



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: JR 2530/14

In the matter between:

LIMPOPO LEGISLATURE

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

KHUTSO ELIAS MPAI N.O

Second Respondent

GUMANI ROBERT MATODZI

Third Respondent

Heard: 01 March 2017

Delivered: 04 April 2017

Summary: (Review – unfair dismissal – existence of dismissal under s 186(1)(b) not proven – no basis for reasonable expectation of renewal of five year contract)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is a review of an arbitration award where the arbitrator decided that, in terms of section 186 (1) (b) of the Labour Relations Act, 66 of 1995 ('the LRA') the third respondent, Mr Matodzi ('Matodzi') had been dismissed on the basis that he had a reasonable expectation of the renewal of his five year fixed term contract. Having decided that Matodzi had been dismissed, the arbitrator went on to determine that his dismissal had been unfair.
- [2] Both parties raised certain *in limine* objections, relating to the attestation of the founding affidavit and the late filing of Matodzi's answering affidavit, but the parties had agreed they would not be pursuing these issues and in the circumstances all these objections were withdrawn.

The review application

- [3] The crux of the review application pertains to whether or not the arbitrator correctly decided that Matodzi did have a reasonable expectation of his contract being renewed when it expired at the end of November 2012. If he did, then the failure to renew it on the same and similar terms would be deemed a dismissal under section 186 (1) (b). At the time s 186 (1) (b) read:

"Dismissal' means that-

...

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; ..."

- [4] Since the question is whether or not a dismissal in terms of that provision took place, the test is an objective one and the court must simply decide whether or not the arbitrator had jurisdiction to determine the unfair dismissal claim based on the existence of a dismissal. The correct approach in reviewing the arbitrator's ruling on the jurisdictional issue is whether or not the arbitrator was right or wrong in deciding if a dismissal took place, not whether the arbitrator's finding was not one that no

reasonable arbitrator could reach.¹ Nonetheless, for the sake of the narrative it is worth mentioning some of the arbitrator's analysis.

- [5] The arbitrator's reasoning in arriving at his conclusion rested fundamentally on the weight he attached to the representations made by persons in senior managerial positions, who "appeared to have been authorised to convey the message [that his contract would be renewed]". He also placed emphasis on the fact that an addendum to extend the contract for a further five-year term had been prepared in November 2012.
- [6] Further, the arbitrator placed much reliance on the fact that reference was made in an email of 18 October 2012 sent by Mr Adams (Divisional Manager: HRM & Labour Relations) to the Senior Legal Advisor, Advocate Ntsomela ('Ntsomela'), in which it was mentioned that Adams had held discussions about Matodzi's contract with the Acting Secretary of the legislature. The portion of Adam's email relied on by Matodzi read:

"Dear Advocate Ntsomela, in my discussion with the Acting Secretary on Wednesday 17 November 2012, the Acting Secretary indicated that the employment contract of GR Matodzi will be extended and that an employment contract shall be drafted in this regard, also the period of extension should be reflected as five years in the document to be drafted.

Given that Legal Services perform the function of drafting employment contracts, it would be appreciated if the document could be drafted for submission to the Acting Secretary for presentation to the Honourable Speaker."

- [7] Adams was not called as a witness to confirm the alleged discussion with the Acting Secretary despite Matodzi repeatedly confirming in the arbitration that he intended to call him. However, the Acting Secretary Mr Mothoa, who did testify, denied having any discussions with Adams about Matodzi's contract. He also pointed out that a copy of Adams' email to Ntsomela was not sent to him, as one might normally expect in such a communication. The arbitrator failed to evaluate the evidence of these conflicting versions, and only acknowledged that the Acting Secretary

¹ *SA Rugby Players Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another* (2008) 29 ILJ 2218 (LAC) at 2229-2230, paras [38]-[41].

denied having sanctioned the communication from Adams. In so doing, he seems to have failed to appreciate the importance of Adams not testifying as Adams, according to Matodzi, was actively involved in the management of the renewal of his contract.

