


IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/ NO
 DATE	30/03/2020 SIGNATURE

CASE NO: 16878/18

PHUMEZA BEAUTY MAGOPENI

APPLICANT

And

ACACIA MINING (SA) (PTY) LIMITED

1ST RESPONDENT

EXACTITUDE CONSULTING (PTY) LTD

2ND RESPONDENT

 JUDGMENT

 KHUMALO J

[1] The Applicant, Phumeza Magopeni (Magopeni), seeks an order against Acacia Mining SA (Pty) Ltd ("Acacia"), the 1st Respondent, and Exactitude Consulting (Pty) Ltd (Exactitude"), the 2nd Respondent, (together referred to as the Respondents") declaring their notice of termination of her employment contract dated 22 January 2018 invalid and unlawful. Magopeni is also as a result claiming damages in the amount of R360 000.00 together with interest arising from the Respondents' alleged repudiation of her employment contract plus money payable for the leave days due to her as at 30 March 2018, the termination date.

[2] Acacia is a South African registered gold mining business operating in Tanzania, part of Acacia Mining Group that is incorporated in England and Wales, with exploration properties in Kenya, Burkina Faso and Mali. It is a listed company in the Johannesburg Stock Exchange.

[3] Exactitude is a management consulting services and technology solutions' company based in South Africa with a blue chip client base that includes Acacia. The management consulting services Exactitude renders to its clients include, inter alia, strategy consulting, portfolio programme and other range of services across various sectors which it does through its networks of professionals.

[4] Magopeni was through a consultancy agreement Magopeni signed with Exactitude employed for a limited period of twenty four (24) months from 1 January 2017 to 31 December 2018, to render services to Acacia as a Vendor Administrator. The contract was concluded by Magopeni as a Consultant and Exactitude as an employer for the duration of the assignment.

Factual Background

[5] The contract of employment bearing the heading "a letter of temporary employment" was then ostensibly terminated on 30 March 2018 by way of a letter from Exactitude dated 22 January 2018. In the letter Exactitude confirmed that Acacia has terminated Magopeni's contract, wherefore her services with Exactitude were also coming to an end. No reasons were given. In subsequent correspondence when Magopeni questioned the termination Exactitude alleged to have terminated the contract reliant on a clause in Magopeni's employment contract which stipulates that "This short term assignment may be terminated by either party with a minimum of 30 days' notice."

[6] The main issue which therefore arises is whether a fixed term contract of service or employment can be terminated prior to its date of termination by mere exercise of the notice as provided in the contract without any existent reasons being stipulated in the notice.

[7] Magopeni alleges that the cancellation clause in the contract that Acacia and Exactitude ("the Respondents") relied upon to cancel her employment was unfair and unreasonable as termination of the contract prematurely without furnishing reasons for the premature termination, is by and large unfair and unreasonable. It goes against the principles of good faith, Ubuntu, fairness and simple justice. The cancellation also amounted to repudiation of the contract which repudiation she accepts and has resulted in her suffering a loss/damages, that is, in her salary payable for the remainder of the contract.

[8] Furthermore Magopeni, who was an erstwhile employee of Acacia when she signed up with Exactitude alleges that the Respondents ought to have considered the history and duration of her employment record with Acacia before terminating the employment contract. She points out that Acacia had prior hereto employed her from time to time based on a variety of contracts, spending a major part of her career under the employment of Acacia. Those periods are:

[8.1] from April 2011 to 26 March 2014, employed on a permanent contract. Acacia issued a redundancy letter on 26 March 2014 terminating this employment. From June 2014 to December 2014 she was appointed on a fixed term contract as a Cataloguer. From January 2015 to June 2015 appointed on a 6 six months contract as a Project

Supply Chain Data Officer based in Tanzania. From August 2015 to January 2016 appointed as a Project Supply Chain Data Officer on a fixed term contract for five months. From January 2016 to June 2016 employed on the same position as the previous contract.

