REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO JR 1684/2010

In the matter between:

CONTINENTAL ADONISERS CC **APPLICANT**

and

DG LEVY *NO* **1ST RESPONDENT**

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **2ND RESPONDENT**

AR MELATO & 13 OTHERS **3RD AND FURTHER RESPONDENTS**

Date heard: 25 April 2014

Judgment delivered: 29 April 2014

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside a ruling made by the third respondent (the commissioner). In his ruling, the commissioner held that the third and further respondents had been unfairly dismissed and awarded them compensation totaling R163 431.

[2] The commissioner made his award on the basis of a finding that the employees had been dismissed, and that their dismissal was unfair. At the arbitration hearing, the applicant contended that the employees had been engaged on fixed term contracts which expired on 15 December 2006, and that it had advised the employees timeously that the contracts would end on that date. The basis on which the commissioner appears to have decided in favour of the employees is that certain of them had a reasonable expectation of renewal of their contracts. The applicant seeks to review and set aside the award on the basis first that this was not the issue that the commissioner was called upon to decide nor was it the case put to any of the applicant's witnesses and secondly, that even if the commissioner was empowered to decide that certain of the employees harboured a reasonable expectation of renewal of his contract, that there was no evidence before the commissioner to sustain that conclusion.

[3] The commissioner (correctly) set out the issue in dispute in paragraph 2 of his award. He was to decide whether the employees had been engaged on what were termed limited duration contracts. The case of the employees, as articulated by the witness who gave evidence on their behalf, was that he had signed no such contract and that he was a permanent employee, dismissed in December 2006.

[3] As I have indicated, the commissioner found that the employees had been employed on limited duration contracts. He went on to find that some of the employees had reasonable expectations of renewal of their contracts, distinguishing them from others on the basis of initial dates of engagement. It was never the case during the proceedings under review that the employees had

any expectation of renewal of a limited duration contract. Mr. Ramahuma, the witness who gave evidence on the employees' behalf, denied any knowledge of having signed a limited duration contract. His case was that he had been engaged on a permanent, indefinite basis. The commissioner found that Ramahuma was a dishonest witness, and that he had denied signing a contract until admonished by his representative to tell the truth. Clearly, as the commissioner held, all of the employees had been engaged on fixed term contracts that expired on 15 December. On that basis, the dispute ought properly to have been determined in favour of the applicant. By extending the enquiry *mero motu* into the existence of any reasonable expectation of the part of all or some of the employees without that issue ever having been placed in dispute, and making a decision in the absence of any evidence of any subjective expectation by any of the employees of any expectation of renewal that was objectively reasonable, in my view, the commissioner committed a gross irregularity. The existence of a subjective expectation of renewal is a matter that ought necessarily to have been canvassed with each employee. The employees were represented by a seasoned trade unionist, who chose to lead the evidence of a single witness. That evidence made no mention of any subjective expectation of renewal of his contract (as I have indicated, the existence of a fixed term contract was denied by the witness, who was found by the commissioner to have lied), nor was there any evidence presented by the witness on why any expectation that he may have had was objectively reasonable.

[4] In so far as the commissioner based his finding on documentation that was produced by the applicant's witness, that documentation (and the UIF records in particular) disclosed no more than that the applicant had been requested by the department of labour to adjust its records so as to reflect the period for which UIF contributions had been made. This manifestly does not establish any expectation of renewal of any fixed term contract on the part of any of the employees.

[5] For the above reasons, in my view, the decision reached by the commissioner is one that no reasonable decision maker could reach on the available evidence. His award accordingly stands to be set aside.

[6] No useful purpose would be served in remitting this matter for rehearing. The award was made some four years ago, and a record of the proceeding is available to the court. I intend therefore to substitute the commissioner's decision with a finding that the referral of the employees' unfair dismissal dispute is dismissed. Mr. Beaton SC, who appeared on behalf of the applicant, charitably did not pursue the issue of costs.

I make the following order:

1. The arbitration award made by the first respondent on 24 May 2010 under case number MEGA 14663 is reviewed and set aside.

2. The award is substituted by the following:

   'The applicants' claim of unfair dismissal is dismissed.'

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. R Beaton SC, instructed by De Villiers & Du Plessis Attorneys

The third and further respondents: In person