

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT INDUSTRY**

In the arbitration between:

S.A. Dlamini

Applicant

and

Carlbank Mining Contracts (Pty) Ltd.

Respondent

ARBITRATION AWARD

Case Number: D1578/JHB/9295/05

Date/s of arbitration: 23 October 2007

Date of award: 31 December 2007

Head-note: Dispute regarding whether the Applicant was dismissed or whether his fixed term contract came to an end. Award in favour of the Respondent.

Johan D. Stapelberg
Arbitrator

1. DETAILS OF HEARING AND REPRESENTATION

The hearing was held on 23 October 2007, at the Bargaining Council's offices in Braamfontein. The Applicant represented himself. The Respondent was represented by Advocate F. Venter, who was instructed by Van Gaalen Attorneys. The hearing was conducted in English (with interpretation in Zulu being provided for the Applicant by U. Kgaphola where required). The hearing was recorded by the Bargaining Council's computer recording system.

On perusing the file, I found that the case had quite a drawn out history, which I will very briefly summarise for completeness sake. The dispute originated in May 2005 and was first referred to the CCMA, where the Respondent raised a jurisdictional point in limine, which led to the matter being referred to the Bargaining Council. There the Respondent again raised the jurisdictional point in limine. The Commissioner ruled that the Bargaining Council does have jurisdiction and this ruling was taken on review to the Labour Court. After some time passed, the Respondent then decided to withdraw its case at the Labour court and accept the jurisdictional ruling of the Bargaining Council.

2. BACKGROUND INFORMATION

2.1 Applicant's Opening Statement

The Applicant said that he worked at HRP as a driver and goods were lost on the way to Pretoria. He, two Assistant Drivers and a Security Guard were the ones transporting the goods to Pretoria. After the goods were lost, he was held responsible. The Applicants said that he was arrested at Kempton Park. He got out on bail and called the Respondent by phone. His employer told him that he got what he deserved because he is a thief. The Applicant said that after winning the case he returned to the Respondent. For two weeks he was told that the person he was looking for is not available. He was told to come with his own overall and to dig holes. When he returned the next day, he was given a referral letter and a UIF form to go and look for another job. He was told that he can return in six months to apply for provident fund. After this he referred a case because he felt the way he was treated was wrong. He said that no hearing was held and no procedures were followed. He believes he was dismissed unfairly. The Applicant said that he wishes to be compensated.

2.2 Respondent's Opening Statement

The Respondent's representative said that they dispute that there was a dismissal. He said that Mr Nsibandé will testify on behalf of the Respondent. The Respondent seeks that the matter be dismissed with costs, as they believe that the referral is frivolous and vexatious.

3. PRELIMINARY ISSUES

None.

4. THE ISSUE(S) TO BE DECIDED

4.1 Issues that are in Dispute:

Whether the Applicant was dismissed and if so whether such dismissal was fair.

4.2 Issues that are Common Cause:

The following is not in dispute:

- The dismissal of the Applicant is in dispute, so the Applicant will start the proceedings and bears the onus to prove that he was dismissed. If he succeeds in this, the Respondent will have the onus to prove the fairness of the dismissal;
- The Applicant started with the Respondent on 8 February 2005. His employment terminated on 10 May 2005. He was employed as a Driver at the time of termination. He was earning a basic weekly wage of R602.56.

4.3 Documentary Evidence

The Respondent submitted documents (21 pages) and the Applicant confirmed that he had received these and read through them prior to the arbitration. The Applicant agreed that nothing contained in the bundle is being disputed and that it can be accepted as evidence in to the record without the need for authentication by oral evidence, with the following exceptions.

- P.10 (Notice of Termination of Fixed Term Contract). The Applicant said that he did not sign this document and he did not receive the document either.
- P.11 (Offer of Alternative Employment). The Applicant said that he did not receive this document.
- P.15 (Letter seeming to be a from a Mr S. A. Dlamini). The Applicant said that he did not write this letter.

With regard to common cause documents, not mentioned above, parties were instructed that they would still need to refer to the specific documents to be considered in analysing the matter.

