IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 3060/05

In the matter between:

MAJOVA NOBUBELE **APPLICANT**

and

R. W. M. KUJAWA **1st RESPONDENT**

SOUTHERN AFRICA ENTERPRISE DEVELOPMENT FUND (SAEDF) **2nd RESPONDENT**

JUDGMENT

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INTRODUCTION

[1] In terms of section 33 (1) of the Arbitration Act No 42 of 1965, ("the Act") the applicant seeks to have an arbitration award dated 31 October 2005 and issued by the first respondent, in a private

arbitration hearing, reviewed, set aside and substituted. The second respondent, in its capacity as the erstwhile employer of the applicant and in whose favour the award was issued, opposed the application.

BACKGROUND FACTS

[2] The third respondent ("the Fund") is an organisation funded by way of grant agreements. Its existence was linked to a period of the grant agreements. The extension of the grant agreement resulted in the extension of the lifespan of the fund. Where the grant agreement was not extended, it would mean the end of the existence of the fund. The fund had agreements with the lifespan of about 5 years. In the event that the fund would close down, there would be a period for the management and servicing of the 5 years long agreements. The grant agreement of the fund was previously due to expire in March 2005.

[3] On 5 November 2002 the applicant and the second respondent entered into a written fixed term contract of employment in terms of which the applicant was to work from 6 January 2003, as a Financial Manager of the fund until 30 September 2004. She reported to the Chief Financial Officer (CFO) who in turn reported to the Chief Executive Officer (CEO) of the Fund, who was then Mr Robert Kelly. On or about 1 April 2003 Mr Kelly was replaced by Mr Cecil Callahan.

[4] Sometime before November 2003, Mr Callahan, in consultation with the applicant, looked for and found a qualified chartered accountant in the person of Ms Thandiwe Mankahla. She was appointed as a Financial Manager of the fund, a position which was then vacated by the applicant. The applicant was henceforth allocated other duties, the nature of which is embroiled in the bone of contention.

[5] In or about May / June 2004 the Chairperson of the Audit Committee of the Fund, Mr Carl Maasters requested Ms Mankahla and the applicant to compile a report based on the review of various activities, performance and the management of the Fund. The report was submitted to Mr Masters in June 2004. The Board of Directors in charge of the Fund and based in Atlanta discussed the report and the issues therein raised in July 2004.

[6] On 23 August 2004 Mr Callahan put the applicant, Ms Mankahla and an accountant one Ms Macingwane on suspension pending a completion of investigations against them, upon a suspicion that they were guilty of serious acts of impropriety. The Fund put an advertisement of some of its posts in a newspaper on 12 September

2004. Whether any of such posts had been occupied by the applicant was placed in dispute. Then on 29 September 2004 the Fund issued a letter informing the applicant that her contract of employment expired on 30 September 2004, further informing her that, by virtue of the contract of employment it was being made clear that she could have no legitimate expectation of the renewal of that contract. She was informed that due to the recent events, the Fund had decided not to renew her contract. She was told not to report for duty on 30 September 2004. She felt that she had been wrongfully dismissed and she referred an unfair dismissal dispute to a private arbitration in terms of her written contract of employment. The first respondent dismissed her claims. It is that decision which she seeks to have reviewed, set aside and substituted.

THE ARBITRATION HEARING

[7] The main claim of the applicant is reliant on the alleged occurrence of two incidents, namely one on 1 November 2003 and secondly, the other in February 2004. Events leading up to each of there incidents are however relevant.

1. THE INCIDENT OF 1 NOVEMBER 2003

1.1 APPLICANT'S VERSION

[8] In May / June 2003 Mr Callahan attended a board meeting in Atlanta. Among issues he took along for a discussion was the appointment of the applicant as a CFO, as the previous incumbent had vacated the post. Mr Callahan was to recommend to the board that duties of the CFO and those of the Financial Manager be merged into one with the applicant appointed for it. Secondly, she was to be given a salary increase. On his return from the board meeting, Mr Callahan informed the applicant that the board declined to appoint her as the CFO due to the fact that she was not a chartered accountant. Mr Callahan was informed that it was within his powers as the CEO to give her a salary increase. Mr Callahan subsequently gave her a salary increase.

