

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: CA 10/2005

IN THE MATTER BETWEEN

**South African Rugby Players'
Association (SAPRA)**

First Appellant

Richard Bands

2nd Appellant

Christo Bezuidenhout

3rd Appellant

and

SA Rugby (PTY) Limited

First Respondent

**Commission for Conciliation,
Mediation and Arbitration (CCMA)**

Second Respondent

Pather A V N.O

Third Respondent

IN THE CROSS-APPEAL

SA Rugby Pty Limited

Appellant

and

**South African Rugby
Players Union**

First Respondent

Victor Matfield

Second Respondent

Judgment

TLALETSI AJA

Introduction

- [1] This is an appeal against a judgment of the Labour Court given by **Gerring AJ** in a review application that was brought to that Court by the first respondent to have a certain arbitration award reviewed and set aside. The first appellant is the South African Rugby Players Association (“SARPA”) a trade union duly registered as such in terms of the Act. SARPA is the first respondent in the cross-appeal. Second and third appellants are members of the first respondent as well as Matfield who is the second respondent in the cross-appeal. The first respondent is SA Rugby (Pty) Limited. It is also the appellant in the cross-appeal. The arbitration award related to an unfair dismissal dispute between the appellants and the first respondent. The arbitration award had been issued by the third respondent under the auspices of the second respondent. The second respondent is the Commission for Conciliation, Mediation and Arbitration (“CCMA”). The third respondent is a commissioner of the CCMA. The third respondent conducted the arbitration which resulted in the arbitration award which was the subject of the review application.
- [2] The dismissal involved in this case was not the normal dismissal but constructive dismissal as provided for in sec 186(1)(b) of the Labour Relations Act 66 of 1995 (“ the Act”). I shall quote the provisions of sec 186(1)(b) later in this judgment. The full text of the arbitration award referred to above is reported as: **SA Rugby Players Association on behalf of Bands & others v SA Rugby (Pty) Ltd** (2005) 26 ILJ 176 (CCMA). The judgment of the Labour Court is

reported as **SA Rugby (Pty) Ltd v Commission, for Conciliation, Mediation & Arbitration & Others** (2006) 27 ILJ 1041 (LC).

[3] The second and further appellants had been employed by the first respondent as rugby players in terms of fixed term contracts of employment. When such contracts of employment were not renewed on the same terms and conditions or were not renewed at all, the appellants claimed that they had reasonable expectation that such contracts were going to have been renewed on the same terms and conditions and that the first respondent's failure to renew them on such terms constituted constructive dismissal as provided for in sec 186(1)(b) of the Act and they sought compensation. The first respondent disputed this and the dispute ended up in an arbitration under the auspices of the CCMA in terms of the Act which resulted in the arbitration award referred to earlier. That award was in favour of the appellants. Hence the review application brought by the first respondent in the Labour Court.

Factual Background

[4] The first respondent ("SA Rugby") is a private company duly registered as such in terms of the company laws of the Republic of South Africa. It is the professional and commercial arm of the South African Rugby Union ("SARU"), its sole shareholder. SA Rugby is the employer of rugby players selected to play for the national team ("the Springboks"). Other commercial activities include marketing the Springboks' brand, attracting sponsorships and other

related commercial activities.

- [5] The selection of players to play for the Springboks is made by a Selection Committee established by SARU. SA Rugby in consultation with the national coach decides who are the players who should be contracted to play for the Springboks. SARPA has since 1998 been engaged in negotiating the content of the national contracts on behalf of its members. It however had no say in the actual award of the contracts.
- [6] A prerequisite to be offered a player's contract by SA Rugby is for one to be selected by the Selection Committee to play for the Springboks. However, being selected is no guarantee of a contract. Criteria to be offered a contract include, *inter alia*, selection, transformation, the needs of the team, the needs of the national coach and the value of the player to the team. The number of contracts offered is limited. The Springboks players are full-time provincial players contracted to their respective constituent unions. They play in the local Currie Cup competition as well as in the Super 12 competition. Some of the players play for overseas teams.
- [7] It is common cause that Matfield, Bands and Bezuidenhout were at all relevant times professional rugby players who were employed by SA Rugby to play for the Springboks during 2003. Matfield had entered into a contract with SA Rugby which was to expire by mutual agreement on 31 December 2003. Unlike Matfield, both Bands and Bezuidenhout had not entered into a standard player's contract with SA Rugby. However, Bands played for the Springboks for most of 2003. He only received match fees for

his services in this regard.

