IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR2602/17

In the matter between:

THATO HERMAN MABIZELA **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

F MOOI N.O **Second Respondent**

SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD **Third Respondent**

Heard: **19 July 2019**

Delivered: **29 November 2019**

Summary: **Jurisdictional review – legitimate expectation of renewal - Commissioner correct – Review set aside**

JUDGMENT

MOGANE, AJ

Introduction

[1] This is a review application brought in terms of section 145 of the Labour Relations Act[1] (LRA) where the Applicant seeks an order reviewing and setting aside the arbitration award issued by the Second Respondent (Commissioner) under case number: GAJB 9678/17.

[2] In the award, the Commissioner found that the Applicant has not discharged the onus in terms of section 192 of the LRA in proving the existence of his dismissal. The Applicant was found to not have been dismissed and the Commissioner dismissed his case.

Background Facts

[3] The Applicant was engaged as a camera operator and freelancer from April 2004 for a period of 12 months which contract was renewed annually from April 2004 to February 2014.

[4] On or about 28 February 2014, the Applicant signed a fixed three (3) year contract with the Third Respondent commencing on 1 March 2014 and terminating on 28 February 2017.

[5] The Applicant expected his employment contract to be renewed as was the case with the previous freelance contracts, which were renewed annually for the past 10 years prior to this fixed term contract of employment for the duration of 3 years which he signed on 28 February 2014.

[6] The Applicant also expected that his contract would be renewed because the then Chief Operating Officer (COO), Hlaudi Motsoeneng (Mr Motsoeneng) had converted other freelancers to permanent employees and a promise was made to convert all other freelancers including the Applicant.

[1] No. 66 of 1995, as amended.

[7] The Applicant contends that the fact that he was not served with a one month notice prior to the termination of his fixed term contract and further that two weeks prior to the termination of his contract, the Applicant was sent by the Third Respondent to the University of Pretoria to do a short course in vision control and vision wiping supports his version.

[9] The Applicant regards the termination of his contract as a dismissal and therefore referred a dispute with the First Respondent.

The Arbitration Proceedings

[10] The Applicant testified himself at the arbitration and the Respondent was represented by Mr Mcineza. The Applicant's evidence before the Second Respondent was that the freelance contract that he signed did not have benefits like medical aid, pension and sick leave and as a freelance contractor, he could also do other work outside of the SABC.

[11] He testified that a verbal commitment was made by Mr Motsoeneng that his fixed term employment would be converted into a permanent position. Further also two of his colleagues, being Mr Kalake and Mr Ngwenya had their contracts renewed but does not know the reasons for the renewal of their contracts. The Respondent did not testify but rather cross examined the Applicant and argued the matter before the Second Respondent.

[16] The Second Respondent arbitrated the dispute and issued an award finding that the Applicant was not dismissed as his fixed term contract came to an end.

The Grounds for Review

[17] The Applicants grounds for review were that: -

17.1 The Award is one that a reasonable decision maker could not reach as the Second Respondent did not take all the relevant factors into

consideration when finding that the Applicant was not dismissed whilst a reasonable expectation was created that the Applicant's contract will be renewed and or that the Applicant would be made permanent like other freelance contractors.

17.2 The Second Respondent committed misconduct in relation to the duties of an arbitrator in making his decision, namely that the Applicant failed to prove that he was dismissed and therefore he was not entitled to the relief sought whilst he (the Applicant) discharged such a burden on a balance of probabilities.

17.3 The Second Respondent committed a gross irregularity in the conduct of the proceedings and misconstrued both the law and the test relating to a reasonable expectation created in section 192 of the LRA.

17.4 The Second Respondent exceeded his powers as a commissioner in finding that the applicant was not dismissed and that a limited duration of a fixed term contract came to an end without any reasonable expectations being created that the same will be renewed for a further period of 3 years.

17.5 The Second Respondent failed to take all the relevant issues into consideration, *inter alia,* the renewal of other freelance employees' contracts and the cautionary rules of evidence. The Second Respondent failed to properly make an analysis of the evidence before him, both oral and documentary as well as the arguments presented. His award appears to be one sided and biased against the Applicant.

17.6 The Second Respondent rendered an award which another reasonable commissioner would not have issued and same stands to be reviewed and set aside, alternatively remitted to the First Respondent to be arbitrated *de novo* by a commissioner other than the Second Respondent.

