



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 1802 /2017

In the matter between:

KELETSO MOTLAASE

Applicant

and

**THE COMMISSION FOR CONCILIATION,
ARBITRATION AND MEDIATION**

First Respondent

NEO MOLOI N.O

Second Respondent

LAFARGE INDUSTRIES (PTY) LTD

Third Respondent

Enrolled: 11 June 2020

Delivered: 18 June 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 18 June 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 15 August 2017 under case number GAJB6450-17 where the Second Respondent (the arbitrator) found that there was no reasonable expectation created and dismissed his case.
- [2] The Third Respondent (Respondent) opposed the application.
- [3] The matter was enrolled for hearing on 11 June 2020. In accordance with the provisions of the 'Urgent directive in respect of access to the Labour Court' dated 28 April 2020, which is applicable with effect from 4 May 2020 until the end of the July 2020 recess, the parties agreed that this matter be disposed of without oral argument. I have considered the papers filed as well as the written heads of argument submitted by the parties.

Background:

- [4] In 2016, the Respondent embarked on a restructuring exercise, which resulted in a moratorium on permanent appointments. However, crucial positions were filled on a fixed term basis.
- [5] The Applicant was employed by the Respondent on a fixed term contract with effect from 1 September 2016 until 28 February 2017. He was employed in the position of process control system technician (PCST) at the Respondent's Randfontein operation in the cement division. The PCST position was regarded as a critical position.
- [6] The Applicant's contract provided *inter alia*, that his contract would automatically terminate on 28 February 2017 and that he accepted that his employment during the fixed period would not under any circumstances give rise to an expectation of a continued employment or any employment relationship beyond the fixed period.
- [7] The Applicant's contract automatically terminated on 28 February 2017 due to the effluxion of time. It was not renewed by the Respondent and the Applicant subsequently referred an unfair dismissal dispute to the First Respondent the Commission for Conciliation, Mediation and Arbitration (CCMA). His case was that he had a legitimate expectation that his contract would be renewed and it was not renewed.

The evidence adduced:

- [8] The issue to be decided by the arbitrator was whether the termination of the Applicant's contract fell within the meaning of dismissal as contemplated in section 186(1)(b) of the Labour Relations Act¹ (LRA). The Applicant's case was that he had expected his contract to be renewed or to be employed on a permanent basis.
- [9] In order to assess the arbitrator's findings, it is necessary to consider the evidence adduced at the arbitration proceedings.
- [10] The Respondent called Ms Kilifele as a witness. She referred to requests made by managers to fill vacant positions. She explained that the positions that existed, were vacant and permanent but could not be filled on that basis because of the moratorium placed on recruitment.
- [11] Ms Kilifele explained that the Respondent was in the process of restructuring its different sites and the cement division, where the Applicant was employed and had a number of sites that were part of the restructuring process. The Respondent could only appoint a limited number of persons in critical positions and on a fixed term basis due to the restructuring and moratorium placed on recruitment.
- [12] On 30 August 2016, the Respondent issued a letter to the Applicant, offering him a fixed term contract from 1 September 2016 until 28 February 2017. It was specifically recorded that he accepted that his employment during the fixed period would not in any circumstances give rise to an expectation of continued employment or any employment relationship beyond the fixed period. The Applicant accepted the offer and Ms Kilifele explained that even before the Applicant commenced his employment, he knew that his employment would be for a period of six months only and that the Respondent never created any other expectation.
- [13] Ms Kilifele testified that after the Applicant entered into the fixed term contract with the Respondent, there was never any offer extended to him to renew the contract, even after the termination of the contract, the Respondent did not

¹ Act 66 of 1995, as amended.

make any attempt to negotiate with the Applicant to be employed and there was no expectation that he would report for duty beyond that period.