[8] The three players concluded separate player's agreements with SA Rugby for the sole purpose of participating in the Rugby World Cup ("RWC") 2003. These contracts were of short duration. They commenced on 1 September 2003 and were to expire on 30 November 2003 by mutual agreement. The contracts for all the players provided, *inter alia*, as follows:

"3.2 As this is a fixed term contract, it shall automatically terminate on the date set out in paragraph 1.2 of schedule 11 hereof (30 November 2003) and the player acknowledges that he has no expectation that this contract will be renewed on the terms herein contained, or on any other terms."

The agreements stipulated further that the duration clause shall be subject to clause 8 of the agreements. The latter clause provided that should the player sustain an injury during the currency of the contract whilst performing his services in terms of the contract, SA Rugby would continue to pay his monthly remuneration from the date of the injury until the termination of the contract.

[9] The other terms of the contracts relevant to this matter provided:

9.1 that any variation of the terms of the agreement shall be of no force or effect unless reduced to writing and signed by the parties;

9.2 that the agreement, constituted the entire agreement

between the parties;

- 9.3 that no agreements, representations or warranties between the parties regarding the subject matter other than those set out in the agreement would be binding on the parties;
- 9.4 that any prior agreements between the parties relating to the subject matter are hereby cancelled;
- 9.5 for the remuneration package for the players which included bonuses for the various stages of the competition in which the Springboks would participate;
- 9.6 a letter of intent which, as incentive for winning the RWC 2003, provided for the payment of a sum of R410 000-00 as well as a guaranteed one year Springboks contract for 2004, with a minimum value of R400 000-00.

[10] Matfield had also concluded a standard player's contract with SA Rugby starting from 1 January 2003 to 31 December 2003. The contract contained provisions similar to those of the RWC 2003 agreement except those terms that specifically related to the RWC 2003 such as the remuneration structure and the incentives.

[11] It is common cause that the Springboks did not do well at the RWC 2003. The team was knocked out of the competition early. As a result the team had to return to the country together with the then national coach, Mr Rudolph Straueli ("Straueli"). As expected, their early exit in the RWC 2003

attracted much criticism from the public and the local media. On 23 November 2003, Piet Heymans (“Heymans”), the Chief Executive Officer for SARPA, addressed an e-mail to Straueli which he copied to other executive committee members of SARU as well as its then President. The body of the letter reads:

“SARPA has been approached by a number of Springboks expressing concern that neither you nor anybody from SA Rugby has communicated with them regarding possible contracts for 2004.

As you are aware most of the current contracted Bok player’s contracts with SA Rugby will expire at the end of November 2003. This excludes the short term contracted Bok players that was contracted for the RWC 2003 only.

In terms of fair employment practices an employer should at least one month before a fixed term contract expires, notify the employee that the contract will not be renewed or alternatively that the employer does not want to renew the contract.

Due to the fact that this has not been done we propose that the current contracted Bok players remain on their current contracts until such time as SA Rugby has been able to communicate with these players regarding their contracts.

Our members need to know what their future prospects are in relation to their national contracts.

As professional rugby players they need to make important decisions based on their provincial and national contracts.

