THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case No: JR849/21

In the matter between:

GOVERNMENT PRINTING WORKS	Applicant
and	
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL	First Respondent
COMMISSIONER KEKANA *NO*	Second Respondent
PUBLIC SERVANTS ASSOCIATION OBO LEBOMBO AND 27 OTHERS	Third Respondent

Heard: 24 March 2025

Delivered: 25 March 2025

Summary: Application to review and set aside the arbitration award issued by the second respondent. Application for review is successful. Award replaced with a finding that the members of the third respondent were not dismissed.

JUDGMENT

DANIELS J

Introduction

[1] This is application is brought to review and set aside an arbitration award, dated 10 March 2021, issued by second respondent (hereafter the "commissioner") under reference GPBC805/2020. The commissioner found that twenty-eight members of the third respondent had been unfairly dismissed, by the applicant, and they must be reinstated into its with two months of backpay.

Condonation

[2] At the start of the hearing, the applicant moved an application for condonation. The review application was filed one week late, a short delay. The delay was fully explained by the applicant in its founding affidavit. Various technical and administrative difficulties conspired to prevent the applicant from filing its application in good time, although the application itself had been prepared before the expiry of the prescribed period. The applicant experienced unexpected difficulties with getting the review application signed, and securing the necessary case number. A detailed explanation of these delays was provided. There was no prejudice, or significant prejudice, to the third respondent. The applicant set out reasons why it has reasonable prospects of success which were adequate in the circumstances. Having weighed all the relevant factors which are appropriate to condonation, I believed that it was in the interests of justice to grant condonation and I therefore did so.

Material facts

[3] The facts of the matter are common cause:

3.1 The twenty-eight employees, all members of the third respondent; the Public Servants Association (hereafter "PSA") were engaged as cleaners, by the applicant, on a fixed term contracts for the following periods:

(1) 8 July 2019 to 31 December 2019 (a period of more than five months but less than six months);

(2) 1 January 2020 to 30 April 2020 (a period of four months);

(3) 14 May 2020 to 31 July 2020 (a period of approximately two and half months).[1]

3.2 Prior to their engagement, the members (hereafter, for ease of reference, "the cleaners") were employed by a contractor named Supercare and placed at the applicant. Prior to this, the cleaners had been employed by other cleaning contractors - though still placed at the applicant. This occurred over several years.

3.3 By mid-2019, the contract between the applicant (hereafter "GPW") and Supercare was in its final stages. The GPW was negotiating the terms of a new cleaning contract, with the successful contractor, following the tender process. However, the negotiations collapsed shortly before the end of the Supercare contract.

3.4 Anxious to avoid any period without cleaning services, the GPW approached the cleaners and offered them fixed term employment. The cleaners accepted the offer and were handed letters of appointment stipulating, inter alia, their salaries and job title. The letters stated that their employment would be for a fixed term, to expire on 31 December 2019. The letter stated: "*Your appointment is subject to the provisions of the Public Service Act, 1994 as amended; the regulations issued in terms thereof, the Human Resource Circular issued from time to time as well as the Labour Relations Act, 1995*." These appointments occurred with no prior interviews, or screening, being conducted.

[1] Accordingly, by the end of July 2020, the cleaners had worked for the applicant for only two and half *consecutive months*.

3.5 At the end of 2019, the employment contracts were extended to 30 April 2020.

3.6 On or about 11 May, the applicant handed the cleaners a letter advising them that their employment would continue until 31 July. The final sentence of the letter stated: "*Please note that the extension of your fixed term employment contract does not mean or should raise any expectation of a permanent employment at the end of the extended contract*."

3.7 On or about 8 July 2020, the applicant handed the cleaners a further letter advising each of them that their "…*employment contract will expire on 31 July 2020 and the Government Printing Works will not extend it*." At the end of July, the GPW did not extend the cleaners' contracts.

3.8 The GPW advertised the vacant posts internally and externally. All the cleaners applied for the posts but none were short listed, and none were appointed.

3.9 The cleaners, unhappy that their contracts had not been renewed or their employment made permanent, referred a dispute concerning the issue to the first respondent (hereafter the "Council," the "Bargaining Council" or "GPSSBC"). This resulted in the arbitration award which is the subject of this review application.

