



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: JR 730/12

Not Reportable

In the matter between:

DUNYISWA MAQUNGO

Applicant

~~and~~ And

LUVUYO QINA N.O

First Respondent

COMMISSION, CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

BAYPORT FINANCIAL SERVICES

2010 Pty) Ltd

Third Respondent

Heard: 9 July 2013

Delivered: 6 February 2015

JUDGMENT

VAN GRAAN AJ

- [1] This is a review application by the applicant, Dungiswa Maqungo, in terms of section 145(1) of the Labour Relations Act, No 66 of 1995 (as amended) (*“the LRA”*) against the arbitration award by Commissioner Luvuyo Qina, first respondent, dated 24 February 2012.

Factual background:

- [2] The following facts appear from the affidavits in the application, the record and the arbitration award:
- 2.1 On 1 April 2011, the third respondent employed the applicant “*on a three (3) months limited duration contract*” in the capacity of a training administrator.
 - 2.2 On 1 July 2011, the applicant’s learning and development manager, Ms D N Hoortzuk, renewed the applicant’s contract which was to expire on 30 September 2011.
 - 2.3 On 2 September 2011, Ms Hoortzuk and Ms A Kgomo, the third respondent’s human business partner, conducted an interview with the applicant. Ms Hoortzuk informed the applicant that she was satisfied with her performance and that she was going to be appointed on a permanent basis.
 - 2.4 The third respondent sent the applicant, during August 2011, on a training course where she obtained certificates in Premier HR Employee Management, Premier HR Performance Management and Premier HR Job Management.
 - 2.5 The applicant, on the day that her contract was supposed to expire, 30 September 2011, was on approved leave.
 - 2.6 On 3 October 2011, when the applicant reported for duty, she received a letter from the third respondent informing her that her employment had been terminated.

- 2.7 The applicant referred a dismissal dispute in terms of section 191(1)(a) of the LRA to the CCMA. In paragraph 3 of the LRA Form 7.11, the applicant characterised the nature of the dispute as an “*Unfair dismissal*”. In paragraph 3 of Part B of the LRA Form 7.11, the applicant stated that the reason for her dismissal was “*Unknown*”.
- 2.8 On 3 November 2011, the parties attempted to resolve the dispute at a conciliation meeting. The commissioner who completed the certificate of outcome stated that the unresolved dispute concerned an “*Unfair Dismissal*” as a result of a “*Reason Unknown*” and that it could be referred to arbitration.
- 2.9 On 24 November 2011, the applicant requested the CCMA to conduct an arbitration.
- 2.10 In the enrolment notice dated 6 December 2011, the CCMA Case Management noted that the primary issue in the arbitration is “*191(5)(a)(iii) – Reason for dismissal not known*”.

Characterisation of the dispute at the arbitration:

- [3] The arbitration hearing was conducted on 31 January 2012 before the arbitrator, first respondent.
- 3.1 The applicant, at the arbitration, was represented by an attorney. At the commencement of the arbitration, the third respondent’s representative, an employee relations manager, Mr H.J. Horn, enquired from the arbitrator, despite applicant referring the dispute as a “*dismissal for unknown reasons, (whether) the applicant can indicate on what basis (she) wishes to proceed...*”
- 3.2 The applicant’s attorney on the invitation of the arbitrator, stated “*that the matter is going to proceed on the basis of termination of a fixed term contract that will be in the line with section 186(1)(b)*” of

the LRA. The attorney informed the arbitrator further that the dispute is about *“a contractual matter where the contract expired but then we are going to rely on the reasonable expectation, which the applicant had in, in believing that ... was actually not going to be terminated.”*

3.3 On the arbitrator's question whether the third respondent's representative, Mr Horn, wished to comment, the representative stated that *“there was at no stage made, an offer to renew the fixed term contract”* and that no reasonable expectation was created by the applicant's managers that her contract would be renewed.

3.4 After their opening remarks, the representatives discussed the bundles of documents with the arbitrator.

3.5 The applicant's attorney thereafter indicated that he would like to call his witnesses. It appears from the transcription of the arbitration proceedings that a brief discussion ensued between the arbitrator, third respondent's representative and the attorney. This discussion was introduced by the arbitrator with the phrase *“Lets see if I understand it please.”* It appears further from the transcription, of which bits were not audible for transcription typist, that the arbitrator attempted to establish whether they were *“speaking about contract ...”*

3.6 The third respondent's representative confirmed the arbitrator's view.

3.7 The arbitrator, however, stated that *“(t)he applicant is saying that in fact there was a legitimate expectation”*. As a result, the arbitrator said, the *onus* would be on the applicant. The applicant's attorney, if he had a different view, did not inform the arbitrator of such view.