[9] In September 2003 there was another board meeting, where a new proposed structure, among other things, was presented to the board. In that proposed structure the applicant was in the fund accounting and administration department, which was a new department that

was to be formed. After that board meeting the applicant took part in the job interview for Ms Mankahla who was subsequently appointed as a Financial Manager in September 2003 and the applicant was then moved to that newly formed department. However, from September 2003 to January 2004 she was handing over to Ms Mankahla and she started to work as a Fund Administrator in January 2004.

[10] The applicant disputed a suggestion that her move from the position of a Financial Manager was due to a discovery by Mr Callahan that she had bad credit records and was consequently not suitable for the position. Her deposition was that she disclosed her bad credit status when she was interviewed for appointment by the Fund. It was up to the Fund at that stage not to hire her and it decided to take her into its employ. She averred that she was not the only Fund employee with bad credit records and she named those she regarded as in a position similar to her.

[11] In the founding affidavit, the applicant said that in the month of November 2003 the fund, duly represented by Mr Callahan entered into another agreement where by she was duly appointed to work

as a Fund Administrator (the second contract) for the Fund. She averred that the second contract was entered into with the intention of cancelling the first fixed term contract. No written contract was however signed. The Fund Administrator post was a full time position as was the case with the positions of Ms Mankahla, Ms Melanie Vocht and Ms Thabisa Ngwane.

THE VERSION OF THE FUND

[12] The applicant was employed in a fixed term contract with employment commencing on 6 January 2003 and automatically terminating on 30 September 2004.

[13] The fund had been under an internal audit by auditors KPMG whose findings were not favourable. The United States' Inspector General investigated the Fund. Mr Callahan requested KPMG to do a forensic audit and asked them to continue with the internal audit they were involved in. Instead KPMG resigned from being the Fund's accountant and took a contract with the US Inspector General to investigate the Fund. In June 2004 Mr Gerald Salange resigned from being a CFO, leaving the applicant as the next senior employee, after Mr Callahan. Mr Callahan noted that the applicant

did not have enough skills to be a Financial Manager but she appeared to prefer to be a Chartered Financial Analyst (CFA). He thought of creating a position for her in the Fund as she was all he had when he joined the Fund and she was trying to do the job. He felt that he owed her the obligation to try and find her something in the Fund throughout her contract and instead, to find a Chartered accountant to take over as the Financial Manager. He decided to split the duties of the Financial Manager into two components namely, the financial and operating side of the accounting field which would be retained by the Financial Manager and the investment part of the accounting job. In the process of restructuring the Fund, he thought of obtaining a Board approval which would see the creation of a new position for the investment part of the accounting and of appointing the applicant in that position. He had not made up his mind on what little to give to that position and thought it might be a Fund accountant or Fund administrator. In later developments the Board adopted the name internal controller for that position.

[14] As far as Mr Callahan was concerned the proposed new position which was to be given to the applicant was not really an official

proposal for adoption and acceptance by the Board. It might have been presented to someone as an idea or a concept. Mr Callahan admitted to having made a mistake of not immediately obtaining the Board's approval for the creation of the new post and to allow the applicant to take the post to continue her contract in it as a good and loyal employee of the Fund. He felt that he should have had the right to create positions in the Fund even if he had to go through some processes. He was critical of the position taken by the Board in being involved in the day to day operational activities of the Fund. As a result of that position, the Board would want to approve the creation of a new position in the Fund. According to Ms Voigt the creation of a new post did not need the Board's approval necessarily. According to her every new appointee, every restructure, every single appointment and a position created in the Fund had to have gone through the Human Resources (HR) Committee and had to be approved by the Board at every single Board meeting.

[15] Mr Callahan said that he did not discuss the issue of the duration of the undefined position held by the applicant after she vacated the Financial Manager's position. He undertook to continue to try to find a position in the Fund for her for as long as he was still working for the Fund.

THE MEETING OF FEBRUARY 2004

APPLICANT'S VERSION

[16] There was a staff meeting held in the boardroom. In that meeting Mr Callahan made a statement that he was abolishing the employment contracts. As such, nobody was to have employment contracts going forward. She understood the statement to mean that for any one who had a contract and it expired, that expiry will not be considered as happening or anyone who did not have a contract would not have to have one as there are people who joined the Fund but had no contracts. By a contract she understood a written contract such as the one she had signed on 5 November 2003. Mr Callahan said that anyone who was employed on a basis of a fixed term contract would immediately be employed on a full time contract, for an indefinite period. She took the statement made by Mr Callahan as an offer which she accepted immediately at the time he made it.