<u>Arbitration proceedings</u>

[4] At arbitration, the PSA called two witnesses, Mr John Pule Mojanaga (hereafter "Mojanaga") and Ms Constance Seleka (hereafter "Seleka"). Mojanaga was an employee of the GPW, a shop steward of the PSA and its chairperson for many years. Seleka was a cleaner and one of the individual applicants at the arbitration.

[5] Mojanaga testified that:

5.1 There was an "in principle" agreement (the "agreement") reached with GPW to the effect that the cleaning service would be insourced and the cleaners employed on a permanent basis. Initially, his evidence appeared to suggest that the agreement was reached with the former Acting Chief Executive Officer, Ms Josphine Meyer (hereafter "Meyer").[2] However, when the commissioner sought to clarify the nature of the agreement,[3] Mojanaga testified that the agreement was reached, after the departure of Meyer, at the Departmental Chamber of the GPSSBC (the "Chamber"). Mojanaga never explained *when* the agreement was reached.

5.2 Initially, Mojanaga stated that the agreement was that the cleaners would be "absorbed" after they had been screened.

5.3 However, shortly thereafter, Mojanaga testified that the agreement was that the vacant cleaning positions would be advertised internally and then stated: "*it was in one way or other to absorb them*…"[4] He clarified that the effect of advertising the posts internally was that the cleaners would be the only individuals to apply for the vacant posts, and they would compete for eighteen positions among themselves.

5.4 Mojanaga testified that there was a long history of the GPW failing to follow its own recruitment processes. GPW did so to comply with an informal agreement, allegedly reached with PSA during 2012, that use of casual workers would be reduced and GPW would try to "absorb" such workers as permanent employees.[5] Mojanaga claimed that the reason

[2] Transcript p261 (lines 10 – 25) and p265 (lines 1 – 5); note that his evidence also reflected that, by the time of the meeting on 15 August 2019, Meyer had departed from the applicant's employ.

[3] Transcript p298 lines 11 – 31

[4] Transcript p298 line 28 – p299 line 6

[5] Transcript p264 lines 10 – 17

why the cleaners had been engaged on fixed term contracts had nothing to do with the expiry of the Supercare contract, and the collapse of negotiations with the new contractor, but it related to the GPW's wish to comply with the 2012 agreement.

[6] Seleka testified that:

6.1 The cleaners hoped they would be permanently appointed because they worked well, there were no complaints about their work, and they continued to work during the COVID19 lockdown.[6] Additionally, Seleka testified: "…*even when we go to the corridors you can hear people saying no don't worry, you'll get the job, even us we were there, then they give us the job*."[7]

6.2 When questioned about a meeting held between the cleaners and Ms Michelle Modise (hereafter "Modise") the General Manager: Human Resources, she testified that Modise said that "hopefully" they would be appointed because of their many years of experience with GPW and the cleaners would likely be preferred over someone from Shoprite.[8]

6.3 Accordingly, Seleka did not confirm the existence of any agreement that the cleaners would be permanently employed.

[7] The applicant called two witnesses, Mr Jan Rossouw (hereafter "Rossouw") and Modise. Rossouw was the Director: Human Resources and Modise, as previously mentioned, was the General Manager: Human Resources.

[8] Rossouw testified that:

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[6] Transcript p307 lines 1 – 34

[7] Transcript p308 lines 7 – 17

[8] Transcript p314 line 23 - p315 line 7

8.1 The cleaners were engaged on fixed term contracts without prior interviews because there was an emergency resulting from the collapse of negotiations with the new cleaning contractor. He testified that it was not the norm, but there were exceptions to the rule that interviews must be held before any appointment. He testified that, at the time of the cleaners' initial engagement, their posts were not included on the post establishment. However, by late 2019, the applicant had been authorised to include such positions on the establishment.[9] GPW commenced the recruitment process by only advertising internally.

