

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA22/2022

In the matter between:

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY

Appellant

and

KANTU THOMAS KABENGELE

First Respondent

M VAN ROOYEN N.O.

Second Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 23 November 2023

Delivered: 27 March 2024

Coram: Molahlehi AJP, Savage ADJP and Mlambo JA

JUDGMENT

SAVAGE ADJP

Introduction

- [1] This appeal, with the leave of the Labour Court, is against the judgment and orders of that Court (per Williams AJ) in which the award of the second respondent, the commissioner, was set aside on review. The dismissal of the first respondent, Mr Kantu Kabengele, by the Cape Peninsula University of

Technology (CPUT) was found to have been procedurally and substantively unfair and Mr Kabengele was reinstated into his employment with the appellant. Mr Kabengele cross-appeals against the reinstatement order made on the basis that it specified neither the date of reinstatement nor the amount of back pay payable.

- [2] Mr Kabengele was employed by CPUT as a lecturer in its Faculty of Engineering in terms of six fixed-term contracts of employment entered into between 24 January 2011 and 31 December 2020. For the duration of his employment with CPUT, Mr Kabengele held refugee status in South Africa. With effect from 1 January 2015, Mr Kabengele was employed on a five-year contract, prior to the conclusion of which he was informed that although the post into which he was to be employed was a permanent one, his was a fixed term contract as he was neither a South African citizen nor a permanent resident of the country. He was informed that on expiry of the five-year contract, CPUT reserved the right to review the post and the contract and that: *"The offer is subject to you obtaining a work permit within a reasonable time. You will not be permitted to assume duty without a valid work permit"*.
- [3] The five-year contract was extended for a further year from 1 January 2020. Despite seeking a further contract extension with the support of his Head of Department (HOD), on 3 December 2020, Mr Kabengele was informed by CPUT that his contract would not be renewed and would expire on 31 December 2020. Dissatisfied, he referred an unfair dismissal dispute to the third respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), on the basis that he held a reasonable expectation that the contract would be renewed and that CPUT's failure to do so constituted a dismissal within the meaning of section 186(1)(b) of the Labour Relations Act¹ (LRA). The CCMA found that Mr Kabengele had not proved that he held such a reasonable expectation and that he had not been dismissed by CPUT.

¹ Act 66 of 1995, as amended.

- [4] Mr Kabengele sought the review of the arbitration award in the Labour Court on a number of grounds. He averred that the commissioner had arrived at an unreasonable decision and had committed a number of reviewable irregularities. He took issue *inter alia* with the commissioner's failure to appreciate the fact of his refugee status, that his contract extension in 2020 could only have been to allow him to obtain permanent residence, and that he had not been placed on express terms by CPUT to obtain permanent residence. CPUT opposed the review application on the basis that the award was "*correct and one which any reasonable decision maker*" would have made.
- [5] The Labour Court accepted that the applicable test in a review of a jurisdictional issue is that of correctness. It found that Mr Kabengele had discharged the onus to prove that he had been dismissed and that his dismissal was unfair. The Court set aside the arbitration award on the basis that it was incorrect, finding the dismissal of Mr Kabengele to have been procedurally and substantively unfair since the objective facts supported a finding that Mr Kabengele held a reasonable expectation that his fixed-term contract would be renewed "*for at least another year*". However, despite finding that Mr Kabengele held no expectation of employment on a permanent basis, the Labour Court ordered CPUT to reinstate Mr Kabengele on a permanent basis into the position of Senior Lecturer in its Department of Mechanical Engineering.

On appeal

- [6] On appeal it was submitted for CPUT, with reference to a range of authorities, including those of this Court in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others (De Milander)*,² *Enforce Security Group v Fikile and others*³ (*Enforce Security*) and *Jonsson Uniform Solutions (Pty) Ltd v Brown and others*⁴ (*Jonsson Uniform*

² [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) at para 24.

³ [2017] ZALAC 9; (2017) 38 ILJ 1041 (LAC) at para 16.

⁴ [2014] ZALAC 79 (13 February 2014).

Solutions) and of the Labour Court in *NUMSA obo Zahela and others v Volkswagen SA (Pty) Ltd and others*⁵ (*NUMSA*), that the review application ought to have been dismissed because the wrong review test, namely reasonableness and not correctness, was pleaded. This was contended to be so on the basis that the Court ought not to have decided the application on grounds that had not been pleaded. In addition, it was argued that Mr Kabengele did not discharge the onus of proving that he had been dismissed; and that the Court erred in finding differently and reinstating him into a permanent position. In addition, if he was shown to have proved dismissal, just and equitable compensation within the meaning of section 194 of the LRA was the appropriate remedy and not reinstatement.

- [7] Mr Kabengele opposed the review. He argued that a correctness review was implicit in the reasonableness grounds pleaded in his review application; and that he had proved that he had been dismissed in that he held a reasonable expectation that his fixed-term contract would be renewed as had occurred previously when his legal status as a refugee entitled him to be employed. It was submitted that the Labour Court had therefore correctly found that he had been unfairly dismissed. Since the reinstatement order did not specify the date of reinstatement, nor the amount of back pay payable, it was submitted that the cross-appeal in these respects must succeed.

