IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR28/17

In the matter between:

PIKITUP JOHANNESBURG (SOC) LIMITED **Applicant**

And

ABIGAIL MUGUTO **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

KHUMALO, BONGANI *N.O* **Third Respondent**

Heard: **29 August 2018**

Delivered: **13 May 2019**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The Applicant (Pikitup) seeks to review and set aside the arbitration award issued by the Third Respondent (Commissioner) in terms of which it was found that the non-renewal of the First Respondent's (Ms Abigail Muguto), fixed-term contract constituted an unfair dismissal within the meaning of section 186(1)(b) of the Labour Relations Act (LRA).[1]

[2] The Commissioner had ordered the reinstatement of Muguto to the position of General Manager: Bulk, and further granted her other relief including arrear remuneration in the amount of 14 months' salary equivalent to R1 038 333,24, and ordered that she be placed at a salary level applicable to all other comparable General Managers. Muguto opposed the review application.

Common cause facts:

[3] Muguto commenced her employment with Pikitup with effect from 24 July 2008 as General Manager: Special Projects in terms of a five year fixed-term contract. The contract contained the normal standard clause that the parties agreed that Muguto had no expectation of a renewal.

[4] The fixed-term contract was extended to February 2014 and then again to June 2014. In March 2014, Muguto was transferred to the position of General Manager: Bulk, on the same terms and conditions as her previous position. The contract was also extended on no less than four occasions. The last period of extension was between15 April 2015, and 31 October 2015.

[5] On 19 June 2015, Pikitup advertised the position of General Manager: Bulk which was occupied by Muguto. The position was to be offered on a permanent basis. Muguto was one of the applicants who had applied for the position and was shortlisted.

[6] The interviews for the position took place on 7 September 2015, and on 30 September 2015, Muguto was advised that her application was not successful. On 21 October 2015, she was advised that her fixed-term contract

[1] Act 66 of 1995 (as amended)

that commenced from 7 August 2008 was to expire on 31 October 2015 and would not be extended any further.

[7] The appointment of the successful candidate, Mr Dan Moodley, was to take effect from 1 November 2015. Aggrieved, Muguto had on 31 October 2015, referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), essentially alleging that the non-renewal of her fixed term contract amounted to a dismissal within the meaning of the provisions of section 186 (1) (b) of the LRA. When attempts at conciliation failed, the dispute was referred for arbitration and came before the Commissioner.

The arbitration proceedings:

[8] The Court was advised that a portion of the arbitration proceedings was missing from the record, and in particular, the evidence of Muguto. Attempts at the reconstruction of the record were impossible as a result of the unfortunate death of the Commissioner. To the extent that the record was incomplete, Pikitup had suggested certain remedies depending on which of its grounds of review were found to be sustainable.

[9] Pikitup's Employee Relations Manager, Mr Dumisani Langa, was its representative and only witness at the proceedings. Muguto was legally represented and had led her own evidence and that of her witness, Ms Ruth Manyama, an IMATU shop Steward.

[10] At the commencement of the arbitration proceedings, the duty to begin became an issue in the light Langa being a representative and also witness in the proceedings. In the founding affidavit in support of the review, Langa averred despite the onus being on Muguto in the light of the dismissal being placed in dispute, the Commissioner informed him that since he was privy to all the evidence, he should assume the duty to begin. The Commissioner had raised concerns about the credibility of his evidence and the weight to be attached to it should Muguto lead her evidence first.

[11] His evidence before the Commissioner pertained to the decision/resolution of the Board of Pikitup in 2012/2013 to convert certain fixed-term contract positions into permanent positions, and to advertise some of those positions. The affected positions were those at level 4 and downwards. According to Langa, it was envisaged that the then fixed-term contracts would be allowed to run their course whilst positions were advertised and filled. He disputed that there was any decision to automatically convert fixed-term contract employees into permanent employees.

[12] He also testified in regards to the circumstances of Muguto's initial appointment, stating that she was appointed as General Manager: Special Projects to deal with the 2010 FIFA World Cup and the Confederations Cup. When that role came to an end, Muguto was then moved to the Bulk section as her contract was for five years. After Muguto had applied for the position as advertised, she was shortlisted and interviewed, and that process was conducted fairly.

