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

Case No. : JR 717/06

In the matter between:-

BEARAM AMBIGEE	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER N. MASEKO N.O.	Second Respondent
JUTA BOOKS	Third Respondent

JUDGMENT

RAMPAI, AJ

[1] These proceedings are about a review application. The applicant applies to have the arbitration award, issued by the second respondent acting under the auspices of the first respondent in Johannesburg on 27 February 2006 under case number GAJB 20252/05, reviewed and set aside. Only the third respondent opposes the application. The first and the second respondents abide.

[2] The third respondent's principal place of business is situated

at Mercury Crescent, Wetton, Cape Town, Western Cape. The third respondent carries on business in the publishing industry and its operations include the selling of books to its customers. Its business is characterised by seasonal peaks and troughs. It has several bookshops in and around Johannesburg.

[3] The applicant is an adult female of 201 Parkwood, 2 Bolton Road, North Park in Johannesburg. She previously worked for Picsie Books also in Johannesburg. Early during February 2005 she approached the third respondent at its Johannesburg bookshop. There she had a meeting with Mr. Andrew Cruickshank, the bookshop manager. She enquired about employment opportunities with the third respondent. After that initial meeting she left without clinging any deal. A few days later, on 21 February 2005 to be precise, she again visited the bookshop. She informed Mr. Cruickshank that she had resigned her employment with Picsie Books. At that stage the bookshop was experiencing a seasonal peak. On account of such upswing in the third respondent's sales

operations, the manager needed an additional orders clerk.

[4] In the circumstances the bookshop manager employed the applicant from 22 February 2005. The applicant was employed as orders clerk by the third respondent at its bookshop in the Carlton Centre, Commissioner Street, Johannesburg. Her contract of employment was temporary. In that capacity she earned R6 400,00 per month. The applicant's employment with the third respondent terminated on 31 July 2005. During that period her fixed term contract was twice extended. The duration of each extended term of employment, was one month. Towards the end of July 2005 the third respondent informed the applicant that her services would no longer be needed after 31 July 2005.

[5] On 1 August 2005 the applicant referred a labour dispute to the first respondent. She alleged that she had been unfairly dismissed. The dismissal, she alleged, was procedurally and substantively unfair.

[6] The first respondent appointed a commissioner to conciliate the dispute. The third respondent did not attend the conciliation hearing. On 29 August 2005 the conciliator issued the certificate of outcome. The applicant then requested that the dispute be referred for arbitration. Her request was granted.

[7] The first respondent then appointed the second respondent to arbitrate the dispute. The arbitration proceedings were held on 21 February 2006. The applicant appeared in person. Ms M. Kingma, a group human resources manager, appeared for the third respondent. Having heard the evidence, Commissioner N. Maseko reserved his decision.

[8] On 27 February 2006 the second respondent issued an award which reads as follows:

> "It is my finding that the dismissal did not occur. The matter is accordingly dismissed."

Vide paragraph 6 award.

[9] It is the aforesaid award which aggrieved the applicant and

which I am now called upon to review and to set aside. There are three grounds of review. The first ground is that the arbitrator committed an irregularity in that he failed to have the arbitration proceedings mechanically recorded. The second ground is that the arbitrator committed an irregularity in that he refused to grant the applicant a postponement thereby denying her a fair hearing. The third ground is that the commissioner committed a misconduct in that the award was not rational.

[10] It was the employee's case that during her interview for employment she was offered permanent employment on condition she served a two months probation period. However, the third respondent put up the defence that the applicant was offered temporary employment and that at no stage was she ever offered permanent employment on condition she served a probation period. Therefore the issue which the commissioner had to determine was the status of the employment relationship between the parties.

[11] The commissioner was not impressed by the applicant's contention. He dismissed it and upheld the contention of the third respondent. He reasoned that the version of the third respondent was more probable than that of the applicant. His critical finding was that the applicant was not unfairly dismissed as she alleged and that her fixed term contract simply came to an end. The applicant was aggrieved by the findings.

[12] I proceed to examine the facts and to analyse the evidence in order to ascertain whether the applicant has made out a case which justifies the review of the arbitration award. The first ground of the review relates to the refusal to postpone the arbitration hearing. The applicant puts it as follows:

> "18. I submit that I made a formal request at the commencement of the proceedings that the 2nd Respondent postpone the matter as I intended to find a representative who would represent me after the one whom I secured disappointed me at the 11th Hour but the 2nd Respondent declined my request saying he did not

> have time to play and he was proceeding with or without his tape recorder which he could not find."

