

SOUTH AFRICA / JUDGMENT

Mining Qualifications Authority v CCMA and Others (JR1766/20) [2023] ZALCJHB 215 (19 January 2023) [2023] ZALCJHB 215

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

JR1766/20

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not

Reportable

case

no: JR 1766/20

In

the matter between:

MINING
QUALIFICATIONS AUTHORITY
Applicant
and
CCMA
First
Respondent
COMMISSIONER
ERIC MYHILL N. O
Second
Respondent
MFUNDO
MDINGI
Third
Respondent

Heard: 18 January 2023
Delivered: 19 January 2023
Summary: An opposed jurisdictional review application – where a fixed term contract ended there is no dismissal. The CCMA lacks jurisdiction to arbitrate the dispute. A recommendation for an appointment and or extension of a fixed term contract does not create a reasonable expectation for renewal. The third respondent failed to establish a dismissal, as such the CCMA lacked jurisdiction. An award issued without the necessary jurisdiction is a nullity and ought to be set aside as such. Held (1): The award is reviewed and set aside. It is replaced with an order that the third respondent was not dismissed and that the CCMA lacked jurisdiction. Held (2): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Before me serves a jurisdictional review against the arbitration award issued by the learned Commissioner, Mr Eric Myhill (Myhill). Myhill found that Mr. Mfundo Mdingi (Mdingi) was dismissed within the contemplation of section 186 (1)(b) (i) of the LRA. He ordered the Mining Qualifications Authority (MQA) to reinstate Mdingi to his expired fixed term employment for a period 1 April 2020 up to and including 1 April 2022. Additionally, he ordered MQA to back pay Mdingi a salary equivalent to R780 269.46 and to also pay him a salary for the month of October 2020. Aggrieved by the arbitration award, MQA launched the present application seeking to

review and set aside the arbitration award. The application is duly opposed by Mdingi.

Background facts

[2] Mdingi has an employment history with MQA. He was employed in 2005 for a period of about three years. He briefly left employment with MQA and made a return in 2008. Relevant to the present application, from 1 December 2016 until 31 March 2018, he was employed for a fixed term as Chief Financial Officer (CFO). After expiry of the fixed term employment, his employment was extended for a further period from 1 April 2018 until 31 March 2020. There was a controversy over this extension. The Board wished to extend for a particular period and an official of the Board compromised it and agreed to a longer period. Disciplinary steps were taken against the relevant officials. This controversy has no particular relevance in the present application.

- [3] Prior to the expiry of the controversially extended fixed term employment, on 28 February 2020, the Acting Chief Executive Officer (ACEO) of MQA, penned a request to the Board of MQA seeking an extension of the employment term until 31 March 2022. The Board did not approve the request by the ACEO. At the end of March 2020, the fixed term employment expired.
- [4] Aggrieved by the non-extension of the fixed term contract, Mdingi referred a dispute to the CCMA and alleged that he was unfairly dismissed within the contemplation of section 186(1) (b) of the LRA. As outlined above, Myhill found in his favour.

Grounds of Review

- [5] MQA raised a number of grounds in attacking the arbitration award of Myhill. Given the view I take at the end it is not necessary

to enumerate those grounds in this judgment. This being a jurisdictional review, the relevant legal question is whether on the

objective facts was Myhill correct or wrong in assuming jurisdiction.

Evaluation

- [6] It is trite law that this Court is not bound by the decision of an arbitrator to assume jurisdiction. The facts pertinent to this

dispute are simple and common cause to a large degree. This Court is not going to concern itself with the reasons given by the Board to refuse the request for extension. They came into being after an expectation was allegedly created. Thus they could not have formed a basis for the expectation. Key in this dispute is an assertion by Mdingi that the request for extension created an expectation that his employment will be extended by the period requested by the ACEO. It was common cause that the Minister had declared a moratorium on employment of Executives and Senior employees. It was for that reason that the Board had amongst other reasons refused to accede to the request. In my view, as stated above, the issue of the reasons provided for refusing to accede to the request is a red herring and irrelevant to the key question. Of course, if Mdingi was unhappy with the reasons so furnished, the remedy would have been to bring a section 158 (1) (h) of the LRA review. Therefore, even if the reasons were sound and convincing that would not affect the alleged reasonable expectation. On Mdingi's version the reasonable expectation preceded the reasons furnished to reject the recommendation. Ms. Lage, who appeared on behalf of Mdingi submitted that, the recommendation letter was not the only fact that generated an expectation. Other facts are, the previous practice of renewal for other employees and that the job profile of the ACEO suggested that he had powers to appoint. To my mind, applying the objective test, those facts would not create a reasonable expectation of renewal, given the prevailing circumstances at the time.

