REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case No. C194/2013
(Not reportable)

In the matter between:

VUYANI W MAPOLISA Applicant

and

MICHAEL B COETZEE N.O. First Respondent

MAX SISULU N.O. Second Respondent

Heard: 2 May 2013

Delivered: 13 May 2013

Summary: Urgent application for Rule Nisi confirming existence of extension of fixed-term employment contract. Application dismissed.

JUDGMENT

Introduction

1. On 26 March 2013 the applicant moved for an urgent application requesting various forms of relief (dealt with in more detail below.) In order to allow the respondents to file answering papers, an interim order was granted postponing the hearing of the application to 2 May 2013. The interim order also required the respondents not to

take any steps to either appointment a person to the position of Director: Core Business and Strategic Support or to fulfil any function which falls or fell within applicant's function as such, or by way of restructuring or otherwise, that will prejudice applicant's alleged current or future employment or function in the said position of Director: Core Business and Strategic Support. This interim relief was granted without any admission by the respondents.

Preliminary issues

2. At the hearing of the matter on 2 May 2013, the applicant applied to amend the notice of motion ("amendment notice") and to file an additional supplementary replying affidavit ("supplementary affidavit"). The amendment notice and supplementary affidavit were provided to the respondents on the morning of the hearing of the application and before the start of argument.

3. Advocate Breitenbach SC, acting on behalf of the respondents, submitted that as the amendment notice and supplementary affidavit were received by the respondents literally before the commencement of the hearing, the respondents would consider the applications to amend and to submit the supplementary affidavit if the applicant was prepared to postpone the urgent application and tender costs occasioned with such postponement. Advocate Bremridge, counsel for the applicant, submitted that the applicant was not amenable to a postponement of the urgent application. Accordingly, the applicant proceeded with the applications to Court to amend and submit the supplementary affidavit.

4. Advocate Bremridge submitted that the supplementary affidavit served to provide further explanations in reply to the answering affidavit. It does not alter the factual submissions which basically stay the same and, in any event, refers to evidence which is already before the Court.Insofar as the amendment notice is concerned, he argued that the amendment simply adds to prayer 2.1 in the notice of motion.

5. Advocate Breitenbach submitted that the supplementary affidavit was literally handed to the respondents at 09h30. When he looked at its contents it was clear that the contents enhance the applicant's original reply to paragraphs 25 to 27 of the first respondent's answering affidavit. Given the short timeframe, the respondents' legal team did not have an opportunity to obtain first respondent's instructions with regard to the contents of the supplementary affidavit, and therefore the respondents'

legal team was not in a position to deal with the supplementary affidavit. Insofar as the amendment notice is concerned, he argued that the applicant is now trying to distinguish between the existence of an alleged employment relationship and the existence of an alleged contract of employment.The latter is all that the declaratory relief in paragraph 2.1 of the notice of motion sets out.

6. Having heard the aforementioned arguments and taking into account the contents of the amendment notice as well as the supplementary affidavit, I ruled that the supplementary affidavit should not be allowed in light of the fact that the respondents were not given an opportunity to consider its contents and provide instructions to their legal team in respect thereof. It is clear from a reading of the contents of the supplementary affidavit that the applicant makes further factual allegations in reply to various aspects of the answering affidavit of the first respondent. Having had the opportunity to do so in the replying affidavit, it is not open to the applicant at a very late stage to expand on his reply in the supplementary affidavit in the absence of providing the respondents an opportunity to consider its contents to provide instructions to their legal team and for the legal team to then deal with it, if necessary, at the hearing of the matter.

7. As far as the amendment notice was concerned, I ruled that it should be provisionally allowed on the basis that Advocate Breitenbach,in reply to the applicant's case, be given an opportunity to challenge the provisional ruling and that it be allowed. Advocate Breitenbach did challenge the provisional ruling in his reply. I deal with his challenge below.

Background facts

8. A large part of the facts in this matter are common cause or incontrovertible.

9. Applicant was the Director: Core Business and Strategic Support in the Office of the Speaker at Parliament.He was employed in terms of a fixed-term employment contract for the period 1 November 2007 to 31 December 2012. The executive director of the Office of the Speaker, Mr Peter Lebeko("Lebeko"), the applicant's direct line manager, recommended that the Secretary to Parliament ("the Secretary") to approve an extension of the applicant's contract from 1 January 2013 to June 2014 on the same terms and conditions ("the 18-month extension"). The recommendation for the extension of the applicant's contract was made in writing on 3 October 2012 and was forwarded to the first respondent who at the time was the Acting Secretary to Parliament. The Secretary to Parliament is the person with the

authority to conclude employment contracts for and on behalf of Parliament. After discussing the recommendation of Lebeko with the Deputy Speaker, the Secretary decided to approve the extension, save that such approval was not communicated to the applicant nor Lebeko as it was practice that such approval would only be communicated when the new draft fixed-term contract document was approved and signed by the Secretary. The human resources department of Parliament then prepared a draft fixed-term employment contract containing the 18-month extension.