[17] The effect of the abolishment of fixed term contracts was on staff such as Thekiso whose fixed term contract expired in January 2004, Mr Andrew Buchanan with March or April being the expiry date and Tshepo with the expiry date in June 2004. When the applicant left the Fund the three staff were employed on a full time basis. To applicant's knowledge there was never any contract that the three staff signed after the termination of their fixed term contracts.

THE VERSION OF THE FUND

[18] Mr Callahan did not abolish the fixed term contracts in a February 2004 staff meeting as stated by the applicant. He was always surrounded by lawyers at work and even when he attended staff meetings. The lawyers would not allow him to abolish fixed term contracts. He did not want to renew the fixed term contracts as they had a history of being extended beyond the expiration of the grant given to the Fund which extension he felt was unfair to the Fund.

[19] There had been a staff complaint that Mr Callahan frequently threatened not to renew contracts of the staff whose performance was a cause for his concern. In the meantime, he had received advice not to renew fixed term contracts which came to an end. He opted to keep the employees whose fixed term contracts had expired, on a month to month employment basis. Such employment could then be terminated with a month's notice. However in July or August 2004 there was an official rejection of his attempts to get rid of the fixed term contracts.

[20] It was Mr Callahan's wish to restructure a number of positions of his staff. That was however dependent on the finalisation of the audit and the investigations conducted at the instance of the Inspector General. That is why he could not finalise the proper posting of the applicant in time.

Her fixed term employment contract was coming to an end on 30 September 2004 and she was advised accordingly of the same.

THE CHIEF ARBITRATION FINDINGS

[21] In support of her version that she was appointed as the Fund Administrator, the applicant referred to various documents. The first respondent examined those documents and found an inconsistency relating not only to the applicant's position but also that relating to which section or department she was employed in. In the documents she was referred to in various appellations. The first respondent found that the applicant was not employed as a Fund Administrator but that she was not sure what her position was.

[22] He found it inherently self contradictory that the applicant said she was appointed on a permanent basis in November 2003 and yet she accepted the offer of permanent employment made by Mr Callahan in February 2004. He found it to have been in all probabilities that she was informed that the Fund needed to appoint a registered chartered accountant to the position of Financial Manager and that an attempt would be made to find somewhere to fit her in. He found that the applicant had failed to show, on a balance of probabilities that in November 2003 a new contract of employment came into being thereby extinguishing the original contract. He found that, at best, there was a variation of the agreement relating specifically and only to the duties to be carried out by the applicant. The balance of her contract remained the same. He said

that if any terms were to be inferred relating to the period of the contract, it was very probable, given the nature of the business and existence of the fund, that the period would be fixed as it was in terms of the written contract. He found then that the applicant's contract of employment was terminated by the effluxion of time.

[23] He found that at the time that the applicant's fixed term contract came to an end she was on suspension; no indication was given that the fixed term contract would be extended. Whether verbally or in writing nor did she plead or testify as to any statements that her contract would be extended for a further period. He held that, if applicant's version was that she was on a permanent post as from November 2003, she would not have been employed in accordance with a fixed term contract and therefore section 186 (b) of the Act would not find application. He said that on applicant's version she ought to fail in the alternative claim. He said that probabilities militated against the applicant's version. He found the position of the applicant to have been different from that of Ms Voigt and Ms Macingwane as they did not sign any written agreement which bound and limited them to a fixed term of employment whereas the applicant did.

[25] He found that the issue of fixed term contracts was then still alive with the Fund personnel. He said that the fact that the minutes of a board meeting held in May 2004 recorded that Ms Voigt raised the issue of fixed term contracts at the meeting, indicated that, in all probabilities, the issue had not been resolved by May 2004. He found if probable that what Mr Callahan said in February was that he would attempt to abolish fixed term contracts but apparently failed to do so. In respect of other grounds raised to establish a reasonable expectation he said that those were factors which were entirely incidental to and consistent with a normal employment relationship. He found that the grounds did not in and of themselves, even when viewed together, constitute representation that the applicant's contract would be extended.

