IN THE LABOUR COURT OF SOUTH AFRICA

Case no: D57/19

Not Reportable

In the matter between:

UMLALAZI MUNICIPALITY	Applicant
And	
SILINDILE MUCOQUE	First Respondent
ARBITRATOR LEON PILLAY	Second Respondent
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC)	Third Respondent

Heard on: 27 January 2022

Delivered on: 27 October 2022

JUDGMENT

Govender AJ

INTRODUCTION

[1] This is an application to review and set aside the arbitration award, issued by the Second Respondent (Arbitrator) under case number KPD091802, handed down on 10 December 2018. In this Award, the Arbitrator found that the dismissal of the First Respondent (hereinafter referred to as the Employee for ease of reference), was procedurally and substantively unfair and reinstated her with retrospective effect. The Applicant is not satisfied with the Award and therefore seeks to set it aside to achieve the desired outcome that the employee is not reinstated.

[2] The employee was employed by the Applicant (the "employer"), as an intern in 2015. The internship was valid for 1 year. Thereafter, on 12 April 2016, the employee was appointed by the Applicant on a fixed term contract for 12 months as a Relief Building Administrator, in the Planning and Development Department with effect from 13 April 2016. The employee thereafter signed further 3 month contacts over a period of a further 12 months, up until June 2018 [1].

[3] The Applicant then offered the employee a further contract, this time valid for 2 months from May to 30 June 2018. Thereafter, the employee was given another contract for 1 month. The employee refused to sign the 1-month fixed term contract and was later given a letter to vacate her office. The employee's last day at work was 15 August 2018. The employee was paid for July 2018 and not for the period worked for August. She was earning R6 896.68 (six thousand eight hundred and ninety-six rand and sixty-eight cents) per month.

[4] The employee considered the notice to vacate her office as a dismissal and she referred an unfair dismissal to the third employee claiming that she was dismissed and that her dismissal was both procedurally and substantively unfairly and sought reinstatement.

[1] Page 2 of the Record at Lines 10-25; Page 3 Lines 24-25 and Pages 4-5 of the Record

[5] The review was filed out of time and there was an application brought for condonation. There was also an application by the employee to make the award an order of court. The employee's legal representatives indicated that they were not opposing the condonation application and were content to deal with the review on its merits. Costs are only sought in respect of the applications, as the employee allege that the Applicant was in default and therefore seeking an indulgence. Hence the only issue before the court is the review application.

COMMON CAUSE FACTS

[6] It is common cause that the employee was employed by the Applicant on fixed term contracts, of different durations and further that the contracts did not stipulate a reason they were fixed in term, as required by section 198B(6)(b) of the Labour Relations Act 1996.

[7] Further, that contracts were in respect of a post that, at the time, was on the organogram of the Applicant. Further, that the housing projects occur all the time and the employee was not employed in respect of a particular housing project or that the fixed term contracts were specifically linked to any housing projects.

[8] It is also common cause the employee refused signed the last contract offered to her by the Applicant, the duration of which was for a month.

MATERIAL BACKGROUND FACTS

[9] The employee joined the municipality as a graduate intern on 6 November 2015. Local Government Sector Education and Training Authority funded the internship program. The internship program was for a year and expired on 5 November 2016.

[10] The employee was appointed by the municipality on a fixed term contract for 12 months as a Relief Building Administrator as per appointment letter. When the first contract expired, the employee worked from April 2017 to June 2017, without a signed a contract. She

there after signed 3-month contracts which were rolled over till June 2018. These subsequent contracts were on the same terms and conditions as the first contract [2].

[11] The employee was then offered another contract for 2 months for May to 30 June 2018. During the month of June 2018, the employee was given another 1-month contract to sign. The employee was not willing to sign this contract and the matter was escalated to the Labour Relations Department to try and resolve it. However, the matter remained unresolved, and the employee persisted in her refusal to sign the 1-month contract and filed a grievance. Despite filing her grievance, the matter still remained unresolved. Thereafter, the Applicant alleges that since the employee had failed to sign the 1-month contract, her conduct was deemed as a repudiation of the Applicant's offer and consequently she was required to vacate her office. The last day of work for the employee was 15 August 2018. She was not satisfied with the manner in which her employment was terminated and referred an unfair dismissal dispute to the Third Respondent.