- [14] It is evident from the transcribed record that in cross-examination, the Applicant posed a number of questions relating to restructuring and retrenchment to Ms Kilifele. Those questions were not relevant to the issue that the arbitrator had to decide and were not helpful to his case.
- [15] It was put to Ms Kilifele that the position that the Applicant was employed in was very critical and that it had to be filled on a permanent basis, more so because the previous incumbent of the position held the position for a period of nine years. Ms Kilifele explained that although the position was critical, it was not ranked to be that critical to call for the appointment of a permanent incumbent.
- [16] The Applicant testified that a legitimate expectation was created whilst he was working as a fixed term employee in the position of PCST. This is so for two reasons. Firstly, when he joined the Respondent, it was never explained to him why he was appointed in a fixed term position and his case is that there was no sound reasoning behind his fixed term employment. Secondly, the position he occupied was a permanent position and it was available. It was a critical position, with tasks only he could perform and he was performing very well.
- [17] The Applicant testified that in January 2017 his manager, Mr Gumede, did his performance appraisal and that created the impression that he would be employed beyond February 2017. Furthermore, the Respondent enrolled him for training courses and the last course which he attended, was in December 2016. In his view, it could not be that the Respondent would send him on training in December 2016 when his contract was to terminate in February 2017. The manner in which the Respondent invested in him, created the impression that his contract would not terminate in February 2017.
- [18] It was put to the Applicant in cross-examination that the fact that he was sent for training and that he was performing the job he was employed to do, do not render him a permanent employee. As an employee of the Respondent, he was sent for training to qualify him for the job he had to perform and as an

employee he was expected to perform his job. Furthermore, every employee underwent a performance appraisal process, which could result in a salary adjustment.

- [19] The Applicant conceded that he was never told that he would be permanently employed. He did not return to work on 1 March 2017 because the Respondent made it clear that his employment had ended. He did a medical exit and received a formal termination letter.

The arbitrator's findings

- [20] In his analysis of the evidence, the arbitrator recorded that he had to determine whether or not a legitimate expectation was created for the Applicant's contract to be renewed or for the position he had occupied to be made permanent.
- [21] The arbitrator recorded that the onus was on the Applicant to prove that he had a reasonable expectation that his fixed term contract would be renewed.
- [22] In the award reference is made to *University of Pretoria v CCMA and Others*² where the Labour Appeal Court (LAC) has held that section 186(1)(b) of the LRA does not provide for employees on fixed term contracts to claim that they had a reasonable expectation of permanent employment. The arbitrator found that a fixed term contract does not give rise to an automatic expectation of permanent employment and he dismissed the Applicant's claim in this regard.
- [23] In respect of section 186(1)(b) of the LRA, the arbitrator held that if the employer created a reasonable expectation that the contract would be renewed or extended, a claim in terms of the said section would be legitimate.
- [24] The arbitrator analysed the evidence of Ms Kilifele, which was that due to the moratorium on recruitment, only critical positions could be filled, after proper motivation and authorisation by senior management. The PSCT position was only authorised to be filled on a fixed term contract and was not regarded as critical for permanent appointment.

² [2012] 2 BLLR 164 (LAC).

- [25] The arbitrator dealt with the factors relied upon by the Applicant in support of his case that a legitimate expectation was created. The arbitrator rejected the Applicant's notion that a reasonable expectation was created because he performed his work well and that everyone was happy with his work on the basis that it is expected of every employee to perform their work well and that as such it does not create a reasonable expectation of renewal of a contract.
- [26] The arbitrator accepted that the PCST position was a critical position but that it was approved to be filled on a fixed term contract due to the moratorium on appointments. He found that the mere fact that a position is critical, does not create an automatic expectation of renewal of the contract, unless there had been a suggestion or promise by an authorised person to that effect. The arbitrator held that the fact that a performance appraisal took place and that the possibility of increasing the Applicant's salary was raised, is not sufficient to conclude an expectation of contract renewal. The only possibility was that of an increase of salary, not a possibility of extending or renewing the contract of employment.
- [27] In respect of the training that the Applicant received, the arbitrator held that the training was for the Applicant's benefit and was to equip him to perform his duties efficiently.
- [28] In conclusion, the arbitrator dealt with the test for reasonable expectation, which is two-fold – firstly whether the employee actually expected the contract to be renewed and secondly whether the expectation was reasonable. He held that the Applicant had an expectation that his contract would be renewed, but his expectation was based only on his hopes and was therefore unreasonable as no expectation was created that his contract would be renewed.
- [29] The termination of the Applicant's contract did not amount to a dismissal as envisaged in section 186(1)(b) of the LRA and the Applicant's case was dismissed.