10. On 21 November 2012 staff members in the Speaker's Office confidentiality informed the Secretary that there may have been unauthorised use of a 3G card and cellular phone of Parliament that was in the possession of the applicant. Based on this information, the Secretary instructed Lebeko to investigate the alleged unauthorised use and to report to him in respect of the investigation. On 6 December 2012, Lebeko, in writing, requested the Secretary to extend the applicant's contract of employment for a month from 1 January 2013 to 31 January 2013 in order to allow for a hand over process and for the Office of the Speaker to make the necessary arrangements for the applicant's replacement. This written request was approved by the Secretary ("the one-month extension contract").

11. On 12 December 2012 the applicant sent a memorandum to the human resources department of Parliament. In his memorandum, he referred to Lebeko's recommendation of 3 October 2012 for his contract to be extended to 30 June 2014 and he indicated that he reasonably expected the 18-month extension. He also indicated that he would not be looking for another job. He accordingly requested an urgent response to the recommendation of Lebeko for the extension of his contract to 30 June 2014 or, if the recommendation was approved, that he be furnished with a copy of the written extension of his contract on or before 14 December 2012. The applicant also indicated in his memorandum that he needed a response on or before 14 December 2012 because this was the closing date of the offices and because his contract of employment would expire on 31 December 2012. The first respondent was copied in on the memorandum. On 14 December 2012 the Secretary signed the one-month extension requested by Lebeko.As the applicant was on leave at the time, the one-month extension contract was not provided to him.

12. It was only on 18 January 2013 that Lebeko submitted his report on his investigation in respect of the alleged unauthorised use of the 3G card to the Secretary. In his report he indicated that the applicant did not dispute that the 3G card was in his possession and custody and that it had been abused. However, the applicant indicated that his son was the person responsible for the abuse. Lebeko also

indicated that the applicant offered to pay for the unauthorised use.Lebeko accordingly recommended that the applicant's explanation be accepted and that his offer to repay the unauthorised usage of the 3G card similarly be accepted. The Secretary did not accept Lebeko's recommendation and instructed him to convene a disciplinary hearing. When the applicant returned from leave in January 2013 he was given the one-month extension contract on 25 January 2013 and he refused to sign the one-month contract extension.

13. On 30 January 2013 Lebeko, in the process of preparing for the disciplinary hearing for the applicant, requested the Secretary, in a written memorandum dated that same day, to further extend the applicant's contract to the end of February 2013 pending the outcome of the disciplinary process. This written request the Secretary declined. Lebeko then arranged for the disciplinary hearing to be held the following day on 31 January 2013. On the morning of 31 January 2013 Lebekomet with the applicant and explained to the applicant that the Secretary declined to extend the contract as he had requested and that the disciplinary hearing had to take place on that same day. The applicant agreed and attended the disciplinary hearing that afternoon. The hearing was chaired by the Acting Deputy Secretary to Parliament. The applicant was found negligent in failing to prevent the abuse of the 3G card by an unauthorised person (his son). The applicant was given a written warning and was required to pay-back the unauthorised expense by the end of 2013. The outcome of the disciplinary hearing was provided to the applicant on 1 February 2013.

14. In a further attempt to extend the applicant's contract to June 2014, Lebeko addressed another memorandum with such a recommendation to the Secretary on 5 February 2013. This further request was declined by the Secretary on 6 February 2013. In his decline, however, the Secretary indicated that Lebeko may, if he so wished, raise the matter with the executive authority (the political arm of Parliament).[1] The Secretary however indicated that in doing so all relevant information must be placed before the executive authority. On 11 February 2013 Lebeko addressed a letter to the second respondent (Speaker of the National Assembley) and Ms N C Mfeketo (Deputy Speaker of the National Assembley) wherein he dealt with his recommendation for the extension of the applicant's contract to June 2014 and the Secretary's refusal thereof. He also dealt with his

[1] In terms of the Financial Management of Parliament Act, No. 10 of 2009, the executive authority consists of the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, acting jointly, to whom the Secretary is accountable for the financial management of Parliament.

investigation concerning the use of the 3G card, his recommendation in that regard and the instructions from the Secretary to convene the disciplinary hearing. He recorded the fact that the disciplinary hearing proceeded and recorded the outcome that followed. In his conclusions, he indicated that the applicant may have a legitimate and reasonable expectation that his contract would be extended and that if Parliament were to be challenged by the applicant in court or at the CCMA, it may result in embarrassment for Parliament should Parliament lose such challenge. On 13 February 2013 the applicant also addressed a memorandum to the Presiding Officers of Parliament requesting that they intervene in what he called his *"case of employment after gathering that the accounting officer is not keen on renewing my contract".*