The evidence by Mr H.J. Horn at the arbitration:

[4] The third respondent's representative, Mr Horn, testified as one of the third respondent's witnesses :

4.1 His evidence was, *inter alia*, that he had a discussion with the applicant on 3 October 2010 when she informed him that she already had "... *prior discussions with other managers in, which they created the expectation that her contract will be a permanent contract*".

4.2 Mr Horn also dealt with the third respondent's letter dated 3 October 2010. The letter reads as follows:

'Bayport Financial Services (third respondent) would like to bring to your attention that your fixed term contract expires on the 30th September 2011 as per our contractual agreement. This is to notify you that the contract will not be renewed, giving you four weeks notice.'

4.3 Under cross-examination, Mr Horn admitted that he was not involved with the applicant's first and second contract. The first contract he admitted was renewed.

4.4 He was informed that Ms D.N. Hoortzuk (learning and development manager) and Ms A. Kgomo (human capital business partner) had a discussion with the applicant "*that there might be a possibility for (the applicant) to become permanent in the company*", but that there was no authorisation for such discussion.

4.5 The applicant's attorney asked Mr Horn whether the discussion between Ms Hoortzuk and the applicant did "*not give (the applicant) a reasonable expectation that her contract [be renewed]*". It appears from the unsatisfactory transcript that he answered in the affirmative. Mr Horn admitted under cross-examination that he terminated the applicant's contract on 3 October 2010 on an "*instruction*". At the end of his cross-examination, Mr Horn tried to distinguish between two scenarios which are different from each other. In the first scenario there are two considerations, one:

“whether there was any permanent contract concluded with her and two whether her fixed term contract was renewed.”

The second scenario concerned the issue:

“whether there is legal expectation for her that something else could have transpired, uhm that reasonable expectation could have existed right.”

The third respondent's second witness :

[5] The third respondent's second witness was the third respondent's employee relations officer, Ms L. Mathikge.

5.1 She testified that she was not involved in the termination of the applicant's employment.

5.2 There was no cross-examination.

The applicant's evidence at the arbitration :

[6] The applicant testified after the third respondent has closed its case:

6.1 The applicant's evidence was that the date of 30 September 2010 was the termination date of her contract. However, she received training from the third respondent to be able to perform in a permanent position.

6.2 When she was given her letter of dismissal she was actually expecting a permanent contract to sign.

6.3 Although her contract expired on 30 September 2010, she went to work on 3 October 2010, because she was promised she was going to become a permanent employee.

6.4 She was sent on training to be able to perform in the permanent position.

6.5 Her attorney asked her to inform the arbitrator what her expectations were

"toward the ... end of (her) contract". She answered that she expected to get a permanent contract to sign because she had been promised that.

6.6 Under cross-examination, she said that she had not been promised a renewal of her contract, but she was promised a permanent position. She testified that the discussion which she had with Ms Hoortzuk and Ms Kgomo and the training which she had received, created an expectation that her contract would be renewed on a permanent basis.

6.7 The applicant stated under cross-examination that when she was asked whether she was interested in a permanent contract she said yes.

The applicant's witness: Ms D.N. Hoortzuk:

[7] Ms Hoortzuk was the learning and development manager of the third respondent :

7.1 She testified in chief that she had renewed the applicant's contract which ended on 30 June 2011.

7.2 She (and her colleague) had the authority to convert the applicant's position *"from a contract position to a permanent position"*.

7.3 Ms Hoortzuk sent the applicant on a course so that she could work effectively.

7.4 She told the applicant that her contract was not going to be terminated.

7.5 On 3 October 2010, the applicant received a termination letter, instead of an appointment letter.

7.6 Under cross-examination, she said that she informed the third respondent's HR official that she was taking the applicant on permanently. She and the HR official confirmed that to the applicant during a meeting with her. The HR official was requested to prepare the necessary documentation to turn the applicant into a permanent

employee.

7.7 When she was re-examined Ms Hoortzuk testified that she and the HR official congratulated the applicant at the aforementioned meeting with her permanent status.

The applicant's witness: Ms A. Kgomo :

[8] Ms Kgomo was employed by the third respondent as a human capital business partner.

8.1 The applicant's fixed term contract with the third respondent was renewed once before, she testified.

8.2 She and Ms Hoortzuk informed the applicant that she would become permanent, but the applicant, on 3 October 2010, received a letter terminating her permanent contract.

