IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

APPEAL CASE NO: JA14/09

In the matter between:

M V JOSEPH Appellant

and

UNIVERSITY OF LIMPOPO First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

P P MOTAKE N.O. Third Respondent

JUDGMENT

JAPPIE JA

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Introduction

[1] This is an appeal against a judgment of the Labour Court in which judgment the Labour Court reviewed and set aside an arbitration award of the third respondent. In the award, the first respondent, the University of Limpopo ("the university"), was ordered to reinstate the appellant, Dr MV Joseph, to his position as at the time and date of his dismissal without loss of any benefit or salary. The university was further ordered to pay to the appellant back pay in an amount of R71 355.00. The third respondent made no order as to costs.

[2] The university sought to review the aforesaid award and on 15 August 2008. The Labour Court found in favour of the university and made an order to the effect:-

> *"1. . . .*
>
> *2. The arbitration award issued by the second respondent dated 1 June 2010 is reviewed and set aside, with costs."*

[3] The appellant sought and was granted leave to appeal to this Court against the aforesaid judgment and order of the Labour Court.

Background

[4] The appellant is originally from India. In May 1997 he was appointed on a fixed term contract of three years as a senior lecturer at the university. In his evidence before the third respondent he explained that he had developed an interest in South Africa and regarded working in South Africa as a challenge. He wanted to work at a rural university such as the University of Limpopo. He explained that he had given up a professorship at the University of KwaZulu-Natal and had accepted the position of senior lecturer on a three year fixed term contract just to pursue his passion at a "non-elitist" rural university that catered for disadvantaged students.

[5] At the end of the three year period, when his fixed term contract had come to an end in 2000, the university advertised his position. According to the appellant this was a formality in order to comply with the legislative requirement pertaining to his employment as a non-South African citizen. He applied for and was appointed to his position for a further period of three years and once again on a fixed term contract.

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[6] During the time the appellant was employed by the university he developed two programs, Contemporary English Language Studies (CELS) and Multilingual Studies (MUST or MULST). These programs were unique in the country and were to be offered in Applied English Language Studies. The CELS and MUST programs used students' home language as a medium of instruction in the teaching of English.

[7] Approval of the new program was obtained from the Qualifications Authority and the Council of Higher Education. The appellant arranged for funding from the Ford Foundation. The program was however blocked by the head of the School of Language and Communication Studies – Professor Louw. It was only after an appeal to the executive dean of the faculty that an internal memorandum prepared by the dean confirmed firstly; that the program would be offered from the year 2003 and secondly that the appellant would play a central role in offering the CELS and MUST modules.

[8] In addition Dr Payle – who belonged to the Theology Department – was also negative towards the introduction of the aforesaid modules.

[9] As it was anticipated that the appellant's fixed term contract would expire at the end of 2003, the appellant became anxious when towards the end of his post was not advertised. It had by then become a formality for his post to be advertised just before his contract would come to an end, he would then apply and be re-appointed to that post.

[10] On 1 September 2003, the appellant addressed a letter to the Human Resource Department of the university wherein he stated the following:

> *"I have assumed that because of my involvement in teaching the new undergraduate BA degree that CELS and MUST offered under the School of Languages and Communication and the foundation modules under CADAC that my services will be needed by the university, and that therefore my contract will be renewed further. Further, both the School of Languages and Communication studies and CADAC know that I am a project leader in 2 (two) research projects which will continue for the next few years and will result in building black research capacity. They also*

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> *know that I am supervising post-graduate student's dissertation work. I have Professor Teffo, Dean of Humanities letter to Dr K Payle stating that I am one of two staff central to CELS and MUST."*

[11] On 3 September 2003, the appellant received a response from the university indicating that is was a requirement of the Department of Home Affairs that the position be advertised and as such it was required of the appellant to apply for the post if he wished to have his contract renewed.

[12] The appellant became concerned at the delay in the advertising of the position and the impact it would have on the renewal of his contract. He, in this regard, addressed a memorandum to the Vice Chancellor, Professor Mokgalong requiring written clarification about his position.

