



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR 159/13

In the matter between

SAKHISIZWE MUNICIPALITY

Applicant

and

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

THOBEKA NCETEZO N.O

Second Respondent

NOMTHANDAZO MAZWAYI

Third Respondent

Heard: 7 May 2015

Delivered: 8 March 2016

Summary: The arbitrator committed a gross irregularity which rendered her award unreasonable in finding that the applicant's failure to renew the third respondent's fixed term contract when it had renewed a similar contract of an employee holding a different position constituted inconsistency. The principle on consistency was not relevant in determining the dispute before the arbitrator.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent ('the arbitrator') in which she found the non-renewal of the third respondent's fixed term contract by the applicant to constitute an unfair dismissal as contemplated in section 186(1)(b) of the Labour Relations Act 66 of 1995 ('the LRA'). She ordered the applicant to reinstate the third respondent on 4 November 2013, retrospectively, on the same terms and conditions which governed the parties' employment relationship at the time of her dismissal. The application is opposed by the third respondent. The third respondent applied for condonation of the late filing of her answering affidavit. The application is not opposed by the applicant. The extent of the delay is 9 days and the explanation the third respondent proffered is reasonable. I am, in the circumstances, satisfied that the third respondent has shown good cause.

Factual background

- [2] The applicant employed the third respondent as Corporate Services Manager on a five year fixed term contract which commenced on 1 May 2008 and terminated on 31 May 2013. On 25 February 2013, the applicant received a notice that of her fixed term contract would not be renewed on 31 May 2013. On 10 May 2013, the third respondent lodged a grievance against her dismissal to which she received no response from the applicant. The position was advertised in terms of the third respondent's recruitment policy. The applicant applied but was unsuccessful. Aggrieved by the non-renewal of her contract, the applicant referred an unfair dismissal dispute to the first respondent ('the Bargaining Council'). The dispute was arbitrated by the

arbitrator who issued the arbitration award which the applicant seeks this court to review and set aside.

The award

- [3] The arbitrator noted that in order to rely successfully of section 186(1)(b) of the LRA, the third respondent had to establish that she subjectively, had an expectation that the applicant would renew her contract on the same or similar terms, the expectation was reasonable and the applicant failed to renew her contract or offered to renew it on less favourable terms. The arbitrator took into account that the five-year fixed term contracts of the applicant's Municipal Manager and Chief Finance Officer ('the CFO') were renewed without being advertised. She noted that the issues in dispute were the applicant's inconsistency and the reasonable expectation the applicant created that the third respondent's contract would be renewed. The arbitrator considered that the position of the CFO and that of the applicant were not the same but their terms of employment were similar. The applicant's witness could not articulate the reason for treating the applicant's position differently from that of the CFO's except for alleging that the applicant's council took the resolution to do so. The arbitrator found that the applicant's failure to advance reasons for renewing the CFO's contract of employment and not to renew the third respondent's constituted unjustified inconsistency. She expressed the view that the third respondent had a reasonable expectation that her contract would be renewed because at the time of the renewal of the CFOs contract, the third respondent was still employed by the applicant. She found that the applicant's argument that the third respondent stopped reporting for work after being notified of the termination of her contract did not affect the third respondent's expectation that her contract would be renewed when she found out about the renewal of the CFO's contract.
- [4] The arbitrator found that even though the applicant was not promised by anyone in authority that her contract would be renewed, the applicant's conduct of renewing the contract of employment of another employee in a similar employment contract as the third respondent created a reasonable expectation that hers would be renewed too. She concluded that the third

respondent had shown that the termination of her fixed term contract of employment constituted an unfair dismissal as contemplated in section 186(1)(b) of the LRA. She ordered her retrospective reinstatement, on 4 November 2013, on the same terms and conditions which governed her employment on dismissal and payment of remuneration the third respondent would have earned but for the non-renewal of her fixed term contract from 1 June 2013 to the date of the award.

Grounds for review

- [5] The applicant submitted that the arbitrator's finding that the third respondent had been treated "inconsistently" and that the conduct of the applicant of renewing the contract of employment of another employee in a similar employment contract created a reasonable expectation that hers would be renewed constituted an error of law so elementary and material as to constitute a gross irregularity in the conduct of the arbitration proceedings rendering the award defective. The applicant further submitted that the arbitrator confused the notion of inconsistency with that of reasonable expectation. It denied that inconsistency creates reasonable expectation. In assuming that there was a connection between the inconsistency and the renewal of the contracts of the CFO and a Municipal Manager, the arbitrator failed to take into account material facts which include the reason for the renewal of the contract, the third respondent took no steps after she was given three months' notice of the non-renewal of her contract and the third respondent conceded that she was not aware of the reasons which influenced the renewal of this CFO's contract. She further failed to consider that the third respondent's contract specified that she had no expectation or legal right to its renewal and that the third respondent, at the advice of the applicant, applied for her post when it was advertised but was unsuccessful.
- [6] The applicant also attacked the reasonableness of the award on the basis that it is inconsistent with relevant authority. The applicant further submitted that the arbitrator erred in confusing the question whether the third respondent was dismissed or whether her dismissal was fair. She further erred in reinstating the third respondent indefinitely to a position which had been filled

by the applicant in terms of its policies. Lastly, the applicant submitted that the Bargaining Council lacked jurisdiction to determine the third respondent's real dispute.