[13] Manyama's evidence pertained to the interviews, with her allegations being that a Union representative was not allowed to participate in the interviews; that Moodley's appointment was not fair as he had submitted his CV on the date of the interview contrary to the rules, and had replaced Muguto before the interviews took place. Manyama's contention was that Moodley's appointment was unfair as he was a relative of the Managing Director, Amanda Nair.

[14] Muguto's case as summarised by the Commissioner was that her initial position of General Manager: Special Projects still existed and was occupied by another employee. She testified in regard to various extensions in relations to her initial five-year fixed term contract, and how employees in similar positions like her were informed that the extensions were merely to formalise their appointments into permanent posts in line with the City of Johannesburg's directives to turn all fixed-term contracts into permanent appointments. In this regard, two other employees at her level were made permanent employees.

[15] Muguto's evidence also pertained to how the interview process was unfairly conducted, including that she was given a case study in preparation for the interview on the date of the interview instead of a day before; that her union, IMATU was not invited to her interview as management had threatened to dismiss any union member who attended the interviews; that the interview panel was not properly constituted; and further being advised informally by the Managing Director that her application for the post was unsuccessful.

[16] Muguto further testified in regard to being advised of the availability of the position of General Manager: Operations which she was prepared to occupy, and further having had a discussion with the COO about other alternative positions that were advertised.

[17] She also complained about the recruitment process in relation to another position she had previously applied for. She testified that she was initially shortlisted but subsequently removed from the shortlist without being interviewed. She contended that the position in question was given to another employee who did not meet the minimum requirements of the post.

The Commissioner's findings:

[18] The commissioner made the following findings;

18.1 Pikitup only called upon Langa to testify, when he had no first-hand knowledge about the facts of the case, and at best, his evidence amounted to hearsay, and thus less evidentiary weight should be placed on that evidence.

18.2 To the extent that certain key individuals who had made decisions pertaining to the full time appointment of fixed-term contract employees were not called upon to testify, an adverse inference should be drawn against Pikitup.

18.3 Certain material evidence was not disputed, including that there were four extensions ('renewals') of six months nor was there a justification for shorter terms; that Pikitup had promised the employees that all their

fixed-term contracts would be converted into permanent posts; that a union representative was not allowed at the interviews; that Pikitup's Amanda Nair's conduct leading to the termination of Muguto's contract was unfair; that Muguto's salary increase was not effected as compared to other employees at her level; that there were other vacant positions that were discussed with Muguto as alternatives but nothing came of it; that Muguto was shortlisted in another process in respect of another position initially, and that Nair had removed her name from the shortlist and appointed another individual with less qualifications; that the interview panel in respect of the position of General Manager: Bulk was improperly constituted, and that Muguto's interview process was unfair;

18.4 The Commissioner questioned the reason why Muguto was not appointed amongst all internal candidates who went through interviews even though she was highly qualified, or why she was paid less than comparable General Managers.

18.5 In the Commissioner's view, Muguto had discharged the onus of proving that she had a legitimate expectation that her contract would be renewed, as Pikitup did not follow its own renewal or interview procedures, and further that Pikitup had predetermined candidates when it manipulated the procedures to ensure that its own candidates succeeded.

18.6 The Commissioner further concluded that that the custom in Pikitup was to award positions to internal candidates or black females; that posts were available where Muguto could be placed, and that there was inconsistent conduct insofar as treating the recruitment process in respect of Muguto, and further insofar as confirming the termination of her fixed-term contract, as she was only given five days' notice.

18.7 The Commissioner further criticised the evidence of Langa, concluding that he had conducted himself as a witness in an arrogant, high-

handed, unrepentant and domineering manner, whilst Muguto's witnesses were consistent, honest and credible in all material respects.

The grounds of review:

[19] Pikitup cited five main grounds for seeking a review of the award. In this regard, it was submitted that;

19.1 The Commissioner incorrectly found that Muguto had a reasonable expectation of a renewal of her fixed-term contract in terms of the provisions of section 186(1)(b) of the LRA, and thus failed to apply a proper and correct test;

19.2 The Commissioner misconceived the nature of the enquiry before him by conflating the question of whether there was a fair interview process, with the question of whether Muguto had a reasonable expectation of the renewal of her contract;

19.3 The Commissioner based his award on a host of factual findings on issues which were never put to Pikitup's witnesses in cross examination, and thus deprived it of a fair hearing;

19.4 The Commissioner committed a gross procedural irregularity in ordering Pikitup to commence with the leading of evidence in the arbitration proceedings;

19.5 In ordering Pikitup to increase the salary level of Muguto, the Commissioner exceeded his powers in that no dispute in this regard was before him.