5. SUMMARY OF EVIDENCE & ARGUMENT

5.1 Applicant's Version

5.1.1 Sabela Alson Dlamini (Sabela / the Applicant), testified under oath:

- The Applicant said that he believes he was unfairly dismissed because he was not found guilty on any of the matters he was accused of and that not even the magistrate found him guilty.
- The Applicant said that the employer was supposed to look in more detail at his arrest and that if he was wrong, a disciplinary hearing was to be held, but the company did not do anything.
- He said that the Respondent was against him and that they were probably relieved that he was arrested.
- The Applicant said that after the matter was finalised in the Magistrates court on 10 August 2005, he was not given any documents by the Respondent or asked to sign anything.
- The Applicant said he was arrested on 5 May 2005 and given bail on 6 May 2005. He said that from 6 May 2005 he was not given any documents nor did he sign anything.
At this point the Respondent's representative objected to the fact that the interpreter was pointing the Applicant to certain documents. The interpreter apologised.
- The Applicant referred to p.10 and said that it does contain his signature, but that he did not sign the letter and he did not receive it either. He said he only saw it today at the arbitration. He said the same applies to p.11.
- The Applicant said that with regard to p.15 he has seen the document before at the first hearing at the Bargaining Council in 2005. The representative from the company gave it to him that time.
- The Applicant said that the company called him a thief and yet he did not steal anything from them. He said that when he was told to do other work, it was clear that he was not wanted back. The Applicant said that the person he spoke to was a Director of the company. He does not recall his name. He said it is not Mr Nsibande or Mr Ferreira.
- The Applicant said that no hearing was held and no procedures were followed, which is why he believes he was unfairly dismissed. He said that he did not sign any documents, apart from the employment contract, which he signed on his first day with the Respondent. The Applicant said that the other pages does not contain his signature, so he he did not sign or write those documents. He is only certain about signing his contract.

During cross-examination, the Applicant was referred to p.1 to 8 of the bundle, which is his contract of employment. It was put to the Applicant that he had not placed these pages in

dispute and although the signature on each page is not precisely the same, it is nevertheless all his signature. The Applicant was referred to p.1 where it says in the first paragraph that the Applicant is employed under the terms that follow. The Applicant was referred to p.2, paragraph 2, where it speaks of the duration of the contract. He confirmed it determines the manner of employment. He was then referred to p.8 where it indicates in the 1st paragraph that he is employed only for 3 months and that his contract is to end on 10 May 2005. He disagreed with this. He was referred to paragraph 2 and 4 on the same page where it confirms that he is employed from 8 February 2005 to 10 May 2005. The Applicant disputed these paragraphs as well.

The Applicant was asked if he had committed an offense with regard to a box of clothes, whether he was committing it against the Respondent or HRP. He said it was against HRP. It was put to the Applicant that this is correct and therefore any action taken against the Applicant would have been taken by HRP and not the Respondent. The Applicant confirmed this. It was put to the Applicant that the reason why there was no hearing or disciplinary action is because the Respondent could not take action against him. All they required was that the Applicant comply with his contract of employment. The Applicant said that he will not comment. It was put to the Applicant that the best evidence are the documents before the Arbitration. He was asked why he now disputes page 8, even though he previously confirmed it to be correct. The Applicant said that he was not told that his contract was terminated, but that he was to leave and do another job, which is why he did not put page 8 in dispute. The Applicant was informed that this response makes no sense at all and the question was repeated. The Applicant, after paging through the contract again, said that he is confused because the contract he had been given before and the one he has today is not the same. He said that page 8 is not contained in the court Application. It was put to the Applicant that the "Annexure A" being referred to in paragraph 2.1 on p.2 of the contract is the same Annexure A contained on p.8 of today's bundle. The Applicant said that he is now disputing page 8 of the contract. He said that the reason for this is that he does not understand why the termination date is recorded as 10 May 2005. He said that the contract had been tampered with and that the company committed fraud in that they changed the date. The Applicant said that he did sign the document, but that the date had not been written down. He said he signed the document but was not told what is meant with a "fixed term contract". It was put to the Applicant that he is not here in good faith and that he did not take his oath seriously. It was put to him that he was wrong about the Director and that now when he is being tied down to the documents that he confirmed to be correct, he suddenly disputes the content, but is unable to give a proper explanation why. He was asked to try again to explain this. He said that he said it because the contract on record is different from the one he signed, as contained in the respondent's court application. The Respondent's

Application pointed out that the copy the Applicant refers to is a fax and some of the content had been reduced. The Applicant said that he did not receive a copy of his contract. He was referred to p.9 where he confirmed that he had received a copy of the contract. He maintained that he did not. He was asked to explain this contradiction with this morning's confirmation that the document is correct. The Applicant said that he was not given a copy of the contract, he just received a copy with the Labour Court application.

