



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 364/12

In the matter between:

DEPARTMENT OF SPORT RECREATION ARTS

AND CULTURE

Applicant

And

GENERAL SERVICE SECTORAL

BARGAINING COUNCIL (GPSSBC)

First Respondent

TOBY MARE (THE PANELIST OF THE GPSSBC)

Second Respondent

NOTHUKELA MASIZA

Third Respondent

Heard: 14 October 2014

Delivered: 13 February 2015

Summary: The bargaining council lacks jurisdiction to arbitrate a dispute arising from the dismissal of an employee as envisaged in section 186(i)(b) of the LRA when the employee fails to prove a dismissal.

JUDGMENT

LALLIE J

Introduction

[1] This is an application to review and set aside a ruling of the second respondent (“the arbitrator”) in which he found that the first respondent (“the bargaining Council”) had jurisdiction to arbitrate the dispute between the applicant and the third respondent. It is opposed by the third respondent.

[2] The facts of this matter are briefly that the third respondent was employed by the applicant as an Executive Assistant in the 2010 World Cup unit on a fixed term contract which ran from August 2006 to 31 December 2010. The third respondent was the Executive Assistant of one of the applicant’s senior managers, Mr Nkwinti. In a letter dated 22 December 2010, Mr Nkwinti requested that the third respondent’s fixed term contract be extended until the post of Executive Assistant to the Senior Manager Recreation (the post) was advertised. Mr Nkwinti’s request was not granted and the third respondent left the workplace during January 2011. Offended by the decision not to accede to Mr Nkwinti’s request, the third respondent referred an unfair dismissal dispute to the first respondent. Her referral was based on section 186 (i) (b) of the Labour Relations Act 66 of 1995 (LRA) which defines dismissal as follows:

‘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’.

[3] The applicant challenged the first respondent’s jurisdiction to arbitrate the dispute the third respondent had referred on the basis that her dismissal claim was based on the applicant’s refusal to appoint her on a permanent basis. Her claim, according to the applicant, fell outside the jurisdiction of section 186 (i) (b) of the LRA. The arbitrator’s reasons for his decision that the third respondent may pursue her dispute under the auspices of the first respondent is captured in his award as follows:

‘19. The parties are no longer divided over the meaning of section 186 (1) (b) in so far as there is no dispute that the Labour Appeal Court has now settled the ongoing uncertainty as to whether an expectation of

permanent employment was also envisaged under this section. Clearly it does not.

20. As to whether the expectation of a further contract is similar, the expectation reasonable, or whether it must be “renewal” and not an “extension” of a previous contract are all factors that must, in my view, be taken into account before deciding on whether that it was fair not to renew the applicant’s contract for another term.
21. Interpreting or applying section 186 of the Act to a set of facts are merely issues in dispute which may or may not have a bearing on the real or main dispute’.

Grounds for review

- [4] The applicant’s main ground for review is that the arbitrator lacked jurisdiction to arbitrate the dispute before him. He disregarded the third respondent’s evidence in chief and under cross-examination to the effect that she had legitimate expectation to permanent employment and accepted her evidence in re-examination that she had an expectation that her fixed term contract would be extended until the position she sought to be appointed to had been advertised. The applicant submitted that absent the explanation by the arbitrator for deciding on the version he preferred, his award was unreasonable and susceptible to review. The applicant further submitted that the arbitrator’s conduct of reaching a decision which was inconsistent with the evidence before him constituted a gross irregularity as the third respondent was not dismissed.
- [5] The basis of the third respondent’s opposition was that at all material times her case was that the applicant failed to renew her fixed term contract by virtue of the conduct of its officials who led her to believe that her fixed term contract would be renewed pending the advertisement of the post and the filling thereof by due process. She further submitted that the expectation of permanence in the post properly contextualised in both the documents before the Bargaining Council and her evidence that her case was in fact not one related to the non-renewal of a fixed term contract, but that she was seeking

an order that the contract be made permanent was opportunistic and insupportable. She sought to rely on Mr Nkwinti's letter in which he requested that she be retained until the permanent post of the Executive Assistant to the Senior Manager Recreation was advertised and filled. Mr Nkwinti requested to retain her on a permanent basis which request was supported by a senior manager. Being allowed to work for a month after the expiry of her contract also led her to have a legitimate expectation that when the post was advertised Mr Nkwinti would be instrumental in considering her for a permanent appointment. She accused the applicant of being opportunistic in characterizing her case to oust the jurisdiction of the bargaining council. She submitted that the arbitrator was correct in finding that the bargaining council has jurisdiction over the dispute because her case was manifestly based upon the applicant's failure to renew a fixed term contract until the post could be advertised and properly filled by due process. The applicant explained that her case was that her fixed term contract was not renewed when it ought to have been renewed and that the renewal could lead to permanence if due process was then followed with the post being advertised.

Intervention in media res

- [6] The third respondent argued that the applicant halted the arbitration proceedings for purposes of bringing the present application before she was afforded an opportunity to lead a witness, Mr Nkwinti. The applicant expressed the need to review the jurisdictional ruling issued after the respondent had testified as it was convinced at that stage that the bargaining council lacked the necessary jurisdiction to arbitrate the dispute the respondent had referred. The court has the power to intervene in media res to restrain illegalities, to prevent grave injustice or where justice may not otherwise be achieved. In this regard see *Booyesen v The Minister of safety and security and Others*¹. As the outcome of the jurisdictional ruling dealt with the first respondent's power to arbitrate the dispute before the arbitrator, this court's intervention is justified in order to prevent the injustice of having the

¹ (2011) 32 ILJ 112 (LAC) at pp 129-130

applicant hauled before the first respondent who lacked the necessary jurisdiction. In the absence of jurisdiction, the award would be a nullity.

