



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR1528/2020

In the matter between:

**SAMWU obo C MOGOROSI
AND 15 OTHERS**

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

TIYANI MAKHUBELA N.O.

Second Respondent

RAND WEST CITY MUNICIPALITY

Third Respondent

Heard: 22 May 2024

Delivered: 24 January 2025

JUDGMENT

MOLOTSI, AJ

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act¹ (LRA). The Applicant is, South African Municipal Workers Union (SAMWU) on behalf of Mogorosi and 15 others, a registered trade union. The third respondent is, Rand West City Municipality, a municipality duly constituted in terms of the Local Government Municipal Structures Act². The arbitration proceedings were held under the auspices of the first respondent, the South African Local Government Bargaining Council (Council.)
- [2] The second respondent, Tinyane Makhubela (commissioner), issued the arbitration award on 7 September 2020, concluding that the applicants failed to discharge the onus to prove that they were dismissed by the third respondent. The commissioner made a finding that the applicants were not dismissed but rather their contracts of employment expired.
- [3] Aggrieved with the outcome of the arbitration award, the applicants launched a review application on 22 October 2020.

The relevant facts

- [4] The applicants were initially employed by the third respondent on a two year fixed term contracts. The fixed term contracts commenced from 2013. The contracts were continuously renewed until 2019. The applicants were employed as supervisors and community health workers.
- [5] Sometime in June 2019, the applicants were furnished with new fixed term contracts. The fixed term contracts had the start period of 1 July 2019 ending 30 June 2021 as per the applicant's version. The version of the third respondent was these contracts only had the commencement date and no

¹ No. 66 of 1995, as amended.

² No. 117 of 1998.

ending date and not signed by the third respondent. The applicants signed these contracts on 27 June 2019. There were other fixed term contracts.

- [6] These fixed term contracts commenced on 1 July 2019 until 30 September 2019. It was a three months fixed term contracts. It appears that this was the extension of contracts for a period of three months after the expiry of the applicants' previous fixed term contracts which commenced from 1 July 2017 until end of June 2019.
- [7] The applicants alleged that they were dismissed on 30 September 2019.
- [8] The applicants referred a dispute to the Council contending that the termination and/or non-renewal of fixed term contracts of employment constituted a dismissal in terms of section 186 (1)(b) of the LRA and that such a dismissal was unfair. In the referral form the date of dismissal is 23 October 2019.
- [9] According to the certificate of non-resolution dated 5 December 2019, the applicant referred the dispute to conciliation on 6 November 2019. The dispute could not be resolved by means of conciliation and the certificate of non- resolution was issued. The applicants then requested the dispute to be resolved by means of arbitration by completing the request for arbitration form (7.13 form). The request for arbitration is dated 12 December 2019.

Jurisdictional issue

- [10] During the hearing of the review application as Counsel were making submissions, this Court observed that: (a) It was common cause that the applicants last day at work was on 30 September 2019 when the three months fixed term contract expired; (b) The certificate of non- resolution issued on 5 December 2019 stated that the dispute was referred to conciliation on 6 November 2019; (c) in the referral form (7.11) the applicants

alleged that the date of dismissal is 23 October 2019; (d) the referral form (7.11) was signed on 31 October 2019.

- [11] This Court requested Counsel to file supplementary heads of arguments to address the issue as to whether the Council had jurisdiction to arbitrate the dispute and /or whether the dispute was referred late to the Council. The parties were further requested to indicate when was the date of dismissal. The applicants never applied for condonation for the late referral of the dispute to Council nor was there any ruling from Council granting condonation to the applicants for the late referral of the unfair dismissal dispute.
- [12] This Court only received the supplementary heads of arguments from the applicants.
- [13] The approach of this Court is that the jurisdictional issue raised during the hearing is dispositive of the matter and that there is no need at this stage to deal with the merits of the review application.

Submissions by the applicants

- [14] The applicants submitted that they signed a fixed term contract terminating on 30 June 2021. They therefore had no knowledge of a fixed term contract terminating on 30 September 2019 and as such had no knowledge of the significance of the date 30 September 2019 until they were advised by the third respondent in its letter dated 23 October 2019. Furthermore, the applicants testified that they never read the contract with termination date 30 September 2019 after they were recalled to correct errors to the initial contract with termination date of 30 June 2021.
- [15] The applicants submitted that the date of dismissal is 23 October 2019 as provided in the dispute referral form which date was not challenged or disputed by the third respondent during the arbitration proceedings. The applicants were paid for the period of 1 October to 31 October 2019.

- [16] On conspectus of all the evidence objectively determined, the date of dismissal is in October, specifically 23 October 2019. Therefore, the commissioner had jurisdiction to conduct arbitration proceedings in that the dispute was referred in October and conciliation held on 6 November 2019.

The arbitration award

- [17] The commissioner in the arbitration award had the following to say: (*verbatim*)

[6] The Applicants were initially employed by the Respondent on a series of 2 years- fixed – term contracts as supervisors and community healthcare workers. It was common cause that the Applicants last reported on duty on 31 September 2019, when the Respondent informed them that their contracts came to an end and that the Respondent will not renew any of the contracts.