The appropriate test on review

[18] The issue that was before the Second Respondent was whether there has been a dismissal or not. This is an issue that goes to the jurisdiction of the CCMA. The test to be applied in this matter was correctly stipulated in *Pik-It-Up Johannesburg (PTY) v IMATU obo Cook*[2] where the Court said:

> '16. …The applicant is correct in its submission that the test for determining jurisdiction in review matters is not that of a reasonable decision maker as is the case in the general review cases but that which was enunciated in the case of SA Rugby Players' Association (SARPA) and others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty Ltd and Another [2008] 9 BLLR 845 (LAC). In that case, the Labour Appeal Court per Tlaletsi JA, held that where jurisdiction is in issue, the test to apply is the following:
>
> "39. The issue that was before the arbitrator 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, 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 (Pty) Ltd v Jacobs NO & Others (1994) 15 ILJ 801 (LAC) at 804C-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 that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regards to jurisdictional facts but upon their

[2] (2011) 32 ILJ 2728 (LC).

objective existence. The court held further that any conclusion to 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 the 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 faint-hearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit." At 804C-D). "In my view, the same approach is applicable to the CCMA".'

[19] The inquiry that needs to be conducted in the present matter is whether the facts as presented by the employee objectively establish that a dismissal had occurred when the applicant did not extend her employment contract. It was further held in *Limpopo Legislature v Gumani Robert Matodzi*[3] that:

> "The correct approach in reviewing the arbitrators ruling on the jurisdictional issue is whether or not the arbitrator was right or wrong in deciding if a dismissal took place not whether the arbitrator's finding was one that no reasonable arbitrator could reach"

Evaluation

[3] Unreported decision. Case number: JR2530/14

[20] One has to firstly determine whether there was a dismissal as defined in terms of section 186(1)(b). In terms of this section dismissal means that:

> (a) ……..
> (b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer -
> (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.

[21] The onus to prove that there has been a dismissal rests on the Applicant. Section 192(1) of the LRA states that:

> 'In any proceedings concerning any dismissal, the employee must establish the existence of a dismissal. The next inquiry then for the Second Respondent to determine was whether on the facts that were placed before him and considered objectively if it has been established that the Applicant held a reasonable expectation that his contract will be renewed[4].'

[22] As a starting point, one should determine at exactly which point did the expectation arise and what gave rise to this expectation. According to the Applicant, his freelance contract was, for a period of 10 years, renewed annually and therefore he expected his three year fixed term contract to be renewed. He was regarded as a full-time employee for over 10 years before signing the fixed term contract on 28 February 2014.

[4] *Ekurhuleni West College v Education Labour Relations Council and Others [2017] ZALAC 75 at paras 17 and 18. See also: SA Rugby Players Association v SA Rugby (Pty) Ltd* (2008) 29 ILJ 2218 (LAC) at para 44 where the test is articulated as follows: *"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."*

[23] I do not agree with this assertion by the Applicant. The Applicant was from April 2004 to February 2014 an independent contractor. In terms of section 213 of the LRA, an employee is defined as:

> (a) any person excluding an independent contractor work for another person or for the state and who receives or is entitled to receive any remuneration; and
> (b) any other person who in any manner assists in carrying on or conducting the business or an employer.

[24] I have had sight of the contract that the Applicant signed on 20 March 2009 running from the period of 1 April 2009 to 31 March 2010[5]. It is apparent in that contract that the Applicant is referred to as an independent contractor. Clause 1.3 of the said contract states:

> 'The SABC hereby engages the News Independent Contractor subject to the terms and conditions set out herein under.'

and then at clause 4.1:

> The News Independent Contractor's engagement in terms thereof shall not constitute 4.1.1 the creation of an expectation, prospects, rights or claim/s for the renewal of this contract and at 4.1.2 or to be deemed to constitute an appointment as an employee of the SABC in terms of the Labour Relations Act of 1999, The Basic Conditions of Employment Act, The Employment Equity Act, The Income Tax Act, The Unemployment Insurance Act, any future employment or Labour Relations legislation or the common law.

[25] The Applicant even conceded when he was cross examined by Mr Mcineza for the Third Respondent that prior to signing the fixed term contract, he was an independent contractor.

[26] In my view, I agree with the Third Respondent that the continued renewal of the independent contractor contract for a period of over 10 years cannot give

[5] Pages 87 to 93 of the index to notices.

rise to an expectation, objectively speaking, that the Applicant's fixed term contract of employment which ended on 28 February 2017 would be renewed.