GROUNDS OF REVIEW

[12] The main basis of this review is that the Applicant contends that the Arbitrator committed a gross irregularity or exceeded his powers by acting unreasonably and unjustifiably on the following grounds:

a) He failed to consider that the employee had not been dismissed but that her contract had expired, and she had refused to sign another contract.

b) He failed to consider the evidence of the employer that the fixed term contracts concluded between the Applicant and the employee were linked to housing projects.

c) He failed to consider that it was not reasonably practical for the employer to offer the employee permanent employment until the post was funded and as a result issued an award completely devoid of any logic, i.e., the Applicant would need to have an approved budget to retain the employee on a permanent basis.

[2] Record pages 4 and 5 of the Record.

d) He failed to properly interpret section 198B (3) of the Labour Relations Act. 66,1995 (LRA) and misdirected himself in finding that because the reason for fixing the term had not been included in the contract, despite the Applicant leading material evidence concerning the justification for such contract, the employee was in terms of section 198B (5) deemed to be employed by the Applicant on a contract of an indefinite basis; and

e) He failed to properly apply his mind in finding that the employee had been dismissed and that such dismissal was procedurally and substantively unfair.

[13] In amplification, the Applicant alleged that the Arbitrator was in conflict with the behest of the Act and did not pay sufficient heed to the Applicant's preliminary point contending that there was no dismissal. The Applicants allege that the Arbitrator ought to have made a ruling on this point first before proceeding to the merits. Further, that since the Applicant had disputed the existence of a dismissal, the onus of proof shifted to the employee to prove or show that indeed there was a dismissal. Further, that the Arbitrator had acknowledged the preliminary point but rather than dealing with it, he misdirected himself by wanting the employee to address him on why she was dismissed and why she thought it was unfair.[3] Further that the Arbitrator did not give the Applicant an opportunity to address him in terms of section 188 of the Labour Relations Act. Further, had the Arbitrator initially ruled on whether or not there was a dismissal, then the Applicant would have been in a better position to deal with a response.

[14] Further, the Arbitrator disregarded evidence that the contracts were linked to housing projects albeit the employee did not challenge this evidence. The Arbitrator misdirected himself by only considering that the contracts did not stipulate the reasons for such extensions. Further since the employee was fully aware that she was employed on a fixed term contract, knew the expiration dates thereof and since each contract clearly stated that the appointments would not create any expectation of appointment there could not have been expectation of employment and the Arbitrator ought not to have made this finding.

[3] P2 of the transcribed record, lines 5-15 and p7 of the transcribed record, line 25.

[15] The Applicant maintains that in light of these grounds the Arbitrator's award is not one of a reasonable and objective decision maker, was unjustifiable in relation to the reasons advanced and further, he exceeded his powers and committed a gross irregularity in the proceedings resulting in him misconceiving the nature of the enquiry. Therefore, the award must be set aside.

THE TEST ON REVIEW

[16] The test that the Labour Court is required to apply in this review of the arbitrator's award is the following:

> "*Is the decision reached by the Arbitrator one that a reasonable decision maker could not reach?*[4]"

[17] In Sidumo supra the Constitutional Court clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[18] Material errors of fact , as well the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside , but are only of any consequence if their effect is to render the outcome unreasonable.

[19] In doing considering whether the finding reached is reasonable one must guard against a fragmented approach of what the Arbitrator failed to consider or what the Arbitrator considered to reach his finding. **Goldfields Mining SA (Pty) Ltd (Kloof Goldmine) v CCMA**[5], the court rejected a piecemeal or fragmented approach to reviews where each factor that the Arbitrator failed to consider is analysed individually and independently for two reasons. The first is that it (assumes the form of an appeal) and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then

[4] Sidumo & Another v Rustenburg Platinum Mines Ltd & Others 2008 (2) SA 25 (CC) at para 11 10.
[5] 2014 (1) BLLR 20 (LAC)

decide whether the decision made by the arbitrator is one that a reasonable decision maker could make. To evaluate every factor individually and independently is to defeat the requirements in section 138 of the Labour Relations Act in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly.[6]

