

IN THE LABOUR COURT OF SOUTH AFRICA
(CAPE TOWN)

CASE NUMBER:

C550/2013

5 DATE:

19 AUGUST 2014

In the matter between:

CASH PAYMASTER SERVICES (PTY) LTD

Applicant

and

10 **SARAH CHRISTIE N.O.**

First respondent

CCMA

Second respondent

N MFENYANA & 24 others

Third and further respondents

J U D G M E N T

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STEENKAMP, J:

This is an application to have an arbitration award reviewed and set aside. The award arises from a dispute about a dismissal in the form of a legitimate expectation of renewal of a fixed term contract in terms of section 186(1)(b) of the Labour Relations Act (Act 66 of 1995). The arbitrator, Sarah Christie, handed down her award on 5 June 2013. She found that the employees, who are cited as the third and further respondents in this matter, were dismissed as defined in /RG /...

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section 186(1)(b) and that the dismissal was unfair. She ordered the applicant, CPS, to pay each of the employees that actually appeared at the arbitration compensation equivalent to six weeks' wages.

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At the beginning of the hearing, I granted condonation for the late filing of the employees' answering affidavit. I turn to the merits.

10 The background to the dispute is largely common cause. Cash Paymaster Services (or CPS) has been awarded the tender to pay out social grants on behalf of the South African Social Security Agency, SASSA. The individual employees were employed on fixed term contracts and it is common cause that
15 the project for which they were employed was coming to an end in the course of 2013. It is further common cause that the contracts had been rolled over before. The contract on which they were employed at the time was due to come to an end at the end of March 2013. However, it is further common cause
20 that about a third of the employees employed on those contracts were retained after the end of March. The remaining employees, or at least the employees that appeared at arbitration, argued that they had a legitimate expectation of renewal.

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That is of course addressed in section 186(1)(b) that reads as follows:

“Dismissal” means that ... an employee
5 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”.

10 Two questions arise in disputes of this nature. The first is
whether there was a dismissal as defined in the section; and
secondly, if there was such a dismissal, whether the dismissal
was fair. As Mr *Pretorius* for the applicant quite rightly pointed
out, it is by now settled law that in questions of the first
15 nature, i.e. whether there was a dismissal, the question goes
to jurisdiction and therefore on review the reasonableness test
set out in Sidumo¹ does not apply. That much was held by the
Labour Appeal Court in SARPA v South African Rugby (Pty)
Ltd (2008) 29 *ILJ* 2218 (LAC) and has been confirmed in a
20 number of cases of this Court since. Should the Court find that
there was a dismissal, the second question on review, i.e.
whether the arbitrator’s finding that the dismissal was unfair
and the compensation that she awarded, is then to be decided
on the reasonableness test.

¹ *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

I turn then to the first question, i.e. whether the arbitrator correctly held that the employees had formed a reasonable expectation of renewal and therefore that the failure to renew
5 amounted to a dismissal. In this regard the Court in SA Rugby² described the test in the following terms:

“The test is that the employee must establish:

- (a) That he had subjectively an expectation that
10 the employer would renew the fixed term contract in question on the same or similar terms; and
- (b) that the expectation was reasonable; and
- (c) that the employer did not renew it or offered
15 to renew it on less favourable terms.”

In the case before me it is common cause that the employer did not renew the contracts. The question is then whether the employees subjectively had an expectation of renewal and if
20 they did, whether such expectation was reasonable. The arbitrator addressed these questions, albeit fairly briefly. She found that it is common cause that there was a practice of rolling over the contracts. That is one element that led to the employees subjectively expecting a further renewal after March

² *SA Rugby (Pty) Ltd v CCMA & ors* [2006] 1 BLLR 27 (LC).

2013. The further factor taken into account is that about one third of their colleagues' contracts were in fact renewed. It is so, as Mr *Pretorius* submitted, that there is perhaps a fading of the lines between the question of whether there was a reasonable expectation and the question of the procedure followed by the employer. That is because the arbitrator found that the selective failure to extend was unfair. However, the arbitrator weighed up the factors that I have outlined as against the factors that militate against an expectation of renewal. For example, she rejected the workers' argument that because they had been employed longer than the rest, they should have been selected.

On balance I am persuaded that the finding of the arbitrator that the workers did form an expectation of renewal and that that expectation was a reasonable one, was the correct finding on the evidence before her. I am not persuaded that that finding is reviewable.

That brings me then to the second question, i.e. whether the dismissal was unfair. In this regard the arbitrator found that the selection criteria ostensibly used by the employer were not rational.

The employer said that it used performance as selection criterion. However, the arbitrator found that there was no evidence before her that the employer did in fact use that criterion or, if it did, that it explained or discussed that
5 criterion with the workers. Therefore the dismissal was also unfair. That conclusion seems to me to fall within a band of reasonable conclusions and is therefore also not reviewable.

There is a further aspect, and that is that CPS argued that the
10 CCMA did not have jurisdiction to make such a finding because if there was a dismissal, it was in fact based on operational requirements; that more than one employee had been dismissed for operational requirements; and therefore the CCMA did not have jurisdiction.

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There are two answers to that argument. The first is that the employer never raised it at arbitration. The second is that the case on which it relies, namely Mkhiva v BCS Joint Venture [1997] 8 BLLR 1014 (LC) is distinguishable.

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In that case the dispute came before the court as a dispute about dismissal for operational requirements in terms of section 189 of the LRA. Zondo AJ, as he then was, pointed out at 1015i-j:

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“The applicant’s claim as embodied in his statement of claim is that the termination of his contract for employment was an unfair retrenchment as well as an automatically unfair
5 dismissal.”

The case before me is a review of a dispute that was clearly referred to and decided by the CCMA as a dispute in terms of section 186(1)(b) of the LRA. As Nugent JA pointed out in
10 Makhanya v University of Zululand 2010 (1) SA 62 (SCA) at paragraphs 71 and 95, the question of jurisdiction must not be confused with the merits. A court or another forum such as the CCMA must decide the case that is pleaded. Whether it is a good or a bad claim is a different question. The case that was
15 pleaded and that was decided upon in the dispute before me is one squarely based on section 186(1)(b) and not section 189. That was never the case for either of the parties. The failure of the arbitrator to decide it on the basis of a section 189 claim is therefore also not reviewable.

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Lastly, with regard to the relief granted, although Mr *Pretorius* did not specifically take issue with that outcome, I will simply add that it appears to me that the award of compensation amounting to six weeks’ wages is not an unreasonable one.

25 As the employer pointed out, if the employees did have an

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expectation of renewal, it could only have been for the renewal of a contract for another three months. To my mind, even if the arbitrator had awarded compensation amounting to three months, it would still have fallen within a range of reasonable
5 outcomes. I am therefore satisfied that both the finding and the outcome are reasonable.

With regard to costs, both parties asked that costs should follow the result and I can see no reason to differ.

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**THE APPLICATION FOR REVIEW IS THEREFORE DISMISSED
WITH COSTS.**

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STEENKAMP, J

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APPEARANCES

APPLICANT: Danie Pretorius of Fluxmans Inc.

THIRD RESPONDENT: Jason Whyte of
Cheadle Thompson & Haysom.