



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No. JR677/2012

In the matter between:

JOHANNES PEEGA

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

JABULANI JELMOND MASHABA N.O.

Second Respondent

MULTICHOICE (PTY) LTD

Third Respondent

Heard: 26 April 2013

Delivered: 29 April 2014

Summary: Application for review of arbitration award dismissed.

JUDGMENT

1. This is an application for the review and setting aside of an arbitration award issued by the second respondent in terms of which he found that the applicant failed to establish that he was dismissed.

Background facts

2. The applicant was employed as a call centre agent by the third respondent in terms of a written fixed term contract of employment for the period 1 January

2011 to 31 December 2011 ("the employment contract"). The applicant was informed by the third respondent on 1 December 2011 that the employment contract would come to an end by the end of that month in accordance with its terms.

3. After the expiry of the employment contract in December 2011, the applicant referred an unfair dismissal dispute to the CCMA. After conciliation, the dispute remained unresolved and the applicant then referred it to arbitration.
4. During the arbitration proceedings, the applicant testified that his dismissal was unfair because he believed that he was the best performer. The applicant also alleged that he was promised to be employed permanently by a person with the name of Rajen. The applicant further testified that he thought his dismissal was unfair because his employment contract was terminated without any valid reason.
5. In cross-examination, he conceded that he did not have any documentation or other evidence to prove his allegations or to prove the promises of permanent employment which he alleged were made to him. He also conceded that he was not the only person whose contract terminated by the effluxion of time.
6. In his founding affidavit, in support of his application to review and set aside the award, the applicant stated that he, together with a number of other employees, were recruited as a team but that some of the employment contracts were allowed to terminate by the end of its period whilst others received further contracts. On this point, he indicated in his founding affidavit that it was unfair for the third respondent to re-employ only some of the team and not others. He claimed that an employer uses a fixed term contract as a tool to cause the termination without having to follow a procedure.
7. As a ground of review, he states that he, together with the other members, were hired as a team and that therefore the third respondent was obliged to consider re-employing them as a team.

Award

8. In his award, the second respondent recorded that in terms of section 192(1) of the Labour Relations Act an employee bears the onus to establish that there existed a dismissal. He further recorded that the evidence showed that the applicant was employed on a fixed term contract from 1 January 2011 to 31 December 2011 and that he was informed on 1 December 2011 that the contract will terminate by the end of that month.
9. He also recorded that the applicant's case was that he was promised to be employed permanently. However, having considered all the evidence, he found on a balance of probabilities that the applicant's fixed term contract of employment terminated on 31 December 2011. He, accordingly, found that the applicant failed in his onus to show that he was dismissed on 31 December 2011. He, therefore, dismissed the applicant's referral.

Condonation application

10. The third respondent opposed the application for review and served its answering affidavit on the applicant on 7 September 2012. The answering affidavit was three months and seven days late. The third respondent filed an application asking for the condonation of the late service of its answering affidavit.
11. As an explanation for the late service of the answering affidavit, the third respondent indicated that the Labour Relations Manager of the third respondent that previously dealt with labour relations and the dispute left the third respondent's employment. The deponent to the founding affidavit in support of the condonation application, Marwaan Davids, who is the Employer Relations Manager of the applicant, took over the responsibilities of the Labour Relations Manager after she left.
12. Davids indicate that when he took over he tried to ascertain from the former Labour Relations Manager what had happened in the matter and did not receive any co-operation from her. When he tried to ascertain from the attorneys what was happening in the matter, they could also not assist him other than to indicate

that they would collect the court file from the court to ascertain what the status of the matter was.

13. The third respondent discovered that the former Labour Relations Manager dealt with an Advocate Metu for purposes of its opposition to the applicant's review. Despite numerous attempts by the third respondent to get Advocate Metu to provide it with any documentation relating to the matter, none was forthcoming. Advocate Metu was not able to provide the third respondent with any timeline of how the matter was dealt with by the former Labour Relations Manager nor assisted with any documentation that Advocate Metu may have prepared in opposition to the matter. The only documentation that the applicant could find was that the answering affidavit was deposed to on 16 July 2012 although it was only eventually served on the applicant on 13 September 2012. The third respondent was unable to confirm whether the answering affidavit was served and filed closer to 16 July 2012 as there was no indication that that was the case.
14. On the prospects of success, the third respondent simply stated that it has good prospects of success for the reasons set out in the answering affidavit. Although I find it incredible that a business which is the size of the third respondent would not have its administrative processes in dealing with labour dispute in order and I am inclined not to accept the explanation provided by the third respondent for the delay in filing its answering affidavit, I am inclined to grant condonation in light of the view I take on the prospects of success when I deal with the applicant's review below.

Legal principles

15. The test for review has recently been dealt with in the case of *Herholdt v Nedbank Limited and Another*,¹ where the Supreme Court of Appeal stated the test as follows:

'That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could

¹ 2013 (6) SA 224 (SCA) at para 12.

reasonably be reached on the evidence and other material property before the arbitrator.'

16. The applicant has failed to set out any grounds of review in his founding affidavit that if found to be established would interest this Court in reviewing and setting aside the arbitration award. In his founding affidavit, the applicant only stated that he was not happy with the award in his founding affidavit. In addition, he simply states that because he, together with other employees, were recruited by the third respondent as a team, the third respondent had a duty to re-employ the team. He also commented that where an employer thinks that by using a fixed term contract the employer cannot use it to cause a termination.
17. I accept that the applicant completed his founding affidavit himself and that he was not legally represented during the proceedings at the CCMA or at the Labour Court. Notwithstanding the fact that the applicant was not represented with these proceedings it does not stop this Court from enquiring into the case that the applicant is trying to make in seeking to review and setting aside of the award. The Court, therefore, has a discretion to consider whether there is any merit to interfere with the award, whether pleaded by an unrepresented applicant. Having said that, I can find no basis in fact, or in law, to review and/or set aside the award of the second respondent.
18. In my view, the award is based on what was before the second respondent. That is that the applicant's employment terminated by the effluxion of time when his fixed term contract came to an end on 31 December 2011. As there was no act on the part of the third respondent giving rise to the termination of the contract of employment, the onus was on the applicant to prove that he was dismissed. As it is common cause that his contract came to an end, he failed to prove that his employment was terminated as a result of an act on the part of the third respondent. Although the applicant indicated, in his evidence, that he was promised further employment, he failed to provide any support for that statement. In my view, therefore, the decision of the second respondent is one that a reasonable decision-maker could have reached.

19. The applicant's application is dismissed. There is no order as to costs.

Visagie, AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: In person

For the Third Respondent: Jean Ewang of Routledge Modise Attorneys