REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1769/12

J 1849/12

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY	Applicant
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	First respondent
S KHOZA	Second respondent
MM MOFOLO	Third respondent
LJ MOTSHOELA	Fourth respondent
DP MOSOLOTSANE	Fifth respondent
MA NDAMANE	Sixth respondent
MC NKUTHA	Seventh respondent
ME NKUNA	Eighth respondent
SJ MOLEFE	Ninth respondent

Heard: **13 June 2014**

Delivered: **22 July 2014**

Summary: Review – LRA s 186(1)(b) – legitimate expectation of renewal. Jurisdictional question if employees were dismissed. Arbitrator's finding correct.

JUDGMENT

STEENKAMP J

Introduction

[1] The second to ninth respondents (the employees) were employed by the applicant (the Municipality) on fixed term contracts linked to the term of office of the executive mayor. After that period lapsed, they continued to be employed for another seven months before the municipality terminated their contracts of employment. They referred an unfair dismissal dispute to the first respondent (the bargaining council). They argued, firstly, that the fixed term contracts had been tacitly converted into permanent ones; and in the alternative, that they had a legitimate expectation that their contracts would continue on the same or similar terms as envisaged by section 186(1)(b) of the Labour Relations Act.[1]

[2] The parties agreed to argue on a stated case at the bargaining council arbitration. The arbitrator (the second respondent) found that the employees had been dismissed in terms of s 186(1)(b); and that the dismissal was procedurally and substantively unfair. He ordered the municipality to reinstate the employees to their positions "on the same terms and conditions and under the same contractual duration they worked in prior to the dismissal" by 16 July 2012.

[3] The municipality seeks to have that award reviewed and set aside. At the same time, the employees want to have it made an order of court in terms of s 158(1)(c) of the LRA (under case number J1849/12).

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[1] Act 66 of 1995 (the LRA).

Background facts

[4] The facts are common cause. Indeed, as I have noted, the parties at arbitration agreed to place a stated case before the arbitrator. Both parties were legally represented by their attorneys of record. In addition, the municipality was represented by senior counsel, Adv W R Mokhari SC. They recorded the following common cause facts:

4.1 The employees commenced their employment with the municipality on various dates between 2007 and 2010. The terms of their contract of employment were identical and contained the following clause:

"Your contract is valid for a fixed term for a period that will not extend beyond the next municipal election; or

for the period that the current executive mayor, Cllr DP Molokwane is deployed in that capacity, whichever one is the shortest.

This agreement of employment may be renewed by agreement at the end of the fixed term for a further term on the same or different conditions and terms at which time a new fixed term contract of employment will be entered into."

4.2 The contracts of employment lapsed on 18 May 2011. The employees remained in employment after 18 May 2011.

4.3 On 25 May 2011 the municipality notified the employees that their contracts "will expire" and that their last working day with the municipality would be 30 June 2011. The letter went on to state:

"Kindly note that this letter serves as a month's notice for termination of your contract, in line with the Basic Conditions of Employment [*sic*]."

4.4 The employees remained in employment after 30 June 2011. On 28 October 2011, the municipality gave them another notice in these terms:

"You are hereby notified that your employment contract is terminated with your last working day being Wednesday 30 November 2011."

4.5 The employees remained in employment after 30 November 2011. On 12 December 2011, the municipality gave them another notice in these terms:

"You are hereby notified that your employment contract is terminated with your last working day being 31st December 2011."

4.6 On 3 January 2012 the municipality instructed the employees to return their office keys.

[5] The parties agreed that the arbitrator had to determine the following issues:

5.1 Was there a dismissal? If not, the bargaining council lacks jurisdiction.

5.2 If there was a dismissal, whether the dismissal was procedurally and substantively fair; and

5.3 whether the employees should be reinstated or awarded compensation if the dismissal is found to be procedurally and substantively unfair.

The award

[6] Mr Scholtz, for the employees, presented oral argument at the arbitration; and Mr Mokhari, for the municipality, argued orally and presented the arbitrator with supplementary written submissions after the arbitration had been concluded. The employees' primary argument was that the fixed term contract of employment had been tacitly converted into permanent employment when they continued to be employed for a period of seven months, relying on *Owen v Department of Health, KZN*[2]. In the alternative, they argued that they had a legitimate expectation of renewal. The alternative argument is captured in Mr Scholtz's recorded argument, in the arbitration award, and in the supplementary submissions that Mr Mokhari filed on behalf of the municipality.

