

SOUTH AFRICA / JUDGMENT

Quebar Electrical and Civil Engineering v Fortuin and Others (C20/2022) [2024] ZALCCT 34 (12 July 2024)

[2024] ZALCCT 34

COURT

Labour Court Cape Town

BEFORE

C de Kock

CASE / FILE NUMBER

C20/2022

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THE

LABOUR COURT OF SOUTH AFRICA

HELD

AT CAPE TOWN

Not

reportable

Case no: C20/2022

In

the matter between:

QUEBAR ELECTRICAL AND
CIVIL ENGINEERING Applicant
(REG
NO: 2014/203054/07)
And
RODERICK
RONALD FORTUIN
First Respondent
JOHANNES
SCOTT
Second Respondent
DAVID
PETERSEN N.O.
Third Respondent
COMMISSION
FOR CONCILIATION MEDIATION
AND
ARBITRATION ("CCMA")
Fourth Respondent

Heard:	4 July 2024 Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date for handing down judgment is deemed to on 12 July 2024
Summary:	application to review – test to be applied to the existence of a dismissal that of correctness - decision of commissioner found not to be rationally connected to the evidence before him – no evidence presented of a reasonable expectation on the same or similar terms – employer's conduct in prematurely terminating the contract constitutes a dismissal – compensation awarded for procedurally and substantively unfair dismissal.

JUDGMENT

DE KOCK, AJ

Introduction

[1] This matter concerns an application by the applicant (hereafter referred to as “Quebar”) to review and set aside an arbitration award given by the third respondent (hereafter referred to as “Petersen”) in his capacity as a commissioner of the CCMA. The application has been brought in terms of section 145 of the Labour Relations Act^[1] (‘the LRA’).

[2] The matter arose from the alleged dismissals of the first and second respondents (hereafter collectively referred to as “the

employees”). The employees alleged that the non-renewal of their fixed term contracts of employment constituted a dismissal, and that their dismissals were unfair both substantively and procedurally. The arbitration proceedings before Petersen took place

on 7 December 2021. Petersen, following the conclusion of the arbitration proceedings, issued an award dated 19 December 2021 wherein he found that the employees were dismissed, and that their dismissals were unfair both substantively and procedurally. Petersen

awarded to each employee six (6) months compensation. It is this determination that gave rise to the current review application.

[3] The review application was filed within the six (6) weeks' time frame and all relevant pleadings and notices were filed by Quebar. The review application, which was heard on 4 July 2024, was unopposed.

The relevant background

- [4] The employees were employed on a fixed term contract of employment from 10 October 2020 to 30 November 2020. The fixed term contracts were extended on a month-to-month basis until 31 May 2021. Quebar did not renew or extend the May 2021 fixed term contracts and handed the employees a formal notice of the expiry of their contracts on 28 May 2021.

The CCMA award

- [5] Petersen found that the fact that the fixed term contracts were renewed at least six times is inter alia enough to conclude that a reasonable expectation was created that the employees' contracts would last until the end of the project (October 2021). It was also found that, since the owner failed to testify and rebut the employees' evidence that he made promises to them that they would be taken to one of its new projects and to keep them employed for at least another six months, it is probable that such promises were made.
- [6] Petersen also found it odd that Quebar's defence was that there was still work to be done until 5 June 2021 and that this is enough to conclude that there was an expectation that the employees would continue working, and that their employment was prematurely

terminated.

- [7] Petersen further found that the fact that Quebar renewed the contracts of other fixed term contract employees on 10 June 2021

shows that the work did not end on 5 June 2021, but on 31 October 2021.

- [8] Petersen therefore found that the non-renewal of the employees' contracts amounts to a dismissal within the meaning of section 186(1)(b)(i) of the LRA. Petersen found that the dismissals were procedurally unfair, as the employees were not informed about the non-renewal on 11 May 2021. The employees only learned about the non-renewal of their fixed term contracts on 28 May 2021, which was three days before the expiry of the May 2021 extension agreement.
- [9] Petersen also found the dismissals to have been substantively unfair due to Quebar's failure to renew the employees' fixed term contracts on 10 June 2021, just like the other 27 employees, and that Quebar therefore had no fair reason to dismiss the employees.
- [10] In respect of compensation, Petersen found that Quebar did not provide any documentary evidence that its contract with the client ended on 5 June 2021, and that no direct evidence was presented that the owner never made the promises to the employees. Petersen accordingly awarded each employee six (6) months' compensation.

The test for review

[11] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,^[2] the Court held that ‘the reasonableness standard should now suffuse section 145 of the LRA’, and that the threshold test for the reasonableness of an award was:

‘...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...^[3]. In *Herholdt v Nedbank Ltd and Another*^[4] the Court applied this reasonableness consideration as follows:

‘... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

[12] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.

