



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2187/17

In the matter between:

MARIA CHRISTINA CAMPHER

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER THEMBEKILE NSIBANYONI

Second Respondent

**THE SOUTH AFRICAN BROADCASTING
CORPORATION SOC LIMITED**

Third Respondent

Heard: 18 May 2020

Delivered: 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 25 June 2020.

Summary: Review application – once the employee accepts the offer for a position which is clearly a fixed term contract there is no turning back to the erstwhile permanent contract of employment – reasonable expectation that a fixed term contract would be

renewed can be supported by practice or assurance by senior managers – reinstatement is an adequate remedy.

JUDGMENT

NKUTHA – NKONTWANA, J

Introduction

- [1] In this application, the applicant, Ms Maria Christina Campher (Ms Campher), seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner), under the auspices of the first respondent, Commission for Conciliation Mediation and Arbitration (CCMA), dated 12 September 2017 under case number GAJB25668-16.
- [2] This application is opposed only by the third respondent, the South African Broadcasting Corporation SOC Limited (SABC).
- [3] Ms Campher's impugn against the award is that the Commissioner committed gross misconduct in relation to her duties as an arbitrator; and alternatively, that she committed a gross irregularity in the conduct of the arbitration proceedings rendering the award which a reasonable decision-maker could not have made having regard to the material facts before her.

Pertinent facts

- [4] Ms Campher was employed by the SABC as the Payroll Manager: Technical and Compliance on permanent basis, a position she held from 2008 to April 2013. She was then offered a position of Chief Financial Controller, which was a five-year fixed term contract, with effect from 1 May 2013 which was prematurely terminated on 31 October 2016.
- [5] It is not in dispute that Ms Campher had meetings with Messrs Kobus Potgieter (Mr Potgieter) and Andre Weber (Mr Weber) from the SABC's Group Employee Relations Department who advised that the SABC intended to

terminate her services because there was 'no room' for her in the structure. She was subsequently served with a letter dated 25 October 2016 notifying her that the SABC had resolved to terminate the employment relationship and pay her for the balance of her fixed term contract which was 18 months. Subsequent to obtaining a tax directive from South African Revenue Service (SARS), Ms Campher was paid an amount of R1,796,952,31.

[6] On 18 November 2016, Ms Campher referred an unfair dismissal disputed to the first respondent, Commission for Conciliation, Mediation and Arbitration (CCMA), seeking reinstatement. The conciliation was unsuccessful and the matter was referred to arbitration.

[7] The main issues for determination during arbitration were identified as follows:

- 7.1. Whether Ms Campher was employed on permanent basis? If so, whether her dismissal was procedurally and substantively unfair justifying her reinstatement?
- 7.2. Alternatively, if it were to be found that Ms Campher was employed on a fixed term contract, whether she had a legitimate expectation that her contract would be renewed for a further period of five years.
- 7.3. Whether the true reason for the applicant 's dismissal was because she was viewed by management of the Third Respondent as a stumbling block to the approval of certain bonus payments to the SABC's erstwhile Acting Operating Officer, Mr Hlaudi Motsoeneng (Mr Motsoeneng); the payment of exorbitant professional fees to contractors of the Third Respondent; and because she repeatedly drew the attention of senior management of the Third Respondent to her concern about the solvency of the Third Respondent.
- 7.4. Whether, if it were found that the applicant was employed on a fixed term contract, the amount paid to her by the Third Respondent at the termination of her services was correctly calculated?

[8] Dismissing Ms Campher's unfair dismissal case, the Commissioner, found that:

- 8.1. Ms Campher was not a permanent employee of the SABC but was on a five-year fixed term contract which had been prematurely terminated by the SABC.
- 8.2. Ms Campher failed to prove that she had a legitimate expectation that her fixed term contract would be renewed beyond the five-year period;
- 8.3. Ms Campher's claim that the true reason for termination of her contract was because she was viewed as an obstacle to the payment of certain bonuses to Mr Motsoeneng was not supported by evidence.

[9] The Commissioner, deferred the dispute between the parties pertaining to the calculation of the amount paid to Ms Campher by the SABC to a process that had to involve actuaries agreed to by the parties. It would seem that this issue is still in dispute, but the parties accept that it is not the subject matter in these proceedings.

