REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 481/10

In the matter between:

GUBEVU SECURITY GROUP (PTY) LTD	**Applicant**
and	
RUGGIERO N.O.	**First respondent**
CCMA	**Second respondent**
M LANGEVELDT	**Third respondent**

Heard: **1 November 2011**

Delivered: **11 November 2011**

Summary: Review – expiry of fixed term contract – reasonable expectation of renewal - LRA s 186(1)(b).

JUDGMENT

STEENKAMP J

Introduction

1] The third respondent, Ms Meagan Langeveldt ("the employee"), was employed by the applicant on a fixed term contract for three months. It was due to expire on 30 November 2009. She continued working until 3 December 2009, after which she was told that she could work out the rest of December as a notice period, but that her contract would not be renewed. She referred a dispute to the CCMA (the second respondent) in terms of s 186(1)(b) of the LRA,[1] claiming that she had been unfairly dismissed as she had had a reasonable expectation that her contract would be renewed.

2] The arbitrator (the first respondent) found in the employee's favour. However, contrary to the employee's assertion that she had entertained the prospect of permanent employment, he noted that in terms of section 186(1)(b) she could only have expected a renewal of the contract for another three months. He also noted that she was offered the option of working out the month of December 2009, but she elected not to do so. Therefore, he ordered the applicant to pay her the equivalent of two months' remuneration as compensation, amounting to R11 000, 00 less any applicable statutory deductions.

3] The applicant seeks to have the arbitration award reviewed and set aside.

Background facts

4] The background facts are largely common cause. The parties concluded a fixed term contract of employment for the period 1 September to 30 November 2009. It was signed on 7 September 2009. In an accompanying email, the applicant's financial director, Ms Katie Mackintosh (who deposed to the applicant's founding affidavit in this review application), stated:

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1 Labour Relations Act 66 of 1995.

"Dear Meagan

As discussed, please see attached the employment agreement for your perusal and signature. I have put in place a 3 month contract at the agreed upon rate. Upon successful completion of the first 3 months of employment, we will increase your rate to R6000, again as discussed.

[The email then sets out some practicalities relating to the terms of employment and concludes]:

Aside from the above, all that is left for me is to wish you all of the best and welcome aboard. We look forward to many years of business together."

5] In the course of the arbitration, and indeed in this hearing, it became apparent that the period of the fixed term contract was really intended to be a probationary period. In response to a question about the "normal company policy" from her attorney, Mr Johannes de Beer (who represented her at arbitration and who was the applicant's instructing attorney in these proceedings), Ms Mackintosh testified at arbitration:

"We always employ them for a period of three months, in the event that they perform or fit in with the company ... to check them out and then a new contract will be entered into obviously if both parties are to be in agreement thereof."

6] The applicant's attorney, Mr de Beer, then asked Mackintosh why the applicant decided not to renew the employee's contract. Her response was:

"Well, just her general attitude and her manner that resulted in me not wanting to continue with the employment agreement or renew the employment agreement."

7] According to Mackintosh, she did not inform the employee of this decision timeously because she was on leave at the end of November. It is common cause that the employee was not told before the end of November that her contract would not be renewed (apart from the terms of the contract itself). On 30 November, Ms Mackintosh's father, Mr Alistair Mackintosh (the applicant's Chief Executive Officer) sent the Managing Director, Mr Rob Cloete, a letter stating:

"Over the few weeks I have been closely reviewing the performance of the Western Cape, which, to say the very least, administratively speaking, has reached an all time low. Furthermore, please also note, for the first time, there appears an unacceptably arrogant and obstructive attitude that has crept in to the Western Cape Company. Something I cannot accept.

In view of the aforementioned, please note that I have instructed that Meagan Langeveldt's contract not be renewed and arrangements be put in place to source an administrative assistant that will comply with head office requirements, in accordance with her contract, her services terminated today. She will however be given the month of December as notice should she so elect."

8] The letter was copied to Ms Katie Mackintosh. It is common cause, though, that the employee was oblivious of this communication until 3 December. On that date, she was informed that her contract would not be renewed.