[13] The third respondent denies the allegation. Its response was as follows:

> "51.2 It is denied that the Applicant at any stage requested a postponement of the arbitration proceedings. As noted above, the Commissioner offered the Applicant a postponement, but the Applicant insisted that the arbitration proceedings continue."

[14] The arbitrator's notes are silent on this issue. The arbitrator noted nothing concerning the alleged request for a postponement.

[15] In her statement of claim the applicant did not raise the complaint that she applied for a postponement in order to get the services of another representative and that her application was refused. Her original founding affidavit was made on 30 March 2005. The issue surfaced in the supplementary affidavit she made on 1 June 2006, some 14 months later. In its answering affidavit the third respondent

alleged that the applicant did not make any application for the postponement of the arbitration hearing.

[16] There are three indicators which tend to support the third respondent's averment. Firstly, such a complaint emerged in the supplementary affidavit for the first time. Secondly, even in her supplementary affidavit the applicant did not state what the third respondent's attitude was towards her application. Thirdly, she did not give any explanation why the arbitrator refused her application for postponement.

[17] Moreover she did not mention any reasons advanced by the third respondent for opposing her application if the third respondent ever opposed it. The fact that the arbitrator's notes are also silent about the matter, gives credence to the third respondent's argument that no such an application was presented to the arbitrator.

[18] The applicant complains that:

> "... At the commencement of the proceedings it was in the eyes

> of the second respondent that the parties before him were not balancing in terms of representation..."

What the applicant was trying to convey here, was that she did not have a fair hearing because she was not represented by someone knowledgeable in labour law matters as compared to the third respondent. I have already found that the applicant, who claimed that she was left in the lurch in the eleventh hour by her representative, did not apply to have the matter postponed for that reason. Through her conduct, therefore, she declared herself able and willing to proceed with the hearing on her own.

[19] Her complaint that she was forced to proceed by the arbitrator, who compelled her to proceed against her will, but shyed away from his prime responsibility to explain the arbitration process and to guide her along the way, fails to impress me. I am inclined to find that she was not forced to proceed with the hearing against her wish. It follows, therefore, that her first ground of review cannot succeed. I am satisfied that the arbitrator did not commit any irregularity

as alleged by the applicant.

[20] The second ground of review relates to the recording of the proceedings. The applicant complained that the arbitrator unilaterally commenced with the proceedings without mechanically recording them. She alleged that the arbitrator could not find his recorder and that he decided to record the proceedings by long hand without first canvassing the views of the parties relating to the problem. *Vide* par. 17 of the supplementary affidavit, p. 22 of the record.

At par. 19 thereof the applicant states the following:

> "19. After finding his tape recorder he became even more furious when the batteries of that tape recorder failed him."

[21] The third respondent denies the applicant's claim. Its response was formulated as follows:

> "22. At the commencement of the arbitration the Commissioner informed the parties that he would not be able to record the arbitration proceedings mechanically

> and enquired whether the parties had any objection to proceeding in the absence of a mechanical recording. Both the Applicant and I, on behalf of the Third Respondent, informed the Commissioner that we were willing to proceed in the absence of a mechanical recording of the proceedings."

[22] Once again the arbitrator's notes are silent about the recording problem. Once again the issue cropped up for the first time in the supplementary affidavit. It appeared nowhere in the original founding affidavit of the applicant. It is not the applicant's case that she objected to the manual recording of the proceedings and that the arbitrator overruled her. It may therefore be argued that she tacitly condoned the method used by the arbitrator to record the proceedings. Her complaint is disputed by the third respondent. According to the third respondent's deponent the arbitrator informed the parties about the problem of recording the proceedings mechanically. The contention of the third respondent that the arbitrator noted the proceedings by long hand with the express consent of the parties is more persuasive to me.

Therefore, I find that the arbitrator did not commit the irregularity as alleged by the applicant. Accordingly, the second ground of review fails.

[23] The third ground of review was that the decision of the arbitrator was not rationally justifiable. The version of the applicant was narrated by the applicant herself. Briefly stated her evidence was that she was a permanent employee of the third respondent and that she was unfairly dismissed. The dismissal, she said, was both procedurally and substantively unfair.

[24] The employer's response was narrated by its bookshop manager, Mr. Andrew Cruickshank. Briefly stated, its response was that the applicant was a temporary employee and not a permanent employee, as she claimed. The third respondent relied on written documentation in support of its case. Its witness vehemently denied that he made an oral offer or promise to the applicant for permanent employment. He denied the claim that the third respondent dismissed the

applicant and averred that the applicant's fixed term contract came to an end.

