REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

REPORTABLE

CASE NO: PA7/11

In the matter between:-

YVONNE DE MILANDER Appellant

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR THE DEPARTMENT OF FINANCE: EASTERN CAPE First Respondent

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL Second Respondent

KELVYN KAYSTER Third Respondent

Heard : 17 August 2012

Delivered : 30 November 2012

Flynote : Dismissal – Non-renewal of fixed term contract – Question whether employee had reasonable expectation of renewal involves two-legged test – existence of expectation and reasonableness of expectation – The former is the subjective

element and the latter objective – Nature of enquiry under section 186 (1) (b).

JUDGMENT DELIVERED ON 30 NOVEMBER 2012

ZONDI, AJA

Introduction

[1] This appeal is against the whole of the judgment and order made by Molahlehi J in which he reviewed and set aside an arbitration award issued by the third respondent ("the Commissioner") under the auspices of the General Public Service Sectoral Bargaining Council ("the GPSSBC") on 9 November 2009, the second respondent.

[2] In terms of the arbitration award the Commissioner had found that the appellant had been dismissed within the meaning of that term in section 186 (1) (b) of the Labour Relations Act 66 of 1995 ("the LRA").

[3] The Court *a quo* found and ruled that the Commissioner erred by finding that the appellant had proved the requirements of section 186 (1) (b) of the LRA. It held that the appellant had failed to show that she subjectively had the expectation that her fixed-term contract would be renewed or that she reasonably expected that it would have not terminated but for the failure of the respondent to renew it. It accordingly set aside the arbitration award. The appeal against the

judgment, which has since been reported as *Member of the Executive Council for the Department of Finance, Eastern Cape v De Milander & Others* [2011] 9 BLLR 893 (LC), is with the leave of the Court *a quo*.

Factual Background

[4] The issues presented in this appeal must be determined against the background of the following facts which are largely common cause.

[5] The appellant commenced her employment (as a public servant) during September 2000, at which time she was employed in the Office of the Premier: Eastern Cape. That contract was one in terms of section 12A of the Public Service Act, 103 of, 1994[1], (the "Public Service Act"). It was linked to the term of the office of the then Premier, Reverend Stofile.

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[1] ***12A. Appointment of persons on grounds of policy considerations.***—*(1) Subject to this section, such executive authorities as the Cabinet may determine may appoint one or more persons under a contract, whether in a full-time or part-time capacity—*

(a) to advise the executive authority on the exercise or performance of the executive authority's powers and duties;

(b) to advise the executive authority on the development of policy that will promote the relevant department's objectives; or

(c) to perform such other tasks as may be appropriate in respect of the exercise or performance of the executive authority's powers and duties.

(2) The maximum number of persons that may be appointed by an executive authority under this section and the upper limits of the remuneration and other conditions of service of such persons shall be determined by the Cabinet in the national sphere of government.

(3) The special contract contemplated in subsection (1) shall include any term and condition agreed upon between the relevant executive authority and the person concerned, including—

(a) the contractual period, which period shall not exceed the term of office of the executive authority;

[6] The appellant's first fixed term contract of employment endured until 01 May 2004. After the expiration of the first fixed term contract the appellant was engaged on a second fixed term contract of employment, on this occasion linked to the term of office of Premier Balindlela. The relevant provisions of the second fixed term contract are the following:

> "*1. The Employer hereby undertakes to engage the Employee and the Employee hereby agrees to serve the Employer for a period of sixty (60) calendar months period (**subject to compliance to the conditions set out in this agreement**) reckoned from the date on which the employee actually assumes duty at the place in the Republic of South Africa mentioned in clause 2 hereof, on the following conditions. (**Period from 1 May 2004 to 30 April 2009**)*
>
> *10. Before or upon completion of the period of service mentioned in clause 1 of this Agreement, the Employer undertakes to consider the Employee for employment in terms of this Agreement for a further specified period.*
>
> *11. The parties agree that the employment is a role playing position linked to the terms of Office of the Premier as provided for in the ministerial hand book and that such employment must terminate at any stage when the Premier ceases to hold such office whether or*

(b) the particular duties for which the person concerned is appointed; and

(c) the remuneration and other conditions of service of the person concerned.

not the period referred to in clause 1 or extended term in clause 10 has been completed."