[26] According to him it did not assist the applicant that there were certain circumstances in which contracts were not renewed but that employees were retained. In such an instance employees would be employed on a monthly basis whose employment could be terminated on one month notice, where as the applicant was suspended and then notified that her contract would not be

renewed. He found no basis for believing that she would simply continue on a monthly basis. He concluded that there could have been no reasonable expectation on the part of the applicant that her contract would be renewed and accordingly that the alternative claim was to fail.

GROUNDS FOR REVIEW

[27] The first respondent was said to have:

- Committed gross irregularities in the conduct of the arbitration proceedings,
- Misconducted himself in relation to his duties. The mistakes were so gross and or manifest that it showed misconduct and / or partiality on his conduct and
- Exceeded his powers.

[28] The following are some of the incidents which were identified by the applicant as evidence in support of the grounds of review:-

1. He failed to analyse the pleadings and the evidence correctly and sufficiently thus resulting in wrong conclusions of fact and law,

2. He made incorrect and insufficient analysis and the summary of the evidence that was given during the proceedings thereby omitting material evidence which led to him making incorrect conclusions of fact and law,
3. He ignored material evidence of the applicant of which, had he considered it, he would have come to a different conclusion,
4. He admitted hearsay evidence and also made it part of his award even though

the applicant duly objected thereto. Had he rejected that evidence he would have come to a different conclusion,

5. He failed, refused and neglected to evaluate the evidence of the second respondent so that he could compare it with that of the applicant. His award shows that his approach was that, the second respondent successfully made an application for absolution from the instance during the proceedings, thereby coming to wrong conclusions of fact and law,

6. He made findings of fact and law on matters that were not pleaded or if pleaded, they were pleaded in a vague and embarrassing manner. On those matters, no evidence was led,

7. The particulars of claim consist of two claims that were pleaded in an alternative to one another. The first claim was novation and the second (alternative) claim was reasonable expectation. The award showed that when the arbitrator was making a decision on the first claim, he "transplanted" the averments together with the accompanying evidence that was made in the second claim, for the second claim into the first claim.

8. The award indicates that the Arbitration was partial in favour of the second respondent in that even though he failed, refused and neglected to evaluate the evidence of the second respondent, he nevertheless was overly technical in assessing the evidence of the applicant thus ignoring the basic rule that substance prevails over form.

9. He misconceived the true legal nature and the position that was relevant to the facts that were presented to him during the proceedings.

10. The cumulative result of the aforementioned defects in the proceedings was that the applicant did not receive a fair trial of the issues as contemplated in section 34 of the Bill of Rights.

2nd RESPONDENT'S RESPONSE

[29] The applicant's grounds of review are an appeal brought under the guise of a review which is impermissible and that the application

should therefore be dismissed. There is a rational connection between the decision reached by the first respondent and the material which was properly placed before him. There is no suggestion by the applicant of irrationality on the part of the first respondent.

[30] I have taken note of the factual submissions made by the applicant in support of the review grounds and the responses given thereto by the second respondent. I do not deem it necessary to outline each of these facts here. Legal submissions have similarly been made by both parties in this matter. I am indebted to both parties for the same.

ANALYSIS

THE APPLICABLE LEGAL PRINCIPLES

[31] The review application before me as already said, is one in terms of section 33 (1) of the Arbitration Act No 42 of 1965 Section 33 (1) provides:

(1) Where-

(a) Any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) An award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties; make an order setting the award aside.

[32] In respect of section 33 (1) there are a number of decisions which provide authority that there could not be misconduct if the word was used in its ordinary sense, unless there has been some wrongful or improper conduct on the part of the person where behaviour is in question. The notion that a bona fide mistake either of law or of fact made by an arbitrator can be characterised as misconduct was rejected. See, the decision in *Total Support Management v Diversfied Health Systems SA 2002 (4) SA 661 (SCA)* and the cases therein cited, in particular *Dickenson And Brown v Fisher's Executors 1915 AD 166*.