Discussion

- [8] Whether a dismissal has taken place within the meaning of section 186 of the LRA is a jurisdictional issue. The CCMA lacks jurisdiction to entertain a dispute referred to it where an employee has not been dismissed.⁶ As a jurisdictional issue, the finding of the CCMA as to the existence of a dismissal is subject to review on objectively justiciable grounds, on the basis of

⁵ Unreported judgment under case no: PR 137/13 delivered 16 November 2016 at paras 6 and 7.

⁶ *SA Rugby Players' Association (SARPA) 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) (*SA Rugby*) at para 39.

correctness and not on the reasonableness test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁷

- [9] CPUT takes issue in this appeal, in the first instance, with Mr Kabengele's failure to plead that the arbitration award fell to be reviewed on the grounds of correctness, pleading rather that the reasonableness test applied. Mr Kabengele disputes this on the basis that, properly considered, his pleadings can be read to include a review on the basis of correctness.
- [10] The Constitutional Court in *Booi v Amathole District Municipality and Others*⁸ (*Booi*) emphasised that labour litigation, as envisaged by the LRA, is distinct from any other civil litigation, with the preamble of the LRA making it clear that the Act seeks "*to provide simple procedures for the resolution of labour disputes...*" The Court stressed that labour disputes must therefore "*not be perceived as ordinary civil disputes by the courts that adjudicate them. Our law is clear: labour dispute resolution must be expedient, simple, accessible and cost-effective*".⁹
- [11] In *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited and others*,¹⁰ the Constitutional Court stated that, from a holistic reading of the LRA, it is apparent that its dispute resolution mechanisms are intended to be "*simple and accessible, so that those to whom the labour rights enshrined in our Constitution are conferred can vindicate those rights speedily and cost-effectively*".¹¹ The Court cautioned, in the context of an award of legal costs, against shutting the doors on litigants unduly and encouraged that an appropriate balance be struck in labour matters between keeping the doors of dispute resolution "*wide open for litigants to air their grievances*" to allow those who seek to vindicate their

⁷ [2007] ZACC 22; 2008 (2) SA 24 (CC). See also *SA Rugby* at para 39 and *De Milander* at para 24.

⁸ [2021] ZACC 36; (2022) 43 ILJ 91 (CC) at para 50.

⁹ *Ibid* at para 50.

¹⁰ [2021] ZACC 26; 2021 (11) BCLR 1249 (CC).

¹¹ *Ibid* at para 27.

constitutionally entrenched labour rights in the specialist institutions created by the LRA to do so.¹²

[12] Despite the recognised distinctions which exist between labour and other civil litigation, many of the same rules apply equally to both. A court is bound to determine the pleaded case before it and a review court is not permitted, as a general rule, to stray into the determination of issues which have not been pleaded by the parties. It is only where the parties have proceeded on an incorrect perception of the law that a court is obliged *mero motu* to raise as much¹³ as it may where it is necessary to raise an issue to dispose of the matter and it is in the interests of justice to do so.¹⁴

[13] In *NUMSA*, the Labour Court refused a postponement and dismissed a review application on the basis that the applicant was bound by its pleaded case on review. The Court found that to allow the introduction of a new cause of action after an extensive period had elapsed since the employees' claim had arisen would defeat the purpose of expeditious dispute resolution.¹⁵ In *SA Post Office v Commission for Conciliation, Mediation and Arbitration and others*¹⁶ (*SA Post Office*), the Labour Court dismissed a review application on a similar basis. Yet, in *PSA obo Mackay and others v Department of the Premier Western Cape and others*¹⁷ (*PSA*), the Labour Court found that to non-suit an applicant who had pleaded the wrong review test amounted to an overly technical approach, out of kilter with the primary objects of the LRA, when, in instituting the review application, the applicant had made it clear that it considered the award to be wrong. The Court stated that implicit in the allegation of unreasonableness was the fact that the applicant considered the award to be wrong, given that unreasonableness amounted to a more stringent threshold since an unreasonable award could not be correct. This Court similarly, in *Enforce Security and Jonsson Uniform Solutions*,

¹² Ibid at paras 30 and 32.

¹³ *CUSA v Tao Ying Metal Industries and others* [2008] ZACC 15; 2009 (2) SA 204 (CC) at para 66.

¹⁴ *Booi* at para 35.

¹⁵ *NUMSA* at para 8.

¹⁶ (2018) 39 ILJ 1350 (LC) at paras 23 - 31.

¹⁷ Unreported judgment under case no: C153/2019 delivered 15 September 2022 at para 20.

determined an appeal on the basis of correctness, despite the fact that the review had been pleaded on the basis of reasonableness.

[14] In the current matter, from a reading of the founding affidavit in the review application it is apparent that although reasonableness was expressly pleaded, Mr Kabengele also took issue with the correctness of the award. He expressly challenged the commissioner's failure to appreciate and draw conclusions from particular facts, detailing a number of instances in respect of which the commissioner had erred.

