



**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

**JUDGMENT**

Not Reportable

Case no: PS 45/13

In the matter between

**LEONARD CLIFFORD SAWYER**

**First Applicant**

**PHILLIPUS ENGELBRECHT**

**Second Applicant**

**BENJAMIN LOURENS ESTERHUIZEN**

**Third Applicant**

and

**4Q FISHING (PTY) LTD**

**Respondent**

**Heard: 8 September 2014**

**Delivered: 23 October 2015**

**Summary: Applicants on fixed terms contracts are not entitled to compensation in excess of the remainder of their contracts when dismissed for operational requirements of the respondent before the termination date of their contracts.**

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**JUDGMENT**

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LALLIE J

- [1] The respondent conducts business in the fishing industry. The applicants alleged that they were employed by the respondent on one of its fishing vessels, the MFV Amalia (“the Amalia”) as skipper, mate and driver respectively. They were employed on fixed term contracts pursuant to a discussion between the first applicant and Mr Van Heerden (“Van Heerden”) a Director and shareholder of the respondent in June 2013. They had to catch 200 tonnes of fish by 31 December 2013. The first applicant was to be paid a commission of R1500.00 per tonne of fish landed plus VAT while the second and third applicants were to earn a monthly basic salary of R4500.00 plus R320.00 per tonne of fish landed. On 20 September 2013, the respondent through Van Heerden informed the first applicant that it had decided, for its operational reasons, to tie the Amalia up. The consequences of the decision were that the Amalia would not be going to sea and the applicants’ contracts would be terminated. The first applicant conveyed the decision to the other applicants. The applicants seek an order declaring the termination of their services to constitute an unfair dismissal. They seek compensation.
- [2] The respondent denied having employed the first applicant and submitted that he was an independent contractor. It however, conceded having employed the second and third applicants but denied having dismissed them. Section 192(1) of the Labour Relations Act 66 of 1995 as amended (“the LRA”) places the onus of proving the existence of a dismissal on employees. In an effort to discharge the onus, the first applicant testified that on his arrival at home after returning from sea on Friday 20 September 2013, Van Heerden phoned him and told him that he was tying the Amalia for financial reasons. He added that they no longer had jobs. The first applicant conveyed the message to the second and third applicant. The following Monday, the applicants went to the Amalia to collect their personal belongings. They found Louis, a new skipper, his mate, driver and crew ready to go to sea on the Amalia. When the first applicant made enquiries from the respondent about the changes, he was informed that the decision was based on economics.

- [3] Van Heerden conceded having told the first applicant that the Amalia had been tied up for economic reasons. He alleged that owing to the first applicant's non-performance, the respondent could not sustain the Amalia. He explained that Louis was employed on another vessel and joined the respondent when it bought the Amalia. He had known Louis for 20 years and considered him the best skipper. He had no driver and no mate but the second and third applicants refused to work with him. They walked out on their jobs without being dismissed.
- [4] I have considered the mutually exclusive versions presented by the parties against the background of the test laid down in *Stellenbosch Farmers' Winery Group Ltd and Another v Mertell Et Cie and Others*<sup>1</sup>. I am of the view that the applicants presented a more probable version because the respondent did not tell the second and third applicants either directly or through the first applicant that they had to work with Louis. Engelbrecht's evidence that the Amalia is a grade four vessel which can only take one mate and one driver was unchallenged. The first and second applicants' evidence that they found Louis, his mate and driver ready to go to sea with their crew is consistent with the respondent's omission to tell them to join Louis on his first trip. By informing the second and third applicants that the Amalia would be tied up and employing a different mate and driver to work with Louis, the respondent terminated the contracts of employment of the second and third applicant. As the respondent terminated the second and third applicants' fixed term contracts of employment before the agreed date, the termination, in the circumstances, constituted dismissal.
- [5] The respondent denied having employed the first applicant and submitted that he was an independent contractor. As the applicants approached this court in terms of the LRA the relevant definition of an employee is the one in section 213 of the LRA which is:

- '(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

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<sup>1</sup> 2003 (1) SA 11

- (b) any other person who in any manner assists in carrying on or conducting the business of an employer’.