[33] In *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another [2002] 3 BLLR 189 (LAC)*, Van Dijkhorst AJA examined the meaning of what constituted misconduct as was given in various cases. At the commencement of that examination he had the

following to say in paragraph 37:

"Counsel for the respondent emphasised that we are not at liberty to interfere with the arbitrator's factual findings on the dismissal, however wrong they may be, and there is no appeal against his finding of procedural and substantive unfairness even though it is in conflict with the evidence. Such approach, which amounts to a mechanical refusal to act, would in my view be incorrect. I will through a review of the relevant case law (which is not unanimous) seek to establish that in certain respects errors of law and fact are reviewable in private arbitration."

At paragraph 52 he had the following to say:

"In my review the following principles emerge: a court is entitled on review to determine whether an arbitrator in fact functioned as an arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognisant with the extent of and limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result *per se* not (unless it evidence's malfunctioning). If the real functioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment."

[34] The decision in *Stocks Civil Engineering* is authoritative on the approach to be adopted in reviewing an arbitration award issued out of a private arbitration.

[35] Van Dijkhorst AJA proceeded to examine that which constitutes a gross irregularity with reference to various cases including *Goldfields Investments Ltd v City Council of Johannesburg And Another 1938 TPD 55 at 560* and *Ellis v Morgan and Desai 1909 TS 576 at 1581*. In respect of *Goldfields Investments'* case he said that:

"Schreiner J distinguished between gross irregularities that are patent and occur during the course of the trial and those that are latent – that occur in the mind of the judicial officer. These are only ascertainable from the reasons given by him. In neither case need there be intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether the irregularity prevented fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not been a fair trial. But if a mistake of law leads to a material misconception of the nature of the enquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial."

NOVATION

[37] According to W.A. Joubert, et al: the Law of South Africa, 2nd Ed. Vol. 19 at paragraph 239 novation is:

"Novation is the termination of an earlier obligation by the creation of a later (new) one in its place by agreement. It can take one of two forms. First, a new obligation may be created between the same creditor and debtor (Novatio inter easdem personas). This is sometimes referred to as specific novation or novation proper. Second, a new creditor or debtor may be substituted for the original creditor or debtor (novatio inter extraneas personas). This is called delegation."

[39] The case which the applicant says she made at arbitration hearing is that while the fixed term contract was valid and enforceable, she and the Fund intentionally entered into a second contract on 1 November 2003 thus substituting the fixed term contract with one contract of employment of a permanent nature.

THE ISSUE

[40] The submissions made by the applicant in support of the grounds for review are that the first respondent:-

Ignored the (actual) evidence that was presented to him as a result of which he came to wrong conclusion of fact and law

CLAIM A – NOVATION

[41] In paragraph 7 of the arbitration award, the first respondent stated that:

"The claimant states that as a result of the appointment of Mankahla in the position that she had hitherto occupied the CEO, Cecil Callahan, undertook to create a new position for her in the respondent, namely that of Fund Administrator. In terms of his undertaking a new department would be created and the claimant would be in charge of that department. She henceforth report

directly to the CEO." (SIC).

[42] The submission by the applicant is that this was neither the evidence of the applicant nor that of the second respondent. The evidence of the applicant was said to be that the CEO undertook to create a new position on or about the month of August / September far before Ms Mankahla could be even interviewed by the second respondent. I have been referred to various pages of the transcript of the arbitration proceedings, in support of the version of the applicant. Page 540 of the paginated bundle has the applicant's evidence, inter alia, saying:

"…Cecil further said to me that he was going to propose to the board that I be appointed as a CFO because he did not feel that there was a need of both the CFO and the Financial Manager considering the SAEDF size. Around May / June of 2003 he went to the board in Atlanta, part of his agenda, one of the agenda items were (sic) the proposal that I be appointed as a CFO…The board said to him that with regards to my appointment as a CFO, the only problem that they had was the fact that I was not a qualified chartered accountant and … (my underlining).