We trust that this important issue will be addressed as a matter of urgency."(My emphasis)

- [12] On 24 November 2003 Straueli forwarded personal letters to the players who had participated in the RWC 2003. In the letters he mentioned, *inter alia*, that the 2003 as a year was interesting and exciting for the players and that, though they could not achieve all their goals, they had managed to build friendship "*on and off the field of play*", especially after their game against Samoa. He mentioned further that it would be very important that they built on what they had started and that correct decisions would have to be taken to ensure that the team stayed together. He recorded, that as the players knew that their contracts with SA Rugby Union were coming to an end on 30 November 2003, they would be reviewed as soon as Rian Oberholzer ("Oberholzer") had returned from his RWC 2003 commitments in Australia. Oberholzer was the Managing Director of SARU at the time.
- [13] On 26 November 2003 one Mandy, who was an employee of SA Rugby forwarded an e-mail to Heymans advising him that Oberholzer was at the time on his way back to South Africa and that he would respond to his e-mail once he had an opportunity to go through all his e-mail messages.
- [14] It is common cause that on the 4th December 2003 Straueli resigned from his position of national coach following a settlement agreement reached with SA Rugby. He was replaced by Jake White. Oberholzer also resigned and was replaced by Mr Songezo Nayo ("Nayo") in an acting capacity.

The president of SARU, who was an elected official, was also replaced. These changes resulted in a new administration coming into office. Before his departure, Straueli had meetings with some of the players individually on 26 November 2006. The discussions of these meetings will be dealt with later when dealing with the evidence of each player.

[15] It is common cause that no national contracts were offered to the players during or at the end of 2003. During the period from January to May 2004 Heymans made several attempts to communicate with SA Rugby in order to renegotiate national players' contracts. The attempts were not successful. The new regime in SA Rugby had decided that they (SA Rugby) would do away with annual contracts and retainers for its players. It was in favour of replacing the retainer system with a "match fee only" structure. This would mean that the players would be paid match fees only and would not be paid if they got injured when participating in their provincial teams. The other disadvantage would be that players would no longer have fixed monthly income. The effect of this system on the players was that insurance companies would not be prepared to insure players who did not have fixed income.

[16] It is common cause that after 30 November 2003 Bands and Bezuidenhout had no contracts with SA Rugby. As Matfield had a standard players' contract, he continued to be contracted to SA Rugby until December 2003. The negotiations between SARPA and SA Rugby regarding new contracts had not been finalised during this period. In

February 2004 the first appellant referred to the CCMA on behalf of the players a dismissal dispute concerning the first respondent's failure to renew the second and further appellant's contracts, for conciliation. A conciliation meeting was held on 4 March 2004 and the dispute could not be resolved. On 17 June 2004 the appellants requested that the dispute be referred to arbitration. They described the issue in dispute as *"failure by employer to renew contract-reasonable expectation; alternatively (2) Failure to re-employ in accordance with an agreement"*. The *"decision"* that they required the commissioner to make was *"that the employer recognise and implement undertakings made to contract with the individual players and/or compensation"*. The arbitration proceedings in respect of the dispute took place on the 28th and 29th October 2004. The arbitration award was issued on 30 November 2004.

[17] At the arbitration, the appellants tendered the evidence of the three players as well as that of Heymans. The first respondent tendered no oral evidence. What follows is the summary of the relevant evidence of the witnesses.

[18] Matfield testified that he was selected to play for the Springboks since 2001. Mr Harry Viljoen was the national coach at the time. When Straueli took over after the departure of Viljoen, Matfield was offered another contract for the year 2002. In terms of the new contract, he earned half of what he was earning the previous year. His agent, Mr Jason Smith, tried to negotiate more money for him but was unsuccessful. He testified that he played well in the year

2001. In 2002 his play was interrupted by an injury. In July 2003 the team's then General Manager (Butch Watson Smith) resigned and the players started to deal directly with Straueli in respect of their contracts.

[19] Matfield testified that he had a successful 2003. He was chosen to play in all the matches at the RWC 2003 and was complimented by the media. Matfield testified that the compliment by the media also contributed in him believing that he would get a contract for the year 2004. I doubt whether being complemented by the media can be a legal ground for a player to harbour a reasonable expectation to be given a Springbok contract. He testified that he expected to negotiate to be paid higher retainers and less match fees for 2004. He confirmed receipt of the letter dated 24 November 2003 from Straueli. He was convinced that the coach had faith in him and that he would be part of the team that would be retained.

