



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case No: JR516/23

In the matter between:

TSHWANE UNIVERSITY OF TECHNOLOGY

Applicant

and

DR DHANASAGRAN NAIDOO

First Respondent

ANNEMARIE BREEDT N.O.

Second Respondent

**COMMISSIONER FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 1 July 2025

Delivered: 7 July 2025 (This judgment was handed down electronically by emailing a copy to the parties. The 7 July 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

MHAMBI, AJIntroduction

[1] The Applicant, Tshwane University of Technology (TUT), seeks to review and set aside the arbitration award issued by the Third Respondent (Commissioner) in terms of which it was found that the non-renewal of the First Respondent, Dr Dhanasagran Naidoo (Dr Naidoo), fixed-term contract constituted an unfair dismissal within the meaning of section 186(1)(b) of the Labour Relations Act (LRA).¹

[2] The Commissioner had ordered the reinstatement of Dr Naidoo to the position of Executive Director: Institutional Effectiveness and Technology, and further granted retrospective compensation from 1 September 2022, which compensation is equivalent to sum of R1 467 657.29 (One Million, Four Hundred and Sixty-Seven Thousand, Six Hundred and Fifty-Seven Rand and Twenty-Nine Cents), and ordered that Dr Naidoo resume his duties no later than 13 March 2023. The review is opposed by Dr Naidoo.

Common cause of facts

[3] Dr Naidoo was employed in the position of Executive Director: Institutional Effectiveness and Technology post level 3 with effect from 1 July 2017, in terms of a five-year fixed-term contract.

[4] The initial contract contained the following relevant terms:

‘3.4 At the end of the five-year term the employee will be appointed to another management/academic position in line with his qualifications, skills and experience at a remuneration package commensurate with the post level of the position and subject to all existing policies and future policies of the University and any applicable legislation.

4.1 This contract will commence on 1 July 2017 and will, subject to 4.4 below, terminate automatically through effluxion of time on 30 June 2022.

¹ Act 66 of 1995, as amended.

4.2 As this is a fixed-period contract, there shall be no expectations, rights or claims by the employee in regard to renewal or extension.

4.3 It is specifically agreed and recorded that as this contract terminated through effluxion of time, termination will therefore not constitute a dismissal.'

[5] It is further common cause that clause 4.1 was amended and/or corrected to read as follows:

'4.1 This contract will commence on 1 July 2017 and will, subject to 4.4 below, terminate automatically through effluxion of time on 30 June 2022 renewable for a further terms of 5 years subject to satisfactory performance.'

[6] When the contract of Dr Naidoo lapsed due to effluxion of time on 30 June 2022, it was not renewed by the applicant.

[7] Aggrieved by the decision, Dr Naidoo referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), essentially alleging that the non-renewal of his fixed-term contract amounted to a dismissal within the meaning of the provisions of section 186 (1)(b) of the LRA. When attempts at conciliation failed, the dispute was referred for arbitration and came before the Commissioner.

Arbitrator's ruling on jurisdiction

[8] Ordinarily, I was not going to entertain this point of law; however, the applicant insisted that I should deal with and decide on this point.

[9] Paragraphs 13 and 14 of the arbitration award read as follows:

'13. During cross examination, the respondent raised a point *in limine* stating that after hearing the evidence of the applicant, it is apparent that the dispute pertained to the "interpretation and application" of the contract of employment, particularly paragraph 4 thereof. It was argued that the CCMA lacked jurisdiction to determine this dispute. The applicant's representative submitted that she was somewhat startled that her colleague was surprised by the evidence of the applicant. The applicant signed a pre-arbitration Minutes clearly stating what the nature of the dispute was. The parties particularly

referred to paragraphs 3.4, 4.1 and 4.3 in the detailed Minutes which were signed by the respondent. Common cause issues and facts in dispute had been agreed upon in these Minutes. It was reiterated that the dispute is one of a reasonable expectation of the renewal of a fixed term agreement.

Ruling:

14. The dispute was referred to the CCMA in terms of section 186(1)(b) and pertained to the non-renewal of a fixed term agreement. At the commencement of the arbitration, the respondent agreed that the issues to be determined were in essence whether the applicant had been unfairly dismissed, and whether he had a reasonable expectation that his fixed term contract would be renewed. The commissioner has a duty to consider the true nature of the dispute, which I did not find to be one of interpretation and application of an employment contract. The CCMA therefore has the necessary jurisdiction to determine the dispute.'

[10] It is a common cause between the parties at least that this ruling which is contained in the arbitration award has not been challenged by the applicant in its review application. It was only during the hearing that the applicant attempted to supplement its review grounds and challenge the arbitration award, based on the same facts which were placed before the Commissioner and gave a ruling on.

