

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR 2243/2006

In the matter between:

KHULISA CRIME PREVENTION INITIATIVE, AN
ASSOCIATION NOT FOR GAIN INCORPORATED
IN TERMS OF S21 OF THE COMPANIES ACT

APPLICANT

and

ALVIN VARUTHAN
THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
SIPHO RADEBE N.O.

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

JUDGMENT

NEL, AJ

[1] This is an application to review and set aside the award dated 20 June 2006, granted by the third respondent (“the Commissioner”) under the auspices of the second respondent in case number GAJB 4967-06. The Commissioner found that the dismissal by the applicant of the first respondent (“Varuthan”) had been substantively unfair and ordered the applicant to pay Varuthan an amount equivalent to four months salary amounting to R51 200.

[2] A brief summary of Varuthan’s association with the applicant is that in March 2004, he entered into a contract of temporary employment with the applicant. This contract ran from 1 March 2004 until 31 August 2004. In terms thereof Varuthan was appointed as a reintegration program coordinator.

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[3] At the time that Varuthan's fixed term contract was coming to an end, the applicant considered appointing him to a different project. It accordingly extended his fixed term contract for a period of two months from 1 September 2004 to 30 November 2004. When funding for the new project, to which the applicant wanted to appoint Varuthan, was confirmed, it offered Varuthan a fixed term contract in terms of which he would be appointed to the position of printing coordinator. Due to an administrative error, Varuthan did not sign a further fixed term contract at the commencement of this fixed term. However, at the time he was offered the position, it was made clear to him that his appointment to this position was on a fixed term basis. When the applicant realised that Varuthan had not signed a fixed term contract at the time that he had commenced as printing co-ordinator, a fixed term contract was drawn up for the remainder of the fixed term period (for the period 1 May 2005 until 31 December 2005). The parties signed this fixed term contract on 12 September 2005. It was a specific term of the contract that "the contractor shall not be entitled to such extension and/or renewal as of right or expectation." This term was with reference to the fact that the contract indicated that at the end thereof the applicant might, at its own discretion, extend and/or renew the contract for a further period agreed upon by the parties. I will revert to these aspects later on.

[4] Varuthan's new fixed term contract related to a completely different job function within the applicant's organisation. Over the period of the term of this contract, Varuthan was on a number of occasions informed that his attitude towards participants in the program was offensive and unacceptable.

[5] On 7 September 2005, a meeting took place between Varuthan and representatives of the applicant. Certain targets were established during this meeting and Varuthan was informed that his performance needed to improve.

[6] On 1 November 2005, the applicant addressed a letter to Varuthan. In the letter it was placed on record that discussions had taken place between Varuthan

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and various representatives of the applicant “over the past weeks”. It further recorded that the performance of certain print shops had been discussed and that it had been agreed that the financial results were inadequate and unacceptable. This letter further recorded that Varuthan had been requested to provide the applicant with a proposal, by 31 October 2005, if he still wished to retain some form of involvement with the print shops after 31 December 2005, for example, on a commission basis of orders received. The letter went on to advise Varuthan that as he had not provided the applicant with a proposal, it had concluded that Varuthan did not wish to have any involvement with the print shops after 31 December 2005. Varuthan was expressly asked to confirm the contents of the letter by signing a copy and returning it to the writer. He did so on 2 November 2005, under the words “I, Alvin Varuthan confirm my understanding and acceptance of the above.”

[7] In December 2005, Varuthan held discussions with one of the applicant’s representatives during which he informed him that he had not yet secured alternative employment. In order to assist Varuthan, the applicant granted him an extension of his contract for a period of two months from 3 January to 28 February 2006. Varuthan signed a further fixed term contract to this effect. It was explained to Varuthan that the purpose of this extension was to tide him over whilst he sought new employment. Varuthan was encouraged to take time off during these two months in order to seek new employment which, according to the applicant, Varuthan took full advantage of. At the time of signing this further fixed term contract, Varuthan was informed that there would be no further extension of his employment with the applicant. Only after he had left the applicant’s employ, Varuthan, on 2 March 2006, referred an unfair dismissal dispute to the second respondent. In his dispute referral form, Varuthan alleges that the dispute arose on 28 February 2006.

It is not quite clear from the Commissioner’s award whether he was alive to the fact that he first had to determine whether a dismissal within the meaning of the

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Labour Relations Act had taken place in the matter before him. It was never placed in issue before the Commissioner that Varuthan had not as a matter of fact and law been employed by the applicant in terms of a fixed term contract. That having been the case, as a matter of law, the contract would terminate on the expiration of the period stipulated therein. The employer did not have to rely on any just cause for the termination of the contract if it was going to rely on the fact that, by operation of law, and in terms of the contract itself it would simply come to an end.

What is clear from the record of the arbitration proceedings is that the employer did deny that it had dismissed Varuthan. Accordingly, Varuthan had the onus to first satisfy the Commissioner that, as a matter of law he had been dismissed. As it was common cause between the parties that Varuthan was on a fixed term contract, he could only claim that he was dismissed if he could bring himself within the ambit of “dismissal” as defined in Section 186(b) of the Labour Relations Act (“the LRA”). This section stipulates that:

“ “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;”

[10] It is apparent from the Commissioner’s award that he commenced in his analysis with what appears to be the right enquiry namely to determine whether Varuthan had a reasonable expectation that his fixed term contract would be renewed. However, having commenced at the right starting point, it is equally apparent that the Commissioner then considered the reasons the employer provided for not renewing Varuthan’s fixed term contract, namely his failure to properly perform. Having done so, it is apparent that

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the Commissioner then arrived at the conclusion that the employer did not do enough to assist Varuthan to improve his performance. That in essence, so it would appear, became the reason why the Commissioner concluded that the applicant's dismissal was unfair.

