

# Two wrongs don't make a right - the Labour Appeal Court cleans up the mess

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In *Clencor Pty Ltd v Mnglezana NO and Others* (25 January 2018), the Labour Appeal Court (LAC) was required to consider whether the Labour Court (LC) erred in coming to a conclusion as to the relevance of evidence not presented at the Commission for Conciliation, Mediation and Arbitration (CCMA).



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Clencor, a temporary service provider operating in the cleaning industry, employed the Respondents. Clencor employed the Respondents on fixed term contracts, which were due to expire in November 2005. However, when the client at which the Respondents were placed required their services for longer, Clencor offered them further fixed term contracts on this basis. The Respondents refused to sign the new fixed term contracts and claimed that their employment contracts would expire upon the termination of the contract between Clencor and the client. After having given the Respondents numerous opportunities to sign the new fixed term contracts, and after they continued to refuse to sign, Clencor, issued them with two weeks' notice and terminated their contracts.

The Respondents referred an unfair dismissal dispute to the CCMA. At arbitration, Clencor did not include the original fixed term contracts in their bundle. Both parties offered to furnish these contracts to the Commissioner, however, the Commissioner rejected their offer. The Commissioner found the dismissal to be unfair on the basis that the employees were allowed to continue to work beyond the alleged fixed term period, and that Clencor had failed to present the original employment contracts during the arbitration. He held that the onus to prove that the contracts were for a fixed term period lay with Clencor. The Commissioner awarded the Respondents reinstatement and backpay in the amount of two months' remuneration.

Clencor instituted review proceedings in the LC to review and set aside the award. Clencor argued that the Commissioner grossly misconducted himself by not accepting its offer to submit the original contracts and thereafter drawing a negative inference as a result of the fact that Clencor did not provide the original contracts.

The LC found that the Commissioner's findings were questionable. However, LC held that the contracts were irrelevant as it was never disputed that the fixed contracts were concluded and that they had a termination date.

Clencor then took the matter on appeal to the LAC. The LAC found that the only issue that was before the LC was whether the Commissioner committed a material irregularity that rendered his decision unreasonable or one that a reasonable decision maker would not have made. The LAC found that at the arbitration, Clencor had pleaded that the employment contracts had expired on the date that was stipulated in the contract, while the Respondents testified that their employment contracts would only expire once the contract between Clencor and its client had terminated. Thus, the original employment contracts were material to the determination of when the original fixed term contracts terminated.

As a result, the LAC found that the LC erred by pronouncing upon the relevance of the contracts and should have only focused on the conduct of the Commissioner. The Commissioner interpreted contracts that he had not seen and the LC failed to address this. The LC effectively settled the dispute by deciding that the Respondents were dismissed and that their original contracts were irrelevant.

Even though the LC decision was not final, the LAC found that such a judgment is appealable if that appeal would lead to a just and reasonable solution for the issues between the parties.

The LAC found that although the appeal was for the findings made by the LC and not the order, the judgment had far reaching consequences. If the LC's order stood, the Respondents at the re-hearing would argue that the LC found that it was a dismissal and the only issue before the CCMA would be the fairness of the dismissal which would be prejudicial to Clencor. Thus, the LAC held that it would be in the interests of justice to set aside the factual findings of the LC and uphold the appeal.

This judgment emphasises the importance of preparation for CCMA hearings and ensuring that all relevant information is placed before the Commissioner in order to achieve an outcome which is reflective of all the pertinent facts and circumstances.

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