[11] However, before this court, the issue was raised as a new point of law which I disagree with, this cannot be a new point of law more especially when it was raised before the arbitrator and the arbitrator made a ruling. All that the applicant seeks to do is to supplement its grounds of review with no proper following of the procedure in respect of supplementing of the review grounds. Although I am tempted to agree with the applicant that this arbitration award has been decided based on the terms of the contract. However, the issue has not been properly brought before this Court. As a result, I have no difficulty in dismissing this point of law and dealing with the matter on the merits as I do hereinbelow.

The Commissioner's findings

[12] The commissioner made the following findings:

12.1 The University Council included a renewal provision in senior managers' fixed-term contracts with the intention of retaining top-level talent and ensuring institutional continuity. This renewal option was intended to be applied once only.

12.2 This renewal clause was of critical importance. It could not simply be overlooked or dismissed, allowing the employer to treat the contract as naturally ending through the passage of time.

12.3 On 21 September 2021, Dr Naidoo received a document from the applicant titled "*Correction of Terms of Contract of Employment*", which formally included the renewal clause. The updated clause stated the contract "*... was renewable for a further term of 5 years subject to satisfactory performance*". This addition rectified an earlier omission and reflected what any reasonable individual would deem significant. The clause became an integral term of Dr Naidoo's employment and reasonably led him to expect renewal, particularly given his history of excellent performance reviews.

12.4 The addition of this clause aligns with what Dr Naidoo was told during his interview: that the five-year contract would be extended for another five years, provided his performance met expectations.

12.5 Ms Moretlo Rosetta Mokuele, supported Professor Van Staden's account, stating the clause required no interpretation due to its clarity. Renewal was not automatic, but clearly contingent upon performance. Following EXCO's approval, this clause became standard practice in similar contracts.

12.6 Dr Naidoo consistently demonstrated excellent performance, which was never challenged. According to Professor Van Staden, his performance was exceptional, and had he remained in charge, he would have renewed the contract. In May 2022, Professor Maluleke also praised Dr Naidoo's contributions. Ms Mokuele, in her role as Executive Director for Human Resources and Transformation, formally recommended that the contract be renewed based on his commendable performance. The applicant failed to give due regard to this, despite it being the central criterion for renewal. On the balance of probabilities, Dr Naidoo fulfilled the performance requirements in a manner comparable to other senior executives.

12.7 Additionally, clause 3.4 of the employment contract stating that upon expiry of the five-year term, the employee would be appointed to another suitable management or academic role further strengthened the expectation of continued employment.

12.8 When asked if Dr Naidoo still had a role at the institution, Professor Maluleke reportedly said, *“that is a no-brainer”*. Professor Twala was unaware of this remark, and Professor Maluleke did not provide testimony to dispute it. Dr Naidoo’s version remains credible.

12.9 Dr Naidoo met all of his responsibilities, including initiating timely correspondence with Professor Twala regarding contract renewal. He even arranged a face-to-face meeting, which was neither honoured nor officially cancelled by Professor Twala. Prior to an EMC meeting, when Dr Naidoo inquired about the status of his contract, Twala responded vaguely with *“no pressure”*. Later, he reprimanded Dr Naidoo for not scheduling a proper meeting. When no clarity was forthcoming, Dr Naidoo took the issue to Vice-Chancellor Maluleke to express his concerns about the process.

12.10 The fact that Professor Twala failed to respond, effectively leaving Dr Naidoo in uncertainty until 3 June 2022, does not invalidate the legitimate expectation arising from the renewal clause.

12.11 The most plausible explanation is that Professor Twala acted on his own, without proper authority or full understanding, and informed Dr Naidoo that his contract had ended through effluxion of time, ignoring the binding implications of the renewal clause. It appears no consideration was given to the legal protections provided by fair labour practices.

12.12 Multiple facts support Professor Van Staden’s claim that Professor Twala unilaterally and unjustly ended Dr Naidoo’s contract:

12.12.1 Any change to the Strategic Plan must comply with legal obligations, including reporting to the Minister of Higher Education. Twala admitted he had a new strategic direction that excluded Dr Naidoo, yet he failed to document or present this vision to the University Council or during the May 2022 Strategic Workshop.

12.12.2 Twala’s assertion that Professor Maluleke had agreed to phasing out Dr Naidoo is unlikely, as evidenced by a WhatsApp message dated 17 May 2022, which showed that Maluleke was unaware of any such

intention. This suggests that no prior discussion occurred between them on the matter.

12.12.3 Professor Van Staden testified that Twala lacked the authority to decide on the renewal of Dr Naidoo's contract, a power reserved solely for the Vice-Chancellor and non-delegable. Under cross-examination, Twala admitted he did not have the mandate to make such a decision. This supports the view that Twala overstepped his role in an effort to align the institution with his personal strategic vision. Ms Mokuele also confirmed that structural changes required adherence to formal procedures, which Twala bypassed.

