REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2710/10

In the matter between:

MAMELODI SUNDOWNS FOOTBALL CLUB (PTY) LTD **Applicant**

and

SIMON NGOMANE **First Respondent**

CCMA **Second Respondent**

G JANSE VAN VUUREN N.O. **Third Respondent**

Heard: **5 February 2015**

Delivered: **24 February 2015**

Summary: Review – question whether employee (assistant coach of Sundowns Football Club) had been dismissed or whether his contract of employment expired at end of season.

JUDGMENT

STEENKAMP J

Introduction

[1] Mamelodi Sundowns Football Club plays in the Premier Soccer League. If they get relegated they lose millions. That is why they place great store in their coaching team. Mr Simon Ngomane was appointed as second assistant coach on 1 June 2008. His contract of employment – that neither party ever signed -- was terminated on 14 May 2009. Was he unfairly dismissed or did his contract expire, commensurate with the end of the football season?

[2] Ngomane claims he was dismissed. He referred an unfair dismissal dispute to the CCMA. The arbitrator (the third respondent) agreed with him. He ordered the Club to pay Ngomane compensation of R480 000, equivalent to 12 months' remuneration. The Club argues that the award is reviewable.

Background facts

[3] The president of Mamelodi Sundowns Football Club is Mr Patrice Motsepe, the chairman of African Rainbow Minerals and a non-practising attorney. He met Ngomane in a restaurant in Sandton in May 2008 and offered him a job as assistant coach to Trott Moloto for Sundowns. Ngomane says he was offered the position for a period of "at least three years"; Motsepe never testified at arbitration.

[4] Motsepe and Ngomane agreed that Ngomane would start as assistant coach, together with Harris Choeu, on 1 June 2008. He did so. A written contract of employment was to be drafted by the Club's attorneys of record, Bowman Gilfillan.

[5] The Club's financial controller, Mr Charles Ferreira, presented Ngomane with a draft contract, prepared by the Club's attorneys on instructions from the board of directors, after he had already started with his coaching duties. The contract, drafted by the attorneys and presented by Ferreira, contained an internal contradiction. Under the definition of "termination date", it indicated that the contract would terminate on 31 May 2010, i.e. after two years; but elsewhere it referred to a limited duration contract for one year.

[6] Ngomane made comments on the draft contract by way of handwritten notes. He insisted that Motsepe had offered him a three year contract. Ferreira said that the "Club administration" would consider Ngomane's comments and get back to him. That never happened and the parties never signed a contract of employment.

[7] Ngomane nevertheless continued his coaching duties on the other terms agreed to with Motsepe, such as a monthly salary of R40 000. In November 2008, mid-season, the Club appointed a new head coach, Henri Michel, in the place of Trott Moloto. Michel brought his own "technical team" in the form of coaching staff with him. Moloto and Choeu were told that they had to focus on recruiting new players. However, Ngomane retained his title as assistant coach, as well as his salary.

[8] In March or April 2009 Michel and his technical team, in turn, were replaced by Ted Dimitroeu as head coach with his own assistants. On 14 May 2009 the Club's Chief Operations Officer, Mr Oupa Mminele, called Ngomane to a meeting. He handed him a letter referring to a "restructuring" of the Club's technical team stating that,

> "…due to the changes that have been implemented, and the redundancy of your position as assistant coach, the club has decided to offer you a retrenchment package".

[9] Mminele told Ngomane to hand over his car keys and other assets relating to his job and he never returned to work. Instead of R40 000 he was paid R25 846, 66 for the month of May 2009. He referred an unfair dismissal dispute to the CCMA. Conciliation failed and it was referred to arbitration.

<u>The award</u>

[10] At arbitration the Club argued that Ngomane had not been dismissed, but that his fixed term contract for 12 months had come to an end; therefore, went the argument, the CCMA did not have jurisdiction as there was no dismissal.

[11] Mr *Nalane*, who appeared for the Club in these proceedings, also represented it at the arbitration. He argued that the parties entered into a fixed term contract that expired on 31 May 2009.

[12] The arbitrator rejected that argument for two reasons:

12.1 Firstly, Mminele (the COO) testified that Ngomane would have been employed until the end of August – and not May – 2009. And Dan Simelane, the chairman of the board – also the chief executive of African Rainbow Minerals Exploration, who is legally trained and has LL B and LL M degrees -- testified that Ngomane's employment would have terminated at the end of June 2009. Both these witnesses also testified that the Board's instructions were to retrench Ngomane. That is obviously at odds with the contention that his contract would simply expire.

12.2 Secondly, Ngomane was dismissed on 14 May 2009. Even if his contract were to expire on 31 May 2009, he was dismissed prematurely. He was advised of his "retrenchment" on that day and Mminele instructed him to hand over the Club's assets, including the keys to the company car. He was also not paid his full salary for the month.

[13] The arbitrator found that Ngomane had been dismissed prior to the date that, even on the Club's version, his fixed term employment contract would have come to an end.