8.2 Following a complaint from NEHAWU, a letter received from the Minister of Home Affairs, and an instruction from the Public Service Commission, GPW decided to advertise the posts internally and externally. The complaint alleged that there was some form of collusion, between the Human Resources Department and the PSA, to ensure that the cleaners were appointed.[10]

8.3 Meyer could not have concluded an agreement with PSA in his absence, as he was the custodian of the Human Resources policies. He had no knowledge of any agreement with the PSA relating to the cleaners.

8.4 The extension, or extensions, of the contracts of the cleaners occurred because of the difficulties with COVID19 and challenges in the recruitment processes.[11]

[9] When Modise testified:

9.1 She gave a full explanation of her meeting with the cleaners, during which she advised the cleaners that the vacant posts would no longer only be advertised internally; but would be advertised internally

[9] Transcript p324 lines 33 - 34

[10] Transcript p322 lines 27 - 30

[11] Transcript p329 lines 18 – 23

and externally.[12] Modise testified that she had encouraged the cleaners to apply for the posts and assured them that the reason for advertising externally was unrelated to them and they still had a good chance of being appointed.

9.2 Modise stressed that she never promised the cleaners that they would be appointed.

9.3 Modise stated that there was an agreement between the PSA and the GPW, reached at the Chamber. The agreement was that the vacant posts would be advertised internally.[13] Modise stated that Meyer could not have reached any agreement that the cleaners would be permanently employed.[14]

9.4 Importantly, Modise testified:

"*I did not create any expectation because throughout this, the cleaners were made aware and if I had created an expectation, <u>why would I create an expectation and then from there go and advertise the position. My going through the …following the prescribed DPSA recruitment process, it's a clear indication that there was no intention to just place a person without following the recruitment process</u> and as such there was no expectations, which is also even in writing, in the documents that I signed and gave to them as an offer of employment*."[15] (own emphasis)

[10] The witnesses referred to the documents in their evidence. Some of the more important documents are referenced below:

[12] Transcript p344 lines 21 – 34

[13] Transcript p352 lines 6 – 13

[14] Transcript p347 lines 20 – 34

[15] Transcript p351 lines 18 – 24

10.1 Section 57(2) of the Public Service Regulations (the "Regulations") permits the employment of individuals additional to the establishment in a limited number of instances.

10.2 Section 57(4) of the Regulations prohibits the employment of any individual "additional to the establishment" for more than *twelve consecutive months*.

10.3 Section 65 of the Regulations requires that vacant posts must be advertised, within the affected department, but they may also be advertised in the public service, locally or nationwide.

10.4 The minutes of the Chamber formed part of the record in respect of the meetings held on 15 August 2019, 5 December 2019, 14 January 2020, 27 July 2020, and 12 August 2020. In this regard:

10.4.1 None of the minutes referred to any agreement, in principle or otherwise.

10.4.2 On 5 December 2019, the GPW advised the PSA that it could not continue extending the contracts of the cleaners because this was not in accordance with its own processes. Importantly, the GPW informed the PSA that: "…*the process of insourcing did not mean that the cleaners would be automatically absorbed*." In reply, PSA did not allege that any agreement existed.

10.4.3 On 27 July 2020, the GPW explained the process relating to the cleaners in full. It explained that the posts had to be advertised externally, as well as internally, and the reasons for that. The PSA argued that a reasonable expectation of further employment had been created, but it identified only one reason for the expectation – that the contracts had been renewed several times. Once again, no agreement was alleged.

Legal principles

Review applications

[11] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It was in this context that the Constitutional Court fashioned the appropriate review test[16] in relation to CCMA arbitration awards in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her*? The test has come to be known as the "*Sidumo* test" or the "reasonableness test."

[12] Subsequently, in *CUSA v Tao Ying Metal Industries and Others*[17] ("*Tao Ying*") the Court held at para 76:

> "*76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:*
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> *"Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues*." (own emphasis)

[16] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

[17] (2008) 29 ILJ 2461 (CC) (18 September 2008)

[13] Thus, following *Tao Ying*, it is clear that the decision maker must apply his or her mind to all the issues that are material to a fair determination of the dispute. The failure of the commissioner to apply his or her mind to the material issues denies the parties a fair trial and, invariably, the outcome will be unreasonable.

