



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case no: D956/17

In the matter between:

HLENGIWE DUBE AND 63 OTHERS

Applicant

and

UNIVERSITY OF ZULULAND

First Respondent

**THE COMMISSION FOR MEDIATION,
CONCILIATION ARBITRATION**

Second Respondent

BERLIN NAYAGER

Third Respondent

Heard: 1 November 2018

Delivered: 8 November 2018

Summary: Review application – section 186(1)(b) dismissal – parties are bound by their pleaded cause of action.

JUDGMENT

NKUTHA - NKONTWANA. J

Introduction

- [1] This is an application for an order reviewing and setting aside the arbitration award issued by the third respondent (commissioner) under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) dated 22 June 2017 under case number KNRB1604-16.

The commissioner found that the applicants failed to prove that the third respondent's failure to renew their fixed term contracts of employment constitutes a dismissal in terms of section 186(1)(b) of the Labour Relations Act¹ (LRA).

- [2] The applicants' main ground of review is that the commissioner committed a reviewable misconduct when he found that they failed to prove any reasonable expectation that their fixed term contracts of employment would be renewed.

Background

- [3] The applicants were employed by the first respondent, the University of Zululand (University) and occupied various positions within the Catering Department, rendering services at the dining halls. The last fixed term contracts of employment for the applicants were for the period between February 2016 and 30 September 2016. Even though not all applicants' contracts of employment for this period were part of the bundle of documents before the commissioner, it was not in dispute that all the applicant's employment contracts had been renewed on the same terms.
- [4] On 21 September 2016, the applicants received notices of expiry of their fixed term contracts of employment with effect from 30 September 2016. The applicants referred an unfair dismissal dispute to the CCMA.
- [5] It is common cause that the applicants' contracts of employment had been renewed more than three times, previously. As such, the crux of the applicants' claim is that they had a legitimate expectation that their contracts would be renewed hence they sought a relief of permanent appointments.
- [6] The University's defence was that its operations in relation to provision of dining hall services to students was affected by the change in the NASFAS funding model. In the past NASFAS allocated 30% of the funding toward food purchased from universities' dining halls. In terms of the new funding

¹ Act 66 of 1995 as amended.

model student are given portion of the funding that was previously allocated for food to spend wherever they choose. As a result, the demand for food provided in dining halls reduced drastically. The University incurred a loss of about 11 million rand annually from 2014 to 2016. Hence it decided not to engage additional staff by not renewing the applicants' fixed terms contracts of employment.

- [7] The figures that were presented during arbitration clearly demonstrated that, because of the declining demand for their catering services, even the jobs of permanent staff members who work in dining halls were under the same threat. Mr Ngcobo, the HR executive, testified that even though he was not the author of the report on the state of the dining halls and the extent of losses suffered by the University, he had personal knowledge of the facts contained therein. As such, the applicants' impugn that the commissioner used an inadmissible document to hinge his findings is without merit. Mr Nonyongo, the applicants' attorney, prudently conceded this point.
- [8] The applicants could not dispute the University's operational challenges. In fact, Ms Mgomezulu, one of the two applicants who testified during arbitration, conceded in cross examination that she was aware that the demand for dining hall meals had dropped and the University incurred losses between April 2016 and April 2017.
- [9] In all the instances, the appointment and/or renewal of the applicants' contracts of employment took place after the promulgation of the LRA amendments in January 2015. However, it was never their case that their contracts of employment were permanent in accordance with section 198B(5) of the LRA which states that 'any fixed term contract concluded in contravention of subsection (3) is deemed to be indefinite'. In fact, in terms of the pre-trial minute the main issue in dispute was whether a legitimate expectation to renew the applicant's fixed term contracts of employment had been created by the University.

- [10] The commissioner dealt with the matter on the basis of the pleaded cause of action and found that there was no reasonable expectation created and that the University was justified in invoking the termination clause in the applicants' contracts of employment which states:

'NB: please note that this contract of appointment for limited period of time only, and as indicated above and there are no expectations of renewal or extension. Your contract will terminate automatically on 30 September 2016. By accepting the offered appointment, you acknowledge and agree that no representations or guarantees regarding your conditions of service have been made by the University other than those contained in this letter of appointment.'

