



(1) Reportable: NO
 (2) Of interest to other Judges: Yes

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

CASE NO: D05/2022

In the matter between:

CHRISTIAN ISREAL

Applicant

And

STANDARD BANK FINANCIAL

CONSULTANCY

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

WAYNE PAUL N.O

Third Respondent

Heard: 19 May 2026

Delivered: This judgment was handed down electronically by circulation to the Applicant's and First Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15H30 on 26 May 2026.

JUDGMENT

LALLIE J

- [1] The applicant launched this application in terms of section 145 of the Labour Relations Act¹ (the LRA) seeking an order reviewing and setting aside an arbitration award of the third respondent who will be referred to as the commissioner in this judgment. He also sought relief concomitant to the setting aside of the arbitration award. The application is opposed by the first respondent.
- [2] In the arbitration award under review the commissioner noted that the applicant was employed by the first respondent in January 2002 as a Financial Advisor until he reached the retirement age on 30 November 2016. The parties then concluded a month's fixed term contract which ran from 1 December 2016 to 31 December 2016. They thereafter concluded pensioners' fixed term contracts. The first commenced on 1 January 2017 and expired on 31 December 2017. The last was for the period 1 January 2019 to 31 December 2019. In December 2019 the first respondent informed the applicant that he would not be offered another fixed term contract because he had failed to meet his set target and that it had decided to replace the pensioners' fixed term contracts regime with independent contractor contracts. The applicant reacted to the first respondent's decision by referring an unfair dismissal dispute based on poor work performance to the

¹ Act 66 of 1995, as amended.

Commission for Conciliation, Mediation and Arbitration (the CCMA). When the dispute was arbitrated the first respondent alleged that the applicant was never dismissed but the employment relationship was terminated by effluxion of time when the fixed term contract expired on 31 December 2019.

[3] In reaching the decision that the applicant failed to prove that he was dismissed the commissioner considered that section 192(1) of the LRA places the burden of proving the dismissal on the employee party in unfair dismissal disputes. He accepted that the reason the first respondent provided for the applicant's dismissal was that it had decided to discontinue pensioners' contracts and that the applicant had failed to meet his target. He expressed the view that the thrust of the applicant's version was that he held the view that he was absorbed back as a permanent employee when he was only provided with a written contract around March 2019. The commissioner further noted that the applicant presented a different version, that he had adopted a reasonable expectation of another fixed term contract. He noted the applicant's evidence that in the last fixed term contract his target was unilaterally increased by the first respondent to R1.5 million, a target that was impossible to meet. The applicant testified that he signed the contract under duress because he feared losing it.

[4] The commissioner preferred the first respondent's version that after the applicant's retirement he was offered post pension fixed term contracts which were valid for a year the last of which expired in December 2019. He also accepted the reason the first respondent gave for not offering the applicant another contract after his last one expired. He rejected as improbable the applicant's version that he firmly believed that he was re-employed on a

permanent basis after his retirement when the fixed term contracts were concluded. He found that the employment relationship came to an end as a result of the last fixed term contract expiring on 31 March 2019. He concluded that the applicant did not establish the existence of a dismissal as contemplated in a permanent employment relationship or a premature termination of a fixed term contract.

[5] The applicant's main grounds for review were that the commissioner committed gross irregularities in the conduct of the arbitration which lead to the incorrect and unreasonable decision that he had failed to prove his dismissal. The first respondent's basis for opposing the application was that the commissioner's decision was correct and that the applicant had not established valid grounds for review.

[6] The significance of establishing whether the applicant was dismissed is that the CCMA has, in terms of section 191 of the LRA, jurisdiction to resolve unfair dismissal disputes based on, *inter alia*, poor work performance. In the absence of proof that an employee was dismissed the CCMA lacks jurisdiction to arbitrate an unfair dismissal dispute referred to it based on poor work performance.

