IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR54/18

In the matter between:

THRU NAIDOO **Applicant**

and

T NSIBANYONI N.O. **First Respondent**

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

NATIONAL HOME BUILDERS REGISTRATION COUNCIL **Third Respondent**

Date heard: 10 March 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 June 2020.

Summary: Review of arbitration award; whether the applicant had a reasonable expectation of renewal of contract; representation inducing reliance must be lawful and competent; *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E-G as cited in *Zungu v Premier, Province of Kwazulu-Natal and Another* (2017) 38 ILJ 1644 (LAC) followed.

JUDGMENT

RABKIN-NAICKER, J

[1] This is an opposed application to review and set aside an arbitration award under case number GAJB13644-17. The first respondent (Commissioner) found that the applicant failed to prove that she had a reasonable expectation that her contract of employment would be renewed. There is also an opposed condonation application for the late filing of the answering affidavit. The third respondent tendered the costs of that application. I have decided to exercise my discretion to grant condonation and deal with the merits of the review below.

[2] The applicant was employed by the fourth respondent (the employer), a regulatory body in the home building industry. The employer is a Schedule 3 Public Entity to which the Public Finance Management Act[1] (PFMA) applies. The applicant was the Head of Human Capital and was on a five year fixed term contract, commencing in February 2012 and to end in February 2017. On 20 February 2017, the applicant was issued with a second contract that ended on 30 April 2017. A further extension was given until 31 May 2017.

[3] The position of Human Capital position had been advertised towards the end of 2016 and the applicant applied for the position with other external applicants. She was shortlisted and interviewed but was not appointed to the position.

[4] It is submitted that the Award is reviewable because the Commissioner failed to take account of material evidence and to apply her mind to the evidence before her, placing undue weight on the employer's evidence and no or adequate weight on the applicant's evidence and her conduct raised a reasonable apprehension of bias. It is also submitted that she misconstrued the nature of the enquiry when she stated that the Commission could not condone the applicant's disregard of the employer's recruitment policy.

[5] I deal first with the material evidence as tendered by the applicant, and which is alleged to have not been taken into account by the Commissioner, i.e. that:

[1] Act 1 of 1999.

5.1. She was given undertakings by the CEO of the employer as well as three other members of management that she would get the position;

5.2. The position of Human Capital Manager was advertised less than three months prior to the expiry of her fixed term contract;

5.3. She had been granted leave during her notice period, contrary to the employer's policy and her employment contract;

5.4 Her employment contract for the period 20 February 2017 – 30 April 2017 reflected a substantial salary increase;

5.5 Her performance review took place on 30 April 2017 and an individual development contract was signed for the period 1 April 2017 – 31 March 2018;

5.6 The interview for the post of Human Capital was postponed twice; and

5.7 The evidence reflected in the MANCO meeting minute of 21 November 2016 that the CEO undertook that advertisements be placed quickly and that all managers be re-appointed.

[6] The Commissioner found that even if the evidence of the undertakings by the CEO and others were to be believed:

> "….the Applicant is an HR executive with extensive experience of more than 20 years and is the custodian of the HR Policies (My emphasis), it was indeed her duty to remind her superiors that renewal of a contract without following proper procedures was in contravention of the Respondent Policy."

[7] In the Award, the Commissioner continues in the vein quoted above, as follows:

> "73. In fact it was the Applicant's testimony that she was told that she must just go through the "motions" which is a dire contravention of the Respondent's Policy, which the Applicant is a custodian thereof.
>
> 74. Proper procedures were indeed followed and the Applicant was not successful in her Application for the position and it was at all times in the knowledge of the Applicant that the Respondent was to contravene the policy to appoint her because she was supposed to go "through the motions".

75. The Applicant can therefore not expect the Commission to condone the contravention of the Policy of the Respondent.

76. It is therefore my conclusion that the Respondent followed proper procedure in terms of its Recruitment and Selection. For the mere fact that the Applicant subjected herself to an interview, objectively suggest that she was aware that there was no lawful or reasonable expectation that her contract was to be renewed."