[12] Ms Zanele Choli testified that she started working for the Respondent in 2014. She was employed by the Respondent as a Health Community Worker. She was employed by the Respondent on a series of 2 years fixed- term contracts. At the time of her dismissal she was a supervisor. She last reported for duty on 31 September 2019. On 27 June 2019, her Coordinator called her to the office to sign a new fixed – term contract of employment. She signed the contract which clearly state that the contract would terminate on 31 June 2021. Few days later her Coordinator called her into the office to come fix the errors on the contracts she signed. She was given a second- fixed term contract to sign.

[13] It was her testimony that she was surprised when the Respondent informed her that her contract would terminate on 31 September 2019. According to her, the contract was supposed to terminate on 31 June 2021. She was dismissed by the Respondent on 31 September 2019.

[14] She (Christina Mogorosi) stated that it was common cause that every time when her contract comes to an end the Respondent would renew the contract for two years. Moreover, it was indicated by the Respondent that the contract was ongoing and that those who are employed on the fixed term contract would eventually be absorb and

permanently employed by the Respondent. She was dismissed by the Respondent on 31 September 2019.

- [19] Joseph Masinga testified that he started working for the Respondent in 2016... The Respondent dismissed him it terminated his fixed contract on 31 September 2019.
- [24] The remaining Applicants confirmed that they were employed by the Respondent as a Health Community Workers. They were employed by the Respondent on a series of 2 years fixed term contracts. They last reported for duty on 31 September 2019.
- [37] The first critical question for determination was whether the Applicants were dismissed by the Respondent. The Respondent disputed that it dismissed the Applicants. The Applicants' evidence seemed to suggest that the Respondent dismissed them when it informed them that their contracts were coming to and end on 31 September 2019 and their last day to report for duty was the said date.'

Founding Affidavit used to support the review application

- [18] In the founding affidavit used to support the review application, the applicant stated the following at paragraph 18:

'The applicants were surprised when they were told that their employment contract will come to an end on 31 September 2019. They were dismissed by the third respondent on 31 September 2019.'

Evaluation

- [19] It is trite principle that the CCMA or Council cannot decide its own jurisdiction. In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and others*³, the Labour Appeal Court (LAC) had the following to say:

'[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

³ (2008) 29 ILJ 2218 (LAC) para(s) 39 – 40.

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 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 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.'

[20] In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*⁴, the LAC held that:

'Nothing said in *Sidumo* means that the grounds of review in sec 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA, arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any other grounds specified in sec 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.'

[21] The Council cannot decide its own jurisdiction and this Court must determine whether the Council had jurisdiction or not. Furthermore, when a commissioner exceeds his/her powers, the arbitration award must be reviewed and set aside.

[22] As previously stated, the issue of the date of dismissal and jurisdiction of the Council was raised *mero motu* by this Court during the hearing. The evidence of the applicants was that they were dismissed by the third respondent on 30 September 2019. As previously stated, the date 31 September 2019 as mentioned by the commissioner in the arbitration award should read 30

⁴ (2008) 29 ILJ 964 (LAC) para 101.

September 2019. The date of 31 September 2019 did not exist in the year 2019.

- [23] The submission made in the supplementary heads of arguments that the applicants had no knowledge of the date 30 September 2019, is with respect incorrect and not consistent with the evidence of the applicants during the arbitration proceedings. The applicants testified that they were dismissed on 30 September 2019.
- [24] This Court is not bound by what the parties indicate is the date of dismissal. This Court must make its own determination regarding the date of dismissal. The determination of the date of dismissal will determine whether the dispute was referred late or not.
- [25] The commissioner in the arbitration award seemed to have accepted that the applicants' contracts of employment expired on 30 September 2019 and the applicants were last at work on 30 September 2019. The pleaded case of the applicants' further states that the applicants were dismissed on 31 September 2019, which must mean 30 September 2019. However, this does not indicate the date of dismissal as per section 190(2)(a) of the LRA.
- [26] As previously stated, the certificate of non- resolution dated 5 December 2019 clearly states that the dispute was referred for conciliation on 6 November 2019. This Court has no reason to reject the certificate of outcome dated 5 December 2019. The certificate still exists and has not been set aside by a competent Court.
- [27] Section 190 of the LRA deals with the *date of dismissal*. Section 190 provides that:

- '(1) The date of dismissal is the earlier of –
- (a) The date on which the contract of employment terminated or
 - (b) The date on which the employee left the service of the employer

(2) Despite subsection (1)

(a) if an employer has offered to renew on less- favourable terms, or has failed to renew, a fixed – term contract of employment, the date of dismissal is the date on which the employer offered the less favourable terms or the date the employer notified the employee of the intention not to renew the contract.’

[28] During the arbitration proceedings Ms. Choli testified⁵ she was last at work on 30 September 2019. Ms. Mogorosi testified⁶ she stopped working for the third respondent on 30 September 2019 and that she did not work during the month of October 2019 although she received salary for October 2019.