[7] The applicant argued that both the correctness and reasonableness of the award had to be considered. The relevance of correctness is that a dismissal must exist for the CCMA to have jurisdiction to arbitrate the dispute the applicant referred. The correctness test is applied because the CCMA either has jurisdiction or lacks it. The principle is re-affirmed in *Pikitup Johannesburg*

(SOC) *Ltd v Muguto and others*² a judgment the applicant relied on where the following was held:

‘(22) Any further doubts about the applicable test was laid to rest in *Jonsson Uniform Solutions (Pty) Ltd v Brown and others*³, where the Labour Appeal Court held as follows:

“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

² (2019) 10 BLLR 1146 (LC).

³ (2014) JOL 32513 ((2014) ZALCJHB 32) (LAC)

the facts so that the reasonable decision-maker standard could be applied.” (Citations omitted.)⁴

[8] It is common cause that the employment relationship between the applicant and the first respondent was terminated on 31 December 2019 when their last pensioners’ fixed term contract expired. It is the applicant’s case that the termination constituted an unfair dismissal for poor work performance. Dismissal of employees on fixed term contracts is defined in the following terms in section 186(1)(b) of the LRA:

“(1)(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”

[9] It is common cause that the applicant was employed by the first respondent as an Executive Financial Planner from 1 January 2001 until he reached the retirement age of 63 on 30 November 2016. He started being on annual fixed term contracts after his retirement. He joined other retired employees of the first respondent who were offered similar contracts. That explains why their contracts were called pensioners’ contracts and they were referred to as pensioners in their correspondence with the first respondent. It was argued on

⁴ At 1152-3

behalf of the applicant that based on his certificate of service issued by Mr Mamabolo (Mamabolo) the first respondent's Human Capital Manager that on 1 December 2016 his roll-overs form 2016 onwards rendered him a permanent employee. The certificate reflects that the applicant was appointed on a permanent contract from 1 January 2002 up until 30 November 2016. It goes on to state that on 1 December 2016 he converted onto a non-permanent pensioner contract due to operational requirement up until termination on 1 January 2020.

[10] It was argued on behalf of the first respondent that the applicant's contention that he was employed on a permanent basis after his retirement was unsustainable. In support of the argument reference was made to clause 1.1 of his pensioners' contract which expressly provides that the position he was offered was "on a fixed term basis, commencing on the 1st January 2019 and terminating on 31st December 2019".

[11] The applicant's argument has no valid legal basis because the applicant worked for the first respondent as a permanent employee and reached the retirement age. He then worked based on pensioners' contracts. It is not possible for a retired employee to regain his or her status as a permanent employee without an unequivocal agreement with the employer. Permanent employment does not imply that an employee must be retained in employment for an indefinite period. The view is supported by the agreement on the fixed term of the contract or the retirement age in a contract of employment. Section 187 (2) of the LRA also confirms that there is a limit to the duration of a permanent contract of employment. Section 187 (2) (b) enables an employer to dismiss an employee when that employee has

reached the normal or agreed retirement age for persons employed in his or her capacity. The reasonableness of the commissioner's rejection of the applicant's version that he believed that he had been permanently re-employed after his retirement is consistent with the provisions of section 187 (2) (b) of the LRA. A certificate of service is a record of the period of an employee's service which confirms his or her years of service and position held. The above proves the correctness of the commissioner's finding that the probabilities of the case before him did not support the applicant's version that he believed that he had been permanently employed.

- [12] It was further argued that the applicant had a reasonable expectation of renewal of his fixed term contract. The applicant relied on *Member of the Executive Council for the Department of Finance Eastern Cape v De Milander & Others*⁵ in support of his argument that the history of prior renewals of his fixed term contracts created a reasonable expectation that his contract would be renewed. It was argued that the applicant was surprised when the contract was not renewed. The applicant relied on an e-mail he received from Mr Ruganan (Ruganan) on 24 September 2019 in which he informed him that product targets had to be met for pensioners' contracts to be renewed in 2020. Ruganan further stated that he would individually contact the planners who were below the production norms to discuss the way forward for the following year. When he was not contacted by Ruganan he had the expectation that his contract would be renewed but was surprised to receive, on 10 December 2019, the news that his contract would not be renewed.

