

SOUTH AFRICA / JUDGMENT

Arendse v Barloworld Ltd (C30/2011) [2014] ZALCCT 72 (19 May 2014)

[2014] ZALCCT 72

COURT

Labour Court Cape Town

BEFORE

Steenkamp

CASE / FILE NUMBER

C30/2011

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 30/2011

Not reportable

In the matter between:

ALBERT ARENDSE Applicant

and

BARLOWORLD LTD First Respondent

Heard: 12-13 May 2014

Delivered: 19 May 2014

Summary: Dismissal

- expectation of renewal of fixed term contract – LRA s 186(1)(b) – expectation not reasonable – dismissal not proven.

STEENKAMP J

Introduction

- [1] The employee's contract was not renewed after it had previously been renewed for ten consecutive months. Was he dismissed as contemplated in s 186(1)(b) of the LRA?[1]

Background facts

[2] The respondent, Barloworld, provides a trucking service for fast moving consumer goods and at all material times, its customer has been PPC. It delivered bags of cement to PPC. The applicant was employed as a general worker – a crew member loading and off-loading bags of cement -- on the following fixed term contracts:

- 26 January 2009 to 28 February 2009
- 1 March 2009 to 31 March 2009
- 1 April 2009 to 30 April 2009
- 1 May 2009 to 31 May 2009
- 1 June 2009 to 30 June 2009
- 1 July 2009 to 31 July 2009
- 1 August 2009 to 31 August 2009
- 1 September 2009 to 30 September 2009
- 1 October 2009 to 31 October 2009

[3] When his contract expired on 31 October 2009, it was not renewed. As from 1 November 2009, the services previously provided by Barloworld were provided by owner drivers previously employed as truck drivers by Barloworld. These owner drivers employed their own crew members.

Legal issues

[4] The employee was previously represented by Cheadle Thompson & Haysom attorneys. They withdrew a week before the trial and the employee chose to represent himself. Nevertheless, the legal issues were spelt out in a pre-trial minute signed by both parties' legal representatives at the time.

[5] The parties agree that s 197 of the LRA does not apply to the situation where the services that were previously provided by Barloworld are now provided by the owner drivers. The employee does not allege that his contract of employment should have been transferred to an owner driver. Instead, he says that he was dismissed in terms of s 186(1)(b) of the LRA and that the dismissal was unfair. He seeks reinstatement. That section reads:[2]

“Dismissal’ means that –

...

an employee reasonably expected the employer 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;”.

- [6] The employee also says that he continued working for Barloworld for four days from 1-4 November 2009. He seeks an order in the alternative that he was “tacitly re-employed” on an indefinite basis.

Evaluation of evidence

- [7] The employee presented his own evidence. Vanessa Thompson (née Paulse), a fleet controller, and Robyn Ann Paul, the depot manager for Kraaifontein, testified for Barloworld. Much of the evidence was common cause, except for the assurances the employee alleges he received that he would remain in employment; and the question whether he continued working for four days in November.
- [8] Before he started working for Barloworld, Arendse was employed in a temporary capacity as a relief crewman for approximately four years.
- [9] Accordingly, he was not a newcomer to temporary employment. He agreed that his services were used on an ad hoc basis at that time. During the trial proceedings, it emerged that Mr Arendse was articulate and astute. He did not fit the description of a general worker. With better opportunities and in a more equal society, he may well have been able to pursue a better education and more satisfactory employment. As it turned out, he was responsible for recruiting four other temporary employees as crew members for Barloworld. He signed nine fixed term contracts, all of which provided that there would be no renewal unless reduced to writing. Of course, the very fact that the contract was renewed nine times may lead to an inference that he formed a reasonable expectation that Barloworld would continue doing so; but the fixed term contracts in this dispute must be seen in context. It emerged from the evidence that there was a legitimate reason for using this unsatisfactory method of employment.
- [10] The respondent’s witnesses explained the reason why it used fixed term contracts from January 2009. The specific service rendered by the respondent (the pocket cement route) was going to be outsourced to owner drivers in terms of a BEE initiative. Subcontractors were used as an interim measure during the handover period. From the date that the applicant and his colleagues were engaged, it was envisaged that the respondent would divest itself of drivers, crewmen and its own trucks and a point would be reached in the near future whereby the respondent would dispense with employing crewmen such as the applicant. Mr Arendse knew this.
- [11] According to Mr Arendse, the depot manager, Mr Amir Sallie (“Sallie”), assured him and his colleagues in the first month of their employment that their positions would be made permanent. This allegation flies in the face of the applicant’s evidence that several meetings were held with Sallie where various complaints relating to working conditions were raised with him, but to no avail. If anything, Sallie insisted that they continue to sign fixed term contracts. He resolutely set himself against making their employment permanent. Even when the applicant’s services came to an end, he made no attempt to approach Sallie to obtain a renewal of his fixed term contract or alternatively to be appointed to a permanent

position.