[14] Turning to the question whether the dismissal was fair, the arbitrator pointed out that the onus was on the Club; and that, contrary to Mr *Nalane*'s argument that the fixed term contract had expired, both Simelane and Mminele testified that Ngomane had been retrenched.

[15] The arbitrator further noted that the Club never argued that it had complied with the provisions of s 189 of the LRA[1] and that it had fairly dismissed the employee for operational requirements. However, the Club also "made no effort to justify the [employee's] premature dismissal on any other ground and consequently failed to discharge the onus of proving that the [employee's] dismissal (on any ground) had been fair from a substantive or procedural point of view."

[1] Labour Relations Act 66 of 1995.

[16] The arbitrator then considered whether Ngomane's contract would in fact have expired on 31 May 2009, as that would impact on the amount of compensation.

[17] He took into account the following factors that pointed to the contrary of the Club's argument that the parties entered into a fixed term contract for one year:

17.1 The draft employment contract specified 31 May 2010 (and not 2009) as the termination date. "This contradicted another clause to the effect that the contract would endure for a period of twelve months, but Mr Ferreira conceded that the [employee] had insisted that this was incorrect and that the period should have been longer."

17.2 The fact that Ngomane had been advised of his "retrenchment" on 14 May 2009. If his contract were to expire on 31 May anyway, "why did the [Club] not simply wait for two more weeks?"

17.3 The COO's letter of 14 May 2009 made no mention of the impending termination of the contract on 31 May; and Mminele's evidence showed "that he had no knowledge of that".

17.4 The letter from Bowman Gilfillan of 10 June 2009 acknowledged that "it was proposed that the maximum duration of your client's employment would be for three years, however that proposal was subsequently reduced to a maximum duration of one year, although the definition of 'termination date' in the draft contract was inadvertently not adjusted to reflect that".

17.5 The employee made out a *prima facie* case that he had been employed for more than one year. The person best place to rebut that was Motsepe, yet he never testified.

[18] The arbitrator then took into account that the employee, in his referral to the CCMA, stated that he had been employed for "a minimum of two years" and that his attorney had relied on 31 May 2010 as the termination date, as reflected in the unsigned draft contract. He accepted, for the purposes of compensation, that the parties had intended Ngomane to be appointed for two years. In those circumstances he ordered the Club to

pay him compensation equivalent to twelve months' salary at R40 000 per month.

Evaluation

[19] The Club's main challenge remains the question of jurisdiction, i.e. whether Ngomane had been dismissed. The test on review in such a challenge is not the reasonableness test in *Sidumo*[2], but whether the arbitrator was right or wrong.[3]

[20] In my view, the arbitrator was correct. He carefully considered all the factors outlined above. The Club's witnesses were inconsistent; not one of them could say with any certainty that Ngomane had been employed for a fixed term of twelve months. If the Board were so adamant about that intention, it would surely have ensured that Ngomane sign a contract to that effect. And even at the stage of this hearing Mr *Nalane* simply could not explain why the Club would terminate Ngomane's employment two weeks before it was due to expire anyway, coupled with an offer of a severance package in what was termed a retrenchment. Both Simelane, the chairman of the board, who is legally qualified, and Mminele, a high powered COO who testified that was responsible for staff intake and "the exits of staff" at the Club, viewed it as a retrenchment. Simelane went further to say that the board issued the instruction that Ngomane should be retrenched. That is simply incompatible with the argument that the contract of employment expired with the effluxion of time.

[21] Mr *Nalane* argued that the arbitrator committed a gross irregularity. He could not explain what the arbitrator did that amounted to a gross irregularity.

[22] With regard to the fairness of the dismissal, Mr *Nalane* argued that the arbitrator "misconceived the nature of the inquiry". I disagree. The arbitrator first had to decide whether the employee had been dismissed. He decided – correctly, in my view – that he had. He then had to decide

[2] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC).

[3] *SARPA v SA Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC); *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* (2012) 33 *ILJ* 363 (LC).

whether the dismissal was fair. He ruled that it was. That was a reasonable decision. The Club appeared to view the dismissal as a retrenchment; yet it did not even attempt to follow the procedure set out in s 189 of the LRA. And, as the arbitrator pointed out, it "made no effort to justify the [employee]'s premature dismissal on any other ground."

Conclusion

[23] The award is not open to review. That leaves the question of costs.

[24] The Club brought the employee to court to defend a well-reasoned, comprehensive arbitration award that is not only reasonable, but correct. The Club – one of the richest in the PSL – has deep pockets. The individual employee, who has been forced to incur significant legal costs, does not. There is no longer any employment relationship between the parties. Both parties asked for costs to follow the result. There is no reason in law or fairness to deviate from that request.

Order

The application for review is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:	Joe Nalane Instructed by Bowman Gilfillan.
FIRST RESPONDENT:	G Shakoane SC Instructed by Tshiqi Zebediela.