[9] Magopeni submits that due to the fact that her employment has been rolled over for about six months several times, she had (2) a legitimate expectation that such a situation will continue. On that basis she expected that her contract would not be terminated prematurely without giving reasons thereof. Further that such termination is manifestly unreasonable and offend against public policy.

[10] The argument made on behalf of Magopeni was that on a proper construction of clause 6, termination was to precede factual and evidential material breach of the contract on the part of the defaulting party. It denies that such evidence exist. Magopeni contends that Acacia had no reason to implement the purported termination clause, did not state any in the Notice, in that regard such termination was unconscionable. Acacia was obligated in applying and construing the purported termination clause to promote the spirit, purport and objects of the Bill of Rights as contemplated in s 39 (2) of the Constitution of the Republic of South Africa, 1996.

Opposition

[11] In an Affidavit deposed to by Acacia's Chief Compensation and Benefits Adviser, Acacia alleges that Magopeni's original employment by Acacia was terminated on account of operational requirements with effect from 31 May 2014, and Magopeni never challenged its unfairness. Subsequent thereto Magopeni was engaged by Exactitude, a company that renders management consulting services to clients across various sectors, through its networks of professionals as one of those professionals. From April 2014 Acacia engaged Exactitude for purpose of procuring, inter alia, project data and administration services for its operations in Tanzania. In turn Exactitude subcontracted 4 of its management consultants who included Magopeni to Acacia, for varying periods of time assigned to render the required vendor administrator services.

[12] On or about 13 December 2016, in Johannesburg, Exactitude concluded a fixed term agreement with Magopeni regulating her limited duration assignment of 24 months to Acacia's operations in Tanzania, which notwithstanding being of a fixed period, contained an express provision for early termination on at least 30 days' notice.

[13] Acacia alleges that on 16 January 2018 following the ongoing review of its operational models occasioned by financial and operational difficulties it experienced in Tanzania, it informed Exactitude that it no longer required the services of the consultants. In turn Exactitude furnished Magopeni and the other consultants with a notice of termination of their employment contracts with effect from 30 March 2018.

[14] Acacia contends that there is no basis in law or fact for the relief that Magopeni is seeking, for she has not presented any compelling evidence to demonstrate why the court should look past the employment relationship between her and Exactitude and hold Acacia liable for her damages arising from an alleged repudiation of an agreement to which Acacia

is not a party. Nevertheless to an extent Magopeni asserted that Exactitude acted as Acacia's intermediary in the conclusion of the contract. Acacia raised this issue of locus standi at the beginning of its arguments during the hearing.

[15] However notwithstanding the *locus standi* contention Acacia continued to address the merits of Magopeni's claim arguing that Magopeni has not made out a sufficient case to justify this court disregarding the sanctity of the terms of the Contract by declining to uphold the enforcement of clause 6 thereof. It contends that unless the terms of the contract provide otherwise there is no requirement in our law that the enforcement of a termination provision in a contract must be preceded by a material breach or reasons for the termination failing which the clause offends against public policy. Absent such requirement there can be no suggestion that Acacia and or Exactitude's repudiated the contract. Magopeni signed in acceptance of the terms and conditions of the contract without any qualifications. Specifically that her employment contract may be terminated with a minimum of 30 days' notice.

[16] Acacia points out that Magopeni claims repeatedly that she is an employee of Acacia and that she therefore has a right of expectation to be appointed permanently by Acacia or to have the terms of the contract rolled over, alleging that Acacia's failure to meet her expectations amounts to a circumvention of the Labour Laws of the country. Acacia accordingly argues that as long as Magopeni is subject to and protected by the provisions of the Labour Relations Act 66 of 1995, she is not permitted to claim damages on account of a breach of an implied contractual term that the termination thereof must be for a fair reason as it is not permissible to circumvent the comprehensive statutory dispute resolution procedures created by the LRA to resolve disputes which on Mogapeni's own construction overlaps with the statutory scheme and remedies it provides.

