

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR333/22

In the matter between:

MOMELEZI KULA

Applicant

and

CCMA

First Respondent

RICHARD BYRNE N.O.

Second Respondent

ROAD ACCIDENT FUND

Third Respondent

Heard: 12 October 2023

Delivered: 26 January 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 26 January 2024.)

REASONS FOR ORDER

PHEHANE, J

[1] On 12 October 2023, I handed down an order dismissing the review application with no order as to costs.

[2] The applicant seeks reasons for the order. Brief reasons follow below.

[3] The applicant sought to review and set aside the arbitration award by the second respondent which dismissed his referral to the first respondent on the basis

that he was not dismissed. The issue before the second respondent was whether the applicant was dismissed as contemplated in section 186(1)(b)(i) of the Labour Relations Act¹ (LRA).

[4] The issue that this Court had to determine was whether or not the decision by the second respondent in finding that the applicant had no legitimate expectation that his fixed term contract would be extended and therefore that there was no dismissal, is a decision that a reasonable decision-maker could not reach.

[5] The applicant's grounds of review contain selectively chosen extracts from the second respondent's arbitration award to substantiate why the arbitration award should be reviewed and set aside. In so doing, he relies on paragraph 17 of the arbitration award to contend that the second respondent found that he had established that he had a reasonable expectation of the renewal of his fixed term contract, but that contrary to this finding, the second respondent concluded that he was dismissed. It is astounding that the applicant chooses to ignore paras 18 to 23 of the arbitration award, wherein the second respondent deals with objective facts that demonstrate that the existence of such expectation was extinguished approximately 12 months prior to the termination of the contract due to the circumstances prevailing at the time.

[6] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*,² the Labour Appeal Court (LAC) rejected a piecemeal and fragmented approach to reviews.

[7] Not only is the applicant's approach piecemeal, but it is selective. By no stretch of the imagination does the second respondent conclude in his final analysis, taking into consideration the totality of evidence before him, that the applicant demonstrated a legitimate expectation that his fixed term contract would be renewed.

[8] In the transcribed record before the second respondent, the applicant does not deny that approximately a year before his fixed term contract was terminated, he

¹ Act 66 of 1995, as amended.

² [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC).

received the written communication dated 27 February 2020, from the Chief Executive Officer of the third respondent informing him that his fixed term contract would not be renewed and would terminate on 31 May 2021 due to the third respondent undergoing restructuring. It is on the basis of this letter that the second respondent found, on the objective facts, that the reasonable expectation that was created had been extinguished.

[9] I find that the decision by the second respondent is reasonable. He conducted the correct enquiry and applied the correct legal principles to determine whether the applicant had established a reasonable expectation that his fixed term contract would be renewed and found that he had not.³

[10] On the totality of evidence before the second respondent, it transpires that the document upon which the applicant relies to create a legitimate expectation was improperly obtained. He does not dispute this. The third respondent accordingly contends that the applicant does not come to this Court with clean hands and therefore this Court should not assist him.⁴

³ See: *MEC for the Department of Finance, Eastern Cape v De Milander and others* [2011] JOL 27506 (LC) at para [32] where the Labour Court stated as follows:

'The onus to [prove] that the dismissal occurred in circumstances where the employee had reasonable expectation that the fixed- term contract would be renewed at the end of its period rests with the employee. A dual enquiry is conducted in determining the existence of reasonable expectation. The first enquiry is subjective and entails enquiring into the subjective basis upon which the person who claims reasonable expectation relies on contending that his or her contract ought to have been renewed. The enquiry into the reasonable expectation ends if the employee fails to show that he or she had the expectation that the period of the fixed-term contract would be extended. If the employee is successful in showing that he or she had a subjective expectation that the contract would be renewed then the second enquiry entails determining the existence of such an expectation on the basis of the objective facts that existed prior to the termination of the contract.' [Emphasis added]

See also: *SA Rugby Players Association (SAPRA) and others v SA Rugby (Pty) Ltd and others; SA Rugby (Pty) Ltd v SARPU and another* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC) at para [44], where the LAC per Tlaetsi JA summarised what needs to be satisfied in assessing the objective test of a reasonable expectation as follows:

'The appellant carried the onus to establish that they had a "reasonable expectation" they had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew his fixed term contract on the same or similar terms.' [Emphasis added]

⁴ See: paras 35 to 36 of the respondent's heads of argument and the authorities cited therein.

[11] The ground of review that the second respondent did not align himself with previous arbitration awards is baseless. On the applicant's own admission, arbitration awards are not binding on other arbitrators.

[12] In view of the afore-going, I find no basis to interfere with the arbitration award. It is for the aforesaid reasons that the aforesaid order was issued.

M. T. M. Phehane
Judge of the Labour Court of South Africa