[20] On 26 November 2003 Matfield had a meeting with Straueli. During this meeting Straueli told him that he was one of the more senior players and that he would want to use his experience. Matfield testified that he raised with Straueli the matter of his fee structure in the contract. The latter told him that they could look at other options and that he (Matfield) was definitely part of his plans for 2004. Matfield testified that, after this discussion, he felt optimistic that he was going to receive a contract for 2004. Matfield testified that he continued to play for the Springboks during 2004 after the expiration of his contract. He said that he was no longer being paid a retainer fee but only match fees and win

bonuses.

[21] Matfield testified that the players continued to be concerned about their 2004 contracts. He said that on the eve of one of the Super Twelve competition matches, Nayo and the new coach-that is Jake White-met with the players. At this meeting the players enquired from Nayo whether they would get contracts for the season. Nayo responded that the issue of the contracts had not been finalised as yet and that, as such he could not give them an answer. Matfield could not recall the date of this meeting. He testified that a day after they had met with Nayo, Jake White had come to see them and told them that it was difficult for him to offer any contracts as he was at that stage not sure who was on his plans and that he would probably look at that after he had assembled his team. Matfield testified that Jake White told them that he would not give any guarantee.

[22] Under cross-examination Matfield testified that he did not take specific notice of the clause stipulating that his contract will end on 31 December 2003 and that he acknowledged that he had no expectation of the contract being renewed on its terms or any other terms. He testified that it had to be understood that national contracts were not negotiable and one had to either accept one as it was or reject it. He mentioned that he had no option but to sign the contract as it was in order for him to play for the Springboks. He accepted that clause 3.2 provided for termination and that it meant that no expectation for the renewal of the contract would be entertained. However, he expected, as it had happened before, that during December there would be negotiations for

a new contract.

[23] On a specific question relating to the basis for his expectation the following is recorded:

“(Mr Arendse): Nou Victor (Matfield) laat ek net verstaan, jou eis ten opsigte van die verwagtinge die reasonable expectation, is dit gebaseer op ondernemings of beloftes wat gemaak is deur Rudolph Straueli of is dit gebaseer op die supplementary aanvullende kontrak wat aangegaan is tussen SA Rugby en die Wereldbeker-spelers.

(Matfield): Nee, ek dink eerstens dit is as gevolg van my performance vir die Springbokke. Die aard (onduidelik) speel. Ek was die heelyd in die span. Daar was net een wedstryd waar ek gedrop word. Op die Stadium het ek nog steeds vir hulle gespeel. So ek het aanvaar ek sal aanhou betaal word deur hulle of nog steeds ‘n kontrak kry en dan ook Rudolf het na die wereldbeker gekom en vir my gesê, (onduidelik) ons kyk na n’ beter struktuur of ons die (onduidelik).

(Mr Arendse): So aanvaar dan nou dat Rudolf dit dan nou vir jou gesê het. Hy het nie vir jou gesê, hy gaan vir jou aanstel of jy gaan gekontrakteer word en dit is nou die terme van die kontrak ne?

(Matfield): Hy het vir my gesê, hy sal na my kyk die volgende jaar, ons moet net kyk na die struktuur (ondeuidelik) so hy het gesê hy sal na my kyk.

(Mr Arendse): Maar hy het nooit gesê, dit is die – dit gaan die terme wees?

(Matfield): Hy het nooit vaste (ondudelik-- tussenbeide).”

Matfield further accepted that there were players who had also played for the Springboks the previous year who were not contracted for 2004. However, he expected that since emphasis was on performance of the player in the previous year, they should also have had an expectation of being given new contracts.