15. Although the applicant was paid his salary on 15 January 2013, he was not paid a salary for February. During this period, the applicant still had his access card to the parliamentary premises as well as his access card to the parking. His parking bay was not allocated to anyone else. The applicant was also invited to an internal meeting in an email that was forwarded to him on 4 February 2013 from Samantha Hector, who works in the office of the first respondent.On 18 February 2013 the applicant forwarded a memorandum to the human resources department wherein he complained that his access to his work email had been prohibited and that his salary for February remained unpaid. On 21 February 2013, the applicant addressed a memorandum to the office of the Speaker and Parliament's human resources department, copying it to Lebeko, wherein he indicated that on the advice of Lebeko, he had not signed his clearance certificate.He stated that he would deal with the clearance certificate after the executive authority had expressed its views on the extension of his contract because he had lodged the matter with the executive authority. Lebeko disputes that he advised the applicant not to sign the clearance and stated that it was the applicant who indicated that he had wanted to wait until he had heard from the executive authority.The executive authority met with the Secretary on 27 February 2013 and at that meeting a decision was taken that the extension of the applicant's contract of employment is a matter falling under the parliamentary administration which was to be dealt with by the Secretary and not the executive authority.

16. The applicant forwarded a further letter on 6 March 2013 to Parliament's human resources department again complaining of the fact that his access to the computer had been prohibited and that his salary for the month of February 2013 remained unpaid. In addition, he indicated that he was still awaiting a response to his

correspondence of 12 December 2012 to the human resources executive regarding the reasonable expectation of the extension of his employment contract. Ms S Gavier replied to the applicant's letter. In her reply, she acknowledged receipt of his correspondence and stated that his clearance form was still outstanding and that he had to return the clearance form so that his leave pay could be paid out to him.

17. The applicant claims that after he provided a signed copy of his founding affidavit to Lebeko with the hope that Lebeko would support it with a confirmatory affidavit, Lebeko presented him with a letter dated 15 March 2013 purporting to end his contract. The letter of 15 March 2013 simply states that his contract had come to an end.

18. The applicant brought his urgent application on 26 March 2013. On 15 April 2013 the applicant referred a dispute to the Commission for Conciliation Mediation and Arbitration. In the referral he indicated that the nature of the dispute concerns an unfair dismissal and an unfair labour practice. He summarised the facts in dispute as pertaining to his employer creating a reasonable expectation that his contract would be renewed and after such renewal he was unfairly dismissed.

Relief

19. The applicant is seeking interim relief in the form of an interim interdict declaring that there was an extension of the applicant's fixed-term employment contract from 01 January 2013 to 30 June 2014, that such extension came about, if not expressly then tacitly, by conduct, directing Parliament to comply with the terms of this alleged extended fixed-term employment contract and to provide him with a written agreement to that effect. In the alternative, the applicant states that if the Court is unable to decide in the applicant's favour on the papers before the Court, then the applicant wants the interim interdict granted on 26 March 2013 to be extended pending a referral to oral evidence in terms of Rule 7(7) of the Rules of the Labour Court or the determination of the dispute between the parties that was referred to the CCMA for arbitration. The applicant is further seeking this Court to set aside the finding of the disciplinary hearing in terms of the powers granted to this Court in Section 158(1)(h) of the LRA[2].

20. It is convenient at this stage to deal with the notice of amendment and the applicant's application to amend the notice of motion.

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[2]Labour Relations Act, 66 of 1995

21. The notice of motion in prayer 2.1 required this Court to declare *"there to be a contract of employment in existence between the applicant and the first respondent."* The notice of amendment requires prayer 2.1 to be amended by declaring:

21.1 the employment relationship between the applicant and respondent continued after termination of the applicant's fixed-term contract on 31 December 2012;

21.2 the parties did not conclude a contract for the renewal of the applicant's contract of employment for a period of one month to 31 January 2013;

21.3 the applicant's contract of employment, alternatively his employment relationship with the respondent, did not terminate on 31 January 2013 by reason of the expiry of any such one month renewal contract; and/or

21.4 there is an extant employment relationship between the applicant and the respondent.

22. Advocate Breitenbach objected to the amendment. He argued that the case that the respondents were required to meet was one in terms of which the applicant claimed that there was an extension of his fixed-term contract of employment for the 18-month period. The applicant's case is that this was a tacit extension. Advocate Breitenbach referred to various references in the affidavits filed by the applicant together with the annexures thereto which indicated that it was his belief that there was an extension of his fixed-term contract that expired on 31 December 2012 for a further period from 1 January 2013 to 30 June 2014. Advocate Breitenbach went on to argue that this is consistent with what is submitted in the applicant's heads of argument where the applicant clearly stated that *"the nub of the applicant's case is that there was between the applicant and his employer an extension of the applicant's fixed-term contract from 1 January 2013 to 30 June 2014, if not expressly, then tacitly by conduct."*

23. What the applicant is now seeking to do with the amendment, so Advocate Breitenbach argued, was to try and shift the goal posts after he received the respondents' heads.He now wanted to introduce an employment relationship that has apparently continued after 31 December 2012. In this regard, therefore, the amendment wants to fundamentally change the case originally made out by the applicant. Advocate Breitenbach also argued that the amended case is not supported by the evidence. The amendments are diametrically opposed by the evidence according to Advocate Breitenbach.

