Not Reportable

In the Labour Court of South Africa
Held at Johannesburg

Case Number: J4015/99
29 JUNE 2000

In the matter between:-

Applicant

and

First Respondent

DA Second Respondent

COMMISSION FOR CONCILIATION,
Third Respondent

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JUDGMENT 17 July 2000

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PILLAY AJ

[1] This is an application to review and set aside the arbitration award of the first respondent in terms of section 145 of the Labour Relations Act No 66 of 1995.

[2] The applicant was initially employed by the second respondent as a lecturer in the Department of Chemistry from 1 January 1991 to 31 December 1993 in terms of a fixed term contract. She was appointed again to the position on two successive terms of two years each.

[3] The applicant received notice on 15 October 1998 that her third fixed term contract would be expiring on 31 December 1998.

[4] She referred for conciliation to the third respondent a dispute relating to an alleged unfair dismissal and unfair labour practice on 9December 1998. The dispute was classified in the certificate (Form 7.12) as an alleged unfair dismissal. The applicant then referred it to arbitration as such.

[5] The applicant alleged that she held a reasonable expectation to have the fixed term contract renewed because:

- she had been advised that the advertising of posts was a requirement not of the second respondent itself but to satisfy the Department of Home Affairs that the post could not be filled by a South African citizen;
- she would qualify for permanent appointment upon obtaining South African citizenship;
- she had obtained permanent citizenship on 2nd December 1998;
- the applicant's period of service from January 1991 to 1998 was regarded as continuous for purposes of provident fund benefits;
- she was given sabbatical leave from March to June 1998, a privilege that was accorded to academic staff of more than five years' service;
- she was given a regular salary increase;
- she received favourable reports about her performance and ability;
- she was issued with the lecture schedule and work load for 1999;
- she was assured by the Human Resources Director of the second respondent that she could expect to be permanently appointed because of her South

African citizenship;

- the applicant's head of department, Professor Malepo, had also reassured her by saying that he would support her application;
- the acting head of department had informed the academic registrar that her services would be essential during January and February 1999.

[6] The second respondent denied that there was a basis for the applicant to have any expectation of the renewal of her contract for the following reasons:

- Her contract had not, on previous occasions, been renewed. Her position had always been advertised in the national newspapers and she had been interviewed along with other job applicants. However, unlike on the previous occasions, the respondent was unable to finalise the advertisement and interview process for the position before the expiry of applicant's fixed term contract on 31 December 1998.

- Furthermore, when the interview was eventually held, the applicant was found to be unsuitable because she failed to respond adequately to questions posed by the interview panel.

[7] On 14 September 1999 the first respondent delivered his award. He awarded that the applicant had not been dismissed in terms of section 186(b) of the Labour Relations Act. He found that the legitimate expectation contemplated in section 186(b) applies only when a fixed term contract has been previously renewed: it did not apply in the case where the applicant had been previously re-appointed after being interviewed.

[8] The First respondent also found that no unfair labour practice as contemplated in Item 2.1(b) of Part B of Schedule 7 had been committed as the case had nothing to do with the promotion, demotion, training or the provision of benefits to the applicant.

[9] Furthermore, he concluded that the second respondent had applied the relevant decision of its council regarding reappointments consistently.

[10] At the end of the arbitration the first respondent had given directions to the parties to submit written heads of argument to him and to deal therein with the question whether the principle of legitimate expectation applied to an employee who had been appointed in terms of a fixed term contract in circumstances where the position was re-advertised as opposed to a situation where the fixed term contract was automatically renewed upon expiry.

[11] The parties, who had legal representation at the arbitration, seemed to have accepted the direction and substantially complied with it.

[12] It is common cause that the applicant's employment contract was not automatically renewed upon the expiry of each successive term. The position was always re-advertised and the applicant was required to re-apply for the position. She was interviewed along with other applicants and had been successful on two occasions since her initial appointment.

[13] The first Respondent based his finding that there was a fresh appointment of the applicant on each occasion and not an automatic renewal of her fixed term contract on these very facts which were common cause. That being the case, his award does not fall to be reviewed and set aside.

[14] The applicant laboured under the mistaken belief that this review was an opportunity for a fresh hearing or could be conducted as an appeal. Another arbitrator might well have come to a different conclusion on the same facts. However, that is not the test for a review. (*Lekota v First National Bank of SA LTD* [1998] 10 BLLR 1021 (LC); *County Fair Foods (Pty) Ltd v CCMA & Others* [1999] 11 BLLR 1117 (LAC); *Carephone (Pty) Ltd v Marcus NO & Others* [1998] 11 BLLR 1093 (LAC)) A number of issues which fall outside the narrow ambit of a review in terms of section 145 were however, canvassed. I do not intend to deal with all these issues. Nevertheless, some of the submissions warrant comment by the court.

