REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C553/2013

In the matter between:

CASH MASTER SERVICES (PTY) LTD Applicant

and

BELLA GOLDMAN N.O. First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent

XOLISA DYANTI & 17 OTHERS Third Respondents

Date heard: 14 April 2014

Delivered: 30 July 2014

Summary: Unopposed application for review

JUDGMENT

Rabkin-Naicker J

[1] This is an unopposed application to review and set aside an award under case number WECT5364 – 13 and WECT5459 – 13.

[2] The applicant had entered into a contract with the South African Social Security Agency (SASSA) for payment of grants to grant beneficiaries. The

project that was the subject matter of the contract involved applicant registering and reregistering more than 10 million beneficiaries across the country. The second phase of this project was finalised during the end of December 2012. The third phase was scheduled to take place between 7 January 2013 and 31 March 2013.

[3] The third respondents were engaged on fixed term contracts linked to the registration process of all beneficiaries. The third respondents referred their disputes to the CCMA after their contracts were not extended beyond 31st of March 2013. They were of the view they had a legitimate expectation for an extension of the contracts.

[4] The award sought to be reviewed found that the third respondents were dismissed and that those dismissals were both substantively and procedurally unfair. The first respondent (the Commissioner) awarded each of the third respondents the sum of R 4050.00 – an amount equivalent to one month's salary.

[5] The third respondents were all employed on fixed term contracts as registration operators. They had to process the registration of social grant beneficiaries. Their contracts ran from 1 April 2012 to 31 March 2013. They were issued with a letter dated 8 March 2013 informing them that their contracts would be terminated in accordance with their fixed term contracts. The award records that clause 2.5 of their contracts of employment provided that: "employment will not continue after the date of termination of the contract and that the employee will have no expectation of his contract being extended or in any way renewed after that date."

[6] Clause 2.9 of the staff manual which was incorporated by reference into the contracts of employment provided that: "there is no expectation that a fixed term contract of employment will be renewed and/or extended. Only the HR Department (in writing) can approve a fixed term of contract of employment to be renewed and/or extended. Please note that verbal promises made by Managers to staff that their contracts will be renewed are not binding on the company."

[7] The Commissioner records that the applicants claimed that they were dismissed in that they had an expectation that their contracts would be renewed on the same or similar terms, on the basis of an undertaking by the provincial manager (one Louis Groenling) who assured them that no one would lose their jobs. They also mentioned the fact that others who were employed for the first time in January 2013 were given another contract of employment and the fact that work still remained to be done. It was conceded by the company that others employed after the applicants were given a contract of one month and then that contract was extended for another month. At the arbitration hearing the company was waiting to hear if its contract would be extended for a further month. These extensions were in order to “mop up" any beneficiaries who had not been registered. Each time the contract was extended fewer employees were required, and according to the company, the selection of employees for each contract was performance-based.

[8] The Commissioner found as follows after hearing the evidence at the arbitration:

> “In terms of what was in the wording of the contract, it is trite that virtually all fixed term contract state that the employee will have no expectation of his/her contract being extended after the date of termination, hence I cannot place much weight on that fact alone. The respondent in its argument relied on the wording of the contract and that of the staff manual in that argument but did not lead any evidence that the applicants were made aware of any staff manual. Further, despite clause 2.9 of the staff manual they did not sign their fixed term contracts at the commencement thereof, which was on 7 January 2013. The contract submitted in evidence was signed off for February 2013 by the applicants and on 21 January by the respondent.
>
> The applicants all stated they were given verbal assurances by Louis Groenling that they would be employed after 31 March 2013. The respondent chose not to call Louis Groenling to dispute this evidence, despite the fact that he is still employed by the respondent as Provincial Manager, hence I accept the applicant's evidence in this regard.

In terms of past practice, the applicants' contracts were in the past renewed on four occasions and thus I find on the evidence before me that they could reasonably have assumed that as long as the work was there as they were informed by Groenling that their contracts would be renewed.