8.3 Ms Kgomo under cross-examination conceded that the applicant was not appointed as a permanent employee – there was only a discussion to appoint her permanently. The appointment was not confirmed by completing the relevant forms. She also testified that there was no contract.

Third respondent's argument before the arbitrator :

[9] The essence of Mr Horn 's argument was that the applicant's case that she had an expectation to be permanently employed is not covered by section 186(1)(b) of the LRA.

Applicant's argument before the arbitrator :

[10] The applicant's attorney initially argued that she had to prove whether there was a reasonable expectation that her contract was still going to continue with the third respondent. The transcription of the argument of the applicant's attorney is not complete due to the certain parts not being audible. It seems that the applicant's attorney also argued that the

applicant had been treated or dismissed “*unfairly and unjustly*” wherefore he claimed compensation on her behalf.

The arbitrator’s award:

[11] The arbitrator’s award is structured in the format usually used by CCMA arbitrators :

11.1 He first described the issues to be decided as follows :

‘4. *Whether or not the applicant was dismissed by the (third respondent); and if so;*

5. *Whether such a dismissal as contemplated in sec 186(1)(b) of the Labour Relations Act 66 of 1995 (the Act) as amended.’*

11.2 He then provided a survey of the evidence on behalf of the parties.

11.3 Under the heading “*Analysis of Evidence and Argument*” the arbitrator, with reference to sec 192(1) of the LRA, explained that the applicant “*bears the onus of proving the existence of a dismissal*”.

11.4 The arbitrator, aware of the fact that the applicant had referred an unfair dismissal of which the reason for dismissal was unknown to the CCMA, stated that her attorney during the arbitration proceedings argued that the dismissal had occurred in terms of sec 186(1)(b) of the LRA. According to the arbitrator “*(t)hese are clearly two different disputes*”.

11.5 He found that the applicant’s version that she would be appointed permanently when her fixed term contract had expired (on 30 September 2011), is not covered by sec 186(1)(b) of the LRA.

11.6 He, however, found that Ms Hoortzuk had the authority to appoint the applicant to a permanent position, that Ms Hoortzuk, on 2

September 2011, offered a permanent position to her and that the applicant had accepted the position.

11.7 As the applicant *“did not challenge the termination of the permanent employment, but chose to base her dispute on sec 186(1)(b) of the Act”*, he was unable to determine the fairness of her termination of permanent employment.

11.8 He finally determined that there was no dismissal in terms of sec 186(1)(b) of the LRA.

The applicant's case in her founding affidavit before the Labour Court :

[12] The applicant stated in her founding affidavit that, on the basis of her explanation in her affidavit, the arbitrator's award was defective as contemplated in sec 145 of the LRA and that he had committed a gross irregularity in the conduct of the arbitration proceedings. In the preceding paragraphs the applicant described the arbitration proceedings conducted by the arbitrator as follows :

‘13. The First Respondent then stated:

“The question is now whether the dismissal of the Applicant was in terms of section 186(1)(b) of the Act.”

14. The First Respondent thus found that the Applicant had been dismissed.

15. In terms of section 192(2) of the Act, it having been found that she had been dismissed, the onus was on the Third Respondent to establish whether or not the dismissal was fair or not and if it failed to discharge this onus the First Respondent was obliged to find that it was unfair and to order either reinstatement of the applicant or for the Third Respondent to pay compensation to the Applicant for unfair dismissal in an amount that was just and equitable in all the circumstances but limited to 12 months of the remuneration to which the applicant was entitled when she was dismissed.

(The third respondent in paragraph 13 of answering affidavit admitted the correctness of the contents of paragraph 15.)

16. *Instead of deciding whether or not the Third Respondent had discharged this onus the First Respondent dealt with the question of whether the dismissal of the Applicant was in terms of section 186(1)(b) of the Act and found that it was not the case. He found that her permanent employment was terminated but that the Applicant, instead of challenging this, chose to base her dispute on section 186(1)(b) of the Act so he found he was unable to determine fairness or otherwise of the termination of the permanent employment.*

17. *Section 186(1)(b) of the falls under the “Meaning of dismissal” under the Act. One of the meanings of dismissal is found in section 186(1)(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.”