The review test:

[20] An issue that arises in this case is that of the applicable review test. This was so in that it was submitted on behalf of Muguto that since the grounds of review relied upon by Pikitup are meant to be in terms of the provisions of section 145 of the LRA, no basis for review was laid in terms of those provisions, as reliance was placed squarely on the test of correctness.

[21] The debates surrounding the applicable review test in such instances is superfluous in the light of what was long stated in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others,* to the effect that;

> "Nothing said in Sidumo means that the grounds of review in sec 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in sec 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is *ultra vires* its powers, the reasonableness or otherwise of its decision cannot arise."[2]

[22] Any further doubts about the applicable test was laid to rest in *Jonsson Uniform Solutions (Pty) Ltd v Brown and others*[3]*,* where the Labour Appeal Court held as follows;

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[2] [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) at para 101; See also *De Milander v MEC for the Department Finance: Eastern Cape and Others* [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) (30 November 2012), where it was held that;

> "[24] Thus the issue before the Commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another* [2008] ZALAC 3*;* [2008] 9 BLLR 845 (LAC) at para [39]). The question whether, on the facts of the case, a dismissal had taken place within the ambit of section 186 (1) (b) involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed."

[3] (DA10/2012) [2014] ZALCJHB 32 (13 February 2014) [2014] JOL 32513 at paras 33 – 36; See also *Enforce Security Group v Fikile and Others* [2017] ZALAC 9; (2017) 38 ILJ 1041 (LAC); [2017] 8 BLLR 745 (LAC), where it was held that;

> "[16] 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. To the extent that the court *a quo f*ound that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner."

"The generally accepted view is that we have a bifurcated review standard *viz* reasonableness and correctness. The test for the reasonableness of a decision was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* as follows: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

In assessing whether the CCMA or the Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the necessary jurisdiction to entertain the dispute. See *SARPA v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU*.

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 the 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.

It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied. The court *a quo*, as both parties agreed, applied the wrong standard." (Citations omitted)

[23] In the light of the above principles, it follows that an attack on Pikitup's reliance on the correctness test in regards to the issue of jurisdiction and whether Muguto was dismissed or not has no merit. The issue turned on whether on the facts placed before him, the Commissioner's decision that Muguto had established a dismissal for the purposes of a claim under section 186(1)(b) of the LRA was correct or not. If it was not correct, the

consequences thereof are that the CCMA lacked jurisdiction to determine the dispute.

The question of onus:

[24] The dispute referred to the CCMA pertained to an alleged unfair dismissal on account of non-renewal of Muguto's fixed term contract as contemplated in section 186(1)(b) of the LRA[4].

[25] Given the approach of the Commissioner in regards to the issue of onus, the contention made on behalf of Pikitup that he (Commissioner) committed a gross procedural irregularity in ordering Langa to commence with the leading of evidence in the proceedings has merit.

[26] The Commissioner in his award had appreciated that the duty to begin rested on Muguto. However for some strange reason, the Commissioner and Muguto's legal representative at those proceedings raised concerns about the fact that Langa, who represented Pikitup, was also its sole witness. On the basis of those concerns, the Commissioner had raised issues of credibility of Langa's evidence by virtue of him wearing two caps in the proceedings, on the basis that he was privy to all the evidence. The Commissioner had also raised concerns about the weight that might be attached to Langa's evidence if he did not commence with the evidence first.

[27] In arbitration proceedings before the CCMA, it is not uncommon for Commissioners to be confronted with less than ideal scenario where a representative of the employer also acts as its witness. Equally so, it is not uncommon for employees to represent themselves in those proceedings and to lead their own evidence. In my view however, irrespective of the circumstances of the case, the question of the duty to begin and discharging the onus in dismissal disputes is a statutory requirement imposed by the

[4] Section 186(1)(b) provides that:
'(1) Dismissal means that-

(a) ...

(b) 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.

provisions of section 192 of the LRA[5]. Those provisions cannot be circumvented for the sake of convenience or expedience.

