



DEFAULT AWARD

Arbitrator: Gerald Jacobs
Case No: NCRFBC25820
Date of award: 9 December 2013

In the Arbitration between

Gापalelwe Bassanio Medupe and 4 others

(Union/Applicant)

And

Setloblox (Pty) Ltd

(Respondent)

The issue of

Section 191(5)(iii)

Union/Employee's representative: Self

Union/Employee's address: PO Box 756
Postmasburg
8420

Telephone: 071 403 7510/079 595 2449

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Employer's representative: None

Employer's address: 3 Newton Road
Marian Industrial Estate
Pinetown

Telephone: 031 791 0512

Fax: 086 274 0513/ 086 269 9987

DETAILS OF HEARING AND REPRESENTATION:

- [1] This is the default award in the arbitration between Gaopalelwe Bassanio Medupe and 4 others the applicants and Setlobox (Pty) Ltd, the respondent. The other applicants in this matter are Mr Gerrit Berhens, Mr Joseph Gakinosi Gabe, Mr Dakies Hendrik Augus and Mr Desmond Goitsemodimo Tlhaolakgono.
- [2] The arbitration was held under the auspices of the National Bargaining Council for the Road Freight Industry (NBCRFLI) in terms of section 191(5) (a) (iii) of the Labour Relations Act, 1996 as amended (the "Act") and issued in terms of section 138(7) of the Act.
- [3] The Arbitration hearing was held on 2 December 2013 at the Road Freight Bargaining Council's office, M-Floor MBA Building, 20 Currey Street in Kimberley.
- [4] The applicants were present and conducted their own case, while there was no appearance by or on behalf of the respondent.
- [5] The proceedings were electronically recorded.

ISSUE IN DISPUTE:

- [6] The issue to be determined is whether the termination of their contracts constitutes a dismissal in terms of the Labour Relations Act. If so, whether the dismissals were substantive and procedurally unfair.
- [7] The applicants seek compensation.

BACKGROUND OF THE DISPUTE:

- [8] The applicants were employed as plant operators during January and February 2013 and earned R7 100.00 per month.
- [9] The applicants were dismissed by being given a written letter on 9 May 2013 by Manager stating the reason as the contract of employment came to its end. The applicants referred an unfair dismissal dispute to the Council claiming that they were dismissed and that the dismissal was unfair on both substantive and procedural grounds.
- [10] I perused the file and found that the notice of set down was transmitted to the employer by means of fax. I also noted that the matter was previously before another commissioner for arbitration and due to the non-attendance by the respondent a default award was issued. The award was rescinded and came before me on 25 October 2013 but was postponed because respondent had an urgent matter before the Durban High Court to attend on that same day.
- [11] On the morning of the scheduled arbitration hearing, there was yet again no appearance by or on behalf of the respondent. My attempts to contact the respondent were futile. In the circumstances, I was satisfied that the respondent was properly notified of the date, time and venue of the hearing. In light of the fact that the respondent has a habit of failing to attend its arbitration before the Council, I proceeded to arbitrate the matter in its absence.

SURVEY OF ARGUMENTS & EVIDENCE:

The Applicant's Version

[12] The applicant's nominated Mr Medupe to speak on their behalf. Below is a summary of his testimony after being duly sworn-in;

Mr Gaopalelwe Bassanio Medupe

[13] He testified that they approach Crossmoor Transport and Plant Hire for employment and was recruited at the company's front gate. They were given training and after its completion were given contracts of employment which they sign. However the duration of the contracts were not stipulated and after questioning this, the manager by the name of Steven under which supervision they worked told them that it was for an indefinite time period.

[14] They were unaware of the existence of the labour broker, called Setlobox. They became aware at a meeting called by Crossmoor held on 24 April 2013. The discussion at this meeting related to their wages because according to the witness they wanted to establish what they were supposed to get paid. The meeting was attended by the Human Resources Manager of Crossmoor. She informed them they are actually working for the labour broker which was also responsible for the payment of their wages and rates.

[15] As to their dismissal, he testified that on 9 May 2013 the manager called them in his office one after the other and informed them that their employment contract came to an end because they were no longer needed on site. He gave them each their letter of termination and said that all queries should be directed to the labour broker.

[16] In closing, he stated that since their dismissal they were languishing at home with neither income nor employment. He doesn't know when they will find alternative employment because the work prospects in the Northern Cape are quite bleak and unemployment is widespread in the area.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[17] The applicants are challenging their dismissal on substantive and procedural grounds. The onus in dismissal disputes is governed by section 192 (1) and (2) of the Labour Relations Act, 1995. The onus is on the applicant to prove the existence of dismissal. Once the existence of the dismissal is established, the onus shifts to the respondent to prove that the dismissal was fair.

