IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J1214/08

In the matter between:

GABRIEL TSIETSI BANDA **Applicant**

and

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **1st Respondent**
and
COMMISSIONER T SEKHABISA *N.O.* **2nd Respondent**
and
EMFULENI LOCAL MUNICIPALITY **3rd Respondent**

JUDGMENT

VAN NIEKERK J

[1] The applicant was employed by the third respondent as a supply chain manager. The terms of the applicant's contract provided that he was to be employed for a fixed term, commencing on 1 November 2005 and terminating on 30 November 2007. The applicant's contract was not renewed. Relying on s 186 (1) (b) of the LRA (which defines as a 'dismissal' for the purposes of the Act as a refusal by an employer to renew a fixed term contract of employment in the face of a reasonable expectation that the contract would be renewed), the applicant referred an unfair dismissal dispute to the CCMA. The dispute was referred to arbitration. In his award, the commissioner ruled that the applicant had

failed to prove the existence of a dismissal, and dismissed the referral on that basis.

[2] In these proceedings, the applicant contends that the commissioner's award stands to be reviewed and set aside on the following grounds: first, the applicant submits, the commissioner committed an irregularity and misconducted himself by concluding that the applicant was not dismissed and that, instead, his employment contract expired. Secondly, the applicant contends that the commissioner erroneously attached too much weight to the inadmissible evidence of a Mr Raymond Raats (this evidence related to the presentation made by the consultant to the third respondent). Finally, the applicant submits that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings by not affording the parties an opportunity to respond to each other's heads of argument.

[3] Mr Dodson, who appeared for the third respondent, submitted that these submissions, proffered as they were on the basis of the test to be applied in review proceedings conducted under s 145 of the LRA, were misconceived. He contended that the judgment of the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC) requires this court to determine what is effectively a jurisdictional issue *de novo*, and without regard to the test of reasonableness established by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[1]. In other words, a commissioner's ruling on the existence or otherwise of a dismissal as defined by s 186 (1) (b) is not subject to a 'reasonableness' review. That being so, the record of the proceedings under review assumes little if any significance in proceedings where the commissioner's ruling is sought to be reviewed and set aside. Rather, it is incumbent on an applicant to make out a case *de novo* in the founding affidavit. In

[1] (2007) 28 *ILJ* 2405 (CC). I am indebted to Mr Dodson for the comprehensive heads of argument filed on the third respondent's behalf; I have drawn liberally on them in preparing this judgment.

relation to any dispute of fact that arises from the papers, Mr Dodson submitted that the rule established in *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) should apply i.e. the court should have regard to the facts stated by the respondent together with the admitted facts in the applicant's affidavit, unless the factual disputes raised by the respondent are untenable

[4] In the *SARPA* judgment, the LAC held as follows:

> *"[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA the significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.*
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> *[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In Benicon Earthworks & Mining services (Pty) Ltd v Jacobs NO & others (1994) 15 ILJ 801 (LAC) at 804 C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act.*
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> *[41] The question before the court a quo was whether, on the facts of the case, a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply*

whether, objectively speaking the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary."

What I understand this passage to mean is that whenever a commissioner has to determine whether or not there was a dismissal, this is an enquiry into a jurisdictional fact, a matter falling outside of the scope of the CCMA's jurisdiction. When a commissioner makes such a determination (as commissioners commonly do), this is done as a matter of convenience. The function of this court is to conduct an enquiry *de novo* into the existence or otherwise of a dismissal and to determine, on the facts before it, the existence or otherwise of a dismissal. Whatever criticisms might be levelled against the *SARPA* decision,[2] this court is bound by it, and must apply it.

[5] The legal principles to be applied are not contentious. Section 186 establishes various definitions of dismissal, including the failure or refusal by an employer to renew a fixed term contract on the same or similar terms. Section 192 places the onus of establishing the existence of a dismissal on the employee. The effect of s 186 (1) (b) is to override the terms of a fixed term contract entered into between two parties, and to impose a fresh contract on them in circumstances where no agreement has been reached between them. The policy reason for what might seem to be a drastic inroad into contractual autonomy is self evident - the provision prevents unscrupulous employers from circumventing the protections afforded by the Constitution and by Chapter IX of the Act by entering into a series of

[2] Mr. Dodson submitted *inter alia* that the judgment may not adequately have taken into account the wording of s 192 of the LRA, which might suggest that a commissioner has a compulsory decision-making role (as opposed to a role that is merely a matter of convenience) in relation to the existence of a dismissal, and assuming there to be one, whether or not it was fair. The SARPA judgment may also overlook the difficulty in distinguishing those issues that are jurisdictional from those that are not. In the present instance, this difficulty does not arise - the existence of a dismissal is clearly a jurisdictional issue - at least in an unfair dismissal dispute.

fixed term contracts in circumstances where the expiry of the agreed term would not constitute a termination of the contract at the initiative of the employer.