18. *The First Respondent found that this did not apply to what happened to the Applicant because she relied on a promise of permanent employment rather than a renewal of her fixed term contract.*

19. *The rational conclusion for him to have drawn from his interpretation of this section of the Act as read with the cases he referred to was that the Applicant had failed to prove that she had been dismissed.*

20. *On the contrary he found from the evidence that the applicant had been dismissed because she had been permanently employed and that this contract had been terminated.*

21. *The AWARD is thus contradictory and is inconsistent with the first respondent’s finding on the evidence placed before him.’*

The third respondent’s stance in its answering affidavit:

[13] The third respondent in its answering affidavit adopted the arbitrator’s approach :

13.1 The arbitrator was tasked with making a ruling as to whether the applicant had a reasonable expectation that her fixed term contract would be renewed. Section 186(1)(b) of the LRA provides that an

alleged unfair dismissal has taken place where 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 not at all.

13.2 As the applicant chose to challenge the termination of her employment in terms of section 186(1)(b) of the LRA and not the termination of the permanent position offered to her, the arbitrator correctly dismissed her claim.

13.3 I have noted, however, that the third respondent's deponent in his answering affidavit did not challenge the commissioner's finding that the applicant had been dismissed by the third respondent.

13.4 The third respondent also conceded to the applicant's criticism raised in paragraph 15 of her founding affidavit (*supra*).

The applicant's replying affidavit:

[14] The applicant in her replying affidavit disputed the contentions and submissions of the third respondent for the following reasons:

14.1 The mandate of the commissioner was to determine the unfair dismissal dispute which the applicant had referred to the CCMA and upon conciliation failing and the said certificate being issued, that the applicant requested, in terms of section 191 of the LRA, to be resolved through arbitration.

14.2 Having heard the evidence, the commissioner determined that the applicant had been permanently appointed by the third respondent and that such appointment was terminated by the third respondent.

14.3 The commissioner was required in terms of the LRA to determine whether the third respondent had discharged the *onus* on it to prove that the applicant's dismissal was both procedurally and substantively fair.

- 14.4 Instead of making such determination the commissioner regarded himself bound by the manner in which the applicant's attorney characterised the dismissal as being a dismissal in terms of section 186(1)(b) of the LRA.
- 14.5 The applicant submitted that the first respondent was not bound by the manner in which the applicant's attorney characterised the dismissal but had the power, in terms of the LRA, to determine the nature of the dismissal himself.
- 14.6 Having made the determination that the applicant had been permanently appointed and that such employment had been terminated by the third respondent, the commissioner misconducted himself in relation to his duties as an arbitrator in terms of the LRA and committed a gross irregularity in the conduct of the arbitration proceedings by finding that he was unable to determine fairness or otherwise of the termination of the permanent employment on the basis that the applicant had not argued this case before him.
- 14.7 The applicant persisted in her contention that there was no rational objective basis justifying the connection made by the first respondent between the evidence before him; the conclusion he eventually reached; and the reasons given for it.
- 14.8 The first respondent reached a conclusion, applicant submitted, that is so unreasonable that no reasonable decision-maker could reach such in the circumstances of this case.
- 14.9 Under these circumstances, the applicant persisted in her contention that the commissioner's award should be reviewed and set aside.

Applicant's main submissions during argument before the Labour Court:

- [15] 15.1 Applicant's representative, Mr Myhill, submitted (with reference to

paragraph 15 of the applicant's founding affidavit – admitted in the third respondent's answering affidavit) that the arbitrator, having found on the evidence that she had been dismissed, was required by section 192 of the LRA to determine whether the third respondent had discharged the *onus* of proving that the dismissal was procedurally and substantively unfair, and if not, whether she should have been reinstated or compensated.

15.2 Mr Myhill, during argument, further submitted that the commissioner had a duty to determine the nature of the dispute. He referred me to *Coin Security Group (Pty) Ltd v Adams and Others*.¹ He also referred me to *Wardlaw v Supreme Mouldings (Pty) Ltd*² followed in *Chizunza v MTN Ltd and Others*³.

The third respondent's submissions before the Labour Court :

[16] The third respondent after dealing with the factual background and the authorities on the test which should be adopted in review applications (*Sidumo and Another & Congress of South Africa Trade Unions v Rustenburg Platinum Mines Ltd and Others*;⁴ *Fidelity Cash Management Services v CCMA and Others*;⁵ *Phalaborwa Mining Co Ltd v Cheetham and Others*;⁶ *Bestel v Astral Operations Ltd and Others*;⁷ *Herholdt v Nedbank Ltd*.⁸) submitted that it has now been settled that an expectation of permanent employment on expiry of a fixed term contract is not covered by section 186(1)(b) of the LRA. (*University of Pretoria v CCMA and Others*.⁹)

[17] It was submitted further on behalf of the third respondent that the

¹ (2000) 21 ILJ 924 (LAC) at 930.

