



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA,
JOHANNESBURG**

Case no: JA9/2017

In the matter between

IMATU obo KC JOUBERT

Appellant

and

MODIMOLLE LOCAL MUNICIPALITY

Respondent

Heard: 08 March 2018

Coram: Waglay JP, Musi JA and Savage AJA

EX TEMPORE JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of this Court, is against the judgment of the Labour Court, Snyman AJ, in which the appellant's application to have the first and second respondents held in contempt of court for failing to comply with the court order granted by Gush J was dismissed.

[2] Ms KC Joubert was employed by the first respondent, Modimolle Local Municipality, on a fixed term contract from 6 May 2005 to 15 November 2005. After she was informed on the 7 October 2005 that she had been unsuccessful in her application for appointment in to a permanent position as an administration clerk, Ms Joubert referred

an unfair labour practice claim to the South African Local Government Bargaining Council for determination.

- [3] On 15 March 2006, the arbitrator found in favour of Ms Joubert and ordered that the first respondent appoint her retrospectively into the position as administrative clerk. This, the arbitrator recorded, was informed by the fact that the position remained vacant.
- [4] The first respondent's application to review the award was dismissed by Gush J after the Municipality was found to have failed to prosecute the review timeously. In April 2006, the appellant, being IMATU on behalf of Ms Joubert, launched a contempt application against both the first respondent and the second respondent, the Municipal Manager. On 29 April 2016, Van Niekerk J ordered that the respondents appear in court on the 5 of August 2006 to show cause why they should not be found guilty of contempt of court and that they file an affidavit to explain their failure to comply. An affidavit filed on behalf of the respondents in due course stated that the position of administration clerk no longer existed in the first respondent's organogram.
- [5] Thereafter the contempt application came before Snyman AJ, who found that the respondents were aware of the arbitration award, were aware of the order of Gush J, and that there had been no compliance with such order. In considering whether this failure had been *mala fide* and deliberate, Snyman AJ found that given that the unfair labour practice jurisdiction extended only to employees and that since Ms Joubert's contract had terminated on the 15 November 2005, she was not entitled to be promoted into the position of administration clerk. This was so in that at the time of the arbitration award, the employment contract had expired, and with no challenge to the expiry of an employment contract having been made, it was no longer competent for Ms Joubert to demand reinstatement so that she could be promoted. The court found that the award in an unfair labour practice dispute concerning promotion could not restore the

employment relationship between an employee and employer. No order of costs was made.

- [6] On appeal, it was contended that the dispute before the Bargaining Council concerned an unfair labour practice to promote, and since an arbitrator may determine such dispute in terms of section 193(4) of the LRA on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation, the relief granted was competent. When the fixed term contract expired a *lis* had existed between Ms Joubert and the first respondent. As a result, it was contended that the award was competent and enforceable, and the Labour Court in its judgment had effectively sought to review the award when the contempt application before it should have been granted.
- [7] The facts show that at the time that the arbitrator's award was issued on the 15 March 2006, Ms Joubert was no longer an employee of the respondents. Since no unfair dismissal dispute had been referred to the Bargaining Council for adjudication, the expiry of her fixed term contract went unchallenged. The arbitrator in the promotion dispute was not empowered to determine an unfair dismissal dispute and could consequently not order the reinstatement of Ms Joubert into a position with the respondents.
- [8] The terms of the section 193(4) do not provide differently. A fixed term contract employee is only employed for a limited, and in this case specified, period of time in a particular post. While such an employee may apply and/or be offered a permanent position and accept such position, this would remove her from the realm of a fixed term contract employee and see her employed in another post.
- [9] In this matter, having regard to the testimony of the employee, it is apparent that she applied for a post, was told first that the post was hers, although no date of commencement was provided or other terms agreed. However, she was later informed that she had not

been unsuccessful in her application. This cannot amount to a failure to promote because she was not an employee who could be promoted on the basis of her fixed term contract. By the time the matter came to arbitration, she was no longer an employee. She had, in effect, applied for a vacant post and had not sought promotion to a vacant post.

[10] A fixed term contract employee is in the same position as a non-employee who applies for an advertised post, hence the reliance on an unfair labour practice jurisdiction for lack of promotion was misconceived. There can, therefore, be no reinstatement in a matter such as this. Reinstatement implies *status quo ante*, hence since the employment had terminated by the effluxion of time, if there is a dispute, it is not one about promotion.

[11] In considering a contempt application, it is proper that the court consider not simply the order of the court sought to be enforced, but the reasons behind that order. This so as to ensure that it has been considered whether it is in the interest of justice that the order be enforced or not. In this case, it is clearly not. It follows that the finding made by the Labour Court that given these facts the respondents had not been shown to have behaved in a wilful and *mala fide* manner cannot be faulted.

[12] Ms Joubert was no longer an employee of the first respondent, given the expiry of her fixed term contract, and consequently no effect could therefore be given to an order that she be retrospectively reinstated into the promoted position of administration clerk with her former employer. In any event, and, in fact, perhaps most centrally to this dispute, the post no longer exists on the respondents' infrastructure. There can, in such circumstances, be no contempt of court for this reason; the award is incapable of implementation, at least due to intervening impossibility. For these reasons the appeal must fail.

[13] The Labour Court correctly stated that Ms Joubert may well have a claim sounding in money for the difference in her salary, if it exists, between the date of 1 October 2005, when the arbitrator found she should have been appointed into the position of administration clerk, and the termination of her employment on the 15 November 2005. Should such a claim exist, it would have to be quantified and pursued by way of normal execution proceedings.

[14] Having regard to considerations of law and fairness, I make no order as to costs.

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

Order

1. The appeal is dismissed.
2. No order as to costs.

Waglay JP and Musi JA agree.

Savage AJA