



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 22/16

In the matter between:

JANOT RUKUNGIRA

Applicant

and

Z MQINGWANA N.O

First respondent

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

EFERTON SERVICES (PTY) LTD

Third Respondent

Heard: 15 November 2017

Delivered: 08 May 2018

JUDGMENT

MAMOSEBO. AJ

Introduction

[1] This is an application in terms of s 145 read with s158(1)(g) of the Labour Relations Act¹ (the 'LRA') to review and set aside a ruling made by the first respondent, Commissioner Z Mqingwana, dated 11 December 2015 under case number GAJB22849-15 in which she found that:

- 1.1 The applicant, Janot Rakungira, was not dismissed as his fixed-term contract of employment had expired;
- 1.2 The applicant had not established a reasonable expectation of the renewal of the fixed term contract; and
- 1.3 The second respondent, the Commission for Conciliation, Mediation and Arbitration ('CCMA') lacked jurisdiction to arbitrate the matter.

The application is opposed by the third respondent only.

[2] The dispute before the commissioner concerned an alleged unfair dismissal of the applicant by Eferton Services (Pty) Ltd (Eferton), the third respondent. The applicant claimed that no proper procedures or any valid reason existed for his dismissal. He therefore bore the *onus* to prove his alleged dismissal.

[3] The applicant testified that at first he was offered a written contract through a recruitment agent in terms of which his salary would be R55 000 on a fixed term contract of three months. He testified further that he raised concerns with regards to same as it was not a permanent contract of employment. A second revised fixed term contract was furnished to him reflecting the applicant's non-pensionable salary of R57 500.00 (cost to company) and in the event the contract is replaced by a permanent contract the salary would increase to R60 000.00. The applicant signed the revised contract on 30 July 2015 and commenced working for Eferton on 11 August 2015. The period of the fixed term contract was for the period of 1 August 2015 to 31 October 2015.

¹ Act 66 of 1995 as amended.

- [4] The applicant was informed on 19 October 2015 that the fixed term contract will not be renewed. This was followed by a letter addressed to him dated 23 October 2015, signed by Carl Els, the Human Resources Manager, highlighting the following clauses of his fixed term contract of employment:

“TERMINATION OF FIXED TERM CONTRACT OF EMPLOYMENT

1. The above matter and the fixed term contract of employment (hereinafter referred to as the “Agreement”) duly entered into between yourself and Eferton Services Proprietary Limited (hereinafter referred to as the “Company”) on 01 August 2015 refers.
2. In accordance with the provisions of the agreement, and more specifically clauses 2.2, 2.4, and 2.5, the Company hereby wishes to confirm that the Agreement shall terminate with effect from 31 October 2015. The Company shall provide you with a certificate of employment, on your last working day, which shall be on the 30th of October 2015.
3. We thank you for the services you have rendered for the duration of the Agreement and wish you well in all your future endeavours”

- [5] A copy of the fixed term contract entered into between the Company and the applicant also formed part of the evidence before the commissioner. Clauses 2.2, 2.4 and 2.5 read:

“2.2 This employment contract will terminate on completion of the fixed term, 31 October 2015, subject to the conditions and terms outlined in the paragraph Termination of Employment below.

2.4 ... However the employee will not have any expectation of whatsoever nature and howsoever arising of employment beyond the end date of this contract. Even in circumstances where this contract is extended or renewed, it is agreed that such extension or renewal will not create any expectation of whatsoever nature that the employment will again be extended.

2.5 The company will endeavour to make a best effort to notify the employee of an intended termination of the contract at least one week ahead of the termination date, subject to the conditions 7.2 under “Termination of Employment.”

- [6] The applicant disputed that the 3-month period was a fixed term contract but a probation period. His passport had expired and this aspect was not disclosed during the interview. He applied for its renewal on 04 August 2015 and was issued with a new passport on 13 October 2015. Although possession of a valid passport which would enable him to travel to the Democratic Republic of Congo (DRC) was an inherent requirement of the job, that was not the basis of his dismissal. The commissioner found that the employment was terminated on 30 October 2015 because his fixed term contract had expired. The applicant, who represented himself during the arbitration, kept referring in his testimony to Ms Jacqui Freeman, the recruitment agent from Powerhouse Appointments, who placed him in employment with the third respondent.
- [7] In particular, that Ms Freeman can confirm that his contract was considered as a 3 months' probation period intended to be a permanent contract. The commissioner enquired from him if he would require that Ms Freeman be subpoenaed and advised him on steps he could follow should he require assistance in that regard. However, in the end, Ms Freeman was never called as a witness.
- [8] The issue which stood for determination before the commissioner was whether the non-renewal of the applicant's fixed term contract constituted a dismissal as envisaged in s 192 (1) of the LRA.
- [9] In *Jonsson Uniform Solutions (Pty) Ltd v Lynette Brown and Others*² the Labour Appeal Court (LAC) clarified the applicable test in jurisdictional rulings as follows:
- “The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of an

² [2014] JOL 32513 (LAC) at para 35.

arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.”

