



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR699/09

In the matter between:

MINISTER OF LAND AFFAIRS

First Applicant

AND

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

COMMISSIONER Z MDLADLA N.O

Second Respondent

PUBLIC SERVANTS ASSOCIATION OF SA

OBO A C MANDOLO

Third Applicant

Heard: 10 November 2011

Delivered: 8 December 2011

Summary: Arbitration award reviewed, set aside and substituted with an order that the third respondent was not dismissed from the employment of the applicant. No reasonable expectation to have a fixed term contract renewed on the same or similar terms.

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent (“the commissioner”) on 12 January 2009 in which the dismissal of the third respondent (“Ms Mandolo”) was found to be both procedurally and substantively unfair following the failure by the applicant to renew her fixed term contract. The applicant was ordered to reinstate the applicant in the position that she held prior to termination.

The facts

[2] Ms Mandolo was employed by the applicant on a fixed term contract in 2003, which contract was renewed first until 2005 and then until 31 March 2008. The contract of employment provided that it would not be extended and that it would ‘finally terminate on 31 March 2008’ without it being necessary to notify the employee of the termination of the agreement. The agreement further provided that Ms Mandolo would have ‘no right to be converted to a permanent position/status’ and that she agreed that ‘no legitimate expectation exists in this regard’. In addition, it was agreed ‘that the Employee or his/her post shall not be part of any conversion process’.

[3] An unfair dismissal dispute was referred to the first respondent by Ms Mandolo after expiry of her fixed term contract on the basis that she held a legitimate expectation that her contract would be converted into a permanent employment contract. In the alternative, Ms Mandolo alleged that she had a reasonable expectation that her contract be extended.

[4] Most of Ms Mandolo’s fellow employees who were appointed on fixed term contracts were appointed into permanent positions with the applicant. Ms Mandolo completed the requisite application for conversion from contract-based to permanent employment but was not appointed permanently in that she was issued with a written warning by the Regional Land Claims Commissioner on 28 March 2008 for the misuse of government transport during September 2007. Ms Mandolo was informed that this was the reason that her fixed term employment was not converted into permanent employment with the applicant. Having been

advised of this fact, the applicant was provided with a letter by Ms Stenie Anderson, of the applicant's human resources directorate, confirming her conversion from fixed term to permanent employment. The said letter was withdrawn on the instruction of the Regional Land Claims Commissioner the same day by Ms Anderson on the basis that the human resource office had not been authorised to issue the letter.

Arbitration award

[5] The commissioner found that the applicant had created a legitimate expectation that Ms Mandolo's contract would be extended or converted into a permanent position given:

5.1 The delay in advising the employee of the outcome of the disciplinary investigation;

5.2 That Ms Mandolo was advised, when her colleagues received letters confirming the conversion of their positions into permanent employment, that her letter had been sent back for correction;

5.3 That the Regional Land Claims Commissioner advised Ms Mandolo that her written warning would be valid for six months and that she was entitled to appeal within five working days;

5.4 That the conversion committee only took the decision on 25 April 2008 when Ms Mandolo's contract had already expired; and

5.5 The human resources office had issued Ms Mandolo with the letter of conversion and there was no evidence that Ms Mandolo had misled Ms Anderson of the human resources office.

Grounds of review

[6] The applicant seeks that the arbitration award be reviewed and set aside in that the expectation of permanent employment does not constitute a dismissal in terms of section 186(2)(b) of the LRA. Furthermore, the evidence presented did not warrant an inference that Ms Mandolo held an expectation of renewal of her fixed term contract or its conversion into permanent employment.

Legal principles

[7] Section 186 of the LRA provides that:

‘(1) 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.’