[20] Basically, this means that the reasons advanced by the Arbitrator for his finding are not necessarily the only determining factor of whether the finding is reasonable or not based on the evidence before him. Even if the reviewing court were of the view, after considering the evidence in totality and despite the reasons stipulated for the finding, that the finding is nonetheless reasonable then such Award must stand. Further, it must be borne in mind, that in determining whether a decision or arbitration award is reasonable, a stringent test is applied that ensures that awards are not lightly interfered with[7].

[21] The question to be determined by this Court is whether the Arbitrator was correct in finding that the employee was dismissed when her contract was not renewed or renewed on less favourable conditions. The existence or otherwise of a dismissal is a jurisdictional issue and in that the determination the correctness standard and not reasonable standard must be applied. The LAC has made it clear that the test for reviewing a jurisdictional issue , as in this case where the first issue is whether a dismissal has taken place , is an objective test and reasonableness is the not the standard .[8] The LAC further clarified the issue in Jonsson Uniforms Solutions (Pty)Ltd v Brown and Others (2014)JOL32513, where it was held that the generally accepted view is that we have a bifurcated review standard viz reasonableness and correctness. In matters where the factual finding is challenged on review, the reasonable decision maker test is applied and where the legal or jurisdictional findings are challenged, the correctness test is applied. There will however be situations where the legal issues are inextricably linked with to the facts so the reasonable decision maker test is applied.

[6] Goldfields at paras 18-21
[7] Sidumo supra
[8] Pikitup Johannesburg(SOC)Ltd v Muguto (2019) 10 BLLR 1146 (LC)

[22] A determination in terms of S186(1)(b) of the LRA is confined to determining whether there was a reasonable expectation that an FTC would be renewed and not permanent employment . Hence the question here is whether the arbitrator was correct in his finding that there was a dismissal.

ANALYSIS

[23] Both the Applicant and employee's versions are recorded in detail in the arbitrator's award and in the transcribed records and in the pleadings and therefore will not be repeated in further detail herein. I will only refer to those salient facts which are in my view pertinent to this review application.

[24] The dispute that was before the Arbitrator and correctly identified by him was a simple one and that is, whether or not the "dismissal" was substantively and procedurally fair. On the issue of procedural fairness, the employee had contended that she was denied an opportunity of a notice period and was not given any reasons for her dismissal but was simply told to vacate her offices. On the issue of substantive fairness, the employee maintained that she had a legitimate expectation to permanent employment created by the fixed term contracts that she had signed previously and by the fact that there was still a need for her services within the employment of the municipality in terms of housing projects, and further, in terms of section 198B of the LRA she was deemed to be permanently employed.

[25] The employer on the other hand, disputed that the employee was permanently employed or that there was any reasonable expectation of legitimate employment. The employer alleged that the contracts were for a specific duration and moreover, the contracts specifically provided that a signing thereof would not create any legitimate expectation of permanent employment. Further, that the employee's refusal to sign the last 1-month contract, was considered a repudiation and rejection of the offer of employment. On that basis, the Applicant claims that there was never a dismissal. The Arbitrator erred by not establishing first whether or not there was a dismissal, making a definitive ruling on this point, and thereafter allowing the Applicant to present their case.

THE AWARD

[26] The following paragraphs relating to the arbitrator's analysis of the evidence and arguments are important for this matter:

1. "*The first issue that I am required to determine is whether the Applicant was dismissed by the employee or whether the Applicant simply refused another fixed term contract resulting in the termination of the Applicant's employment at the employee."*
2. Section 198B (1) states that a fixed term contract of employment is *"A contract of employment that terminates on-*

    a) the occurrence of a specific event.

    b) the completion of a specified task or event; or

    c) a fixed date, other than an employee normal or agreed retirement age, subject to sub-section (3)".

The provisions of sub-section (2) deal with exclusions, none of which are applicable to the Applicant.

