



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2213/13

In the matter between:

EKHURULENI WEST COLLEGE

Applicant

and

EKHURULENI LABOUR RELATIONS

COUNCIL (ELRC)

First Respondent

R DE WET N.O

Second Respondent

SHIKWAMBANA JERRITAH TINYIKO

Third Respondent

Heard: 3 December 2015

Delivered: 2nd March 2016

Summary judgment: review application fixed term contract

JUDGMENT

GUSH J

- [1] In this matter the applicant applies to review and set aside the award of the second respondent and substitute the award with an order that the third respondent's dismissal was "not substantively unfair". In his award, the second respondent concluded that the third respondent (the applicant at the arbitration) had discharged the *onus* of establishing the existence of a dismissal based on the failure of the applicant to renew her contract. The second respondent found that the third respondent had a legitimate expectation that her contract would be renewed and that in the absence of any evidence that the dismissal was for a valid reason or in compliance with a fair procedure, he ordered the applicant in this matter to pay the third respondent compensation in an amount of R43,250.01 equal to three months compensation.
- [2] The third respondent was formerly employed by the applicant in accordance with a series of fixed term contracts. Third Respondent was first employed by the applicant as a Lecturer on a three months fixed term contract with effect from the 18 of July 2012. This contract was to run from 18 July 2012 and terminate on 30 September 2012.
- [3] Prior to the expiry of this contract, the applicant extended the third respondent's contract for a further three months, commencing from 1 October 2012 to 31 December 2012.
- [4] Before the expiry of the second contract, the applicant again extended the third respondent's contract for a further three months from 1 January 2013 to 31 March 2013.
- [5] The third respondent was given notice of termination of the contract on 18 March 2013 and she ceased working for the applicant on 20 March 2013 and was paid up to 31 March 2013. At the time of the termination of the contract, the third respondent was pregnant. The applicant had been made aware of her pregnancy during January of 2013.

- [6] During July 2012, the applicant had advertised a number of permanent posts, including the post the third respondent was occupying. The closing date for applications was 3 August 2012. The closing date fell within the duration of the third respondent's first contract.
- [7] At the arbitration, the second respondent correctly determined the issue to be decided as whether the third respondent had been dismissed and if so whether the dismissal was fair. The second respondent identified that in order to establish a dismissal, the third respondent bore the *onus* of establishing that she had a reasonable expectation for her contract to be renewed and that the applicant had not done so.
- [8] The third respondent gave evidence herself and called two witnesses. The applicant elected not to adduce any evidence and relied purely on the expiry of the fixed term contract in opposing the third respondent's application.
- [9] Briefly, the third respondent's evidence was that, at the time of her employment, she had been advised by the applicant's human resource department that although the position was a temporary one it was a three month renewable contract. Her unchallenged evidence was that she would not have accepted the temporary post if she had not been assured that it would be continually renewed. The third respondent was permanently employed at the time she took up employment with the applicant.
- [10] During January 2013, she advised the applicant's human resource manager, Ms Mgwexe, that she was pregnant and enquired about maternity benefits. Ms Mgwexe advised the third respondent to obtain a letter from her doctor detailing the expected date of the confinement and to complete and submit maternity leave forms as she would be entitled to four months maternity leave.
- [11] This she did and attempted to hand over the documents to Ms Mgwexe. She testified that Ms Mgwexe had advised her that she was busy and the applicant

should not to be concerned as long as she had complied by the “Easter holidays”.

- [12] The third respondent confirmed having received the notice of the termination of her contract on 18 March 2013 and had consulted with the applicant’s human resource department but to no avail. Her evidence was that both Mgwexe and her immediate superior Mr Kkalanga expressed concern and surprise at the fact that she had been given notice.
- [13] Ms Mgwexe, giving evidence for the third respondent, confirmed that she had asked the third respondent to obtain a doctor’s letter and complete the forms “in order to secure a replacement for her”. Ms Mgwexe further stated that she had done this on the understanding that the advertised positions had not been filled. There was no evidence to suggest that the status of the advertised positions was ever discussed with the third respondent.
- [14] The third respondent’s supervisor, the Department of engineering studies HOD, Mr Kkalanga gave evidence for the third respondent. He confirmed that he too had asked the third respondent for a doctor’s note detailing the expected date of confinement.
- [15] In analysing the evidence and the argument presented, the second respondent correctly dealt with *inter alia*:
- a. the right of employees to fair Labour practices;
 - b. the provisions of section 187(1) of the Labour Relations Act 66 of 1995 (the Act) relating to automatically unfair dismissals in the case of pregnancy;
 - c. that the third respondent had to establish that she had been dismissed on the grounds that she had a reasonable expectation that the contract would be renewed as provided for in section 186(1) of the Act; and

- d. That if she was relying on the averment that the dismissal was an automatically unfair dismissal, that she had to prove that she had been dismissed for reasons relating to her pregnancy.

