

SOUTH AFRICA / JUDGMENT

Selau v Department of Justice and Constitutional Development (J2914/2017) [2021] ZALCJHB 398 (2 November 2021) [2021] ZALCJHB 398

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J2914/2017

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THE

LABOUR COURT OF SOUTH AFRICA

(HELD

AT JOHANNESBURG)

Not

reportable

CASE

NO: J 2914/2017

In

the matter between:

THAPELO

AUBREY

SELAU Applicant

and

DEPARTMENT

OF JUSTICE AND

CONSTITUTIONAL

DEVELOPMENT Respondent

Date of hearing: 02

November 2021

Date of judgment: 02

November 2021

JUDGMENT

VAN NIEKERK J

- [1] When this matter was called this morning, the applicant failed to appear. After submissions by the respondent's counsel, I dismissed the application without any order as to costs. I indicated that I would provide brief written reasons for my order. These are my reasons.
- [2] The applicant seeks an order declaring that the respondent's conduct in terminating his contract of employment was ultra vires the Labour Relations Act and the Basic Conditions of Employment Act, that the termination constituted an unfair dismissal, that the applicant's continued employment for a period of 13 months amounted to permanent employment, alternatively, that it creates a legitimate expectation for permanent employment.
- [3] The respondent submits that the court has no jurisdiction to entertain the applicant's claims. In essence, the respondent identifies the applicant's claim as one based on an unfair dismissal emanating from the nonrenewal of his employment contract beyond 30 September 2017. In terms of section 191 of the LRA such a dispute, so the respondent contends, or to be referred to the bargaining council or the CCMA for conciliation, and in the absence of a resolution of the dispute, to arbitration. Further, the respondent contends that this court has no jurisdiction to adjudicate a dispute of this nature in the absence of conciliation (*NUMSA v Intervolve (Pty) Ltd & others* (2015) 36 ILJ 363 (CC) at paragraph 39). To the extent that the applicant appears to invoke section 198(B) of the LRA, the respondent submits that any dispute regarding the application and interpretation of that section must be referred to conciliation and thereafter to arbitration. In the circumstances, section 157 (5) precludes this court from exercising jurisdiction, the dispute being one that the LRA requires it to be resolved through arbitration.
- [4] It is well-established that jurisdiction must be determined from the pleadings. In the present instance, the applicant avers that in response to an advertisement issued by the respondent, he applied for the post of maintenance officer at the Rustenburg Magistrate's Court. He signed a contract on 11 October 2015, for a fixed term, to 12 October 2015 to 31 March 2016. The contract was thereafter extended on a number of occasions, with the result that the applicant was engaged in the post for a period of 23 uninterrupted months. In September 2017, the post was again advertised. The applicant did not apply for the position, on the basis that he believed that he was in occupation of the post and that it was not necessary for the position to be advertised. He's cause of action is vague, to say the least, but the applicant appears to assert that the respondent breached the Basic Conditions of Employment Act in relation to his fixed term contract, that a legitimate expectation of permanent employment had been created by the respondent and that the respondent thus acted ultra vires in term of the LRA and the BCEA in terminating his employment and advertising the post in which he had been engaged. He avers specifically that 'In so doing the conduct of the respondent constituted an unfair labour practice and as such I am

entitled to redress and to be placed back to the position occupied being of a maintenance officer at Rustenburg Magistrate's Court' The relief sought by the applicant is that he be placed in the permanent position of a Maintenance Officer at the Rustenburg Magistrate's Court 'as I have already applied and placed in that position after meeting all the qualification that was needed by Respondent (sic)'. The respondent does not dispute that several fixed term contracts of employment were concluded between it and the applicant for the same position, the last one of which lapsed on 30 September 2017. None of the contracts were for a duration of more than six months and all of them were concluded in terms of circulars issued by the respondent regulating the employment of persons employed on fixed term contracts. The last of these was issued in August 2017 and made allowance for the completion of the recruitment process for posts that had been found to be critical, one of them being the post occupied by the applicant. What followed was a process of advertisement and recruitment for the post. The applicant does not dispute that the respondent notified him and alerted him of its intention not to further renew his fixed term contract, or to appoint him on a permanent and indefinite basis in the absence of any application for appointment to the post. The applicant also does not dispute that he was aware of the advertisement of the post of maintenance officer for the Rustenburg Magistrate's Court, and that he did not apply for the post.

- [5] The pleadings in essence assert that the non-renewal of the applicant's contract after 30 September 2017 constituted an unfair dismissal, that his continued employment on a fixed term basis for some 23 months entitled him to permanent employment on the basis that a legitimate expectation of permanent employment was created or that the period exceeded the three-month period which triggers the deeming provisions of section 198B (5) of the LRA.
- [6] Insofar as section 198B is concerned, the applicant's salary exceeds the threshold set by the minister in terms of section 6 (3) of the BCEA. Consequently, the section does not apply to the applicant (see section 198B (2) (a)). Further, the application of section 198B is excluded by virtue of section 198B (2) (c), in that the applicants fixed term contract was permitted by statute in the form of sections 8 (2) and 9 of the Public Service Act. For those reasons, the deeming provision of section 198B does not apply to the applicant and this court has no jurisdiction to entertain that part of his claim in which he reportedly seeks to assert its rights afforded by the section.
- [7] Turning next to what is in essence a claim of unfair dismissal, while it is correct that a dismissal is defined in section 186 (1) (b) to extend to a failure or refusal to renew a fixed term contract of employment in the face of a reasonable expectation of renewal, this court has no jurisdiction as a court of first instance to make any determination of the fairness of a dismissal in the circumstances. Section 191 makes clear that a dismissal dispute must be referred to conciliation, and then to arbitration if the dispute remains unresolved, depending on the reason for dismissal. The applicant has not asserted a reason for dismissal that would bring his claim of unfair dismissal within the jurisdictional purview of this court.

In any event, as the Constitutional Court has made clear, the referral of a dismissal dispute to conciliation is a jurisdictional prerequisite to any determination of the dispute by this court. Finally, and insofar as the applicant's claim is one of an unfair labour practice, the provisions of section 191 require any claim of unfair labour practice to be referred to conciliation and in the event that conciliation fails, to arbitration. Section 157 (5) makes clear that this court does not have jurisdiction to adjudicate an unresolved dispute if the LRA or any other employment law requires the dispute to be resolved through arbitration.

[8] For all of these reasons, I came to the conclusion that this court has no jurisdiction to entertain the application, and dismissed the application on that basis.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: No appearance

For the respondent: Adv MT Moshodi, instructed by the state attorney. (Heads of argument drafted by Adv DT Skhosana SC and Adv MT Moshodi.)

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