[15] Although imprecisely pleaded, the Labour Court was therefore correct in refusing to non-suit Mr Kabengele on the basis that he had not expressly pleaded that the review of the award was sought on the basis of correctness. This is so in that it was patently clear from the pleadings that Mr Kabengele considered the award to be wrong and, unlike in *NUMSA*, he did not seek to raise a new review ground which had not been pleaded for the first time at the hearing of the review application. In suggesting that Mr Kabengele should be non-suited on this basis, CPUT sought to raise what amounted to an unmeritorious technical defence. Within the context of labour litigation, such defences are to be viewed with caution by our courts and are not to be quickly accepted given the constitutional right to fair labour practices, the nature of labour disputes and the approach of the LRA to the resolution of such disputes.

Was a dismissal proved?

[16] The definition of a dismissal in section 186(1) includes where –

‘...’

(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer –

(i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it...’

[17] Mr Kabengele bore the onus to prove that he held a “reasonable expectation” that his contract was to be renewed. This required that he put up facts which, objectively considered, established such an expectation. As was stated by this Court in *South African Rugby Players Association v SA Rugby (Pty) Ltd (SA Rugby)*,¹⁸ because the test is objective, the enquiry turns on whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew their fixed-term contract on the same or similar terms. The facts of this matter are distinct from those in *SA Rugby*, in which this Court found there to be no reason that the players could justifiably any reasonable expectation that their contract would be renewed in that their claims were based mainly on promises made by an outgoing coach.¹⁹

[18] Objectively considered, the facts indicate that Mr Kabengele held a reasonable expectation that his fixed-term contract of employment would be renewed for a further year. This was so in that on six occasions from 2012 he was employed by CPUT in terms of various fixed-term contracts. His 5-year fixed-term contract was renewed from 1 January 2020 for a further year and the HOD assisted Mr Kabengele to seek a similar further contract extension in December 2020. His legal status as a refugee remained unaltered. He was not placed on terms by CPUT to obtain a permanent residence permit within a particular period. He was not asked to provide an update on his application for either permanent residence or a work permit, nor given notice that, failing this, his contract would not be renewed.

[19] The letter advising him that his contract would expire provided no reason why this was so and gave less than one month’s notice of the expiry of the contract. Mr Kabengele responded to this letter stating that it had come as “a surprise and a shock, almost in the middle of the month” by the time it was received and that the decision, with no reason provided for it, was “unilateral and unfair”, with no regard to his past loyal service. Although Mr Kabengele was informed in 2014 that the contract offer made to him was subject to his

¹⁸ *SA Rugby supra*.

¹⁹ *SA Rugby supra* at paras 48 and 53.

obtaining a work permit “*within a reasonable timeframe*” and that he “*will not be permitted to assume duty without a valid work permit*”, he was allowed to assume duty and had his contract period extended from 1 January 2020, without being placed on terms by CPUT to obtain a valid work permit or provide an update on his application for permanent residence. Having regard to all of these facts, the Labour Court cannot be faulted for finding that the arbitrator reached a decision which objectively was not correct and that the arbitration award fell to be set aside on review.

[20] There is however no merit in the finding of the Labour Court that Mr Kabengele held a reasonable expectation that his contract would be renewed on a permanent basis. On his own version, Mr Kabengele was always employed on a contract basis. He made out no case that he held a reasonable expectation in December 2020 that he would be employed on a permanent basis by CPUT. What the facts proved instead was that he held a reasonable expectation that his contract would be extended for a further year with effect from 1 January 2021.

[21] It follows that Mr Kabengele proved that he had been dismissed by CPUT and that the requirements of section 186(1)(b) had consequently been met. It fell then to CPUT to prove that the dismissal was both procedurally and substantively fair. It failed to do so. Since Mr Kabengele held a reasonable expectation that his contract would be extended for a further year, a just and equitable order in the circumstances was that, given the time that had elapsed, CPUT be ordered to pay to Mr Kabengele twelve months’ compensation.

[22] It follows for these reasons that this appeal must succeed in part with the cross-appeal dismissed. Having regard to considerations of law and fairness, no order of costs is appropriate in this matter.

[23] In the result, the following order is made:

Order

1. The appeal succeeds in part.
2. The order of the Labour Court is set aside and substituted as follows:
 1. The review application succeeds.
 2. The arbitration award of the CCMA in case number WECT 1288-21 is set aside and substituted to read:
 - i. The applicant, Mr Kantu Kabengele, was dismissed from his employment by the respondent, the Cape Peninsula University of Technology (CPUT), in terms of section 186(1)(b) of the LRA.
 - ii. The dismissal of the applicant by CPUT was procedurally and substantively unfair.
 - ii. CPUT is to pay to the applicant twelve (12) months' compensation within ten (10) days of the date of this arbitration award.'
3. The cross-appeal is dismissed.
4. No order of costs is made.

SAVAGE ADJP

Molahlehi AJP and Mlambo JA concur.

APPEARANCES:

FOR THE APPELLANTS:

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FOR RESPONDENT:

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LABOUR APPEAL COURT