[14] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*[18] the court clarified that the *Sidumo* test did not extinguish the procedural grounds for reviews contemplated in section 145(2)*(a)* of the LRA. However, the procedural defects alleged must indicate that the arbitrator misconceived the nature of the enquiry, or arrived at an unreasonable result.

[15] In *Bestel v Astral Operations Ltd & others*[19] the court considered the narrow scope of review and accepted that an arbitrator's finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The Court held that:

> '*… the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever <u>this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal</u>. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected*.' (Own emphasis)

[16] In *Goldfields Mining SA (Pty) Ltd v CCMA and others*[20] the court held that the concept of reasonableness embraces a wide range of outcomes, many of which may be reasonable. The outcome should not be evaluated on a piecemeal basis, but on the totality of the evidence.

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[18] (2013) 34 ILJ 2795 (SCA)

[19] [2011] 2 BLLR 129 (LAC) at para 18

[20] (2014) 35 ILJ 943 (LAC) at para 14

[17] In *Head of the Department of Education v Mofokeng and others*[21] the court confirmed that where an arbitrator fails to apply his or her mind to the material issues, this will usually indicate that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, when a mistake of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

Analysis of the grounds of review

[18] The dismissal dispute related primarily to two provisions of the Labour Relations Act No. 66 of 1995 as amended (hereafter "the LRA"):

18.1 Section 186(1)(b) which includes in the definition of "dismissal" instances where:
"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." (own emphasis)

18.2 Section 198B(3), which prohibits the employment of an employee on a fixed term contract, or successive fixed term contracts, for longer than three months of employment save for those exceptions identified in subsections (a) and (b). In general, employees may only be engaged on fixed term contracts for longer than three months where the nature of the

[21] [2015] 1 BLLR 50 (LAC)

work is of a limited duration or there is some other justifiable reason. If the work is not of a limited duration, or there is no justifiable reason, the employment is deemed to be of an indefinite duration.

[19] Where employees allege that they have been dismissed in terms of section 186(1)(b) of the LRA, as in this matter, the onus lies on them to prove the existence of the reasonable expectation, by reference to evidence justifying that expectation.[22] The evidence could be proof of previous regular renewals of the employment contract, provisions of the employment contract, assurances or promises that the employment contract would be renewed, the reasons why the employment contract was concluded on a fixed term basis, failure to give reasonable notice of non-renewal of the employment contract, the nature of the business, etcetera. This is not a closed list. In order to discharge the onus, the employees must prove the facts that, objectively considered, establish a reasonable expectation. 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[23] or appoint him or her on an indefinite basis.

[20] The provisions of section 186(1)(b) and 198B of the LRA ought not to be conflated[24] given that they relate to discrete issues with different consequences. Our courts have suggested that the better place for the arbitrator to begin is to determine whether a reasonable expectation exists in terms of section 186(1)(b).

[21] In my view, in this matter, the arbitration award was based entirely on irrelevant considerations. Among other things:

[22] *Joseph v University of Limpopo & others* (2011) 32 ILJ 2085 (LAC)

[23] *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC)

[24] *Stellenbosch Municipality v SA Local Government Bargaining Council & others* (2023) 44 ILJ 388 (LC)

21.1 The commissioner considered it relevant that interviews were not always held, by the GPW, in the past;

21.2 The commissioner considered it relevant that the cleaners were not given full employment contracts but only given letters of appointment;

21.3 The commissioner believed that the real reason the employment of the cleaners was "terminated" was because NEHAWU had lodged a complaint with the Public Service Commission.

[22] The commissioner found, in paragraph 57 of the award, that the applicant contravened section 198B(3). However, he failed to consider section 198B(2)(c) which provides that section 198B is not applicable where an employee is employed in terms of a fixed term contract permitted by statute, sectoral determination, or collective agreement. In this dispute, the Regulations permitted the employment of public servants on fixed term contracts for periods up to twelve consecutive months. Section 198B was therefore not applicable, and should therefore have played no role in the outcome. Clearly, this error of law had a material distorting effect on the outcome.

[23] The applicant contends the commissioner failed to take into consideration that the reasons for the extension (or extensions) of the fixed term contracts were fully and reasonably explained.[25] I accept these submissions too. This was a further misdirection.