- [7] In terms of section 186 (1) (b) of the LRA a dismissal occurs when an employee employed in terms of a fixed term contract of employment

reasonably expected an employer – (i) to renew a fixed term contract of employment on the same or similar terms but the employer

did not renew it (ii) to retain the employee in employment on an indefinite basis but employer did not offer to retain the employee.

The case of Mdingi was predicated on the first leg of renewal of the fixed term contract. He bore the onus to show that his expectations of renewal were reasonable. The test as already indicated is objective. 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 on the same or similar terms (SARPA and others v SA Rugby (Pty) Ltd and others)[1].

[8] On the facts of this case, it is Mdingi's sole contention, which contention was accepted by Myhill, that the request of the ACEO to the Board penned on 28 February 2020 created a reasonable expectation of renewal. The memorandum was nothing but a request. Therefore, no reasonable employee can harbour an expectation of renewal and base it on a simple request. As a general position, a

request may be acceded to or rejected. It matters not how a request has been motivated for, it may be accepted or rejected. A different

situation may have arisen if the ACEO had promised Mdingi that his contract will be extended. This memorandum was penned in the

circumstances where on 27 November 2019, the Minister of Higher Education and Training had issued a directive placing a moratorium on filling of vacant positions at executive and senior management level. Mdingi knew about the directive. Under such circumstances, it was unreasonable of him to expect a renewal. A renewal would have amounted to a filling of a vacant position. Expecting the Board of MQA to defy the directive of the Minister is an expectation that is not reasonable at all. On the issue of the directive, Ms. Lage submitted that because there was a moratorium, Mdingi had an expectation that since the Board cannot fill the vacancy and cannot operate without a CFO, as required by the PFMA regulations, he shall be retained in the position after the effluxion of time. There is no merit in this submission. First of all, there was nothing to prevent MQA, in honouring the moratorium to have a junior employee in the finance department to perform the duties attached to the statutory CFO functions on an acting capacity. Secondly, it was not impossible for MQA to have approached the Minister and plead its case to make a statutory appointment in the face of the moratorium. A conclusion that the memorandum generated a reasonable expectation of renewal is one wrongly arrived at.

[9] On the objective facts, Mdingi was not dismissed within the contemplation of section 186 (1) (b) of the LRA. A conclusion that he was dismissed within the contemplation of the section, is one wrongly reached. Since Mdingi failed to establish the existence of a dismissal, the CCMA lacked jurisdiction to entertain the alleged unfair dismissal dispute. The arbitration award issued by Myhill is a nullity, having being issued without the necessary jurisdictional powers and stands to be reviewed and set aside on this basis alone.

[10] For all the above reasons, the arbitration award issued by Myhill is not justifiable and is reviewable in law.

[11] In terms of section 145 (4) of the LRA, this Court is empowered, if it sets aside an arbitration award, to determine the dispute in the manner it considers appropriate. Given the fact that all the evidence to determine the question whether there was a dismissal is fully available to this Court, it is appropriate to determine the dispute. As indicated above, the appropriate order to make is that on the objective facts there was no dismissal.

[12] In the results I make the following order:

Order

1. The award issued by Commissioner Eric Myhill dated 16 October 2020 under case number GAJB7450-20 is hereby reviewed and set aside.
2. It is replaced with an order that Mfundo Mdingi was not dismissed as such the CCMA lacked jurisdiction to determine the alleged unfair dismissal dispute.
3. There is no order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances: For the Applicant: Mr Lebogang Kutumela Instructed by: M M Baloyi Attorneys, Johannesburg. For the 3rd Respondent: Ms. M V Lage of CG Grove Attorneys, Randburg

[1]

(2008) 29 ILJ 2218 (LAC) at para 44.

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Prepared on 10 October 2026 · Esheria