

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA2/19

In the matter between:

UKWEZA HOLDINGS (PTY) LTD

Appellant

and

NYONDO A NO

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

OLIVER MICHAEL DAVID

Third Respondent

Heard: 18 February 2020

Delivered: 04 March 2020

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

WAGLAY JP

- [1] The appellant, with leave of the Labour Court, appeals against the judgment and order of that Court (Lallie J) which dismissed its review application to set aside the award of the first respondent (commissioner).
- [2] The facts relevant for the determination of this appeal may be summarised as follows: The appellant conducts a catering business that provides service to a number of customers. One of those customers is Life St George Hospital. The appellant is required to have a project manager on site to run its business at the Life St George Hospital. Its project manager resigned and the appellant appointed the third respondent (employee) on a fixed-term contract from 11 December 2014 to 31 December 2014 to replace its resigned project manager. Although the contract ended on 31 December 2014, the employee continued to render services to the appellant. It was only after the middle of January 2015 that the appellant approached the employee to extend the fixed-term contract to 31 January 2015. The employee agreed.
- [3] The testimony of the employee was that it is upon a query from a prospective candidate that he became aware that the position he occupied had been advertised. The employee contacted Mr Bam his immediate superior to enquire about the advertisement. Mr Bam testified for the appellant. Although the two testimonies differ on what was said to each other, it is not disputed that Mr Bam informed the employee that he would also be considered for the post along other candidates. On 3 February 2015, the employee received a notice of termination of his employment which

unequivocally reflected that his “fixed term contract will end on the 13th February 2015”. This notice of termination of employment was issued a day after the employer had emailed the employee notifying him that he had been unsuccessful for the position of project manager. The e-mail also intimated that the employee’s contract would not be extended and would come to an end on the 13th of February 2015. The reason for the date of 13 February 2015 was that the employer was under the mistaken belief that even though the fixed-term agreement had come to an end it was obliged to give two weeks’ notice of termination in terms of the Basic Conditions of Employment Act 75 of 1997.

- [4] The employee construed the termination of his contract as a dismissal. He referred his dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). At the outset of the arbitration, the commissioner was confronted with the question whether there was any dismissal as the appellant contended that the contract terminated by effluxion of time. The commissioner made a ruling that the employee was dismissed and that the appellant had to prove the fairness of the dismissal.
- [5] The employee testified in essence that he had the expectation that he would be made permanent once the appellant secured the contract with Life St George Hospital. He further said that the appellant knew that he had no private hospital experience as he disclosed that during the interview. The employee further stated that a Ms Oosthuizen apparently employed by the appellant assured him that that his lack of experience was not a problem because he was the right person for the job as she knew him from a previous project. As regards the extension of his contract to 31 January 2015, the employee testified that it was a temporary measure while awaiting the service agreement with Life St George Hospital at which time; his contract would have been made permanent.
- [6] Mr Bam testified that at the time of the appointment of the employee, the appellant had not yet signed the service level agreement with Life St George Hospital. Hence the fixed-term contract was extended to 31 January 2019. He further alluded to the fact that because the appellant was on a probationary period for three months, the

appellant had to “up his game” to secure the service level agreement. This is why the appellant needed to appoint an on-site project manager. Under cross-examination, he stated that the appellant did not know at the time when it offered the fixed-term contracts that the employee had no hospital experience and it was for this reason that he was not appointed to the post. He confirmed that the employee sought and was considered for the post and was not successful. In the circumstances, averred the appellant that the employee could have had no expectation of being appointed otherwise he would have not have wanted to be considered in competition to other applicants for the post.

- [7] The commissioner reasoned that the employee continued working after the fixed-term contract ended on 31 January 2015. Consequently, the termination letter of 03 February 2015 which incidentally was the next working day after 31 January, was not terminating the fixed-term contract because that contract was no longer in operation as it had expired. The commissioner thus found that the letter of 03 February 2015 constituted a notice of termination of the employee's contract and a dismissal in terms of section 186(1)(a) of the Labour Relations Act 66 of 1995. Having made a ruling that the matter was a dismissal dispute, the commissioner analysed the evidence to determine the fairness of the dismissal, found the dismissal unfair and awarded the employee compensation.
- [8] Dissatisfied with the outcome of the arbitration, the appellant sought to review the award. The Labour Court dismissed the review application. The court reasoned that the commissioner was correct in his finding that the CCMA had jurisdiction. Further that the commissioner could not be faulted to find that the fixed-term contract had already expired at the time that the appellant issued the notice of termination of the employment.
- [9] The appellant seeks to reverse the decision of the Labour Court on three grounds. The appellant first of all contends that the CCMA had no jurisdiction to entertain the dispute as it was not one of dismissal and that the Labour Court applied the incorrect test in dealing with the question of jurisdiction. The appellant submits that because the review