² (2007) 28 ILJ 1042 (LAC) at 1046-1053.

³ (2008) 10 BLLR 940 (LC) at para 13.

⁴ (2007) 33 ILJ 1789 (LAC); 2008 (2) SA 24 (CC).

⁵ (2008) 29 ILJ 964 (LAC).

⁶ (2008) 29 ILJ 306 (LAC).

⁷ (2011) 2 BLLR 129 (LAC).

⁸ (2012) 33 ILJ 1789 (LAC); (2012) 9 BLLR 857 (LAC) at para 33.

⁹ [2012] 2 BLLR 164 (LAC) at para 18 and para 21. The LAC judgment on which the third respondent relied is distinguishable on the facts from this matter. In this matter a contract of employment of a permanent nature was offered to the applicant which she accepted, unlike the employee in the LAC judgment.

arbitrator's award that the applicant's dismissal was not in terms of section 186(1)(b) of the LRA and that he needs not to have determined the fairness of the applicant's termination of employment, "*is one which a reasonable decision would have arrived at*" considering the evidence presented.

- [18] The correctness of the *Coin Security Group, Wardlaw and Chizunza* judgments on which the applicant relied on for her argument that it is the duty of a commissioner to determine the nature of a dispute was not challenged by Mr Citi, the third respondent's attorney. He, however, during his argument, pointed out that the applicant's case enunciated in her heads of argument relating to the commissioner's duty to determine the nature of the dispute, was not specifically included in her founding affidavit as a ground for review. He referred me to *CUSA v Tao Ying Metal*.¹⁰

Applicant's response in its replying affidavit

- [19] Mr Myhill, in reply, submitted that his argument based on the *Wardlaw's* principle is a supplementary argument, which finds support in paragraph 15 of the applicant's affidavit.

Conclusion:

- [20] The commissioner, first respondent, in his award rejected the third respondent's version that Ms Hoortzuk "*had no authority to appoint the applicant to a permanent position*".
- [21] The commissioner in his analysis of the evidence before him noted that a permanent position was offered to the applicant "*which she has accepted during the meeting which was held on 2nd September 2011*". The commissioner, noting the aforementioned evidence, then found that the evidence "*means that the Applicant was permanently employed by the Respondent (third respondent)*" and that the "*permanent employment was going to kick in ... on 30 September 2011*".

¹⁰ (2009) 1 BLLR (CC) at para 64.

- [22] This finding by the first respondent, the conclusion of the employment contract, which has not been challenged by the third respondent on review, would reasonably evoke the question whether the applicant had been dismissed. The commissioner had in fact found that there was a dismissal, but that the *“Applicant’s dismissal was not in terms of section 186(a)(b)”*.
- [23] Reasonableness would require, the commissioner having found that the applicant had been dismissed, a further investigation by the commissioner, whether the applicant’s dismissal was fair as contemplated in section 192(2) of the LRA.
- [24] It is clear from the opening address and the final argument of the applicant’s attorney that the attorney clearly lacked an understanding of what case he had to present before the commissioner. The evidence by the applicant and Ms Hoortzuk was that a contract had been concluded.
- [25] Under these circumstances, the decision of the first respondent not to determine whether the dismissal was fair or not, was unreasonable.
- [26] The first respondent’s finding that he was unable to determine the fairness or not of the applicant’s termination and that she was not dismissed in terms of section 186(1)(b) of the LRA is reviewed and set aside.

Costs:

- [27] The usual rule in respect of costs is that the successful party is entitled to costs. In this instance, it is appropriate to deviate from this rule. Had the applicant’s attorney presented the applicant’s case in a coherent manner, the commissioner’s unreasonable decision might have been avoided.

Order:

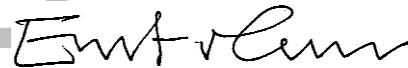
- [28] In the event, it is ordered as follows :

28.1 The award of the first respondent that he was unable to determine

fairness or otherwise of the termination of the applicant's permanent employment (including paragraph 23 of his award) is hereby set aside.

28.2 The remaining portion of the dispute (whether the termination of the applicant's employment was fair or not) and, if it was unfair, the appropriate relief, is remitted back to the first respondent (and in the event of the first respondent no longer being employed by the second respondent, to a commissioner appointed by the second respondent).

28.3 No order as to costs is made in respect of this application.



Van Graan AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv E Myhill

Instructed by: Goba Attorneys

For the Third Respondent: D Cithi of Tabacks Inc

LABOUR COURT