[7] The appellant's second fixed term contract of employment was due to endure for the five year period commencing on 01 May 2004, and terminating on 30 April 2009. But this was never to be as during early 2006, less than two years into the five year contract, the appellant's personal circumstances took a dramatic turn. This resulted in her communicating with numerous high-ranking provincial officials with a view to securing either a transfer or a secondment to any vacant public service position in Port Elizabeth.

[8] The transfer was granted, subject to certain conditions. One of those conditions was that the appellant would lose her so-called role-playing allowance. It was further recorded that she was to be appointed on a contract basis "*... for the remainder of your contract period with Premier's Office with effect from 1 September 2006 to 30 April 2009."* The letter went on to record that *"... you will be held against a post of a Manager (Deputy Director): Cacadu District Office*".

[9] Some five months or so after her transfer, the position she was occupying at the district office was advertised for the purpose of filling it permanently. Shortly after the advertisement, the appellant addressed a letter to the first respondent ("the MEC") requesting that her appointment be translated from fixed term contract to permanent appointment. Her letter reads as follows:

"I am formally requesting that you consider translating my post from contract to permanent position

Background:

1. *I joined the Premier's office on 1 September 2000, and served under two Premiers. Both terms were on contract for the duration of the Premiers' tenures. However, in October 2006 I requested a transfer to your department at your Port Elizabeth offices. The transfer was granted for the duration of my current contract with the Premier's office, which expires in April 2009.*
2. *I am currently in a fully funded post of Deputy Director according to the approved organogram for the district office."*

[10] In motivating her request the appellant had this to say:

"3. Since joining your Port Elizabeth District Office, the work ethics and standards of the staff have improved significantly, especially concerning meeting the deadlines for monthly, quarterly and yearly reports and the Debt and Revenue Management side of our work. Our District Office has been commended on several occasions by Senior Management for the efficiency in which we respond to deadlines and queries from Head Office.

4. It also needs to be said that since I rejoined the Government Service in 2000, I have received annual performance bonuses for work done above satisfactory level. I think that the reason for this is that I have more than 20

years experience in various government departments and para-statals and the experience gained there stood me in good stead when having to work under extreme pressure and make level-headed quick decisions.

5. I have also, since joining your Department, attended several workshops and short courses which has enhanced my work ability and those of the staff in our office. I feel that I have a very valuable service and the knowledge to enhance service delivery in your department and have many more years of service left.

6. Also, one of the main reasons for requesting a translation to a permanent position is that although I have made provision for my own pension, I now feel that it will not be sufficient for my retirement one day. I wish to join the Government Service Pension Fund to build for my future. Currently under contract, I cannot subscribe to the Pension Fund."

[11] On the 12 May 2008, Prof Kusi, the then Superintendent General, Provincial Treasury acknowledged receipt of the appellant's request and responded thereto as follows:

"1. In response thereto kindly be advised as follows:

(a) Your transfer to this department was on contract and it will expire on 30 April 2009, as it is linked to the term of office of the Premier of the Provincial Administration.

(b) Contract employees cannot be absorbed into permanent positions

as this is contrary to the Public Service Rules and Regulations.

(c) To be considered for permanent employment you have to apply for an advertised post and therefore compete with other candidates."

[12] During August 2008, Ms Balindlela vacated her office as Premier of the Province. This was prior to the expiry of her term as Premier. The MEC allowed the appellant to continue with the remainder of the period which the Premier would have served had she not left earlier.

[13] On the 16 September 2008, the appellant addressed a further letter to Prof Kusi, on this occasion requesting that her contract be extended. The letter reads as follows:

*"**Request : EXTENSION OF CONTRACT : MYSELF***

1. Further to my initial request for translation of my contract post to a permanent position and subsequent discussions between yourself, Adv Makinde and myself, I hereby formally request that you consider extending my contract with another three years.