The provisions of section 198B (3) states as follows:

> *"(3) an employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than 3 months of employment only if:*
>
> *(a) the nature of the work for which the employee is employed is of a limited or definite duration; or*
>
> *(b) the employer can demonstrate any other justifiable reason for fixing the term of the contract."*

Sub-sections 5 and 6 provide as follows:

"(5) Employment in terms of a fixed term contract concluded or renewed in contravention of sub-section (3) is deemed to be of indefinite duration.

(6) An offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract must-

(a) be in writing; and

(b) state the reason contemplated in sub-section (3)(a) or (b)."

*In the case of the Applicant the parties did produce a contract of employment that stipulated the various terms and conditions of employment. The clause on "**duration** stated that the contract would **run for a period of 1 month commencing on 01 July 2018**---".*
There is no clause that records the reason for fixing the term of the contract and the clause on the termination of agreement stated this agreement may be terminated:

(i) At the expiry date specified in this contract, it being noted that the employee will not hold any expectation of a fulltime or permanent employment at the municipality.

(ii) By the employer without any notice or any payment in lieu of notice in case of gross misconduct or dishonesty on the part of the employee. The employee guarantees that in such event she will follow the procedure laid down in the disciplinary code and procedure.:"

It is common cause that the successive fixed term contracts exceeded 3 months therefore in the absence of a stipulated reason for fixing the term, the Applicant, in accordance with section 198(B)(5), is deemed to be employed by the employee on a contract of indefinite duration. It is also the employee's version that the employee needed a warm body to perform the duties that were performed by the Applicant.
Based on the above, the employee's reliance on the expiry of the fixed term contract and the refusal of the Applicant to sign the renewal / extension of the contract, in order to terminate the employment relationship between the Applicant and the employee, is ill conceived. By

operation of law the Applicant is deemed to have been employed on a contract of indefinite duration. As I have found that the Applicant is deemed by law to be employed on a contract of indefinite duration, the termination of the employment relationship by the employee, constitutes a dismissal.

All that I have before me is a contract that stipulates the date when the contract would terminate and the say-so of the HR Manager that the contracts were linked to housing projects, which is not found in any document or evidence. Further the employee accepted that the position occupied by the Applicant was on the employee's organogram, albeit it unpaid, and that the Applicant's services were still required after the contract had expired.

The employee incorrectly believed that as the Applicant's fixed term contract of employment had expired, there was no employment relationship in existence. Notwithstanding the fact that there wasn't a signed contract, the Applicant worked for the month of July 2018, and she was paid. Clearly therefore there was a contract of employment in existence. The same situation existed from 1 August 2018 to 14 August 2018.

Under the circumstances the only reason for terminating the Applicant's employment was a refusal to sign another fixed term contract. I therefore find that the employee did not have a fair reason to terminate the Applicant's contract of employment with the employee, nor did the employee follow a fair procedure.

The employee is ordered to reinstate the Applicant to her position as a data capture on the same terms and conditions of employment that prevailed prior to her dismissal and order to pay the Applicant retrospective salary amounting to R30 513.52 (thirty thousand five hundred and thirteen rand and fifty-two cents) within 14 (fourteen) days of the employee being informed of this award."

Was the manner in which the Arbitrator dealt with issue of the "dismissal" irregular?

[27] I have considered the above reasons advanced for the finding together with the evidence lead. One of the Applicant's main contentions of irregularity is that the employer was not given an opportunity to respond or rather to prove that the dismissal was fair once the Arbitrator found there was a "dismissal." Their basis for this contention is that the onus on the employee to establish her dismissal and once a dismissal was established, the onus then shifted on the employer to prove that the dismissal was substantively and procedurally

fair. Since there was no formal ruling on this jurisdictional issue, the employer did not respond to the merits. The Applicant alleges that its entire case was predicated on its version that there was no dismissal.

[28] However, I disagree that this conduct makes the award defective. The Arbitrator at the hearing informed both parties as to he how he will deal with the issue of the dismissal. The issue pertaining to the termination of the employment was in any event canvassed satisfactorily by the applicant. The Arbitrator from the outset informed the parties of how he was going to conduct the hearing. This was his prerogative, providing he acted fairly to all parties and dealt with the substantial merits of the dispute[9]. He found that contracts only had a termination date and that evidence that contracts for were housing projects were not supported by any documentary evidence. The arbitrator has the power to determine the procedure to be followed at the hearing, bearing in mind his overall duty of fairness to both parties in the proceedings.