24. Finally, Advocate Breitenbach argued that the applicant in his founding affidavit approached this Court in terms of Section 77 of the Basic Conditions of Employment Act which provides this Court with jurisdiction to hear a matter concerning a contract of employment. Accordingly, Advocate Breitenbachsubmitted the applicant has made his bet and it is not now for him, at this late stage, to change his case because the respondents and their legal team have prepared for the case made out by the applicant in his affidavits and not the one which he now seeks to introduce with the amendment.

25. If one has a look at the case made out by the applicant on paper (prior to the notice of amendment) it is without doubt one relating to the applicant's claim that there was an express, alternatively a tacit, extension of his fixed-term employment contract after it expired on 31 December 2012 to a further period from 1 January 2013 to 30 June 2014. Not only is this the case made out and referred to in the notice of motion, founding and replying affidavits of the applicant, but it is also contained in the numerous correspondence between the applicant and the first respondent, annexed to the affidavits. It is therefore without doubt that the case that the respondents were required to meet was one relating to the applicant's claims that there was an extension of his fixed-term employment contract that expired on 31 December 2012 to a further period from 1 January 2013 to 30 June 2014.

26. The amendment seems to suggest that there could have been a continuing and existent employment relationship that came about in January 2013 between the applicant and Parliament. The amendments suggest that this existent employment relationship is not one necessarily based on the extension of the fixed-term employment contract. This, in my view, does fundamentally change the applicant's case from one which was originally based on the extension of a fixed-term employment contract to one that is also based on a continuing employment relationship absent the extension for a further fixed period.

27. In the result, the application to amend the notice of motion is desired.

Applicant's case

28. There are a number of factors which the applicant's case is based upon for his contention that there was an extension of the fixed-term employment contract for the period 1 January 2013 to 30 June 2014.

29. Advocate Bremridge stated that there is no dispute that the first respondent approved the extension of the applicant's contract to June 2014 on the same terms

and conditions after the recommendation to do so by Lebeko. He submits that the fact that the first respondent did not communicate this approval to Coetzee nor Lebeko is a mere formality and not a requirement for the continued existence of an employment relationship. He also argued that it was not disputed that the applicant was informed that his contract had been prepared. Also, before the applicant left in December for leave, no communication was sent to him to indicate that his contract would not be renewed and, before his return in January 2013, his salary was paid on 15 January 2013. Accordingly, Advocate Bremridge argued, the employment relationship continued beyond 31 December 2012.

30. Advocate Bremridge submitted that although the applicant was presented with the one-month extension contract upon his return from leave in January 2013, it is common cause that he did not accept the one-month extension contract.He refused to sign the agreement. On this basis, therefore, according to Advocate Bremridge there was no extension for one month in the absence of the applicant signing the one-month contract as is claimed by the first respondent. In the result therefore, Advocate Bremridge argued the respondent cannot claim that the applicant's employment terminated at the expiry of the one-month contract on 31 January 2013.

31. Advocate Bremridge also questioned why Parliament would have a disciplinary hearing in respect of the applicant if a continued relationship was not contemplated. The disciplinary finding was presented to the applicant on 1 February 2013 and Lebeko was instructed to recover the unauthorised expenditure. Advocate Bremridge questionedhow Lebeko would be able to recover the unauthorised expenditure as the direct line manager of the applicant if it was not for the fact that Lebeko would continue to exercise supervisory control over the applicant. These factors, according to Advocate Bremridge, contemplate a continued employment relationship with the applicant. In a further indication of the ongoing employment relationship, according to Advocate Bremridge,is the fact that the disciplinary finding included a right to appeal.

32. As for the events after the aforementioned disciplinary process, Advocate Bremridge submitted that there were no responses received by the applicant to his correspondence to Parliament. In response to the disciplinary hearing finding, the applicant wrote a memorandum on 12 February 2013 requesting a breakdown of the amount he had to pay back. On 13 February 2013, he wrote a memorandum to the executive authority requesting an intervention. On 6 March 2013 he wrote a memorandum to Ms S Gabier, Manager: Organisational Resourcing, copying the first respondent and Lebeko in on the memorandum, complaining about the

termination of his access to his computer and the non-payment of his salary. In this memorandum, he also indicated that he was still awaiting a response to his correspondence of 12 December 2012 concerning his reasonable expectation of the extension of his employment contract. Despite this correspondence, so Advocate Bremridge submitted, there was no written response from the first respondent to the applicant to say that his employment contract was terminated.

33. Advocate Bremridge also pointed out that not only was the applicant invited to attend a meeting in an invitation sent in an email to him by Samantha Hector on 4 February 2013, but he attended the meeting to which the email related. The applicant in his replying affidavit stated that the meeting was chaired by the Speaker and that he attended in his capacity as Director: Strategy and Strategic Planning without any demure from the Speaker or the other attendees at the meeting. The applicant stated that he attended until the conclusion of the meeting.

