

SOUTH AFRICA / JUDGMENT

Motsei and Others v General Public Service Sector Bargaining Council and Others (JR 38/2020) [2022] ZALCJHB 253 (9 September 2022) [2022] ZALCJHB 253

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 38/2020

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR 38/2020

In

the matter between:

L
MOTSEI AND 54
OTHERS
Applicant
And
GENERAL PUBLIC SERVICE
SECTOR
BARGAINING
COUNCIL
First Respondent
E
MAREE
N.O.
Second Respondent
STATISTICS
SOUTH
AFRICA
Third Respondent
Heard: 06 September
2022
Delivered: 09
September 2022

(This judgement was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 09 September 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicants seek to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 30 November 2019, as well as an interlocutory ruling made by the same arbitrator on 24 August 2018.
- [2] The material facts are recorded in the award under review and I do not intend to repeat them here. For present purposes, it is sufficient to note that the applicants were employed by the third respondent from 2015 on a series of fixed term contracts. Those of the applicants engaged as survey officers had their fixed term contracts renewed five times, either shortly before or shortly after the expiry of the prior contract. Those of the applicants engaged as administrative assistants had their contracts renewed on six different occasions. The applicants' fixed-term contracts terminated on 30 September 2017, and were not renewed. The applicants contended that the refusal to renew their contracts constituted a 'dismissal' for the purposes of section 186(1) and disputed the fairness of their dismissals. The matter was referred ultimately to arbitration.
- [3] In her award, the arbitrator held that the employees had failed to discharge the onus of proving that they had been dismissed as contemplated by section 186 (1)(b) of the LRA. The arbitrator found that the evidence did not conclusively establish that the promises of renewal on which the applicants had relied were in fact made. Further, the fact that the applicants' contracts had previously been renewed, had to be viewed in a factual context where the contracts of employment themselves recorded that there was to be no expectation of renewal. Although the work on which the applicants were engaged remained ongoing, the arbitrator found, on the evidence, that the third respondent's financial constraints (which included a moratorium on the filling of posts), were such that it was not in a position to renew the contracts, a fact of which the applicants were aware.
- [4] The interlocutory ruling which the applicants seek to review relates to the applicants' claim under section 198B of the LRA. That section provides, amongst other things, that in respect of employees whose earnings fall below a prescribed threshold and in other circumstances not relevant to the present proceedings, employment on a fixed-term contract in the absence of defined exceptional circumstances is deemed to be a contract of indefinite duration. In her ruling, the arbitrator held that the bargaining council had no jurisdiction to

deal with any dispute relating to section 198B, since no such dispute had been properly referred to conciliation by the applicants. After the ruling, the arbitration continued on the basis that the dispute between the parties only concerned an unfair dismissal and in particular, the existence of a dismissal.

- [5] The applicant contends that the arbitrator committed a gross irregularity by taking into account irrelevant considerations, which ultimately led to her misconceiving the nature of the inquiry. The evidence on which the applicants particularly rely is that of the respondent's provincial executive manager, Ms. Mohale, whom they contend had given assurances that if the applicants worked hard, 'they would have work', and that the work undertaken by the third respondent was on-going. Further, the applicants contend that the arbitrator placed undue reliance on the stipulation in their

fixed term contracts that there was no expectation that the contracts would be renewed. The applicants further submit that the arbitrator committed a gross irregularity by ignoring material evidence and in a particular, evidence that Mohale had informed them that they would remain employed until the period applicable to the current master sample expired in 2024. The applicants submit that the arbitrator ignored evidence that they had taken Mohale at her word when she said that she would secure funds to support their continued employment. Thirdly, the applicants contend that the arbitrator erred by accepting Mohale's evidence and by failing to draw an adverse inference from her lack of credibility.

- [6] In a supplementary affidavit filed by the applicants after the filing of the record, the applicants sought to supplement their grounds for review and extend the ambit of their application to the interlocutory

ruling

dated 24 August 2019. In the supplementary affidavit, the applicants record the history of their employment with the respondent

and of a dispute referred to the bargaining council on 25 January 2017, when they sought pay parity with the third respondent's

permanent employees. A settlement of that dispute saw the applicants paid, with effect from 1 July 2017, at the same rate payable to permanent administrative assistants, with retrospective effect from 1 August 2015. The applicants contend that the arbitrator's

ruling on the interlocutory point (i.e. that the bargaining council had no jurisdiction to deal with the dispute in terms of section 198B as it had not been properly referred or conciliated in terms of section 198D), is wrong. In particular, the applicants contend that that their employment was deemed indefinite in terms of section 198B