[17] According to Acacia provision of services was by Exactitude through contractor personnel like Magopeni, a contractor personnel is defined as any person employed by Exactitude or otherwise engaged by Exactitude as agent or representative in connection with the provision of services to Acacia (accordingly, this term included Magopeni within its ambit) were subject to the following material and relevant terms:

[17.1] In terms of clause 8.1, Exactitude was solely responsible for contractor personnel and nothing in the terms and conditions would render the Contractor Personnel an employee, agent or other representative of Acacia. Acacia was entitled in terms of clause 8.7, having stated its reasons, to instruct Exactitude to remove a member of the Contractor Personnel from site.

[17.2] Exactitude is in terms of clause 8.10 (a) and (b) liable for the payment of all salaries, allowances, taxes and costs (including leave entitlements) which arise in relation to the Contractor Personnel and for any costs or expenses relating to the removal of any Contractor Personnel. It indemnifies and holds Acacia harmless in respect of any liability (as defined) suffered by Acacia in connection therewith. Finally Acacia may in terms of clause 28.3 terminate at any time during the agreement with Exactitude or any of the components of the provision of the services in whole or part, by giving Exactitude no less than 20 business days' notice in writing, setting forth the extent of the termination and the effective date thereof.

[18] Acacia points out that it was compelled to write down the value of its assets in Tanzania following an imposition of an export ban by the Tanzanian Government which led to its reported loss of more than \$ 700 million in 2017. The situation posed a serious threat to its continued financial sustainability. In an effort to minimise the potential impact of these economic pressures on its work force it elected to terminate the services of external service providers on non-essential projects (such as those rendered by Exactitude) in relation to vendor administration and rather in source the requisite services.

[19] It accordingly on 16 January 2018, in compliance with the termination provisions of the terms and conditions, furnished Exactitude with a notice of termination of the services rendered by it through, inter alia, Magopeni. Acacia also explained to Magopeni which it did not need to do the circumstances that led to its termination of the component of the services procured from Exactitude. Acacia therefore contends that Magopeni concluded her employment contract with Exactitude to which Acacia is not a party. That is consistent with Exactitude's undertaking to be solely responsible for Magopeni and her assignment to Acacia. It did not acquire any right or obligations under the contract Magopeni signed with Exactitude and thus never invited to accept any.

[20] Acacia continued to argue on the merits notwithstanding its position on the *locus standi*, that good faith and fairness are not free standing requirements for the exercise of a contractual right. The mere fact that Magopeni considers the termination clause to have operated harshly against her by itself does not lead to the conclusion that it offends against the values of the Constitution or is against public policy. According to it the general position in our law is that a fixed term contract may only be prematurely terminated for material breach or repudiation unless its terms provide for early termination on notice. Therefore impugned termination notice clause not contrary to public policy.

[21] It further alleges that there is no complaint that reveals that the impugned termination clause is objectively unconscionable since there are no allegations that the contract was not concluded freely or that there was unequal bargaining power between Magopeni and Exactitude, such that it was not possible to negotiate a clause in terms of which it required good cause and a fair procedure before the contract was cancelled. It argues that Magopeni must have been aware of the implications of the termination clause. Also that no facts have been set out to establish that the enforcement of the termination clause would be against public policy.

[22] For that reason Acacia argues that it would be untenable to relax the doctrine of the sanctity of contract in this case and read in it, that the termination clause required Exactitude and Acacia to furnish the Applicant with reasons for early termination or be preceded by a material breach of the contract, which would be tantamount to the court making the agreement for the parties.

[23] Acacia generally denies that Magopeni was in employment with Acacia directly or through Exactitude. Also that Exactitude was employed as an agent for Acacia. It states that Acacia and Exactitude agreed that Exactitude is solely responsible as regards Contractor Personnel therefore denies that the notice of termination was delivered to Magopeni on behalf of or on instructions from Acacia. It also denies that it was incumbent on Acacia to

furnish Magopeni with reasons for the premature termination of the contract. It denies that the contract was terminated without lawful grounds that entitles Magopeni to damages.

