THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2548/15

In the matter between:

THE AGRICULTURAL RESEARCH COUCIL	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
WILLEM KOEKEMOER	**Second Respondent**
MOHAMED SAYED JEENAH	**Third Respondent**

Heard: **30 August 2017**

Delivered: **31 January 2018**

Summary: Summary: Review of an award – legitimate and reasonable expectation for the renewal of a fixed term employment contract – primary issue is whether there is dismissal and the issue is jurisdictional in nature – test is whether the decision of the Commissioner is correct or wrong – applicant erroneously relied on a section 145 review test – review dismissed.

JUDGMENT

CELE J

Introduction

[1] The Applicant seeks an order to have the award issued by the Second Respondent, the Commissioner, on the 3 December 2015 under case number GATW 8045/ 2015 reviewed and set aside in terms of section 145 of the Labour Relation Act[1]. The Third Respondent opposes the application and simultaneously seeks to have the award made an order of Court in terms of section 158 (1) (c) of the LRA.

Factual Background

[2] The Third Respondent began his employment with the Applicant in 2008 when he signed a five year fixed term contract of employment for the position of Executive Director: Research and Development on 1 December 2008 but he started working on 1 February 2009. Clause 2.3 of his fixed term contract provided that:

> " irrespective of the last date of signature in this agreement, this agreement will be effective and will be deemed to have commenced on 1 December 2008 for a fixed period of five years or until terminated prior to the expiry date on written notice by either party in accordance with the termination provisions of this agreement."

[3] The Applicant underwent an organisational restructuring in 2013 and it was finalized in February 2014. The effect of the change to the third respondent was that his position was split into three Group Executive posts being of Crop Science, Animal Science as well as Research and Innovation Support (RIS). A number of senior managers and executives were placed into positions on the basis that the job specifications had not changed substantially. The Applicant made re-assurances that no one would lose their jobs as a result of the restructuring.

[4] The positions for the restructured posts were advertised and the Third Respondent applied only for the RIS position but he was not successful. The

[1] Act Number 66 of 1995, hereafter referred to as the LRA.

Crop Science and Animal Science posts were not filled and the Third Respondent did not apply for either one of those posts. At the time, the Third Respondent's expectation was that he would continue his employment with the Applicant as he had been doing the work and the position was simply split into three posts.

[5] In November 2013, the Third Respondent received a three months' notice of non-renewal of his five years' contract that was to terminate on 31 January 2014. However, on 22 January 2014, prior to the expiry of the three months' notice, the Third Respondent received a letter that his contract would be extended for two months until 31 March 2014.

[6] On 31 March 2014 the Third Respondent received an offer of employment for Acting Group Executive Director: Crop Science for one year starting on 1 April 2014 to 31 March 2015. He accepted the offer. He did not challenge the termination of the initial five year contract. Therefore the Third Respondent has never made any timeous referral for an unfair dismissal relating to this period. In any subsequent challenge to the fairness of the termination of his contract of employment, this period should be left out of consideration. In any event the Third Respondent said in evidence that the one year extension met his expectation. The one year contract stipulated, inter alia, that:

> " 2..4 Although the ARC may review the Employees contract nearer the expiry date, it is specifically recorded that there is no expectation that the Employees contract will be renewed for a period other than the one envisaged in clause 2.3 above. The termination of this agreement shall not constitute a retrenchment, but shall be the natural completion or fulfilment of the contract. "

[7] He entered into a performance contract with the Applicant for the one year contract which also stated that:

> "This agreement shall commence on 1April 2014 and continue until 31 March 2015 and thereafter for the duration of the employment contract."

[8] Under the renewed contract, the Third Respondent was doing what he was doing under his previous contract *albeit* in a reduced capacity and only focused on Crop Science, which was one component *of* his previous contract of

employment. He supervised less people because his work load was reduced. During this period the Applicant instructed him to work on the integrated Crop Sciences strategic plan for the next five years. He was unable to complete this project within twelve months. His contract of employment was then extended for a further period of three months from 1 April 2015 to 30 June 2015 in order to allow him sufficient opportunity to deliver the integrated Crop Sciences strategic plan. He delivered it on 29 April 2015.

[9] On 2 April 2015, the Third Respondent had a meeting with the Chief Executive Officer (CEO) of the Applicant Dr Moephuli where the Third Respondent was advised that a request had been received from the Director General of the Department of Science and Technology for the secondment of the Third Respondent to the National Advisory Council on Innovation ("NACI"). The CEO indicated to the Third Respondent that he was prepared to second him and make up the difference in salary. Dr Moephuli conceded during cross-examination that it was the CEO's prerogative to renew the fixed- term contracts for the Third Respondent. On 15 April 2015, the Third Respondent was advised that he had received an annual salary increase for the 2015/2016 financial year.

[10] The Third Respondent was required to participate in drafting his performance contract for the 2015/2016 financial year. The Applicant mandated a consultant, M Missio, to negotiate a one year performance contract with the Third Respondent. This was in line with other performance contracts. In this respect the performance contract implied a further and/or continued employment relationship.

[11] In May 2015, a review meeting was held by the Applicant to deal with the five year plan and on or about 2 June 2015, a recommendation was made by the Human Resources Manager recording that the Third Respondent had successfully acted in his position. The manager recommended the Third Respondent's appointment until his retirement, which retirement was to take place within the next five years.

