REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 853/15

In the matter between:

ARMSCOR DOCKYARD, a division of ARMSCOR SOC	Applicant
and	
CCMA	First Respondent
Tariq JAMODIEN N.O.	Second Respondent
Raynold Thabo NGCOBO	Third Respondent

Heard: 7 September 2016
Delivered: 14 September 2016
Summary: Review – LRA s 186(1)(b) – legitimate expectation of renewal of fixed term contract. Arbitration award not reviewable.

JUDGMENT

STEENKAMP J

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Introduction and background

[1] Mr Raynold Thabo Ngcobo[1] was employed by the applicant, Armscor, at the Simon's Town naval dockyard as senior human resources manager. Armscor wanted to make a permanent appointment but, as the employee was 59 years old at the time, it would have been too expensive, given the costs of the medical aid scheme and provident fund. The parties found a way out. The employee was employed on a fixed term contract. Armscor's senior employee relations manager, Dr Phasoane Mokgubu, sent the employee an email confirming his employment on a fixed term contract for three years "which is renewable subject to performance". The employee performed well; but at the end of three years, his contract was not renewed. He referred an unfair dismissal dispute to the CCMA[2] in terms of s 186(1)(b) of the LRA.[3] The arbitrator, Tariq Jamodien[4], found that the employee had been dismissed; and that it was unfair. He ordered Armscor to reinstate the employee on a fixed term contract from 1 July 2014 until 31 December 2016. Armscor seeks to have the award reviewed and set aside.

The arbitration proceedings and award

[2] Both parties were legally represented at the arbitration. By agreement, the arbitrator considered the record of a previous arbitration that had been set aside and remitted. He also heard the further evidence of Dr Mokgubu (via video conference) and the General Manager to whom the employee reported, Mr Themba Goduka.

[3] The initial fixed term contract was due to expire on 31 March 2014. In July 2013 the employee and Goduka started discussing its extension or renewal. On 29 July 2013 Goduka wrote a letter addressed to the acting CEO, Mr JS Mkwanazi. He motivated for the renewal of the contract and recommended its extension for a further three years, when the employee

[1] The third respondent.

[2] The Commission for Conciliation, Mediation and Arbitration (the first respondent).

[3] Labour Relations Act 66 of 1995.

[4] The second respondent.

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would reach retirement age of 65. However, he did not send the letter off and only raised the issue directly with Mr Mkwanazi in December 2013.

[4] It is not disputed that Goduka supported the employee. It went so far as the employee submitting a draft to Goduka in October 2013 setting out his motivation to extend the contract and highlighting the successes he had achieved during his tenure. It is common cause that the employee performed well.

[5] There was no indication to the employee between July 2013 and March 2014 that the renewal of his contract would not be approved. (There is a dispute whether Goduka told him that it was subject to the CEO's approval). Only on 4 March 2014 did Goduka tell him that the CEO refused to renew it because Parliament had insisted on a permanent appointment. Armscor advertised a permanent position on 5 March 2014. On the same day, the employee wrote to Goduka and to the general manager: human resources. He noted that Goduka had supported his request for an extension of his contract; that he had submitted his motivation in October 2013; and that he had achieved significant successes. He concluded: "I therefore plead that the matter be reconsidered with a view to extend the contract."

[6] Goduka responded on 12 March 2014, offering the employee an extension of three months only, until 30 June 2014. The employee responded that the offer did not comply with the terms of his contract. He stated (in a letter dated 17 March 2014):

> "The provisions of my fixed term contract of employment create a legitimate expectation that my contract of employment will be renewed on the same or similar terms as set out therein, which includes the period of renewal thereof."

[7] Goduka responded on 24 March 2014:

> "In the light of the reasons provided in our letter dated 12 March 2014, Management's decision to appoint a HR manager for the Dockyard on a permanent basis remains highly significant for business. Therefore your fixed term contract which expires on 31 March 2014 can only be extended for three months."

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[8] The arbitrator correctly noted that he had to determine whether the employee had a reasonable expectation of renewal of his fixed term contract; and if so, whether its non-renewal constituted an unfair dismissal. That is consequent upon the provisions of s 186(1)(b)(i) of the LRA:

> "'Dismissal means that –
>
> (b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer –
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> (i) 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".