- [12] Mr Arendse also claimed that Ms Vanessa Thompson (“Thompson”), an administrative controller employed in a clerical position at the time, informed him that his employment would be secure. Thompson testified that she had no authority to make any promises and stated that she may have asked one of the owner drivers, Mr Gareth O’ Ryan (“O’Ryan”) of GRO Transport if he could offer the applicant employment. As it transpired, none of the owner drivers who took over on 1 November 2009 engaged any of the temporary crew members. Whatever promises Thompson may or may not have made, they related to employment with a third party and not with the respondent itself.
- [13] Throughout his evidence, the applicant was fully alive to the concept of owner drivers. He had interacted with several of them before he took up employment with the respondent. During his tenure with the respondent, he gained an accurate insight into the process that was unfolding. This is evident from the instructions that he gave to his attorney as reflected in his amended statement of case. For the first three months of his employment, his services were utilized on Barloworld’s own trucks. Thereafter, even though he was still employed by Barloworld, he provided services to a sub-contractor, Singh’s Transport (“Singh’s”). He knew that GRO Transport replaced Singh’s as from 1 November 2009. It appears that he formed an expectation to continue to work for Barloworld provided that Singh’s continued to offer a service to Barloworld.
- [14] The termination of Singh’s services immediately created a dilemma for the employee because the owner drivers were finally in a position to take over that service. He then claimed in the alternative that his contract had been tacitly renewed because he continued to work for the respondent during the period of 1 to 4 November 2009. In a letter that he wrote to the Court on 15 June 2011, before his attorneys delivered an amended statement of claim, he stated the following:

‘I was placed on a contractor’s (Jubie Singh Transport of Ravensmead) truck. I was employed till his contract was expired. The contract was given to Gerrit Orion [actually Gerard O’Ryan] from Barloworld. He decided that he will employ his own workers’.

- [15] This raises the question what service the employee could have rendered during the period of 1 to 4 November 2009 where on his own version he did not assist GRO Transport with any deliveries. He claimed that he assisted one of Barloworld’s drivers, Reuben Claassen. Ms Robyn Paul (“Paul”) led evidence that during that period, the applicant was not recorded as a crew member of any vehicle on the log sheets. At the request of the Court, she provided copies of the trip sheets for that period to the Court. Arendse’s name does not appear on any of them, while Claassen’s does. She pointed out that during that period Reuben Claassen did not require the assistance of a crew member as the load that he carried was a palletized load. In addition, when Claassen went to Penny Pinchers on 3 November 2009 he did not require the services of a crewman. The same situation was applicable to either 2 or 4 November 2009. As it transpired, 1 November 2009 was a Sunday and no trips were

undertaken.

- [16] It was common cause that the applicant was not paid for working any days after 31 October 2009 and that he did not demand payment either. It was also common cause that no one from management either asked the applicant to work over that period or were in fact aware that he was carrying out any duties. Even if the applicant did accompany Reuben to Penny Pinchers on 3 November 2009, he was not authorised by the respondent to do so. On a balance of probabilities, Barloworld did not ask the employee to work in November 2009.
- [17] When Arendse was asked in cross-examination what work he would have performed if his contract was extended for an additional period of a month, he was at a loss to explain what he would have done. He could also not allude to any specific permanent position he could have been appointed to. His reference to the wash bay did not assist him because that service had been outsourced before he started working for the respondent.
- [18] In his discussion on what constitutes a reasonable expectation within the meaning of s 186(1)(b), John Grogan in his book “Dismissal” states the following:

‘The critical issue when determining when this form of dismissal has occurred is whether the employee’s claim that he or she expected the contract to be renewed was reasonable in the objective sense, ie whether the circumstances were such that any reasonable employee would in the circumstances have expected the contract to be renewed on the same or similar terms’. [3]

- [19] On a full conspectus of the evidence, the employee has not been able to establish that he had a reasonable expectation that his fixed term contract would be renewed. In terms of the prevailing jurisprudence, it is unlikely that an expectation can relate to permanent employment as opposed to the extension of a fixed term contract. One of the proposed amendments to the LRA is to cater for a reasonable expectation to permanent employment which demonstrates that the current position is at odds with the proposed amendment. Furthermore, since the employee had to sign each and every fixed term contract, to his knowledge it would have been most unlikely that he would have been offered a permanent position without having to sign a new contract.

Conclusion

- [20] It follows that the employee has not discharged the onus to show that he was dismissed. The application must fail.
- [21] With regard to costs, I take into account that the employee eventually had to represent himself. He is 50 years old and now unemployed. He has cancer of the voicebox. He is living in his aged parents’ back yard in a “hokkie”. In law and fairness, I do not think that an order for him to pay the company’s costs is appropriate.

Order

The application is dismissed.

Steenkamp J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: In person.

RESPONDENT: W J Hutchinson, Instructed by Fluxmans, Johannesburg.

[1] Labour Relations Act 66 of 1995.

[2] At the time of this dispute, the subsection has not been amended. The proposed amendment reads as follows: “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; (Proposed amendment: Para. (b) to be substituted by s. 30 (a) of Bill No. 16D of 2012.)

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(Proposed amendment: Para. (b) to be substituted by s. 30 (a) of Bill No. 16D of 2012.)

[3] At 43.

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