The grounds for review

- [30] It is trite that a party who seeks to review an arbitration award is bound by the grounds for review contained in the review application, subject to one

qualification namely that the Court is obliged to deal with a point of law apparent from the papers³.

[31] In *Northam Platinum Ltd v Fganyago NO and Others*⁴ it was held that:

'In my view, the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit.

[32] *In casu*, the Applicant raised two main grounds for review in his founding affidavit. The first ground for review is that the arbitrator was biased and the second ground is that the arbitrator failed to apply his mind. The Applicant filed a supplementary affidavit wherein he elaborated on the same grounds for review, to wit the arbitrator's failure to apply his mind to the evidence and bias. I will deal with the grounds for review in turn *infra*.

[33] It is evident from the Applicant's heads of argument that the review application is pursued on the ground of reasonableness.

The test on review

[34] Section 186(1)(b) of the LRA provides for dismissal to mean that 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 at all. In such a case the existence or not of the dismissal determines whether the CCMA or bargaining council has jurisdiction to adjudicate the dispute. As soon as the requirements of section 186(1)(b) have been satisfied, it would be found that the employee had been dismissed and the employer would have to establish that the dismissal was both procedurally and substantively fair⁵.

[35] In *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others*⁶ the Labour Appeal Court held that:

³ *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at par 67 and 68.

⁴ (2010) 31 ILJ 713 (LC) at para 27.

⁵ *S A Rugby Players Association and others v S A Rugby (Pty) Ltd and others* (2008) 29 ILJ 2218 (LAC) at para 44.

⁶ (2013) 34 ILJ 1427 (LAC) at para 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 & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 ILJ 2218 (LAC); [2008] 9 BLLR 845 I (LAC) at para 39). The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 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.'

- [36] *In casu*, the Applicant's case is that he had a reasonable expectation that his contract would be renewed or that he would become a permanent employee but instead the Respondent failed to renew his fixed-term contract or to appoint him on a permanent basis. The Applicant had to establish a 'reasonable expectation' that his contract was to be renewed and that he was indeed dismissed. This clearly involved a determination of a jurisdictional fact.
- [37] The question whether a dismissal had taken place or not, goes to the issue of jurisdiction and it has been confirmed on numerous occasions that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁷ does not find application in reviewing a jurisdictional ruling or finding⁸.
- [38] This Court has to decide whether the arbitrator was right or wrong in finding that no legitimate expectation was created, thus that the Applicant was not dismissed. The question is not whether the finding that the Applicant was not dismissed was justifiable, rational or reasonable⁹ and it is also not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach.

⁷ (2007) 28 ILJ 2405 (CC) at paras 78 and 79.

⁸ *SA Rugby (Pty) Ltd v SA Rugby Player's Association and Another* (2008) 29 ILJ 2218 (LAC), *MEC Department of Health Eastern Cape v Odendaal and Others* (2009) 30 ILJ 2093 (LC), *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 ILJ 363 (LC), *Majatladi v Metropolitan Health Risk Management and Others* (2013) 34 ILJ 3828 (LC).

⁹ *SA Rugby (Pty) Ltd v SA Rugby Player's Association and Another* (2008) 29 ILJ 2218 (LAC) at para 41.

- [39] In considering whether an employee was dismissed or not, this Court has to consider the evidence that was placed before the arbitrator during the arbitration proceedings and has to decide the existence of dismissal and the issue of jurisdiction *de novo* and of its own accord¹⁰.
- [40] In the event that the review Court finds that the arbitrator was wrong in respect of his findings regarding the existence of a dismissal and thus jurisdiction, the award falls to be set aside on review. In the event that the Court finds that the arbitrator correctly found that an employee was dismissed, the reasonableness test as set out in *Sidumo*¹¹ will apply to the arbitrator's findings on procedural and substantive fairness.