The award

9] The arbitrator, having considered the common cause facts, came to the conclusion that the employee had a reasonable expectation that her fixed term contract would be renewed. That was based mainly on the contents of the email by Katie Mackintosh of 7 September 2009; and the fact that the applicant did not, at any stage during the three month period – that was akin to probation – make the employee aware of any problems with her performance or "attitude".

10] The employee had claimed that she expected her contract to transmogrify into permanent employment. The arbitrator, though, accepted that she could only have expected her fixed term contract of three months to be renewed. In considering the appropriate relief, therefore, he took into account that she could have worked for the month of December but elected not to; and therefore she was entitled to two months' salary as compensation only. That equated to R11 000, based on a salary of R5 500 per month.

The test on review

11] Both parties approached the review application on the basis that the test set out in *Sidumo v Rustenburg Platinum Mines*[2] applies, ie whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.

12] They persisted in this view even when I questioned it in oral argument. In the light of the weight of authority in the Labour Appeal Court, though, I am not persuaded that they are correct.

13] As I pointed out in *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others*[3], the LAC has held that a question concerning the reasonable expectation of renewal of a fixed term contract in terms of s 186(1)(b) of the LRA[4] is essentially a jurisdictional one, going to the existence of a dismissal.

14] Anomalous as it may seem, therefore, the *Sidumo* test does not apply. The LAC spelt it out in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others:*[5]

> "The issue that was before the Commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain a dispute in terms of section 191 of the Act.
>
> The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.…

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2 (2007) 29 *ILJ* 2405 (CC); [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC).

3 [2011] ZALCCT 21.

4 Section 186(1)(b) provides that dismissal means that – "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."

5 (2008) 29 *ILJ* 2218 (LAC) at paras [39] – [41].

The question before the court a quo was whether on the facts of the case, a dismissal had taken place. The question was not whether the finding of the Commissioner that they had been a dismissal of three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction, irrespective of its findings to the contrary."

15] In the more recent case of *Joseph v University of Limpopo & others*[6], however, the LAC appears to have applied the *Sidumo* test to a review application arising from a dispute in terms of s 186(1)(b). It did so without having regard to the *SA Rugby* judgment or considering whether that was the appropriate test.

16] The most recent authority that I have considered is that of *University of Pretoria v CCMA & others.*[7] That judgment was handed down by the LAC some two days ago, and three days after this matter had been argued before me.

17] In the *University of Pretoria* case, having considered the provisions of s 186(1)(b), Davis JA appeared to agree with the approach in the *SA Rugby* case with regard to the question whether the existence of a fixed term contract could lead to the expectation of permanent employment (of which more later). But he did not specifically address the question of the appropriate test of review as set out in *SA Rugby*; nor did he apply *Sidumo*, but without setting out any reasons therefor or explicitly stating that *Sidumo* does not apply. He simply stated[8] that:

"Given that this court has found that both the [arbitrator] and the court *a quo* erred in concluding that there could be a dismissal, in that on facts properly shown, there was a reasonable expectation of permanent employment, [the arbitrator's] decision falls to be reviewed and set aside".

18] The court substituted the arbitrator's finding that the employee in that case

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6 (2011) 32 *ILJ* 2085 (LAC) [per Jappie JA, Waglay DJP and Hendricks AJA concurring].

7 JA 38/2010 (4 November 2011) [per Davis JA, Ndlovu JA and Mocumie AJA concurring].

8 In para [22]. The court also did not refer to the *University of Limpopo* case.

had been dismissed with the following order:

> "It is declared that the [employee] was not dismissed by the applicant.
>
> It is declared that [the CCMA] has no jurisdiction to entertain the dispute referred to it by [the employee] pertaining to her alleged unfair dismissal."

19] In the light of the clear authority of the LAC in *SA Rugby*, and the indication in *University of Pretoria* that the question under consideration in applying s 186(1)(b) is a jurisdictional one, I still consider myself bound by the *dictum* in *SA Rugby* that *Sidumo* is not the appropriate test in these circumstances and that I simply need to consider whether the arbitrator was correct in deciding as he did.

