



REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA49/2013

In the matter between:

INDEPENDENT MUNICIPAL AND ALLIED

First Appellant

TRADE UNION

CHRISTIAN LESOLANG

Second Appellant

and

CITY OF JOHANNESBURG METROPOLITAN

First Respondent

MUNICIPALITY

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

ZARINA WANELE NO

Third Respondent

Heard: 19 November 2013

Delivered: 04 March 2014

Summary: Jurisdiction- reviewing court entitled to raise *mero motu* the jurisdiction of the council or CCMA. Dismissal- fixed terms contract- employer notifying employee of the date of termination of his fixed terms contract- employee referring dismissal dispute- notification not dismissal- referral premature- council lacking jurisdiction- employee receiving bursary from employer beyond contract- bursary not extending contract- no reasonable expectation of renewal- appeal dismissed with costs

CORAM: WAGLAY JP, et C J MUSI et FRANCIS AJJA

JUDGMENT

C J MUSI AJA

- [1] This is an appeal against the judgment of the Labour Court (Edmonds AJ). The appeal is with the leave of the Labour Court.
- [2] The second appellant (Mr Christian Lesolang, “the employee”) was employed by the first respondent (City of Johannesburg, Metropolitan Municipality “the municipality”) from 13 December 2004 on a fixed term contract for a period of five years. The contract was therefore supposed to terminate on 31 December 2009 but it was erroneously recorded that it will terminate on 31 December 2010.
- [3] The employee initially, for a period of two years, worked as an office manager in the office of the executive head but was subsequently moved to the ethics and discipline unit.
- [4] On 24 February 2009, the municipality and the employee entered into a memorandum of Agreement (Subsidised Education for Council Employers). In terms of this agreement, the municipality would render financial assistance to the employee during his studies towards a two year diploma in Labour Law. It is common cause that the qualification would be obtained through block-release studies. The parties agreed that:

‘4.2 In the event of the qualification being a Block-Release Course, i.e. a qualification in respect of which the Institution requires the employee to attend lectures or to undertake practical work or to attend practical demonstrations during working hours for a total period in excess of 3 (three) months during a year, irrespective of whether or not the employee obtains the qualification, he/she undertakes not to leave the employee of the council as follows:

4.2.1 for a period of 1 (one) year in respect of each year in which examination, study or special study leave of up to and including 26 weeks in the year was granted, and...'

- [5] They further agreed that if the employee is suspended or abandoned his studies or failed any course required for the obtainment of the qualification for two consecutive years or be refused permission, by the institution, to continue his studies, he would be obliged to repay the municipality the full amount of the financial assistance granted. The employee commenced his studies in February 2009. He would therefore have completed it in February 2011.
- [6] Pursuant to a letter dated 10 February 2009, Mr Netsianda, the Senior HR Manager: Human Resource Emergency Management Services of the municipality wrote the following letter to the employee on 12 May 2009.

'The letter dated 10 February 2009 refers. Kindly take note that I have done some investigation regarding the termination date of your contract. I can confirm that the termination date stipulated in your contract is 31 December 2010. However it should have been a typing error which happened during the time your FTC contract was compiled (sic). The City does not offer an FTC contract which is for a period of six years. It should be noted that the SAP print-out confirms that you were employed on FTC as from 13 December 2004 and your contract terminated on the 12 December 2009. Secondly, your appointment letter dated 13 December 2004 indicates that you are appointed on a Fixed Term five year contract as from the 13 December 2004 (sic). In view of the above evidence it should be noted that your contract will terminate on the 12 December 2009 (sic). The position will be advertised and you are welcome to apply and compete should you desire to do so...'

- [7] On 6 July 2009, the employee referred an unfair dismissal dispute to the South African Local Government Bargaining Council (second respondent). He alleged that the dispute arose on 12 May 2009 but that he was dismissed in writing on 12 December 2009. The facts of the dispute, according to him, were that the contract was terminated before the termination date.

