IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO: C 277/05

In the matter between:

SOUTH AFRICAN CLOTHING AND TEXTILE WORKER'S UNION

FIRST APPLICANT

J HEYNES

SECOND APPLICANT

AND

CADEMA INDUSTRIES (PTY) LTD
RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] The Second Applicant in her statement of case claimed that the termination of her employment by the Respondent constituted a dismissal as contemplated by section 186(1) (b) of the Labour Relations Act 65 of 1995 ("the LRA"). She also contended that she particularly had reasonable and objective expectation that the Respondent would renew her fixed term contract of employment.

[2] As concerning procedural fairness the Second Applicant contended that the Respondent did not consult with her or the First Applicant as required by section 189 of the LRA.

[3] The applicants also applied for condonation for the filing of the filing of their statement of case. The delay was occasioned by the initial referral of the dispute to the National Bargaining Council for Clothing Industries ("the bargaining council").

[4] Conciliation having failed the matter was arbitrated and the outcome thereof was in favour of the Second Applicant. The Respondent successfully reviewed and had the award set aside on the basis that the bargaining council did not have jurisdiction because the reason for the dismissal was for operational requirements.

[5] The condonation application was granted regard being had to the reason for the delay and the fact that the Respondent did not oppose it.

Background facts

[6] The facts in this matter are fairly common cause. The Respondent is a manufacturer of children's outer wear. The Respondent has a common practice dating to 1995 of employing its employees on fixed term contracts.

[7] The Second Applicant was similarly employed on several fixed term contacts on a continuous and unbroken period of 4.5 (four and half) years. All the various contacts that the Second Applicant signed contained the same terms and conditions except for the term relating to

the duration of the contract which varied from one to six months.

[8] It is common cause that during April 2003, Ms Arendse, the personnel officer of the Respondent, informed the Second Applicant that her contract would not be extended.

[9] Ms Arendse testified that the Second Applicant pleaded with her and requested that the decision not to offer her another contract be reconsidered in the light of her personal circumstances. As a result of this request a meeting was convened with Mr Krauss, the managing director of the Respondent who agreed to a further extension of the Second Applicant's contract. In offering her the extension Mr Krauss commented that the Second Applicant should stop eating chips in his factory. This remark apparently related to an instance where the Second Applicant was found eating chips in the factory contrary to the rule that prohibited such conduct.

[10] Immediately after the extension of the contract the Second Applicant was deployed at the binding section. She testified that she was informed by a certain Michael of the Respondent that there was a lot of work in the binding section.

[11] At the end of this contract the Second Applicant continued to work for an additional 7 (seven) days including Saturday 25 October 2003. She was then told the following Monday that her contract was not renewed.

[12] During cross examination the Second Applicant testified that she was told by other employees that the fact that her contract was not terminated on the expiry date meant that she would be offered permanent employment. And when questioned why she thought she would be offered another contract the Second Applicant stated that because there was enough work and she was regularly required to work overtime.

The legal principles

[13] The common law principle that a fixed term contract expires automatically on the arrival of the date on which the parties agreed that it should, has been altered by the provisions of section 186(b) of

the LRA. The section reads as follows:

> *"Dismissal" means that -*
>
> *(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."*

[14] Section 186(b) has its origins in the equity jurisprudence that emerged during the era of the 1956 Labour Relations Act. The jurisprudence was based on the concept of legitimate expectation, recognized as such in the case of *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A). The case *MAWU & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (LC), was the first case during that period to raise the concept of reasonable expectation.

[15] The link between the Industrial Court jurisprudence of reasonable expectation and renewal or re-employment in as far as it related to the unfair labour practice of the old Act was confirmed by the Labour Appeal Court in *Foster v Steward Scott Inc* (1997) 18 ILJ 367 (LAC),

where it was held that:

> "*It would be unwise to attempt to categories the instances where a failure to consider or grant re-employment will be considered to be an unfair labour practice, because the possible factual circumstances under which it could occur are so varied. The principle of a "reasonable expectation" to re-employment seems to be the best and most flexible criteria that can be formulated. [Cfs 186(1)(b) of the new Labour Relation Act 66 of 1995.] It is within that context that the Industrial Court's jurisdiction in matters relating to a refusal to re-employ should be reviewed. (Cf Zank v Natal Fire Protection Association (1995) 16 ILJ 708 (IC) at 715-G)."*

[16] It has been held that the concept of *"reasonable expectation,"* which is not defined by the LRA, includes; (a) equity and fairness; (b) existence of substantive expectation that the fixed term contract would be renewed; (c) the employee, subjectively expecting the contract to be renewed or extended- the expectation need not be shared with the employer; (d) objective factors that supports the expectation. See in this regard *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) (at page 1245 paragraph [130]).

