THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 59/15

ALAN TULWANA **First Appellant**

ROBERT WIEBOSCH **Second Appellant**

and

CITY OF JOHANNESBURG **Respondent**

Heard: **26 May 2016**

Delivered: **26 July 2016**

Summary: Employees claiming dismissal as a result of the non-renewal of their fixed term contract – employees contending that they have reasonable exception for the renewal of their fixed term contract in term of a 2006 collective agreement - alternatively that their dismissal was automatically unfair on the basis of a protection disclosure made against one senior employee- employer contending that no legal basis exists for the employees to reasonably expect the renewal of their contract on account of the new collective agreement. Appeal – evidence showing that employees' contract terminated prior to the coming into effect of the new collective agreement and that the 2009 collective agreement was still applicable. – no fair reason exists to justify the failure to renew the employees' fixed term contract and it stands to be considered to be an unfair dismissal in terms of s188 of the LRA.

Protection disclosure – court finding that employees must discharge the burden of proof or convince the court that the inference advocated is the most readily apparent and acceptable inference to be drawn from a number of possible instances - there is no doubt that an inference can be drawn that occupational detriment followed upon the disclosure. Court holding however that two factors militate against a finding that employees were dismissed for occupational detriment: the fact that only one out of nine employees whose fixed term contracts ended was reemployed and that the employer's failure to follow the provisions of the 2006 agreement was due to a mistake of law as opposed to an act of occupational detriment suffered by the employees. Employees' dismissal found only to be substantively unfair – Labour Court's judgment set aside –

Relief – because of the passing of the first appellant prior to the hearing of the appeal it is impracticable to afford him the reinstatement - maximum compensation of 12 months is ordered- employer ordered to reinstate second appellant with no loss of benefits.

Coram: Davis, Musi JJA *et* Murphy AJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against a judgment of Molahlehi J of 29 April 2015 in which the learned judge dismissed the claim of the appellants to be reinstated with no order as to costs.

[2] The background to this case can be summarised thus: Both appellants were long standing employees of the respondent. First appellant was employed as from 10 February 1984 and the second appellant as from 1975. For most of their careers

with respondent, both appellants had been employed on permanent contracts in the financial unit of the Emergency Medical Services Department (EMS). On 1 November 2005, both entered into fixed term contracts for a period of five years.

[3] It appears that, in terms of these new contracts, the employees could elect to maximise their income, while the employer was empowered to introduce maximum performance management into these contracts.

[4] On the evidence, there is no suggestion that appellants did not voluntarily enter into these contracts. It was clearly their intention to secure additional remuneration thereunder, together with further additional benefits such as training courses and skill improvement programs. In terms of these contracts, the employment relationship between appellants and respondent was to terminate on 31 October 2010.

[5] Of additional significance to the present dispute was a settlement agreement, which is a collective agreement with binding effect in terms of s 23 of the Labour Relations Act 66 of 1995 ('LRA'), entered into between the Independent Municipal and Allied Workers Union (IMATU) and the South African Municipal Workers Union (SAMWU) on the one hand and the South African Local Government Association (SALGA) on the other. Clause 2.4 of this agreement provided as follows:

> 'In respect of current fixed term contracts concluded with non-Section 57 employees, these contracts will run for their agreed terms, where-after the employees concerned will remain employed on the SALGBC terms and conditions of employment and at the applicable SALGBC grades and salary scales, unless otherwise agreed in a division of the SALGBC or unless exemption is granted in terms of clause 7 thereof.'

[6] Being a collective agreement, this provision altered the terms of the appellants' contracts by virtue of s 23(1)(d) of the LRA. This agreement was the subject of considerable dispute. Initially, it was made an arbitration award which was subsequently rescinded on application by SALGA. On 1 August 2006, SALGA,

together with various municipalities, instituted an application in the Labour Court to set aside this agreement. It is clear from an agreement which was then later entered into between respondent, IMATU and SAMWU that this settlement agreement was only declared to be null and void and of no force and effect as from the conclusion of a fresh agreement entered into between the parties on 28 September 2012. Consequently, the first collective agreement remained binding until that date. In terms of the second collective agreement, clause 9 thereof provided:

> '9. TERMINATED FIXED TERM CONTRACTS OF EMPLOYMENT
>
> All fixed terms contracts of employment that have already terminated automatically through the effluxion of time, in accordance with its own terms, prior to or on 31 July 2012, shall have no claim against the COJ in respect of the process of conversion and placement as set out more fully in paragraphs 7 above.'