[13] On 20 November 2003 Professor Mokgalong addressed a letter to the Department of Home Affairs motivating for the extension of the appellant's work permit. The letter reads as follows:

> *"I am writing to request an extension of 3 months from Jan 1, 2004 to March 31, 2001 for the current work permit of Dr. Michael Joseph, Senior Lecturer at the University of the North. This extension is to enable the university to advertise his post so that he can apply for it.*
>
> *Dr Joseph's current work permit expires on 31December 2003.*
>
> *The university undertakes to advertise his post immediately from the Faculty of Humanity, School of Language and Communication Studies, and complete the process of selection by Jan 2004, so that the successful candidate can assume duties on February 1, 2004.*
>
> *I urge you to view this application favourable."*

[14] The post for a senior lecturer in English in the Facility of Humanities was advertised in December 2003.

[15] In the meantime the appellant had applied to and was offered an appointment at the University of the Witwatersrand. On 2 December 2003 the appellant sent an

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e-mail to the University of the Witwatersrand declining the appointment which that university had offered to him. The relevant e-mail reads as follows:

> *"I hope you have received my email requesting till today to give you a response to the offer of an appointment at Wits.*
>
> *I am still not absolutely sure that I am doing the right thing but I have just been assured by UNIN Management that my post will be advertised this month and an appointment made by the end of January 2004. Given my training and experience and because of the many projects that I have started at UNIN, I stand a very good chance of being retained at UNIN. These projects are in the niche area of multilingualism and are particularly relevant to the Limpopo province.*
>
> *In the light of this development I have to refuse the Wits offer. I do this with great regret and even with a sense of insecurity because I have no guarantees at UNIN. As I have explained to you, I would like to continue at UNIN, there was even a small chance that I could be retained there and now this chance, though still small, seems very possible."*

[16] The appellant then applied for the position as advertised. The outcome of the interviews conducted subsequent to the advertisement was that the appellant was unsuccessful. The outcome of the interview process was that the panel recommended that a Dr Dlamini-Sukumane be appointed as the successful candidate. The appellant was placed as the second best candidate for the position.

[17] Very shortly after accepting the position Dr Dlamini-Sukumane resigned and the position of senior lecturer was once again vacant. Nevertheless, the university declined to appoint the appellant to that position.

[18] The appellant was formally advised on 26 January 2004 that his application had been unsuccessful. On 11 February 2004 the appellant referred the matter to the Commission for Conciliation Mediation and Arbitration (CCMA). On 19 March 2003 the CCMA issued a certificate of outcome that the matter remained unresolved and it was referred for arbitration.

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The Arbitration

[19] At the arbitration the appellant alleged that the university had caused him to be unfairly dismissed by failing or refusing to renew his fixed term employment contract after it allegedly created a reasonable or legitimate expectation that it would be renewed. He relied on s186 (1) (b) of the Labour Relations Act 66 of 1995 (the "LRA"). The relevant section provides:

> "(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;"

[20] He further alleged that the university discriminated against him in failing or refusing to appoint him or to renew his contract after an interviewing process which he alleges was unfair.

[21] The third respondent was the commissioner and the arbitration proceeded before him. After having heard evidence from the appellant and his witnesses and evidence on behalf of the university, the third respondent came to the following conclusion:

> *"I further, therefore, find that the respondent dismissed the applicant when it failed or refused to appoint him after the said interview and therefore, failed to renew the said contract.*
>
> *The said dismissal is, without saying, unfair both substantially and procedurally."*

The third respondent ordered that the university reinstate the appellant without loss of any benefit or salary. He further ordered the university to pay to the appellant back pay in an amount of R71355.00. No order as to costs was made.

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On Review

[22] The university was unhappy with the outcome of the arbitration proceedings and brought an application in the Labour Court for the review and the setting aside of the third respondent's award. The university sought the review on the following grounds:-

- That the arbitrator did not have the necessary jurisdiction to arbitrate the said matter;
- That the award and the reasons therefore are not justifiable, as there is no rational objective basis justifying the connection made by the arbitrator between the material facts before him and the conclusion he eventually arrived at;
- The arbitrator did not apply his mind to the documentation before him, and furthermore did not apply his mind to the evidence used by the various parties;
- The arbitrator's award is in any event reviewable on the grounds that he ignored direct evidence before him, and relied on evidence which was not before him;
- The arbitrator furthermore committed a serious error of law, and his award was inconsistent with the right of the applicant to a fair labour practice; and
- The accumulative effect of the misdirections of the arbitrator resulted in a failure of justice.