It was put to the Applicant that he had a very particular start and end date and he was given an alternative offer of employment, which he declined. The Applicant said that he wasted two weeks at the company's door and was then told to go work elsewhere.

The Applicant was referred to p.10 and it was put to him that he did sign this document and that he did know that his contract would terminate on 10 May 2007. The Applicant denied this.

The Applicant was referred to p.11 and told that this document was given to him and also confirmed the date his contract was to end, as well as mentioning the alternative position. The Applicant denied this.

The Applicant was referred to p.15 and it was put to him that he had written this letter and that in it he has said that he did not wish to work for the company any longer. The Applicant denied writing this letter and he said that he had not seen Mr Nsibande before. The Applicant was again referred to p.8 and asked to mention each aspect that was changed after he signed it. The Applicant said that he did not have enough time today to read the contract. It was pointed out to him that before being asked about the accuracy of the documents, he said he had had enough time to study the bundle and that he did not request more time even though it was offered. It was also pointed out he had answered questions about p.8, claiming he did sign it but that the completion date was changed. He was then again asked to list all of the alleged changes that were made after he had signed the document. The Applicant said that when he signed the contract, it did not indicate that he would work as a driver for three months. He said that he had put his signature next to a blank paragraph in respect of paragraphs one to three. He said he also signed at the bottom even though no date was completed there either.

The Applicant said that the Magistrates Court faxed the documents through to the Bargaining Council directly as well as to the Labour Court. He said that they did not give him copies of the documents. He said that he was using a government lawyer and was later told he doesn't work for the government any longer. The documents indicate that the case was finalised on 25 August 2007. It was pointed out that this was long after his termination with the respondent was finalised.

The Applicant had nothing to say in re-examination.

5.2 Respondent's Version

5.2.1 Abel Macdonald Nsibande (Abel / the Applicant), testified under oath:

- Abel said that he is the Operations Director. He said he has held this position for the past 20 years. He said that the Respondent employs about 22000 people.
- Abel said that the Applicant is not telling the truth and that all of the signatures on the documents are his. He said that they used to leave recruitment to the Junior Managers and he became more involved. He was also involved when the company was smaller. As they grew they used allocation managers, but he decided to get involved again. He said that he is involved in many of the placements. He said that they generally use the same core group that is being redeployed.
- Abel said that all employees working for them go through the same induction and are given the same documents to sign. He said that to his knowledge the Applicant did receive a copy of his contract. He confirmed that prior to today the Applicant never disputed the content of the contract.
- Abel said that HRP is a logistics company and they have a work relationship with them. If they need people, they send a staff request and the Respondent goes to employ such people. He confirmed that their work involved driving.
- Abel confirmed that their company uses a number of Directors. He said that the Applicant never came to him or any of the other, claiming he had been deceived or unfairly treated by one of the Directors. He said that he also did not mention anything about being unhappy or being dismissed unfairly. Abel said today is the first time he hears of this.
- Abel said that he himself normally explains the documents, including p.8. He said the Applicant is not telling the truth when he claims that he never saw him before. Abel denied that this document had been tampered with after signing. He said that what is given to the employees are as per the request from the client. He said that nothing was written into the contract afterwards and this is the same as the original documentation.
- Abel was referred to p.9 and said that this checklist is used to ensure that all items have been dealt with. He said it is not correct that the Applicant did not get a copy of the contract.
- Abel said that he is involved in recruitment because he speaks various other languages so he helps to explain the documents to the employees. He said that he speaks about 11 languages.