[7] During June 2009, first respondent discovered that Dr Gule, who was the executive manager of EMS, had deposited an amount of R 208 148.29 into her personal bank account, although this amount had been part of a sponsorship which she received to finance a trip to the United States of America. The complaint against Dr Gule eventually reached the Parliamentary Portfolio Committee and received extensive media coverage. Second appellant was involved in this issue, in that he had invoiced Dr Gule to repay the amount in question.

[8] Appellants' case was that respondent had created a reasonable expectation that their fixed term contracts of employment would be renewed on the same or similar terms upon the expiry thereof on 31 October 2010. First appellant testified that his supervisor had informed him that notwithstanding the fixed term contract, if he performed to the best of his abilities, there was no reason why his contract would not be renewed. However once the disclosure had been made, the relationship between appellants or Dr Gule deteriorated markedly. Appellants

contend that Dr Gule ensured that no renewal of their contract would be concluded Thus, failure to renew the contracts or employ the appellant's permanently was, in their view, as a result of the disclosures pertaining to fraud, corruption and financial impropriety perpetuated by Dr Gule; that is in her attempt to personally appropriate the R 208 148.29.

[9] In summary, appellants cause of action was based upon the allegation that they were dismissed because they had a reasonable expectation of renewal in terms of s 186(1)(b) of the LRA or alternatively in terms of s 186(1)(a) of the LRA because their terms and conditions of employment had been novated in terms of s 23(1) of the LRA by the 2006 collective agreement. Whatever the nature of the dismissal, they allege an automatically unfair dismissal in terms of s187(1)(h) of the LRA in that they were victimised for making a protected disclosure.

<u>The decision of the court *a quo*</u>

[10] In essence, Molahlehi J, accepted the argument of respondent that the appellants' had no reasonable expectation of the renewal of the fixed term contracts nor that it was required in law for respondent to employ the appellant's permanently upon the expiry of their fixed term contracts on 31 October 2010. He further accepted that the fixed term contracts terminated automatically through the effluxion of time and that no nexus could be shown to exist between the termination of these contracts and the particular disclosures which had been made by appellants regarding the conduct of Dr Gule, to which I have made reference.

[11] The critical reasoning employed by the learned judge is reflected in the following two passages from his judgment:

> '[54] In considering the above evidence, it cannot be said that but for the protected disclosure, the fixed term employment contracts of the applicants would not have been terminated. The proposition that is supported by the evidence and which I accept is that of the respondent, which is that the fixed term contracts of the applicants came to the end as a result of the effluxion of time. In

other words, it cannot be said on the facts and the circumstances of this case that the protected disclosure made by the applicants was the main, dominant or most likely cause of the termination of the fixed term contracts.

[55] In summary, the applicants have failed to show that the termination of their fixed term contracts was due to an impermissible reasons of the respondent. The applicants' fixed term contracts came to an end as a result of the effluxion of time. Accordingly, I find that the applicants were not dismissed and, therefore, this court does not have jurisdiction to entertain their claim of automatically unfair dismissal.'

Regarding the averment that the collective agreement had amended the terms of the appellant's arguments, Molahlehi J said:

'The non-implementation of the 2006 collective agreement does not assist the applicants in their assertion that they expected their contracts to be extended. It has not been disputed that that agreement was never implemented. There is also no evidence that the applicant ever sought to enforce that agreement.'

<u>The appeal</u>

[12] On appeal, Mr Flynn, who appeared on behalf of the appellants, contended that, apart from the two bases upon which the initial application has been dismissed by the court *a quo*, respondent had failed to employ the appellants permanently in accordance with the terms of the 2006 Collective Agreement, upon expiry of their fixed term contracts of employment. In so doing, appellants had suffered occupational detriment in terms of s 3 of the Protected Disclosures Act 26 of 2000 ('PDA').

[13] By contrast, respondent contended that the settlement agreement had been rescinded and set aside in 2008 and hence it held no significance to the present dispute.

[14] According to respondent, following the legal position which, in its view, was no longer governed by the 2006 agreement, on 11 February 2010 a letter was sent by respondent to the appellants which read thus:

> 'Kindly be advised that your fixed term contract COJ dated 01 November 2005 will be ending on 31 October 2010. The position will be advertised and you are welcome to apply and compete should you desire to do so.'

This letter followed upon a general notice which was placed on the notice boards of respondent on 18 May 2009 which read thus:

> 'Kindly take note that no Fixed Term Contract will be extended or renewed at the end date of such a contract.
>
> All positions on Fixed Term Contract will be advertised at the end of such contract. All employees including the job holder of the Fixed Term Contract position could apply for the same position or any other position if he/she desires to do so.'