[15] It was submitted for the applicant that the first respondent had erred in concluding that the position for which she had applied was not the same as in previous years. When read in context it is obvious that the first respondent did not come to such a conclusion but was in fact referring to the job content of the position which had changed by the inclusion of organic chemistry as a requirement. The change was also common cause.

[16] Whatever the job content of the position was and whether it influenced the first Respondent in concluding that the Applicant could not have had a reasonable

expectation of employment, became immaterial once the interviewing panel found her unsuitable. That decision of the panel was not open to challenge at the arbitration once the first respondent concluded that the dispute did not fall within the ambit of Item 2(1)(b) of Part B of Schedule 7 because the contract had not been renewed previously . Consequently, whether the Applicant had done research in organic chemistry was equally irrelevant. Neither the first respondent nor this court should substitute itself as the interviewing panel and consider the suitability of the applicant for the position.

[17] Mr Verster submitted for the applicant that the first respondent had committed a serious error of law in that he misconstrued the import of the decision in *Dierkes v University of South Africa* 1999 (4) BLLR 304 (LC) by finding that an employee can only rely on section 186(b) of the LRA if his or her contract has previously been renewed.

[18] I do not agree that such a misconstruction can be inferred from the award. The first respondent was applying the facts of the *Dierkes*' case to this case. In *Dierkes*' case the employee's previous contracts with the respondent had been renewed. Despite this, Oosthuizen, A J had found that nothing had been said to *Dierkes* to give rise to a reasonable expectation of renewal. In this case, the first Respondent found that there had been no renewal of her contract; therefore even if he committed an error of law it would not have affected the outcome of the arbitration. It was therefore not so serious as to amount to an irregularity or misconduct on the part of the first respondent.

[19] The issue of permanent employment which was canvassed in the *Dierkes*' case became a secondary issue in this case, the primary issue being whether there was a legitimate expectation to renew the contract, be it on a permanent or fixed term basis.

[20] *McInnes v Technokon Natal* [2000] 6 BLLR 701 (LC) also does not support the Applicant because in that case too *Mc Innes*' contract of employment had been renewed on previous occasions. That her
contract had not been renewed previously is a *bona fide* conclusion of fact which, as pointed out above, is not open to review.

[21] With regard to the council policy on the advertising of posts on re-appointment, the first Respondent was mindful of the dispute between the representatives of the parties at arbitration as to the interpretation to be placed on the policy. Nothing prevented him from interpreting the policy himself. He was not obliged to revert to the parties first before interpreting the policy, as contended by the applicant. Even if his interpretation of the policy was incorrect it is a conclusion of fact which does not in the circumstances amount to a gross irregularity or misconduct on his part.

[22] The applicant relied on the date of dismissal at the arbitration to be 9 December 1998. That was a date on which the letter dated 8 December 1998 from the second respondent came to her attention. That letter informed her for the first time formally that no interviews would take place prior to the expiry of her fixed term contract and that interviews would only be held the

following year. The applicant inferred from this that the second respondent had refused to renew her fixed term contract.

[23] The date of the dismissal was not canvassed as an issue in dispute in the award. The first Respondent had apparently accepted that the contract had expired in December 1998. However, it was put in issue during argument in this application.

[24] In the referral to arbitration (LRA Form 7.11) the applicant recorded in the section under "Special features" that "on December 31 the employment terminates."

[25] On the other hand, on 15 October 1998 the applicant was notified that her fixed term contract would not be renewed. Despite these direct references to the termination of her employment, the applicant strained to construe the letter received on 9 December 1998 as the letter of dismissal.

[26] It was submitted on behalf of the applicant that neither the 15October nor 31 December 1998 were dates capable of being interpreted as the dates of dismissal as envisaged in section 190(2) of the LRA. The basis for this submission is not clear. The most probable reason for her pegging the date of dismissal as 9 December 1998 must have been to ensure that her referral was made timeously. If she had relied on the 15 October, she would have been out of time. If she regarded 31 December 1998 as the date of termination of her services her referral on 9 December 1998 would have been premature.

[24] The applicant had been informed of the decision that her contract would terminate on 15 October 1998. By implication it meant that she would not be reappointed. That was the effective date if she was relying on a dismissal in terms of section 186(b). However, if the arbitrator had taken account of her statement in the referral to arbitration form that "on December 31 the employment terminates," the first respondent cannot be faulted for concluding that the contract of employment had expired on 31 December 1998.

[25] It was common cause that the notice dated 15 October 1998 was fifteen days short of the prescribed period of three months. The first respondent did not discuss this at all in the award. This might have been a procedural irregularity if there had been a dismissal. But having found that there was no dismissal, it fell away.

[26] In the circumstances the application is dismissed with costs.

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D PILLAY, AJ

Date of hearing: 29 June 2000

nt: 17 July 2000