- [24] Matfield was referred to clause 5.1.15 of the agreement between Straueli and SA Rugby which provided, as one of his responsibilities, that:

“advise SA Rugby from time to time of the names of players selected in the National Squad and/or the National Team (and such other players that Straueli may deem appropriate), which requires to be contracted to SA Rugby. It shall be the obligation of SA Rugby to enter into contracts with the players, and in so doing, Straueli shall advise SA Rugby as to the level at which and duration for which a particular player should be contracted on terms which are fair, reasonable and acceptable to SA Rugby”.

It was further pointed out to Matfield during cross-examination that Straueli could only tell the player that he should play for him and thereafter only recommend that SA Rugby should enter into an agreement with the player. Matfield agreed that this is how it worked.

- [25] The next player, Bezeuidenhout, testified that he was part of the Springboks that played in the Tri-Nation's Test against New Zealand in August 2003. On their way back from the match, he testified, Straueli told him that he wanted him to

be part of the world cup squad. At the RWC 2003 he played three of the five matches. He mentioned that, after their match with England, he and Bands were selected for the World 15 dream rugby team voted by the media. The reason for their being voted was, according to him, their good performance. He confirmed receipt of the letter dated 24 November 2003 from Straueli.

[26] Bezuidenhout testified further that he also had a meeting with Straueli on 26 November 2003. At this meeting, he testified, Straueli told him that he was not well known to him but that the chance that he gave to him in the RWC 2003 was well used to prove himself and that he was in his plans for 2004. Bezuidenhout testified that he informed Straueli that his remuneration was not as 'big' as other players because he was playing in the small rugby union, playing for the Pumas team. Straueli then told him that he would see if he could not design his contract in such a way that he would in total earn in line with other players. This meant that he would earn more than other players on his Springboks' contract to make up the deficiency at Union level. He testified that Straueli did not specify what that amount would be. He was to revert back to him about the final contract for the 2004 season.

[27] Bezeuidenhout testified that nobody thereafter communicated with him to inform him that he would not be receiving a contract for 2004. He only learnt from the media that they were not going to receive contracts. He confirmed that at the beginning of 2004 he participated in the training camp for the Springboks which had been assembled by the

new coach, Jake White. He played for the South African A team against Namibia but was later sent home. At the time Jake White told him that he might recall him for the next test. Bezuidenhout testified that he believed that he was initially part of Jake White's plans. However, he testified that he realised later that he was not. Under cross-examination he testified that Jake White told him that, if he and the other players became part of his group, he would back-date their contracts to January 2004, but he first had to see which players he was going to use in the tests against Ireland, Wales as well as in the Tri-Nations at the end of February 2004. It is not disputed that Bezuidenhout did not play in any of these tests.

[28] On a specific question as to what the basis of his expectation for the renewal of his RWC 2003 contract was, Bezuidenhout testified that:

- (a) Straueli told him that at that time he was part of his plans;
- (b) he had played well in 2003, the Super 12 and the RWC 2003, and

(c) he had been chosen above players whose standard players' contracts ran up to the end of 2004.

He conceded that it happens in rugby as in other sporting codes that one may play very well but not necessarily be given a contract. He also conceded that at the end it was SA Rugby that decided who should get a contract. He added, though, that it was the coach who should still train the player.

[29] Bands testified that he played for the Springboks for the first time in 2003. He played in 11 of the 12 'tests' that were

scheduled for 2003. During the RWC 2003 he played very well and was chosen by the media as part of the World 15 dream team. He also received the letter dated 24 November 2003 from Straueli. He believed that he was one of the players referred to in the letter who were said to be talented and needed to build on. He also met Straueli on 26 November 2003 at Loftus Versveld Stadium. The latter told him that he wanted to keep the same players in the team for the sake of continuity. He had enquired from Straueli if he was going to be contracted by SA Rugby for 2004 as he had already received an offer from Northhampton Saints for R 1.5M. He testified that Straueli told him that he was part of his plans and that he would give him a contract. He testified that he expected to be paid a retainer of R300 000-00 for the 2004 season.