[15] For this reason, Ms Snyman, on behalf of the respondent, submitted that the claim of appellants that the settlement agreement of 2006 created an expectation of renewal could not be substantiated. At best for appellants, this agreement was disputed, had not been implemented and was later replaced by the 2012 agreement. The 2012 agreement contained paragraph 9, to which I have already made reference, namely that all who held fixed term contracts of employment that had already been terminated automatically through the effluxion of time prior to or on 31 July 2012, had no claim against respondent. Respondent contends that it was this clause that governed the relationship between appellants and respondent; hence there was no legal basis upon which appellants' claim could be justified.

<u>Evaluation</u>

[16] In my view, the insurmountable difficulty which confronts respondent is that the evidence shows clearly that the settlement agreement of 2006 had not been

replaced prior to the termination of appellants' fixed term contracts on 31 October 2010. When these fixed term contracts terminated in October 2010, clause 2.4 of the 2006 settlement agreement still applied. This meant that appellants would remain employed 'on the SALGBC terms and conditions of employment and at the applicable SALGBC grades and salary scales'. The evidence before this Court is clear: the 2006 agreement was only cancelled as a result of clause 4.1.1 of the 2012 agreement which provided:

> 'The parties agree that:
>
> with effect from the Signature Date, the Disputed Settlement Agreement as it purports, on the face of it, to bind the COJ, shall be null and void and of no force and effect;'

[17] Therefore, it must follow, absent any further evidence, that the refusal to reemploy the two appellants, the provisions of the 2006 agreement notwithstanding, constituted a dismissal in terms of s186(1) of the LRA. Section 23 of the LRA provided that the collective agreement had altered the terms of employment of appellants. The absence of any justification for the dismissal as defined means that, at best for respondent, it was not for a fair reason and stands to be considered to be an unfair dismissal in terms of s188 of the LRA. The conclusion leads to a further enquiry: whether the dismissals were triggered by a protected disclosure which converted the dismissals into automatically unfair dismissals.

<u>Protected Disclosure</u>

[18] I turn thus to deal with the further question as to whether these dismissals were automatically unfair in terms of s187(1)(h), namely the dismissal was for a reason which was in contravention of the PDA, on account of evidence that appellants had made a protected disclosure as defined in the PDA. In turn, a finding of this nature would have significant consequences for the relief which may be granted.

[19] Section 3 of the PDA provides that no employee may be subjected to any occupational detriment by his or her employer on account or partly on account of having made a protective disclosure. Occupational detriment is defined in s 1 of the PDA to include: 'been otherwise adversely affected in respect of his or her employment, professional office, employment opportunities and work security.'

[20] It is common cause that the *onus* was on appellants to show a nexus between the occupational detriment that they alleged to have suffered, the failure to employ them permanently in terms of the 2006 collective agreement and the disclosure they made in respect of Dr Gule's appropriation of the sponsorship money.

[21] Appellants' case in respect of occupational detriment was based on evidence which can be summarised thus: Following upon the disclosure, Dr Gule deliberately obstructed first appellant in the performance of his duties. For example, first appellant was responsible for collecting monies from the Road Accident Fund ('RAF') in respect of ambulance accounts. After a meeting in late 2009 which was attended by first and second appellant and representatives from the RAF, first appellant was advised that the respondent should also claim ambulance monies from the RAF. A new revenue stream for the respondent would thus have been created by first appellant, who tabled a request to Dr Gule so that she could approve this new revenue stream. She simply ignored this request. First appellant discussed the problem issue with Ms Naidoo who then approached Dr Gule. Dr Gule indicated that she did not wish to discuss this issue further, as a result of which respondent lost approximately R 6 million revenue.

[22] In relation to a grievance lodged by first appellant, Dr Gule simply referred the matter to his immediate supervisor and refused to deal with the issue any further.