[28] It is not clear as to which provision in the Law of Evidence Act[6] the Commissioner was referring to when raising the question of credibility and the weight to be attached to Langa's evidence if he did not commence with the leading of evidence despite his clear appreciation of the duty to begin. Be that as it may, in a less than ideal scenario already referred to above, if in arbitration proceedings the issue of a dismissal is common cause, an employer representative who is also its witness should for obvious reasons lead his/her evidence first before all the other witnesses are called. That evidence like any other should be subject to the normal rules of evidence. Equally so, where the fact of a dismissal is in dispute, the employee alleging the dismissal, whether self-represented or not, must lead evidence first to demonstrate that indeed a dismissal took place.

[29] The question of the credibility of the evidence led by witnesses in whatever order is not a consideration in determining where the onus lies. It is but one of the considerations in the overall assessment and evaluation of evidence in line with the principles set out in *Stellenbosch Farmers' Winery Group Ltd v Martell et cie*[7].

[30] There is a dispute as to whether the Commissioner had compelled Langa to testify first, or whether as the Commissioner had stated in the award, that Langa had offered to begin. The record of proceedings however indicate that the parties reached agreement on who should begin[8]. In my view however, that dispute is inconsequential, as in line with the provisions of section 192 of the LRA, it was for the Commissioner to simply remind the parties what their statutory obligations were in regard to the issue of onus, and to give direction

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[5] **192. Onus in dismissal disputes**
(1) In any proceedings concerning any *dismissal*, the *employee* must establish the existence of the *dismissal*.
(2) If the existence of the dismissal is established, the employer must prove that the *dismissal* is fair.

[6] Law of Evidence Amendment Act; 1988 Act No. 45, 1988

[7] 2003 (1) SA 11 (SCA) para 5. See also *Sasol Mining (Pty) Ltd v Ngqeleni NO* (2011) 32 ILJ 723 (LC)

[8] Transcribed Record at page 11, Lines 1 - 4

in regards to the duty to begin irrespective of the constraints (if any) Langa was faced with.

[31] To the extent that the Commissioner first heard the evidence of Langa when the duty to begin and to discharge the onus in regards to the dismissal was on Muguto, there can be no doubt that the Commissioner clearly misconceived the question of onus, and committed a gross procedural irregularity, which on its own rendered the award reviewable. That irregularity prevented Pikitup from having its case fairly heard, or prevented a fair trial of the issues.

Was a dismissal established?

[32] The provisions of section 186(1)(b) of the LRA were interpreted in *University of Pretoria v CCMA and Others*[9] as follows;

> "[18] The words employed in s186 envisage that two requirements must be met in order for an employer's action to constitute a dismissal:
>
> (1) a reasonable expectation on the part of the employee that a fixed term contract on the same or similar terms will be renewed; and
>
> (2) a failure by the employer to renew the contract on the same terms or a failure to renew it at all.
>
> These words do not however carry the meaning which is urged by third respondent, namely that, by being employed on the basis of a series of fixed terms contracts, an employee has without more a reasonable expectation of a permanent appointment. The distinction between the fixed term contract and a permanent contract has a clear economic rationale. An employer in the position of appellant may have discretionary funds for a limited period. During this period, it offers a series of fixed term contracts to a particular employee. At some point these funds are depleted and the employer can no longer afford a further fixed term contract. By contrast, the creation of a permanent post would necessitate a more permanent source of funding"

And,

[9] Unreported Case No JA38/2010, 4-11-11) (Davis JA)

"[21] The words chosen by the legislature, absent an amendment to the legislation, cannot carry the burden of third respondent's case in that it covers a restrictive set of circumstances, namely a reasonable expectation of a renewal of that which had previously governed the employment relationship, namely a fixed term contract which had previously been enjoyed, which had now expired and, by virtue of the factual matrix created, at best, a reasonable expectation of a renewal."

[33] As already indicated, the onus of proof in such disputes is on the employee to prove the dismissal by placing facts before the Commissioner which objectively considered, would lead to a conclusion that the employee held a reasonable expectation that her fixed term contract would be renewed[10]. In an instance such as this, where obviously the dismissal is placed in dispute, the enquiry invariably transcends into that of jurisdiction, as without the fact of a dismissal having been proven, the CCMA would lack jurisdiction to determine the dispute[11]. Where however the fact of a dismissal was established, it would then be for the employer to establish that the dismissal was procedurally and substantively fair[12].

