

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

**Reportable
Case number JR1834/09**

In the matter between:

PIK-IT UP JOHANNESBURG (PTY) LTD

Applicant

and

SALGBC

First Respondent

K MAMBA N.O

Second Respondent

IMATU obo COOK

Third Respondent

Date of Hearing: 16 February 2011

Date of Judgment: 28 June 2011

JUDGMENT

Molahlehi J

Introduction

[1] This is an application in terms of which the applicant seeks to have the arbitration award, issued by the second respondent (the arbitrator) under case number JMD 1208/09, declared *null* and *void* alternatively reviewing and setting aside the same. In terms of the arbitration award, the arbitrator found that the termination of the third respondent's employment contract to have been unfair and ordered that she be reinstated.

[2] This matter which was filed in this Court under the above case number was argued at the same time with the one filed under case number JR1613/09. Whilst the facts of both cases are similar and the respondent is the same in both

matters, I have for convenience decided to write two separate judgments.

[3] For ease of reference and convenience the third respondent in this judgment is referred to as “the employee.”

Background facts

[4] It is common cause that the five years fixed term contract which the employee had with the applicant was terminated after she was served with what purports to be a month’s notice, served on her on 23 October 2008. The relevant portion of that contract for the purpose of this judgment reads as follows:

“This contract of employment is for a period of five years (renewable at the end of the period, subject to performance) and shall come into operation on the 1 November 2003 and shall continue until the employment of the employee shall cease and terminate.”

[5] On 23 October 2008, the applicant addressed a letter to the employee informing her that the employment contract would expire on 31 October 2008 and that she was given one month’s notice.

[6] The employee in the dispute she referred to the first respondent, (the bargaining council) contended that she had an expectation that her five years contract would be renewed and that failure to do so by the applicant constituted a dismissal in terms of section 186 (b) of the Labour Relations Act (the LRA).¹

Grounds for review

[7] The grounds for review upon which the applicant seeks to review the arbitrator’s arbitration award are set out in the founding affidavit as follows:

“18 The fundamental premise of the award was that the third respondent had proved that she was dismissed on the grounds that she had a reasonable

¹ 66 of 1995.

expectation of renewal in terms of section on 186(b) of the Labour Relations Act, 1995.

19 The entire premise for the award was faulty and incorrect. The common cause facts show that the contract expired on 31 October 2008 and that the date of termination was 30 November 2008. As at that date of termination, there was no fixed term Contract of Employment for 5 years any longer.

20 The fundamental premise of the award is wrong and this error of law is gross that it permeates the entire award rendering the entire award reviewable.”

[8] The applicant contends that any expectation for the renewal of the five years’ contract of employment of the employee was destroyed when she was issued with the letter dated 23 October 2008 which informed her that she was given a month’s notice of termination of that contract. The applicant contends that the arbitrator in assessing whether there was an expectation that the contract of employment would be renewed for a further five years ignored and failed to take into account the letter of 23 October 2008 and thereby committed a gross irregularity. The applicant says the arbitrator committed a gross irregularity because:

“21.1 The Arbitrator failed to apply her mind to the material evidence; and

21.2 The conclusion that she reached is not reasonable in relation to the material before her.”

[9] At the hearing of this matter, Mr Boda for the applicant argued that the employment contract was fairly terminated because the applicant had given the employee a reasonable notice of termination of the contract. He further contended that the decision of the arbitrator to reinstate the employee was unreasonable and thus the arbitrator exceeded his powers by ordering reinstatement.

The arbitration award

[10] The arbitrator in his analysis of the evidence and the arguments submitted to him during the arbitration hearing accepted the version of the employee that she had a reasonable expectation that her fixed term employment contract would be renewed on its expiry as being credible and further that it was corroborated by documentary evidence. The arbitrator rejected the contention of the applicant that the letter of 23 October 2008 constituted a new one month fixed term contract. In this respect, the arbitrator in the second sentence of paragraph [13] of his arbitration award said the following:

“...Firstly, no evidence was led to prove this and secondly van Aswegan’s letter dated 23 October 2008, states clearly that the applicant was being notified of the expiry of her fixed term contract and her notice period. No mention is made that she was being offered a one month ‘s contract, even if such offer had been made, there is absolutely no evidence of any acceptance by the applicant that, whether tacitly or otherwise, of the said offer. It is well established law that in the absence of a clear and unequivocal acceptance by the applicant there can be no valid contract.”

[11] In assessing whether the employee had an expectation that her contract would be renewed the arbitrator (at paragraph [15]) said:

“Was her expectation reasonable? I had no reason to reject the applicant’s evidence that she had a reasonable expectation that the contract would be renewed as she had fulfilled the condition attached to the renewal of her contract namely that of performance. Any reasonable employee in the circumstances would expect the employer to renew the fixed term contract after having fulfilled the condition agreed upon. It is common cause that the applicant was generally an excellent worker throughout the duration of her employment, she received performance bonuses in support of this. In addition to these the applicant’s manager van Aswegan made recommendations for her contract to be extended, this to me is a classic undertaking that her contract would be renewed. This tacit undertaking was made by a person with the necessary authority to do so, no

contrary evidence was led to show that van Aswegan did not have such authority. Under these circumstances, any reasonable employee would have an expectation that the contract would be renewed. A reasonable employee would anticipate renewal."

