

SOUTH AFRICA / JUDGMENT

Solidarity obo Stones v Special Investigation Unit and Others (JR2751/18)

[2021] ZALCJHB 450 (10 December 2021)

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COURT

Labour Court Johannesburg

BEFORE

Phehane

CASE / FILE NUMBER

JR2751/18

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Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR2751/18

In

the matter between:

SOLIDARITY
obo C.R.
STONES Applicant
and
SPECIAL
INVESTIGATION
UNIT First
Respondent
COMMISSION
FOR CONCILIAITON, MEDIATION AND
ARBITRATION Second
Respondent
L.NOWOSENETZ
N.O. Third
Respondent

Enrolled: 7 October 2021
Decided
in chambers: 10 December 2021
(In view of the measures
implemented as a result
of the Covid-19 outbreak, this judgment was handed
down electronically by
circulation to the parties' representatives by email. The
date for hand-down is
deemed to be on 10 December 2021)

JUDGMENT

PHEHANE, J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA),[1] to review and set aside the arbitration award by the third respondent dated 18 October 2018 under case number GATW 13264-14. The application is opposed by the first respondent. The parties have agreed that the application be decided on the papers.

Background

- [2] The factual background is largely common cause. The applicant commenced employment with the respondent on 1 October 2006 on the basis of a fixed-term contract which expired on 31 July 2007. A second fixed-term contract was concluded for the duration 1 April 2008 to 31 March 2009. A third fixed-term contract was concluded for the period 1 April 2009 to 1 March 2011. A fourth fixed-term contract was concluded for the duration 1 April 2011 to 31 March 2012.
- [3] On 13 January 2012, the applicant turned 60 years.
- [4] After March 2012, the applicant rendered services with no contract in place. On 4 October 2013, the applicant signed a fixed-term contract for the period 1 April 2013 to 1 March 2014. Once again, post March 2014, no new contract was concluded and the applicant continued to render services.
- [5] In a letter dated 4 September 2014, the applicant was notified in writing, that his employment contract would terminate on 30 September 2014. At this date, the applicant was 62 years old.
- [6] The applicant lodged an unfair dismissal dispute with the second respondent. The outcome of the arbitration was that the first respondent did not dismiss the applicant. It is against this finding that the applicant brings this application.

The grounds of review

- [7] In summary, the applicant contends that the third respondent committed a gross irregularity in the conduct of the arbitration proceedings; that he misconstrued the evidence and came to the conclusion that the applicant was not dismissed. Further, that the respondent failed to have regard for the full complement of evidence that was before him and failed to apply his mind to the evidence. In addition, that he exceeded his powers by making certain conclusion which were unsubstantiated by any evidence. In the circumstances, that the arbitration award is unreasonable.[2]
- [8] In his supplemented grounds of review, the applicant contends that while he had referred an unfair dismissal dispute to the second respondent, the third respondent incorrectly stated that the applicant's case is premised on section 186(1)(b) of the LRA, in that he had a reasonable expectation of the renewal of his contract of employment. In the circumstances, the applicant contends that the third respondent misconstrued the evidence before him and came to an erroneous conclusion that the cause of action falls under section 186(1)(b) of the LRA. The applicant submits that his unfair dismissal dispute was not based solely on the expectation of the renewal of his contract. That this was an alternative claim. Strangely, he contends that his main argument

before the third respondent, was that he had the expectation to be employed until the age of 65, alternatively, until March 2015, due to the fact that no contract existed the time of the termination of his services. In conclusion, the applicant contends that the third respondent placed undue weight on the evidence of the respondent's witness, one Ms. H. Dreyer and ignored the evidence of the applicant that he was employed for an indefinite period until he attained the age of 65 years.[3]

Opposition

- [8] The first respondent contends that the third respondent correctly identified the nature of the dispute as falling under section 186(1)(b) of the LRA, in view of the evidence before him.
- [9] The first respondent denies that it made any undertaking of continued employment beyond the contracted period. The first respondents contends that on the evidence before the third respondent, the applicant was informed that the first respondent would undertake a review or "scoping" exercise to determine whether to place the role that the applicant occupied on its permanent structure. Following such review, the first respondent determined not to place the role on its permanent structure. The applicant was informed about this decision. He was also informed that his employment would not continue after 30 September
2014. Further, there was no evidence before the third respondent, that the applicant was informed that he would continue to be employed until he reached the age of 65 years.
- [10] The first respondent denies that the arbitration award is reviewable on the grounds as pleaded.

Analysis

[11] The applicant's case before the first respondent was summarised as follows at the commencement of the arbitration proceedings:

'APPLICANT'S REPRESENTATIVE: Thank you, Commissioner. It is the applicant's case that he was firstly dismissed and that the dismissal was both procedurally as well as substantively unfair. At the time of the dismissal, the applicant did not have a fixed term contract of employment, hence the reason we are saying that he was dismissed. It is not because there was a contract that had expired due to a (inaudible) of time. It is our contention that the applicant had a reasonable expectation that he would continue working for the respondent until the age of 65. Alternatively... intervened.

...

APPLICANT'S REPRESENTATIVE: ... So, he had a reasonable expectation that he would carry on for another three years. Alternatively, that he would continue with the respondent until 31 March 2015, as the applicant was employed on various fixed term contracts, the first commencing on 1 October 2016. These contracts were renewed a continuous basis. And contracts, in most cases, ran from 1 April to 31 March the following year.'[4]

[12] The further claim before the third respondent, was a monetary claim, which does not form part of the grounds of review in casu, and correctly so.