[10] See *Joseph v University of Limpopo & others* [2011] 12 BLLR 1166 (LAC), where it was held that;

"[35] The onus is on an employee to prove the existence of a reasonable or legitimate expectation. He or she does so by placing evidence before an arbitrator that there are circumstances which justifies such an expectation. Such circumstances could be for instance, the previous regular renewals of his or her contract of employment, provisions of the contract, the nature of the business and so forth. The aforesaid is not a closed list. It all depends on the given circumstances and is a question of fact."

[11] See *Mnguti v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 3111 (LC) at para 14, where it was held that;

"The issue whether or not a dismissal exists concerns the jurisdiction of the CCMA. If there is no dismissal, then the CCMA has no jurisdiction to entertain an unfair dismissal claim. Where a commissioner thus finds that no dismissal exists, that commissioner in essence determines that the CCMA does not have jurisdiction and the matter is then dismissed on that basis."

[12] See *South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC); (2008) 29 ILJ 2218 (LAC), where it was held that;

"[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. In Benicon Earthworks & Mining Services (EDMS) BPK v Jacobs No & Others (1994) 15 ILJ 801 (LAC) at 804 C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The Court held

[34] Bearing in mind the criticism levelled against the Commissioner's approach in regards to the question of onus, the next enquiry is whether there were facts that were placed before the Commissioner, which when objectively considered, would lead to a conclusion that indeed Muguto had a reasonable expectation that her fixed-term contract of employment would be renewed on the same or similar terms.

[35] It is correct as stated on behalf of Muguto that there is no closed list of factors that are relevant to the enquiry whether an employee had a reasonable expectation of a renewal. Be that as it may, the following factors have been held to be of significant value in the objective enquiry, *viz*,

(a) The terms and conditions of the contract[13];

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that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The Court further held that any conclusion to which the industrial court arrived at on the issue, has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In Benicon's case the Court said:

> *"In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit."* (at 804 c-d)"

And,

"[43] What s 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 s 186(1)(b) are in my view, that the employee should have a 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.

[44] The appellants carried the onus to establish that they had a 'reasonable expectation' that their contracts were to be renewed. They had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time 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 s186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair."

[13] *IMATU and Others v City of Johannesburg Metropolitan Municipality and Others* [2014] 6 BLLR 545 LAC at para 34, where it was held that;

"When assessing whether an expectation is reasonable all the surrounding facts and circumstances should be considered including the terms of the contract of employment,

(b) The past practice of renewals or extensions;

(c) The nature of the work and the reason for fixed term contract arrangements[14];

(d) Any assurances or undertakings by the employer that the contract would be renewed/extended;

(e) The failure to give reasonable notice of non-renewal of the contract.

[36] In this case, and as already stated, the fixed term contract entered into between Pikitup and Muguto was renewed on no less than four occasions from its inception on 24 July 2008 until 15 April 2015, when Muguto was informed of the final extension.

[37] It has been stated that the mere fact that a fixed-term contract was renewed repeatedly does not in itself give rise to the existence of a reasonable expectation of renewal. The renewal or extension must be viewed within the context of its purpose and objectives and the factors already mentioned in this judgment.

[38] In most instances, such contracts contain the standard clause expressly stating that the employee had no right to renewal or expectation of a renewal (The so-called disavowal clause). It is accepted on the authority of *Mediterranean Woollen Mills (Pty) Ltd v SACTWU*[15] that despite these clauses, a reasonable expectation could still arise during employment if assurances, existing practices and the conduct of an employer led an employee to believe that there was hope for a renewal, whether on a temporary or an indefinite basis. Even then, these factors are still subject to an objective assessment.

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promises made by the employer – regardless of contractual terms which gainsay what the employer promised and the general conduct of the parties"

See also *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at page 1246 paragraph [133],

[14] *SeeSA Clothing and Textile Workers Union v MediterraneanWoolen Mill* 1998 (2) SA 1099 (SCA) in "It is apposite to consider the reasons why parties enter into a fenced-term contract. Usually a fixed - term contract is entered into because the task to be performed is a limited or specific one, or the employer can offer the job for a limited or specified period only."