- [8] Conciliation failed and the employee subsequently referred the dispute to arbitration.
- [9] During the arbitration proceedings the employee, who was the only witness, testified that when he was moved to the ethics and discipline unit he was offered a new five year contract by the Director: Corporate Services, which he accepted. His contract would therefore have ended in 2011 and not 2009.
- [10] He also testified that because he would complete his studies in 2011, he was, in terms of the subsidised education agreement, obliged to work an additional two years for the municipality. His contract would therefore only terminate in 2013.
- [11] When he received the letter dated 12 May 2009, he regarded it as a letter of termination because it altered his contract of employment to end during December 2009 instead of December 2010 as per the original contract. He had a meeting with Mr Netsianda, the author of the letter, who informed him that his contract was for five years and not six years. He demonstrated and told Netsianda that it was normal for him to assume that his contract was for six years. He also indicated to Netsianda that he was obliged to work for the municipality for two years after completing his studies. He was told that the municipality sent him to school he must see it as an advantage which he should "take and run."
- [12] The arbitrator found that the contract of employment expressly stated that it was for five years and destined to terminate at the end of 2009 and not 2010 as alleged by the employee. She found that the employee failed to prove that a second contract of employment was entered into when he moved to the ethics and discipline unit. She however found that the municipality created a reasonable expectation of renewal when the employee was granted a study subsidy that obliged him to remain in employment of the municipality for two years, after the completion of his studies. She was of the view that the municipality's conduct, by not renewing the contract of employment, fell within the definition of a dismissal. She concluded that the employee's dismissal was substantively and procedurally unfair.

- [13] In terms of relief, she was of the view that the employee would have studied for two years (2009 – 2011) and would thereafter have to work for two years for the municipality (2011 – 2013).
- [14] She issued an award to the effect *inter alia* that the municipality must reinstates the employee from 1 January 2010 and she extended the employee's contract of employment until 28 February 2013. She also awarded the employee back-pay to the amount of R44 564,24. The employee subsequently on 6 May 2010, applied for the variation of the monetary award from R44 564,24 to R131 216,99. The outcome of that application is unknown. In his answering affidavit, in the review proceedings, he requested that the arbitration award be made an order of court subject to the variation of the monetary award.
- [15] The municipality, being dissatisfied with the award, launched a review application wherein it challenged the arbitrator's findings that there was a dismissal. Although it did not challenge the second respondent's jurisdiction to adjudicate the dispute, the court *a quo mero motu* considered whether the second respondent had the necessary *vires* and concluded that it did not.
- [16] The employee and the first appellant (The Independent Municipal and Allied Trade Union (IMATU)) took a point *in limine* to the effect that the review application should be dismissed because it was brought in terms of section 158(1)(g) instead of section 145 of the Labour Relations Act 66 of 1995 (the "Act").
- [17] The court *a quo* found that the review was properly before it in terms of section 158(1)(g) of the Act and therefore dismissed the point *in limine*.
- [18] The court *a quo* found that the letter dated 12 May 2009 did not constitute notice of termination as it was not necessary for the municipality to give such notice in terms of the contract. The court *a quo* also found *en passant*, that if the letter dated 12 May 2009 constituted notice then the employee was supposed to refer the dispute within 30 days thereafter to the second respondent. It was only referred on 6 July 2009, which is in excess of the 30 day period and therefore out of time. The second respondent could only

adjudicate the dispute if the application for condonation in terms of section 191(2) was granted. In the absence of such application the second respondent did not have jurisdiction to adjudicate the dispute.¹ The court *a quo* also found that the employee stated that his dismissal was to take place on 12 December 2009, when he referred the dispute on 6 July 2009. The court *a quo* was of the view that the referral was premature and the second respondent, for that reason too, had no jurisdiction to adjudicate the dispute.

- [19] The two appellants challenged the court *a quo*'s findings on various grounds. They submitted that the municipality brought the review, in the court *a quo*, in terms of section 158(1)(g) of the Act whereas it was supposed to utilize the provisions of section 145 of the Act. According to them the review application should have been dismissed for this reason alone. They also contended that the court *a quo*'s determination that the dispute referral was premature is erroneous. According to them, the premature referral was not part of the municipality's case, and in any event so they argued, the certificate of non-resolution having been issued the second respondent had jurisdiction. It was further argued that the finding that the dispute could not be adjudicated because of the late referral was also erroneous.