[8] Generally, a reasonable expectation may arise as a result of a prior promise, either express or implied, by the employer to renew the fixed term contract or as a result of prior practice, for example, where the employer has habitually renewed the contract. The onus is on the employee to prove that a reasonable expectation of renewal existed.¹

[9] The test for establishing a reasonable expectation is an objective one. The court will enquire whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew his or her fixed term contract on the same or similar terms.² A number of factors have been considered by the courts in assessing whether or not a reasonable expectation exists. These include:

‘... the evaluation of 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 nature of employer's business.’³

[10] The fact that the contract contains a clause permitting renegotiation does not in itself create a reasonable expectation.⁴ Likewise, a clause stating that the contract will not be subject to renewal does not preclude a challenge that a reasonable expectation of renewal was created. However, the Labour Appeal Court has held that when a contract specifically states that it is for a fixed period

¹ *Ferrant v Key Delta* (1993) 14 ILJ 464 (IC); and *SA Rugby Players' Association and Others v SA Rugby (Pty) Ltd and Others* [2008] 9 BLLR 845 (LAC) at para 44.

² *SA Rugby Players' Association and Others v SA Rugby (Pty) Ltd and Others* [2008] 9 BLLR 845 (LAC).

³ *Dierks v University of South Africa* (1999) 20 ILJ 1227 at 1246.

⁴ *SA Bank of Athens Ltd v Cellier NO and Others* (2009) 30 ILJ 197 (LC).

and that there will be no expectation of renewal, a party claiming a reasonable expectation must advance more than 'flimsy evidence'.⁵

[11] In *Cremark A Division of Triple P-Chemical Ventures (Pty) Ltd v SA Chemical Workers Union and Others*,⁶ the surrounding circumstances will determine whether termination of employment at the end of a contract period is fair. In *Bronn and Others v University of Cape Town*,⁷ employees were employed on fixed term contracts that were renewed as long as funding was available. The CCMA did not take issue with the fact that UCT would continue to renew the contracts only for as long as funding was available.

[12] The circumstances in which repeated renewal of a fixed term contract will give rise to a reasonable expectation of further renewal will depend on the facts of the case. In *King Sabata Dalindyebo Municipality v CCMA and Others*,⁸ it was held that as the employer had previously renewed the employees' contracts without demur and as the services the employees had performed were still regularly required, the employees had had a reasonable expectation of renewal of their contract.

[13] In *SACTWU and Another v Cadema Industries (Pty) Ltd*,⁹ repeated renewals over a long period of relatively short fixed-term contracts gave rise to a reasonable expectation. This was reinforced by the fact that the employee had been permitted to work beyond the termination date of the final contract.

[14] In the circumstances, in order for a reasonable expectation of renewal of the contract to arise:

14.1 the employee must advance more than 'flimsy evidence' that objectively a reasonable expectation of renewal existed;

14.2 the surrounding circumstances must support the contention that such a reasonable expectation existed. This may require a consideration of the nature

⁵ *Rugby Players' Association and Others v SA Rugby (Pty) Ltd and Others* above n2 at para 46.

⁶ (1994) 15 ILJ 289 (LAC).

⁷ (1999) 20 ILJ 951 (CCMA).

⁸ [2005] 7 BLLR 696 (LC) at 702A-C.

⁹ [2008] 8 BLLR 790 (LC) at para 23.

of the employer's business, the purpose for which the fixed term contract has been concluded, whether the post is available or not, the conduct of the employer in the form of agreements or undertakings, and past practice or custom; and

14.3 where consecutive fixed term contracts have been concluded, reasonable notice may, according to the circumstances, be required of the expiry of the contract in order not to give rise to an expectation of renewal.

[15] Where a reasonable expectation of renewal is found to exist, the failure to renew the fixed term contract will constitute an unfair dismissal in terms of section 186(1)(b) of the LRA. However, where it can be shown that objectively a reasonable employee in the circumstances prevailing at the time could not reasonably have expected the employer to renew his or her fixed term contract on the same or similar terms, no unfair dismissal can result.¹⁰

Evaluation

[16] On the basis of the decision of the Labour Appeal Court in *Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*,¹¹ Ms Mandolo was required to advance more than 'flimsy evidence' to support an argument that a reasonable expectation of renewal existed given the fixed term period recorded in a contract and the existence of the contractual provision recording that there is to be no expectation of renewal.