[29] Evidence was led by the employee as to the circumstances which led to her termination of employment. She alleged it was a dismissal and of course the Applicants maintained it was not a dismissal. The Arbitrator called the evidence of the Applicant first and he correctly identified that she had the onus to establish the dismissal. He understood the dispute and dealt with the substantial merits of the dispute and this is evident from his award.

[30] The Applicant had an opportunity to respond and did respond to her allegations of an unfair dismissal through the evidence of Mr Mthethwa, the HR manager. The Applicant presented their version that the employee's repudiation was the only reason for the termination of the employment relationship. This is crystal clear from the record.

[31] The employer elaborated further in evidence, that the contracts were for a stipulated period and that the employee could not be employed as the post was not yet funded even

[9] Kloof Goldmine Supra, an arbitrator must deal with a dispute with the minimum of legal formalities and expeditiously and fairly.

though it was on the organogram. Further they presented evidence that the contracts were for limited duration given the nature of work. Further that during consultations it was communicated to the employee that contracts were fixed even if it was not contained in the written contracts. After consideration of the employer's version a determination was made by the Arbitrator that there was, in fact, no repudiation but, in fact, a dismissal because the Applicants were incorrect in their belief and/or stance that the Applicant was employed on a fixed term contract only, when the facts revealed otherwise.

[32] Clearly this was done based on the evidence that was lead before him. I find that on a consideration of the evidence in totality, that even though the Arbitrator did not make the specific ruling that there was, in fact, a dismissal, the Applicants nonetheless had an opportunity to present evidence to support their contentions that it was not a dismissal. I re-iterate that the evidence of Mr Mthethwa was clear that the employer, considered the refusal of the employee to sign the 1-month contract as a repudiation of the offer of employment. Further, the employer led evidence to illustrate all the reasons why the employee was considered a contract worker. Hence there really was nothing further that the Arbitrator needed to consider apart from the evidence of Mr Mthethwa and the evidence of the employee as to the reasons for the termination. Bearing in mind that this is an objective determination.

[33] The Applicant does not state what further evidence it would have led, (apart from the evidence that it did lead at arbitration) in the event that there was a formal ruling on whether or not there was a dismissal and how this evidence may have impacted on the outcome. In *casu*, if there was a formal ruling on whether there was a dismissal and then further evidence lead on the fairness thereof, would in my view (considering the evidence lead and the versions of both parties herein) only resulted in repetitive evidence. The Arbitrator has the powers to conduct the arbitration hearing with a minimum of formalities and resolve the true dispute between the parties. The corner stone of all arbitration proceedings is the issue of fairness to both parties and that consideration entails whether or not both parties had an opportunity to present their case and their understanding of the true nature of the dispute. Cleary all parties understood the nature of the dispute, and both had fair opportunity to present

evidence of its choice to prove its versions, which both did. In my view, the Applicant was not prejudiced, and I am not persuaded that the outcome would have been any different.

[34] The Arbitrator specifically dealt with the issue of the Applicant, incorrectly believing that the employee's fixed term contract had expired and that there was no employment relationship in existence. The reasons are set out in detail in the Award. Hence, he considered the reasons advanced by the Applicant as to why the employment relationship was terminated. If the onus shifted to the Applicant after a Ruling on "dismissal", the Applicants would have still in my view had to maintain its version that termination was due to the employee's refusal to sign a further contract for one month.

Did the Employee have a reasonable expectation of renewal and was the employment of an indefinite duration?

[35] It is trite that according to S198B (3) of the Act, an employer may employ an employee on a fixed term contract or successive fixed term contracts of longer than 3 months only if the nature of the work is of a limited or definite duration or the employer can demonstrate any justifiable reason for fixing the terms of the contract. If any employer is unable to meet the requirements, the employee will be deemed employed on for an indefinite duration.