The law applied to the facts

20] In *University of Pretoria*, the LAC preferred the view that s 186(1)(b) does not allow for an order to be made that an employee who had been employed on a fixed term contract should be employed permanently, based on a reasonable expectation to be so employed.

21] The court found support for this argument in article by Prof Marius Olivier entitled "Legal constraints on the termination of fixed term contracts of employment: An enquiry into recent developments".[9] Under the heading, "Nature of the expectation" the learned author states:

> 'The third issue of importance relates to the nature of the expectation, and by implication the nature and extent of the relief to be afforded. What is required in order to activate the provisions of s 186(b) is an expectation that the fixed-term contract in question would be renewed on the same or similar terms. It is evident that the Act does not require that or regulate the position where the expectation implies a permanent or indefinite relationship on an ongoing basis ...
>
> The reference to renewal on the same or similar terms supports that this is the inference to be drawn from the wording of the subsection. What s 186(b) apparently envisages is that an employer should not be allowed not to continue with fixed-term employment in circumstances where an expectation of renewal is

9 (1996) 17 *ILJ* 1001.

justified. The implication is that the usual remedy to be granted in this case, if the termination is found to be unfair, is that of reinstatement or re-employment on the same or similar terms (see s 193(1) and (2)), but not that the employee has to be (re-)appointed as a permanent employee or on an indefinite basis ... This would consequently leave the possibility open that the employer could after the expiry of the period of the subsequent fixed-term contract terminate the services of the employee concerned, as long as the termination is not otherwise prohibited - such as where the employee had once again a reasonable expectation that the contract would be renewed.

22] The LAC in *University of Pretoria* preferred this approach, followed in *Dierks v University of South Africa*[10] and *SA Rugby (supra)* to that of the acting judge in *McInnes v Technikon Natal.*[11]

23] In doing so, Davis JA had regard to the clear language of s 186(1)(b) and the dictum of the Constitutional Court in *S v Zuma*[12] that courts cannot interpret legislation to mean 'whatever we might wish it to mean'.

24] The wording of s 186(1)(b) requires that, in order to constitute a dismissal, the employee had a reasonable expectation that the contract would be renewed "on the same or similar terms"; and that it was not so renewed. If there was a dismissal, therefore, the remedy could not be to order the employer to reinstate the employee permanently. The employer could only be ordered to renew the fixed term contract "on the same or similar terms" or to pay the employee compensation that would give effect to the terms of that contract. That is exactly what the arbitrator did in this case.

25] It is clear from Ms Mackintosh's email to the employee accompanying her contract of employment that she would have created a reasonable expectation of renewal in the mind of the employee. In the ensuing three months, and up to 3 December 2009, the applicant did nothing to dispel that expectation.

26] In those circumstances, given the clear evidence of a reasonable

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10 (1999) 20 *ILJ* 1227 (LC) paras 118-149.

11 (2000) 21 *ILJ* 1138 (LC) at 1143 para 20.

12 1995 (2) SA 642 (CC) paras 17-18.

expectation of renewal before him, the conclusion reached by the arbitrator was entirely justified. He also properly applied his mind to the appropriate remedy and ordered only two months' salary as compensation. The decision is not reviewable.

Costs

27] The employee had an arbitration award in her favour. She had little choice but to oppose the application for review in order to indicate her rights. The applicant, on the other hand, chose to incur legal costs well in excess of the amount of compensation (R11 000 minus statutory deductions) it was ordered to pay the employee. Mr *Venter*, for the applicant, submitted that it did so in order to establish a principle, as the award would have far-reaching consequences for its operations, were it allowed to stand. The consequences for the applicant may well be that it will reconsider its inappropriate use of fixed term contracts of employment instead of a probationary clause in what is intended to be permanent employment. That would be in accordance with the purpose and objects of the Labour Relations Act and section 23 of the Constitution.

28] In law and fairness, the applicant should pay the respondent's costs.

Order

29] The application for review is dismissed with costs.

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A J Steenkamp

Judge

APPEARANCES

APPLICANT:	Adv F Venter Instructed by Johannes de Beer.
THIRD RESPONDENT:	N Masizana of Legal Aid SA.