[6] The court must adopt a two-stage approach to determine the existence of a dismissal. In *University of Cape Town v Auf der Heyde* (2001) 22 *ILJ* 2647 (LAC), the court described the test in the following terms:

> *"In order to determine whether the respondent had a reasonable expectation, it is necessary first to determine whether he, in fact, expected his contract of employment to be renewed or converted into a permanent appointment. If he did have such an expectation, the next question is whether, taking into account all the facts, the expectation was reasonable."* (at para [21])

In other words, what is required to establish the existence of a dismissal is a subjective expectation of renewal of the fixed term contract that is objectively reasonable.

[7] In *SA Rugby (Pty) Ltd v CCMA & others* (2006) 27 ILJ 1041 (LC), this court elaborated on this approach:

> *"For the employee's expectation to be 'reasonable' there must be an objective basis for the creation of his expectation, apart from the subjective say-so or perception…This is an objective enquiry; would a reasonable employee in the circumstances prevailing at the time have expected the contract to be renewed on the same or similar terms. As stated in Grogan,* Workplace Law *8 (ed) 2005 at 110-1: 'The notion of reasonable expectation suggests an objective test: the employee must prove the existence of facts that, in the ordinary course, would lead a reasonable person to anticipate renewal.'"*

[8] I turn now to the first leg of the enquiry i.e. was there a subjective expectation of a renewal of the applicant's contract? The *SARPA* judgment makes it clear that the anticipation of the negotiation of a new contract with no certainty that the terms will be the same or similar is not protected by s 186 (1) (b) – see paragraphs [48] and [53] of the judgment. What the applicant is required to establish to trigger the protection of s 186 (1) (b) is an expectation of renewal of the existing contract on the same or similar terms. In his founding affidavit, Banda avers that in or about October 2007 he was informed by Tshabalala, the acting municipal manager, that the third respondent had passed a resolution in February 2007 to the effect that all fixed term contracts would be converted to permanent employment. Banda states further that he obtained a copy of the resolution concerned, as well as a copy of the preceding presentation made by the consultants containing recommendations on the basis of which the resolution was passed, and a copy of a settlement agreement between the third respondent and a number of trade unions recognised by it. Banda quotes portions of the presentation and resolution respectively, and concludes, on this basis, that the municipal manager never consulted or negotiated with him as he was mandated to do. But nowhere in the affidavit does the applicant aver that he subjectively expected his contract to be renewed – his complaint is that the municipal manager failed to enter into a process of consultation and negotiation with him. This is borne out in a concession made by the applicant in the arbitration proceedings:

> "COMMISSIONER: I understand the objection of Adv Mphahlele. The reason why you wanted him to go further, it was to highlight that the applicant's case is that his contract should have been extended until the negotiation process.
> MR MPHAHLELE: That is correct.
> COMMISSIONER: That is the crux of your case.
> Mr MPHAHLELE: That is correct."

Further, in his founding affidavit, the applicant concludes, on the basis of the resolution and the presentation, that Tshabalala "*never consulted or negotiated*" with him, and that "*as a result*", he referred an unfair dismissal dispute to the CCMA. Section 186 (1) (b) does not protect the expectation of a negotiation, nor does it protect the expectation of a temporary extension of a contract for the purposes of a negotiation.

[9] Nor can it be said, in my view, that the applicant has established a reasonable, objective basis for any expectation of renewal of his fixed term contract. In his founding affidavit, the applicant relies on the objective basis of the statement made by Tshabalala, the presentation and the resolution adopted by the third respondent in February 2007. In so far as the presentation is concerned, none of the paragraphs relied on by the applicant provide for the renewal of his fixed term contract or for its conversion into a permanent contract. The presentation clearly refers to the conversion of fixed term contracts of the staff of Metsi-a-Lekoa, a business unit previously constituted as a separate legal entity, and later incorporated unto the third respondent. The applicant was not employed by Metsi-a Lekoa. The Quotes from the presentation incorporated into the applicant's affidavit have been incorporated selectively – it is clear from a reading of the presentation annexed to the affidavit that the purpose of the presentation (and the recommendations made by the consultants) was to rationalise employment contracts as between different categories of employees as a consequence of the absorption of the Metsi-a-Lekoa unit, and to eliminate the anomalies that that had created. The presentation made no reference to the applicant's fixed term contract, or its conversion to a permanent contract. There is accordingly nothing in the presentation that established a reasonable, objective basis for the renewal of the applicant's fixed term contract.