2. I am in the process of enrolling at UNISA for a three year diploma in Human Resource Management. I am also in contact with their Unit of Recognition of Prior Learning to ascertain whether I will not be able to get credit for some of their units, either due to work experience and a Certificate in Public Relations that I already possess. If I do get credit for some of these modules, obviously the

duration of a study period will be reduced. I am enrolling in this programme so that I will be able to conduct my work more professionally and provide the correct advice to the staff in this office. It will also mean that I am engaging in an exercise to better myself and my working conditions so that I can add more value to the day to day work in this office.

3. I am respectfully requesting you to consider extending my contract for this period, so that I can apply for a Department bursary for the course of my studies."

[14] It would seem that the first respondent did not respond to the above letter and this prompted the appellant to address a further letter on 29 September 2008, to the first respondent stating the following:

"Further to my email and attached letter (dated 19 September 2008), I respectfully request a response. The reason why I am pressing this issue is that I have to register with UNISA before 30 September 2008. I cannot register with UNISA if I don't know if I will qualify for a bursary. I contacted Human Resources and they told me that they will not even consider my application for a bursary as my contract is ending next year. I informed them that I am in negotiation for an extension of my contract, but they say they cannot act on that until they have anything in writing indicating that my contract has been extended. So I am in catch (sic) two situations, as my future with the department depends on my obtaining a formal qualification,

but I cannot move on this issue without a formal letter indicating that my contract has been extended."

[15] Prof Kusi responded to the appellant by a letter dated 30 September 2008, in which he stated:

"REQUEST FOR EXTENTION OF CONTRACT: YOURSELF

(a) Your transfer to this Department was based on the agreement that the condition as stipulated in the contract from the Office of the Premier would remain the same. The contract that you signed with the Premier states that it is linked to the term of office of the Premier which was expected to be ending on 30 April 2009. The Department has decided to retain the expiry date of your contract as 30 April 2009. Your contract states that you will be informed of the decision to extend or terminate your services at least three months before the expiry date. The Department cannot give you an assurance of contract extension at this stage as it is deemed to be too early to take decision and will be contrary to the contents of your contract.

(b) With regard to the bursary application you are free to apply for a bursary as you are currently the employee of the Department and your application will be subject to the same criteria as any other official."

[16] During February 2009, the first respondent informed the appellant that her employment contract would not be extended. The appellant was clearly not

happy with that development and accordingly referred an alleged unfair dismissal dispute to the bargaining council, contending that the termination of her contract constituted an unfair dismissal in view of the fact that she had reasonably expected that it would be renewed on the same or similar terms.

[17] An attempt to conciliate the dispute failed and the appellant referred the dispute for arbitration on 22 May 2009. The Commissioner, who presided at the arbitration hearing, found that the appellant had proved that she had a reasonable expectation that her contract would be renewed and held that the first respondent's failure to renew it constituted a dismissal which he found to have been unfair. The Commissioner thereafter proceeded to order the first respondent to reinstate the appellant and pay her a sum of R202 216.00. The reasons underpinning this conclusion are encapsulated in these paragraphs in the award:

> *"It is common cause that the applicant's contract was renewed only once after the departure of Premier Stofile. She submitted that she was re-appointed when Premier Balindlela took office and that the renewal of her contract was regarded as continuous service. The once-off renewal of the contract in itself cannot be seen to have created an expectation of further renewals. During the duration of her second contract she requested and was indeed transferred to the respondent department. The transfer letter clearly states that her role playing allowance would fall away, thereby relieving her of the constraint that her contract would be aligned with that of*

the Premier's. In fact, the letter expressly mentioned dates with the end date being 30 April 2009.

Before discussing the grounds for the applicant's contention one needs to have regard to the relevant clauses in the applicant's employment contract. Clause 1 stipulates the contract period as 01 May 2004 to 30 April 2009. Clause 4 (a) summarised her functions, which were mostly administrative in nature. Clause 6 (b) stipulates that "... In the event of any extension of the original currency of this agreement, the extended period must be regarded as continuous with the original period of service". This implies that renewal/extension of the contract is not prohibited. Clause 10 (b) provides for termination in the event of breach of the contract or misconduct. Clause 10 stipulates that "...Before or upon completion of the period of service mentioned in clause 1 of this agreement, the employer undertakes to consider the employee for employment in terms of this agreement for a further specified period." This implies that extension/renewal should be considered before the contract comes to an end. This is a further indication that extension is a possibility and gives further weight to the principle in the Malandoh case referred to above that the reason for appointing people on fixed term contracts should be considered. Madikiza admitted that there was still a need for the service that the applicant rendered, hence the advertisement for the permanent position."