[17] The factors to take into account in assessing whether there was an expectation for the renewal of a contract, are enunciated in the *Diereks v University of South Africa* (supra) (at page 1246 paragraph [133]), by Oostehuizen AJ as follows:

> "*A number of criteria has been identified as consideration which have influenced the findings of the past judgments of the Industrial and the Labour Appeal Courts. This includes an approach involving the evaluation of all the surrounding circumstances, the significance, or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed-term contract, inconsistent conduct, failure to give reasonable notice, and (sic) nature of employer's business.*"

[18] Rycroft seating as an assessor in the Labour Appeal Court in the case of *SA Clothing and Textile Workers Union v Mediterranean Woolen Mill* 1998 (2) SA 1099 (SCA) in dealing with the purpose of a fixed-term contract, said:

"It is apposite to consider the reasons why parties enter into a fenced-term contract. Usually a fixed -term contract is entered into because the task to be performed is a limited or specific one, or the employer can offer the job for a limited or specified period only."

[19] Thus, in addition to showing the subjective anticipation for the renewal of the contract the employee has to adduce evidence that point to the objective creation of such anticipation. In other words reasonable expectation cannot be established by a simple statement of perception or bald averment. The test entails an objective enquiry of determining whether a reasonable employee in the circumstance prevailing at the time would have expected the contract to be renewed on the same or similar terms. See in this regard *Dierks v University of South Africa* at 1246 and *SA Rugby (Pty) Ltd v CCMA & Others* [2006] 1BLLR 27.

[20] The written provisions of the contract also play an important part in the evaluation of the existence of the expectation but are not decisive. It is the totality of the evidence together with the surrounding circumstances that serves to indicate whether or not there objectively

existed a reasonable expectation on the part of an employee whose contract expressly excluded such expectation. See in this regard the decision of Supreme Court of Appeal in *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* 1998 (2) SA 1099 (SCA); (1998) 19 *ILJ* 731 (SCA) at 733–734, *Dierks v University of South Africa* at 1246 and 1250 paragraph [161]) and *Zank v Natal Fire Protection Association* (1995) 16 ILJ 708(IC).

[21] Turning to the facts of this case, the evidence of the Second Applicant which was not challenge or contradicted by the Respondent's witnesses, clearly indicate that there existed in the circumstances an expectation of the renewal of the contract on her part.

[22] Clearly the several renewals or extensions over a period of 4.5(four and half) years period must have led the applicant to the belief that the contract would be renewed when it expired on the 20 October 2003. The uncontested evidence is that these contracts were renewed without any discussion why they were renewed and why the practice of renewal for the various periods.

[23] The totality of the undisputed evidence, particularly relating to the regular and continuous renewal over the extended period created a reasonable expectation that the applicant's contract would be renewed. This is further supported by the fact that the last time the contract was renewed it was done so after a plea that her personal circumstance dictated for such a renewal. And more importantly the Second Applicant was permitted to continue working for another 7 (seven) days after the contract expired on the 20 October 2003. There is no evidence that the Second Applicant was informed why she was allowed to continue working after the expiry of her contract on the 20 October 2003, including working for that matter on the Saturday 25 October 2003.

[24] The Respondent contended that the dismissal was due to operational reasons. It was upon this ground that the Respondent successfully reviewed and had the arbitration award which was issued in favour of the Second Applicant set aside by this Court. However, at another level the Respondent argued that the employment of the Second Applicant was terminated by operation of the law.

[25] Where a fixed term contract comes to an end by the operation of the law and not due to other reasons, the obligations of the employer set out in sections 188 and 189 of the LRA do not arise. In this regard see *SACTWU v Mediterranean Woolen Mills (Pty) Ltd* (1995) 16 ILJ 366 (LC) and *Mediterranean Woolen Mills (Pty) Ltd v SACTWU* (1998) 19 ILJ 735 (LAC).

[26] Thus, in circumstances where the contract is not renewed because of operational requirements and the employee had a reasonable expectation that, that contract would be renewed, the employer is obliged to comply with the operational requirements procedures for the dismissal to be procedurally fair. And for the dismissal to be substantively fair, in these circumstances, the employer has to prove that the dismissal was for a valid and legitimate reason.

[27] In the case of *SACTWU v Mediterranean Woolen Mills*, the employer offered re-employment of number of employees after being dismissed for participating in an illegal strike. The employer had informed the employees before they could sign their three months contracts that if they lived to its expectation they would be offered

employment. At the end of the three months period those of the employees who performed well in terms of regular attendance at work and positive attitudes towards their managers and other employees were offered re-employment. The contract of those of the employees who did not satisfy these criteria was not renewed. The Supreme Court of Appeal in confirming the decisions of both the Labour Appeal Court and the Industrial Court held that the employees whose contracts were not renewed:

> "*… were not told why they had been rejected, nor were they given any opportunity to explain any features which might have given rise to their rejection. They were merely left with the conclusion that they had not been re-employed because their temporary contract had expired, whereas the true reason for their not being re-employed was something else- a reason which was not conveyed to them. This in itself seems to me to be basically unfair (cf Cremark a Division of Triple P-Chemical Ventures (Pty) Ltd v SA Chemical Workers Union & others (1994) 15 ILJ 289 (LAC) at 293D-E. In addition they were not given an opportunity of meeting the objections against them, they may conceivably have been able to show that the attendance records had been inaccurately kept, or that*

they had unavoidably been detained in hospital through no fault of their own. Fairness it seems to me would require that such persons should at least have been given an opportunity of being heard."