[27] In my understanding, for one to develop an expectation as envisaged in section 186(1)(b) of the LRA, one ought to have been employed in terms of a fixed term contract of employment.

[28] Of course it does not end there. Other factors ought to be taken into account in order to objectively determine whether an expectation has been created. *In IMATU and Others vs City of Johannesburg Metropolitan Municipality and Others*[6], 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 and promises made by the employer regardless of the contractual terms which can say what the employer promised and the general conduct of the parties."

[29] According to the Applicant, in the year 2012, Mr Motsoeneng, stated that free-lance contractors will be converted into permanent employees. This, in my view, cannot create an expectation. It should be borne in mind that at that time in 2012, the Applicant was a freelance contractor but was offered a fixed term contract in February 2014. Therefore, if what the Applicant contends is true, one would then have expected the Applicant to not sign the fixed term contract but to have insisted on permanent employment as per Mr Motsoeneng's statement.

[30] The Applicant also sought to rely on a video clip of Mr Motsoeneng where he addressed the staff (such was played at the arbitration). It is quite clear, in the video clip and as captured by the second respondent in the award, that Mr Motsoeneng was addressing the employees in an encouraging nature. He speaks about the fact that if one has talent then one should use that talent. He further goes on to congratulate certain employees. People that are multiskilled

[6] [2014] 6 BLLR 545 (LAC) at para 34

will be rewarded and those that are not multiskilled will not be gotten rid of[7]. The commissioner is correct in saying that nowhere during the address does Mr Motsoeneng state that the fixed term contracts will be renewed.

[32] The Applicant in his evidence stated that there was a memorandum dated 8 November 2012 by Mr Mosweu which said that freelancers should be converted to permanency. This memorandum created a reasonable expectation. The Applicant's evidence is however at odds with him signing a fixed term contract in the year 2014. As I have already mentioned in this judgment, if the Applicant had an expectation he would not have signed the fixed term contract. He should have taken action against the employer for failing to convert his employment to one of permanency. Failure to lodge a dispute with the employer is indicative of the fact that no expectation was created. In other words, he did not allude to his expectations.

Expectations created during the fixed term contract (2014 to 2017)

[33] The Applicant said that in the year 2016, two of his colleagues who occupied the same position as his, had their contracts renewed. They were Mr Kalake and Mr Ngwenya. He had no personal knowledge however, how their contracts came to be renewed. He was shown a list by Mr Kalake for contract renewal and his name was on the list. He conceded when cross examined that implementation could only be done when the CFO had signed. The Applicant could not prove that the CFO had signed, implementing the decision. In the absence of the signature, it is my view that that list has not

[7] The commissioner in his award correctly captured the video recording as captured in the transcribed record. At paragraph 40 of the award it says: *"If you have talent, it must be known to the audience so that you sustain the audience. Also consider if you have talent you can do well. You can do well as you a presenter but it depends on what kind of content you sell… you see because if your talent is dead you will also be dead."*
Paras 41-43: "*So I think we need to balance the two colleagues. But…about you…I ask to work on that project. I have been working….Coming to Lebogang. Congratulations I hear you have a child. You are a mother now. Congratulations. When I say multi-skilled, we are not saying we should get rid of people who are not multi-skilled. No, we are saying if you able can do multi-skilled work, we should reward you accordingly. You are not going to lose your job because of that multi-skill if someone is not multi-skilled. But we are saying if someone can do 1,2,3 we should recognize that talent and reward that person accordingly then congratulate. Para 43: You also have been doing well. I know that they reward you, on air. SABC should put you back on air. Because you see your colleagues we talk SAT?(words inaudible) need to stress that. And people with disabilities. We need to see them as presenters. We need to see them on air."*

been approved and could therefore not have created an expectation. Having regard to the transcribed record, the Applicant conceded when cross examined that, in the process of appointing staff members the line manager motivates and that motivation needs approval by the CFO.

