



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PR115/17

In the matter between:

SIPHIWE SPELLMAN

First Applicant

THOZINA PORTIAL KOTA

Second Applicant

NOZUKO TUSWA

Third Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

NALEDI BURWANA-BISIWE – N.O

Second Respondent

NELSON MANDELA BAY MUNICIPALITY

Third Respondent

Heard: 15 August 2019

Delivered: 20 December 2019

JUDGMENT

LALLIE, J

Introduction

- [1] The applicants seek an order in terms of section 145 of the Labour Relations Act¹ (the LRA), reviewing and setting aside an arbitration award of the second respondent (the arbitrator). The application is opposed by the third respondent (the municipality).

Background

- [2] The factual background to this dispute is, mainly, not in dispute. It is correctly captured by the arbitrator to include the fact that amongst the responsibilities of the municipality is housing development and delivery in collaboration with the provincial and national departments of Human Settlements. In discharging the responsibility the municipality employed a number of individuals in its housing sub-directorate on fixed term contracts, including the applicants. Some were employed directly and others through agencies.
- [3] The first applicant was employed as a project manager through an agency, Goba Consulting (Goba), in September 2012. In January 2013 he was appointed, through the same agency, on a 12 months' fixed terms contract (FTC), as the housing accounts manager. The second applicant was appointed directly by the municipality on a FTC as a project manager in May 2011. Her contract was renewed annually. The third applicant was employed on a fixed term contract by the municipality through Goba as a project manager in 2013.
- [4] In 2014 the municipality entered into fixed term contracts of employment with the first and third applicants directly which it renewed in 2015. When the last fixed term contracts of all the applicants expired on 31 May 2016, the municipality refused to renew them prompting the applicants to refer an unfair dismissal dispute to the first respondent (the bargaining council). They claimed that the refusal to renew their fixed term contracts constituted

¹ Act 66 of 1995, as amended.

dismissal as envisaged in section 186 (1)(b) of the LRA. Having arbitrated the dispute, the arbitrator dismissed the applicants' referral on the grounds that they had failed to prove their dismissal in terms of section 186 (1)(b) of the LRA and the bargaining council therefore lacked jurisdiction to arbitrate their dispute. It is that decision which the applicants seek to review and set aside in this Court.

- [5] The applicants' main grounds for review are that the arbitrator's decision that the bargaining council lacked jurisdiction is wrong. They submitted that the arbitrator misconceived the nature of the enquiry she had to conduct in concluding that if no dismissal took place she would have no jurisdiction to determine the reasonableness of the expectation of the renewal of their fixed term contracts. The applicants also attacked the award on the grounds that the arbitrator disregarded relevant evidence, misconstrued vital evidence, made errors of fact and interpreted and applied the provisions of section 186 (1)(b) of the LRA incorrectly.
- [6] The applicants further submitted that the decision reached by the arbitrator was disconnected from the material facts which had been placed before her. The grounds for review were amplified in the applicants' supplementary affidavit. The municipality opposed the application mainly on the grounds that based on the evidentiary material properly placed before the arbitrator, she reached a correct and reasonable decision. It added that the applicants' attempt to rely on evidence which was not tendered at arbitration was impermissible.
- [7] The decision under review is that the bargaining council lacked jurisdiction to arbitrate the applicants' case because they had failed to prove that they were dismissed as envisaged in section 186 (1)(b) of the LRA. The test for review therefore is whether the decision is correct and not whether it is reasonable².

² *IMATU and Others v City of Johannesburg Metropolitan Municipality and Others* [2014] 6 BLLR 545 (LAC)

- [8] Both the applicants and the municipality correctly argued that the approach the arbitrator was required to have adopted is enunciated as follows in *SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others*³:

[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 s 191 of the Act.'

The Court dealt with the question of the onus of proof in the following way⁴:

[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 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 players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair.'

- [9] The applicants sought to rely on both the incorrectness and unreasonableness of the arbitration award. Based on the correct test for the review application at hand, I will consider only the relevant grounds for review, namely, those in which the correctness of the award is challenged. The applicants submitted that the arbitrator conducted the enquiry incorrectly and consequently reached an incorrect decision.

³ (2008) 29 ILJ 2218 (LAC).

⁴ Ibid at para 44.