[25] The arbitrator analysed the evidence and found that the version of the applicant was more probable than that of the applicant; that the third respondent's witness never offered the applicant any permanent job; that the applicant was bound by the fixed term contracts and that the applicant had not been dismissed from employment as she had claimed.

[26] The version of the third respondent, as fully set out in its answering affidavit, is uncontested. The applicant did not file a replying affidavit. Therefore, wherever there is conflict between the two versions, the version of the third respondent must prevail. See **PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) 623 (AD). The applicant claims that at her first interview Mr. Andrew Cruickshank promised her permanent employment. Apparently the promise was made in the presence of two persons, namely, a certain M. Farreire and a certain Ms

Vanessa Bodrick. But she did not call these possible witnesses to give evidence on her behalf. This was important because the employer testified first and denied such an oral offer.

[27] As regards the three fixed term contracts her evidence was that she was made to sign these three written temporary contracts to make up for the two months probation period she was obliged to serve. The arbitrator was not impressed by this argument. So am I. The very first problem I have with the alleged probation story is that the total length of the three contracts was approximately 5.25 weeks, in other words, some 3.25 months longer than the alleged probation period of 2 months. The arbitrator found that the applicant had failed to prove the existence of the oral offer for permanent employment and that she was bound by the written fixed term contract which expired on 31 July 2005. I am satisfied that the documentary evidence presented to the arbitrator by the third respondent, strongly militates against the applicant's version.

[28] The documentary evidence which the arbitrator referred to during the course of his reasoning consisted of the following:

28.1 A temporary employment contract dated 17 March 2005 which makes it clear that the third respondent appointed the applicant on a temporary basis as an orders clerk as from 22 February 2005 to 31 May 2005. This was the first fixed term contract of employment.

28.2 A temporary employment contract dated 31 May 2005 which also makes it clear that the third respondent appointed the applicant on a temporary basis as an orders clerk with effect from 1 June 2005 to 30 June 2005. This was the second fixed term contract.

28.3 An application for a letter of employment dated 5 July 2005 which shows the date of engagement as 5 July 2005 to 31 July 2005 and states clearly that there was no expectation of continuation despite renewal.

[29] The first and the second fixed term contracts contained the following caveat:

> "CONFIRMATION OF TEMPORARY NATURE OF EMPLOYMENT
>
> By accepting the appointment you agree that your appointment is temporary and lapses automatically at the expiry of the contract period unless it is renewed and signed by both parties before hand. You further agree that you shall not entertain any expectation of renewal or extension of the contract or **re-appointment to any position including permanent position**. Any extension of the contract shall be at management's sole discretion and shall not be construed as an indication or promise of further renewal. To be valid any renewal must be in writing and signed by both parties....."

These temporary contracts of employment were signed by

the applicant.

[30] The applicant carried the onus to prove that there had been a dismissal. This averment was disputed by the third respondent. The applicant admitted that she had signed the fixed term contracts and understood the temporary nature and fixed duration of her employment as clearly stated in the contracts. Her signature notwithstanding, her exculpatory contention was that she had been promised a permanent appointment. This too was denied.

[31] The evidence presented on behalf of the third respondent was that no such promise was made and that it could not have been made when permanent members of staff were facing retrenchment. Such members of staff who were retrenchment had been in the employ of the third respondent for a considerable period of time. The third respondent's evidence that it could only offer the applicant fixed term contracts on account of its seasonal upswing in its operations, is persuasive.

[32] The applicant took up another employment with the third respondent from 22 February 2005 while she was still legally an employee of Picsie Books. She certainly knew that what she was doing was wrong. This knowledge prompted her to send an untrue message to Picsie Books to the effect that she was ill disposed while in trust and in reality, she was not. This has a direct bearing on her allegation that she was made to sign the fixed term contracts under the pretext that it was necessary to do so in order to make up for her probation period. But the three temporary contracts she signed make no mention of a probation period. The third respondent denies her claim that the temporary contracts was intended to serve as a probation period in anticipation of a permanent appointment.

[33] The applicant has shown herself to be an untrustworthy witness. The third respondent has denied the applicant's allegations pertaining to the recording of the proceedings, the postponement application, as well as the probation

period and now the promise for permanent employment. The applicant was entitled to rebut all these denials by way of a replying affidavit. She chose not to do so. In the circumstances it has to be accepted that the version of the third respondent is the most probable and credible version.