- [6] The first applicant testified that Van Heerden offered him the job, on exactly the same terms he had been working. He had been working as an employee and not an independent contractor. Van Heerden testified that when the first applicant told him that he was looking for a job, he further told him that he worked for a commission which he used for his farming business. He then introduced him to the big shareholders who made decisions. It was never his intention to employ the first applicant as he did not even promise to pay him remuneration. For purposes of his payment, the first applicant submitted an invoice and charged the respondent VAT.
- [7] A number of tests may be applied to determine whether the first applicant was an employee. I, however, have considered the submissions on behalf of both parties on whether the first applicant was an employee including the authority they sought to rely on and found the decision in *Denel (Pty) Ltd v Gerber*<sup>2</sup> relied on by both parties apposite. The court found that the true relationship between the parties needs to be established objectively. The dominant impression test is applicable in determining the existence of an employment relationship. It requires an enquiry into whether the employer had the right to supervise and control the employee, whether the employee forms an integral part of the organisation, and the extent to which the employee was economically dependent upon the employer.
- [8] Van Heerden denied that the first applicant worked under his supervision and control. His version could not stand against the first applicant’s evidence that he did not take the decision when to go and return from sea. He had no unconditional right to refuse to go to sea. He did not refuse to go back to sea immediately after offloading. The first applicant formed an integral part of the respondent in that the respondent provided everything that he needed to fish. At sea he was a manager of all the respondent’s employees in the Amalia.

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<sup>2</sup> [2005] 9 BLLR 849 [LAC]

- [9] Van Heerden testified that the first applicant was not economically dependent on the respondent in that he used the money generated from fishing to pursue his farming operations and engineering work. The first applicant's version to the contrary is more probable judging by the amount of time he spent at sea, he could not have had time to do other business. The Amalia generally went to sea on Sundays and returned on Fridays. The first applicant did not refuse to make a turnaround in that when required by the respondent he would offload immediately and return to sea. The single income generating job he did for the respondent outside his work as a skipper is insufficient to base the decision that the first applicant was not economically dependent on the respondent. Charging VAT does not on its own disqualify a person from being an employee. See *Denel (supra)*. When the dominant impression test is applied, it supports the version that the first applicant was an employee of the respondent. The termination of his employment on 20 September 2013 when he was told that the Amalia would be tied up constituted a dismissal.
- [10] The respondent's evidence that the applicants were dismissed for its operational requirements was not refuted. The respondent conceded that it did not follow a fair procedure in effecting the dismissals. It was argued on behalf of the first applicant that he should be awarded compensation equivalent to remuneration he would have earned for fishing 160 tonnes of fish, the outstanding amount in terms of his contract. The second and third applicants argued that the respondent should be ordered to pay them compensation equivalent to remuneration they would have earned over a period of 12 months. The respondent argued that there was no legal basis for the applicant to be awarded compensation in excess of remuneration they would have earned had their fixed term contracts ran their course.
- [11] The applicants were employed on fixed term contracts which would have expired either after they had fished 200 tonnes of fish or at the end of December 2013. It is important to maintain the distinction between limited and unlimited duration contracts of employment. Section 194 (1) of the LRA requires compensation to be just and equitable. Compensation for employees on fixed term contracts therefore may not exceed remuneration for the balance

of their fixed term contracts. In this regard see *Tshongweni v Ekurhuleni Metropolitan Municipality*<sup>3</sup>. The applicants presented no evidence justifying awarding them compensation in excess of the remainder of their fixed term contract. The applicants on the average earned monthly remuneration of R 17 063.20, 8 931.05 and R9 216.05 respectively.

[12] I could find no reason both in law and fairness for costs not to follow the result.

[13] In the premises the following order is made:

13.1 The applicants were employees of the respondent.

13.2 The applicants' dismissal for operational requirements of the respondent was substantively fair but procedurally unfair.

13.3 The respondent is ordered to pay each applicant compensation equivalent to remuneration he would have earned over a period of three months which represents the remainder of his fixed term contract.

13.4 The respondent pay the applicant's costs.

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Lallie J

Judge of the Labour Court of South Africa

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<sup>3</sup> [2010]10 BLLR1105 (LC).

Appearances

For the Applicant: Mr Portgieter of Portgiter Attorney

For the Respondent: Mr Unwin of Chris Unwin Attorneys

LABOUR COURT