[12] On 9 June 2015, the Third Respondent was advised that his contract of

employment would not be renewed beyond 30 June 2015. During the conversation with the CEO, the Third Respondent was advised that he had the requisite skills and was one of the good performers. The position of Group Executive: Crop Sciences is still available and there is funding for it as evidenced by the advertisement of the post on 19 July 2015.

[13] The Third Respondent was aggrieved by a failure of the Applicant to extend his employment contract within the next five years, which would take him up to his retirement and he referred an unfair dismissal dispute for conciliation and later for arbitration on the basis that he expected his employment contract to be extended by the Applicant but it was not extended. When conciliation failed to resolve the dispute he referred it to arbitration and the Second Respondent was appointed to arbitrate the dispute. At arbitration the dismissal of the Third Respondent was placed in dispute and he therefore had to prove its existence.

[14] In brief the case of the Third Respondent was essentially that, both the Human Resources Executive and the CEO had promised him that the contract which ended in June 2015 would be extended for the next five years which would see him retire before its expiry. He expected the extension of his contract also because he had been with the Applicant for some time and that, in line with the CEO, no one was to lose his job. Further, he expected the extension because he had worked on the intergraded Crop Science strategic plan which was designed to cover the next five years. This plan included the retention of his post which was not only funded but was integral to the strategic plan.

[15] The case of the Applicant was basically to deny making any promises for the contract extension. The CEO said that it was his prerogative to either extend or not extend the contract and he chose the latter. He said that the existence of a five year strategic plan was not a pointer to continued employment of the Third Respondent, pointing out that as CEO he was also working on a thirty year plan which could never entitle him to work thirty years for the Applicant.

<u>The Commissioner's findings</u>

[16] Two essential questions were considered by the Commissioner in his award. The first was to determine whether the Third Respondent had from a subjective point of view an expectation that his fixed term contract was to be extended or

renewed beyond 30 June 2015. He found that the Third Respondent had such legitimate expectation. Following from that finding the second question was whether this legitimate expectation was reasonable. Again he found in favour of the Third Respondent. The Commissioner accepted the version of the Third Respondent as one favoured by the probabilities of the case. He concluded that the Third respondent was dismissed by the Applicant, that such dismissal was without a fair reason and that no fair procedure had been followed by the Applicant. He then ordered the Applicant to re-instate the Third Respondent with retrospective effect until his retirement.

Grounds for review.

[17] In its pleading as well as in its heads of argument the Applicant relied on section 145 of the Act to identify the grounds of review. To this extent, the Applicant argued throughout its submissions that the arbitration award should be reviewed and set aside on the basis that the decision reached by the Commissioner was not one that a reasonable decision maker could reach. During the presentation of this matter by the parties, I pointed out to Mr Mokhari appearing for the Applicant that the test espoused by the Applicant for review was not a correct one. This issue had also been raised by the Third Respondent in his papers and confirmed by Mr Boda appearing for the Third Respondent.

[18] At the commencement of the arbitration proceedings the Commissioner was first confronted with the question whether the Applicant had dismissed the Third Respondent, therefore it was a jurisdictional issue.

[19] In *SA Rugby Players' Association (SARPA) v SA Rugby (Pty) Ltd & Others; SA Rugby (Pty) Ltd v SARPU & Another*[2] ("SARPA") the Court held that-

> "What section 186(1) (b) provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in section 186(1) (b) are, in my view, that the employee should have a

[2] [2008] 9 BLLR (LAC).

reasonable expectation, and the employer fails to renew a fixed term contract or renew it on less favourable terms. The fixed term contract should also be capable of renewal.[3]

[20] Further, the Court in *SARPA* held that once it is found that there had been a dismissal as contemplated in section 186 (1) (b) of the Act, the onus shifts to the employer to justify its fairness. The court in *De Milander v Member of the Executive Council for the Department of Finance : Eastern Cape & others*[4] agreed with the view expressed in *SARPA* and also noted that an employee who claims a dismissal must set out the material facts in order for a commissioner to draw a conclusion of law. It follows that the test for review is whether the Commissioner's decision is correct or wrong.

[21] A review application is determined on the basis of the grounds of review outlined. In the absence of any properly identified grounds of review therefore, the review application ought not to succeed. In the present matter it was never pleaded that the decision of the Second Respondent was wrong and that therefore the arbitration award should be reviewed and set aside. It does not lie in this Court having to *mero muto* substitute the ground for review for an applicant. It must follow then that the review application in this matter has no prospects of success. In any event, I am of the view that a correct approach was adopted by the Commissioner in this matter and that he reached a correct decision. As a matter of clarity, the Commissioner's order must not be construed as ordering a permanent appointment of the Third Respondent but it is an extension of a fixed term contract for a period short of five years as the Third Respondent will retire before the expiry of the five years.

[22] Accordingly, the following order shall issue:

1. The review application in this matter is dismissed.
2. The Applicant is ordered to pay the costs thereof.
3. The arbitration award issued by the Second Respondent in this matter is made an order of Court.

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[3] At para 43.
[4] [2013] 34 ILJ 1427 (LAC).

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Mr Mokhari

Instructed by: Werksmans Attorneys.

For the Respondent: Mr Bhoda

Instructed by: Cliffe Dekker Hofmeyer Inc.