[24] Acacia in addition denies that its historical employment of Magopeni is relevant to the termination of the contract. The fixed term contract that regulated Magopeni's employment at Acacia in the capacity of Project Supply Chain was concluded between Exactitude and the Applicant, thus Exactitude considers itself the employer. Magopeni's salary was paid by Exactitude. Acacia did not acquire any rights from the contract entitling it to rely upon the provisions of the termination clause. It relied on the terms and conditions to terminate Exactitude's services. It points out that Magopeni's allegation that she was an independent contractor alternatively a fixed term employee is mutually exclusive as the latter excludes independent contractors.

[25] Acacia disputes Magopeni's entitlement to damages as claimed, on the basis that Exactitude terminated the contract on lawful grounds as there can be no finding that either Acacia or Exactitude repudiated the contract.

Exactitude's Opposing Affidavit

[26] On the other hand, in its Answering Affidavit deposed to by its Managing Director, Mr Clinto Van Winkel ("Winkel"), the signatory of Magopeni's employment contract and the letter of termination, Exactitude denies that it is Acacia's agent but a management consultancy and technology solutions service provider of which Acacia has been their client for some time. Exactitude confirms that prior to Magopeni being contracted by it in 2014, she was in the permanent employment of Acacia. Magopeni was one of a lot of employees that Acacia retrenched when the company encountered difficulties with the Tanzanian Government. Magopeni never challenged the correctness of such termination.

[27] In her first appointment by Exactitude on 31 July 2015, Magopeni was to fulfil a specific task project as a supply chain data officer at Acacia. The project was a temporary assignment for a five months term, in terms of which Magopeni provided a service only. Magopeni once again voluntarily concluded two successive six month temporary assignment agreements from 1 January 2016 to June 2016 and then from 1 July 2016 to 31 December 2016. Both could be terminated with either party giving one week's notice.

[28] Magopeni then voluntarily concluded the written contract of a limited duration of 24 months with Exactitude employed as a Vendor Administrator. According to Exactitude this was not a fixed term contract since it in clause 6 provides for either party to terminate the assignment on 30 days' notice. No basis is given for this reasoning. It alleges to have got notice from Acacia that its operations in Tanzania had become untenable therefore it was terminating the services of certain subcontracted individuals, which included Magopeni. It was told Magopeni was called in to discuss the changing circumstances and her position and seemed to understand and thus she did not raise any objection. Exactitude then served Magopeni with the letter of termination giving her 60 instead of 30 days' notice as per contract in consideration of fairness and as a gesture of goodwill.

[29] Exactitude denies that the cancellation clause contained in the contract was unfair, unconscionable and militates against principles of good faith, Ubuntu, fairness and simple justice. It also denies that the termination thereof constitutes a repudiation of the contract

but just that the services of Magopeni were no longer required by the client and therefore no longer required by Exactitude.

[30] Exactitude argue that the argument by Magopeni that Acacia (but apparently not Exactitude is acting unconstitutionally and circumventing the operations of the Labour Laws of the Republic of South Africa and that she has a right of expectation is a red herring which Magopeni is at great pain to claim and has to be ignored. Mainly for the reason that she is not prosecuting her claim in terms of the LRA or the Basic Conditions of Employment or any other applicable employment legislation but has elected to approach the High Court on the basis of breach of contract.

[31] On Magopeni alleging that her contracts have been rolled over on numerous occasions by Acacia creating a legitimate expectation, Exactitude responds that only the four most recent contracts have been concluded with Exactitude all of which were for different durations and based on the specific business relationship and needs of the Respondents. It denies that Magopeni was employed by Acacia during the period August 2015, as she was then a consultant with a contract with Exactitude not Acacia. Acacia was a client of Exactitude. Exactitude alleges that Magopeni was an independent contractor who voluntarily concluded a contract to that effect with Exactitude.