[34] The commissioner, correctly so, came to a conclusion that attending a training course does not by itself indicate an expectation of renewal. The respondent, in its heads of argument, stated that the training was arranged months in advance and as such, the Applicant's scheduled training cannot create a reasonable expectation. This was not rebutted by the applicant. I align myself with the *IMATU*[8] decision cited by the third respondent where it was said:

> "The subsidised education agreement is not and was never intended to be a variation of the contract of employment. The subsidised education agreement is a benefit that the Municipality gave to all its employees who qualified thereof. Qualifying employees who make use of the benefit incur certain obligations. The fact that an employee made use of the benefit does not ipso facto mean that his/her employment contract is varied or extended, neither does it mean that the municipality is obliged to retain the employee in its employ, beyond the clear stipulations of the employment contract."
>
> According to the appellant, there is, by virtue of the education agreement, an inferred obligation on the municipality to keep the employee in its employ. This is a senseless argument. If it was so, it would mean that the subsidised education contract would be the basis of the employment relationship and trump the contract of employment. This in turn would mean that the employee will practically be immune to discipline and dismissal during that period. This cannot be. The subsidised education contract is a separate and distinct benefit that the employee gets by virtue of the existence of an employer-employee relationship which is governed by the contract of employment. In my view, the subsidised education agreement did not vary the contract of employment…

[8]Id fn 6 at paras 41,42 and

> The argument that the subsidised education agreement gave the employee a reasonable expectation that his contract will be extended until 2013 is unsound … A failure to renew a contract presupposes a failure to renew the contract on the same terms and conditions as previously enjoyed. That was not the employee's case. His case was that his contract of employment was extended to 2013 by the subsidised education contract. That in my view is totally misplaced and wrong."

[35] The Applicant signed the fixed term contract on 28 February 2014. It is so stated in the contract itself that the period of employment shall be of limited duration, commencing on 1 March 2014 and automatically terminating on 28 February 2017.

[36] The express terms of the contract are contained in clause 1.1 to 1.4 of the contract:

> '1.1 The period of employment shall be of limited duration commencing on the 01 March 2014 and automatically terminating on 28 February 2014. In this instance, no separate notice of termination of the contract shall be necessary.
>
> 1.2 You agree that your employment is of fixed duration and that, no retrenchment procedure or severance pay shall be applicable. On expiry of the agreed period of your employment this contract of employment terminates automatically, which does not constitute a dismissal by the SABC.
>
> 1.3 You accept that once the period set out in paragraph 1.1 expires, there shall be no expectation or renewal or continuation of the contract of employment for a further period, nor for any indefinite period.
>
> 1.4 Despite the contract of employment being of limited duration, the contract shall either terminate automatically on expiry of the period set out in clause 1.1 or it could be terminated if the parties adhere to the provisions of clause 16 below.'

[37] Having regard to this contract, it is clear that the Applicant signed a fixed term contract which came to an end by an effluxion of time. The contract is clear that there would be no expectation of renewal after the expiry of the contract. It is further clear that at the expiry of the agreed period, the contract automatically comes to an end and that no notice is necessary.

[38] I am alive to the fact that an express term in a fixed term contract to the effect that the employee entertains no expectation of renewal is not a guarantee that no legitimate expectation can be found to exist[9]. In many cases, contracts that contain the standard clause stating that the employee had no right of renewal or expectation of renewal i.e. the so-called disavowal clause can still create a reasonable expectation. It is accepted on the authority of *Mediterranean Woollen Mills (Pty) Ltd v SACTWU*[10] that despite these clauses, a reasonable expectation could still arise during employment if assurances, existing practices and the conduct of an employer led the employee to believe that there was hope for a renewal, whether on a temporary or an indefinite basis and even then these factors are still subject to an objective assessment.[11]

[39] In this case, I have already dealt with the factors as enunciated by the case mentioned *supra* and it is my view that after an objective assessment of these factors, no legitimate expectation has been created.

[40] Therefore objectively assessed, the Third Respondent failed to place facts which could lead to a conclusion that he had an expectation that his contract would be renewed or that he had an expectation of permanency.

[41] The commissioner was correct in finding that the Applicant has not discharged the onus in terms of section 192 of the LRA in proving the existence of his dismissal.

[9] *Yebe and University of Kwa Zulu Natal (Durban)* 2007 ILJ 490 (CCMA).
[10] 1998 (2) SA 1099 (SCA).
[11] *Pikitup Johannesburg (SOC) Limited v Muguto and Others* [2019] 10 BLLR 1146 (LC).

[42] On the issue of costs, it is my view that law and fairness dictates that no costs order should be made.

[43] Therefore, the following order is made:

Order

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

C. Mogane
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: N.A Moyo, Instructed by Roy Ramdaw & Associates

For the Third Respondent: SABC Group Employees Relations