[24] The applicant argued that the commissioner failed to consider that the minutes of the Chamber reflect that there was no agreement to engage the services of the cleaners on a permanent basis. The third respondent alleged that an agreement had been reached at the Chamber. Such agreement should have appeared from the minutes, but did not. The commissioner failed to consider the minutes - despite the fact that such evidence was highly relevant.

[25] At arbitration, the applicant had alleged that there was a single extension from 31 December 2019 until 30 April 2020. While I place no emphasis on this, I presume this was because of the apparent break in employment between 30 April and 11 May 2020.

In fact, even the agreement which Modise conceded existed (namely that the vacant posts would be advertised internally) do not appear from the minutes. Despite this, the third respondent did not allege that the minutes were inaccurate or incomplete. The failure to consider this relevant consideration is a further indication that the commissioner failed to apply his mind to the issues.

[25] The applicant submitted that the commissioner failed to take into consideration that: (1) the offer of employment, from the GPW, dated 11 May stated that the employment offer (which extended until 31 July) should not raise any expectation of permanent employment; and (2) the letter from the GPW, dated 8 July, advised the cleaners that their contracts would expire at the end of July 2020 and would not be extended. Indeed these considerations did not feature in his reasoning. Though the terms of the employment contracts, or letters of appointment, are not considered conclusive proof of whether an expectation exists, or not, such documents remain relevant.

[26] The applicant submitted that the evidence presented by the third respondent was unclear on the nature of the promise (or agreement) allegedly made by the GPW, or the identity of the individual who had made such promises. I accept this submission without hesitation. The transcript reveals that the evidence of the "agreement" or "promise" was entirely unsatisfactory. The commissioner was justifiably confused about the true nature of the promise, or agreement. It was clear from the evidence that no promise of permanent employment was made by Modise. According to Mojanaga the promise, or agreement, of permanent employment, was made at the Chamber yet he could not identify when it was made, who concluded the agreement, nor did he explain why there was no record of it in the minutes. At most, there might have been an informal agreement to advertise the posts internally, which could have led to the permanent appointment of some of the cleaners.

[27] The third respondent conceded that, in reaching his conclusion, the commissioner did not rely on any alleged promise or agreement. Paragraph 45.1 of its answering affidavit makes this clear. I accept this submission. In the

absence of any promise or agreement, the case of the third respondent was hardly compelling.

[28] When stripped of the irrelevant considerations, the outcome is hard to comprehend. The commissioner finds that there was a reasonable expectation of permanent employment but there is no credible basis for his conclusion.

[29] The totality of the evidence pointed in one direction alone. The third respondent accepted that the permanent appointees would be subjected to screening and prior interviews. The applicant warned the third respondent at the Chamber meetings that insourcing did not mean the automatic appointment of the cleaners. There was no compelling evidence of any promise or agreement. The cleaners hoped to be permanently appointed, but that does not constitute a reasonable expectation. The fact that there were three fixed term contracts over a twelve-month period is, by itself, insufficient. The reasons for that were fully explained. The presence, or absence, of interviews before the first appointments (of the cleaners) were adequately explained - even if one assumes it is relevant.

[30] In my view, little purpose would be served in referring the dispute back to the first respondent, given that the record is complete. It would not serve one of the primary functions of the LRA - the expeditious resolution of employment disputes. The third respondent failed to discharge the onus of proving that its members held a reasonable expectation of renewal of their fixed term contracts, or a reasonable expectation that they would be permanently appointed.

[31] In the result, the review application must succeed.

<u>Costs</u>

[32] Costs in labour disputes do not follow as a matter of course. The third respondent was entitled to defend its victory at arbitration and did so to the best of its ability. I see no reason to mulct it in costs.

Conclusion

[33] In the circumstances, for the reasons set out above, I make the following order:

33.1 The arbitration award issued by the second respondent, under reference GPBC805/2020, is reviewed and set aside,

33.2 The arbitration award is replaced by an order that third respondent's members' failed to discharge the onus in terms with section 186(1)(b); and section 198B is not applicable to the dispute,

33.3 There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:
Adv Mokawala
State Attorney

For the Third Respondent:
Adv Maponya
L Khumalo Attorneys