[9] The arbitrator correctly summarised the test to be applied:

> "The view seems to be that the expectation must be reasonable in the objective sense. The question that one has to ask is whether the circumstances were such that any reasonable employee would, in the circumstances, have expected the contract to be renewed on the same or similar terms."

[10] He referred to relevant case law against which to assess the evidence before him. In *McInnes v Technikon Natal*[5] the court adopted the following approach:

> "Here the court has to conduct a two-stage enquiry. The first stage is to determine what the applicant's subjective expectation actually was in relation to renewal. This is a question of fact. Only once the subjective expectation has been established as a fact does the court then go on to decide the second stage, namely whether this expectation was reasonable in the circumstances.
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> As to the former, what is required is that the applicant must subjectively have held the expectation that her contract would be renewed on terms which are the same or similar to the terms which prevailed during her fixed-term contract."

[11] The arbitrator also considered *Auf der Heyde v University of Cape Town*[6] in which the court, in turn referred back to *Dierks v University of South Africa*[7]:

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[5] (2000) 21 *ILJ* 1138 (LC) paras [15] – [16].

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> "The gravamen of s 186(b) in the context of what an employee would be entitled, all other things being equal, reasonably to expect at the conclusion of the specified period of a fixed term contract was examined by this court in *Dierks v University of South Africa.* The issue for determination in that matter bore a basic similarity, insofar as the interpretation and applicability of s 186(b) of the Act was concerned, to this case… Citing *Olivier* with apparent approval, the court (Oosthuizen AJ), noting that the concept of 'reasonable expectation' as expressed in s 186(b) has no statutory definition, characterised it as including, essentially, 'an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of law would not foresee a remedy'. Whether or not the employee's expectation was reasonable, the court commented, must be deduced on the basis that 'apart from the subjective say-so or perception there is an objective basis for the creation of his expectation'. This must be assessed on an analysis of the facts and relevant circumstances bearing upon it."
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> And in *Dierks* the court held that the surrounding circumstances must be evaluated, including –
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> "the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice and nature of the employer's business."

[12] In summary, the test remains that set out by the LAC in *SA Rugby Players' Association v SA Rugby (Pty) Ltd:*[8]

> "The enquiry is whether a reasonable employee, in the circumstances prevailing at the time, would have expected the employer to renew his or her fixed term contract on the same or similar terms."

[13] Applying these principles, the arbitrator took account of the fact that the initial advertisement to which the employee responded envisaged a permanent position. The parties only agreed to a fixed term contract in order to mitigate the impact of the huge financial implications in respect of

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[6] (2000) 21 *ILJ* 1758 (LC) para [26].

[7] [1999] 4 BLLR 304 (LC).

[8] (2008) 29 *ILJ* 2218 (LAC) para [44].

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medical aid and provident fund should he have been permanently employed, given his age. That much was confirmed by Goduka. And the arbitrator rejected the belated version of Dr Mokgubu that that employee had to mentor a successor – that had never been raised before Mokgubu testified.

[14] The arbitrator agreed with Armscor that the fact that the contract was "renewable" did not amount to a guarantee – it merely meant that it was "able to be renewed". But, given the assurance in the email from Mokgubu that it was "renewable subject to performance", he likened it to a suspensive condition – performance was the only significant condition set for the possible renewal of the contract. If the employee performed, he was "in line to have his contract renewed". He had performed. Goduka supported the renewal of his contract. In those circumstances, he held a subjective expectation of renewal.

[15] Goduka confirmed during cross-examination that he had the delegated authority to appoint employees, i.e. to renew the contract; but the arbitrator noted that he also then said that he needed approval from the CEO. The arbitrator accepted, having considered all the evidence, that Goduka, who was the general manager and delegated authority, wanted to exercise the "option to renew" the contract up to the employee's retirement age at 65. He had communicated this to the employee; what he had not done, is to tell the employee that it was subject to approval by the CEO. Hence from October 2013 (when the employee and Goduka drafted the joint motivation) until March 2014, the employee had reasonably held the expectation that his contract would be renewed. And in any event, given that the contract was renewable 'subject to performance', the employee had persuasively demonstrated his subjective expectation. Furthermore, the arbitrator found, the employee had met the standard as stated in *SA Rugby*, i.e. that "a reasonable employee, in the circumstances prevailing at the time, would have expected the employer to renew the contract on the same or similar terms".