[43] The evidence of the applicant continued at 551 of the paginated bundle where she said:

" As I have already mentioned was that in June when Cecil went to the board in Atlanta where he propose that I be a CFO, the board said their only problem with me being a CFO is that I was not a qualified chartered accountant, therefore Cecil must still look for a qualified chartered accountant, which I helped him to look and we found Thandiwe Mangatla and in September there was another board meeting, September 2003, where a proposed new structure amongst other things was presented to the board. In the structure I was, in the proposed structure I was in the fund accounting and administration department. Which was a new department that was formed and after that board meeting we interviewed Thandiwe and some other candidates between September and October, Thandiwe was extended an offer and she started in November and Thandiwe is a qualified chartered accountant." (my underlining).

[44] The evidence of the applicant makes it pertinently clear that:

- Mr Callahan would make *proposals* for the restructuring of the position in the Fund.
- He would submit those proposals to the board in Atlanta for adoption.
- His proposal that the position of a Financial Manager and that of a Chief Financial Officer (CFO) be merged into one was accepted by the board, in May/ June 2003.
- The board had a problem in the applicant being the incumbent of the unified position as she was not a qualified chartered accountant.
- The applicant agreed to Ms Mankahla being appointed as the incumbent of the unified position, still referred to as the Financial Manager, as she was a qualified chartered accountant.

- In September 2003 there was another board meeting where a proposed new structure, among other things, was presented to the board. In that proposed structure the applicant was to be in the Fund accounting and administration department, a new department which was to be created.

[45] It was as early as in June 2003 that the applicant and the Fund where of the same mind, namely that a qualified chartered accountant had to be found to take over the position of a financial manager. In September 2003, a firm decision had not yet been taken by the Fund as to what position would be given to the applicant, after vacating the position of Financial Manager. In September the board had still to consider the proposal by Mr Callahan that a new department be created to which the applicant could be accommodated. The vacation of the office of the Financial Manager by the applicant in favour of a qualified chartered accountant was never made dependent on the applicant assuming a particular position within the Fund. The version of the applicant is wanting on whether on not a firm decision was taken by the board in September on what her position in the fund would be. To the extent that her evidence is clear, it is that "… in the

proposed structure, I was in the fund accounting and administration department…" In my view, the restating of the evidence of the applicant by the first respondent in paragraph 7 of the award, did not deserve the criticism to which it was subjected by the applicant. The reading of paragraph 7 of the award, in the context of the entire award, cannot, in my view, reasonably be said to evidence the ignoring of the actual evidence that was presented to the first respondent.

[46] Mr Majola, for the applicant, further submitted in this regard, that the board of directors of the Fund was duly informed of the applicant's new position and did not object. He said that the first time was in September and the second time was in February 2004. His submissions are at odds with the evidence of the applicant, as it is the board that was a decision maker over proposals submitted to it by Mr Callahan.

[47] It was always common cause between the parties that the nature of the business of the Fund is one of a temporary nature. Its continuity depended on the availability of funds. The applicant who was a Financial Manager would be better suited to know about this

conditional operation of the affairs of the Fund. Therefore to have a belief that a Fund employee would be permanently employed, would be unreasonable in the circumstances.

[48] The decision which I have reached in respect of the main claim makes it unnecessary to have to deal with every attack of the award. That witnesses of the second respondent may have preformed poorly, did not absolve the applicant from firstly making out a case to which the second respondent had to answer. In my view the assessment of the evidential material and the applicable legal principles were accorded a reasonable interpretation by the first respondent. I am in total agreement with the first respondent that the applicant failed to show, on a balance of probabilities, that there was a novation. I find that, on the evidence adduced, there was a variation of the agreement relating specifically and only to the duties to be carried out by the claimant and that the balance of her contract remained unaffected, a decision reached by the first respondent. This conclusion, which is irresistible from the facts is not dependent on variation being pleaded.

CLAIM B – REASONABLE EXPECTATION

[49] The applicant's case is that she reasonably expected that the Fund would on 30 September 2004 renew her fixed term contract of employment on the same or similar terms but that the fund did not renew it. Mr Callahan's evidence was that he was not in favour of the renewal of the fixed term contracts as such renewal was subject to an abuse. He said that employment contracts that expired after February 2004 were not renewed but that the employees would just continue with employment on a contract of month to month basis. The applicant's version is that she expected to be similarly treated.