[12] The arbitrator went further to say:

"The respondent has not led any evidence to disprove that the applicant's expectation was unreasonable, their assertion that it was not, is not evidence, it is just (sic) that an assertion. I do not believe the applicant is required to show that she pestered the respondent about the renewal of the contract for her to prove that she had a reasonable expectation that it would be renewed. What was essentially required of her to guarantee renewal was her to perform and she did just that. This was never disputed by the respondent."

[13] It was on the basis of the above that the arbitrator concluded that the employee had successfully shown that she had reasonable expectation that her contract would be renewed.

Evaluation

[14] In evaluating whether I should interfere with the arbitration award, the first issue to consider is whether there exists a dismissal upon which the jurisdiction of the bargaining council to entertain the dispute would have been based. The second issue to consider if I find that the employee was indeed dismissed is whether such a dismissal was fair or otherwise. It has to be noted that unlike in dismissal for misconduct where the line between the determination of the existence of dismissal and the fairness thereof can be easily separated, such a distinction is generally easy to make where it is alleged that a fixed term contract was terminated despite reasonable expectation of its extension on the part of the employee. The termination of a contract of employment in fixed term contracts and the fairness thereof are integrally

linked by the concept of “reasonable expectation” for the renewal of the contract. The determination of the existence of a dismissal in a dispute concerning the non-renewal of a fixed term contract remains critical in that it is a jurisdictional fact upon which the CCMA or the bargaining council can entertain the dispute.

[15] In terms of section 192 of the LRA, read with section 186(1) (b), the employee bears the *onus* of showing that he or she was dismissed because the employer failed to renew or renewed a fixed term contract on terms less favorable than those that existed previously despite reasonable expectation of its renewal. The employee discharges the *onus* by showing that he or she had reasonable expectation that despite the contract having come to an end by effluxion of time, he or she had reasonable expectation that the contract would be renewed and the employer failed to do so. Once the employee has discharged the *onus* of showing that the employer has failed to renew a fixed term contract despite the existence of reasonable expectation, the *onus* rests on the employer to show that the termination of the contract was for a fair reason.

[16] In the present case, the starting point is to determine the jurisdictional fact of whether the employee was dismissed by the applicant. The duty to show the existence of such a dismissal rests as indicated above on the employee. The applicant is correct in its submission that the test for determining jurisdiction in review matters is not that of a reasonable decision maker as is the case in the general review cases but that which was enunciated in the case of *SA Rugby Players’ Association (SARPA) and Others v SA Rugby*

*(Pty) Ltd and Others; SA Rugby (Pty) Ltd and Another*². In that case, the Labour Appeal Court per Tlaletsi JA, held that where jurisdiction is in issue the test to apply is the following:

“[39] The issue that was before the arbitrator was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, and then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others* (1994) 15 ILJ 801 (LAC) at 804C–D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived at on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter, provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In *Benicon’s* case, the court said:

‘In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be faint-hearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit.’
(At 804C–D.)

In my view, the same approach is applicable to the

2 [2008] 9 BLLR 845 (LAC).

CCMA.”

[17] The enquiry that needs to be conducted in the present matter is whether the facts as presented by the employee objectively establish that a dismissal had occurred when the applicant did not extend her employment contract.

[18] The common cause facts which had been presented before the arbitrator was that the parties entered into a five year fixed term contract. It is also common cause that the applicant issued the employee with a letter informing her that the five years contract would not be renewed. The notice period, fell outside the period of the fixed term contract.

[19] At one level, the applicant contends that the notice “dealt a blow” to any expectation which the employee may have had and at another level says that the notice period constituted a new one month’s fixed term contract on the expiry of which the employment relationship with the employee was terminated.

[20] I have already indicated earlier that the *onus* to show that there was a dismissal rests on the employee and if successful in doing so, the employer has the duty to show that dismissal was for a fair reason. In the present case, the only evidence which was presented at the arbitration hearing was that of the employee which sought to show the existence of reasonable expectation for the renewal of the fixed term contract. The applicant only made oral and written submissions as to what happened with regard to the termination of the employment contract. In challenging the version of the employee, the applicant focused on the fact that the provision of the contract of employment provided for the termination of the contract at the end of the period set out therein.

[21] The employee on the other hand testified that she expected her contract to be extended because she had satisfied the important condition for the renewal of the contract being good performance. The performance of the employee was not placed in dispute neither did the applicant seek to rely on it as a reason for the non renewal of the employment contract. The employee further testified that during the currency of the employment contract, she received annual performance bonuses and wage increases in recognition of her good performance.