¹ Section 191 of the Labour Relations Act 66 of 1995 reads as follows:

"(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-

- (i) a council, if the parties to the dispute fall within the registered scope of that council; or
- (ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within-

- (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
- (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

[Sub-s. (1) substituted by s. 46 (b) of Act 12 of 2002.]

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

[Sub-s. (2) substituted by s. 46 (c) of Act 12 of 2002.]

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

[Sub-s. (2A) inserted by s. 46 (d) of Act 12 of 2002.]

(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer..

53 See flow diagrams 10, 11, 12 and 13 in Schedule 4

53 See flow diagrams 10, 11, 12 and 13 in Schedule 4."

- [20] Section 158(1)(g) of the Act states that the Labour Court may subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law.² Section 51(8) of the Act provides that “unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a bargaining council”.
- [21] The appellants argued that there is no collective agreement governing this issue, therefore the municipality was obliged to bring the review in terms of section 145. In my view the argument is without any force.
- [22] Section 51(8) only makes the sections mentioned therein applicable to arbitrations which are conducted under the auspices of a bargaining council. It does not mean that all arbitrations conducted under the auspices of a bargaining council should only be reviewed in terms of section 145. In terms of the last mentioned section any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. This section, therefore, only deals with arbitration awards issued under the auspices of the Commission. Section 51(8) seeks to make section 145

² Section 145 of the Act reads as follows:

“(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; or

[Para. (a) substituted by s. 36 (1) of Act 12 of 2004.]

(b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.

[Para. (b) substituted by s. 36 (1) of Act 12 of 2004.]

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

[Sub-s. (1A) inserted by s. 34 of Act 12 of 2002.]

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may-

(a) determine the dispute in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute.”

applicable to awards issued under the auspices of a bargaining council as well.

[23] An arbitration conducted under the auspices of a bargaining council is a function provided for in the Act. In terms of section 127 bargaining councils are accredited by the commission to conciliate and where the Act requires it, to arbitrate disputes.

[24] A section 158(1)(g) review is permissible subject to section 145. The phrase “subject to” was considered in *S v Marwane*, where Miller JA, writing for the majority, stated that:

‘The words ‘subject to the provisions of this Constitution’ in s 93 (1) of the Constitution clearly govern the provision that laws in operation immediately prior to the commencement of the Constitution are to continue in operation. The purpose of the phrase ‘subject to’ in such a context is to establish what is dominant and what subordinate or sub-servient; that to which a provision is ‘subject’ is dominant- in case of a conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be ‘subject to’ the other specified one. As Megarry J observed in *C and J Clark v Inland Revenue Commissioners* (1973) 2 All ER 513 at 520:

‘In my judgment, the phrase ‘subject to’ is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail. See also *Rennie NO v Gordon and Another NO* 1988 (1) SA 1 (AD) at 21D-G.’³

³ 1982 (3) SA 717 (A) at 747G – 748A.

In this matter there is no conflict because the review was brought within the time stipulated in section 145 and based on the review grounds stipulated therein.

[25] It has been said that in terms of section 158(1)(g) the Labour Court is given power, despite section 145, to review the performance or purported performance of any function provided for in the Act.⁴ I agree.

[26] Although the lack of jurisdiction was not one of the municipality's grounds of review, the court *a quo* was entitled to consider this issue *mero motu*. The court *a quo* had to be satisfied that on the objective facts, the second respondent had jurisdiction to adjudicate the matter.⁵ The second respondent had or it did not have jurisdiction, as a matter of law, to adjudicate the dispute. In *CUSA v Tao Ying Metal Industries and Others*, it was said that:

'Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'⁶

[26] The court *a quo* as stated above, found that the employee referred his dismissal dispute on 6 July 2009 alleging that his dismissal was to take place on 12 December 2009. The court *a quo* found that the referral was premature and the second respondent therefore lacked jurisdiction to hear the matter because there was no dismissal at the time of the referral.

[27] The court *a quo* adopted a very strict approach to determine this issue. It did not endeavour to ascertain what the true dispute was, considering the history

⁴ See *Reddy v Kwa-Zulu Natal Department of Education and Culture* [2003] 7 BLLR 661 (LAC) at para [17].