[15] Supra

[39] In the end however, when a renewal or extension is effected, it cannot be said that on its own, it varies the original terms and conditions of the contract for the purposes of creating or proving a legitimate expectation, unless this is expressly stated when the contract is renewed or extended.

[40] Significant with the facts of this case is that at some point of the duration of the fixed-term contract, Muguto was moved to another position as General Manager: Bulk. Even then, the letter of transfer dated 27 March 2014 expressly stated that other than the change in roles and reporting structures, her remuneration and other terms and conditions remained the same.

[41] Central to Muguto's case appears to be the position of General Manager Bulk. Nothing much is said about her original position of General Manager: Operations, even though her contention was that the position was still available *albeit* someone else occupied it. Even then, any reasonable expectation that she may have had could only have been with respect to the last post she occupied, which was that of General Manager: Bulk, and which on the common cause facts, she had agreed would be essentially on the same terms and conditions, including disavowal of guarantees of further extensions.

[42] Taking into account the factors for consideration in determining whether a case of a dismissal or legitimate expectation was made, it is my view that notwithstanding the constraints with the missing portion of the record, and purely based on the common cause facts and the applicable legal principles, the Commissioner's findings that Muguto was dismissed are clearly not correct, and the award ultimately ought to be reviewed and set aside. My conclusions in this regard are based on the following considerations;

42.1 There is a dispute as to whether fixed-term contract employees were promised that their contracts would be converted into permanent contracts or not.

42.2 Muguto sought to rely on the *'Agreement on the Conversion of Fixed term Employees in terms of the Institutional Redesign'* entered into between the City of Johannesburg and the recognised Trade Unions,

for the proposition that there was a promise or assurance that her fixed-term contract would be converted. Her contention was that based on that agreement, all fixed-term employees on reporting level 3 structures and below, were to be converted into permanent employees. Whilst relying on that agreement, Muguto further pointed out that a provision was made that where business imperatives dictated, the company would advertise positions to give it an opportunity to appoint persons with suitable skills.

42.3 According to Langa, the agreement Muguto sought to rely on was not binding on Pikitup as a separate entity. What Pikitup had however done was that its Board took a resolution to convert fixed-term contract posts into permanent post. Langa's emphasis was on the post rather than individuals occupying the posts, and in line with that resolution, certain posts were to be advertised whilst letting the existing fixed-term contracts run their course.

42.4 In my view, even if there was merit in the contention that the City of Johannesburg agreement was binding, and in line with the provision that certain posts were to be advertised, I fail to appreciate the reason Muguto would nonetheless still feel entitled to the position on a permanent basis, particularly in the light of her appreciation that a prerogative was to be retained in regards to the advertisement of the posts, and the common cause facts that indeed her position was advertised.

42.5 Furthermore, to the extent that Muguto sought to rely on the agreement, that was an issue raising a different dispute altogether under the provisions of section 24 of the LRA as was correctly pointed out on behalf of Pikitup. As if that was not enough, a dispute surrounding a conversion from fixed-term contract to permanent contract cannot by all accounts be consistent with the requirements or what needs to be proven under the provisions of section 186(1)(b) of the LRA.

42.6 To the extent that Langa's evidence in regards to the agreement and the Boards' resolution appeared to be more plausible and probable, once Pikitup had taken a resolution to advertise some of those positions which were initially offered on fixed-term, that was a matter within its prerogative. If an employer decided to advertise positions that were previously occupied by fixed-term contract employees, that decision is in accordance with the prerogative it enjoys, and a consideration of its own operational requirements. That decision as I understood the evidence, was of Pikitup's Board, which remained unchallenged.

42.7 It is not clear from the evidence as to at what stage Muguto had acquired the expectation that the contract would be renewed. It was however common cause that she was advised on 15 April 2015 when the contract was extended that subsequent renewals or extensions were not guaranteed. The post was then advertised in June 2015. At no stage between the last notice and 31 October 2015 when the contract was terminated did Muguto take any steps or alluded to her expectations.