The applicants did receive a letter of termination. However, as per their evidence and that of respondents own witness, Troy Jaco, every time a contract came to an end all fixed term contract employees received a letter of termination. The applicants had received letters of termination before and their contracts had been renewed and as such this letter would have had no bearing in terms of their expectation of renewal.

Taking the above factors into account I am satisfied that the applicants had a reasonable expectation that they contract of employment, which ran from seven January to 31 March 2013 would be renewed on the same or similar terms. I thus find that the applicants were dismissed in terms of section 186 (1) (b) of the LRA.

The next issue I must now decide is whether their dismissals were fair; that is, were there valid reasons for not renewing the applicants contracts? It appears that the applicants contracts were not renewed based on their performance and conduct. However, no evidence was led that the respondent followed the guidelines set out in schedule 8 (performance and misconduct) of the LRA when selecting the employees for the April 2013 contract.

The applicants were not informed of any performance standard they failed to meet or of any poor attendance record. It was not denied that the respondent would have that information at hand and no evidence of poor performance or absenteeism compared to that of employees whose contracts were renewed was submitted."

[9] I note that the transcript of the arbitration indeed records that the evidence of the company's witness was to the effect that the criteria used by the company as to whether contracts should be renewed was based on the attendance of the employees and whether there were any complaints against them.

[10] The alleged grounds of review of the award are that it was not reasonable, inasmuch as the award failed to take into account the evidence and arguments submitted by the company that there was no legitimate expectation created. It is also submitted in the founding affidavit that far too much emphasis was placed by the Commissioner on the selection criteria used to select employees who would continue for a short while in employ of the company. The applicant also alleges that its representative was interrupted by the Commissioner when trying to cross-examine the witnesses that an impression was created that the Commissioner had already made a decision that the dismissals had taken place in accordance with section 186 of the LRA. These averments concerning interruptions by the Commissioner were not pursued in the written submissions before the court.

[11] In as far as the issue of the alleged failure to take into account the evidence at the arbitration, the industrial relations manager of the company states in the founding affidavit that "… this will all be expanded upon when the record of the proceedings becomes available." She then goes on to say that it will be argued at the hearing of the application that the Commissioner misconstrued the principles applicable to an extension of an employment contract and that based on the evidence presented at the arbitration proceedings there was no legitimate expectation created, and that it was not competent for the first respondent to have relied upon the so-called arbitrary selection of employees who continued in the employ of the applicant for short period thereafter.

[12] It is contended by the company in the founding papers that the Commissioner reached an unreasonable conclusion; misapplied her mind; exceeded her powers; and committed a gross irregularity. I note that no supplementary affidavit was filed by the applicant company and that the founding papers therefore make no reference whatsoever to the record to substantiate the grounds for review. The written submissions on behalf of the company and the argument made before me take the matter no further, essentially concentrating on the reasoning of the Commissioner and suggesting that her understanding of the law was lacking in find that the third respondents: " had an expectation that they would be permanently employed." Further, it is argued that the Commissioner's finding that the dismissals were unfair

because no evidence was led about the performance standards of the employees should not have been a relevant consideration.

[13] In my judgment, the applicant company has failed to make a case for the review of the award. The award in question sets out the legal basis for the enquiry in terms of section 186 (1) (b) of the LRA. The Commissioner proceeds to apply that law to the evidence before her and cogently sets out the reasons for her award. The award stands to be upheld on the basis of the law on review applications as set out in the Supreme Court of Appeal in **Herholdt**[1] and the Labour Appeal Court, **Goldfields**[2] judgment. It is an award that is within the bounds of reasonableness. Further, based on all the facts and circumstances of the matter, the awarding of one month's compensation to the employees was appropriate and did not amount to a finding that the third respondents had a reasonable expectation that their contracts would be renewed on the same terms.

[14] I therefore make the following order:

Order

1. The application to review the award under case numbers WECT5364 – 13 and WECT5459 – 13 is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

[1] Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) 2013 (6) SA 224 (SCA)
[2] Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others; JA 2/2012 4/11/2013

Appearances:

Applicants: N/A

Respondent: Adv W. Hutchinson instructed by Fluxmans Inc