Analysis of the grounds for review

Bias

- [41] The first ground for review is that the arbitrator was biased.
- [42] Bias in the context of a review application is regarded as a patent gross irregularity. The principles related to the concept of bias had been set out by the Courts and a brief overview of those principles is necessary.
- [43] In *Turnbull-Jackson v Hibiscus Coast Municipality and others (Ethekwini Municipality as amicus curiae)*¹² the Court held:

'Allegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deleterious to the confidence reposed by the public in administrators. The reactive bias claim stems from unsubstantiated allegations of corruption and incompetence. These are serious allegations, especially the one of corruption. Yes, if public officials are corrupt, they must be exposed for what they are: an unwelcome, cancerous scourge in the public administration. But accusations of corruption against the innocent may visit them with the most debilitating public opprobrium. Gratuitous claims of bias like the present are deserving of the strongest possible censure.'

¹⁰ *Trio Glass t/a The Glass Group v Molapo NO and others* (2013) 34 ILJ 2662 (LC) at para 22, *Kukard v GKD Delkor (Pty) Ltd* (2015) 36 ILJ 640 (LAC) at par 12 footnote 2, *Pecton Outsourcing Solutions CC v Pillemer NO and others* (2016) 37 ILJ 693 (LC) at para 16.

¹¹ *Supra* n 7.

¹² 2014 (11) BCLR 1310 (CC).

[44] In *Sepheka v Du Point Pioneer (Pty) Ltd*¹³ the Court threw caution as follows in respect of allegations of bias:

‘Any allegation of bias, especially on the part of a Judge of this Court, must be substantiated by a proper factual basis, must not be based on mere speculation and conjecture, and must be proved by the party alleging bias.’

[45] It is a trite principle of our law that in order to succeed with a claim of bias, more than mere conjecture must be shown. It happens in the normal course of events that litigants could harbour a sense of apprehension against those administering justice. This of course does not mean that anytime when a litigant is not happy with the proceedings or that the judgment or outcome is not in that party’s favour, a claim of bias would suffice.

[46] The Courts have time and time again warned against litigants making unfounded allegations of bias on the part of presiding officers tasked with deciding disputes, without cogent proof to substantiate those allegations.¹⁴

[47] It is a natural result of adversary litigation that one party would be successful and that the other party would fail. The mere fact that the outcome went in favour of the other party, does not render the presiding officer or decision maker biased. More is needed.

[48] *In casu*, the Applicant claims that the arbitrator was biased. To succeed with this ground for review, the Applicant has to prove bias and he has to substantiate his claim by a proper factual basis.

[49] In the founding affidavit this ground is supported by the following averment:
‘The second respondent was biased in not putting emphasis in (sic) the facts that the third respondent hired Les (former employee who resigned) on the fixed term contract while I was still employed, later terminated my contract, after three months, Les was made permanent without advertising that position.’

[50] These averments do not constitute bias, but rather unhappiness with the way in which the arbitrator dealt with the evidence before him.

¹³ (2019) 40 ILJ 613 (LC).

¹⁴ See for example *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO and Others* (1998) 19 ILJ 1240 (LC) at para 48; *SMCWU v Party Design CC* [2001] 6 BLLR 667 (LC) at para 12;

- [51] In his supplementary affidavit, the Applicant stated that the arbitrator conducted the proceedings in such a way that his conduct gave rise to a reasonable apprehension of bias. This is so because the arbitrator issued a ruling on 11 July 2017 which directed that the matter be rescheduled for arbitration on the ground that the dispute be arbitrated in terms of section 198 of the LRA. The Applicant's case is that he is excluded from the operation of section 198 as he earned above the threshold and the CCMA would not have jurisdiction to adjudicate a dispute in terms of section 198 of the LRA.
- [52] The Applicant had to approach this Court on an urgent basis to interdict the intended proceedings and to order the arbitrator to issue an award in respect of the dispute that was indeed arbitrated.
- [53] The Applicant's case is that the arbitrator, in acting as aforesaid, intervened in the proceedings with the intention to advance the Respondent's case to his detriment.
- [54] In my view, there is no merit in this ground for review.
- [55] The arbitrator's intention to reschedule the dispute for arbitration and for the matter to be arbitrated in respect of another section of the LRA, is unknown and in any event it never materialised as it was interdicted by this Court. Even if the arbitrator's intention was to advance the Respondent's case by the rescheduling of the arbitration, as alleged by the Applicant, it did not happen. Whatever the intention was, it never went over to action and that intended process had no bearing on the outcome of the arbitration proceedings that led to the arbitration award, which is the subject of this review application.
- [56] The Applicant failed to prove bias and to substantiate his claim by a proper factual basis.