[17] The evidence before the commissioner was that:

17.1 Ms Mandolo had applied to have her position converted into permanent employment;

17.2 When other colleagues were sent an email requesting them to collect letters, Ms Mandolo did not receive such an email;

¹⁰ *Zamisa and Another v Sans Fibres (Pty) Ltd* (1999) 20 ILJ 726 (CCMA).

¹¹ Above n 2 especially para 46.

17.3 She queried this with Ms Anderson of human resources and was told to be patient as there was an error with her new notch and that the letter would 'be ready by the end of the week',¹²

17.4 However, on 28 March 2008 Ms Mandolo met the Regional Land Claims Commissioner and was given a written warning in exceeding the period for which a vehicle had been rented. She was told that by the Commissioner that 'she did not consider her for permanent employment';

17.5 Ms Mandolo's supervisor informed the Regional Land Claims Commissioner that Ms Mandolo had a letter of permanent employment. The Regional Commissioner instructed Ms Anderson to withdraw this letter;

17.6 In a letter dated 28 March 2008 from Ms Anderson to Ms Mandolo it was stated:

'The Department informed you in a letter dated 26 March 2008 about your conversion from contract employment to permanent employment. You came to the Directorate: Human Resource Management on 28 March 2008 for advice. You informed the Human Resources Practitioner that your Manager informed you that you will not be converted because you are dismissed. Your Manager then handed a written warning letter to you. You were subsequently informed by the Human Resources Practitioner that a warning letter cannot be used as a letter of dismissal and a copy of the conversion letter was handed to you on 28 March 2008.

It then came to the Directorate's notice that you misled the Human Resources Practitioner by withholding a true reflection of what had transpired between you and your Manager. As a result of the fact that you withheld serious information as indicated above, it is with regret that the Department has to inform you that it has decided to withdraw your letter of permanent appointment that was given to you by the Human Resources Practitioner on 28 March 2008 with immediate effect. The Human Resources does not have the jurisdiction or authority to appoint staff in the Commissioner.'

[18] The commissioner concluded that 'any reasonable person could have had a legitimate expectation that his/her contract would be either renewed or converted' for reasons including:

¹² Arbitration award para 4.1

18.1 The delay in advising the employee of the outcome of the disciplinary investigation;

18.2 That Ms Mandolo was advised, when her colleagues received letters confirming the conversion of their positions into permanent employment, that her letter had been sent back for correction;

18.3 That the Regional Land Claims Commissioner advised Ms Mandolo that her written warning would be valid for six months and that she was entitled to appeal within five working days;

18.4 That the conversion committee only took the decision on 25 April 2008 when Ms Mandolo's contract had already expired;

18.5 The human resources office had issued Ms Mandolo with the letter of conversion and there was no evidence that Ms Mandolo had misled Ms Anderson of the human resources office.

[19] This Court, with reference to the grounds of review, is entitled to set aside an arbitration award if the commissioner's decision falls outside of a band of decisions to which a reasonable person could come on the available evidence.¹³ It is accordingly not the correctness of the commissioner's decision which is relevant but whether the result of the arbitration proceedings is reasonable.

[20] In *Bestel v Astral Operations Ltd and Others*,¹⁴ Davis JA emphasised:

'...that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[21] The test in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent one that will ensure

¹³ See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC)

¹⁴ [2011] 2 BLLR 129 (LAC) at para 18.

that awards are not lightly interfered with.¹⁵ It follows therefore that it is only an award that is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence that may be considered unreasonable.¹⁶

[22] It is clear that the commissioner, in concluding that 'any reasonable person could have had a legitimate expectation that his/her contract would be either renewed or converted', failed to apply her mind to the provisions of section 186 in two respects. In the first instance, the requirement is not one that an employee held a legitimate expectation but rather a reasonable expectation. In the second instance, the employee is required to show that he or she reasonably expected the employer to renew a fixed term contract on the same or similar terms. Not much appears to turn on the commissioner's error in considering a legitimate as opposed to a reasonable expectation and it is apparent from the arbitration award that the commissioner's reasoning does not consider the distinction and that in the circumstances, it is not material.