[10] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*³ the LAC made the following instructive pronouncement:

“[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.

[41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. 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.” Also see *South African Police Service v Naidoo and Others*⁴.

[10] There are two versions in respect of the nature of the contract that the commissioner had to consider. The applicant’s averment was that he was employed on a permanent basis subject to a three months’ probationary period. He was dismissed at the end of the probation period which makes the dismissal

³ [2008] 9 BLLR 845 (LAC) at paras 39 – 41; (2008) 29 ILJ 2218 (LAC).

⁴ (D673/09) [2015] ZALCD 38 (26 June 2015) at para 44.

unfair both procedurally and substantively. Eferton argued that the contract was for a fixed term which was not extended following its expiry date on 31 October 2015.

- [11] The commissioner considered that the *onus* to prove dismissal rested on the applicant. She also had regard to the applicant's argument in respect of his alleged permanent employment. She was convinced that the applicant relied on what was said by the recruitment agent, who was not called to testify, on the aspect of permanent employment. He also did not request that the recruitment agent be subpoenaed for that purpose but wanted the discussions that took place outside the signed contract to be read into the contract. I would add that nothing stopped the applicant from further requesting the commissioner to subpoena one Mr Deon who allegedly also assured him that it was company policy to employ all new employees on a probationary period and the same applied to him.
- [12] The commissioner was dissatisfied with the submissions by the applicant that he was employed permanently for the following reasons: she found the provisions of the fixed term contract to be unambiguous; he failed to call the recruitment agent, Ms Freeman to corroborate his version; he confirmed the binding nature of the contract and that he understood its contents. The commissioner remarked that the applicant had a tertiary qualification and was assertive during the proceedings. She found it inconceivable that he would have signed a contract without agreeing to its terms.
- [13] A fixed term contract means a contract of employment which terminates on the occurrence of a specified event; the completion of a specified task or project; or on a fixed date other than an employee's normal or agreed – upon retirement age.
- [14] The new LRA amendments in respect of fixed term contracts do not apply to employees earning more than R205 422.30 per annum.⁵ The commissioner can therefore not be faulted in accepting the existence of the fixed term contract.

⁵ Section 198B(2)(a).

- [15] There is nothing in support of the averment by the applicant that his employment was on a permanent basis. The clause that comes close to what he is alleging is the following:

“in the event that the contract is replaced by a permanent employment upon expiry of this agreement, the non-pensionable salary will increase to ZAR 60 000.00 per month total cost to company. This amount includes all benefits such as medical aid and pension fund for which the employee is personally responsible.”

The commissioner has correctly considered this clause and I cannot fault her for finding that the phrase “in the event” does not give certainty or assurance or expectation.

- [16] I am satisfied that the applicant has failed to discharge the *onus* that there was a dismissal. He understood the contract and the risk involved in accepting its terms. He cannot sign the contract and later contend that terms that are not contained therein be read into it. The contract has a non-variation clause which requires that any amendments and/or variations thereto be in writing and signed by both parties. The applicant has also failed to show that an expectation was created.
- [17] On the foregoing analysis I am not persuaded that the commissioner erred in her jurisdictional ruling. She was correct in finding that no employment relationship existed between the applicant and the third respondent, therefore there was no dismissal. She correctly analysed the evidence before her and arrived at a reasonable outcome. The application for the review and setting aside of the commissioner’s decision therefore stands to be dismissed.
- [18] In relation to costs, in my view, the requirements of law and fairness referred to in s 162 of the LRA would be best served if the applicant is ordered to pay the costs of this application.
- [19] I therefore make the following order:

Order

1. The application for the review and setting aside of the commissioner's decision is dismissed with costs.

MC Mamosebo

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Mr C Higgs of Higgs Attorneys

For the third respondent: Advocate E Tolmay

Instructed by: Webber Wentzel Attorneys

LABOUR COURT