IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA 38/2010

THE UNIVERSITY OF PRETORIA **Appellant**

and

THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER GS JANSEN VAN VUUREN NO **Second Respondent**

JUDITH GELDENHUYS **Third Respondent**

JUDGMENT

DAVIS JA:

Introduction

[1] Appellant employed third respondent in terms of a series of fixed term contracts during the period 1 February 2004 to 30 November 2007. On 30 November 2007, third respondent was interviewed for one of several permanent positions which appellant sought to fill. Third respondent's application was unsuccessful. However, she was offered a further fixed term contract for the first

semester of 2008, which she rejected on the basis that she was not willing to accept yet another fixed term contract.

[2] Third respondent then approached first respondent, alleging that she had been unfairly dismissed. She contended that she had been dismissed in terms of s186 (1) (b) of the Labour Relations Act 66 of 1995 ('the LRA') which includes within the concept of dismissal the following:

> "(b) *an employee reasonably expected the employer to renew a fixed term contract on the same or similar terms but the employer offered to renew it on less favorable terms or did not renew it*."

[3] Third respondent alleged that she had reasonably expected to be appointed on a permanent basis and contended that the failure to so appoint her constituted a dismissal in terms of s186(1)(b) of the LRA. The arbitration hearing commenced on 5 May 2008, during which the appellant raised a point in *limine,* namely that first respondent did not have jurisdiction to deal with this dispute, as the third respondent had not been dismissed in terms of the concept of dismissal as defined in the LRA.

[4] Second respondent decided that a reasonable expectation of permanent employment, if proved, could provide a ground for a claim of dismissal in terms of s186(b) of the LRA. He further held that the offer of a further fixed term contract was irrelevant and that appellant's failure to make an offer of a permanent contract

would, if there had been a reasonable expectation of such a permanent appointment, constitute a dismissal in terms of the LRA.

[5] The appellant approached the court *a quo* for an order declaring that third respondent had not been dismissed by it, further for a setting aside of the ruling handed down by second respondent, and an order declaring that first respondent had no jurisdiction to entertain the dispute referred to it by third respondent, and in the alternative, an order remitting the matter to first respondent for adjudication *de novo* before a new commissioner. The court *a quo* dismissed this application with costs. With leave of the court *a quo,* the appellant appeals to this court.

The factual background

[6] During the period 1 February 2004 to 30 November 2007 third respondent had been employed by appellant in terms of seven fixed term contracts. On 30 November 2007 she was interviewed for one of the three permanent positions to which successful candidates would be appointed on an indefinite basis. On 7 January 2008 the head of the Department of Mercantile Law informed third respondent that she had been unsuccessful in her application for a permanent appointment but, at the same time, offered her a fixed term contract for the first semester of 2008; '*op soortgelykke of beter voorwaardes as die waaronder jy voorheen by Handelsreg gewerk het.*'.

[7] This offer of a further fixed term contract on improved conditions was confirmed by third respondent as is evidenced from the following exchange between second respondent and third respondent during the hearing:

"*KOMMISARIS: Ek wil net weet die pos wat aangebied was, was dit inderdaad op dieselfde terme…*

MEJ J GELDENHUYS: Dit was…

KOMMISARIS: …as wat u voorheen gehad het?

MEJ J GELDENHUYS: …baie skielik op beter terme

KOMMISARIS: Sê weer?

MEJ J GELDENHUYS: Dit was baie skielike op beter terme. Ja, um, my kontrak was…

KOMMISARIS: Jy sê skielik?

MEJ J GELDENHUYS: Ja, my kontrak was 7 keer hernu op dieselfde…

KOMMISARIS: Ja.

MEJ J GELDENHUYS: …terme en toe die 8ste keer was dit op beter terme um, heeltemal…

KOMMISARIS: Was dit inderdaad beter terme?

MEJ J GELDENHUYS: Ja, heeltemal beter terme wat buite die…

KOMMISSARIS: Was hierdie laaste keer wat hulle…

MEJ J GELDENHUYS: …buite die beeld van die Universiteit."

[8] It is not clear as to the basis of third respondent's refusal of the offer of an eighth fixed term contract because it appears that third respondent would have explained the reasons comprehensively had the hearing continued. Mr Cheadle, who appeared on behalf of third respondent, submitted that what could be ascertained from the record was that her reasons for refusal were that she was not offered the contract she had reasonably expected namely 'a permanent position', and, further, that the offer of the fixed term contract had been made subject to the condition that it would be the final fixed term contract between her and appellant. As she stated before second respondent:

> "*Dit was ook 'n vaste termyn diens kontrak, maar hulle het toe vir my gesê dat dit sal net vir ses maande wees en hulle sal dit nooit, nie weer hernu nie waar hulle dit nooit vantevore vir my gesê het nie*."