[7] Having considered both parties' arguments and the common cause fact that the employees continued working for the municipality for a period of seven months after their contracts should have lapsed, the arbitrator concluded:

[2] (2009) 30 *ILJ* 2461 (LC).

"The [municipality's] conduct of frequently rolling over the [employees'] fixed term contracts even after stating that it had no intention to, gave rise to a reasonable expectation on the part of the [employees] and that their contracts will continue to be rolled over in the future. Therefore the [municipality's] argument that such an expectation is unfounded is illogical as any reasonable employee in the position of the [employees] would have had the same expectation. It is therefore clear that the [employees] were indeed dismissed from their employment on the 12th December 2011.

Section 186(1)(b) of the Labour Relations Act provides that it would constitute a dismissal if the employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer did not. In *Biggs v Rand Water* (2003) 24 *ILJ* 1957 (LC) the Labour Court stated that:

'Section 186(1)(b) was included in the LRA to prevent the unfair practice of keeping an employee in a position on a temporary basis without the employment security until it suits the employer to dismiss such an employee without the unpleasant obligations imposed on employers either LRA in respect of permanent employees.'

It is therefore my finding in the light of the above that the [employees] were indeed dismissed from their employment and that such a dismissal was procedurally and substantively unfair.

I make the following award:

1. The [employees] were dismissed from their employment and the said dismissal was procedurally and substantively unfair.
2. The [municipality] is ordered to reinstate the [employees] to their positions on the same terms and conditions and under the same contractual duration they work in prior to their dismissal by no later than 16 July 2012.
3. I make no order as to costs."

<u>The appropriate test on review</u>

[8] The municipality seeks to have the arbitration award reviewed and set aside in terms of section 145 of the LRA. In its initial application, it relied on a "latent gross irregularity"; that the arbitrator committed misconduct; and that he exceeded his powers. In his argument before this court, Mr

Cassim argued, relying on *Herholdt v Nedbank Ltd*[3], that the arbitrator's findings led to results that are unreasonable; and that he misconceived the nature of the enquiry and reached a conclusion not supported by the available evidence. Mr *Scholtz*, on the other hand, argued that the award was reasonable, also relying on the test in *Herholdt* and *Sidumo*[4].

[9] It is only in his oral argument in reply that Mr *Ngcukatoibi* belatedly raised the issue that the first question before the bargaining council – i.e. whether the municipality had dismissed the employees – went to jurisdiction, and therefore, that the test in *SARPA v SA Rugby (Pty) Ltd*[5] applies, and not the *Sidumo* test; in other words, this court should decide whether the arbitrator was correct, and not whether his award was so unreasonable that no other arbitrator could have come to the same conclusion. (Of course, if there was a dismissal, the reasonableness test would still apply to the subsequent questions whether it was fair and with regard to the relief ordered). I was of the same view, but I believed it was fair to give both parties the opportunity to submit further written argument on this point, having regard to what O'Regan J stated in *CUSA v Tao Ying Metal Industries and Others*:[6]

> "Where a material irregularity or other defect appears on the face of the record before the reviewing court, which defect would mean that the proceedings before the reviewing court were either unlawful, or procedurally unfair or unreasonable, the reviewing court is not obliged to overlook that defect. Of course, the court must act in a manner that is fair to the parties and ensure that they have an opportunity to address the issue the court has identified."

[10] I therefore asked both parties to submit further written submissions on this point by 18 June 2014. Messrs *Ngcukatoibi* and *Scholtz* both did so. They agreed that the question of whether the employees had been dismissed was a jurisdictional one; and that, therefore, the court had to decide whether the arbitrator's finding on that question was correct.

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[3] [2013] 11 BLLR 1074 (SCA).

[4] *Sidumo & ano v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[5] [2009] 9 BLLR 845 (LAC).

[6] 2009 (2) SA 204 (CC) para [131].

Evaluation

[11] The award is not a model of clarity. However, the question is whether the conclusion that the arbitrator reached on dismissal, is correct; and if so, whether his further conclusions were so unreasonable that no reasonable arbitrator could have come to the same conclusions.

[12] In my view, the finding that the Municipality had dismissed the employees was correct. The arbitrator was faced with a stated case by agreement between the parties. On the common cause facts before him, the employees continued to be employed by the municipality for seven months after their contracts should have lapsed. On those facts, any reasonable employee would have formed the legitimate expectation that his or her contract of employment had been renewed.

[13] It should be added that the municipality did not attempt to renew the contract for a month at a time. In this regard, the arbitrator's comment that the contracts "were renewed on a monthly basis" is incorrect. But that does not make the entire award reviewable. The conclusion is still correct, namely that the municipality only dismissed the employees on 12 December 2011.