- [8] The third respondent claimed that he was first notified by the Acting Secretary on 1 August 2012 that, his contract was being extended by five years. Two days later in another meeting with the Acting Secretary on 3 August 2012 he was advised that the matter was being handled by Mr Nkuna, who was a manager in the Speaker's office and later on 23 October Mr Adams advised him that the matter was already with Adv Notsomela. In support of this, he advanced various alleged entries from his diary. He was cross-examined at length about serious anomalies in some of the entries as well as inexplicable omissions, such as crucial entries made with the different coloured pen duplicate pages of the diary on 01 August 2012, and the entire month of September been missing from the diary.
- [9] Mothoa denied that he would ever have referred the issue of the contract of the CFO to be dealt with by staff on the level of Adams or Nkuna as it would have been dealt with between him and the Legislature's board. It was the board which would give him instructions on what to do and that would decide whether or not to renew the CFO's contract. He could not have told anyone Matodzi's contract was going to be renewed unless he was instructed to do so by the board. However, he conceded that the Speaker could also authorise the renewal of contracts, in conformity with section 5 (2) of the Limpopo Province Legislature Service Act 3 of 1997.
- [10] On 1 November 2012, Matodzi received another email from Mr SM Khotsa of Legal Services, which read:

"I was asked to prepare an agreement for the extension of your employment contract.

Attached hereto please find a draft copy of the agreement in question which is in an addendum format. In terms of my brief, the duration of the term is to be extended by a further period of five years on the same terms and conditions contained in the main agreement.

Kindly peruse this agreement as well as the main agreement and advise if there is any other issue that you feel should be included, for further consideration by the Secretary.

Please, do not hesitate to contact me should there be any other issue which we need to discuss further.”

[11] Attached to the email was an addendum in the form of a draft contract. Despite making some minor corrections and returning the document, Matodzi never got a response thereafter. He agreed that he did meet with Khotso and raised the amendments to the addendum with him, but could not remember him saying that he was referring the whole thing to Ntsomela because it seemed the whole issue had not been approved or discussed by the Board. Mothoa said he was unaware of this communication at the time but the staff involved in those communications should have been instructed by him acting on instructions of the Board. In the absence of that happening, the proper procedure had not being followed. When this came to light in 2013 he started to investigate it.

[12] Nevertheless, as far as any written response is concerned, the only correspondence he received were letters notifying him of the short-term extension of his contract. None of these extensions were preceded by any discussion or consultation with him. During his evidence in chief, he never mentioned that he queried the first letter that he received which notified him of the initial eight month extension of his contract. That letter stated:

“This serves to inform you that the Honourable Speaker of the Legislature considered the fact that your employment contract expires at the end of November 2012. In terms of the contract mentioned above, the employer shall inform you at least six months before the expiry on whether or not your contract will be extended. In view of this, the Honourable Speaker directed that the contract be extended for eight months, that is from 1 December 2012 to 31 July 2013 to allow all the processes and any consideration by the executive authority to be concluded.”

Mothoa testified that he was simply advised of this by the Speaker and instructed to convey it to Matodzi. He did not know what issues the Board had considered in making the decision.

[13] It was only under cross-examination that Matodzi claimed that he went to Mathoa to say that he was surprised to receive this letter instead of the five-year contract he was expecting. He said somewhat vaguely that Mathoa could not give him “a satisfactory answer” and allowed him to go to the Speaker. When pressed on what the secretary allegedly said, Matodzi claimed that the secretary started to distance himself from the proposed contract. The Speaker told him that he was not happy with the letter he had been issued with all the way that Matodzi was being treated. Because of the wording of the letter and also because the Speaker told him he would sort it out, Matodzi assumed that they were going to resolve it amicably by issuing the contract in the form of the amended addendum. He had no explanation why the Speaker was supposedly unhappy with the process or the letter itself when the letter appeared to have been written specifically on the Speaker’s own instructions. He very reluctantly conceded that he had nonetheless agreed to continue working for eight months on the same terms and conditions that applied at the end of November 2012. When he was pressed later in his cross-examination about why he only filed a grievance late in 2013, he sought to elevate his alleged interaction with the Secretary and the Speaker to the equivalent of lodging a grievance at that stage.