12.12.4 The Commissioner found that Professor Twala's testimony about consulting stakeholders and obtaining legal advice lacked specificity. It remains unclear what legal issue was being reviewed, and no evidence was provided that any such consultation occurred. More critically, he failed to engage Dr Naidoo, the individual most affected by his decision. The absence of any supporting documentation in the applicant's file further weakens his claims.

The grounds of review

[13] TUT cited two main grounds for seeking a review of the award. In this regard, it was submitted that:

13.1 The Commissioner committed gross irregularities in the conduct of the arbitration proceedings; and

13.2 The Commissioner committed misconduct in relation to her duties as an arbitrator.

The review test

[14] A central concern in this matter involves identifying the correct standard of review to apply. Dr Naidoo's legal representatives argued that since TUT's challenge is grounded in section 145 of the Labour Relations Act (LRA), the case should not be approached using the reasonableness standard. Instead, they contended that because the matter involves the CCMA's jurisdiction, the proper test should be one of correctness, not reasonableness.

[15] The debate over the appropriate standard of review in these circumstances has largely been settled, particularly in light of the ruling in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*. That judgment clarified:

‘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’s arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the 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.’²

[16] Any lingering uncertainty about which test applies was further clarified in *Jonsson Uniform Solutions (Pty) Ltd v Brown and Others*,³ where the Labour Appeal

² [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) at para 101; See also *De Milander v MEC for the Department Finance: Eastern Cape and Others* [2012] ZALAC 37; (2013) 34 ILJ 1427 (LAC) (30 November 2012), where it was held that:

“[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 (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC) at para [39]). The question whether, on the facts of the case, a dismissal had taken place within the ambit of section 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.”

³ [2014] ZALCJHB 32; [2014] JOL 32513 at paras 33 – 36; See also *Enforce Security Group v Fikile and Others* [2017] ZALAC 9; (2017) 38 ILJ 1041 (LAC), where it was held that:

“[16] The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties’ dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding. To the extent that the court *a quo* found that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner.”

Court affirmed the dual nature of review standards, reasonableness and correctness. The court explained:

‘The generally accepted view is that we have a bifurcated review standard *viz* reasonableness and correctness. The test for the reasonableness of a decision was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* as follows: “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

In assessing whether the CCMA or the Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the necessary jurisdiction to entertain the dispute. See *SARPA v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU*. The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.

It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied. The court *a quo*, as both parties agreed, applied the wrong standard.’⁴

[17] Nevertheless, it is my view that courts should not rigidly adhere to the wording of the pleadings but should instead consider their substantive content as opposed to

⁴ Ibid at paras 33 – 36.

the form. In the context of this matter, although the applicant has relied on reasonableness, careful consideration of its grounds borders on the incorrectness standard. In any event, it is my further view that a conduct that is not correct cannot be reasonable.

[18] Applying the legal principles above, it becomes evident that the critique of TUT's reliance on the reasonableness standard to challenge jurisdiction lacks substance. The core question was whether, based on the evidence presented, the Commissioner was correct in finding that Dr Naidoo had proven a dismissal as contemplated in section 186(1)(b) of the LRA. If this determination were incorrect, it would mean the CCMA did not have jurisdiction over the matter.

Was a dismissal established?

[19] The provisions of section 186(1)(b) of the LRA reads as follows:

- '(1) "Dismissal" means that –
- (b) 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....'

[20] These words do not, however, carry the meaning, which is urged by the first respondent, namely that, by including the conditional renewal terms on the contract of Dr Naidoo, it implies that he had a reasonable expectation that his contract would be renewed automatically. In my view, that will take us to the contractual dispute, and the dispute brought by Dr Naidoo is a dispute which relates to unfair dismissal in terms of section 186(1)(b) as opposed to the dispute of interpretation of the contract.

[21] As previously mentioned, it is the employee's responsibility to demonstrate that a dismissal has occurred by presenting evidence to the Commissioner that, when viewed objectively, supports the conclusion that the employee reasonably anticipated a renewal of their fixed-term contract. In cases like this, where the existence of a dismissal is itself in question, the issue becomes one of jurisdiction. Unless the employee can first establish that a dismissal took place, the CCMA does not have the jurisdiction to adjudicate the matter. However, once a dismissal is proven, the burden then shifts to the employer, who must prove that the dismissal was both procedurally and substantively fair.⁵

⁵ See *South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC) where it was held that:

"[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 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 the 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. In *Benicon Earthworks & Mining Services (EDMS) BPK v Jacobs No & Others* (1994) 15 ILJ 801 (LAC) at 804 C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The Court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The Court further held that any conclusion to which the industrial court arrived at on the issue, has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In *Benicon's* case the Court said:

"In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit." (at 804 c-d)"

And,

"[43] What s 186(1)(b) provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in s 186(1)(b) are in my view, that the employee should have a reasonable expectation, and the employer fails to renew a fixed term contract or renew it on less favourable terms. The fixed term contract should also be capable of renewal.