[34] The applicant merely raised as an issue in her heads of argument an allegation that the third respondent was not in the process of retrenching employees. It must be accepted that the third respondent was indeed in the process of retrenching some of its permanent employees. The applicant did not present any evidence to the arbitrator why the employer's evidence in that respect was untrue. The arbitrator accepted the evidence of the third respondent in this regard. I am not persuaded that he was wrong in doing so.

[35] The applicant commenced working for the third respondent on 22 February 2005 while she was still in the books of another employer. She signed the first fixed term contract

with the third respondent on 17 March 2005, for almost three weeks she had been absent from her previous employer under false pretences. According to her founding affidavit she resigned from her previous employment on 18 March 2005. It is blatantly clear that when she resigned, there was absolutely no written indication, whatsoever, that the first fixed term contract was a prelude to her permanent appointment.

[36] In her statement of claim she did not aver any promise of permanent appointment. Instead, she averred that "she was made to believe that she was at all times a permanent employee". Such belief apparently emanated from an oral promise which was disputed by the third respondent. She claimed she had two witnesses but made no effort to explain why she could not annex any confirmatory affidavits from them or why they did not testify during the arbitration hearing.

[37] The applicant attempted to rely on annexure "AB4" dated 5

July 2005 as proof of a promise for permanent appointment. Indeed the form appears to be a document used by the third respondent in connection with permanent appointment. But it is not so much the matter of form but substance that counts. In relation to the question in the form which requires any additional comments or specific unusual terms of employment, the following is stated by hand in the printed form:

> "There shall be no expectation of continuation despite renewal."

The contention by the applicant that the form in itself substantiates the promise of permanent appointment is indeed without substance, as Mr. Maenetje submitted.

[38] In the absence of proof by the applicant that she reasonably expected the third respondent to renew the fixed term contract for the third time after its expiry on 31 July 2005, the arbitrator could not have been justified had he found that the applicant was dismissed. The only legitimate conclusion justified by the evidence was that the applicant had not been dismissed but that her fixed term contract was simply

terminated by effluxion of time.

[39] Section 186(1) of the Labour Relations Act, No. 66 of 1995, provide that dismissal means:

> "(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;"

An alleged promise of permanent appointment does not fall under section 186(1)(b). See **DIERKS v UNIVERSITY OF SOUTH AFRICA** [1999] 4 BLLR 304 (LC) par. [137] to [138]; **AUF DER HEYDE v UNIVERSITY OF CAPE TOWN** [2000] 8 BLLR 877 (LC) par. [17]; **MALANDOH v SABC** [1997] 5 BLLR 555 (LC); **UNIVERCITY OF CAPE TOWN v AUF DER HEYDE** [2001] 12 BLLR 1316 (LAC) par. [20] where the issue was raised but not decided. The applicant attempts for the first time in her heads of argument to make out a case of dismissal in terms of section 186(1)(b). It is impermissible.

[40] It is not open for a party to attempt to make out a case in the

heads of argument which was not made out on papers or to argue a proposition on new facts embodied in the founding affidavit which were not presented earlier to the arbitrator. **RUSTENBURG PLATINUM MINES (PTY) LTD v CCMA & OTHERS** [2004] 1 BLLR 34 LAC par. 15. No evidence was led before the arbitrator by the applicant to show that, taking into account all the facts, it could reasonably be said that she had a subjective expectation that her fixed term contract would be renewed or that she would be offered a permanent employment at the end of such contract. As I see it, the arbitrator committed no misconduct as alleged by the applicant. There was a rational connection between the conclusion he reached and the evidence presented to him. It follows therefore that the third ground of review must also fail.

[41] In all the circumstances of this matter I have therefore reached the conclusion that no case has been made out to justify any interference with the arbitrator's decision by way of a review of the award he issued in Johannesburg on 27

February 2005 under the aforesaid case number.

[42] Accordingly I make the following order:

1. The review application is dismissed.

2. The applicant is ordered to pay the costs relating to this application.

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M.H. RAMPAI, AJ

HEARD **:** 23 February 2007

DELIVERED **:** 27 March 2008

On behalf of applicant:	Mr. T.A. Ntela Instructed by: National Contract Workers Union JOHANNESBURG
On behalf of first and the second respondents:	No appearance
On behalf of third respondent:	Adv. N.H. Maenetje Instructed by: Cliffe Dekker Inc Jozi R van Voore CAPE TOWN

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