[22] In my view, the evidence of the employee, which as already indicated was not disputed, was sufficient to discharge the *onus* of showing the existence of a dismissal by the applicant as envisaged in terms of section 186(1) (b) of the LRA. Thus the bargaining council had jurisdiction to entertain the unfair dismissal dispute which the employee had referred for determination.

[23] In light of the above finding, I now proceed to determine whether the decision of the arbitrator in finding that the dismissal of the employee was unfair was reasonable or otherwise.

[24] It is trite that the common law principle that a fixed term contract expires automatically on the expiry of the date on which the parties agree that it should, has been altered by the provisions of section 186(b) of the LRA. The section reads as follows:

“Dismissal” means that -

(b) 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.”

[25] The LRA does not provide a definition of the concept “reasonable

expectation.” The concept has however been defined by case law to include, (a) equity and fairness; (b) existence of substantive expectation that the fixed term contract would be renewed; (c) the employee, subjectively expecting the contract to be renewed or extended ; (d) objective factors that supports the expectation. See in this regard *Dierks v University of South Africa*³

[26] In *Dierks v University of South Africa*, the Court held that the following factors are important in the assessment of whether there existed an expectation that the fixed term contract would be renewed:

“A number of criteria have been identified as considerations which have influenced the findings of the past judgments of the Industrial and the Labour Appeal Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance, or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed-term contract, inconsistent conduct, failure to give reasonable notice, and (sic) nature of employer’s business.”⁴

[27] The enquiry to be conducted in determining whether an employee had a reasonable expectation that the fixed term contract would be renewed consists of both the subjective and objective factors. In other words the employee has to adduce evidence showing that she had subjectively anticipated that the contract would be renewed. The employee has to also adduce evidence that point to the objective creation of such anticipation. It is well established that the written provisions of the fixed term employment contract also play an important role in the evaluation of the existence of the expectation but is not decisive. The key in the assessment of the objective existence of the reasonable expectation is the totality of the evidence together with the surrounding

3 (1999) 20 ILJ 1227 (LC) at 1245 para130.

4 Id 1246 para 133.

circumstances of a given case. See in this regard the decision of Supreme Court of Appeal in *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing and Textile Workers Union*⁵, *Dierks v University of South Africa*⁶ and *Zank v Natal Fire Protection Association*.⁷

[28] Turning to the facts of this case, I have already indicated that the evidence of the employee that she expected the contract to be renewed was not contradicted by the applicant. It was on these basis that the arbitrator found that the failure by the applicant to renew the fixed term employment contract of the employee to be unfair. The arbitrator rejected the contention of the applicant that upon the expiry of the five years fixed term contract a new one month's fixed term contract was concluded. The arbitrator correctly rejected the contention of the applicant on the basis that there was no evidence that a new contract was concluded between the parties. The applicant by failing to lead evidence regarding its assertion that a new contract was concluded failed to discharge its duty of showing that indeed a new contract was concluded between it and the employee.

[29] In my view, the totality of the evidence and the circumstances of this case support the view that objectively speaking the employee had reasonable expectation for the renewal of the five years fixed term contract. The facts that support the finding of the arbitrator that there was reasonable expectation for the renewal of the employment contract are that; there is undisputed evidence

5 [1998] ZASCA 11; 1998 (2) SA 1099 (SCA); (1998) 19 ILJ 731 (SCA) at 733–734.

6 at 1246 and 1250 para 161

7 (1995) 16 ILJ 708(IC).

that the employee performed well and thus satisfied the precondition to the extension of the contract; the employee received wage increases and bonuses during the currency of the fixed term contract. In fact, Mr Boda, for the applicant, conceded that the wording of the contract itself created a basis for the expectation of the renewal of the contract.

[30] Assuming the letter of 23 October 2008 was to be regarded as notice of termination then the question that arises is whether it constituted reasonable notice. If that is the case, then strictly speaking it means the employee was given less than ten days notice of termination of the contract because the contract was, on its provisions, to expire on 31 October 2008. I do not agree with Mr Boda when he says that the applicant had given the employee a reasonable notice which would have addressed the issue of reasonable expectation. On the facts and the circumstances of this case, the notice as was given was not reasonable. As stated earlier, this is a case where the employee had performed in terms of the provisions of the contract, received bonuses for that reason and wage increases.

[31] It is on the basis of the above that I find that the conclusion reached by the arbitrator satisfy the requirements and the standard of reasonableness as set out by the Constitutional Court in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁸ I am therefore of the view that there is no basis for interfering with the decision of the arbitrator and accordingly the applicant's application stands to fail. I also see no reason in

⁸ (2007) 28 ILJ 2405 (CC).

both law and fairness why the costs should not follow the results.

Order

[32] In the premises, the applicant's application to review the decision of the second respondent is dismissed with costs.



Molahlehi J

Appearances

For the Applicants : Adv F Boda instructed by Mokhatla Attorneys

For the Respondent : Mr S Ramsden of Sean Ramsden Attorneys