Review Proceedings

[18] The MEC applied to the Court *a quo* for the review and setting aside of the arbitration award in terms of section 145 of the LRA contending mainly that the conclusion reached by the Commissioner was incorrect. The MEC advanced various grounds upon which his attack on the arbitration was based. In particular he submitted, firstly, that the Commissioner failed to appreciate that the alleged "*expectation*" which the appellant allegedly held, was per se unreasonable. In this regard, it was argued by the MEC that it is inherently unreasonable for the appellant to expect the State to reserve a position for an employee for three years until he or she is properly qualified and, moreover, to continue to employ that employee for these three years so that it may fund her or his studies.

[19] Secondly, the arbitration award was attacked on the ground that the Commissioner failed to appreciate that, even if such a "*representation*" had been made to the appellant, it would not have been competent/lawful for the official concerned to have made such a representation.

[20] The Court *a quo* reviewed and set aside the arbitration award. It held that the appellant was not dismissed and, that being the case, the Commissioner did not have jurisdiction to entertain the unfair dismissal dispute referred in terms of section 186 (1) (b) of the LRA. The basis of its finding was that the appellant had failed to discharge the *onus* of showing that she subjectively had an expectation that her contract would be renewed when it expired or that she had a reasonable

expectation that her contract would not have terminated but for the failure by the MEC to renew it. It held that the written communication between the appellant and the MEC was destructive of the appellant's case.

Proceedings in this Court

[21] The judgment of the Court *a quo* is attacked mainly on the ground that the Court *a quo* erred in failing to conclude that the appellant had a subjective expectation of renewal of her fixed-term contract of employment. To assess the correctness of the appellant's contention, it is necessary to have regard to how the appellant had characterised the dispute in the request for arbitration forms.

[22] In the arbitration referral form, the appellant characterised the issues in dispute as unfair dismissal arising out of the MEC's failure to renew a fixed-term contract of employment on the same or similar terms and as a relief she requested the "*renewal of the contract on the same terms*".

[23] The nature of the issues in dispute as set out in the arbitration referral form was confirmed by the appellant's legal representative in addressing the Commissioner in his opening address at the arbitration hearing. In outlining the appellant's case, he told the Commissioner that the dispute that was before him was whether or not the appellant had been dismissed and pointed out that there

would be evidence that the appellant reasonably expected the MEC to renew the fixed term contract of employment on the terms similar to those that prevailed at the time of her dismissal.

[24] Thus the issue before the Commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant (*SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another* [2008] 9 BLLR 845 (LAC) at para [39]). The question whether, on the facts of the case, a dismissal had taken place within the ambit of section 186 (1) (b) involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test approach as enunciated in *Sidumo*[2]. The test is whether, objectively speaking, the facts which would give the GPSSBC jurisdiction to entertain the dispute existed.

[25] The appellant's case is founded upon section 186 (1) (b) of the LRA and that being so, she had to provide facts which, objectively considered, would bring her case within the ambit of that section. This section provides as follows:

> *"**186 Meaning of dismissal and unfair labour practice***
>
> *(1) **'Dismissal'** means that-*
>
> *(a) ...*

[2] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC)

(b) an employee reasonably expected the employer 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..."

[26] In *SA Rugby Players' Association supra* at para [44] it was held that the onus is on an employee to establish the existence of a reasonable or legitimate expectation. The test whether or not an employee has discharged the *onus* is objective, namely whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his or her fixed-term contract on the same or similar conditions. But once it is found that there had been a dismissal as contemplated in section 186 (1) (b), the *onus* shifts to the employer to justify its fairness.