[11] I am of the view that the Commissioner herein completely misconstrued the issue he had to determine. He first of all had to determine whether a dismissal had as a matter of law taken place. The onus in this enquiry rested on the employee. Only once the Commissioner was satisfied, and found, that the employee had satisfied the onus resting on him to show that he had been dismissed, could he proceed to determine whether such dismissal had taken place after a fair procedure and for just cause. The onus to satisfy the Commissioner in this regard would then rest on the employer.

[12] It is patently clear that the Commissioner did not apply his mind at all to the first enquiry namely whether a dismissal had in fact taken place, such dismissal herein having to be one within the meaning of Section 186(b) of the LRA.

[13] Accordingly it was incumbent upon the Commissioner to first of all determine whether the employee had an expectation that the employer was going to renew his fixed term contract. Only once the Commissioner was satisfied that the employee had indeed subjectively expected the employer to renew his fixed term contract, should the Commissioner have embarked on the second part of the enquiry, namely to determine whether such expectation was reasonable. The failure by the Commissioner to have embarked on this two-prong enquiry in my view constitutes a serious and reviewable irregularity justifying in and by itself that the award herein should be reviewed and set aside.

[14] Had the Commissioner embarked on this enquiry he of course immediately would have been confronted with the problem that the employee before him did not adduce any evidence in support of a proposition that he had the expectation

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that the employer would renew his fixed term contract. All Varuthan said was that he saw the number of fixed term contracts that he had signed with the applicant. With the exception of this one lined statement, and it would also appear largely under the guidance of the Commissioner, Varuthan merely proceeded to deal with his alleged poor performance. Varuthan certainly did not adduce any evidence in support of him having formed a subjective expectation that his fixed term contract of employment would be renewed on the same or similar terms.

[15] On the other hand, the applicant's evidence was most expressly to the effect, both in terms of the oral evidence adduced as well as the documentary evidence placed before the Commissioner, that Varuthan could not have had an expectation of renewal at all.

[16] In this regard, it becomes very material that Varuthan was advised on 7 September 2005 that things had to improve or that changes would have to be made. It is not, I believe, irrelevant that shortly thereafter, on 12 September 2005, the applicant ensured that a fixed term contract, which was originally orally entered into, be properly recorded in writing and signed by the parties.

[17] What is however of great relevance are the contents of the letter from the applicant to Varuthan on 1 November 2005. I have dealt with it fully earlier herein and do not need to repeat it. Varuthan was in the most expressed terms advised on 1 November 2005 that his contract would expire on 31 December 2005. Of more importance is that he was requested to provide a proposal if he wanted to retain some form of involvement with the applicant after 31 December 2005. Quite clearly, if Varuthan at all had any expectation that his contract would have been renewed on 1 January 2006, he would have at this stage indicated that in the clearest of terms. Instead, he confirmed his understanding of the contents of the letter and accepted the terms thereof. Such acceptance included that his contract was to expire on 31 December 2005.

[18] The evidence adduced on behalf of the applicant was very expressly and clearly to the effect that such extension as it did grant Varuthan for two months was to enable him to find alternative employment. This evidence was not taken issue with in cross-examination by Varuthan. In this regard, I may just mention that I found the manner in which the Commissioner conducted the proceedings herein rather strange. Whilst I am aware of the fact that Commissioners have a wide discretion how to conduct proceedings, it seldom involves a process whereby the parties are simply allowed to make their various statements, contradictory as they may be, and then the Commissioner goes away and renders his award. This, however, appears to be how the Commissioner herein conducted the proceedings. No questions whatsoever were posed by Varuthan to the witness who testified, or made a statement, on behalf of the applicant. When Varuthan presented his evidence, some form of questioning by the applicant's representative appears to have taken place.

[19] Be that as it may, I am of the view that the Commissioner did not have before him any evidence by Varuthan on which he could conclude that Varuthan had the expectation that his fixed term contract of employment would be renewed. That being the case, the matter could not even proceed to the next enquiry, namely whether such expectation was reasonable.

[20] It is further necessary to mention that not an iota of evidence, or a shred of fact, surfaced anywhere during the arbitration proceedings of Varuthan at any time between 1 November 2005 (when he was advised that his fixed term contract was not going to be renewed), until 2 March 2006 (when he declared his dispute), raising at all with the applicant the proposition that he had expected his contract to be renewed and that he regarded the applicant's conduct in not renewing it as being unfair.

[21] Patently clearly Varuthan had failed to satisfy the onus which rested on him, namely to satisfy the Commissioner that he had been dismissed by the applicant.

I am accordingly of the view that the conclusion arrived at by the Commissioner herein is wholly unjustified and that accordingly the whole of the Commissioner's award herein stands to be reviewed and set aside. For the reasons that I have already provided the Commissioner ought to have concluded, on the evidence and documentary material before him, that Varuthan had failed to show that he had been dismissed within the meaning of Section 186(b) of the LRA.

[22] I turn to deal with the issue of costs. No special circumstances have been placed before me why the costs herein should not follow the result. Accordingly I make the following order:

1. The award of the third respondent under case number GAJB4967-06 dated 20 June 2006 is reviewed and set aside.

2. The aforementioned award is substituted by the following ruling:

"The applicant has failed to prove a dismissal within the meaning of the Labour Relations Act. His application is dismissed."

3. The first respondent is ordered to pay the applicant's costs of suit.

DEON NEL

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 12 June 2007

Date of Judgment: 30 January 2008

Appearances:

For the applicant: Mr A Smith of Bowman Gilfillan.

For the first respondent: In person.