Review test

[10] The review test is trite. The award must be one that a reasonable decision-maker could have arrived at for it to escape being assailed.¹ However, that is not the end of the enquiry. In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,² LAC stated that:

[15] ...the Labour Court's approach to the review of the Commissioner's award transcends the mere identification of process related errors to

¹ *Sidumo v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110; see also [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC); See also *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC). *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia)* [2013] 11 BLLR 1074 (SCA).

² [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC) at paras 15 to 16.

reveal the Commissioner's basic failure to apply his mind to considerations that were material to the outcome of the dispute, resulting in a misconceived hearing or a decision which no reasonable decision-maker could reach on all the evidence that was before him or her.

- [16] Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court in *Head of the Department of Education v Jonas Mohale Mofokeng and Others*, 'for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result'. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator 'must not misconceive the inquiry or undertake the inquiry in a misconceived manner', as this would not lead to a fair trial of the issues. In further approval of *Herholdt*, this Court in *Mofokeng* stated that:

'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.' (Emphasis added)

Was Ms Campher employed on a permanent contract?

- [11] Ms Campher persists that she was employed on permanent basis when her contract of employment was terminated. She asserts that since the fixed term

contract was never signed by both parties it never came into existence. I deem it unnecessary to be arrested by this issue. Ms Campher concedes that she signed the offer of employment dated 18 April 2013 which clearly states the commencement date as 1 May 2013 and fixed end date as 30 April 2018.

- [12] It is evident from the correspondence between her and Mr Mzu Ndlovu (Mr Ndlovu), the Human Resources Manager: Group Services, after she received the fixed term contract that she took no issue with her appointment on fixed term basis. She only raised the issue of continuity as a membership of pension fund given the change from permanent to fixed term contract.
- [13] Ms Campher continued to accept the benefits attached to the position of Chief Financial Controller and performed the responsibility attached to that position for more than three years. As correctly submitted by counsel for the SABC, if she did not want to accept the promotion and increase in salary, she should have declined the offer.
- [14] The Commissioner's finding that Ms Campher was employed on fixed term contract cannot be faulted.

Did Ms Campher have reasonable expectation that her fixed term contract would be renewed?

- [15] The SABC takes issue with Ms Campher's assertion that she had a reasonable expectation that her fixed-term contract would be renewed. Counsel for the SABC submitted that Ms Campher presented two inconsistent cases; her persistent claim that she remained a permanent employee is inconsistent with her case that she had a fixed term contract which she legitimately expected that it would be extended.
- [16] Ms Campher deals with the SABC's contention in the founding and replying affidavits and asserts that the fixed term contract case is pleaded in the alternative. In my view, it is perfectly sensible that a party would mount two alternative cases. In fact, the commissioner entertained and pronounced on

both cases. As such, I do not think that I should say anything further in this regard.

[17] Ms Campher gave a detailed explanation as to why she harboured an expectation that her fixed term contract would be renewed. She testified that she was aware that General Managers who were employed at salary scale code 120 or above were appointed on five year fixed term contracts. However, it was the SABC's practice to roll over or renew the fixed term contracts.

[18] She had discussions with other staff members within the Finance Department, including Mr Christiaan Olivier (Mr Olivier), who was an Acting Financial Officer of the SABC at that time and her supervisor, and they all assured her that it was practice at the SABC that fixed term contracts do get renewed. Mr Olivier, confirmed this practice in his evidence. There was also a list with names of the staff members in the Finance and Human Resources Departments whose fixed term contracts had been rolled over. This evidence was not controverted.

[19] Ms Campher testified that her position as Chief Financial Controller was relevant to the SABC. Even though there were discussions on the new structure in 2015, she had discussed her suitability for a position of General Manager: Shared Services with Mr James Aguma (Mr Aguma), the then Acting Financial Officer. Also in September 2016, Ms Campher attended a workshop where the proposed new structure for the SABC Finance Department was presented and discussed. Ms Audrey Raphela, the then acting Chief Financial Officer, assured the staff members that there would be a place for everyone in the new structure and that individual meetings would be held with staff members to discuss their positions in the new structure. This evidence was not controverted.