34. Advocate Bremridge submitted that it was only when a draft copy of the founding affidavit was forwarded by the applicant to Lebeko on 15 March 2013 via email and the applicant met with Lebeko later that afternoon in order to take his commissioned founding affidavit to Lebeko in the hope that Lebeko would agree to signing a confirmatory affidavit, that he was presented with the letter dated 15 March 2013 informing him that his contract had terminated.

35. Advocate Bremridge submitted that if regard is had to all the factors listed above that there was a tacit renewal of the applicant's fixed-term employment contract. It was his submission that the court should not be tied by the strict principles of contract, but that the principles of fairness and equity should also be considered. As to the urgent relief that the applicant is seeking, Advocate Bremridge submitted that there is currently a restructuring underway in Parliament which was admitted to by the first respondent and, accordingly, there is the possibility that the applicant's position would be affected. There is therefore the fear that the applicant would suffer prejudice if his position is affected by this restructuring process. In this regard, Advocate Bremridge referred the Court to the decision in *Jack vs Director General: Department of Environmental Affairs*[3], where the court accepted that urgent relief is appropriate where *"the post, which has not yet been filled, might be filled, thereby inconveniencing the other appointee and the respondent if the applicant were to take up his position later."* The Court went on to say that *"The applicant could be*

[3]2003 1 BLLR 28 (LC) para 7 to 9

seriously disadvantaged if the post is filled by the time the dispute is determined in the ordinary course." On the other hand, Advocate Bremridge argued that if Parliament do not intend to fill the position, then there can be no prejudice to Parliament if the interim relief is granted.

36. In support of his argument that this Court should not apply the strict principles of contract but should also have regard to the principles of fairness, Advocate Bremridge referred to various authorities holding out this position.

Respondents' case

37. Advocate Breitenbach submitted that it is common cause that the authority to conclude contracts of employment for and on behalf of Parliament rests with the first respondent. Even though the first respondent approved the recommendation by Lebeko, it is common cause that the first respondent never signed the draft extended contract of employment prepared by Parliament's HR department. Applicant was aware of the fact that Lebeko made a recommendation for the extension of his contract, that a draft contract of employment was prepared and that first respondent, the person vested with authority to conclude contracts, was required to sign the contract.The applicant confirmed all of the above in his memorandum to the HR department (copying first respondent and Lebeko in on it) of 12 December 2012.

38. Advocate Breitenbach submitted further that it is also common cause that Lebeko requested the first respondent, after Lebeko was instructed to investigate the alleged unauthorised use of Parliament's 3G card by the applicant, to extend the applicant's contract for a further one month period from 1 January 2013 to 31 January 2013 in order to conclude the disciplinary process. A contract in this regard was prepared by the HR department and was signed by first respondent. Advocate Breitenbach submitted that when the applicant returned in January 2013 and was handed a copy of the one-month contract indicating first respondent's agreement for a one-month extension until the end of January 2013, it should have been clear to the applicant that Parliament was not prepared to extend his contract for the 18-month period as was recommended by Lebeko.

39. Advocate Breitenbach also stated that when Lebeko tried to extend the applicant's contract for a further one month from 1 February 2013 to 28 February 2013 in order to conclude the disciplinary process, such request was refused by the first respondent and this refusal was explained to the applicant by Lebeko. According to

Advocate Breitenbach, Lebeko explained to the applicant that this was the reason why the disciplinary hearing had to be held on such short notice. The applicant agreed to attend the disciplinary hearing which took place on that same day and the outcome of the disciplinary hearing was handed to the applicant the following day. Advocate Breitenbach argued that the fact that the outcome was provided to the applicant the following day it does not follow that his contract of employment was extended beyond 31 January 2013, by which time the applicant was already aware, as he was informed of such by Lebeko, that the first respondent refused to extend his contract beyond 31 January 2013. The outcome of the disciplinary hearing, so Advocate Breitenbach argued, was given to the applicant at the first available opportunity and the sanctions were not given effect to as the applicant ceased to be an employee.

40. Advocate Breitenbachalso submitted that during the period of February 2013 and the first part of March 2013, the applicant did not return his access card and parking access card and his parking bay was not allocated to anyone else.He could therefore use the cards to access the precincts of Parliament and park there. He also did not return the laptop and cellphone and was asked to sign a clearance certificate, but he refused to do so. In his letter of 21 February 2012, he confirmed that he was waiting for the executive authority to give a view on the extension of his contract before he would deal with the clearance certificate. According to Advocate Breitenbach, the applicant was clearly hoping for an intervention by the executive authority who in the end decided that the extension of the applicant's contract was a matter falling under the parliamentary administration and to be dealt with by the first respondent and not the executive authority. Despite being made aware of this decision, by 11 March 2013 the applicant had not signed the clearance certificate and handed in all access permits and parliamentary equipment in his possession. In the result, Advocate Breitenbach submits, the applicant's wrongful retention of the property of Parliament cannot be a basis for saying that his contract continued beyond 31 January 2013.