[30]Bands testified further that he also had a telephonic discussion with Straueli after the expiry of his contract. He mentioned that Straueli assured him that he would get a Springboks contract and that he (Straueli) intended to stay on as coach until his contract expired in 2005. He only discovered via the media that he was not going to receive a contract from SA Rugby.

[31]Unfortunately the entire cross-examination of Bands is not part of the record. What is available is only some handwritten short-hand notes by the commissioner. It was not the parties' contention before the court a quo and before us that the information on record is not sufficient for the determination of the matter. Most of the evidence tendered was in any case not disputed. This appeal will therefore be considered on the

material available on record.

The arbitration

[32]In the award the arbitrator recorded the issue to be determined as whether or not the applicants were dismissed in terms of section 186(1)(b) of the LRA and whether such dismissal was fair. She held that the players impressed her as witnesses and that their evidence was consistent under cross-examination. She accepted the players' evidence that they based their expectation for renewal of their contracts on the promises made by Straueli both orally and in writing and their consistent performance in the RWC 2003. She found Straueli's conduct to amount to an express offer of the Springbok contracts to the players. She further reasoned that Straueli was not called by the SA Rugby to challenge the player's evidence and as such their evidence remained uncontroverted. She concluded that:

"In the light of the abovementioned evidence I am of the view that personally, all the applicants' had an expectation that their contracts would be renewed and that in the light of the factors on which their expectations were based, their expectations were reasonable".

[33]On the question as to whether there was an objective basis for the expectations, the commissioner remarked that the evidence presented by "both" parties indicated that professional rugby environment was *"insecure, uncertain and characterised by a frequent change in management"*. She said that each coach had a different approach as to how the

contracts should be awarded and structured. She remarked that there were no clear policies or guidelines on how contracts should be awarded or structured. She held that such an environment could result in unfair treatment and that employees needed protection. She mentioned that despite the change in management the “*legal entity*” remained the same and as such players were therefore entitled to rely on the word of a coach who had “*implied authority*” and created an expectation that contracts would be given. She also found that despite the fact that the team did not perform well in the World Cup the performance of the three players during the world cup was “*outstanding*” and that it was evident that the coach wanted to keep and develop the “talent of the tight five after the World Cup”. The “tight five” was the position in which Bands and Bezuidenhout played with three other players.

[34]On the argument that in terms of the contract between Straueli and SA Rugby it was clear that Straueli had no express or implied authority to give undertakings or make promises to players, the commissioner held that on the evidence presented Straueli had the implied authority to promise Springboks contracts. She based her conclusion on what she referred to as the “significant” role played by Straueli in the team with regard to selecting players and awarding contracts.

[35]In conclusion, on the submission that the players were bound by the express terms of their contracts, the commissioner held that their claims were statutory ones in terms of the Act, which was based on fairness and equity as opposed to

contractual claims. She held that SA Rugby could not rely on the terms of the contract alone and that in the interests of fairness and equity, the surrounding circumstances of the case had to be considered and that SA Rugby had to justify the “dismissal”. She thereafter found that SA Rugby had not proved that there was a fair reason for not renewing the contracts of the players or that their “dismissal” was effected in accordance with a fair reason.

[36]The commissioner thereafter ordered that Matfield be paid an amount of R400 000-00 and Bands and Bezuidenhout be paid an amount of R300 000-00 each, all payable by the 31st January 2005. She made no award as to costs. SA Rugby, aggrieved by the award of the commissioner, instituted review proceedings in the Labour Court to have the award reviewed and set aside.

Proceedings in the Labour Court

[37]The Labour Court ruled that the commissioner’s reasoning and conclusion in relation to Matfield’s contract was justified and dismissed the review application. In respect of Bezuidenhout and Bands the Labour Court concluded that it had not been shown that the two players had a reasonable expectation that their fixed term contracts would be renewed by the employer on the same or similar terms as required by section 186 (1) (b) and that the commissioner’s finding to the contrary was not supported on an objective and rational basis.