- Abel was referred to p.10. He said that this document was issued to the Applicant and he himself signed as a witness that it was given to the Applicant. He said the document was also explained to the Applicant.
- Abel was referred to p.11. He said that on the last day, when the individual is getting his final pay, this is attached to his payslip, inviting him to return for redeployment. He said they sometimes also staple IRP5s to the payslips. The Applicant said that he left some of his payslips at the Department of Labour and he does not have his final payslip with him.
- Abel said that the Applicant was not the only person whose contract ended that day, but said that there were more than 5, which included Drivers and Packers.
- Abel was referred to p.15. He said he is familiar with this document. He said that after the invitation the Applicant came to their office. He was given the option of working in civils because there were no driving positions available at the time. He was told he would receive the same salary as before. His response was that he rejected the offer and he submitted this letter the next day. He said that the Applicant gave him this letter personally. He said the Applicant wrote this letter there on the company premises and he did so because the Respondent asked him to confirm his decision in writing.
- Abel denied that the Applicant left because he was dismissed. He said that his fixed term contract ended.

During cross-examination, Abel maintained that he was present on the day the Applicant was employed and that he employed the Applicant. It was put to him that the Applicant was dealing with a white person on that day. Abel said that the Applicant is being dishonest and that he (Abel) was involved in the explanation of the contract, signing thereof and the deployment of the Applicant.

Abel was referred to p.10. He said that the signature of the Applicant on this page looks the same as on the other documents he had signed. Abel said that p.10 was explained to him when he was given notice. There was also no need to mention the notice on the day of termination, as it was already explained before then. He said on the day of termination various offers were made to him, which he turned down.

Abel was referred to p.11 and it was put to him that this document was not attached to his last payslip and that his pay was handed over to him. Able maintained that the document was attached to the Applicant's final payslip.

Abel was referred to p.15. It was put to him that the Applicant signed each page of his contract and he was asked why there are no signatures on p. 10, 11 and 15. Abel pointed out that p.10 was signed by the Applicant. P.11 was attached to is payslip and there was no need for him to sign the document. Abel said that the Applicant wrote this letter in his own

handwriting. He was asked why it was not deemed important for the Applicant to sign pages 11 and 15. Abel said that these documents are not agreements requiring a signature. They may as well have been faxed.

Abel was asked why the contract in the bundle and the one he received with the court application is not the same, in that documents were left out. Abel said that an agreement was signed and a copy was given to the Applicant. He said that his own original copy is valid as it stands. It was put to him that the contract he received through the Labour Court is not the same as what he has received today. Abel and the Respondent's representative studied the document for some time, after which Abel replied that the contracts are in fact the same. Abel was asked why page 8 of the contract was not included in the Court Application. Abel said that he is unable to say why it was not included. He said that he did not draft the review Application. He also pointed out that the contract in the court Application also makes reference to an Annexure A, just like the one before the Arbitration today and yet the Applicant did not deny that there should be an Annexure A or supply a different document to the Annexure A they are referring to today.

There were no questions in re-examination.

5.3 Closing Arguments

5.3.1 Applicant's Closing Statement

The Applicant said that he believes the Respondent has been dishonest and he seeks to be compensated for the time he was unemployed.

5.3.2 Respondent's Closing Statement

The Respondent's representative said that there is no evidence that the Applicant had any expectation of renewal and he did not rely on this defense. The Applicant confirmed he entered into the fixed term contract and later retracted a number of submissions. He said that the Arbitrator has to rely on the "integration" or the "best evidence" rule. He said that the best evidence is the contract and the papers bearing signatures. The Employer went to great lengths to ensure its administration was in order. No evidence was presented to show that the contract was entered into under duress. He said that in accordance with the Caveat Subscriptor principle, the Applicant is bound by the contract. He is bound because he affixed his signature. The Applicant was evasive and contradictory in his testimony on a number of instances, and these were also pointed out to him.

The Applicant had to show that he was dismissed, which he has failed to do. The enquiry should therefore cease there. He has failed to prove his case. The manner in which he proceeded in the matter, shows that he was being frivolous and vexatious. The Respondent

seeks for costs to be awarded on a party to party scale. The Respondent's representative agreed to fax the case law he is relying on to myself.

6. ANALYSIS OF EVIDENCE AND ARGUMENT

6.1 General

Having considered the evidence and arguments presented to me, I find that the version of the Respondent is far more probable than that of the Applicant. Here follows an analysis of some of the evidence presented, which I found particularly significant in reaching my conclusions.