41. As far as the invitation to the applicant to attend a meeting was concerned, Advocate Breitenbach submitted that the first respondent indicated in his answering affidavit that the applicant was inadvertently sent the email inviting him to the meeting. Shortly thereafter, the applicant's email account was closed which was a matter that he raised in written complaints in February 2013. It was only in the applicant's replying affidavit that he for the first time referred to work that he allegedly submitted on 7 March 2013 and that he in fact attended the meeting where

other officials were present. There is no explanation for the omission from the founding papers of these allegations and certainly not an opportunity for the first respondent to deal with it.

42. In the result, so Advocate Breitenbachargued, that if the Court takes only the facts set out by the applicant and the facts set out by the first respondent which the applicant cannot dispute, having regard to the inherent probabilities, there is no prospect of the applicant obtaining final relief on those facts.

Legal principles

43. The well-established requirements for an interim interdict are a prima facie right; the well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; a balance of convenience in favour of granting of the interim relief; and the absence of any other satisfactory remedy[4].

44. In the case of *Knox D'Arcy Limited & Others vs Jamieson & Others*[5]*,* the court stated the following:

"In the present context the statement that a court has a wide discretion seems to me no more than that a court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision. This is also the sense in which, I take it, Freiner J used the word "discretion" in the following oft quoted passage from Transvaal Property an investment CO Limited and Rainhold& Co vs South African Townships Mining and Finance Corporation Limited and the Administrator 1938 TPD at 512:

> *"No doubt the remedy by way of interdict has been said to be unusual, … it is also described as discretionary … it seems to me, however, that apart from cases of interim interdicts, where considerations of prejudice and convenience are of importance, the question of discretion is bound up with the question whether the rights of the party complaining can be protected "by any other ordinary remedy" (Setlogelo's case, 1914 AD 221, at 227)."*

The court has not defined the considerations which may be taken into account in exercising the so-called discretion, save for mentioning that the obvious examples

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[4] SetlogelovsSetlogelo 1914 AB 22 21 Act 22(27); Olympic Passenger Service (Pty) Ltd vsRamlagan 1957 (2) SA 382 (D) at 383 A-C; Pietermaritzburg City Council vs Local Road Transportation Board 1959 (2) SA 758 (N) at 772 C-E

[5] 1996 4 SA 348 (A) pages 361 (para H-J) and 362 (A-C)

such as the strength or weakness of the applicant's right, the balance of convenience, the nature of the prejudice which may be suffered by the applicant and the availability of other remedies. Whilst this list is not exclusive, it does not indicate what the relevant features are in an application of this sought. I find it difficult to imagine that considerations which are entirely unrelated to these features could be accorded weight in granting or refusing an application for an interim interdict."

45. The prima facie right that the applicant relies upon is his claims that his fixed-term employment contract that terminated on 31 December 2012 was renewed for a further period from 1 January 2013 to 30 June 2014 and that such renewal was either expressly, alternatively tacitly by the conduct of the parties. I do not think that there can be any doubt that there was no express renewal of the fixed-term employment contract to the further period ending 30 June 2014. It is common cause that although the first respondent initially approved the recommendation by Lebeko, such approval was not communicated to the applicant nor was it communicated to Lebeko. It is further common cause that when the HR department of Parliament prepared the draft fixed-term employment contract for the extended period, it was not signed by the first respondent and accordingly no signed copy was ever presented to the applicant.

46. Was there a conclusion of the extended fixed-term employment contract by the conduct of the parties? Advocate Breitenbach referred to the case of *Butters vsMncora*[6] where the Supreme Court of Appeal stated that for an applicant to succeed to convince the court of the conclusion of an alleged tacit agreement *"the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in the consequence of their agreement."*

47. The facts show that it was common cause that Lebeko made a recommendation to the first respondent motivating why the applicant's contract needed to be extended for the 18-month period. The first respondent approved the recommendation and set in motion a process whereby a draft contract to that end would be completed and the first respondent would sign the contract before providing it to the applicant. The facts also showed that the first respondent did not sign the contract when it was provided to him because by that time he instituted an investigation into the alleged unauthorised use of a 3G card by the applicant. The applicant in the meantime

[6]2012 (4) SA 1 (SCA) para 34

enquired about the extension as he was told by Lebeko that his contract would be extended. When the applicant did not hear from the first respondent after enquiring when he could expect the signed contract giving effect to the extension, he proceeded to go on leave and returned in January 2013. It was also common cause that he must have returned in early January 2013 sometime before 25 January 2013 when he was presented with the one-month extension contract signed by the first respondent. Prior to being presented with the one-month extension contract, he continued working and in fact was paid his salary on 15 January 2013. The applicant did not sign the one-month extension contract yet he continued working. Lebeko must have obtained the applicant's explanation for the 3G card use prior to the meeting between him and Lebeko on 31 January 2013. So much Lebeko stated in his report to the first respondent when Lebeko recommended that the applicant's explanation should be accepted and his offer to repay for the unauthorised use would also be accepted. It is common cause that the first respondent did not accept Lebeko's recommendation and insisted that a disciplinary enquiry be held. This then led to Lebeko meeting with the applicant on 31 January 2013 and requiring the applicant to attend a disciplinary hearing later that afternoon, which the applicant agreed to.