[8] The above statements actually reflect a key legal question at issue in the dispute before the Commissioner. On the applicant's own version, it was represented to her that the selection and recruitment process were to be a facade, despite the advertising of the position to external applicants. Her case was premised on reliance on such representations.

[9] In *Zungu v Premier, Province of Kwazulu-Natal and Another*[2], the LAC in dealing with a matter concerning the reasonable expectation of renewal of a fixed term contract, referred to the judgment of *National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 (W)* as follows:

> '[27] A legitimate expectation "arises where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken". De Smith, Woolf and Jowell Judicial Review of Administrative Action 5th ed at 417, para 8-037.
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> Such an expectation may arise, "either from an express promise given on or behalf of a public authority or from the existence of a regular practice which the claimants can reasonably expect to continue". *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 (HL) ([1984] 3 All ER 935) at 401B-C; *Administrator, Transvaal, and Others v Traub, and Others* 1989 (4) SA 731 (A) at 756I; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059) in para [212].[28] The law does not protect every expectation but only those which are "legitimate". The requirements for legitimacy of the expectation, include the following:

[2] (2017) 38 ILJ 1644 (LAC).

(i) The representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification": De Smith, Woolf and Jowell (op cit at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: *Administrator, Transvaal v Traub* (supra at 756I-757B); De Smith, Woolf and Jowell (supra at 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: *De Smith, Woolf and Jowell* (op cit at 422 para 8-050); *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h-j.

(iv) <u>The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E-G.'"</u> (My emphasis)

[10] A 'reasonable' expectation is used interchangeably with the term 'legitimate' expectation in the jurisprudence of the Labour Courts[3]. The requirement that the representations of the CEO and others had to be competent and lawful in order to raise a reasonable expectation on the part of the applicant, applies *in casu*.

[11] It is not necessary in these circumstances for the Court to decide on the credibility of the respondent's witnesses at the arbitration, or the other procedural issues raised by the applicant such as the refusal by the Commissioner to grant a postponement. The question whether the employer's failure to renew the fixed-term contract of employment constitutes a dismissal within the meaning of s 186(1)(b) of the Labour Relations Act[4] (LRA) is a legal one. In other words, the commissioner hearing the matter is called upon to determine the conclusion of

[3] See: *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2234 (LAC) at para 8 in which the court referred to "<u>any legitimate expectation or reasonable expectation as the phrase is employed in s 186(1)(b)"</u>

[4] Act 66 of 1995 as amended.

law[5]. The enquiry is concerned with both the subjective expectation of the applicant and secondly, if she did have such an expectation, whether taking into account all the facts, that expectation was reasonable, which is the objective element.[6] In the matter before me there could not be a reasonable expectation on an objective basis because as a matter of law, the applicant's subjective views relied on incompetent and unlawful representations. This on her own version. The Commissioner did not misconstrue the nature of the enquiry before her in dealing with the lawfulness of the undertakings which the applicant claimed she had received.

[12] The Commissioner was therefore correct in her conclusion that the applicant had not met the onus of showing that she had a reasonable expectation of renewal of her fixed term contract and as a consequence, a dismissal had not taken place. The review application therefore stands to be dismissed.

Costs

[13] On the issue of costs, I grant these only in respect of the condonation application. For the rest, each party is to pay its own costs there being no exceptional circumstances for costs to follow the result.

[14] In the premises, I make the following order.

Order

1. The application for condonation is granted with costs to be paid by the third respondent.
2. The review application is dismissed with no order as to costs.

H Rabkin-Naicker

H. Rabkin-Naicker

[5] See: *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others* (2013) 34 ILJ 1427 (LAC) at para 35.
[6]See: *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC)

Judge of the Labour Court of South Africa

Representation:

For the Applicant: Advocate T. Govender

Instructed by: J. Chetty Attorney

For the Third Respondent: Advocate XD Matyolo

Instructed by: Gildenhuys Malatji Incorporated