42.8 It is my view that at the time that Muguto's post was advertised, Pikitup's message was clear and unequivocal that her contract would not be renewed or extended. To the extent that the position was advertised, it is my view that if Muguto harboured any legitimate expectation that her fixed term contract would be renewed or that she would be appointed permanently as she alleged, it was at that point that she needed to have taken steps in regard to the recruitment process or raise issues surrounding her legitimate expectation. She did not do so, and it can be accepted that she had resigned herself to the reality that the post was indeed to be advertised, and like any other candidate, she had to prove her worth in the interview processes.

42.9 To the extent that she had applied for the position, was shortlisted, interviewed and was unsuccessful, there can be no talk of a legitimate expectation, as any outcome related to that recruitment process, led to

a new dispute. Her conduct in relation to her active participation in the recruitment process is irreconcilable with her contentions that she had a legitimate expectation of a renewal of her fixed-term contract.

42.10 It follows that any suggestion by the Commissioner that Muguto should have been considered for other alternative positions was not in sync with what her case was, which was that she had a legitimate expectation to have her fixed-term contract of employment as General Manager: Bulk renewed. A legitimate/reasonable expectation to be placed in an alternative position or into a permanent position is inconsistent with what was envisaged in the provisions of section 186(1)(b) of the LRA.

42.11 On 30 September 2015, Muguto was informed that her application for the post was unsuccessful. She was reminded of the termination of her contract on 12 October 2015 and again, she took no steps, either by raising legitimate expectation or a dispute surrounding her non-appointment. She waited until the last day of the termination of her contract to lodge a dispute.

42.12 When she was advised of the termination of the fixed-term contract on 12 October 2015, it is equally implausible that any legitimate expectation could have accrued at that time. This is so in that the recruitment process was finalised and a new incumbent to the position was appointed. Any alleged expectation at that stage of a renewal was clearly not reasonable nor rational.

42.13 It is within the context of determining whether a legitimate expectation was established (*i.e*., a dismissal) that the Commissioner had as it was correctly pointed out on behalf of Pikitup, conflated that issue, with that of the failure to appoint following the interviews. Any evidence in relation to the interviews or recruitment process pertaining to the position of General Manager: Bulk, or any other positions Muguto had previously applied for and was unsuccessful for whatever reason, was irrelevant for the purposes of establishing whether she had a

reasonable/legitimate expectation of a renewal of her fixed-term contract as General Manager: Bulk.

42.14 It further follows that any findings made by the Commissioner in relation to the recruitment process pertaining to that position, or any issues raised pertaining to salary disparities, carried little weight in regard to the issues for determination. The issues of the failure to appoint into a position that was advertised, and of salary disparities were not before the Commissioner. To be more specific, those issues had not been referred for conciliation for the purposes of jurisdiction. Without the necessary jurisdiction, any relief granted in regard to those issues, especially pertaining to salary was a nullity.

[43] It follows from the above observations that the only conclusion to be reached is that it cannot be said in the light of the prevailing facts and circumstances, that Muguto had placed facts before the Commissioner, which when objectively assessed, could have led to a conclusion that she had a legitimate expectation that her fixed-term contract would be renewed on the same or similar terms.

[44] It follows from the above that the decision by the Commissioner that Muguto was dismissed within the meaning of section 186(1)(b) of the LRA was an incorrect one, and consequently, the CCMA had no jurisdiction to determine the dispute. As a result, the matter ought to have been dismissed.

[45] I have had regard to the fact of the missing portions of the record and the order to be made by this Court. In the light of the conclusions reached in this case, I agree with the submissions made by Mr Orr on behalf of Pikitup that once there was no basis to conclude that Muguto had established a legitimate expectation, no purpose would be served by remitting the matter back to the CCMA, and the Court is in a position to substitute the Commissioner's award.

[46] I have further had regard to the issue of costs in line with the requirements of law and fairness. In that regard, I am of the view that a costs order is not warranted in this case.

[47] In the premises, the following order is made;

Order:

1. The arbitration award issued by the Third Respondent under case number GAJB23564-15 dated 30 December 2016, is reviewed, set aside and substituted with an order that;

   (a) Ms Abigail Muguto has not established a dismissal under the provisions of section 186(1)(b) of the Labour Relations Act.

   (b) Ms Abigail Muguto's referral is dismissed on account of lack of jurisdiction.

2. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: C Orr, instructed by Bowman Gilfillan

For the First Respondent: Z Makgalemele, instructed by Crispen Machingura Attorneys