[16] The arbitrator then considered whether the dismissal was fair, or, as he put it, whether or not the employer's reasons for non-renewal were valid.

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[17] The reason given by Goduka was simply that Parliament had questioned the use of fixed term contracts. The arbitrator found that Armscor had taken a unilateral approach to terminate the contract, without considering the peculiarities of the situation. The resultant termination was unfair.

[18] As to remedy, the arbitrator took into account that the contract had been renewed for three months. He ordered Armscor to renew it further from 1 July 2014 until 31 December 2016. He did not order costs.

Review grounds

[19] Mr *Ackermann*, for the applicant, set out five grounds of review, arguing that the arbitrator was wrong on the facts:

19.1 Goduka's support did not lead to a reasonable expectation of renewal.

19.2 The contract itself did not envisage its automatic renewal or a reasonable expectation of renewal.

19.3 Performance was not the only criterion for renewal.

19.4 The arbitrator was wrong in concluding that other criteria were not communicated to the employee.

19.5 Goduka did not have the authority to renew the contract.

Evaluation / Analysis

[20] As Mr *Ackermann* correctly submitted, the question whether there was a dismissal in terms of s 186(1)(b) goes to jurisdiction. The test on review is therefore not whether the arbitrator acted reasonably, but whether he was correct in determining that the employee had been dismissed.[9]

[21] The onus was on the employee to show that he held a reasonable expectation of renewal.[10] Tlaletsi AJA[11]posited this test to discharge the onus:

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[9] *SA Rugby* (above) para [41]. See also *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* [2012] 4 BLLR 354 (LC); (2012) 33 ILJ 1171 (LC).

[10] *SA Rugby* para [44].

[11] (as he then was) in *SA Rugby* para [44].

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> "[The employee] had to place facts which, objectively considered, established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew his or her fixed-term contract on the same or similar terms. As soon as the other requirements of s 186(1)(b) have been satisfied it would then be found that [the employee] had been dismissed, and [the employer] would have to establish that the dismissal was both procedurally and substantively fair."

The first stage: a subjective expectation?

[22] The starting point is the wording of the contract itself. It sets out the fixed term period as follows: "You are appointed on a 3 year (fixed term, renewable contract) from 1 March 2011 until 31 March 2014."

[23] It is clear that the parties envisaged a renewable contract. That was amplified in the email from Dr Mokgubu to the employee that confirmed:

> "As discussed the offer will be a three year fixed term contract which is renewable subject to performance."

[24] I agree with Mr *Ackermann* that "renewable" does not mean that the contract would automatically be renewed. But, given that the employee had performed, I agree with the arbitrator that this factor reasonable raised the expectation of renewal with the employee.

[25] The employee formed the impression, based on Goduka's assurances and support, that his contract would be renewed. That subjective expectation was bolstered by the common cause fact that he had performed well. It is a similar situation to that in which the employee in a recent private arbitration found herself when her immediate superior assured her that her contract would be renewed but she was then informed by a more senior person that the company had decided against it.[12]

[26] It seems clear to me that the employee did subjectively expect his contract to be renewed. Mr *Ackermann* argued that this is not borne out by his motivation and "plea" for renewal; but, having motivated why the contract

[12] *Jossel and Old Mutual Life Assurance Co Ltd* (IRC private arbitration award, 29 August 2016).

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should be renewed, the employee was assured of Goduka's support. That could only have bolstered his expectation.

The second stage: Was the expectation reasonable?

[27] Whether the expectation was reasonable must be assessed in the light of the context and other factors such as those outlined in *Dierks.* One of the primary factors is the purpose for concluding the fixed term contract in the first place, i.e. that the employee would have been appointed in a permanent position had it not been for his age, that made the cost of the provident fund and medical aid prohibitive.

Was the dismissal fair?