[13] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.^[5] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.^[6]

[14] The test for reviews, as referred to above, is not however applicable to a jurisdictional issue where the existence of a dismissal is in dispute. The relevant test to be applied in determining whether there was a dismissal is whether the commissioner’s decision is correct. I will now proceed to consider the review application by the applicant against the above principles and test applicable to review applications, with specific reliance on the “correctness” test.

Grounds of review

[15] Quebar takes issue with Petersen’s failure to take into consideration the employees’ testimony that their contracts

were renewed on a month-to-month basis, that they did not testify and/or were able to prove that a practice and/or expectation was created, and they did not dispute the fact that the nature of the work and/or contract was limited.

- [16] Quebar challenges Petersen's finding that the expectation was until October 2021, as the employees' evidence was that they were promised that they would be taken to one of the new projects. It was thus common cause that the project for which the employees were employed (Garop Wind Farms) was indeed completed. It is alleged that Petersen exceeded his powers by jumping to a conclusion based on vague, and unsubstantiated averments.
- [17] Quebar also takes issue with the award, as the employees failed to indicate who the owner was that made the promises and they failed to prove their allegations. Petersen erroneously found that Quebar carried the burden of proof that the promises were not made, and this constitutes an error in law rendering the award reviewable.
- [18] Petersen also failed to consider whether all employees, employed on the Garop Wind Farm project, contracts were indeed terminated.

Analysis

of the grounds of review

- [19] It is necessary, in considering the various grounds of review, to firstly refer to the initial fixed term contracts of employment.

Quebar's submissions are that the fixed term contract was linked to the Garop Wind Farm project. A clear reading of the contract however reveals that the fixed term contracts were not linked to the Garop Wind Farm project but appears to be of a general

nature. Be that as it may, the contract was indeed one linked to a specified period, i.e. until 30 November 2020.

- [20] It is common cause that the initial contracts were extended on 6 further occasions with the last extension being up until 31 May 2021. The extension agreements, duly signed and accepted by the employees, refer to the project for which the employees have been employed. Although the project is not mentioned, the project could only have been the Garop Wind Farm project, as this is where the employees' rendered their services. The extension agreements also specifically state that the previous contract will no longer be applicable should the extension agreement be accepted.
- [21] The extension of the initial fixed term contract on 6 occasions does not automatically lead to a reasonable expectation that the contracts would be renewed beyond the last date of the extension agreement. The employees were made aware that the extensions were done until the last date mentioned in the extension agreement, or until the project is completed, whichever date/events comes sooner.

- [22] Petersen's finding that the renewal of the fixed term contracts on six occasions is enough to conclude that a reasonable expectation was created that their contract would last until the end of the project (October 2021), is not supported by the evidence that was placed before him. There is no evidence that the Garop Wind Farm project continued until 31 October 2021. The evidence shows that this project came to an end on 5 June 2021. Petersen's finding therefore that there was a reasonable expectation that the contracts would be renewed until October 2021 is not supported by the evidence that was placed before him and is simply incorrect.
- [23] Petersen's finding further that the fact that the contracts of others were renewed on 10 June 2021 shows that the work did not end on 5 June 2021, is also not supported by the evidence. The evidence was that new contracts were entered into in relation to a different project. It is not therefore correct to conclude, based on new contracts having been entered into on 10 June 2021 for another project, that the work at Garop Wind Farm did not end on 5 June 2021. The evidence, looking at holistically, shows that the Garop Wind Farm project terminated on 5 June 2021.
- [24] Although the evidence presented shows that some employees were given contracts for another project on 10 June 2021, the undisputed evidence was that they entered into new contracts of employment linked to that specific project.
- [25] The employees testified that they were promised by the owner (Quinton) that they will be moved to other projects and that they will be employed until October 2021. It is unfortunate that Quinton was not called as a witness to rebut the employees' evidence in this regard. The employees were unable to provide any proof of such promises that were allegedly made, as based on their testimony these promises were made verbally. There was nonetheless an onus on Quebar to call Quinton as a witness to either confirm or deny that he made such promises.
- [26] In the absence of the employees' evidence being disputed by the direct evidence of Quinton, this Court must find that the said promises were indeed made. Booysen was not present when these promises were made, and his evidence can therefore not be considered as a rebuttal of the evidence.
- [27] This then leads to the determination whether the employees were dismissed in terms of section 186(1)(b)(i) of the LRA, i.e. a reasonable expectation for the renewal of the fixed term contract on the same or similar terms was created and that Quebar failed to renew the fixed term contract on the same or similar terms or did not renew the contract.
- [28] The expectation for a renewal must be on the same or similar terms. The last extension of the fixed term contract was for one month, i.e. from 1 May 2021 to 31 May 2021. The employees' evidence was that they were promised employment until October