- [10] The arbitrator recorded, correctly, that the onus of proving the dismissal had to be discharged by the applicants. She correctly stated that the test whether the applicants had a reasonable expectation of the renewal of their fixed term contracts was objective. The arbitrator was further correct in taking into account that without proof of dismissal the bargaining council lacked jurisdiction to arbitrate the dispute.
- [11] The applicants' submission that the arbitrator failed to apply her mind to relevant evidentiary material properly placed before her, is, as the municipality correctly argued, incorrect. Applying the correct test for dismissal as envisaged in section 186 (1)(b) of the LRA the arbitrator referred to relevant authorities. She considered the applicants' submission that they should have been retained and their fixed term contracts renewed and extended pending the finalization of the recruitment process to fill the positions they occupied on a permanent basis in terms of the municipality's organogram and/or up to May 2019. She considered the applicants' argument that the municipality had sufficient funds to pay their salaries which it could source from unspent government allocated funds which had been rolled over from previous years. The arbitrator took into account the applicants' submission that when their last fixed term contracts expired, the respondent needed their services which remained necessary until May 2019 when the Integrated Human Settlements Programme Implementation Protocol Agreement (the Protocol) expired.
- [12] It is common cause that the last two fixed term contracts were concluded between each applicant and the respondent. The contracts had similar terms and ran from 2014 to 2015 and 1 June 2015 to 31 May 2016. In reaching her decision, the arbitrator relied on the following provisions of the fixed term contracts:
- [16] The contract will terminate
- 16.1 automatically and without notice on expiry of the term referred to in the contract, subject to any extension or renewal. It is specifically recorded that the contract shall not be interpreted in such a manner as to create expectations of a permanent

appointment, extension or renewal. The Municipality's decision not to renew or extend the contract shall not constitute an unfair dismissal and the contractor shall not be entitled to any form of compensation.

[18] Variation

No addition to or variation or mutually agreed cancellation or novation of this contract and no waive of any right arising from contract or its breach or termination shall be of any force or effect unless reduced to writing and signed by or on behalf of both parties.

[25] Notice

This contract is subject to the MHSCG Business Plan Based Project issued by the National Department. This contract is subject to funding based on the above project; therefore, the candidate is not entitled to expectation of renewal of the contract after the expiry date has occurred. The employment shall commence on the stipulated starting date and shall end upon the stipulated ending date. The contractor agrees that this contract is the whole contract between him/her and the Municipality and that no representations, promises or undertaking outside of this written contract are binding on the Municipality.'

- [13] The arbitrator found that the terms and conditions of the fixed term contracts were binding on the parties. The applicants argued that the award stands to be reviewed and set aside on the grounds that the arbitrator adopted a narrow interpretation of the basis of their expectation and disregarded other relevant factors which supported their version. The municipality correctly argued that their submission is not supported by the record including the award. Over and above taking the provisions of the fixed term contracts into account, the arbitrator considered the other documents the applicants sought to rely on. She rejected the applicants' evidence that they were promised and given undertakings by managers that their contracts would be extended until the positions they occupied were filled or the protocol expired. She gave reasons for rejecting their argument based on their contracts and relied on the following dictum of *SA Rugby* (supra):

‘clause 3.2 stating that the contracts automatically terminated on the dates set out and that the players acknowledged that they had no expectation that their contracts would be renewed on the terms contained therein or any other terms is to me of critical importance. This clause and other exclusionary clauses referred to above were deliberately included in the contracts in order for them to be part of the contracts and to mean what they were intended for. It would, therefore, be expected of the appellants to place more credible facts to make their expectation reasonable in the face of clause 3.2. The mere ipse dixit that there is an expectation, based on flimsy grounds, would not suffice.’

- [14] Contrary to the applicants’ submissions, the arbitrator considered the other grounds they sought to rely on which include the unreasonableness of the decision not to renew their fixed term contracts, the availability of work in terms of the protocol, the availability of funds to pay their salaries and the absence of other personnel to perform their work. She concluded, based on the test for reasonable expectation of the renewal of a fixed term contract that the availability of funds and work on its own was insufficient to base a decision of the renewal of a contract on the same or similar terms in the absence of the evidence that a reasonable expectation had been created. She concluded that the applicants had failed to prove that they were dismissed.
- [15] The applicants sought to rely on *Dierks v University of South Africa*⁵ in attacking the correctness of the arbitrator’s decision on the grounds that she failed to consider the availability of work, the purpose of the fixed term contract, the nature of the municipality’s business/operation and its inconsistent conduct. The applicants’ arguments are not supported by the evidentiary material presented at arbitration. It was not disputed that during the 2015-2016 financial year the National and Provincial Human Settlements Departments and the municipality agreed that housing delivery for the municipality in the following 3 years would be undertaken by the National Housing Development Agency (NHDA). One of the consequences of the

⁵ 1999 (20) ILJ 1227 (LC).

agreement was that the project on which the applicants were employed as well as its funding came to an end. On 1 July 2015 the HAD was charged with the responsibility of discharging the implementing protocol leaving the municipality with no role to play.

[16] The applicants did not succeed in proving that the arbitrator's decision was wrong. In the circumstances there exists no grounds for this Court to interfere with the arbitrator's decision.

[17] In the premises, the following order is made:

Order:

1. The application for review is dismissed.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Ntsepe
Instructed by Siya Cokile Inc Attorneys

For the Respondent: Advocate Voultsos
Instructed by W. Langson and Associates

LABOUR COURT