[28] The arbitrator found that the reasons for non-renewal were not valid. I agree.

[29] The only criterion stipulated for renewal was that of performance. The employee met that criterion. In the absence of other valid reasons having been communicated to the employee beforehand, the finding that the dismissal was unfair, is a reasonable one.[13]

Specific review grounds on the facts

[30] Insofar as the specific review grounds based on the arbitrator's factual findings have not been addressed in the discussion so far, I consider them individually.

Goduka's suppport

[31] Mr *Ackermann* argued that, if the employee subjectively believed that the contract would be renewed, he would not have needed to motivate for its renewal.

[32] I do not think that the employee adopting a "belts and braces" approach negates his subjective state of mind. Goduka led him to believe that, since he had performed well, his contract would be renewed once more until he

[13] The test for deciding whether there was dismissal is correctness; but, once that has been established, the test on review concerning the arbitrator's finding that the dismissal was unfair, and the appropriate remedy, is the reasonableness test outlined in *Sidumo.*

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reached retirement age. He assisted Goduka in drafting the motivation. The employee subjectively believed that the renewal would then be a formality, given Goduka's support. That led to a subjective expectation of renewal.

The wording of the contract

[33] The contract itself states that it is "renewable". I agree with Mr *Ackermann* that that in itself does not imply an automatic renewal, but merely an option to renew. But the contract must be read together with the email from Dr Mokgubu containing the offer of employment on a fixed term contract "which is renewable subject to performance". That would have raised the reasonable expectation in the mind of the employee that, should he perform satisfactorily, his contract would be renewed. And that expectation was bolstered by Goduka's support.

Performance criterion

[34] The only criterion for renewal mentioned by Dr Mokgubu in his offer of employment was that of performance. Neither Goduku nor Mokgubu ever raised a different criterion with the employee during the three years that he performed well. And the arbitrator correctly rejected the belated evidence of Dr Mokgubu that the employee was meant to mentor a successor: that version was not put to the employee in cross-examination, it was not raised in any performance discussions with the employee, and there was no evidence that the employee in fact mentored a successor or was expected to do so.

Other criteria

[35] No other criteria, other than performance, were communicated to the employee. As the arbitrator found, "there were no further indications about any other possible reasons which may lead to a renewal and conversely there is no indication in the contract that there is no prospect of renewal or that renewal is dependent upon the operational requirements of the [employer]."

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[36] The issue of Parliament wanting Armscor to appoint someone in a permanent position was not raised with the employee until March 2014. From July 2013 – when Goduka drafted his recommendation for renewal – until March 2014, the employee was oblivious of this motivation not to renew coming from outside the employer. It could not have detracted from his reasonable expectation of renewal.

[37] The employee's evidence in chief that Goduka did not tell him about the CEO's lack of support in December 2013 went unchallenged in cross-examination. On a balance of probabilities he only learnt of it on 4 March 2014. Had Goduka raised it before, either one of them would surely have followed it up in writing.

Implied authority

[38] Goduka said under cross-examination that he had the authority to appoint, i.e. to renew the contract. He then went on to say that he needed approval from the CEO. But he created the impression in the employee's mind that he had, at the least, ostensible authority. He wanted to exercise "the option to renew". I do not think that the arbitrator is wrong when he finds that Goduka adopted the position that renewal was a *fait accompli*.

Conclusion

[39] I agree with the arbitrator that the employee formed an expectation that his contract would be renewed; that the expectation was a reasonable one in all the circumstances; and that the failure to renew it on the same or similar terms amounted to a dismissal as defined in s 186(1)(b) of the LRA. I also agree that the dismissal was unfair, given the paucity of reasons for the non-renewal communicated to the employee. And the remedy was a fair and reasonable one.

[40] The award is not reviewable. Both parties asked for costs to follow the result. I see no reason in law or fairness to disagree. The employee's renewed fixed term contract will in any event come to an end in three months' time, on 31 December 2016.

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Order

The application is dismissed with costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Lourens Ackermann Instructed by Bowman Gilfillan Inc.
THIRD RESPONDENT:	Guy Elliot Instructed by Dorrington Jessop Inc.

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