[20] The SABC led the evidence of Mr Jaco van Staden (Mr Van Staden), a Remuneration and Information Specialist in the SABC's Human Resources Department. His testimony was mainly about the events post the termination

of Ms Campher's contract of employment. He testified that the position of the Chief Financial Controller had been delimited in December 2016. He explained delimiting as taking a position off from the structure; which could be reinstated after following a process.

[21] Mr Van Staden also presented the organogram for the SABC's Finance Department dated 20 June 2017 with no reference to the position of Chief Financial Controller. Ms Campher disputes the contents of the organogram mainly because it is not consistent with the discussions she had with Mr Aguma and Raphela on the proposed new structure immediately before the termination of her contract of employment.

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

‘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*...

[23] The Commissioner was required to determine whether on the facts before her, objectively considered, it had been proven that Ms Campher held a reasonable expectation that her contract would be renewed.³ The Commissioner accepted the organogram for the new structure of the SABC's Finance Department that was presented by Mr Van Staden as the only cogent evidence. In turn, she rejected Ms Campher's evidence that she had reasonable expectation that her fixed term contract would be renewed.

³ See: *Dierks v University of South Africa* (1999) 20 ILJ 1227(LC); [1999] 4 BLLR 304 (LC) paras 137 to 138; see also: *SA Rugby Players' Association and Others v SA Rugby (Pty) Ltd and Others* [2008] 9 BLLR 845 (LAC); (2008) 29 ILJ 2218 (LAC) at para 44.

Conversely, the transcript shows that Van Staden confirmed that it was practice at the SABC to renew fixed term contracts. He also conceded that at least four employees (Mr Lambert, Mr Shaw, Ms M Dlamini and Mr Modau) at Finance Department, who were at the same level as Ms Campher and also reporting to Mr Aguma, had their fixed term contracts renewed more than once in some instances.

[24] Notably, Ms Campher's evidence about the discussions with Mr Aguma and Ms Raphela on the proposed new structure, with her individually and collectively with her colleagues at the Finance Department, which assured her that she would be accommodated in the new structure went uncontested. Ms Campher's interrogation by Counsel for the SABC riveted over whether, given her assertion that she was employed on permanent basis, could she have had a reasonable expectation that her fixed contract would be renewed. As stated elsewhere in this judgment, these cases were pleaded and pursued in the alternative.

[25] In addition, Ms Campher had no reason to doubt that her employment with the SABC would have continued beyond the expiry of her fixed term contract in any similar position as assured by her senior managers, Mr Aguma and Ms Raphela. In my view, the delimiting of Ms Campher's position from the structure or its absence from the new organogram is accordingly not fatal to her case that she had a reasonable expectation that her fixed term contract would be renewed.

[26] Ms Campher was suspicious that there was 'no room' for her in the SABC structure hence the premature termination of her fixed term contract. She testified that the true reason for the premature termination of her fixed term contract was because she was viewed as an obstacle to the payment of Mr Motsoeneng's bonuses. She had raised concerns about the liquidity of the SABC and the lawfulness of the verbal instruction she had received to effect the first instalment of about R11 million for Mr Motsoeneng's bonus. In fact, Mr Motsoeneng's *modus operandi* at the SABC during his tenure as the Chief Operating Officer and controversy around the payment of the R11 million

bonus received reportage in various newspaper articles which were part of the evidence before the Commissioner. The essence of Ms Campher's evidence in this regard is that, but for her questioning of the payment of Mr Motsoeneng's R 11 million bonus, her fixed term contract would not have been prematurely terminated.⁴ In the absence of any evidence in rebuttal, the evidence of Ms Campher must stand.

[27] Therefore, it was incumbent upon the SABC to prove that the dismissal of Ms Campher was procedurally and substantively fair and it failed dismally.

[28] The Commissioner clearly misconceived the nature of the enquiry and, consequently, there was no fair trial of the issues. Put otherwise, the Commissioner diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

Conclusion

[29] Given the outcome that I have arrived at above; it would be superfluous to deal with the other issues that arose in this matter. It follows that the award stands to be reviewed and set aside.