[32] Acacia was even then not supine and had informed its employees, service providers and contractors, which include Exactitude and Magopeni of the events occurring at its Mara Mine and its Tanzanians operations. It argues that the notice of termination did not have to set out reasons for termination as Magopeni was always fully alive to the going on and circumstances of Acacia's operations in Tanzania. Also that the proper reading of the contract is that it is a service contract, and if the reason for the service falls away, the contract can be terminated. The contract does not provide for a fault based termination.

[33] Exactitude disagrees that the termination must be subjectively reasonable or that a reasonable expectation arose and contends that the expectation can only be claimed if the contract had come to an end which is not the case in this instance. It points out that even if Magopeni was an employee she would only be entitled to compensation if she could illustrate that she had an expectation that a maximum of duration of contract would run for its full term.

[34] As a result Exactitude denies that Magopeni has set out a case justifying the granting of the relief she is seeking and submit that the Application ought to be dismissed.

Reply

[35] Magopeni in her reply, emphasised the fact that her claim is based on the repudiation of the contract by the Respondents, terminating the contract before its expiry date, as a result of which she suffered damages. Acacia had admitted that the contract was prematurely terminated without any reasons furnished. She has as a result set out a claim against both Respondents. She submits that the Respondents by appointing her on a fixed term contract assumed the risk of her becoming redundant before the contract expires. She argues that Acacia's restructuring of its operations does not take precedence over the terms and conditions of her contract or that any retrenchment or restructuring by Acacia of its

operations apply to her but on its employees. She thereby claims that she is entitled to damages that are equal to her salary payable for the remainder of her contract.

[36] Magopeni further points out that notwithstanding Exactitude's allegations, Acacia has denied having instructed Exactitude to terminate the contract concluded between Magopeni and Respondents. Acacia indicated that Magopeni was employed by it but she had a contract with Exactitude. Whilst Exactitude had also disputed that Magopeni had a contract with or was employed by Acacia.

The issues arising

[37] The main issue being whether a fixed term services employment contract can be terminated (prematurely) prior to the agreed termination date or the happening of the agreed-upon circumstance (a question of law) by mere exercise of the notice as provided in the contract, without any existent reasons being stipulated in the notice (determining if there was repudiation), further issues to be determined are:

[37.1] the locus standi of the Respondents, that is, as to between the Respondents, who exactly is liable to Magopeni (determining with which of the two companies was Magopeni's contract of employment concluded) or with which of the two does the Applicant's claim lie.

[37.2] Was it a proper construction of clause 6, that notwithstanding the termination notice such termination was still to be preceded by factual and or evidential material breach of the contract on the part of the defaulting party, otherwise clause unfair and unreasonable.

Legal framework

[38] The common law position is that fixed term contracts of employment or service cannot be prematurely terminated, unless (1) there is a material breach or repudiation by either party. In other words there is no right to terminate such contract even on notice, without a material breach or repudiation (2) unless its terms provide for such termination."

[39]. In *Buthelezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC) on the occasion of the Municipality having terminated Mr Buthelezi's 5 year fixed-term contract 4 years early, the Court held that:

"There is no doubt that at common law a party to a fixed-term contract has no right to terminate such contract in the absence of repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination." (my emphasis).

[40] There are therefore two alternative jurisdictional exceptions for a premature termination of a fixed term contract that is valid, fair and reasonable. Firstly there should be

repudiation or a material breach, alternatively the terms of the contract should provide for such termination. Consistently, the Courts have upheld the principle that by entering into a fixed term contract of employment for a specific period, the parties intend to be bound by the contract for the stipulated duration unless there is express provision made for earlier termination; see *Nkopane and Others v Independent Electoral Commission* (2007) 28 ILJ 670 (LC). The court was required in *Nkopane*, just as in *Buthlezi*, to determine whether an employer can prematurely terminate a fixed term contract due to its operational requirements. In arriving at the decision that the employer is only entitled to premature termination on the basis of operational requirements, if the contract allows for it, the Court said:

“It could easily have worded the form and the related documents to make it clear that the employment would terminate at the latest on the date specified and was subject to earlier termination for operational reasons.”