Legal principles and application

- [11] In the recent decision of the Labour Appeal Court (LAC) in *Enforce Security Group v Fikile and Others*,² the review test in these instances was reaffirmed as one of correctness as opposed to reasonableness, In this regard it was stated:

'The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties' dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding, as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding.'

- [12] In terms of section 186(1)(b) of the LRA, dismissal means that:

'(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer –

² [2017] 8 BLLR 745 (LAC) at para 16, see also *SA Rugby (Pty) Ltd v SARPU and Another* [2008] 9 BLLR 845 (LAC) at paras 39 – 40.

- (i) 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; or
- (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;'

[13] The best construction of section 186(1)(b) is found in *Fedlife Assurance Ltd v Wolfaardt*,³ quoted with approval in *Enforce*⁴, where the Supreme Court of Appeal (SCA) stated:

[17] The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so.

[18] The clearest indication that it had no such intention is s 186(b) which extends the meaning of "dismissal" to include the following circumstances:

"[A]n 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."

It is significant that although the legislature dealt specifically with fixed-term contracts in this definition it did not include the premature termination of such a contract notwithstanding that such a termination would be manifestly unfair. The reason for that is plain: The common-law right to enforce such a term remained intact and it was thus not necessary to declare a

³ 2002 (1) SA 49 (SCA); (2001) 22 ILJ 2407 (SCA) at paras 17-18.

⁴ *Supra* n 2 at para 20.

premature termination to be an unfair dismissal. The very reference to fixed-term contracts makes it clear that the legislature recognized their continued enforceability and any other construction would render the definition absurd. By enacting s 186(b) the legislature intended to bestow upon an employee whose fixed-term contract has run its course a new remedy designed to provide, in addition to the full performance of the employer's contractual obligations, compensation (albeit of an arbitrary amount) if the employer refuses to agree to renew the contract where there was a reasonable expectation that such would occur. That being so, it would be strange indeed, and bereft of any rationality, for the legislature to deny to the employee whose fixed-term contract of five years has been unlawfully terminated within days of appointment the benefit of either specific performance of the contract or damages for its premature termination and to confine the employee to the limited and entirely arbitrary compensation yielded by the application of the formula in s 194 of the 1995 Act.' (Emphasis added)

- [14] Clearly, the burden was on the applicants to show the basis of the expectation that their contracts of employment would be renewed on 30 September 2016 and the reasonableness thereof. As set out by the LAC in *SA Rugby Players' Association v SA Rugby (Pty) Ltd*:⁵

[44] [The employee] had to place facts which, objectively considered, established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew his or her fixed term contract on the same or similar terms. As soon as the other requirements of s 186(1)(b) have been satisfied it would then be found that [the employee] had been dismissed, and [the employer] would have to establish that the dismissal was both procedurally and substantively fair.' (Emphasis added)

⁵ *SA Rugby* above n 2 at para 44.

- [15] In this instance, the commissioner was satisfied that, given the declining demand for the dining hall catering services, the University's decision not to renew the applicants' contracts of employment was operationally justifiable. Stated otherwise, the change in the University's operational requirements interrupted the applicant's expectation that their contracts of employment would be renewed. This finding cannot be faulted.
- [16] There is nothing untoward with University's decision to invoke the automatic termination clause in the applicants' contracts of employment as opposed to retrenchment. In *Enforce*⁶ the LAC, pertinently that '[t]he fact that the appellant had an option to retrench the employees or could have considered other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. Put differently, one cannot simply use the considerations of the fairness or otherwise of a dismissal to determine whether an employee has been dismissed'.
- [17] Unlike in *Enforce*, the applicants in the present case are not challenging the validity of the automatic termination clause. As such, I deem it unnecessary to deal with this issue.

Conclusion

- [18] In all the circumstances, I am convinced that the arbitration award is unassailable and the review application stands to be dismissed.

Costs

- [19] I am disinclined to award costs against the applicants who are individual litigants.

- [20] In the premises, I make the following order:

Order

⁶ *Supra* n 2 at para 24.

1. The review application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Mr Nonyongo from MP Nonyongo Attorneys

For the respondent:

Mr G Cassels from Maserumule Attorneys

LABOUR COURT