



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

Case no: C477/2010

In the matter between:

Soraya Booley

First Applicant

Eleanor Momberg

Second Applicant

Marion Carolus

Third Applicant

Mustapha Isaacs

Fourth Applicant

Heidi Williams

Fifth Applicant

Hamish Arries

Sixth Applicant

Nomhiki Sigaga

Seventh Applicant

Dilshaad Allie

Eighth Applicant

Moegsien Ismail

Ninth Applicant

Bonnie Croeser

Tenth Applicant

Ferial Alexander

Eleventh Applicant

Vanessa van Rooy

Twelfth Applicant

Neliswa Mgwayi

Thirteenth Applicant

Elhana Jackson

Fourteenth Applicant

Faith Landu

Fifteenth Applicant

and

ANC

First Respondent

ANC CAUCUS

Second Respondent

Dates heard: 10-14/6,20/6 and 13 /12/2013

Date delivered: 15 April 2014

Summary: Claim for reinstatement or compensation for unfair retrenchment

JUDGMENT

Rabkin-Naicker J

- [1] When comrades employ comrades, labour relations between them take on a distinct character and form. However, in substance, such relations are still subject to employment law and disputes that arise in this context have to be adjudicated in the same way as do others.
- [2] The applicants, ANC members, were all employed to provide services to the ANC's Parliamentary Caucus well before the 2009 general election. They were employed on five year fixed term contracts which were due to expire 30 days after the commencement of polling for the next election of Parliament to expire on or about 31 May 2009.
- [3] It is their case that they reasonably expected their employer to renew their fixed term contracts for a further five years after the 2009 election on the same or similar terms. The basis of such an expectation as recorded in their statement of claim, being first that their employer had since 1994 adopted the practice of renewing the five year fixed term contracts of its employees in Parliament after each election. And secondly, that on least two occasions prior to the 2009 general election, the ANC's then chief whip, Mr N Booi, assured employees that rumours that their contracts would not be renewed were incorrect and that their contracts would be renewed for a further five years. The employees were requested to and did campaign on behalf of the ANC on the basis that their continued employment was secure.

- [4] Shortly before 31 May 2009 after the election, the applicants were given letters which read as follows:

"Expiration Of A Fixed Employment Contract And An Offer Of Six Months Fixed Employment Contract "

Dear Cde.....

This letter is to inform you of an expiration of your fixed employment contract on 31 May 2009 between you and ANC Parliamentary Caucus for the third term of Parliament which started on June 2004 to May 2009.

It is with pleasure that I offer you a fixed term appointment as..... as from the 1 June 2009 to 30th of November 2009. You will work in Parliament Cape Town... ..

The offer is subject to the following conditions:

*your written acceptance within three (3) days of receipt of the letter of offer of employment.

*Successful completion of security clearance (where applicable).

*Signing of a fixed contract of employment and performance agreement.

*Acceptance and compliance with other conditions of service applicable to all staff of the ANC Parliamentary Caucus.

After the inevitable restructuring process, posts will be advertised and you're more than welcome to apply...."

- [5] The applicants also learnt in about May 2009 that their employer needed to retrench staff as a result of having obtained a reduced majority in the general election, which would have a negative impact on its available funds. The applicants made it clear that they were aggrieved by the failure to renew their employment for a further five-year term and threatened to have a public demonstration at the opening of the new parliament. They claim that President Jacob Zuma addressed the Parliamentary staff of the ANC Caucus

and gave them an assurance that their positions were secure and that none of them would lose their jobs.

- [6] It is the applicants' case that they only signed the six-month contracts to avoid being unemployed from 1 June 2009, and in the reasonable expectation that these contracts would in due course be renewed for the balance of the five year term. The six-month contracts which they signed contained a clause which was headed "whole agreement" and read as follows:

"This employment contract contains the entire agreement between the employer and the employee with regard to all that is contained or referred to in this employment contract. There are no other terms, conditions, undertakings, promises or warranties of any nature whatsoever regulating the parties relationship in regard to the matters referred to or contained in this employment contract, unless reduced into writing and signed by both parties. The parties acknowledge that there are no collateral agreements between the parties in regard to the matters contained in or referred to in this employment contract or any undertakings, assurances, promises or inducement of any nature whatsoever."