[41] The court’s finding in the *Buthlezi* and *Nkopane* cases, that there is no common law right to premature termination of a fixed term contract unless the fixed term contract provides for such right was maintained in *Lottering and Others v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC). At paras 14 and 20, the court held that:

“If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation.”

[42] The court held, in the most recent case of *Nord v Civicus World Alliance for Citizen Participation Inc* (JS363/12) [2016] ZALCJHB 162 (21 April 2016) that:

“.....premature termination of a fixed term contract is permissible, where an express provision is made for such an event.”

[43] Following on the established authorities, it is therefore of vital importance that employers ensure that their fixed term contracts of employment include their specific requirements. They have to ensure that the contract includes a clause allowing for premature termination, especially if it is anticipated. A clause that expressly makes provision for no claim for compensation or damages against the Company in case of a lawful termination of a fixed term contract prior to its expiry would be appropriate.

[44] The application of the principle was clearly endorsed in the matter of *Joni v Kei fresh produce Market*, (936/2012) [2018] ZAECMHC 39; (2018) 39 ILJ 2405 (ECM) (14 August 2018). The court held that nothing prevents an employer from terminating a fixed term contract prematurely where this is specifically catered for in the contract. In this case *Joni* instituted a claim for damages against *Kei Fresh*, her employer, for the unlawful termination of her fixed term contract in that it was terminated by *Kei Fresh* for operational requirements, prior to the termination date. *Joni* stated that she understood that she would be entitled to the

monetary equivalent of the balance of her contract in the event of premature termination. The court's key considerations were that:

- The fixed term contract commenced on 1 July 2010, to continue for a period of 5 years until 30 June 2015.
- It was an express term of the fixed term contract that either party could terminate the contract on one calendar month's written notice to the other party; and
- Notwithstanding anything to the contrary the agreement may be terminated on any grounds recognised in law to be sufficient.
- The employer terminated the contract on 30 November 2011 by giving Joni one calendar month's written notice of cancellation and citing the company's operational requirements as the reason for termination.

[45] The court held that "while it is trite that a fixed term contract cannot be terminated in the absence of a repudiation or a material breach of contract by the other party in terms of the common law, the exception to this rule is where the contract provides for such termination. In this case the clause was clear – either party could terminate the fixed term contract on one calendar month's written notice to the other. There was no restriction on the grounds for the premature termination and, the employer provided Joni with the reasons for termination being that of operational requirements. Therefore, the court held that the clause could not be restrictively interpreted to exclude the possibility of retrenchment and is wide enough to cover this situation. In the circumstances, the High Court held that the fixed term contract was lawfully terminated in accordance with the provisions of the agreement and Joni was not entitled to damages.

[46] As a result, strictly, premature termination of a fixed-term contract amounts to a breach of contract, unless the contract specifically makes provision for earlier termination. Employers who want to terminate a fixed-term contract before the expiry date could do so, as long as the employee is paid for the full term. Joni makes it clear that if the fixed term contract allows for premature termination then the employer will not be liable to pay the employee in respect of the remainder of the term of the contract and an employer can retrench an employee employed on a fixed term contract even if the contract does not specifically mention that this is permissible, but rather allows for premature termination as a general statement.

[47] The court's reference in *Joni* to the following reasoning in *Buthelezi* is of considerably importance to this common law principle:

"The rationale for all this is clear. When parties agree that the contract will endure for a certain period as opposed to a contract of an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of material breach. Accordingly, no party is entitled to later escape its obligations in

terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate a fixed term contract of employment prematurely in the absence of material breach of such contract by the other party.”