[14] The arbitrator stated:

“It cannot reasonably be expected that the officers who issued the addendum to the applicant would have done so on their own without a mandate. It is also important to note that it could not have been by coincident that these correspondences arose within the period of six (6) months towards the expiry of the initial fixed term plants contract while the main contract made provision for the initiation of extension of the employment contract. The parties called on me to decide whether the several emails that were referred to by the applicant created a legitimate expectation of renewal of his fixed term contract. The applicant indicated those that did and that those did not raise his expectations.”

(Emphasis added)

[15] Having regard to the circumstances in which the communications were issued and the timing thereof, the arbitrator concluded that they created a

legitimate expectation of renewal. The additional short term extensions of Matodzi's contract also reinforced this expectation as he understood that the five-year extension of his contract was being finalised and therefore it was not unreasonable for him to expect that it would be extended and renewed. The arbitrator speculated that even if the addendum containing the proposed five-year extension of his contract had not been sent to him, these interim extensions of his contract created a legitimate expectation that the five-year contract was in the process of being finalised.

[16] The arbitrator placed some reliance on the case of **SACTWU & Others v Cadema industries (Pty) Ltd**² in which it was held that several renewals of a relatively short term contract over a number of years led the employee to believe that her final contract would be renewed.

[17] Undoubtedly, various representations were made relating to the prospective renewal of Matodzi's contract. In the absence of any other factors, these representations could conceivably have raised some hope of renewal of the five-year contract which Matodzi had entered into as the Chief Financial Officer. The high point of these representations was a draft addendum sent to Matodzi at the beginning of November 2012 proposing an extension of the contract by a further five years. Nonetheless, it is common cause that this contract was never concluded.

[18] Instead of insisting at that stage that the Legislature should conclude the extension of the contract for a period of five years, Matodzi entered into three successive extensions of his contract. The first extension was for a period of eight months. This was followed by a one-month extension to the end of August 2013. The last extension was for three months starting in September 2013. The arbitrator noted this in his analysis. The termination letter to Matodzi dated 29 November 2013 from the Secretary stated:

RE: TERMINATION OF EMPLOYMENT CONTRACT

1. I refer to the various discussions and engagements I had with you in the above-mentioned regard.

² [2008] 8 BLLR 790 (LC)

2. In light of the discussions you requested us to further undertake with the Honourable Speaker on the matter on Tuesday, 26th November 2013, I hereby confirm as follows:

- That as per the letter dated 30th August 2013, signed by the Speaker, Hon. Nong, your employment contract expired on 30th November 2013.
- I have been informed that the issue you asked me to further consider, i.e. your performance and project clean audit, were tabled and considered at the last board meeting which meeting, notwithstanding, decided to allow a three (3) months contract and is further directed that the posts be advertised.

3. In the circumstances I therefore consider the matter of contract termination clarified.”

[19] It was only on 27 September 2013 that Matodzi lodged a grievance in respect of an alleged unfair labour practice relating to *inter-alia* the extension of his employment contract. The substance of his grievance was described in the following terms:

“Paragraph 11 of the employment contract makes provision for the process relating to the extension or non-extension of the contract. In my view the provisions of this paragraph was not followed by the employer. Over the past 10 months the contract has been extended three times, firstly for eight months, secondly one-month and certainly for three months. No satisfactory reasons are provided for the timeframe of the extensions.”

[20] At this juncture, the provisions of that paragraph and others in his original contract should be mentioned:

“1. INTERPRETATION

1.1 This agreement constitutes the whole agreement between the parties and the other party shall be bound by any undertaking or representation not recorded herein.

...

2. APPOINTMENT

...

2.1 The general conditions of service of the employee is subject to all the policies (as amended) of the Legislature as at the date of commencement and any other policies as would be proved by the Legislature Services Board from time to time.

...

3. COMMENCEMENT AND DURATION

3.1 Notwithstanding the date of signature, the agreement commences on 1st December 2007 and shall subsist for a period of five (5) years (sixty (60) calendar months) from the date of commencement unless termination in accordance with any other provisions of the agreement.