- [7] In response, it is pleaded that the ANC Parliamentary Caucus is given allowances from Parliament to fund the constituency work of members of Parliament. This includes salaries. At all material times, the applicants were aware that the amounts of funds provided by Parliament were dependent on the numbers of members per party after each election in terms of the policy on political allowances. It therefore pleads that none of the applicants could have had any expectation of a renewal beyond the fixed period. The applicants contracts therefore terminated by effluxion of time at the end of May 2009 and given that each of the applicants was provided with notice to this effect, they could not have reasonably expected renewal on the same or similar terms.
- [8] It is stated on the half of the respondents that the applicants knew or ought to have known that the only purpose for the limited six months duration contract

was to grant the ANC caucus an opportunity to follow fair recruitment processes and to avoid the collapse of its administration. The applicants participated in the recruitment process with the consent of their union NEHAWU. It is further respondent's case that by participating in the recruitment process the applicants knew that they would be competing for posts, and that none of them would have a guarantee or expectation of renewal. On the respondent's case therefore there was no dismissal and this court lacks jurisdiction to hear the matter.

Evaluation

[9] The issue that the court has to first determine is whether dismissals in fact took place or whether the termination of the six-month fixed term contracts can be labeled as a termination due to the effluxion of time. I will first consider the applicable law in respect of the doctrine of "reasonable expectation of renewal" in our labour law.

[10] In **De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others**¹ the Labour Appeal Court per Zondi J summarised the law as follows:

"[25] The appellant's case is founded upon s 186(1)(b) of the LRA and that being so, she had to provide facts which, objectively considered, would bring her case within the ambit of that section. This section provides as follows:

'186 Meaning of dismissal and unfair labour practice

(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.'

[26] In **SA Rugby Players Association** at para 44 it was held that the onus is on an employee to establish the existence of a reasonable or legitimate expectation. The test whether or not an employee has

¹ (2013) 34 ILJ 1427 (LAC)

discharged the onus is objective, namely, whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his or her fixed-term contract on the same or similar conditions. But once it is found that there had been a dismissal as contemplated in s 186(1)(b), the onus shifts to the employer to justify its fairness.

[27] In **Joseph v University of Limpopo & others** (2011) 32 ILJ 2085 (LAC); [2011] 12 BLLR 1166 (LAC) this court pointed out that, in deciding whether or not an employee has established that he had a reasonable or legitimate expectation that the contract would be renewed, the court will have regard inter alia to previous regular renewals of his contract of employment, terms of the contract and the nature of business but it pointed out that the list was not exhaustive. This means that where there is evidence of regular renewal of the employee's contract of employment in the past by the employer the court will most likely consider it as a strong indication that the parties intended to extend their employment contractual relationship.....

[29] In order to assess the correctness of Mr. Le Roux's contention that the appellant had a reasonable expectation that her contract would be renewed and that the MEC's failure to renew it constituted a dismissal, it is first necessary to determine whether she in fact expected her contract to be renewed, which is the subjective element. Secondly, if she did have such an expectation, whether taking into account all the facts, that expectation was reasonable, which is the objective element." (my emphasis)

[11] Taking the above approach, I note that it is the applicants' claim that expectations were strengthened amongst others, by the mandating of a delegation from the ANC's head office led by Mr. U. Abrahamse, to facilitate a solution to the dissatisfaction which had arisen regarding the failure to renew the employees contract for the expected period. The amended statement of claim records this amongst others in paragraph 14 and 15 as follows:

“14. After meeting with representatives of the affected parties, the delegation issued an initial report, dated 4 June 2009, to the respondent's chief whip and a report dated 5 June 2009 to the secretary general....

15. On or about 12 June Abrahamse met with shop stewards representing the affected employees and, on behalf of the respondent, sought their agreement to the content of the initial report of 4 June 2009 to the Chief Whip. Aspects agreed to with the shop stewards included the following:

15.1 the parties would as far as possible avoid the possibility of rendering staff redundant but where this could not be avoided, alternative employment would be identified for redundant staff members.

15.2 operational staff (administrative assistants and secretaries to MPs, PCO staff and researchers) would be "ring fenced" during the process. Should a situation arise where any staff were not offered new contracts of employment, operational staff would be the last category of staff to be affected.

15.3 in the event that some staff members were not offered new contracts of employment, the following interventions would be made to prevent them from being rendered unemployed:

15.3.1 placement in other ANC structures;

15.3.2 placement in the public's service and/or newly established Ministry;

15.3.3: training intervention for those who needed to be re-skilled.

15.4: the proposed engagement process would not be driven by the current management but would be driven directly by the chief whip, with the assistance of the respondent's head office.”²

² the applicant's case before court was that the ANC was the employer of the applicants although they did amend their citation of the respondents to include the ANC caucus as second respondent.