[48] Accordingly, a notice to bring a fixed term contract to an early end is a repudiation because it does not in itself constitute a contractually permissible act of termination. Being a repudiation, the innocent party has an election to hold the guilty party to the contract or to accept the repudiation and cancel the contract. As long ago as in the case of *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 18 the court confirmed that a premature termination of a fixed term contract of employment results in a claim for damages for breach of contract.

[49] In terms of the common law the damages that an employee is able to claim for breach of contract, is limited to the amount still due for the remainder of the period of the contract. Whilst in terms of the LRA an employee may in certain circumstances be able to claim more if an employer prematurely terminated the fixed term contract; see *PSA obo Mbiza v Office of the Presidency and Others* (2014) 3 BLLR 275 (LC), as premature termination of employment may also amount to an unfair dismissal. This means that employers may be held liable to pay compensation in addition to the amount paid out in terms of the contract. Which is not what we are dealing with in this matter. The Applicant's claim in *casu* is only for damages under common law for the breach of contract, limited to the amount payable in terms of the contract for the remainder of her fixed term.

[50] The amount for which the Respondent would be liable/ for which the Applicant is entitled to be reimbursed must place the Applicant in the same position it would have been had the Respondent not prematurely terminated his employment, leaving aside the issue of other damages it may have suffered or have been entitled to due to his termination. The judgment in *Fedlife* is important as far as it highlights the equivalence in the application of the principle, that where an employee terminates a fixed term contract of employment prematurely, said employee is also liable for damages in terms of outstanding services, which he or she failed to perform.

[51] In *Fedlife*, applying the common law principle, the court noted that where no provision is made for notice of termination, an employee's resignation before the happening of the determined event or term that would have ended the contract amounted to a breach. A party or an employee could be held liable for the value of the outstanding services he failed to perform, subject to the employer's duty to mitigate the damages. There should be a direct link between the termination of the employment contract by the Respondent and the damages claimed by the Applicant.

Analysis

[52] In *casu*, Magopeni concluded a fixed term contract of twenty four months (24) with Exactitude to render her services to a third party that being Acacia. The contract was terminable on a notice period of one month. The contract therefore was under common law not predisposed to a premature termination unless there is repudiation or a material breach of the contract by the other party, since neither the clause nor the entire contract provided

for such termination. As a result Magopeni's fixed term contract of services was terminable before the expiry date without repudiation or breach, on condition she is paid for the remainder of the contract.

[53] The termination of Magopeni's contract prior to its expiry date even on notice, which was not accompanied by any reasons for termination, amounted to a repudiation. Magopeni rightfully alleges to have accepted the repudiation which has resulted into a breach of contract. Consequently Magopeni is entitled to a full payment of the remuneration that was still due for the remainder of the term of her contract. Her contract was to expire in nine (9) months at the time of termination. She was in terms thereof earning a monthly salary of R40 000.00. She as a result is rightfully claiming an amount of R360 000.00.

[54] Magopeni is also claiming to be compensated for the leave pay that was going to accrue to her had her contract not been prematurely terminated. She is entitled to be placed in the same position she would have been had her contract of employment not been prematurely terminated. In principle if the premature stoppage of Magopeni's services had resulted in her forfeiting leave, she would be entitled to be compensated for the loss. The leave being a benefit resultant from the contract, therefore a loss for which she is also entitled to be fully reimbursed. Nevertheless, even though Magopeni is entitled to reimbursement of the loss, she has failed to prove that she indeed forfeited leave or had leave due to her at the time of termination, the days for which leave has been accumulated and the amount payable.

[55] On the Respondent's argument about the contract having been validly terminated on the basis of operational requirements, in *Joni*, it was made clear that if the fixed term contract allows for premature termination then the employer will not be liable to pay the employee in respect of the remainder of the term of the contract and an employer can retrench an employee employed on a fixed term contract even if the contract does not specifically mention that this is permissible, but rather allows for premature termination as a general statement. It is not the case in *casu*, no provision for premature termination was made, even on general terms.