- [7] The third respondent opposed the application mainly on the grounds that the arbitrator's decision that the applicant acted inconsistently in renewing the CFO's fixed term contract and not renewing hers while their contracts were similar was unassailable. She denied that the arbitrator confused the notion of consistency with reasonable expectation. The third respondent submitted that inconsistency arises from the failure to justify different treatment of employees whose terms of employment are similar although they hold different positions. She added that the applicant's inconsistency was unjustified. The third respondent further submitted that considerations and deliberations that led to the renewal of the Municipal Manager and CFO's contracts were not presented at the arbitration. It was argued, on behalf of the third respondent, that it is notorious that, within the context of disciplinary proceedings and hearings, the use of language is often imprecise particularly with the parties who are not English speaking and the use of an interpreter was not provided. It was further argued that a proper reading of the word "inconsistency" in the context of the evidence given in the arbitrator's ruling elicits a sense that the applicant failed to treat the third respondent on the same basis as it treated other contractual employees.
- [8] Although the views of the applicant and the third respondent on the arbitration award are different, the common thread which runs through their arguments is that the arbitrator did not use the term "inconsistency" correctly. The applicant attributed the arbitrator's imprecision to confusion but the third respondent attributed it to the use of language by the arbitrator who is not an English-speaking person. Notwithstanding the reason for the use of the word "inconsistency", it is common cause that the arbitrator should not have used it. The arbitration award is based solely on inconsistency. The arbitrator was enjoined by section 138 of the LRA to conduct the arbitration fairly. Part of that fairness includes a reasonable decision on the issue before her.

- [9] The term “consistency” has a particular meaning in labour law. It is used to promote equality by ensuring that employees who have committed similar misconduct are not treated differently without valid reason. It is only fair and proper that it retains its meaning. The arbitrator erred in relying on inconsistency when the unfair dismissal dispute before her was not based on misconduct. The unfair dismissal dispute the arbitrator had to determine is based on section 186(1)(b) of the LRA because the third respondent alleged that she was unfairly dismissed because the applicant failed to renew her fixed term contract when she had reasonable expectation that her contract would be renewed on similar terms. The arbitrator was required to establish whether the third respondent had established the relevant factors which would have led her to conclude that she had been dismissed.
- [10] The arbitrator expressed the view that the third respondent had reasonable expectation that her contract would be renewed because at the time that the applicant renewed the CFO’s contract, the third respondent was still employed by the applicant. The arbitrator further expressed the view that the third respondent’s expectation of the renewal of her contract arose when she found out about the renewal of the CFO’s contract. The finding that the third respondent had a reasonable expectation that her fixed term contract would be renewed had to be based on the evidence which served at the arbitration. It is common cause that the third respondent received the notice of the non-renewal of her contract on 25 February 2013, thereafter her position was advertised and she applied for it. The CFO’s contract was renewed in May 2013 and the third respondent’s contract was terminated on 31 May 2013. By advertising the third respondent’s position, the applicant eliminated any expectation of the renewal of the third respondent’s contract before it arose. When the third respondent applied for the advertised position, she was only left with the hope that she would be the successful candidate and be re-employed by the applicant. When the applicant subsequently renewed the CFO’s position, the third respondent had no expectation that her contract would equally be renewed as steps had already been taken to fulfil the position. Her subjective expectation of a renewal was, in the circumstances, unreasonable. The arbitrator’s finding that the third respondent had

reasonable expectation of the renewal of her contract is not supported by evidence.

[11] The court, in *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,¹ found that a commissioner's error of approaching a dismissal for misconduct as one of poor performance had rendered the commissioner's decision unreasonable. Similarly, the arbitrator rendered her award reviewable by approaching a section 186 (1)(b) unfair dismissal dispute as an unfair dismissal dispute based on misconduct. In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*,² it was found that when the error committed by a commissioner in the conduct of an arbitration affects the reasonableness of the commissioner's award, the award becomes reviewable. The arbitrator committed a gross irregularity in finding that the applicant committed unjustified inconsistency and by concluding that the termination of the third respondent's contract constituted an unfair dismissal. Evidence tendered at the arbitration proved that the third respondent failed to prove her dismissal. Absent dismissal, the first respondent lacked jurisdiction to arbitrate the dispute.

[12] In the premises, the following order is made:

12.1 The late filing of the answering affidavit is condoned.

12.2 The arbitration award issued by the Second Respondent under case number ECDO71304 and dated 21 October 2013 is reviewed and set aside and substituted with the following:

¹ [2014] 1 BLLR 20 (LAC) at para 31.

² (2013) 34 ILJ 2795 (SCA) at para 16.

12.3 The First Respondent lacked jurisdiction to arbitrate the dispute referred by the Third Respondent against the Applicant.

Lallie, J

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Advocate Grogan

Instructed by Wesley Pretorius and Associates

For the Third Respondent: Advocate Dyke

Instructed by Nosindwa Attorneys

LABOUR COURT