

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO: JR 35/08

In the matter between:

KWEZI GROUP

APPLICANT

AND

BOND B

1ST RESPONDENT

ZWANE B

2ND RESPONDENT

COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION

3RD RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) of an award issued by the second respondent on 20 November 2007 under case number GAJB 30028-07.
- [2] In terms of the award, second respondent found that the dismissal of the first respondent was unfair and ordered the applicant to pay to the first respondent three (3) months salary in the sum of R48 000-00.
- [3] Applicant also seeks to stay the enforcement of the award pending the finalization of the review in terms of section 145(3) of the LRA. It is this award which is subject of the review proceedings.
- [4] First respondent is opposing the review application.

The parties

- [5] The applicant is Kwezi Group, is a juristic person duly registered in accordance with the company laws of the Republic of South Africa.

- [6] The first respondent is Barbara Bond a former employee of the applicant.
- [7] The second respondent is Buti Zwane, a commissioner of the third respondent. The second respondent is cited herein in his capacity as the commissioner who presided at the arbitration proceedings under case number GAJB 30028-07 and issued the award.
- [8] The third respondent is the Commission for Conciliation Mediation and Arbitration, a juristic person established in terms of section 112 of the LRA.

The Facts

- [9] The first respondent was employed by the applicant as a Professional Assistant in terms of a fixed term contract.
- [10] The fixed term contract was renewed on several occasions as follows:
- 01 November 2006 to 30 April 2007 (six months)
- 01 May 2007 to 31 July 2007 (three months) and
- 01 August 2007 to 31 August 2007 (1 month).
- [11] Prior to the expiry of the first fixed term contract, applicant met with first respondent to raise concerns regarding her poor work performance which included amongst others handling of travel arrangements and scheduling of meetings which resulted in double bookings, having new business cards for the applicant's printed with a wrong e-mail address, failure to submit travel claims to Kwezi KV3 and failure to take applicant's calls after hours.
- [12] During July 2007 applicant offered to extend first respondent's contract by one month commencing on 01 August 2007 and ending on 31st August 2007 as, according to applicant, first respondent's performance had not improved. According to applicant, the purpose of the short contract was to enable first respondent to find alternative employment.

- [13] On 16 August 2007, applicant informed first respondent in writing that it will not be renewing her contract. The employment contract terminated on 31 August 2007.
- [14] First respondent referred a dispute concerning her alleged unfair dismissal to the third respondent. The dispute was conciliated. The dispute which remained unresolved after conciliation was subsequently referred to arbitration. The dispute was arbitrated on 15 November 2006.
- [15] At the end of the arbitration proceedings, second respondent found that the dismissal of the first respondent was unfair and ordered that the first respondent be paid compensation in the sum of R48 000-00 which is an equivalent of the first respondent's three months salary.
- [16] The Applicant seeks to review the order and have it set aside.

Grounds for review

- [17] In the founding affidavit the applicant contends amongst others that:
- (a) The second respondent committed misconduct in relation to his duties as a commissioner; committed gross irregularity in the conduct of the arbitration proceedings; exceeded his powers; or failed to properly consider the evidence presented at the arbitration and to make a finding that is justifiable in relation to the evidence before him.
 - (b) Second respondent gave insufficient weighting to the fact that the first respondent misconceived the nature of the contracts, none of the contracts provides for probation and that the contracts had fixed periods.
 - (c) The second respondent misconceived the law on dismissal pertaining to employees on fixed term contracts. Even if the first respondent harboured an expectation of renewal there was no objectively reasonable expectation of renewal as she was informed that there would be no further extensions, the contract was renewed twice for reduced periods, her quality of work

was poor and she was informed of such and no undertaking was made that her contract will be renewed or that she would be made permanent.

- (d) Even if the first respondent had an expectation of further employment, the expectation could not have exceeded one month as according to section 186(1)(b) a reasonable expectation of renewal lies with respect to renewal on “the same or similar terms” (and not with respect to permanent employment).

Applicant’s Submissions

- [18] Applicant reiterated the grounds for review and more particularly that the decision reached by the second respondent is not one which a reasonable decision maker could have arrived at given the materials which were before him.
- [19] Applicant argued that the award shows that second respondent did not apply his mind to the facts properly before him and thereby committed a gross irregularity which renders his award reviewable.

First Respondent’s Submissions

- [20] Second respondent’s award is one which a reasonable decision maker could under the circumstances make. The award is consistent with the evidence presented during the arbitration proceedings.
- [21] First respondent had a reasonable expectation that her contract would be renewed on similar terms or on terms in respect of which she will be made a permanent employee. With regard to the third extension, her contract should have been extended with six months. She however advised applicant to extend it with a period of one month because applicant had sufficient opportunity to decide on what it wanted to do with her.
- [22] Applicant failed to advise her that it was her last extension. At the time of her employment Mr Mahamba (the Director of Kwezi Group) verbally informed her that her contract will be a long term or permanent. She could not have accepted employment on a fixed term contract.

- [23] According to the first respondent, she stated at the arbitration hearing that she had a legitimate expectation that her contract will be renewed, like they had done in the previous occasions. She had a reasonable expectation that her contract will be renewed on the same terms or into a permanent employment.