[56] A party to a fixed term contract is not entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future had been erroneous or had overlooked certain things. Such a question arose in *Buthelezi*, being based on the alleged unfairness of the application of the common law principle on the employer, who may want to restructure his business before the end of the term. Jafta AJA stated that:

"I have no hesitation in concluding that there is no unfairness in such a situation. This is so simply because the employer is free not to enter into a fixed term contract but to conclude a contract for an indefinite period if he thinks that there's a risk that he have to dispense with the employee's service before the expiry of the term. If he chooses to enter into a fixed term contract, he takes a risk that he might have need to dismiss the employee mid-term but is prepared to take the risk." (my emphasis)

[57] In this matter the circumstances are such that there was prior engagement of Magopeni's services under similar contracts but for shorter periods. Each of the contracts ran its course, none were prematurely cancelled. Acacia and Exactitude were at all times aware

of the volatility of Acacia's operations, both having alluded to in their affidavits. It is therefore reasonable to would have expected that Exactitude would have consciously concluded a two year contract with Magopeni appreciative of the possible risk it might have to endure as a result of Acacia having to restructure its business. Hence failure by Exactitude to make a provision for a clause that will allow termination if restructuring to Acacia's business become necessary was negligent. They cannot be heard to complain or circumvent liability if or when the risk materialises.

[58] In addition, none of the fixed contracts concluded by Magopeni with Exactitude or Acacia to render services to Acacia were ever prematurely terminated, albeit being of very short periods. Magopeni's expectation that even this two year contract was going to run its term and not be terminated prematurely was not only legitimate but reasonable.

[60] Lastly Exactitude, to an extent also Acacia dispute that Magopeni was an employee of Acacia and allege that she was an independent contractor who voluntarily concluded a contract to that effect with Exactitude. Magopeni indeed had signed a contract with Exactitude not Acacia. Acacia was a client of Exactitude. Exactitude had further rightfully stated that since during the period commencing 1 August 2015, Magopeni was a consultant to Exactitude in terms of which Exactitude handsomely remunerated her.

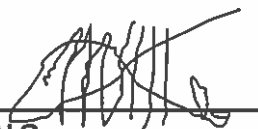
[61] Exactitude's allegations are in line with the terms in the agreement/contract headed "letter of temporary assignment, signed by Magopeni as a consultant and by Exactitude as the employer, represented by its Managing Director. In terms thereof she accepted the offer of employment by Exactitude for the fixed or limited duration of twenty four months whereupon she was assigned to render her services to Acacia on behalf of Exactitude. The termination clause that the Respondents were reliant upon being a term of the agreement between Magopeni and Exactitude and applicable only between the two. Her hours of work, remuneration and line of reporting predetermined in the contract by Exactitude, as the employer. It therefore follows that only Exactitude was obligated to Magopeni to ensure that Magopeni's employment contract was properly honoured. In line with that Acacia has pointed out that the terms and conditions of Magopeni's employment indicate that Exactitude will be solely responsible for Magopeni's assignment to Acacia. Accordingly the letter of premature termination of Magopeni's contract emanated from Exactitude.

[62] As a result even though Magopeni brought her Application against both Respondents seeking relief from both, her claim lies against Exactitude for the premature termination of her contract without any reasons provided. Her citing of Acacia in the matter was however not misplaced considering its involvement in the matter. Magopeni performed her employment by rendering services to Acacia. Acacia was therefore indeed an interesting party as was argued on behalf of the Applicant.

[63] Under the circumstances the following order is made;

1. The termination of the Applicant's fixed term contract of employment by letter dated 22 January 2018 is invalid, constituting a breach of contract.

2. The 2nd Respondent is to pay to the Applicant an amount of R360 000, 00 being the total salary payable for the remainder of the Applicant's employment contract.
3. The 2nd Respondent is to pay the costs.
4. The Application against the 1st Respondent is dismissed.


N V KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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