The Appeal

[38]SARPA's appeal is against that part of the judgment of the Labour Court which upheld the first respondent's review application in respect of Bezuidenhout and Bands. There is also a cross-appeal by the first respondent against that part of the judgment in which the Labour Court dismissed the review application in respect of Matfield.

[39]The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In **Benicon Earthworks & Mining Services (EDMS) BPK v Jacobs No & Others** (1994) 15 ILJ 801 (LAC) at 804 C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The Court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The

Court further held that any conclusion to which the industrial court arrived at on the issue, has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In Benicon's case the Court said:

"In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit." (at 804 c-d)

In my view the same approach is applicable to the CCMA.

[41] The question before the *Court a quo* was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.

[42]Section 186 (1) (b) provides that:

“(1) Dismissal means that-

(a) ...

(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,”

[43] What s 186(1)(b) provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in s 186(1)(b) are in my view, that the employee should have a reasonable expectation, and the employer fails to renew a fixed term contract or renew it on less favourable terms. The fixed term contract should also be capable of renewal.

[44] The appellants carried the onus to establish that they had a ‘reasonable expectation’ that their contracts were to be renewed. They had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms. As soon as the other requirements of s186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the

dismissal was both procedurally and substantively fair.

[45] It was contended on behalf of the appellants that the evidence presented by the players proved a reasonable expectation on their part. The evidence referred to relate to the “outstanding” performance of the players at the RWC 2003 as well as the remarks made by Straueli. In the case of Matfield, he relied on the meeting of 26 November 2003 in which Straueli told him that, as he was one of the senior players, he (Straueli) wanted to use his experience and was part of his plans for 2004. In the case of Bands and Bezuidenhout they also relied on the remarks by Straueli that they were part of his plans for 2004 and that he would like to keep the same team together.

[46] Clause 3.2 stating that the contracts automatically terminated on the dates set out and that the players acknowledged that they had no expectation that their contracts would be renewed on the terms contained therein or any other terms is to me of critical importance. This clause and other exclusionary clauses referred to above were deliberately included in the contracts in order for them to be part of the contracts and to mean what they were intended for. It would therefore, be expected of the appellants to place more credible facts to make their expectation reasonable in the face of clause 3.2. A mere *ipse dixit* that there is an expectation, based on flimsy grounds, would not suffice.

[47] It should be borne in mind that the RWC 2003 contracts were for a specific event that came and went. The terms of the contract related to what was to happen at the RWC event. It

follows, as was contended on behalf of the respondent, that such a contract could not be renewed after the event, whether on the same or similar terms. Furthermore, in the letter of intent sent by Straueli to those players who had participated in RWC 2003, the players were reminded that Rugby World Cup comes once every four years. The letter also explained to the players that they were guaranteed a one year contract for 2004 and an incentive of R600 000-00 only in the event of them winning the tournament which did not happen. It is also evident in the letter from Heymans dated 23 November 2003 that RWC 2003 contracts were excluded from negotiations for renewal.

[48] I am unable to find on the evidence before us that Bezuidenhout and Bands could justifiably form any reasonable expectation that their RWC 2003 contract would be renewed. Their “outstanding” performance at the RWC 2003 could only place them in a better position to be considered for a new standard contract on negotiated terms different from the RWC 2003 contracts. Even the former coach on whose remarks they relied did inform them that their contracts would be reviewed when Oberholzer, the managing director at the time, returned from overseas. Furthermore, their expectation was, on their evidence, that they would be given standard players’ contracts for a period of one year and not to participate in RWC 2004. Such contracts would differ materially from the RWC 2003 contracts as they would be for a different purpose. In addition the promise made by Straulie seems to have been to give them contracts on terms more favourable than the ones they had.

[49] The Labour Court seems to have relied on the failure by SA Rugby to respond to the letter dated 23 November 2003 from Heymans to find that Matfield had a reasonable expectation that his contract would be renewed. The Labour Court reasoned thus:

“In the absence of an answer or an explanation it was in my judgment reasonable in the circumstances for Matfield to expect his employer to renew his fixed term contract for calendar year 2003 on the same or similar terms and the commissioner was justified in finding that in respect of Matfield there was an objective basis for his expectations, and that his expectations were reasonable”.