The disputed question

[9] The critical question raised in this appeal is not dependent on a factual dispute, the facts being essentially common cause, but whether, in terms of the LRA, a reasonable expectation of indefinite employment meets the requirements of s186(1)(b), which would then mean that, properly proved on the facts, third respondent could have been dismissed in terms of the LRA.

[10] Mr Freund, who appeared on behalf of the appellant, submitted that the express wording of s186(1)(b) indicated that there could only be a dismissal in terms of this provision where the employee 'reasonably expected the employer to renew

the fixed term contract of employment on the same or similar terms.' In support of this submission, he referred to an article by Marius Olivier "Legal restraints on the termination of fixed term contracts of employment: An enquiry into recent developments" (1996) 17 ILJ 1001. In this article Professor Olivier writes at 1006:

> "*The third issue of importance relates to the nature of the expectation, and by implication the nature and extent of the relief to be afforded. What is required in order to activate the provisions of section 186(b) is an expectation that the fixed-term contract in question would be renewed on the same or similar terms. It is evident that the Act does not require that or regulate the position where the expectation implies a permanent or indefinite relationship on an ongoing basis. The reference to renewal on the same or similar terms supports that this is the inference to be drawn from the wording of the subsection. What section 186(b) apparently envisages is that an employer should not be allowed not to continue with fixed-term employment in circumstances where an expectation of renewal is justified. The implication is that the usual remedy to be granted in this case, if the termination is found to be unfair, is that of reinstatement or reemployment on the same or similar terms (see section 193(1) and (2)), but not that the employee has to be(re-) appointed as a permanent employee or on an indefinite basis. This would consequently leave the possibility open that the employer could after the expiry of the period of the subsequent fixed-term contract terminate the services of the employee concerned, as long as the termination is not*

otherwise prohibited- such as where the employee had once again a reasonable expectation that the contract would be renewed."

[11] This approach was followed in **Dirks v The University of South Africa** (1999) 20 ILJ 1227 (LC) at paras 118 – 149. However in **McInnes v Technicon of Natal** (2000) 21 ILJ 1138 (LC) at 1143 Penzhorn AJ held this approach to be 'clearly wrong'. At para 20 of his judgment, Penzhorn AJ said:

"*What section 186(b) clearly seeks to address is the situation where an employer fails to renew fixed-term employment when there is a reasonable expectation that it would be renewed. It is the employer who creates this expectation and it is then this expectation, created by the employer, which now gives the employee the protection afforded by this section. If then the expectation which the employer creates is that the renewal is to be indefinite, then the section must be held also to cover that situation*."

[12] That view finds support in Grogan Workplace Law(10th ed) at 150:

"*There seems to be no reason in logic or law, why an expectation of permanent employment should not provide a ground for a claim of dismissal under this provision. It seems excessively technical to presume that the legislature had in mind the duration of the contract when it required that the employee's expectation should contemplate renewal on the 'same or similar terms*."

[13] Mr Freund submitted that the approach adopted by Olivier should be preferred to that advocated by Grogan and upheld in **McInnes** *supra,* in that the wording of the section provided that 'an employee reasonably expected the employer to renew a fixed term contract on the same or similar basis'. This phrase thus showed that the section envisaged an expectation of a renewal of a fixed term contract. An expectation of a conclusion of a permanent contract could and should not be equated with an expectation of a renewal of fixed term contract. Furthermore, a permanent contract could not be regarded as a contract 'on the same or similar terms' to a fixed term contract. In support of this distinction, see **SA Rugby (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others** (2006) 27 ILJ 1041 at paras 10 - 13.

[14] By contrast, Mr Cheadle contended that the very purpose of s186(1)(b) was to prevent employers from concluding a series of short term contracts with employees which can then be brought to an end without reason at the termination of the fixed term and, as a result of which, employees could then be denied a range of protection, including social security and other benefits which are enjoyed by employees in indefinite contracts of employment. Accordingly, the interpretation of s186(1)(b) should be informed by this purpose, that is to prevent employers from using their freedom to contract to avoid what would otherwise be the creation of obligations in terms of the LRA and thus erode the concomitant rights of employees.

[15] In support of this submission Mr Cheadle referred to the approach of the Constitutional Court in **NUMSA v Bader Bop (Pty) Ltd and another** (2003) 24 ILJ at 305 (CC) at para 37 that:; "*If (that provision) is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred*." Thus, when the section refers to the renewal of a 'fixed term contract', its purpose is to prevent the abuse of a 'rolling over contract' in order to avoid the fair labour practice obligations which are set out in s23 of the Republic of South Africa Constitution Act 108 of 1996 and which, in turn, are given content in the LRA.