- The Applicant was referred to p.8 of the contract of employment, where it indicates in the 1st paragraph that he is employed only for 3 months and that his contract is to end on 10 May 2005. He disagreed with this. He was referred to paragraph 2 and 4 on the same page where it confirms that he is employed from 8 February 2005 to 10 May 2005. The Applicant disputed these paragraphs as well. I fail to understand why the Applicant said he disagreed with the content of the page. He did not provide an explanation for disagreeing. The contract clearly states that it ends on 10 May 2005. The contract was also one of the the common cause documents that were not placed in dispute at the beginning of the arbitration.
- The Applicant said that he did not receive a copy of his contract. He was referred to p.9 where he confirmed that he had received a copy of the contract. He maintained that he did not. He was asked to explain this contradiction with this mornings confirmation that the document is correct. The Applicant said that he was not given a copy of the contract, he just received a copy with the Labour Court application. The Applicant failed to explain the contradiction in that he confirmed the accuracy of the documents in the beginning of the arbitration and later denied it. I will therefore hold the Applicant to his earlier acceptance of the relevant documents in the bundle.
- The Applicant said that when he signed the contract, it did not indicate that he would work as a driver for three months. He said that he had put his signature next to a blank paragraph in respect of paragraphs one to three. He said he also signed at the bottom even though no date was completed there either. I believe this is a blatant lie and that the caveat subscriptor maxim (beware the signatory) is very much applicable in this case.
- It was put to Abel that the contract the Applicant received through the Labour Court is not the same as what he has received today. Abel and the Respondent's representative studied the document for some time, after which Abel replied that the contracts are in fact the same. My own observations confirmed this. Not all signatures appear on all pages, which may be due to it being cut off by fax, but the Applicant's signature is on all

pages in the same place, as compared between his own copy and the copy in the bundle. The content of the contracts is identical as well.

6.2 Analysis of Issues in Dispute

– Whether the Applicant was Dismissed, as opposed to his fixed term contract terminating:
I agree with the Respondent's representative that the best evidence before me are the documents containing the Applicant's own signature, these being the contract of employment and its annexure. Since I am holding the Applicant to his earlier acceptance of the bundle, including the contract of employment which is central to determining the dispute, it follows that I accept the Respondent's version that he was not dismissed, but that his fixed term contract of employment expired and furthermore that he was not redeployed elsewhere because he refused to accept the alternative offer of employment. The Applicant has therefore failed to prove that he was dismissed. The fact that the Applicant was arrested and charged with theft and that the client (HRP) clearly did not want him working on their premises again, has no bearing on the fact that his employer, the Respondent, did not dismiss him.

6.3 Request for Costs

The Respondent alleged that the Applicant's referral was frivolous and vexatious and that he never had any prospects of success and as such should be ordered to pay the wasted costs of the Respondent. The Respondent's representative alluded to the issue of costs in both its opening and closing statement and the Applicant never provided any arguments against the request. In cross examination, the Applicant admitted that the negative actions taken against him were done by HRP and not the Respondent, so whatever grudges he may hold regarding the fact that he could not continue working at HRP's premises could clearly not be directed at the Respondent. I agree with the Respondent that the Applicant never had any prospects of success. Although the delays in having the matter arbitrated are in my view, mostly due to the Respondent's previous interventions, the fact that the Applicant persisted with the matter, in the absence of any prospects of success, would indeed contribute to frivolous and vexatious nature of the referral. As such, I believe that it would be appropriate to order that the Applicant bear the costs of the Respondent on a party to party scale.

7. AWARD

I find that the Applicant was not dismissed, but that his fixed term contract expired and as such the matter is dismissed.

The Applicant is hereby ordered to pay the costs of the Respondent on a party to party scale. The Respondent is to submit its schedule of costs to the Taxation Master at the

Bargaining Council. Once an approved amount has been determined by the Taxation Master and served on the Applicant in writing, the Applicant is to pay the relevant amount to the Respondent within 14 days of receiving the written notice containing the amount.

A handwritten signature in black ink, appearing to read 'Johan D. Stapelberg', is written over a light grey rectangular background.

Johan D. Stapelberg

Arbitrator