[50] On 23 august 2004 the applicant was suspended from duty with full pay and with effect from 24 august 2004 pending an investigation against her pertaining to alleged serious acts of impropriety. She was still on suspension on 29 September 2004 when the Fund issued a letter advising her that her employment contract expired on 30 September 2004 and that she could not have a legitimate expectation of the renewal of it. She was informed that it was in the light of the recent events that the fund decided not to renew her contract.

[51] In the case of *Administrator of the Transvaal and other v Traub and others 1988 (4) SA 731 at 756* Corbett CJ had the following to say after illustration the nature and scope of the doctrine of "legitimate expectation".

"It is clear from these cases that in this context "legitimate expectations" are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis … But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege and if so the courts will protect his expectation by judicial review as a matter of public law… legitimate or reasonable expectation may arise either from an express promise given …. or from *the existence of a regular practise which the claimant can reasonably expect to continue*..."

[52] In the ordinary course, the applicant could rely on the existence of a regular practice of allowing continued employment even after the effluxion of time for a fixed term employment contract. The fact that the applicant was put on suspension from 24 August 2004 brought about a *novus actus interveniens* to the regular practice. The continued employment of the applicant was put under threat by her suspension. Seen from the perspective of the Fund, her presence at the working place was no longer desirable while investigations were on going against her. The recent events to which the letter of 29 September 2004, given to the applicant, must clearly be a reference to the suspension of and investigations against the applicant. The merits or demerits of the investigations

against the applicant and her suspension are issues of no relevance for present purpose.

[53] A final consideration in this aspect, relates to the subjective belief of the applicant in September 2004. The first respondent dealt with this issue when considering evidence on events of November 2003 as against events of February 2004. In my view the attack on the award in this respect has no merits at all. The applicant who, according to her version believed she was on a permanent employment position, could not simultaneously believe that a contract of employment which was no longer in existence could be continued after 30 September 2004.

[54] Accordingly, the applicant could not reasonably expect the Fund to renew a fixed term contract of employment on the same or similar terms. The decision reached by the first respondent is certainly not the decision that a reasonable decision maker could not have reached.

That the Arbitrator admitted hearsay evidence and made it part of his award notwithstanding that the applicant duly

objected thereto.

[55] The submission was made by Mr Majola that the human resources manual commissioned by the Fund to Deloitte and Touché for update and the minutes of a staff meeting held after the applicant left the fund, were introduced as new evidence after the applicant had closed her case. This submission is very erroneous. These documents were introduced by Mr Motau as he was cross examining the applicant. The first respondent expressed his displeasure at such introduction of documents but pointed out, rightly in my view, that the problem emanated from a failure of the parties to engage each other on document discovery. The applicant even conceded at page 671 of the paginated bundle, having seen the manual being introduced. Mr Majola had an opportunity of dealing with these documents during the re examination of the applicant. In my view, even as the documents were introduced late, there was a full and fair trial of the issues based on these documents. Mr Majola had an opportunity of cross examining the second respondent's witnesses on these documents. The attack of the award based on these documents is accordingly misplaced.

That the arbitrator exceeded his powers in that he made

findings of law and fact on matters that were not pleaded or if pleaded were pleaded in a vague and embarrassing manner.

[56] The attack on the award is premised on the finding by the first respondent that the applicant had failed to show, on a balance of probabilities, that there was novation and that, at best it appears that this was a variation of the agreement relating specifically and only to the duties to be carried out by the applicant. The attack is that the applicant did not plead variation of the first contract. The applicant is clutching at straws here. She agreed to vacate the office of a financial manager and to help find a qualified chartered accountant long before it was determined what position she would be moved into. The conclusion reached by the first respondent was inevitable when mind is had to the evidence brought to him, in this respect by both parties.

[57] I believe it is unnecessary to have to deal with the last two attacks on the findings of the first respondent. What has been said, in my view goes far enough to address the concerns on the main and the alternative claims. In the main, submissions made by Mr Motau for the second respondent, in opposing this application have merits.

[58] Accordingly, the following order is issued:

1. The application is dismissed.

2. The applicant is ordered to pay costs of the application.

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Cele AJ

Date of Hearing: 08 February 2008

Date of Judgment: 06 June 2008

APPEARANCES

For the Applicant: Adv Motau

Instructed by: Routledge – Modise Inc

For the Respondent: Mr Votani Majola

Instructed by: Majola Attorneys