48. After the disciplinary hearing was held, the applicant was given the outcome the following day. In my view, not much turn on the fact that the outcome was given to the applicant in February 2013. However, by 31 January 2013 or soon before then, the first respondent should have been aware that the applicant had refused to sign the one-month contract that was presented to him on 25 January 2013. If the first respondent was not aware then surely Lebeko was aware because this is the reason why he requested the first respondent to extend the one-month contract for the further month of February 2013, which request the first respondent declined. Despite all of this, there was no communication to the applicant that he would no longer be required to provide his services after 31 January 2013. Even when the applicant was inadvertently included in an email requesting him to a meeting, and the applicant claims that he attended that meeting (although I accept that the respondent was not given an opportunity to deal with those claims) there was no communication from the first respondent nor Lebeko to indicate to the applicant that his employment contract and employment terminated on 31 January 2013. Even when the applicant's access to his emails and computer was terminated after it was discovered that the email was inadvertently sent to him, there was still no direct communication from the first respondent nor Lebeko to indicate to the applicant that his employment contract and employment had terminated on 31 January 2013. For

these reasons I am of the view that the applicant has established prima facie the right to the extension of his contract for the 18-month period. However, although it is prima facie established, it is open to some doubt.

49. It is clear that the applicant was aware that it is only the first respondent who could sign and conclude the 18-month draft contract prepared by the HR department. He was also aware that before he went on leave on 14 December 2012 that the first respondent did not at that stage sign the 18-month draft fixed-term employment contract. When he returned in January 2013 and received the one-month contract which he refused to sign at that stage he should also have been aware that the first respondent only signed a one-month extension contract. When he had his discussion with Lebeko on 31 January 2013 and was informed by Lebeko that the first respondent did not want to extend for the month of February 2013 and therefore the disciplinary hearing had to proceed on that same day, it would have been a further indication to him what the attitude and intention was of the first respondent concerning his further employment and particularly the extension of his employment beyond January 2013. These aspects throw some serious doubt on the case of the applicant for his right that there was the expectation of the extension of his contract of employment for a further 18 months to 31 June 2014. However, in determining whether a prima facie right has been established, the right need not be shown on a balance of probabilities, it can be so established even though it may be open to some doubt.[7]

50. The applicant's main submission insofar as the apprehension of harm is concerned, is Advocate Bremridge's argument that there is currently restructuring underway in Parliament which was admitted to by the first respondent. Accordingly, there is the possibility that the applicant's position will be affected although the first respondent indicated that the applicant's position would not be filled in the foreseeable future. Even if it was filled, so the first respondent stated, there would be a recruitment process which will take a couple of months according to the first respondent. The applicant also claimed that the harm that he is suffering is his inability to seek work elsewhere and in applying for other posts in Parliament. I do not think that these are sound arguments for claiming irreparable harm. Nothing prevents any employee from applying for or seeking work even if that employee is employed. The applicant also claimed that his salary was not being paid and that it would seriously impact on his livelihood. I do not see the applicant to be in a different position than any other

[7]Webster vs Mitchell 1948 (1) SA 1186 (W) at 1189

employee who may have been unfairly dismissed or whose contract may have been unlawfully terminated and as a result is not paid his/her salary. For these reasons (and the ones below), I do not think that the applicant has made out a case to show that he would suffer irreparable harm if the interim relief is not granted.

51. Advocate Bremridge submitted that the case of *Jack* is authority for the proposition that this Court is prepared to enforce a contract of employment through an urgent application. The facts of that case, however, are different to the facts facing the Court in the current application. In *Jack*, it was common cause that there was a contract of employment between the parties. When the employer did not want to give effect to the contract of employment, the employee went to court on an urgent basis to enforce the contract. That dispute was however settled between the parties. The only thing that then came before the judge was the issue of costs. The employer did not want to pay the costs of the urgent application on the basis of two arguments. First, the employer argued that financial difficulty occasioned by unemployment was not sufficient ground for urgent relief. Second, the employer claimed that the court did not have jurisdiction as the Basic Conditions of Employment Act No. 75 of 1997 did not apply (this second basis is not relevant for purposes of this application). Dealing with the first ground, the court accepted the first ground as a general statement of our case law. The court, however, also stated that *"the additional reason advanced for urgent relief is that the post, which has not yet been filled, might be filled, thereby inconveniencing the other appointee and the respondent if the applicant were to take up his position later."* The court went further to say that *"… as the respondent put the applicant to such inconvenience through its own inefficiency, it cannot complain about being inconvenienced by an application of this kind. The applicant could be seriously disadvantaged if the post is filled by the time the dispute is determined in the ordinary course."*[8] On the facts therefore, *Jack* is clearly distinguishable from the current matter where the very existence of the contract of employment is in dispute whereas in the *Jack* case there was no dispute as to whether or not there was a contract of employment.