Evaluation

[16] The implication of third respondent's argument can be summarized thus: once an employee has established a reasonable expectation of a renewal of a fixed term contract, an obligation is created to renew this contract indefinitely on the same or similar terms, subject to a fair reason for refusing to do so. Therefore, once a contract has been renewed because there was a reasonable expectation of a renewal, taking into account the series renewal of the employee's fixed term contract in the past, this expectation creates an obligation to renew indefinitely and, in this fashion, the obligation transforms so as to create a duty upon the employer to offer the employer a permanent contract.

[17] In **S v Zuma** 1995 (2) SA 642(CC) para 17 – 18 the Constitutional Court warned that courts cannot interpret legislation so that it means 'whatever we might wish it to mean'. In other words, language chosen by the legislature must be

respected. This conclusion should not be read to deny the inherent ambiguity in the use of language but it emphasizes that a court is obliged to engage carefully with the words that have been used in the Act and to develop an interpretation which can be plausibly justified on the basis of the words chosen by the legislature. See also **SA Airways (Pty) Ltd v Aviation Union of SA and others** (2011) 32 ILJ 87 (SCA) at para 27 – 33.

[18] The words employed in s186 envisage that two requirements must be met in order for an employer's action to constitute a dismissal:

(1) a reasonable expectation on the part of the employee that a fixed term contract on the same or similar terms will be renewed; and

(2) a failure by the employer to renew the contract on the same terms or a failure to renew it at all.

These words do not however carry the meaning which is urged by third respondent, namely that, by being employed on the basis of a series of fixed terms contracts, an employee has without more a reasonable expectation of a permanent appointment. The distinction between the fixed term contract and a permanent contract has a clear economic rationale. An employer in the position of appellant may have discretionary funds for a limited period. During this period, it offers a series of fixed term contracts to a particular employee. At some point these funds are depleted and the employer can no longer afford a further fixed term contract. By contrast, the creation of a permanent post would necessitate a more permanent source of funding.

[19] Although a draft Bill has no significant interpretative weight, it is instructive to refer to the Labour Relations Amendment Bill of 2010 in which the following amendment was proposed to s186:

> "*Section 186 of the principal Act is amended by-*
>
> *(b) an employee engaged under 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 favorable terms, or did not renew it; or*
>
> *(ii) to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it on less favorable terms, or did not offer it, where there was reasonable expectation.*"

The draft therefore makes a clear distinction between an expectation to renew a fixed term contract and the offer of an indefinite contract of employment.

[20] The facts of this case illustrate this distinction. Third respondent enjoyed seven fixed term contracts prior to her application for a permanent position. In this case, she chose 'to put her hat in the ring' for a permanent appointment. In other words, her own conduct illustrates the distinction between the expectation of the renewal of a fixed term contract and another form of contract, in this case a

permanent post. Had she not been offered a further fixed term contract, then depending on the evidence, she could be entitled to proceed in terms of s186(1)(b) That would, however, not be a case based, as is this one, on a different form of employment, being a permanent contract.

[21] The words chosen by the legislature, absent an amendment to the legislation, cannot carry the burden of third respondent's case in that it covers a restrictive set of circumstances, namely a reasonable expectation of a renewal of that which had previously governed the employment relationship, namely a fixed term contract which had previously been enjoyed, which had now expired and, by virtue of the factual matrix created, at best, a reasonable expectation of a renewal.

Conclusion

[22] Given that this court has found that both the second respondent and the court *a quo* erred in concluding that there could be a dismissal, in that on facts properly shown, there was a reasonable expectation of permanent employment, second respondent's decision falls to be reviewed and set aside.

[23] Accordingly, appellant is entitled to the declaratory order so sought. In the light however, that third respondent is an individual litigant being involved in litigation to vindicate her rights, I do not consider this to be a case where it would be appropriate to award costs.

[24] In the result the following order is made.

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with the following order.
   - 2.1 It is declared that the third respondent was not dismissed by the applicant.
   - 2.2 It is declared that the first respondent has no jurisdiction to entertain the dispute referred to it by third respondent pertaining to her alleged unfair dismissal.

_____

DAVIS JA

NDLOVU JA and MOCUMIE AJA concurred

Appearances

For appellants: **A J FREUND S.C.**

For respondent **HALTON CHEDLE**

Date of hearing: **20 May 2011**

Date of judgement: 04 November 2011