**REPUBLIC OF SOUTH AFRICA**

Not reportable
Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

Case no: C 484/10

In the matter between:

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| **JAMILLAH SAMSODIEN** | **Applicant** |
| and | |
| **CCMA** | **First respondent** |
| **CRAIG BOSCH N.O.** | **Second respondent** |
| **UNISA** | **Third respondent** |

**Heard**: **25 May 2011**

**Delivered**: **23 June 2011**

**Summary: Review – unfair dismissal – employee not dismissed – award not unreasonable**

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**JUDGMENT**

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STEENKAMP J

Introduction

[1] The applicant, Jamillah Samsodien, referred an unfair dismissal dispute to the CCMA (the first respondent). The arbitrator, Craig Bosch (the second

respondent) found that she was not dismissed by the third respondent, the University of South Africa (UNISA) within the meaning of s 186(1) of the Labour Relations Act[1]. He therefore dismissed her claim for unfair dismissal. She seeks to have that award reviewed and set aside.

Background

[2] In early 2008, UNISA advertised positions for “casual contract workers” in its Department of Learner Support in Parow. The position advertised was for a fixed term from 1 February 2008 until 31 December 2010 at a rate of R52, 00 per hour. When the applicant signed a contract of employment, however, the period of employment was recorded as being from 1 February 2008 to 31 March 2008. Notwithstanding that, UNISA’s intention was to employ her until 31 December 2010, as offered in the advertisement, and she continued in employment after 31 March 2008.

[3] In late 2009, in an attempt to solve the problem of the payment of salaries to "ghost employees", UNISA’s human resources department directed that all current casual workers were to conclude written employment contracts. It then came to his attention. That no written contract of employment existed for the applicant pertaining to the period of 1 February 2008 until 31 December 2010.

[4] UNISA advised the applicant in December 2009 that she should not coming to work until such time as the parties had concluded a written contract of employment, recording the terms of the employment relationship. On 5 February 2010 one. Claudine Petersen of UNISA that the applicant that asked her to come to work on 6 February 2010. However, some 20 minutes later, Petersen found her again and told her that contracts were not in place and that she should not come into work.

[5] According to the applicant, Petersen further again on 9 February 2010 and told her that the hourly rate would be reduced from R52, 00 to R32, 00. The applicant regarded this as a dismissal and referred an unfair dismissal dispute to the CCMA.

[1] Act 66 of 1995 (the LRA).

The award

[6] The arbitrator made the following findings, as it appears from the award:

6.1 The applicant was employed in terms of an oral fixed term employment contract for the period February 2008 to 31 December 2010.

6.2 It was the evidence of both parties that, notwithstanding anything to the contrary contained in the written agreement they signed, the parties had agreed that the applicants' term of employment extended until December 2010.

6.3 The applicant based her claim for unfair dismissal on both section 186 (1) (b) and s186(1)(d) of the LRA.

6.4 The arbitrator rejected the applicant's argument of unfair dismissal in terms of section 186(1)(b) because she had failed to prove that the fixed term contract that being brought to an end. The question of renewal (or the failure to renew) was therefore not of any relevance.

[7] In coming to this conclusion, the arbitrator took the following evidence into account:

7.1 The applicant testified that when she was advised that she was not to come into work until there was a written contract of employment in place, she did not consider this as amounting to a termination of the employment relationship and waited to be advised further by UNISA.

7.2 Dr Johan Jacobs of UNISA made it clear that UNISA intended to keep the applicant on during 2010, but could not pay her without her having a written contract.

7.3 Included in this evidence was a letter dated 11 February 2010 from Dr Jacobs and Prof DV Roberts to the executive director of human resources and the executive director of learner support in which the terms of the fixed employment agreement were recorded and in which appropriate written employment contracts recording these terms was requested.

7.4 The applicant conceded that the contents of this letter made it clear that UNISA intended to keep her on until the expiry of the period of the fixed term employment agreement, i.e. until the end of December 2010.

7.5 It was probable that UNISA had employed other casual workers to do the work of employees such as the applicant until such time as written employment contracts could be concluded. That was not an indication that UNISA had terminated the applicant's employment.