[18] Whilst the applicants were aware that they were contract Plant Operators, having been recruited at Crossmoor, and having been trained and having at all times worked under the supervision and control of Crossmoor staff, they were not aware of the existence of the Labour Broker, Setlobox. Although they were paid monthly they were unaware that their payment emanated from Setlobox. Furthermore, they were employed on fixed term contracts but it failed to specify the duration of its validity. Instead, the applicants' contracts were terminated because Crossmoor did not need their services any longer.

[19] It was evident from the testimony of Mr Medupe that Crossmoor transferred their employment contracts to the labour broker and by doing so, side step its obligations as an employer under the law. Furthermore, the letter that was given to the applicants from Setlobox states as follows;

“In terms of your contract we hereby wish to give you notice that we will not be renewing your employment contract and your employment will be terminated as at the 10th of May 2013. We thank you for your services rendered and will keep your details on the database for new contracts”.

On closure look, the letter informs the applicants that they remain on the database for another assignment which might or might not materialise.

[20] The evidence also shows that the applicants were without pay. In terms of section 213 the definition of an employee means “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”. The applicants were not receiving any remuneration after the termination of their contract even though they remained on the data base of the labour broker and according to the letter they were also not entitled to receive any pay. The applicants do not fall within the ambit of the definition of an employee in terms of the LRA and can only be regarded as dismissed. This was also confirmed in both *Numsa obo Daki v Colven Associates Border CC* [2006] 10 BALR 1078 (MEIBC) and *Smith v Staffing Logistics* where it was found that by placing a worker on ‘standby’ or database after the client indicated it no longer wanted the worker on site constitute an unfair dismissal. The onus therefore shifts to the respondent to prove the procedural and substantive fairness of dismissal.

[20] The respondent failed to present valid reasons for the applicant’s dismissal. There was no fair reason for the termination of the applicants’ contract and if it was not for the Crossmoor insistence that the applicants services were no longer require, the applicants would still have been employed. The respondent also failed to follow fair procedures in terminating the applicants’ employment. In the circumstances it follows that the applicants’ dismissal was substantively and procedurally unfair.

Relief

[21] The applicants are currently at home with neither an income nor employment. The prospects of finding alternative employment seem bleak. The Labour Relations Act in section 193 states that where a dismissal is found to have been substantively unfair the primary remedy should be reinstatement or re-employment. However in this case the applicants are not asking for reinstatement and compensation is accordingly awarded.

[22] In terms of section 23 of the Constitution “Everyone has the right to fair labour practices”. In addition section 185 of the LRA states that every employee has the right not to be unfairly dismissed. The employer disregarded the applicants’ rights by dismissing them for no good reason and not following proper procedure. In considering the factors as a whole I conclude that 10 months remuneration would be just and fair in the circumstances, as a result I make the following award.

AWARD

[23] The applicants were dismissed and their dismissal was substantively and procedurally unfair.

[24] The respondent, Setlobox (Pty) Ltd, is ordered to pay, each applicant the sum of R71 000.00 (seventy one thousand rand) by no later than 27 December 2013. (R7 100.00 per month x 10 months = R71 000.00).

[25] Payment of the amount referred to in paragraph [24] must be effected by paying the said amount into bank account of the applicants with the following particulars:

First Applicant

Account Holder: Mr Gaopalelwe Bassanio Medupe
Bank: First National Bank
Account No: 62362301386

Second Applicant

Account Holder: Mr Gerrit Berhens
Bank: Standard Bank
Account No: 10048254760

Third Applicant

Account Holder: Mr Joseph Gakinosi Gabe
Bank: Capitec Bank
Branch Code: 470010
Account No: 1300075358

Fourth Applicant

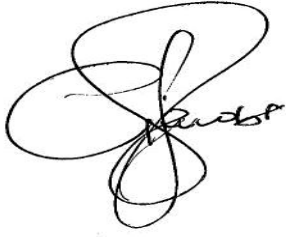
Account Holder: Mr Dakies Hendrik Augus
Bank: Capitec Bank
Branch Code: 470010
Account No: 1187719178

Fifth Applicant

Account Holder: Mr Desmond Goitsemodimo Tlhaolakgono.
Bank: ABSA Bank
Account No: 10048254760

[26] There is no order to costs.

Signed and dated at Kimberley on 9 December 2013

A handwritten signature in black ink, appearing to read "Gerald Jacobs". The signature is highly stylized, featuring large, overlapping loops and a cursive script.

NBCRFI Arbitrator: Mr Gerald Jacobs