[10] In so far as the applicant places reliance on the resolution, the applicant faces similar difficulties, since on his own version, the resolution was based on the presentation. If the presentation made no

recommendations for the renewal of fixed term contracts for persons in the applicant's position or for their conversion into permanent contracts, there can be no suggestion that the resolution would have done so. None of the paragraphs of the resolution make any reference to either renewal of fixed term contracts of employment or their conversion to permanent contracts of employment.

[11] On the basis of the *Plascon Evans* test, the third respondent's version (i.e. that the presentation and resolution contemplated that any conversion from fixed term to permanent employment applied only to the Metsi-a-Lekoa employees) must prevail. Even on the applicant's version that the conversion did apply to him, this does not assist him. The facts on which the applicant relies to establish the existence of a reasonable expectation establish nothing more than a far-fetched expectation of a conversion of his fixed term contract to a permanent one. Aside from the fact that the resolution clearly covered specific categories of employees (into which the applicant does not fall), for the applicant to submit that he had a reasonable expectation of a temporary renewal of his contract pending the opening and finalisation of negotiations regarding the conversion, is unwarranted by the facts and evidence before this court. Accordingly, even if the applicant harboured a subjective expectation of a renewal of his contract, it is not an expectation that on the evidence before me can be described as objectively reasonable.

[12] In so far as the other elements of an enquiry into the reasonableness of an expectation of renewal are concerned, (the terms of the contract, past practice and prior promise - see Grogan *supra* at 151), none of these assist the applicant. The applicant's contract of employment and his letter of appointment make it clear that his employment was to be limited to a two year period, and that there should be no expectation of renewal. There is no evidence of any past practice of renewal, nor is there any evidence of any express prior promise. In so far as the

applicant asserts an implied promise of renewal, I have dealt with the documents and the oral statement on which the applicant relies.

[13] The approach that I have adopted in the determination of this matter and the conclusion to which I have come are wholly dispositive of the matter. However, I wish to express a view on the approach adopted by the applicant in bringing this matter to court. Assuming that I am mistaken in relation to the manner in which matters of this nature are to be approached by this court and assuming that the "reasonableness review" approach, as Mr Dodson has labelled it, is the appropriate approach to be adopted by this court, this court would still have to review and set aside the commissioner's award only if it is persuaded that the conclusion to which the commissioner came falls outside of the band of reasonableness as set out in *Sidumo.* That is to say that this court would have to scrutinise the decision of the commissioner with a view to determining whether it was reasonable in light of the facts and evidence before the commissioner. Although this does not require this court to adopt a deferential approach to commissioners, it is, admittedly, a significant obstacle for applicants in review proceedings and is intended to prevent review courts from gratuitously substituting their discretion for that of the designated decision-makers. Without wishing to canvass the commissioner's reasoning, having found as I have in relation to the issue of reasonable expectation, it is not difficult to deduce that my line of reasoning supports the decision of the commissioner as well as his reasoning and logic in coming to it. In my view, the conclusion to which the commissioner came hardly qualifies as one to which no reasonable decision-maker could come. As the third respondent has correctly pointed out, s 138 of the LRA gives the commissioner a broad discretion to conduct the proceedings as he sees fit and that CCMA proceedings are not to be equated to court proceedings insofar as procedure and formalities are concerned. The *Sidumo* test considerably narrows the scope for the review of commissioners' rulings. As Zondo JP observed in *Fidelity Cash Management Service v CCMA & others* (2008) 29 *ILJ* 964 (LAC), the

Sidumo test is a stringent test that will ensure that awards are not lightly interfered with; it will not be often that a commissioner's decision will be found to be one to which no reasonable decision-maker could come.

[14] In the result, the applicant has failed to satisfy the onus to prove that he was dismissed, as required by s 192 (1). The absence of a dismissal means that the CCMA lacked jurisdiction to determine the dispute referred to it by the applicant. For these reasons, the application stands to be dismissed.

[15] Finally, there is no reason why costs should not follow the result. The third respondent is also entitled to the costs of the proceedings on 29 January 2009 when argument was heard on a point *in limine* raised unsuccessfully by the applicant.

I accordingly make the following order

1. The application is dismissed.

2. The applicant is to bear the costs of this application, including the costs of the proceedings on the 29 January 2009 when the applicant's point *in limine* was dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 14 May 2009

Date of Judgment: 11 August 2009

Appearances:

For the applicant: Adv M S Mphahlele

Instructed by: Mpoyana Ledwaba Inc.

For the Third Respondent: Adv A Dodson

Instructed by: Bowman Gilfillan Inc.