[28] The case of the Respondent is that the reason for terminating the Second Applicant's employment was because there was no work during March 2004. In support of its assertion the Respondent relied on the letter dated 10 March 2004, wherein the First Applicant conceded that due to lack of orders it was inevitable that short time could not be avoided. This exchange occurred 5 (five) months later after the contract of the second Respondent was already terminated. The relevant period relating to the non-renewal of Second Applicant's contract is October 2003. The Respondent did not adduce evidence relating to the state of affairs in as far as the relevant period related to the dismissal of the Second Applicant was concerned.

[29] The evidence of the Second Applicant is that there was still sufficient work at the time her fixed term contract was not renewed. She testified that she was transferred to the binding section during that period as there was a lot of work in that section. She further testified

that she worked over time during October 2003, and had to work on Saturday, two days before the termination of her contract.

[30] The balance of probabilities favours a conclusion that there was no substantive reason for the termination of the Second Applicant's employment. The termination was also substantive unfair because of the criteria used to dismiss her. The selection criterion was unfair in that at the time of the termination the Second Applicant had been working, for the Respondent for a period close to five years. The Respondent retained casual employees who had been with it for a period far shorter than that of the Second Applicant.

[31] It is also evidently clear that the Respondent had the opportunity to avoid or delay the termination of the contract of the second Respondent. In this regard Ms Arendse, conceded during cross-examination that the Respondent had an option of extending the Second Applicant's contract for a further two weeks until the work in the binding section ran out. This opportunity was according to Ms Arrendse not considered.

[32] As concerning the retention of the casual employees at the expense

of the Second Applicant, Ms Arendse, testified during cross-examination that the position of the Second Applicant was grade B and that of the casual employees, grade C. In weekly wages grade C was approximately R100, 00 lower than grade B. The difference in the grades was in my view irrelevant in determining or implementing a fair selection criterion. What was relevant was that the Respondent should have considered offering the Second Applicant a grade C position and different consideration would have applied had she turned it down for the reason that it was a less paying position. Therefore the criterion used to select the applicant for retrenchment was unfair. And therefore the Respondent failed to endeavor to avoid the retrenchment of the Second Applicant.

[33] Assuming that the version of the Respondent that there was no work, was to be accepted and that the situation that applied during March 2004 was the same in October 2003, that would still not help the case of the Respondent. The fact of the matter is that it is evidently clear that the Respondent did not follow a fair procedure in terminating the employment of the Second Applicant.

[34] In addition, assuming that there was a shortage of work in the embroidery, where the Second Applicant was appointed to work in, the Respondent has not presented evidence that she could not be transferred to other sections where there was work. During cross-examination Ms Arendse conceded that not all sections were affected by the shortage of work. According to Ms Meyer employees, depending on the needs were moved around the various sections. In fact the Second Applicant who initially started as a cleaner was moved to embroidery and at the time of her dismissal was employed in the beading section.

[35] Thus the termination of the Second Applicant's services by the Respondent constituted a dismissal as contemplated by s186 (1) (b) of the LRA. In this regard the dismissal was substantively unfair, the objective factors having pointed towards the existence of a reasonable expectation that the contract would be extended. The dismissal was also procedurally unfair in that the Respondent did not consult with the First Applicant or Second Applicant for that matter, resulting in the non compliance with the provisions of s 189 of the LRA.

[36] The last renewal was for a period of six months, commencing the 14 May 2003 to 20 October 2003. In my view the probabilities favour a finding that objectively there existed a reasonable expectation that the contract would be extended for a further period of six months. The Second Applicant was paid weekly remuneration R 497.00.

[37] The Second Applicant withdrew her prayer for reinstatement but persisted with the prayer for compensation. I see no reason in law and fairness why the costs should not follow the result.

[38] In the premises the following order is made:

1. The late filing of the applicants' statement of case is condoned.
2. The dismissal of the Second Applicant was both substantively and procedurally unfair.
3. The Respondent is ordered to compensate the Second Applicant for the period equivalent to six months calculated on the weekly salary of R 497.00 x 27 weeks = R13 419.00.
4. The Respondent should pay costs of the applicants.

MOLAHLEHI J

DATE OF HEARING : 05-07 SEPTEMBER 2007

DATE OF THE ORDER : 11 JANUARY 2008

DATE OF THE JUDGMENT: 24 JANUARY 2008

APPEARANCES

FOR THE APPLICANT: MS T C RALEHOKO OF CHEADLE THOMPSON & HAYSOM INC.

FOR THE RESPONDENT: MR H C NIEUWOUDT OF DENEYS REITZ INC.