⁵ See *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Association* (2008) 28 ILJ 2218 (LAC).

⁶ 2009 (2) SA 204 (CC) at para [68].

of the matter.⁷ I do not blame the court *a quo* because the appellants' case, on the papers and evidence, is difficult to understand.

- [28] I agree with the court *a quo* that on the one interpretation of the referral and evidence, it is clear that the employee referred the dispute prematurely without there being a dismissal, because he was of the view that his contract will be terminated in December 2009 whilst his contract was only destined to terminate in December 2010. It is for that reason that he indicated that the outcome he required was "contract to continue as per contract" and that he will be dismissed on 12 December 2009. His summary of the facts of the dispute that "contract terminated before end date as per contract" is also indicative of the fact that he viewed December 2010 as the termination date of his contract of employment.
- [29] The employee, however, also endeavoured to use the existence of the subsidised education agreement to indicate that the contract of employment was varied and secondly that the letter dated 12 May 2009 constituted a notice that his contract will not be renewed. His case was therefore also based on the fact that he was dismissed because the municipality did not review the fixed term contract when he reasonably expected it to renew it.
- [30] In terms of section 186(1)(b) of the Act, a dismissal means that an employee reasonably expected the employer 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.
- [30] Section 190(2) which determines the date of dismissal in section 186(1)(b) situations provides that if an employer has offered to renew on less favourable terms, or has failed to renew a fixed term contract of employment, the date of the dismissal is the date on which the employer offered the less favourable term or date on which the employer notified the employer of the intention not to review the contract.

⁷ *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at para 52.

- [31] On the totality of the evidence, it is clear that the employee regarded the letter of 12 May 2009 as notification of the municipality's intention not to renew the fixed term contract.
- [32] The employee bears the *onus* to establish that he was dismissed.⁸ He must therefore prove on a balance of probabilities that he reasonably expected his employer to renew the fixed term contract of employment on the same terms and that the employer refused to do so. The employee had to adduce evidence which, objectively considered, established a reasonable expectation. The test to establish the reasonableness of the expectation is an objective one. In *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others; SA Rugby (Pty) Ltd v SA Rugby Players Union and Another* the test was formulated thus: would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms.⁹
- [33] It goes without saying that if the employee laboured under an unreasonable, unjustified or far-fetched expectation, section 186(1)(b) would be of no assistance to him/her. Likewise the expectation must relate to the renewal of the employment contract and not based on a wrong assumption that another contract or instrument has varied the employment contract and thereby extended or renewed it.
- [34] When assessing whether an expectation is reasonable all the surrounding facts and circumstances should be considered including the terms of the contract of employment, promises made by the employer – regardless of contractual terms which gainsay what the employer promised and the general conduct of the parties.¹⁰
- [35] In my view the employee did not succeed in proving that he was dismissed. I say so because the letter of 12 May 2009, properly contextualised, did not constitute and was not intended to constitute a notice that the contract will

⁸ See section 192(1) of the Act.

⁹ (2008) 29 ILJ 2218 (LAC) at para 44.

¹⁰ See *Mediterranean Woollen Mills (Pty) Ltd v South African Clothing and Textile Worker's Union* 1988 (2) SA 1099 (SCA).

not be renewed. The letter was clearly written after the discrepancy relating to the dates came to light and because the employee was of the view that his contract of employment will terminate, by effluxion of time, in 2010 and not 2009. Netsianda went and investigated the whole matter and reported his findings to the employee. Having informed him what the true state of affairs were he informed him what the consequences of the fixed term contract were. This is clear because he states: "In view of the above evidence it should be noted that your contract will terminate on the 12 December 2009 (sic)..."