[50] In my view, this aspect alone is not sufficient to establish a reasonable expectation. In the first place Heymans' letter recognised that the contracts were coming to an end and that the players had not been contacted regarding “possible” contracts for 2004. Failure to communicate an intention not to renew, cannot, in my view, mean that the contract would be renewed when the contract itself does not make room for renewal. Although Matfield played for the Springboks since 2001 and was given a contract for 2002 and 2003, it has to be understood that these contracts were not on the same or similar terms. They were negotiated contracts for each year and given to the players who were selected by the coach who was in charge of training the team at the time. Not all the players who played for the Springboks during the years preceding 2002 and 2003 were selected by the coach and given contracts.

- [51] Furthermore, Heymans acknowledged that the contracts would be coming to an end by mutual agreement and proposed that the players should remain on those contracts until such time that SA Rugby had communicated with the players. This proposal was in my view a request for an extension of the contracts that would expire and cannot be a basis for a reasonable expectation of renewal. Lastly, on this aspect, Heymans expressed the view that players needed to know their future prospects in relation to their national contracts. This was, as contended on behalf of respondent, evidence of uncertainty and not of an expectation of renewal.
- [52] In my view, a statement by the then national coach-Straueli-that the players were part of his plans for 2004 is not sufficient to form a basis for a reasonable expectation. Matfield conceded in his evidence that it was not the coach that decided on the substance of the contract but negotiations that would take place between the collective bargaining agents, i.e SA Rugby and SARPA. Even if one could find that Straueli could have raised an expectation on the players about the renewal of their contracts such expectation should have diminished when Straueli's contract was terminated on 04 December 2003. It should have been clear to the players, as professional rugby players, that each coach had his own preferences and only the players he required would feature in his plans. The players should therefore have known that they were not guaranteed a place in the Springboks when a new coach was appointed. Selection of players to be in the team depended on the incumbent coach. This could be a reason why contracts were

for a limited period. It would be absurd to allow an outgoing coach to decide on the players his successor should include in his team. The criticism by the commissioner that the professional rugby environment is insecure, uncertain and characterised by frequent changes in managers is not entirely valid because, among others, SA Rugby must be responsive to changing conditions. The criteria adopted for selecting Springbok players had to be satisfied first. Performance in the RWC 2003 could be one of the considerations but not the only one.

[53] Since the claims of the players are based mainly on the promises made by Straueli, they should perhaps have pursued other contractual remedies and not rely on the provisions of S 186 (1) (b). This view is fortified by the fact that Heymans testified that they engaged SA Rugby in a process of negotiating contracts for the 2004 season. I did not understand his evidence to mean that negotiations centred around renewing the existing contracts of all the players contracted for 2003 season. Indeed, some of the players did not play for the Springboks for the 2004 season. It is common cause that Matfield played for the Springboks during 2004 on different but agreed terms with SA Rugby. Furthermore, his 2003 contract was less favourable than that of 2002 in that he earned less than he previously did. This is indicative of the fact that there was no automatic renewal but re-engagement on negotiated terms.

[54] In conclusion I am of the view that the appellants have not shown that there had been a dismissal in terms of s186 (1) (b) and as a result the CCMA had no jurisdiction to entertain

the dispute. In the result the appeal must fail and the cross-appeal should succeed. It is in my view in accordance with the requirements of the law and fairness that there be no order as to costs.

In the result I make the following order:

- 1. The appeal is dismissed.**
- 2. The cross-appeal is upheld.**
- 3. There is to be no order as to costs.**

TLALETSI AJA

I agree

ZONDO JP

I agree

WAGLAY JA

Appearances

For the Appellant: Mr Robert Stelzner

Instructed by: Adams & Adams

For the Respondent: Mr Norman Arendse SC

Instructed by: Sonnenberg Hoffmann & Galombik

Date of Judgment: 12 May 2008