[23] The review was heard before Mr Justice Molahlehi who came to the following conclusion:

> *"[33] It is evidently clear from the above that after failing to afford the successful candidate and opportunity to be heard during the arbitration proceedings, the Commissioner issued an award whose*

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consequence was undoubtedly detrimental to the successful candidates interest. Accordingly in conducting the arbitration to finality without affording the successful candidate an opportunity to be heard and making a finding whose consequences had negative implications to her the commissioner committed a gross irregularity.

[34] In the light of the above I deemed it unnecessary to consider the other grounds of review raised by the applicants in its founding papers. I also do not deem it necessary in the circumstances of this case to refer the matter back to the CCMA in as far as the issue of non-joinder is concerned."

The Labour Court then made an order upholding the review and set aside, with costs, the third respondent's award.

On Appeal

[24] In upholding the review the court *a quo* did so after consideration of a single issue. The court *a quo* held that the third respondent had committed a gross irregularity in conducting the arbitration to finality without affording the successful candidate, Dr Dlamini-Sukumane, an opportunity to be heard and by making a finding which consequences had negative implications for her.

[25] Counsel for the university, at the commencement of his address to this Court, correctly conceded that the court *a quo* had erred in reviewing and setting aside the award of the third respondent on the ground of the non-joinder of Dr Dlamini-Sukumane.

[26] In *Gordon v Department of Health, KwaZulu-Natal*[1] the following was held:-

"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned"

[1] 2008 (6) A 522 (SCA) per Mlambo JA at para [9].

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[27] Dr Dlamini-Sukumane had resigned long before the arbitration proceedings commenced before the third respondent, and the post for which the appellant had applied for was thus vacant.

[28] Applying the test as set out in *Gordon's* case in regard to the issue of non-joinder, it is apparent that the court *a quo* erred in reviewing and setting aside the third respondents award on the basis as articulated in its judgment.

[29] As the *court a quo* did not consider any of the other grounds raised by the university it remains for this Court to consider whether the award of the third respondent should be set aside on such grounds as contended for by the university.

[30] Counsel for the university argued that on the evidence and material that were placed before the third respondent no reasonable decision maker could have come to the conclusion that the appellant could have had a reasonable expectation of being appointed to the position of senior lecturer as advertised. It was argued that the appellant is a foreign national. The appellant would require a work permit issued by the Department of Home Affairs before he could take up any position with the university. Accordingly the appellant would have to comply with s19(2) of the Immigration Act 13 of 2002. That is to say the appellant would have had to obtain a general work permit as the section provides as follows:-

> "A general work permit may be issued by the Director-General to a foreigner not falling within a category or class contemplated in subsection (1) if the prospective employer –
>
> (a) satisfies the Director-General in the manner prescribed that despite the diligent search he or she has been unable to employ a person"

It was submitted that the appellant could not have reasonably held the belief that there was no South African citizen with an equivalent qualification who could fill the position. Therefore, subjectively, the appellant could not have had a legitimate expectation of being appointed to the position as advertised.

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[31] It was further argued that the appellant, when he testified gave evidence to the effect that he and the Head of the School of Language and Communications, Dr Payle had major differences. So much so, that when the appellant declined the position at the University of Witwatersrand he stated the following:

> *"In the light of this development I have to refuse the Wits offer. I do this with great regret and even with a sense of insecurity because I have no guarantee UNIN. As I have explained to you, I would like to continue at UNIN, if there was even a small chance that I could be retained there and now this chance though still small, seems very possible."*

It was argued that this communication reflected the appellants' state of mind. In his own mind he had no guarantees.

[32] It was further argued that for a legitimate expectation to exist in the mind of the appellant, that such an expectation must have been created by someone with sufficient authority acting for and on behalf of the university.

[33] The argument advanced by the university that s19(2) of the Immigration Act prevented the appellant from forming a legitimate expectation that he would be appointed to the position of senior lecturer, in my view, is not a factor which could have prevented the appellant from holding a reasonable or legitimate expectation that his contract would be renewed. It is only after a decision has been made to renew the appellant's contract that it can be said that the provisions of s9(2) of the Immigration Act can be complied with. That is to say s19(2) comes into effect only once the university had decided to re-employ the appellant can it then be said that despite the diligence search the employer has been unable to employ a person in the Republic with qualifications equivalent to those of the appellant.