[13] The evidence before the third respondent comprised of the retirement policy of the first respondent, which provides the age of retirement is 60 years, and this may be extended for operational needs.[5] In discussions during January 2012 between the applicant and Mr. Mavuso Shabalala, the former Head of Human Resources and supervisor

of the applicant at the time, Mr. Shabalala intimated extending the applicant's contract by three years.[6] In a memorandum of 15 March 2013 addressed to the head of the first respondent, Mr. Shabalala motivated for and recommended the renewal of the contract of the applicant for a period of one year, terminating on 31 March 2014. In addition, that human resources

scopes the role for incorporation into the establishment of the first respondent.[7] The applicant subsequently signed a contract in October 2013, in respect of his fixed-term contract for the period 1 April 2013 to 1 March 2014. There was no evidence before the third respondent that beyond this period, the applicant was employed on a permanent basis until the age of 65 years.

[14] The further evidence before the third respondent was that the scoping was undertaken and the first respondent took a decision not to incorporate the role on its permanent establishment. This was communicated to the applicant on 4 September 2014,[8] in a letter notifying him of the termination of his employment contract. In this letter, the applicant was reminded of previous

discussions and correspondence that his existing contract would not be extended beyond 30 September 2014.[9] This was e-mail correspondence during June 2014, between the applicant and Ms. Miseria Nyathi, the head of business support of the first respondent, wherein she unequivocally informed the applicant that his contract will not be extended beyond September 2014.

[15] In response to a question as to why the applicant thought his contract would continue post 30 September 2014 after he had been notified by Ms. Nyathi that it would not, the applicant replied that he had an expectation that it would be renewed, as his previous contracts were renewed. Further, that Mr. Shabalala had informed him that a three year contract would be looked at.[10]

[16] The evidence before the third respondent was that the applicant's "main dispute" was that there was an expectation that he would continue to be employed by either being furnished with a two or three-year contract, or he would be employed until the age of 65. This was his "essential expectation".

[17] The evidence of Ms. Dreyer centered around payroll and that contracts of employment are important to determine the rate of payment. It is undisputed that the applicant received the renewal of contracts late on each occasion.

[18] In my view, on the totality of evidence before the third respondent, the applicant was an employee of the first respondent,[11] his case was premised on the failure of the first respondent to renew his fixed-term contract that expired in March 2014, or to employ him until he turned 65 years old. The applicant was aware as early as June 2014, that his contract of employment, which was indefinite at the time, would not continue post 30 September 2014. He was notified of the termination of his contract in a letter dated 4 September

2014. He could not say with certainty, when he received the termination notice.[12] Nonetheless, he was aware in June 2014, that his employment contract would terminate on 30 September 2014.

[19] Section 186(1)(b) of the LRA reads as follows:

'(1) 'Dismissal' means that –

(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.'

- [20] The applicant's case before the third respondent that he held the expectation that his contract would be renewed for a further fixed-term ending on 31 March 2015, or that he would be employed on a permanent basis until he attained the age of 65 years, in my view, brings the applicant's case under the purview of section 186(1)(b) of the LRA. In the circumstances, in my view, the first respondent did not misconstrue or ignore the evidence before him. He correctly determined the nature of the dispute before him.
- [21] The onus that the applicant was required to discharge, is to prove whether the respondent created a reasonable expectation that his fixed-term contract would be renewed.[13]
- [22] On the totality of evidence before the third respondent, the applicant was aware that his role was not on the permanent establishment of the first respondent. This, he conceded.[14] He was aware that the result of the scoping was that his role was not required in the establishment of the first respondent. He was also aware of an irregularity in his contract[15] and was informed in June 2014, and later, notified in September 2014, that his contract would terminate on 30 September 2014.
- [23] In the circumstances, I find the third respondent's decision that the applicant failed to discharge the onus on him to prove that he was dismissed as contemplated in section 186(1)(b) of the LRA, is reasonable.
- [24] In the light of the afore-going, I do not find any basis to interfere with the arbitration award.

Order

[25] In the premises, I order as follows:

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

M. T. M. Phehane

Judge of the Labour Court of South Africa

Representation:

For the Applicant: A

Nel of Solidarity Trade Union

For the First Respondent: Adv Baloyi SC

Instructed by: State

Attorney, Johannesburg

[1] Act 66 of 1995, as amended.

[2] Pleadings, founding affidavit, para 8, pp 10 to 11.

- [3] Pleadings, supplementary affidavit, para 2.9, where the applicant makes an assertion that his “argument” before the third respondent was that he was employed for an indefinite period until he attained the age of 65 years after the expiry of his last fixed term contract (30 March 2014).
- [4] Transcribed record, pp 231 to 32.
- [5] Records, p 199.
- [6] Transcribed record, p 255 to 256.
- [7] Records, pp 149 to 151.
- [8] Records, p 205; transcribed record, pp 270 to 274.
- [9] Records, pp 201 to 204.
- [10] Transcribed record, p 274 to 275.
- [11] The Court order per Gush, J dated 17 August 2017 states this.
- [12] Transcribed record, p 283, lines 15 to 20.
- [13] See: Department of Agriculture Forestry and Fisheries v Baron and Others [2019] 12 BLLR 1289 (LAC), where LAC dismissed an appeal against the judgment a quo which found an arbitrator’s decision was reasonable insofar as the arbitrator found that the applicant discharged the onus that was upon him to prove that the employer created a reasonable expectation of renewal and therefore, that his dismissal was as contemplated in section 186(1)(b) of the LRA. The LAC set out the reasoning of the arbitrator’s finding in this regard in para [17]. This reasoning illustrates that the applicant in that case, had discharged the onus on him and that the respondent had failed to prove that the dismissal was both procedurally and substantively fair.
- [14] Transcribed record, p 308, lines 15 to 25.
- [15] Ibid, p 269, lines 1 to 10 and Records, p 203.

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