Legal position

- [24] The question as to what constitutes a reasonable expectation for renewal of a fixed term contract of employment as contemplated in section 186(1)(b) of the LRA was dealt with by the court on several occasions.

- [25] In **University of Cape Town v Auf der Heyde (2001) 22 ILJ 2647 (LAC)** at paragraph 21 the Labour Appeal Court stated that:

“In order to determine whether the respondent had a reasonable expectation, it is first necessary to determine whether he, in fact, expected his contract to be renewed or converted into a permanent appointment. If he did have such an expectation, the next question is whether, taking into account all the facts, the expectation was reasonable.”

- [26] In **SA Rugby (Pty) Ltd v CCMA & others (2006) 27 ILJ 1041 (LC)** paragraph 11 the Labour Court held that *“For the employee’s expectation to be ‘reasonable; there must be an objective basis for the creation of this expectation, apart from the subjective say-so or perception. (See Auf der Heyde at para 26; and Dierks v UNISA at 1246). This is an objective enquiry: would a reasonable employee in the circumstances prevailing at the time have expected the contract to be renewed on the same or similar terms. ...”*

- [27] On page 1048 para 25 the court held as follows: *“What section 186(1)(b) requires in expressed terms is a reasonable expectation on the part of the employee that there would be a renewal of the fixed contract in question, i.e the said 3 month contract on the same or similar terms, not an expectation of another contract for a period of 1 year and for a different purpose”.*

[28] In the SA Rugby case, the court pointed out that for an employee to rely successfully on section 186(1) (b), the employee must establish:

*“(a) that he had, subjectively, an expectation that the employer would renew the fixed-term contract in question on the same or similar terms; and
(b) that the expectation was reasonable; and
(c) that the employer did not renew it or offered to renew it on less favourable terms.”*

[29] In **Vorster v Rednave Enterprises CC t/a Cash Conservators Queenswood (2008)10 BLLR 1111 (LC)** at page 1121 paragraph 19 Basson J held that *“Although the fact that a contract has been renewed a few times may weigh in favour of a conclusion that a reasonable employee could have expected a further renewal, this fact will not necessarily result in such a conclusion.”*

[30] **Grogan J in Workplace Law (8ed)** at 110 – 111 stated the following regarding the test for reasonable expectation:

“The notion of reasonable expectation clearly suggests an objective test: the employee must prove the existence of facts which will lead a reasonable person to anticipate renewal. The facts that found a reasonable expectation will clearly differ from case to case but will most commonly take the form of some prior promise or past practice – e.g. where the employer has habitually renewed the contract. That a fixed long term contract has been renewed a number of times it is not itself indicative of the existence of a reasonable expectation of renewal; whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee. The conduct of employer in dealing with the relationship, what the employer said to the employee at the time of the contract was concluded or thereafter, and the motive for terminating the relationship have been cited as factors to be considered”.

Did the respondent fail to consider evidence properly before him and thus committed a gross irregularity in finding that the first respondent had a reasonable expectation that her contract will be renewed.

[31] It is clear from the case law referred to above that an objective test is used to determine the reasonableness of an employee's expectation that her contract will be renewed. The test is whether a reasonable person in the position of the employee would have expected her contract to be renewed in the circumstances of the particular case. To satisfy the test the employee cannot merely rely on the fact that the contract was renewed previously but he must prove sufficient fact, objectively speaking would justify the expectation of renewal.

[32] In this matter it is common cause that applicant and first respondent had concluded an initial fixed-term contract for six (6) months. It is further common cause that at the end of the six (6) months period applicant renewed the contract for a lesser period, i.e. three (3) months. It is not disputed that applicant started complaining about respondent's poor performance and this probably explains the reduction in the period of the contract. Applicant's explanation that he discussed first respondent's poor performance with her in July 2007 is probable and acceptable as it is the most reasonable explanation for offering respondent a shorter contract being one (1) month.

[33] In the circumstances a reasonable employee in the position on the first respondent could not have, in the light of the complaints about her poor performance and the continued reduction of the period of the fixed term contracts, have reasonably expected that the contract would have been renewed for a longer period or be granted permanent appointment.

[34] The above common cause facts were before the second respondent when he arrived at the decision that first respondent had a reasonable expectation that her contract would be renewed.

[35] In my view the second respondent did not apply his mind properly to the facts before him and thus committed a gross irregularity in arriving at his award.

[36] I therefore conclude that the decision reached by the second respondent in the circumstances is not one which a reasonable decision maker could have reached given the materials before him.

Order

[37] In the premise I make the following order:

37.1 The arbitration award issued by the second respondent on 20 November 2007 under case number GAJB 300028-07 is reviewed and set aside.

37.2 The award is substituted by the following order:

37.2.1 The termination of first respondent's employment on 31 August 2007 does not constitute a dismissal as contemplated in section 186(1)(b) of the LRA.

37.3 First respondent is ordered to pay the costs.

Nyathela AJ

Date of Hearing : 18 June 2009

Date of Judgment : 03 February 2010

Appearances

For the Applicant : Dawn Wenton

For the Respondent: Adv. V.P Ngutjane

Instructed by : Mogaswa Attorneys