2021. The expectation that was created by this promise must be to the effect that it was an expectation of a renewal on the same or similar terms. The expectation, created by the promise, cannot therefore have been held to be for another five months from 31 May 2021 and for an entirely different project, as this would not fall within the requirement of “same or similar”, as provided for in section 186(1)(b)(i) of the LRA. The expectation, at best, should have been for another extension of one month, i.e. for June 2021 and for the same project.
- [29] The promise, as testified to by the employees, was not that the employees’ contracts will be extended for another month on the Garop Wind Farm project. The promise was for different projects, and for a period that by far exceeds the last extension, which was on a month-to-month basis. The promise that was made could therefore not have created a reasonable expectation of a renewal on the same or similar terms but is indicative of a promise of entering into new contracts of employment. This was not the issue that was placed before Petersen to consider.
- [30] The next issue to be considered is whether the employees had a reasonable expectation that their contracts would be extended until the end of the project, which based on the evidence was on 5 June
2021. The May 2021 extension agreements, duly signed by the employees, clearly states that the contract would come to an end either on 31 May 2021 or on the date that the project is completed,
- whichever is sooner.
- [31] In terms of the wording of the extension agreements, the contracts would expire on 31 May 2021. This being the case, the only

conclusion

that Petersen should and could have reached, based on the evidence before him, was that there was no reasonable expectation for renewal on the same or similar terms, and that the employees failed to discharge the onus that they were dismissed in terms of section 186(1)(b)(i) of the LRA.

- [32] This is however not the end of the enquiry as to whether the employees were dismissed. The employees’ extension agreements
- guaranteed them employment until at least 31 May 2021. The employees were called in on 28 May 2021 and advised of the expiry of their contracts. The employees were not paid for 31 May 2021, and on the evidence, which evidence I accept, was not told to report for duty on 31 May 2021. I also accept that Quebar failed to show that the employees were verbally informed of the expiry of their contracts on 11 May 2021.

- [33] I have some serious reservations regarding the manner in which the employees were called into the office on 28 May 2021, and the reasons advanced for doing so. On the evidence that was before Petersen, the employees' contracts were prematurely terminated on 28 May 2021, and the terminations constitute a dismissal as provided for in section 186(1)(a).
- [34] I am of the view that, given the manner in which the employees were dismissed, their dismissals were unfair both substantively and procedurally. I took into consideration that the dismissals on 28 May 2021 were premature to the extent that the extension agreements would have expired on 31 May 2021. This would have been on the next working day, which was the Monday.
- [35] The obvious relief that the employees are entitled to is their salary for Monday, 31 May 2021. I do not however believe that such relief would be appropriate and fair towards the employees given the manner in which their employment was terminated. The employees are entitled to be compensated for their unfair dismissals, and I am of the view that compensation of one month's salary for each employee is fair and reasonable compensation for their unfair dismissals on 28 May 2021. I have considered the fact that the employees' last working day would have been on 31 May 2021, but the employees are nonetheless entitled to compensation for their unfair dismissals even if such compensation exceeds the period for which they would have been employed.

Conclusion

- [36] I am satisfied that the award must be reviewed, corrected and be set aside insofar as Petersen found that the employees had a reasonable expectation that their contracts would be renewed until 31 October 2021, and insofar as Petersen awarded 6 months' compensation to each employee. This decision is simply incorrect, and it is not supported by the evidence.

Costs

- [37] In terms of the provisions of section 162(1) of the LRA, I have a wide discretion when it comes to the issue of costs. I am mindful of the dictum of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[7] when it comes to the issue of costs in employment disputes, and I am as such not inclined to exercise my discretion in awarding costs in this matter. This is especially so given that the review application was unopposed.

- [38] In the premises, I make the following order:

Order

1. The arbitration award is reviewed and set aside and replaced with the following order:
 - 1.1 The employees discharged the onus to prove that they were dismissed on 28 May 2021.
 - 1.2 The employees' dismissals were unfair both substantively and procedurally.

1.3 Quebar is ordered to pay to Rodrick Fortuin one month's compensation in the amount of R17,464.16, and to Johannes Scott one month's compensation in the amount of R7,400.00.

1.4 The payment in 1.3 above must be paid to the employees within 14 days of the date that this judgment was delivered.

1.5 There is no order as to costs.

C de Kock

Acting Judge of the Labour Court of South Africa

Representatives: For the Applicant: Adv Viljoen Instructed by: Symington De Kock Attorneys For the Respondents: Unopposed (No appearance)

[1] Act 66 of 1995 (as amended).

[2]

(2007) 28 ILJ 2405 (CC).

[3] Id at para 110.

[4]

(2013) 34 ILJ 2795 (SCA) at para 25.

[5] Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others

(2008) 29 ILJ 964 (LAC) at para 102.

[6] See Campbell Scientific Africa (Pty) Ltd v Simmers and Others

(2016) 37 ILJ 116 (LAC) at para 32; Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others

(2015) 36 ILJ 1453 (LAC) at para 12.

[7]

(2018) 39 ILJ 523 (CC).

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