- [36] In my view, it would be far-fetched and absurd to read more into the letter than what is clearly stated herein. The fact that the letter states that the position will be advertised and that the employee would be welcome to apply therefore, after the termination of his contract, should he desire to do so, is also of no moment. It is just an explanation as to what would happen after the termination of the employee's contract. The employee's contention that the explanation or clarification constitutes the act of dismissal is absurd. If it is upheld it would mean that an employee's engagement on a fixed term contract and his/her dismissal will always coincide if the employer, on the day of engagement, explains to the employee what would happen at the end of the contract.
- [37] There is no evidence that the municipality considered and decided against the renewal of the employee's contract. There is likewise no evidence that his contract was reviewed by the municipality. His contract in any event clearly states that it shall endure for five years and terminate automatically when that period lapses. Clause 3.3.1 of the contract of employment also clearly states that the failure to review or extend the contract period shall not constitute a dismissal. There was no need or obligation to give him any notice of termination.
- [38] In my view, the wrong termination date that appeared, on the contract viz 31 December 2010 instead of 31 December 2009, could also not give rise to a reasonable expectation that his contract would be extended to 31 December 2010. The contract is clear that it shall endure for five years only and

terminate automatically. In any event a patent error cannot in my view give rise to a reasonable expectation.

[39] Did the municipality, by entering into the subsidised education agreement with the employee, create a reasonable expectation that his contract would be extended or renewed? Allied to this question is the question whether the subsidised education agreement varied the employment contract. I deal with the second question first.

[40] The contract of employment contains a clause governing variations, which reads as follows:

“Except by resolution of the Municipal Council, no variation, modification or waiver of any provision of this agreement, or consent to any departure there from, shall in any way be of any force or effect unless confirmed in writing and signed by the parties and then such variation, unification, waiver or consent shall be effective only in the specific instance and for the purpose and to the extent for which it was made or given.”

[41] The subsidised education agreement is not and was never intended to be a variation of the contract of employment. The subsidised education agreement is a benefit that the municipality gave to all its employees who qualified therefor. Qualifying employees who make use of the benefit incur certain obligations. The fact that an employee made use of the benefit does not *ipso facto* mean that his/her employment contract is varied or extended; neither does it mean that the municipality is obliged to retain the employee in its employ, beyond the clear stipulations of the employment contract.

[42] According to the appellants, there is, by virtue of the subsidised education agreement, an inferred obligation on the municipality to keep the employee in its employ. This is a senseless argument. If this was so, it would mean that the subsidised education contract would be the basis of the employment relationship and trump the contract of employment. This, in turn, would mean that the employee will practically be immune to discipline and dismissal during that period. That cannot be. The subsidised education contract is a separate and distinct benefit that the employee gets by virtue of the

existence of an employer-employee relationship which is governed by the contract of employment. In my view the subsidised education agreement did not vary the contract of employment.

[43] The argument that the subsidised education agreement gave the employee a reasonable expectation that his contract would be extended until 2013 is unsound. The employee's case is that there was a failure to renew the contract whereas he had a reasonable expectation that it would be renewed. There was no evidence whatsoever that there was an expectation created by the municipality that the contract of employment would be renewed.

[44] The employee's entire case was based on the subsidised education agreement that has no bearing on the contract of employment. A failure to renew a contract presupposes a failure to renew the contract of employment on the same terms and conditions as previously enjoyed. That was not the employee's case. His case was that his contract of employment was extended to 2013 by the subsidised education contract. That in my view is totally misplaced and wrong. The appellants failed, on all permutations of their case, to prove that there was a dismissal.

[45] My conclusion renders it necessary to decide, in this matter, whether a certificate of non-resolution gives the CCMA or Bargaining Council jurisdiction to arbitrate a dispute. That point was also not the reason why the court *a quo* found that the Bargaining Council had no jurisdiction to adjudicate the matter.

[46] It is axiomatic that there was no need, in view of its finding, for the court *a quo* to consider the request that the arbitration award should be varied.

[47] In my view, the requirements of the law and fairness dictate that a costs order be made in this matter.

[48] I accordingly make the following order:

a. The appeal is dismissed.

- b. The appellants are ordered to pay the first respondent's costs jointly and severally, the one paying the other to be absolved.

C J Musi AJA

Waglay JP and Francis AJA concurred with the judgment of Musi AJA.

APPEARANCES

FOR THE APPLICANTS:

Adv Van Staden

Instructed by Savage Jooste & Adams
Pretoria

FOR THE FIRST RESPONDENT:

Adv Redding SC

Instructed by Norton Rose Buth Africa
Sandton