[23] Second appellant refers to a failure to appoint him to the post of Deputy Director: Finance, notwithstanding that he had successfully acted in this position for almost two years. By contrast, Mr Skosana whom the appellants referred to as "a known cohort of Dr Gule", was appointed to the post, albeit that appellants claim he had

little or no financial acumen. Further, second appellant was not informed at all of this appointment. According to the testimony of second appellant, the way in which he found out about the appointment of Mr Skosana was as follows:

> 'Let us get that part, Ruben Skosana, okay. You came back from leave, you said Ruben Skosana comes into your office. --- Yes.
>
> At that point when you come back from leave, were you still acting? --- I was still acting, yes.
>
> Deputy Director? --- For all intents and purposes, yes, I was, Your Lordship.
>
> What does Skosana say to you when he comes into your office? --- He said something like: has anybody spoken to you about your acting post because I have been put into this acting post by Dr Gule now and you are not acting anymore and he says …[intervenes]
>
> So he just came into your office… --- Ja, did anybody come and discuss it? I said no, nobody, that is the first I heard of it, Your Lordship.
>
> You had heard nothing from Dr Gule about this? --- Nothing at all, Your Lordship.'

[24] Appellants refer to the suspension of Ms Lakraj-Naidoo, appellants' manager which prevented them from properly performing their duties as they had no person to report to for extended periods other than Dr Gule, who continued to behave in an aggressive fashion towards them.

[25] The action of Dr Gule against Ms Lakraj-Naidoo resulted in a CCMA order to the effect that Dr Gule had committed an unfair labour practice by demoting her. She was therefore reinstated into her position as Director-Finance and Supply Chain Management.

[26] Appellants refer further to their achievements in the performance in their posts. This averment finds support from Ms Lakraj-Naidoo who, in a letter on 1 September 2010 motivating for an extension of their contracts, said of first

appellant that he "regularly takes brilliant initiatives to ensure that optimum revenue is collected on a monthly basis." Further "he demonstrates his expertise by initiating new ideas and ensures his contribution to networking capital of the City and his liquidity position by his commitment and dedication." Of second respondent, Ms Lakraj-Naidoo noted that "his technical financial knowledge and experience is unequalled in this department" and that "although interviewed for the position of Deputy Director: Finance he was denied the opportunity of the post although he still acting in the post after the interview". She also referred to the fact that second appellant had received performance bonuses over the past four years for his achievements at EMS.

[27] Mr Flynn contended that the only employees to have suffered this sort of treatment at the hands of Dr Gule were appellants and Ms Lakraj-Naidoo. No reasonable inference could have been drawn, other than that, but for their protective disclosures of Dr Gule's financial impropriety, they would not have suffered occupational detriment, they would have had their contracts renewed, alternatively they would have been placed in permanent employment in accordance with the terms of the 2006 agreement.

[28] Respondent counters by contending that there had been a practice to advertise positions of those whose contracts were due to expire, a point which was not disputed by first appellant insofar as EMS was concerned. In his evidence, first appellant was taken to a document of 16 August 2010 which listed the names of nine employees whose fixed terms contracts were terminating on 31 October 2010, save for one CS Hartnady whose contract was to terminate on 30 September 2010. First appellant was asked:

> 'I am saying the fact that your positions were advertised could not have created an expectation in your mind that your contract would be renewed… no it could not. It could… No it could not.'

Furthermore although only two appellants had made a protective disclosure, none of the employees on this list, save for a Mr Gaju, were reappointed after the expiration of their contracts.

Evaluation

[29] The question which arises for determination is whether appellants showed a sufficient causal connection between respondent's refusal to extend their contracts and the protected disclosure they had made, and then as to whether it was the latter which caused occupational detriment as defined in the PDA. Invariably, in cases of a protected disclosure, there is a diminished likelihood of a "smoking gun" being found and Courts are required to rely on inferences. In this case, the question is whether the only reasonable inference that can be drawn is that the failure to abide by the 2006 agreement and thus ensure that the appellants remained employed by respondent, subsequent to the termination of their fixed term contracts, was as a result of the protective disclosure, whether in whole or in part.

[30] In proceedings of this nature, the inference sought to be drawn must be consistent with all the proven facts, although it needs not be the only reasonable inference. It is sufficient if it is the most probable inference. See *Katz v Katz* [2004] 4 All SA 545 (C) at para 95 and *AA Onderlinge Assuransie Bpk v De Beer* 1982 (2) SA 603 (A) at 614-615 where it was held that a plaintiff who relies on circumstantial evidence needs not prove that the inference which he or she asks the court to draw is the only reasonable inference. He or she will discharge the burden of proof if he or she can convince the court that the inference advocated is the most readily apparent and acceptable inference to be drawn from a number of possible instances.