[23] However, what is apparent is that the commissioner did not apply her mind to the issue of expectation of renewal of the contract on the same or similar terms. There was a total absence of any evidence before the commissioner which indicated that Ms Mandolo at any time held any expectation at all that her fixed term contract stood to be renewed on the same or similar terms for any further period. Rather, the evidence before the commissioner clearly indicated that Ms Mandolo had applied for a conversion into permanent employment and expected to obtain such employment. The conclusion of the commissioner therefore, that 'any reasonable person could have had a legitimate expectation that his/her contract would be either renewed or converted' is unsupported by any evidence and is disconnected from the evidence that was before the commissioner, is based on speculation and is made without appropriate consideration of evidence before her. There is simply no basis on which to support a finding, given the evidence before the commissioner, that Ms Mandolo held an expectation that her fixed term contract

¹⁵ Above n13 at para 100.

¹⁶ See A Myburgh 'Sidumo v Rusplats: How the Courts deal with it' (2009) 30 ILJ 1

was to be renewed on the same or similar terms. Her expectation, on her own evidence, was directly to the contrary.

[24] It follows therefore that the arbitration award falls outside of a band of decisions to which a reasonable person could come on the available evidence and therefore stands to be reviewed and set aside.

[25] The applicant does not seek this Court to refer the matter back to the first respondent for a hearing *de novo* nor does he seek to substitute the award. The Court is in terms of the further relief sought by the applicant entitled to consider whether or not to substitute the award or refer the matter back to the CCMA for a hearing *de novo*. In doing so, considerations of fairness are paramount bearing in mind the record of evidence available and whether there would be a purpose in remitting the matter back to the CCMA for re-hearing.¹⁷ The LAC and this Court have held that a decision should be substituted or corrected rather than be referred back to the CCMA for a hearing *de novo* where:

25.1 the result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter;

25.2 where a further delay would cause unjustified prejudice to the parties;

25.3 where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or

25.4 where the court is in as good a position as the CCMA to make the decision itself.¹⁸

[26] In this matter, I am satisfied that the factors referred to above under subparagraphs 25.1, 25.2 and 25.4 are present. It is therefore not appropriate that the matter be remitted back to the first respondent for re-hearing.

Costs

¹⁷ See *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at para 40.

¹⁸ *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC) at para 33

[27] With regard to the issue of costs, in terms of section 162 of the LRA, this Court holds a discretion as to whether or not to award costs taking into account considerations of law and fairness. In exercising this discretion, ordinarily, it is the party that is wholly successful in an action or application that is awarded costs.

‘...In other words, the judicial officer may not, as he or she pleases, deprive a successful party of its costs. He or she must do so for reasons which he or she must set out or state. It similarly follows that, although ordinarily a successful party will be awarded its costs, it does not follow that that will always be the case.’¹⁹

[28] I can find there to exist no reason as to why costs, given considerations of law and fairness, should not follow the result.

Order

[29] The arbitration award made by the second respondent under the auspices of the first respondent under case number PSGA 87-08/09 dated 12 January 2009 is reviewed and set aside.

[30] The third respondent, Ms A C Mandolo, was not dismissed from her employment with the applicant.

[31] The third respondent is to pay the applicant’s costs.

K M Savage

ACTING JUDGE OF THE LABOUR COURT

¹⁹ *The Trustees of the Time Being of the Biowatch Trust v Registrar Genetic Resources and Others* (Open Democracy Advice Centre as Amicus Curiae) (A831/2005) [2008] ZAGPHC 135 (13 May 2008) 2008 JDR 0442 (T) at para 31

APPEARANCES

APPLICANT:

Mr P Pio

Instructed by State Attorney, Pretoria

THIRD RESPONDENT:

Mr F van der Merwe

PSA

LABOUR COURT