[14] The arbitrator did not find that the employees' contract had been converted into permanent employment, and correctly so. In terms of the Labour Relations Amendment Bill[7] it is envisaged that the meaning of "dismissal" in s 186(1)(b) will be amended to include the situation where an employee employed in terms of a fixed term contract of employment reasonably expected the employer –

> "to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee".

[15] As the law stands, though, the subsection does not include an expectation of permanent employment.[8] The question of whether the arbitrator's

[7] No 16B of 2012.

[8] *University of Pretoria v CCMA & others* [2012] 2 BLLR 164 (LAC).

finding was correct, therefore, turns only on his finding that the employees had a legitimate expectation to be employed on the same or similar terms, as they had argued in the alternative.

[16] On the stated facts, the employees must surely have formed a reasonable expectation that there contracts had been renewed, as envisaged in their contracts of employment:

> "This agreement of employment may be renewed by agreement at the end of the fixed term for a further term on the same or different conditions and terms at which time a new fixed term contract of employment will be entered into."

[17] After 11 May 2011, they continued in employment for another seven months. When the Municipality did notify them of the termination of their contracts on three occasions, it did so on notice and with reference to the Basic Conditions of Employment Act[9]. It did not rely on an argument that their fixed term contracts had already lapsed by operation of law. The only reasonable inference that could objectively be drawn, was that the Municipality continued to employ them on the same terms, as envisaged by their contracts. And then, after they had continued to work for the Municipality for seven months, it decided in clear terms to "terminate" their employment with effect from 31 December 2011, i.e. to dismiss them.

[18] The arbitrator's conclusion that the employees were dismissed, is correct, in my view. Once that is accepted, it follows that the dismissal was substantively and procedurally unfair. The Municipality gave them no reason for the dismissal and followed no procedure.

[19] The further order that the employees must be reinstated "on the same terms and conditions and under the same contractual duration they worked in prior to the dismissal" could certainly have been clearer. However, it can only be read in conjunction with their contracts of employment, in terms of which they would be employed until the next municipal election or commensurate with the term of office of the incumbent executive mayor. It is also in line with the employees' argument at arbitration that there was "sufficient evidence to indicate that there [was]

[9] Act 75 of 1997.

a legitimate expectation that the contracts would have been renewed on the same terms and conditions" and that the employees "would have remained in the employ of the municipality for another term involved [*sic*] to the term of the executive mayor or the municipal elections which is about another four years." Should either or both of the parties remain of the opinion that that part of the award is not clear, they can ask the arbitrator for clarification or variation in terms of s 144 of the LRA. It does not render the award reviewable.

[20] It is so that the evidence on which the arbitrator had to decide the question whether there was a dismissal, was scant. But the parties – both of whom were represented by senior and experienced legal representatives – chose to argue that dispute on a stated case. On the evidence available to him, it is my view that the arbitrator came to the correct conclusion.

Conclusion

[21] In my view, the arbitrator came to the correct conclusion on the evidence before him. Once he came to the conclusion that the employees were dismissed, his further conclusion that the dismissal was unfair; and his order that the municipality must reinstate them on the same terms and conditions as those that prevailed prior to the dismissal, was not so unreasonable that no other arbitrator could have come to the same conclusion. The award is not open to review.

The application in case no J1849/12

[22] The parties were agreed that, should the award stand, it could be made an order of court. (The converse would also apply).

Costs

[23] Both parties asked for costs to follow the result, both in the pleadings and in their arguments on the day of the hearing. It is only when he filed his supplementary submissions that Mr *Ngcukatoibi* submitted that there should be no order of costs. The employees had an arbitration award in their favour. The municipality elected to take that an award on review. It

has been unsuccessful. I see no reason in law or fairness why costs should not follow the result. My only concern is that the ratepayers of Merafong will ultimately bear those costs.

Order

[24] I therefore make the following orders:

24.1 In case number JR 1769/12:

The application for review is dismissed with costs.

24.2 In case number J 1849/12:

The arbitration award of 11 June 2012 under case number GPD 021207 is made an order of court in terms of s 158(1)(c) of the LRA.

The Municipality is ordered to pay the costs of the employees.

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Anton Steenkamp
Judge of the Labour Court

APPEARANCES

APPLICANT:	Nazeer Cassim SC (with him Thembeka Ngcukatoibi) Instructed by Werksmans attorneys.
THIRD to NINTH RESPONDENTS:	WP Scholtz (attorney).