- (5) of the LRA, Further, the applicants maintain that section 198B does not contemplate the referral of the dispute to the CCMA or the bargaining council for the provisions of that section to apply in unfair dismissal proceedings referred under section 191 of the LRA.
- [7] The third respondent takes issue with the supplementary affidavit, at least to the extent that the applicants seek to extend the ambit of their review to the arbitrator's interlocutory ruling, and submits that the review application pertaining to the interlocutory ruling is not properly before the court. In particular, the third respondent submits that the applicants have impermissibly sought to introduce a new review application by way of their supplementary affidavit.
- [8] I deal first with the arbitrator's interlocutory ruling. The review application filed by the applicants on 16 January 2020, was brought (correctly) in terms of section 145 of the LRA, the section that applies to the review of arbitration awards issued by the CCMA or the bargaining council. The review of rulings issued by commissioners or arbitrators, on the other hand, are regulated by section 158(1)(g) of the LRA. To the extent that the applicants seek to review the arbitrator's ruling, that ought to have been pursued in a discrete application, filed within a reasonable time from the date on which the ruling was issued. In any event, to the extent that Rule 7A (8) permits an applicant in a review application to amend, add to or vary the terms of the notice of motion and to supplement the founding affidavit, the Rule does not go so far as to permit an applicant by way of the delivery of a supplementary affidavit, effectively to deliver a new and different review

application, relating to a different award or ruling and under a different section of the LRA. In *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (2015) 36 ILJ 3045 (LC), this court held that Rule 7A (8) envisages that the supplementary affidavit contain a final statement of the applicant's grounds for review, in relation to the award that is the subject of the review application. What the applicants have in effect done is sought to introduce a new and different application for review through the back door, under the guise of a supplementary affidavit, some two years after the ruling sought to be reviewed was issued, and long after the conclusion of the arbitration proceedings that form the subject of the main review application.

- [9] Counsel for the applicants submitted that the application of the deeming provision in section 198B (5) had the consequence that the applicants were deemed to be engaged on contracts of indefinite duration, three months after their engagement in 2015. This being so, it was not open to the third respondent to regard their fixed-term contracts as having expired, and to refuse to continue to employ them on that basis. In effect, as I understood counsel to argue, the unfair dismissal proceedings should be disregarded, since the applicants had at the relevant time been deemed to be permanent employees. There are at least two difficulties with this proposition. The first is that the applicants' remuneration placed them above the threshold established in terms of section 198B (2), with the consequence that section 198B is not applicable to them. Although

the applicants' earnings in 2015 placed them below the threshold, the terms of the settlement agreement between them and the third respondent, which provided for parity with permanent employees, with retrospective effect, placed them above the threshold. Secondly, the deeming provision in section 198B (5) is not unconditional. It applies only once the neither of the conditions stipulated by section 198B (3) are met. For that reason, section 198D establishes a discrete dispute resolution mechanism which requires a referral to conciliation of any dispute about the application or interpretation of section 198B, with its on time periods. Nothing precluded the applicants from referring a dispute in terms of section 198D during the pre-arbitration phase, and seeking to consolidate that dispute with the unfair dismissal dispute. What the applicants seek to do is bypass the time limits established by section 198D and have the bargaining council arbitrate a dispute about the interpretation and application of section 198B without any reference to conciliation.

- [10] Turning next to the review of the arbitration award, the applicants have employed the wrong test for review. The existence or otherwise of a dismissal has been held by the LAC to be a jurisdictional issue, with the consequence that the relevant threshold is one of correctness and not reasonableness (see *SA Rugby Players' Association v SA Rugby* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC)). Even if I were to consider the applicants' grounds for review on this basis, the arbitrator was required to determine the existence of any reasonable expectation of the applicants' fixed term contracts, in circumstances where the applicants bore the onus to establish both a subjective expectation that their contracts would be renewed, and that the expectation, in the light of the circumstances prevailing at the time, was reasonable.
- [11] Only two of the applicants gave evidence. In the absence of any evidence of the other applicants that they held a subjective expectation that their fixed term contracts would be renewed, those applicants failed at the first hurdle to place facts before the arbitrator to establish why, subjectively, they had a reasonable expectation that the third respondent would renew their fixed term contracts. Even if it is accepted that the arbitrator could consider the objective facts to determine whether the applicants (save for the two applicants who testified) held any reasonable expectation of renewal, the evidence does not establish that this was the case. What the evidence does establish is that the third respondent's precarious financial position was well known. The national treasury had imposed budget cuts of 13% on the third respondent's budget, and the third respondent had been obliged to compromise on its staffing requirements. Neither of the applicants who testified disputed this, nor did they dispute that the third respondent had placed a moratorium on recruitment with effect from September 2016. The evidence of the witnesses, naively, was that the third respondent could simply secure unlimited funds from the treasury to subvent their continued employment.
- [12] In so far as the applicants attack the arbitrator's finding that Mohale was a credible witness, the starting point is the reluctance by a review court to intervene with credibility findings made by a decision-maker who has had the opportunity to observe the witnesses and to

form an impression of their credibility. Mohale testified that she would do everything in her power to ensure that the applicants' fixed term contracts were renewed, but that she was not in a position to offer guarantees, on account of the third respondent's precarious financial position. There is no reason, having regard to the record, to call Mohale's evidence into question. Mohale went no further than to say that she would 'fight

for' the applicants and their continued employment, but she made clear that this outcome was conditional on the third respondent

securing the necessary funding from the treasury.

[13] In summary, the arbitrator considered all of the surrounding circumstances at the time that the applicants fixed term contracts were terminated, including the third respondent's precarious financial position and the fact that the applicants, on their own version, were aware of that position, and also their acknowledgment of terms of their contracts to the effect that they ought to entertain no expectation of renewal. The arbitrator's decision was correct, and the application to review her award stands to be dismissed.

[14] The third respondent charitably did not pursue the issue of costs, and no order as to costs will be made.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

L Hollander (pro bono)

Instructed by:

Sheppstone and Wylie (pro bono)

For the respondents: R Itzkin

Instructed by:

ENS Africa Inc.

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