[30] In the interest of justice, I deem it expedient not to remit this matter back to the CCMA. The issues were properly ventilated during the arbitration proceedings and the adequacy of the record of those proceedings is not placed in issue. I am, accordingly, in a position to determine the matter to its finality.

[31] In the light of the findings I have arrived at above, it is clear that the dismissal of Ms Campher was procedurally and substantively unfair.

[32] Turning to the issue of remedy, Ms Campher seeks reinstatement. The SABC contends that reinstatement would not be an appropriate remedy because the position of Chief Financial Controller is no longer part of the SABC's Finance

⁴ See: *Department of Agriculture, Forestry and Fisheries v Baron and Others* (2019) 40 ILJ 2290 (LAC); [2019] 12 BLLR 1289 (LAC) at para 38 -39.

Department structure and the manner in which she approached her case, accusing the SABC on bad faith and malfeasances. This argument is untenable given the light of its concession that Mr Motsoeneng has been dismissed from the SABC. The argument that Ms Campher ought to have led evidence to show her how she mitigated her loss subsequent to her dismissal is equally untenable as it was rejected by the Constitutional Court in *Billiton Aluminium SA Ltd v Khanyile*,⁵ for it undermines the claim to the primary statutory remedy of reinstatement.

- [33] In *Department of Agriculture, Forestry and Fisheries v Baron and Others*,⁶ the Labour Appeal Court (LAC) dealt with the practicability of reinstatement in similar circumstances and pronounced as follows:

‘...The provisions of section 193 of the LRA are clear and its meaning has been clarified in decisions, *inter alia*, of this Court and the Constitutional Court. Mr Baron had no *onus* to show that it was not reasonably practicable for him to be reinstated. Having found that Mr Baron had been dismissed as is contemplated in section 186(1)(b) of the LRA – in accordance with section 193 – the arbitrator had to require Mr Baron’s reinstatement. Mr Baron wanted to be reinstated to the position he held at the time of the dismissal letter, which was to be extended for three years. There was nothing to show that the circumstances surrounding the dismissal are such that the continued employment relationship would be intolerable. There was further nothing to show that it was not reasonably practicable for the Department to reinstate Mr Baron as he had sought, and Mr Barron’s dismissal was reasonably found to be both, substantively and procedurally unfair.’ (Footnotes omitted)

- [34] Even in the present case, Ms Campher cannot be denied the primary remedy in terms of the LRA, specifically seeing that there is no evidence to show that it would not be reasonably practicable to do so. She must be reinstated to the position she occupied before she was dismissed; alternatively, to the same or similar position to the one she occupied before she was dismissed on the

⁵ *Billiton Aluminium SA Ltd v Khanyile* [2010] 5 BLLR 465 CC at paras 40 – 42.

⁶ *Ibid* at para 42.

same or similar terms and conditions of employment and without loss of benefits with effect from 1 May 2018. The SABC shall pay Ms Campher full back pay for the period between 1 May 2018 and the date of this order.

Costs

[35] It is trite that costs do not follow the result in this Court. Notwithstanding, this is a typical case where it would not offend the principles of fairness and equity that the SABC be ordered to pay the costs. Ms Campher is an individual litigant who had to spend so much to vindicate her rights against a patently arbitrary decision to terminate her employment contract.

[36] In the premises, I make the following order:

Order

1. The arbitration dated 12 September 2017 issued under case number GAJB25668-16 is reviewed and set aside and substituted with the following order:
 - 1.1 The dismissal of Ms Maria Christina Campher was procedurally and substantively unfair.
 - 1.2 The South African Broadcasting Corporation SOC Limited is ordered to reinstate Ms Campher to the same or similar position to the one she occupied before her dismissal and on the same or similar terms and conditions of employment with effect from 1 May 2018.
 - 1.3 The South African Broadcasting Corporation SOC Limited shall pay Ms Campher full back pay for the period between 1 May 2018 and the date of this order.
2. The South African Broadcasting Corporation SOC Limited shall pay the costs.

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

Appearances:

For the Applicants: Advocate G Pretorius SC

Instructed by: Makaula Zilwa Inc.

For the Respondent: Advocate P Bosman

Instructed by: Brand Potgieter Attorneys