[22] In the context of this matter, Dr Naidoo relies on the corrected clause 4.1 and the evidence of Professor Van Staden to support his case that he had reasonably expected his contract to be renewed for another period of 5 years, whilst clause 4.2 of the contract remained unchanged that:

‘4.2 As this is a fixed-period contract, there shall be no expectations, rights or claims by the employee in regard to renewal or extension.’

[23] In the case of *Independent Municipal and Allied Trade Union and others v City of Johannesburg Metropolitan Municipality and others*⁶, it was held that:

‘When assessing whether an expectation is reasonable all the surrounding facts and circumstances should be considered including the terms of the contract of employment, promises made by the employer – regardless of contractual terms which gainsay what the employer promised and the general conduct of the parties.’⁷

[24] It is accepted on the authority of *Mediterranean Woollen Mills (Pty) Ltd v SACTWU*⁸ that, despite these clauses, a reasonable expectation could still arise during employment if assurances, existing practices and the conduct of an employer led an employee to believe that there was hope for a renewal, whether on a temporary or an indefinite basis. Even then, these factors are still subject to an objective assessment.

[25] Taking into account the factors for consideration in determining whether a case of a dismissal or legitimate expectation was made, it is my view that the Commissioner’s findings that Dr Naidoo was dismissed are clearly not correct, and

[44] The appellants carried the onus to establish that they had a ‘reasonable expectation’ that their contracts were to be renewed. They had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms. As soon as the other requirements of s186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair.”

⁶ [2014] 6 BLLR 545 (LAC); [2014] ZALAC 3 at para 34.

⁷ See also *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at page 1246, para 133.

⁸ *Supra*.

the award ultimately ought to be reviewed and set aside. My conclusions in this regard are based on the following considerations:

25.1 There is a dispute as to whether the fixed-term contract of Dr Naidoo was automatic or was going to be renewed based on the clause 4.1 suspensive condition of satisfactory performance.

25.2 Dr Naidoo sought to rely on clause 4.1 and the evidence of Professor Van Staden and their interpretation of clause 4.1 that he had a reasonable expectation that his fixed-term contract would be renewed, whilst replying on the contract, he states that the position still exists.

25.3 There is a dispute whether the contract provides for further expectation in that at the end of the five-year term then Dr Naidoo will be appointed to another position.

25.4 According to the applicant, clause 4.1 does not mean that the contract will be automatically renewed, as it was a fixed-term contract, it came to lapse through the effluxion of time.

25.5 In my view, even if clause 4.1 meant that the contract of Dr Naidoo would be automatically renewed in light of clause 4.2, which clearly states that he cannot have expectations of his contract to be automatically terminated. This quagmire can only be resolved through interpretation, which is not the case herein.

25.6 Furthermore, to the extent that Dr Naidoo sought to rely on the terms of the contract, that issue raises a different dispute altogether under the provisions of section 24 of the LRA, as was correctly pointed out on behalf of TUT. That position will fall short of the jurisdictional fact of section 186(1)(b) of the LRA.

[26] It follows from the above observations that the only conclusion to be reached is that it cannot be said in the light of the prevailing facts and circumstances, that Dr Naidoo had placed facts before the Commissioner, which when objectively assessed, could have led to a conclusion that he had a legitimate expectation that his fixed-term contract would be renewed on the same or similar terms.

[27] It follows from the above that the decision by the Commissioner that Dr Naidoo was dismissed within the meaning of section 186(1)(b) of the LRA was an

incorrect one, and consequently, the CCMA had no jurisdiction to determine the dispute. As a result, the matter ought to have been dismissed.

[28] I have further had regard to the issue of costs in line with the requirements of law and fairness. In that regard, I am of the view that a costs order is not warranted in this case.

[29] In the premises, the following order is made:

Order

1. The arbitration award issued by the Third Respondent under case number GAJB12039-22 dated 5 March 2023, is reviewed, set aside and substituted with an order that:
 - (a) Dr Naidoo has not established a dismissal under the provisions of section 186(1)(b) of the Labour Relations Act.
 - (b) Dr Naidoo's referral is dismissed on account of lack of jurisdiction.
2. There is no order as to costs.

MH Mhambi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr D. Masher

Instructed by: Edward Nathan Sonnenbergs Inc.

For the First Respondent: Adv F. Venter

Instructed by: Beech Veltman Incorporated