- [16] In a well-reasoned award, the second respondent concluded that the third respondent had established that she had a reasonable expectation that the contract would be renewed and that she had accordingly been dismissed. The second respondent was not persuaded that the third respondent has established that the reason for the dismissal was a reason related to her pregnancy.
- [17] The second respondent found that in many respects the evidence of the witnesses subpoenaed and called by the third respondent who were employees of the applicant was unreliable and unsatisfactory. Despite this the second respondent found that they corroborated the essential elements of the third respondent's evidence.
- [18] Specifically, the second respondent concluded, in dealing with the applicant's explanation for the termination of the third respondents employment that the applicant had not adduced any evidence rebutting the existence of a dismissal nor any evidence to suggest that there was a valid reason or fair process in the dismissal.
- [19] As far as the second respondent's finding that the third respondent was dismissed, it is completely inconceivable that the third respondent would not have had a reasonable expectation that her contract would be renewed in light of the her evidence, corroborated by the evidence of her two witnesses that she was requested to obtain a doctor's certificate regarding her pregnancy and was to complete maternity leave forms. This is particularly so given the unchallenged evidence of the assurance that her contract would be renewed and the actions of the applicant in renewing it on two subsequent occasions.
- [20] In the founding affidavit, the applicant sets out its grounds of review. The applicant appears to rely on the fact that the second respondent committed a

gross irregularity in the conduct of the arbitration proceedings and that the outcome reached by the second respondent is not one that could be reasonably reached on the evidence.

- [21] In support of these grounds of review, the applicant sets out what is in essence grounds of appeal in respect of the second respondent's award.
- [22] Given that the applicant relies on an averment that the second respondent committed a gross irregularity, it is necessary to refer to the test set out by the Labour Appeal Court in the *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*¹ matter (*Gold Fields*). In this matter the court held :

The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act² (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct,³ gross irregularity in the conduct of the arbitration proceedings,⁴ and/or excess of powers⁵ will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.⁶

And

In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and

¹ [2014] 1 BLLR 20 (LAC).

² 66 of 1995.

³ S145(2)(a)(i) of the LRA.

⁴ S145(2)(a)(ii) of the LRA.

⁵ S145(2)(a)(iii) of the LRA.

⁶ Paragraph 14

came to a conclusion which was reasonable to justify the decisions he or she arrived at.⁷

[23] In summary the court in *Gold Fields* records:

The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?⁸

[24] In this matter, the answers to the questions are clear. Not only did the second respondent deal with the matter appropriately and afford the parties a full opportunity to have their say, the second respondent identified and understood the dispute he was required to arbitrate and dealt with the substantial merits of the dispute. It is also abundantly clear from the award that the second respondent's decision was eminently a decision that another decision-maker could reasonably have arrived at.

[25] As far as costs are concerned, there is necessary to record that the legal representative of the third respondent, Mr Goldberg saw fit not to attend court when this matter was heard. Mr Goldberg took it upon himself to dispatch a candidate attorney on the morning of the hearing to advise the court that he was otherwise and elsewhere engaged. Needless to say when the matter was called Mr Goldberg was conspicuous by his absence. In the circumstances, and despite the fact that the applicant's review is dismissed (without the assistance of Mr Goldberg), I make no order as to costs.

⁷ Paragraph 16

⁸ Para 20 the *Sidumo* test.

[26] For the reasons set out above I make the following order:

- a. the applicant's application is dismissed with no order as to costs.

Gush J

Judge of the Labour Court of South Africa.

APPEARANCES

FOR THE APPLICANT

Mr Kolwi.

Motalane Kgariya Inc

FOR THE THIRD RESPONDENT

Mr Goldberg (failed to appear) Goldberg
attorneys