[27] In *Joseph v University of Limpopo and Others* [2011] 12 BLLR 1166 (LAC) this Court pointed out that, in deciding whether or not an employee has established that he had a reasonable or legitimate expectation that the contract would be renewed, the Court will have regard *inter alia* to previous regular renewals of his contract of employment, terms of the contract and the nature of business but it pointed out that the list was not exhaustive. This means that where there is evidence of regular renewal of the employee's contract of employment in the past by the employer the Court will most likely consider it as a strong indication that the parties intended to extend their employment contractual relationship.

[28] Mr **Le Roux**, who appeared for the appellant, in his argument before us, relied heavily on the letter of 30 September 2008 for the submission that it provided sufficient evidence to support the appellant's contention that she had expected the MEC to renew her contract of employment and that her expectation was reasonable. He argued that this letter together with the appellant's evidence regarding the source of her expectation, which he submitted, in the absence of evidence by the MEC, remained unchallenged, had to be accepted. He submitted that the Commissioner's finding that there was a reasonable expectation of the referral was unassailable and there was therefore no basis for the Court *a quo* to find that the Commissioner's decision was unreasonable.

[29] I disagree with Mr **Le Roux's** contentions. In order to assess the correctness of Mr **Le Roux's** contention that the appellant had a reasonable expectation that her contract would be renewed and that the MEC's failure to renew it constituted a dismissal, it is first necessary to determine whether she in fact expected her contract to be renewed, which is the subjective element. Secondly, if she did have such an expectation, whether taking into account all the facts, that expectation was reasonable, which is the objective element. Whether or not her expectation was reasonable will depend on whether it was actually and genuinely entertained. (*University of Cape Town v Auf der Heyde* [2001] 12 BLLR 1316 (LAC).

[30] In my view the letter of 30 September 2008, upon which the appellant seeks to rely, is at best for appellant ambivalent as to reasonable expectation. It

makes it clear that her transfer was based on the terms of the agreement she had concluded with the Premier which agreement was expected to end on 30 April 2009, being the date to which her employer was committed. It is apparent from the contents of the letter that the employer considered itself bound by the contract which the appellant concluded with the Premier and in terms of which her transfer was facilitated. In order to succeed in her claim that she had an expectation that her contract would, upon its expiration, be renewed, the appellant had to demonstrate that, after her transfer from the Premier's office, she no longer considered herself bound by the terms of that contract.

[31] There is no evidence on record that the appellant challenged the correctness of the employer's assertions in the letter of 30 September 2008. In the circumstances, the letter of 30 September 2008 could not have led the appellant, on any plausible basis to expect that her contract would, upon its expiration, be renewed. Even if it did, her expectation could not, given the correspondence, have been genuinely or honestly held.

[32] The other evidence upon which the appellant relied for the contention that she had a reasonable expectation that her contract would be renewed involves the communication between her and Prof. Kusi and Advocate Makinde during which she says, she was promised that her contract would be renewed. In this regard the appellant's evidence was that, after her transfer to the MEC's office, she requested the MEC to translate her "*post from contract to a permanent post*"

as at that stage she was implementing the management workplace flow system which she had introduced when she joined the MEC's office.

[33] Prof. Kusi and Advocate Makinde considered the appellant's request but told her that her fixed term contract of employment could not be translated to a permanent position as the employer's rules and regulations did not make provisions for it. Some few days thereafter, the appellant met Prof. Kusi with a view to persuading him to reconsider the matter. Prof. Kusi undertook to find a solution for her. He told her to arrange an appointment with Advocate Makinde. She met Advocate Makinde, who told her that, in terms of the employer's policy memorandum to be considered for permanent position, an employee above assistant director level had to be in possession of a diploma or degree, which qualification she did not have Hence a permanent post had to be advertised. In this regard, the appellant's evidence was that she was advised by Kusi and Makinde to apply for an extension of her contract while studying towards a relevant diploma or degree. She says she was promised that her contract would be extended "*for at least another three years*" while she was studying. On the strength of this promise she registered with University of South Africa for a relevant diploma.