The test for review

- [7] The test to review a decision whether the first respondent had the necessary jurisdiction to arbitrate the dispute before the arbitrator is objective. It is whether based on the facts before the arbitrator it can be established that the dispute falls under the jurisdiction of the first respondent. The test is expressed thus in *SA Rugby Players Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others, SA Rugby (Pty) Ltd SARPY and Another*²

‘...The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary’.

The Court explained the operative terms of section 186 (i) (b) of the LRA to be that the employee should have reasonable expectation, and the employer fails to renew a fixed term contract or renew it on less favourable terms.

- [8] In *University of Pretoria v Commission for Conciliation Mediation and Arbitration and Others*³, a decision which both parties sought to rely on, the Court expressed the view that section 186 envisages that two requirements must be met in order for any employer's action to constitute dismissal. Firstly, reasonable expectation on the part of the employee that a fixed term contract will be renewed on the same or similar terms. Secondly, there must be a failure by the employer to renew the contract on the same terms or failure to renew it at all.
- [9] The applicant's case to have the jurisdictional ruling reviewed and set aside is based on the unreasonableness of the ruling. Its approach does not detract from the fact that its main ground for review is that the third respondent was not dismissed as envisaged in section 186 (i) (b) of the LRA. Absent the dismissal, the first respondent had no jurisdiction to arbitrate the dispute

² [2008] 9 BLLR 845 (LAC) at para 41.

³ (2012) 33 ILJ 183 (LAC).

before the arbitrator. The arbitrator's ruling to the contrary is incorrect and stands to be reviewed and set. The applicant argued that the third respondent failed to prove a reasonable expectation of the renewal of a fixed term contract beyond 2010. She was employed in the unit which assisted in the 2010 soccer world cup and her services were not unnecessary after the completion thereof. Her expectation of permanent employment fell outside the purview of section 186 (i) (b) of the LRA.

- [10] The third respondent's version does not assist her. Her expectation is based on the conduct of officials of the applicant who led her to believe that her fixed term contract would be renewed pending the filling of the permanent post of the Executive Assistant to the Senior Manager Recreation by due process. She further submitted that she had been allowed to form a legitimate expectation that when the post was advertised, Mr Nkwinti would be instrumental in considering her for a permanent appointment.
- [11] It is common cause that the applicant did not renew the third respondent's fixed term contract. On the third respondent's own version the expectation she had was not for a renewal of the contract on the same or similar terms. She expected her contract to be renewed until a permanent post was advertised. Her expectation was unreasonable because it is based on her being given an unfair advantage over other applicants when the post would eventual be advertised as she expected that Mr Nkwinti would be instrumental in her appointment to the post. It is not related to the terms of the fixed term contract the applicant refused to renew.
- [12] The arbitrator identified the dispute before him correctly. He needed to determine whether he had jurisdiction to arbitrate the dispute before him. He recorded that the applicant's case was that the third respondent's claim fell outside the ambit of 186 (i) (b) of the LRA for both reasons she sought to rely on, namely, expectation of permanent employment and expectation of the renewal subject to the advertising of the permanent post. The third respondent submitted that the renewal of a fixed term contract did not have to be precisely for the same period. The nature of the work she would be doing was identical to that which she previously performed. The third respondent

argued that her expectation of permanent employment and renewal of her fixed term contract pending the filing of the post were not mutually exclusive in that permanent employment might well follow after due process.

- [13] The arbitrator acknowledged that expectation of permanent employment falls outside the realm of section 186 (i) (b) of the LRA. Having correctly identified the dispute before him that he had to decide whether he had the requisite jurisdiction, the arbitrator made an incorrect finding that interpreting or applying section 186 of the LRA to a set of facts are merely issues in dispute which may or may not have a bearing on the real or main dispute. The question whether a bargaining council has jurisdiction to arbitrate a dispute of an unfair dismissal arising from the employer's failure to renew a fixed term contract cannot be properly determined without the application of section 186 of the LRA. The arbitrator should have applied the section 186 (i) (b) to determine the existence of a dismissal as without a dismissal he had no jurisdiction to arbitrate the dispute.
- [14] The arbitrator erred in not rejecting the third respondent's argument that her expectation of permanent employment and a renewal of the fixed term contract until a permanent post was advertised were not mutually exclusive in that permanent employment might follow after due process. Expectation of permanent employment falls outside the realm of section 186 (i) (b). See *University of Pretoria (supra)*. The arbitrator made a finding that the relief sought was for the applicant to renew the third respondent's fixed term contract which is in the power of the first respondent to hear and determine. This finding overlooks the correct legal position that the third respondent had to establish that the first respondent had jurisdiction to determine the dispute she had referred by proving her dismissal. She failed to do so and left the first respondent without the necessary jurisdiction to determine the dispute. The arbitrator's ruling that the first respondent had jurisdiction to arbitrate the dispute which had been referred by the third respondent is incorrect and stands to be reviewed and set aside.
- [15] In the premises the following order is made:

15.1 The jurisdictional ruling issued by the second respondent under case number GPBC 3913\2011 and dated 28 June 2012 is reviewed and set aside and substituted with the following:

15.1.1 The first respondent lacks jurisdiction to arbitrate the dispute referred by the third respondent under case number GPBC 3913/2011.

Lallie J

Judge of the labour Court of South Africa

APPEARANCE

For the Applicant: Advocate Bono

Instructed by: State Attorney

For the Third Respondent: Advocate Grobler

Instructed by: Micheal Randel Attorneys

LABOUR COURT