[36] In *casu*, it is common cause that the HR Manager, Mr Mthethwa, conceded that after the Applicant stopped working, there was still a need for her services. Further, the position remained on the organogram, although not funded. Further, that there were no reasons stipulated in the contract indicating why the employee is employed for a limited or definite duration. Most interesting is the fact that she continued to work for a month and 15 days without any contract in place. In my view, on the reading of the transcripts, the Arbitrator was very much alive to the fact, that although the Applicant refused to sign the 1-month contract for July 2018, she nonetheless continued to work and was paid for the month of July.

So, when she worked in July there was no fixed term contract signed.[10] She also continued to work for 15 days in August before she received a letter of a notice to terminate.

[37] The employee has to demonstrate the existence of a reasonable or legitimate expectation of a renewal. Herein pertinent to the employee's case was the renewal of numerous fixed term contracts. The fact of regular 3-month rollover contracts which continued for 12 months. Noteworthy, is that the Applicant worked from April 2017 to June 2017 without a written contract in place. Again, her rendering of services for the month of July and half of August 2018 without a written contract. The fact the Applicant's witness conceded that there is still a need for services post termination. The evidence that the employer wanted her permanently if there was a budget. The employee certainly in my view discharged the onus on her to prove her reasonable expectation of continued employment. These facts collectively, clearly demonstrate that the provisions of S198B (3) of the LRA were not met and in terms of the of S198B (5) (6), the employment was deemed of an indefinite duration. The Arbitrator was correct in this finding.

[38] The basic definition of an employment relationship is the offering of services, under certain conditions in return for renumeration. Clearly for the month of July the employee continued to work, she offered her services, and she was renumerated for July, so an employment relationship did exist, even post the expiration of the two-month contract on 30 June 2018. Further, the Applicant's services were still required thereafter and hence there was no reason for the Applicant to have terminated the employee's employment simply because she refused to sign a contract on less favourable terms.

[39] I am satisfied and accept that the most natural and plausible conclusion to be drawn from the evidence in this case and as presented before the Arbitrator is that an employment relationship existed between the Applicant and the employee, even post June 2018. The fact of the numerous fixed term contracts and the repeated renewals, indeed created a

[10] P28 of the transcripts, lines 14-20.

reasonable and legitimate expectation of employment when one considers the evidence that there was still a need for the services rendered by the employee and that the employer wanted to retain the employee but was awaiting funding. The objective factors certainly support the subjective belief of the employee herein.

[40] The Arbitrator's findings that there was indeed an employment relationship which had been unfairly terminated is thus entirely sustainable and certainly not irregular. In short, the finding is a correct outcome.

CONCLUSION

[41] In light of these considerations, the Arbitrator's award is correct in that it cannot be said to be entirely disconnected with or unsupported by the evidence. The evidence lead at the arbitration clearly bears out the fairness and correctness of the Arbitrator's findings that the employee's dismissal was both procedurally and substantively unfair. This finding does not, in my view, fall outside a range of reasonable conclusions to the employee's case. It is clear the Arbitrator properly identified the issue before him ,gave all parties a full opportunity to have their say ,weighed up all the evidence before him, dealt with the substantial merits and it is in the light of all those circumstances that he correctly found that the Applicant had been unfairly dismissed and that she was properly deemed as employed on an indefinite contract .

[42] In the premises, the Applicant's review has no basis as the Arbitrator's finding of procedural and substantive fairness was certainly substantiated by the evidence lead at the arbitration and is not in any way irregular.

[43] The finding must accordingly be upheld.

COSTS

[44] I am not persuaded to make any costs orders herein for any of the applications.

ORDER

[45] In the premises I make the following order:

1. The review application is dismissed.

2. The Award dated 28 November 2018. under case number KPD 091802, is made an Order of Court.

3. There is no order as to costs. Neither do I make any costs orders in respective of the application to stay or the application to make the Award and Order of court.

N GOVENDER AJ

Acting Judge of the Labour

Court of South Africa

Appearances:

On behalf of the Applicant: Derik Jafta Attorneys

On behalf of the respondent: Messers Jafta Incorporated Attorneys