52. In dealing with the balance of convenience, I am not convinced that it favours either party. First respondent's argument is that the applicant's presence at Parliament would be damaging to the institution in light of the abuse of the 3G card. In addition, so it was argued, the staff members who originally brought it to the first respondent's attention may make good on their threat to go to the media if the applicant is re-

[8] Supra paras 8 and 9

employed. On the other end, the applicant argues that his future livelihood is being affected and that he cannot apply for other jobs. He also argues that he is qualified to do his job and that Parliament had budgeted for his position.

53. Neither of these arguments convinces me that the balance should be tipped in favour of one of the parties. Despite the first respondent's complaints about the risk to Parliament if the applicant returns in the light of his abuse of the 3G card, the applicant's immediate line manager Lebeko was of the view that such abuse was not serious and could simply be dealt with by accepting the applicant's explanation. In addition, Lebeko continued motivating that the applicant's contract be extended even after becoming aware of the applicant's abuse of the 3G card.

54. The applicant has already referred a dispute to the CCMA claiming an unfair dismissal by reason of Parliament's failure to extend his contract of employment in circumstances where he alleges that he had an expectation of such extension or renewal. In my view, the applicant has a suitable alternative remedy and there was no need to approach this Court on an urgent basis asking for relief essentially similar to that which the applicant can attain through the dispute processes at the CCMA. The remedies that the CCMA can provide to the applicant include his reinstatement and payment of arrear salary, together with interest. Even if the applicant were not to follow the CCMA dispute processes, the applicant could also claim contractual damages for the non-payment of his salary and benefits for the balance of the 18-month contract if you could show that the contract was tacitly concluded with Parliament.

55. For these reasons, therefore, the applicant has not satisfied the requirements for an interim interdict.

56. The applicant has also requested this Court to declare the finding of the disciplinary hearing null and void on the grounds of procedural unfairness in terms of the powers granted to this Court in Section 158(1)(h). Besides the applicant having an obvious alternative remedy in Section 186(2)(c) to file an unfair labour dispute with the CCMA relating to an alleged unfair disciplinary action short of dismissal, on the papers I am in any event not convinced that the disciplinary proceedings were procedurally unfair. Lebeko had a meeting with the applicant on the morning of 31 January 2013 and he explained to the applicant why the disciplinary hearing had to proceed and that the first respondent was not amenable to extend the contract for a further month. The applicant agreed to have the disciplinary hearing the afternoon and in fact attended the disciplinary hearing. Under these circumstances, I cannot

see how the applicant can say the disciplinary hearing was procedurally unfair for want of proper notice.

57. For the reasons already advanced above, my view is that the applicant's dispute is best to be dealt with by the CCMA where it is currently at. I am accordingly not inclined to exercise this Court's discretion in favour of referring the matter to trial proceedings or to oral evidence as prayed for by the applicant in his notice of motion.

Conclusion

58. I therefore find that although the applicant has shown a prima facie right open to some doubt, the applicant has failed to satisfy the requirements that he will suffer irreparable harm if the Court does not step in at this point in time nor could he convince this Court that the balance of convenience favour granting the interim relief. More importantly, the applicant has adequate alternative remedies to his claims that he had a reasonable expectation of the extension of his employment contract for a further 18-month period.

Costs

59. Both parties asked for costs, together with costs of two counsel, in the event of success. Although I have come to the conclusion that the applicant has not made out a case for the relief that he is seeking in his notice of motion, I am nonetheless not entirely convinced that the respondents should not be partially to blame for the applicant having to rush to Court on an urgent basis as a result of the uncertainty surrounding his position. As I have indicated above, despite numerous written correspondence from the applicant to the first respondent and Parliament's HR department seeking clarity on his position at various stages starting in December 2012 and leading up to March 2013, very little, if any, definitive responses were given to the applicant. Although not clear from the papers, it appears to me that Lebeko had a big role to play in the applicant dealing with his situation as he did. Lebeko, as the applicant's line manager, should have been at the forefront of proper communication and feedback to the applicant when he raised the issue about his position with his employer. If Lebeko had done so or if Parliament had done so, there may not have been the need for the applicant to urgently approach this Court to seek clarity on his position, which could have been provided to him by his employer. In the circumstances, therefore, I make no cost order.

Order

60. In the result, the following order is made:

60.1 The application is dismissed.

60.2 There is no order as to costs.

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AJ DEON VISAGIE

Judge of the Labour Court

APPEARANCES

For Applicant: Adv I C Bremridge (with him Adv L Ackermann), instructed by Ralph Jiyana Attorneys

For Respondents: AdvBreitenbach SC, Adv N Mangcu-Lockwood, instructed by the State Attorney