⁵ (2011) 32 ILJ 2521 (LC).

[13] The first respondent argued that the applicant's surprise and expectation were unreasonable because in the same communication of 24 September 2019, he sought to rely on Ruganan reminded him that meeting the production target was a precondition for the renewal of his fixed term contract. It is common case that the applicant reached R79 737 of his R1 500 00 production target. The applicant did not meet his target. He was warned in September 2019 of the consequences of not meeting the target. The evidence tendered at arbitration including the applicant's evidence that he expected to continue working as he had planned to officially stop working at age 75 support the commissioner's decision that the applicant had no sufficient cause to adopt a reasonable expectation of the renewal of his fixed term contract. After the applicant reached the agreed retirement age he was left with no residual power to unilaterally decide that he would be the first respondent's employee until he turned 75 years.

[14] The authorities the applicant sought to rely on in support of his version that the commissioner's decision stands to be reviewed and set aside cannot assist him. They are based on distinguishable facts. The fact that the applicant had been retired having reached the retirement age before the fixed term contracts were concluded is material. As the applicant relied on gross irregularities the commissioner committed which rendered his award unreasonable, the reasonableness of the award must be considered. An arbitration award may be reviewed and set aside if its falls outside the bounds of reasonableness⁶. Enunciating the principle the court in *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) the court held that the defects the applicant

⁶ *Sidumo v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC).

relies on must fall within the meaning of a defect provided for in section 145 (2) of the LRA and result in the arbitrator misconceiving the nature of the enquiry he or she had to conduct or arriving at an unreasonable result. An arbitrator misconceives the enquiry when he or she conducts the wrong enquiry or conducts the correct enquiry incorrectly. The court went on to explain that not every material error of fact or errors relating to the weight and relevance of evidence the commissioner make in the conduct of an arbitration render his or her award unreasonable. It is only when the errors have the effect of rendering the award unreasonable that justifies the decision to review and set the award aside.

- [15] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) the court re-affirmed that the correct approach in adjudicating a review application is to avoid adopting a piecemeal approach but to consider whether based on the totality of the evidence that was presented at arbitration the arbitration award falls within the bounds of reasonableness. It is common cause that the commissioner conducted the correct enquiry of determining whether the applicant had been dismissed. Evidence tendered at arbitration proves that the commissioner conducted the enquiry correctly. He considered the evidence tendered at arbitration and based his decision on it. The errors the applicant can rely on must in fact be errors which had the effect of distorting the commissioner's decision. The applicant could not rely on the alleged error that the commissioner disregarded correspondence from an employee of the first respondent in which she said that he was dismissed in 2019. Not every allegation by any employee of the first respondent that the

applicant had been dismissed constitutes evidence of his dismissal. In the absence of admissible evidence in support of the allegation, the allegation remains that employee's opinion. It is not evidence that the commissioner irregularly disregarded.

[16] The commissioner considered the applicant's attempt to rely on his dissatisfaction with the unilateral increase of his production target and the first respondent's failure to take steps to deal with his difficulty to reach the target. He was, however, not convinced that the dispute before him was a dismissal for poor work performance. His conclusion that the fixed term contract reached its expiry date on 31 December 2019 cannot be faulted. It is common cause. Nothing prevented the applicant during the subsistence of the contract from dealing with the issue of having his target raised unilaterally and not getting assistance when not reaching it. The applicant did not establish that the commissioner incorrectly or unreasonably accepted the first respondent's reasons for not renewing his fixed term contract. He further failed to prove the incorrectness or unreasonableness of the commissioner's decision that he did not prove that he had been dismissed. He provided no cogent reason for this court to interfere with the arbitration award. His application can, in the circumstances not succeed.

[17] The first respondent did not seek a costs order against the applicant.

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

1. The application for review is dismissed.
2. There is no order as to costs.

MZN Lallie

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

For the Applicant:

Adv D Dheoduth

Instructed by

KRN Attorneys

For the Respondents:

Doctor Cithi of Tabacks Attorneys

LABOUR COURT