidence rule in our law. It sought to reconcile the generous admissibility of extrinsic evidence of context and purpose and the strictures of the parol evidence rule in the following way:

"The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement…"[11]

[42] This reconciliation requires some reflection. It recalls one of the most important debates as to the foundations of the law of contract. Is the meaning of a contract to be understood on the basis of the subjective intentions of the parties to the contract or the objective manifestations of their consensus? The rationale of the parol evidence rule is based on the value of objectivism. Parties enter into written contracts that include clauses affirming the writing to be the exclusive memorial of the parties' agreement

[10] Ibid at para 68.
[11] Id at para 92.

so as to permit certainty as to the agreement, and avoid making every agreement the starting point of an evidential battle.'

[16] In addition, in *Capitec Bank,* the SCA made the following observations on the implications of the *dictum* in *University of Johannesburg*[12]:

'[47] …First, it is inevitable that extrinsic evidence that one litigant contends to have the effect of contradicting, altering or adding to the written contract, the other litigant will characterise as extrinsic evidence relevant to the context or purpose of the written contract. Since the interpretative exercise affords the meaning yielded by text no priority and requires no ambiguity as to the meaning of the text to admit extrinsic evidence, the parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined. That is so for an important reason. It is only possible to determine whether extrinsic evidence is contradicting, altering or adding to a written contract once the court has determined the meaning of that contract. Since meaning is ascertained by recourse to a wide-ranging engagement with the triad of text, context and purpose, extrinsic evidence may be admitted as relevant to context and purpose. It is this enquiry into relevance that will determine the admissibility of the evidence. Once this has taken place, the exclusionary force of the parol evidence rule is consigned to a rather residual role.

[48] Second, *University of Johannesburg* recognises that there are limits to the evidence that may be admitted as relevant to context and purpose. While the factual background known to the parties before the contract was concluded may be of assistance in the interpretation of the meaning of a contract, the courts' aversion to receiving evidence of the parties' prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract. Blair Atholl rightly warned of the laxity with which some courts have permited

[12] *Capitec Bank* at paras 47 – 51.

evidence that traverses what a witness considers a contract to mean. That is strictly a matter for the court. *Comwezi* is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case made it plain such evidence must be relevant to an objective determination of the meaning of the words used in the contract.

[49] Third, *Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni*, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.

[50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.' (Emphasis added)

[17] Turning to the present case, clearly there is no merit in Solidarity's contention that the arbitrator misconstrued the applicable legal principles pertaining to contractual interpretation. It is clear from the above authorities that the parol evidence rule does not prevent evidence on contractual context and purpose from being adduced.

[18] The provisions at issue is clause 1.3.7 of Mr Swart's contract of employment, which defines the "end date" as the date of automatic expiration of the appointment referred to in item 10 of Annexure A or the termination of the project/assignment for which the employee has been appointed as reflected in item 7 of Annexure A, whichever occurs first. Despite the fact that the project or assignment is not spelt out, it is common cause that KCWJV was contracted by Eskom to carry out the main civil works or the project.

[19] For whatever reason, in 2014 Eskom and the KCWJV concluded a memorandum of understanding (MoU) wherein the main civil works and 'completion works' were separated, albeit under the original scope of the Main Civil Contract. The main civil works concluded on 30 June 2015, hence fixed term contract employees were demobilised, including Mr Swart.

[20] Solidarity takes no issue with the fact that KCWJV was only contracted to perform main civil works when Mr Swart was employed. Nonetheless, it disputes that Mr Swart's contract of employment automatically terminated on 30 June 2015 for the following reasons:

> 20.1. Mr Swart's employment contract could only terminate automatically when the joint venture was dissolved; and
>
> 20.2. The Main Civil Contract between Eskom and KCWJV did not come to an end on 30 June 2015.

[21] In my view, the construction Solidarity accords to the phrase "KCWJV Completion" is untenable. As correctly contended by KCWJV, what would have been the purpose of keeping Mr Swart in its employ when the main civil works, which his

contract of employment was subject to, had been completed. Therefore, the arbitrator's finding that, given the context of the relationship between Eskom and KCWJV, the phrase "KCWJV Completion" could only refer to the completion of the main civil works, cannot be faulted.

[22] Likewise, nothing much turns on the fact that the Main Civil Contract between Eskom and KCWJV did not come to an end on 30 June 2015. Clause 1.3.7 of Mr Swart's contract of employment defines the "end date" as the date of automatic expiration of the appointment referred to in item 10 in Annexure, that is, KCWJV Completion or the main civil works.

[23] Tellingly, KCWJV's evidence that the main civil works ended on 30 June 2015 was not seriously disputed and was accordingly accepted by the arbitrator. The high water mark of Mr John Le Riche's (Mr Le Riche) cross examination was that KCWJV had re-access work continuing even after 30 June 2015. Mr Riche was adamant that re-access work after 30 June 2015 was part of completion works which was still subject to further negotiations between Eskom and KCWJV. Nonetheless, Eskom could have appointed any contractor to attend to the completion works, including re-access work, in terms of a different package. Since the main civil works concluded on 30 June 2015, the contractual terms between Eskom and KCWJV changed thereafter as correctly found by the arbitrator.

[24] Having considered the evidence that was before the arbitrator, it is clear that the terms of the Main Civil Contract between Eskom and KCWJV do lend context to clause 1.3.7 of Mr Swart's contract of employment read with item 10 of Annexure thereto which was to link the end date with the completion of the main civil works. To hold otherwise would be inconsistent with the purpose to which the fixed term contract of employment was concluded; and, in turn, contrary to sound commercial notion.

Conclusion

[25] In all the circumstances, the award is unassailable as Mr Swart's employment terminated *ex contractu*. This application accordingly falls to be dismissed.

Costs

[26] On the issue of costs, I am not inclined to award costs as it would offend the principles of law and fairness.

[27] In the premises, I make the following order:

Order

1. The review application is dismissed.

2. There is no order as to costs.

P. Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate C Jooste
Instructed by:	Solidarity
For the First Respondent:	Advocate M Lennox
Instructed by:	Beech Veltman Incorporated