Failure to apply his mind

- [57] The crux of the second ground for review raised by the Applicant as set out in his founding and supplementary affidavits is that the arbitrator failed to apply his mind, that he had ignored evidence or failed to consider evidence. The Applicant submitted that the arbitrator's failure as aforesaid, resulted in a decision that a reasonable decision maker could not reach. The argument put

forward in the heads of argument, is that the arbitrator's decision is one that a reasonable decision maker could not reach, given the evidence that was placed before him. The grounds for review are firmly based on reasonableness.

[58] 'Reasonableness' finds no application *in casu*. I have already alluded to the test to be applied in an application such as this one *supra*.

[59] In *NUMSA obo Zahela and Three Others v Volkswagen SA (Pty) Ltd and Others (Zahela)*¹⁵ an application for review was dismissed where the applicant incorrectly relied on 'reasonableness' instead of 'correctness' and it was held that:

'In other words, reasonableness ordinarily has no place in a review where the enquiry is whether or not the CCMA had jurisdiction. This is an assessment that must be made objectively, having regard to the facts placed before the commissioner. It amounts to a determination of whether the commissioner's decision was correct.

It follows that in a matter such as the present, where the proper right of review is one based on correctness that is the case that must necessarily be pleaded. The applicant, mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator's decision. Mr Niehaus, who appeared for the applicant, did not dispute that the applicant had sought intervention on a basis that was incorrect. He requested the court to postpone the matter and to grant the applicant leave to file amended papers in order to address the error.

There are a number of considerations that compelled me to conclude that a postponement and the concomitant further delay in the resolution of these proceedings was not appropriate in the circumstances. First, as I have indicated, the fact of the matter is that the applicant has approached this court on the basis of pleadings that posit the incorrect test. All of the submissions in the founding papers, to the extent that they suggest that the arbitrator failed to appreciate the nature of the enquiry that she was to conduct and that her decision fell outside of the band of decisions to which reasonable people could come on the available material, are irrelevant. The applicant would be obliged to make out an entirely new case for review. The present situation is not dissimilar to that where a plaintiff elects the wrong cause of action to pursue

¹⁵ Unreported case number PR 137/13, handed down on 16 November 2016.

his or her claim. It is not open to a plaintiff, generally speaking, in those circumstances simply to seek to remove the matter from the trial roll and introduce a new cause of action.'

[60] This Court has followed the *dicta* in *Zahela*¹⁶ in *SA Post Office SOC Ltd v CCMA and Others*¹⁷ and I see no reason not to follow same in this instance.

[61] The application before me is interspersed with allegations relating to reasonableness and the grounds for review are clearly seeking a review of the arbitration award because it falls short of 'reasonableness'. All those allegations are irrelevant as the test to be applied is correctness.

[62] It is trite that an applicant's case should be made out in the founding affidavit and in a review, that case can be supplemented in a supplementary affidavit. *In casu*, the case made out is for the review of an arbitration award on the basis that it is unreasonable. This application was based firmly on the reasonableness test and it admits no scope for a correctness argument. In fact, there is not a single averment made to support a case on the basis that the arbitrator was incorrect.

[63] I re-iterate: reasonableness has no place in a review such as this one and the grounds for review relating to reasonableness cannot be considered. The Applicant has failed to make allegations to sustain this application as he clearly approached this Court on the basis of an incorrect test. This is fatal to the Applicant's case and on this ground alone the application should be dismissed.

Costs

[64] This Court has a wide discretion in making a cost order, considering the requirements of law and fairness.

[65] This Court is ordinarily reluctant to make orders for costs against individuals, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is not an immutable rule.

¹⁶ Ibid

¹⁷ (2018) 39 ILJ 1350 (LC).

[66] This is a matter where a cost order would be warranted, however I am alive to the fact that the Applicant represented himself in this matter. A cost order may burden him beyond what he may be able to bear.

[67] In my view, the interest of justice will be best served by making no order as to costs.

[68] In the premises I make the following order:

Order

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

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

Applicant: In person

Third Respondent: Solomon Holmes Attorneys