application concerned an issue of jurisdiction, the Labour Court was obliged to determine the issue by determining *de novo* whether the commissioner's decision was right or wrong. The appellant then argued that by deferring to the commissioner's decision; the Labour Court erred by applying the incorrect legal review principle.

- [10] The second contention is that the commissioner determined the wrong dispute before him. The appellant contends that the employee's evidence was to the effect that he had an expectation that his contract would be renewed and as such the commissioner had to decide whether the employee had established a reasonable expectation of a permanent employment.
- [11] The last contention related to the quantum of compensation. The appellant contends that the commissioner did not exercise his discretion judicially as the compensation amount was grossly excessive. It submits that the Labour Court should have set aside the compensation and substituted it with one month's salary.
- [12] The appellant is correct. When it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively justifiable grounds. The test is that of correctness and not one of reasonableness. At the arbitration, the appellant raised the CCMA's lack of jurisdiction because there was no dismissal as the contract had terminated by effluxion of time. This contention was met with the employee's version that he had been dismissed as he expected a renewal of his contract on a permanent basis once the appellant had secured the contract with Life St George Hospital. The commissioner found that the fixed-term contract ended on 31 January 2015 and that the notice period issued on 03 February 2015 could not be for a contract that had already expired. Consequently, the commissioner found that the employee was on an indefinite contract from 01 February 2015 and that he had been dismissed.
- [13] The above approach is not only too technical an approach, it fails to take into account the real and practical way in which the parties dealt with each other. On the commissioner's analysis, the employee should, in fact, have been in the appellant's permanent employ on 1 January 2015 already because he had remained in the appellant's employ on that date despite the fact that the original fixed contract had

come to end on 31 December 2014. The reality was that the appellant and the employee only commenced discussion and agreed on the fixed-term contract for the month of January sometime after the second week of January and there was no issue of the employment being permanent because of the absence of a new fixed-term contract or the employee remaining in the appellant's employ after the expiry of the original contract.

- [14] On 3 February, after being informed that he was unsuccessful, the employee raised the issue that he had a legitimate expectation to be permanently appointed to the post and as such the notice to say that his fixed term contract came to an end constituted a dismissal. This argument is misconceived. The facts are that the employee was or became aware that the appellant advertised to fill the post the employee occupied and that he made himself available to be considered for the post. In the circumstances there could be no legitimate expectation to the post he occupied. Furthermore, that he rendered services to the appellant after the end of January when his fixed-term contract came to an end does not mean that the fixed-term contract morphed into permanent employment. Also the appellant's mistaken belief that it was obliged to pay two weeks' notice pay, during which time the employee did not nor was he required to render any services mean that the relationship had gone beyond the fixed-term relationship.
- [15] In my view, the fixed term contract ended on 31 January 2015. The fact that the appellant did not inform the employee prior to the expiry of the contract that the contract will not be renewed or extended or that it will be coming to an end does not mean that it is either automatically extended or that the employment has become permanent, unless provisions of the law specifically provided for that.
- [16] It follows therefore that the CCMA erred in concluding that there was a dismissal and as such it was entitled to arbitrate the dispute.
- [17] In the light of the above there is no reasons to deal with the other two issues raised by the appellant. This is also not a matter where costs should follow the result.

[18] Finally, the appellant has sought condonation for the late filing of its notice of appeal. I am satisfied that condonation should be granted.

[19] In the result I make the following order:

(a) Condonation for the late filing of the notice of appeal is granted.

(b) The appeal is upheld and the order of the Labour Court is substituted to read:

“The award handed down by the CCMA is hereby reviewed and set aside and replaced with the following: The CCMA has no jurisdiction to arbitrate the dispute in the absence of a dismissal.”

Waglay JP

I agree:

Murphy AJA

I agree

Savage AJA

APPEARANCES:

FOR THE APPELLANT:

Mr Orton, attorney from Snyman attorneys

FOR THE THIRD RESPONDENT:

In person