7.6 The applicant's reliance on s 186(1)(d) was also misplaced. She had failed to prove the initial dismissal and she failed to produce any evidence that other casual employees who may have been dismissed were subsequently re-employed after the date of her alleged dismissal.

[8] The arbitrator concluded that the applicant had failed to discharge the onus on her to prove that she had been dismissed within the meaning of section 186 (1) of the LRA. He therefore dismissed the claim for unfair dismissal.

Review grounds

[9] In her founding affidavit, the applicant based her review application on the following grounds:

(a) the Commissioner committed misconduct in relation to his duties, because "he did not see my way of argument to this whole matter and was more on the side of the respondent";

(b) the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings because he "was not interested at all what I had to say and I felt inferior to this boastful behaviour"; and

(c) the Commissioner exceeded his powers "by not listening to my case in this and I could sense that he was showing more of overall authority and not as an arbitrator."

[10] In her supplementary affidavit, the applicant also alleged that she "did not know how the law works if somebody gives their affidavit as proof of evidence without being present".

[11] At the hearing of the application, the applicant was represented by counsel. Mr *de Kock* was granted leave to submit supplementary heads of argument. He argued that the arbitrator's finding that the applicant failed to discharge the onus to prove that she was dismissed is a decision that no other reasonable decision maker, faced with the same facts, could reach. He argued that the evidence showed that the applicant was, indeed, dismissed on 9 February 2010.

[12] The applicant did not assert any facts upon which she relies in order to assert that the arbitrator was biased. In his argument, Mr *de Kock* wisely abandoned this ground of review. He also did not persist with the review grant that the arbitrator "was boastful and made the applicant feel inferior." Neither did he assert that the arbitrator exceeded his powers.

[13] The only review ground relied upon by the applicant's counsel was that the arbitrator's conclusion was not reasonable, referring to the test in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*.[2]

[14] The arbitrator commented that UNISA "took an inordinately long time to sort out the applicant's written contract and deprived the applicant and her colleagues of an opportunity to work as a result. I do not think that his actions were in good faith and this dispute might have been avoided if the respondent was more efficient in issuing a written contract to existing employees to whom it owed a duty of good faith. Be that as it may, the issue is not before me. I must determine whether the applicant has been dismissed and my finding is that she was not."

[15] In coming to that conclusion, it cannot be said that the arbitrator acted unreasonably.

[16] He correctly found that the applicant's reliance on section 186(1)(d) of was misplaced. She alleged that she had been dismissed on 9 February 2010 but led no evidence that any other casual workers were dismissed and had been offered re-employment.

[17] Neither did the applicant shows that she was dismissed within the meaning of s 186(1)(b) or, for that matter, section 186(1)(a).

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[2] (2007) 28 *ILJ* 2405 (CC)

[18] The arbitrator correctly accepted – and indeed, it was common cause – that the applicant was employed in terms of a fixed term contract for the period February 2008 to 31 December 2010. He then found that the applicant was unable to demonstrate that the fixed term contract was brought to an end. Even though he criticised the conduct of UNISA, with good reason, this conclusion is not an unreasonable one. There was simply no termination of the oral contract. The arbitrator was not called upon to consider whether the contract was suspended and whether that was fair, and he did not do so.

[19] With regard to the allegation that Petersen had told the applicant that her rate of pay would be reduced from R52 to R32 per hour, Dr Jacobs explained in his evidence that the rate of pay for new casual employees would be R32, but that the applicant would continue to e paid R52. The arbitrator appears to have accepted this evidence on the probabilities.

[20] In short, the arbitrator accepted that the contract of employment had not come to an end, or was it terminated.

Conclusion

[21] The conclusion reached by the arbitrator was one that a reasonable conclusion maker could reach. The application for review must fail.

[22] With regard to costs, I take into account that the applicant, was initially unrepresented and that she is unemployed. In law and fairness, I do not consider a costs order to be appropriate.

[23] The application is dismissed with no order as to costs.



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Anton Steenkamp

Judge of the Labour Court

APPEARANCES

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|---|---|
| APPLICANT: | Adv C de Kock<br>Instructed by CK attorneys |
| THIRD RESPONDENT: | Adv S Fergus<br>Instructed by Macrobert Inc |