[34] The Department of Home Affairs had on previous occasions granted to the appellant a general work permit. In the event of the university renewing the appellant's contract of employment there is nothing to suggest that the Department of Home Affairs would not again have issued the appellant with a general work permit.

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[35] The onus is on an employee to prove the existence of a reasonable or legitimate expectation. He or she does so by placing evidence before an arbitrator that there are circumstances which justifies such an expectation. Such circumstances could be for instance, the previous regular renewals of his or her contract of employment, provisions of the contract, the nature of the business and so forth. The aforesaid is not a closed list. It all depends on the given circumstances and is a question of fact.

[36] It is common cause that Mr LD Liebenberg, a Senior Manager in the Human Resources Department, motivated for the extension of the appellant's current work permit. Moreover Professor MN Mokgalong, the Acting Vice Chancellor of the university supported the application for the extension of the appellant's work permit. In the correspondence both Mr LD Liebenberg and Professor MN Mokgalong stated that the appellant's services were of importance to the university. Both Mr LD Liebenberg and Professor MN Mokgalong are senior officers in the administration of the university. Both could act and did act on behalf of the university. Accordingly in my view both Mr Liebenberg and Professor Mokgalong were persons of authority who could, through their conduct, create in the mind of the appellant that his employment contract would be renewed.

[37] It is common cause that the appellant, prior to 2003 had developed the two programs, CELS and MUST. These programs were unique and were offered in applied English language studies. He was, so to speak the intellectual anchor in the implementation of the two programs. At the time when the appellant applied to be re-appointed to his position the programs were ongoing and were still being offered by the university.

[38] It is further common cause that Dr Dlamini-Sukumane did not have the necessary qualifications to implement and to teach the two programs. This was underscored by her resignation soon after taking up her appointment.

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[39] Given the aforesaid circumstances it is, in my view, reasonable for the appellant to have expected that his contract with the university would be renewed.

[40] The unfairness of the process in not renewing the appellant's contract is demonstrated by the composition of the panel that interviewed him. The chairman of the interviewing panel was Professor Djolov. The other members were Dr Nel, Dr Payle and Professor Louw. Both Dr Payle and Professor Louw had outwardly shown animosity towards the appellant. In fact Professor Djolov testified that if he had known of Dr Payle's and Professor Louw's attitude towards the appellant he would have objected to the manner in which the panel was constituted. Moreover, Dr Nel, in his evidence, indicated that he had gathered from the manner in which Dr Payle raised certain issues with the appellant, that there was a problem between Dr Payle and the appellant. Dr Nel further conceded that Professor Louw should not have been allowed to sit on the panel given her animosity towards the appellant.

[41] The third respondent had before him the letter written on the 27th November 2003 by Mr Liebenberg to the Department of Home Affairs. The letter concluded by stating that the appellant's services were indispensable to the university and urged the Department to extend the appellant's work permit for another three years.

[42] It was common cause that the appellant had established the two programs, CELS and MUST and had himself, obtained money from the Ford Foundation for its implementation.

[43] The post that was advertised was for the position that was then occupied by the appellant and specifically called for someone involved in academic development. This was precisely what the appellant had been doing. The third respondent, in the award acknowledged the fact that whoever filled the post had to have the necessary qualifications to deal with the highly specialized programs which the appellant had introduced.

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[44] In the light of the aforesaid, in my view, it cannot be said that the conclusion reached by the third respondent was one that a reasonable decision maker could not reach[2]. That being so there is no basis for a court to interfere with the award of the third respondent and the court *a quo* ought to have dismissed the university's application to have the award reviewed and set aside.

[45] In the result the following order is made:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and is replaced with an order that the application for review is dismissed with costs.
3. The first respondent is ordered to pay the appellant's cost of the appeal.

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Jappie JA

I agree:

Waglay DJP

I agree:

Hendricks AJA

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[2] *Sidumo & another v Rustenberg Platinum Mines Ltd & others* (2007 28ILJ 2405 (CC) para 110

DATE MATTER HEARD:	23 September 2010
DATE OF JUDGMENT:	13 May 2011

APPEARANCES

Appellant's Counsel:	Adv LA GRANGE
Instructed by:	Mendelow – Jacobs Attorneys

First Respondent's Counsel:	Adv Hulley
Instructed by:	Hlatshwayo, Du Plessis, Van der Merwe, Nkaiseng Attorneys

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