[34] The appellant says, besides the aforementioned discussions with Prof. Kusi, she also had further discussions with him in or about October or November 2008 during which Prof. Kusi assured her that he would sort out the matter

regarding her contract renewal before he left the employ of the first respondent. Her impression after these discussions was that her contract would be extended.

[35] I disagree with the appellant. The question whether the employer's failure to renew the fixed-term contract of employment constitutes a dismissal within the meaning of section 186 (1) (b) is a legal one. In other words the Commissioner hearing the matter is called upon to determine the conclusion of law. It is therefore incumbent upon an employee who brings an unfair dismissal dispute in terms of section 186 (1) (b) to set out the material facts upon which he relies for the conclusion of law he wishes the Commissioner to draw from those facts and it will not be sufficient, therefore to plead a conclusion of law without pleading the material facts giving rise to it. The mere *ipse dixit* of an employee, without further evidence, is not sufficient. The setting of this standard will prevent the opening of the floodgates for large numbers of other cases involving claims based on section 186 (1) (b).

[36] I am not convinced in the instant matter that the appellant has succeeded to set out the necessary facts, on which her belief that her contract would be renewed, was based. It is clear from the totality of the objective facts that the appellant's employment was linked to the term of office of the Premier and had to terminate at any stage when the Premier ceased to hold such office.

[37] The fact that she was no longer working in the Premier's office and had been transferred to another department when she requested her contract to be

extended does not change the nature and character of her employment contract. That this is the case is confirmed by the employer's letter addressed to the appellant on 30 September 2008, in which *inter alia* it is stated that her transfer to the department was based on the understanding that the conditions as stipulated in her contract with the Premier would remain the same. The appellant's claims that she had a reasonable expectation that her contract would be renewed are therefore irreconcilable with the content of this letter, the correctness of which, it would appear, she never disputed.

[38] In the light of the MEC's letter of 30 September 2008, the appellant's evidence that Kusi had promised to extend her contract means nothing more than that there was an attempt to explore the possibility of extending her contract which is quite different from an unconditional undertaking to renew the contract. Before September 2008 the appellant had unsuccessfully requested the MEC to translate her contract to a permanent position. She was told it could not be done and why it was not possible. She abandoned the idea and instead requested that her contract be extended. It was explained to her that a vacant position had to be advertised first and the appellant like all other candidates would be free to apply for it. A diploma or degree was a requirement for the position in which the appellant was interested.

[39] The appellant was aware that she did not have a degree or a diploma, which was required for the position in which she was interested and that it would have taken her three years of study to acquire it. The discussions between the

appellant, Kusi and Makinde were therefore an attempt to see how the appellant could be assisted in order to meet the job requirements. According to the appellant, she was advised by Kusi and Makinde to obtain the necessary diploma and in the meantime to seek an extension of her contract for three more years. She needed funds to register for a three year diploma which funds she did not have.

[40] These promises, which depended for their realisation on a number of conditions being fulfilled, could not give rise to the reasonable expectation that her contract would be renewed. For her to have her contract extended at least two things would have to occur. First, a permanent position would have to be created for her and second, she had to enrol for a relevant diploma for which she needed funds which she did not have. In these circumstances, there can be no basis for the contention that the appellant's discussions with Kusi and Makinde provide sufficient material facts from which to draw a conclusion that the appellant reasonably expected the MEC to renew her contract and that the latter's failure to renew her contract constituted a dismissal. In the light of these facts, in my view, the appellant's expectation that her contract would be extended was unreasonable.

[41] As far as the costs of this appeal are concerned, although the appellant is a losing party, in the exercise of my discretion, I will not order the appellant to pay the first respondent's costs. The appeal was not frivolous. The appellant was

entitled to challenge the first respondent's failure to have her fixed term contract renewed.

Order

[42] In the result the appeal against the Court *a quo's* judgment must fail and no order is made as to costs.

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ZONDI, AJA

DAVIS and NDLOVU JJA concur in the judgment of ZONDI AJA.

APPEARANCES

For the appellant : Mr F Le Roux

Instructed by : Francios Le Roux Attorneys

For the first respondent : Adv. J G Grogan

Instructed by : Wesley Pretorius & Associates