[12] Their statement of claim sets out how the applicants applied for the posts in the new structure as instructed, but were not reappointed and were instead informed on or about 13 November 2009 that their employment had expired, though they would be paid for December 2009. The following statement is made in paragraph 21 of the claim:

“21. The applicants had reasonably believed that their employment would be renewed for the balance of the applicable five-year period. The respondent's failure to renew their contracts constituted a ‘dismissal’ in terms of section 186 (1) (b) of the Labour Relations Act.”

[13] It is therefore applicants’ pleaded version that their shop stewards agreed to the so-called ‘initial report’ as set out above. Clause 15 of the Statement of Claim cannot be read other than to reflect that restructuring of the caucus staff was going to take place, and that the parties would as far as possible avoid the possibility of rendering the staff without employment. The issue of ‘ring fencing’ and deployment to other structures and departments of government are all reliant on the supposition that certain of the ANC caucus staff were at risk of losing their employment. The content of applicants’ own pleaded case belies their subjective beliefs that they would not risk losing their jobs.

[14] I am however, for the purposes of deciding this point in limine, prepared to accept that given the close relationship between Nehawu and the ANC and the fact that the applicants and their employer all owed allegiance to the ANC, that applicants’ genuinely held a subjective belief that matters would be resolved and they would not be ‘put out to dry’ after years of service to their own party. However, what remains to be considered is whether this subjective belief was objectively reasonable. It was submitted on behalf of the ANC Caucus that there were several facts and events which objectively could not have rendered the expectation of the applicants’ reasonable. These included:

14.1 That their contracts before 2003 were all linked to the lifetime of Parliament;

14.2 That a letter was written to the applicants on the 13th May 2004 from the office of the Chief Whip. The letter inter alia read “ it should be

noted that these contracts are not roll over contracts and do not create an expectation of further employment at the end of this contract period."

- 14.3 The challenge from the new political party on the scene for the 2009 elections COPE to the ANC's majority was a further objective fact that negated any reasonable expectation of renewal.
- 14.4 The letter dated 31 March 2009 in which the Chief Whip wrote to employees indicating that their contracts would terminate effective 31 May 2009. Although some evidence in court on behalf of the applicants suggested that very few of them had received this letter at the time it was sent to them, non-receipt of the letter is not pleaded.
- 14.5 The dissolution of the ANC caucus in April 2009 when Parliament dissolved in terms of the provisions of the Constitution;
- 14.6 The loss of seats by the ANC and the resultant drop in funding for posts mitigated against any reasonable expectation of renewal when the ANC returned a reduced majority with a reduction of some 33 MPs.
- 14.7 The 22 May 2009 letter which informed all the applicants that their contracts would not be renewed at the expiry of the fixed term ending end of May 2009. In this letter they were offered fixed term appointments from one June 2009 to 30th of November 2009 and it was also indicated to them that after an inevitable restructuring process, posts would be advertised and that they would be welcome to apply.
- 14.8 The signing by the applicants of the six month contract with its clause 14 headed "whole contract" the content of which is referred to above. Although there was evidence from Booley that she signed the contract under duress, the legal requirements of duress were not shown. At that point the applicants did not claim that they had been dismissed.(It was acknowledged by Mr. Freund for the applicants that had they claimed an expectation of renewal for five years at that stage they would have had a sound legal case but then would have faced immediate unemployment).

14.9 The conduct of the applicants in applying for jobs in the new structure and the conduct of the union in acting as observers to the application process.

- [15] Weighing the conspectus of facts and circumstances referred to above, including the conduct of the applicants themselves, I find that any subjective expectation held by the applicants cannot be considered as objectively reasonable. Their testimony that certain undertakings were made to them that their jobs would be safe, even if accepted as undisputed, can still not disturb this finding. By the time of the 12 June 2009 meeting at which their shop stewards agreed to the 'initial report', it was their union representative's understanding, as pleaded, that jobs may be lost and that the caucus was to be restructured.
- [16] The applicants could have referred an unfair dismissal dispute to the CCMA before signing the six month contracts but they elected not to. Taking into consideration the terms of the contracts they signed, and the facts and circumstances listed above on which I have determined that there was no reasonable objective basis for their expectation of renewal of their contracts, I find that as of the 30 November 2009, the applicants' employment terminated due to the expiration of their six month fixed term contracts. No dismissals took place.
- [17] In the circumstances, I make the following order in the knowledge that the applicant's case was funded by NEHAWU and that the union and the Respondents have an ongoing relationship.

Order:

1. The applicants' claim is dismissed for want of jurisdiction
2. There is no order as to costs.

Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

For the Applicants : Adv AJ Freund SC with Adv Graham Leslie instructed by
Vernon Seymour Attorneys

For the Respondents: Advocate F Boda instructed by Ntanga Nkuhlu Inc Attorneys

LABOUR COURT