[31] In this case, there is no doubt that an inference can be drawn that occupational detriment followed upon the disclosure of Dr Gule's dishonesty with regard to the scholarship money. But is it the most probable, readily apparent inference? The list of actions which constitute possible detriment is extensive, as set out earlier

in this judgment. But there are two powerful factors which need to be taken into account, namely that only one of the nine employees whose fixed term contracts ended in 2010 was reemployed and, further, that it appears that the respondent’s failure to follow the provisions of clause 2.4 of the 2006 agreement was due to a mistake of law as opposed to an act of occupational detriment suffered by the appellants who had disclosed Dr Gule’s dishonesty; that is, given the manner in which the case was argued by respondent, incorrect advice was given to respondent which caused the failure to reemploy the two appellants.

[32] I accept that there is little evidence as to whether any of the other of the nine employees, whose fixed contracts ended in 2010, were not reemployed because they preferred to leave the employ of the respondent as opposed to being confronted by a refusal of respondent to abide by the terms of clause 2.4 of 2006 agreement. But, in my view, it cannot be said that the respondent’s decision not to renew the contracts of appellant was not due to a complete misreading of the contents of continued validity of the 2006 agreement. In other words, it cannot be said that the more natural plausible conclusions amongst several conceivable and plausible alternatives was not that the respondent had mistaken the proper legal position which governed the relationship between it and the appellants.

[33] For these reasons therefore, the probabilities do not justify a conclusion that a dismissal of the appellants as defined in s186 (1) of the LRA can be sourced in s 187(1)(h) of the LRA. The evidence presented does not justify an exclusion of a plausible, readily apparent, alternative inference. Accordingly, the requisite nexus has not been properly proved by appellants.

<u>The remedy</u>

[34] As indicated earlier, the finding that s187 (1)(h), (that is that the dismissals were automatically unfair), cannot be sustained has consequences for the remedies which are available to appellants.

[35] This is particularly the case because first appellant passed away on 09 February 2016, three and half months before this appeal was heard. Accordingly, the primary remedy of reinstatement in terms of s193(1) of the LRA is now rendered impractical in terms of s193 (2)(c) of the LRA.

[36] Mr Flynn contended that courts have accepted that a claim for benefits arising from the employment relationship could accrue to a deceased estate. He submitted that the benefit of reinstatement, which would ordinarily have been available to the first appellant but for his death, should not, in the interests of fairness and equity, be unnecessarily curtailed. In Mr Flynn's view, the plain wording of s193 (2)(c) of the LRA provides that reinstatement should not be ordered where it is not reasonable practicable 'for the employer'. In other words, the reason for the impracticability of reinstatement must arise from submissions made by the employer in relation to its own operational necessities. The death of the first appellant is a reason which arises from first appellant himself, and therefore falls outside the purview of s193(2)(c). In addition, it is common cause that the posts are vacant, that they are still on the respondent's organisational structure and that the first appellant sought reinstatement up to the point of his passing.

[37] The wording however of the relation in s193(2)(c) is clear; namely 'it is not reasonable practicable for the employer to reinstate or re-employ the employee'. However unfair the outcome may be to the estate of first appellant, the words 'reinstate' or 'reemploy' must be given their clear meaning and neither can be twisted to justify the case made out by Mr Flynn on behalf of a deceased employee. Thus, given the finding regarding the appropriate classification of the dismissal, namely that it cannot be based upon s187 of the LRA, s 194 (1) is of clear application, namely that the compensation which must be awarded to first appellant can be no more than the equivalent for 12 months remuneration calculated at the employees rate of remuneration on the date of dismissal.

[38] By contrast, it is reasonably practical for respondent to reinstate the second appellant, whose post has not been filled.

[39] Accordingly and for these reasons, the following order is made:

1. The appeal is upheld with costs.

2. The order of Molahlehi J of 29 April 2015 is set aside and replaced with the following order:

   2.1 The failure to renew the employment contracts of the first and second applicants constituted an unfair dismissal in terms of s186(1) of the Labour Relations Act 66 of 1995 read together with s188 (1) of that Act.

   2.2 Respondent is ordered to pay the executor of first applicant's estate an amount equivalent to 12 months remuneration calculated at first appellant's rate of remuneration as at 1 November 2010.

   2.3 Respondent is ordered to reinstate second applicant retrospectively with no loss of benefits, increases or bonuses as from 1 November 2010.

   2.4 Respondent is ordered to pay both applicants' costs.

Davis JA

Musi JA and Murphy AJA concur in the judgment of Davis JA

APPEARANCES:

FOR THE APPELLANTS:	Adv P E Flynn
	Instructed by Cowan Harper Attorneys
FOR THE RESPONDENT:	Adv F M M Snyman
	Instructed Helena Strijdom Attorneys