[29] A special formula in terms of section 190 (2)(a) of the LRA caters for date of dismissal in respect of fixed term contracts. The applicants’ contracts which ended at the end of June 2019 commenced from 1 July 2017. It was a two-year fixed term contract.

[30] The evidence of Ms. Sosibo, the third respondent’s witness in respect of the circumstances that led to the extension of contracts for three from 1 July 2019 until 30 September 2019 was that:

‘After the, yes after the- they were on contract for two years, from 2017, until June 2019, their contract terminated, and from there on now, we said that we are giving you grace of three months. So now, you need to sign again because we cannot choose that contract, because it has terminated, you are out of the system of the municipality. At the end of the month of July you wouldn’t be paid, because you are not on contract, so we made them sign a contract of three months for the period that they are going to be working, that is the grace period of three months, which is stated here. This termination of field workers HIV and AIDS program⁷.’

[31] Under cross examination the following exchanged occurred between the applicants representative at arbitration and the third respondent’s witness:

⁵ Index Record page 37 lines 11- 13.

⁶ Index Record page 51 lines 15- 18.

⁷ Index Record page 166 line 16 – page 167 line 3.

MS SOSIBO: But when the, when the contract was supposed to end on the 30th of June 2019, so I had to renew, because it was after payday, the 25th. So, because they were given an extension of three months, from July until September. So, I called them, because if I didn't do that they wouldn't be in the system, they wouldn't be captured and they wouldn't be paid. So, they came to sign the contract for the three months period

APPLICANT: On the 27th

MS SOSIBO: On the 27th of June. I can't remember the date, but yes, I called them to sign the three months...

MS SOSIBO: Well I called them- to bundle B. Yes, I called them to sign the contracts, but I can't remember. Yes, it says the 27th June because the contract, their contract were ending 30th June, for them to be on the safe side on the 1st July, and for them to be paid at the end of July⁸.

[32] What the above evidence shows is that: (a) Prior to the expiry of the applicants contracts which commence on 1 July 2017 until 30 June 2019, Ms. Sosibo called the applicants, (b) Ms. Sosibo called the applicants on 27 June 2019; (c) She informed the applicants that their two year fixed term contracts will not be renewed and offered the applicants a less favourable fixed term contracts for three months (1 July 2019 to 30 September 2019); (d) The applicants signed the three months contracts.

[33] Consequently, in terms of the special formula as contained in section 190(2)(a) of the LRA dealing with the date of dismissal for the purposes of fixed term contracts, on 27 June 2019, when Ms. Sosibo informed the applicants that their two year fixed term contracts will not be renewed at the end on 30 June 2019 and offered them the three months fixed term contracts, renders 27 June 2019 as the date when the third respondent informed the

⁸ Index Record page 192 line(s) 6 – 23.

applicants that their two year fixed term contracts will not be renewed and the date of 27 June 2019 constitutes, the date of dismissal.

- [34] The date of dismissal is neither the 30 September 2019 nor 23 October 2019. The date of dismissal is 27 June 2019 when the applicants were offered a less favourable fixed term contracts of three months and when they became aware that their contract ending 30 June 2019 will not be renewed. The applicants' version that they were offered and signed a fixed term contract ending 30 June 2021 is simply not born out by the evidence (both documentary and viva voce evidence).
- [35] The fact that the referral form was signed on 31 October 2019, which is just over four months, after the date of dismissal, shows that the referral was made late. I make this point, in case the date of 6 November 2019 was incorrectly inserted on the certificate of non-resolution. At the time when the referral was signed by the applicants, the referral was already late. At the time when the applicants say they were dismissed i.e. 30 September 2019 as per their evidence and 23 October 2019 as per the referral form, the referral was late from the date of dismissal.
- [36] The letter dated 23 October 2019, could not have possibly been the first time that the third respondent informed the applicants that they will not renew their contracts. The applicants' contracts were not renewed at the end of June 2019 and they were informed of the intention not to renew their contracts. Instead, they were offered and signed a less favourable fixed term contracts of three months.
- [37] Given the totality of evidence during the arbitration proceedings, the commissioner ought to have realized that the date of dismissal is 27 June 2019.
- [38] Since the applicants referred the dispute to council on 6 November 2019, as per the certificate of non-resolution, the dispute was referred late to the

Council. The applicants did not apply for condonation for the late filing of the unfair dismissal dispute to the Council.

[39] The commissioner exceeded his powers when he arbitrated the dispute which was referred late and there was no condonation application. The Council therefore lacked jurisdiction to arbitrate the dispute. Consequently, the arbitration award must be reviewed and set aside.

[40] In the premises the following order is made:

Order

1. The arbitration award issued by the second respondent dated 7 September 2020 under case number: GPD111904 is hereby reviewed and set aside.
2. The first respondent did not have jurisdiction to arbitrate the dispute as the referral was made late.
3. There is no order as to costs.

H. Molotsi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : J H Gwebu
Instructed by : MGM Incorporated

For the Respondent : T Mosikili
Instructed by : Padi Attorneys