...

10. TERMINATION OF EMPLOYMENT

10.1 The agreement shall terminate under the following circumstances:

10.1.1 expiry of the fixed term, and

10.1.2 dismissal based on misconduct and incapacity.

10.2 Either party may terminate this agreement by giving other party two (2) months written notice of termination of employment.

11. RENEWAL AND EXTENSION OF TERM

11.1 The employer shall at least six (6) months before the expiry of the agreement term, in writing, communicate to the employee whether or not the agreement will be renewed or extended.

11.2 Should the employer decided to extend or renew the agreement, the employee shall, within one (1) months of receipt of written notice referred to in clause 12.1, inform the employer of his acceptance or not of such extension or renewal.

11.3 The services rendered by the employee and the expired agreement shall be recognised as a continued service under the new agreement and shall not prejudice the employees accrued pro rata entitlements.

11.4 Omission by the employer to give written notice contemplated in clause 12.1 shall not in any way imply, all, create an expectation

on the part of the employee, that this agreement will be renewed or extended.

- 11.5 The employer may, six (6) months prior to the expiry of the agreement term, and pursuant to the employer's omission referred to in clause 12.4 initiate the negotiations relating to the extension or renewal of this agreement and the employer must forthwith inform the employee whether or not the agreement will be renewed or extended."

(emphasis added)

I note in passing that the references in clause 11.4 and 11.5 to clauses 12.1 and 12.4 respectively seem to be typographical errors and instead should refer to clauses 11.1 and 11.4. respectively.

- [21] In his grievance, the applicant made specific reference to the provisions of paragraph 11 of his contract which governed the issue of renewals and asserted that the employer had failed to follow that provision. When the grievance was filed, he did not claim that there was already an agreement that his contract would be extended by another five years.
- [22] The body responsible for providing administrative services to the legislature is the Legislature Service Board established in terms of the Limpopo Province Legislature Service Act 3 of 1997. In terms of section 12 (1) (c) of that Act, it is the Board which appoints a head of Department. Matodzi was the Legislative Services Chief Financial Officer (CFO) and a head of Department. As such he could only be appointed or reappointed to the position on the authority of the Board. In the arbitration proceedings, Matodzi did not dispute this. He also agreed that the Board may delegate the power to sign contracts to the Secretary or Speaker. The power of delegation is provided for in section 9 (1) of the Service Act. Between sittings of the board, section 5 (2) of the Service Act provides that the Speaker of the legislature performs all the functions and exercises all the powers of the board, subject to his or her actions being referred to and considered by the board at the first meeting after such functions are performed.

- [23] It was common cause that Matodzi's superior was Mothoa, yet the greater part of his evidence in support of the creation of the expectation of the renewal of his contract was based on representations made by more junior members of staff than himself or Mothoa. He also conceded that Ntsomela drafted the five-year contract renewal document based on what she was told by Adams and not because of a direct instruction to her by Mothoa or the Speaker. In the course of his testimony, Matodzi conceded that any communication from Khotsa could not have contributed to his expectation of the renewal of his contract. He struggled to explain why the fact that Ntsomela drafted the contract at the request of Adams could have created an impression that she was personally making a representation that the employer intended to renew the contract. Further, in relation to the meeting he claimed to have had with Mothoa on 28 November 2012, just two days before the expiry of his initial contract, Matodzi gave an inconsistent account of his diary entry which indicated that he had "inquired about the signed contract". Further, he could not give a plausible reason why a person of his seniority and education would not have recorded anything in writing to Mothoa when confronted with Mothoa's supposed about turn after the meeting on 28 November when Mothoa supposedly gave the impression that the contract was on track but then Matodzi was presented with the eight months extension document a day or two thereafter.
- [24] The third respondent also claimed that the fact that he was invited to an interview after he applied for the advertised post in September 2013, encouraged an expectation that his contract would be renewed because it showed that his services were still required. He further, somewhat absurdly suggested that other applicants were invited for interviews merely invited to 'accompany' him in that process.
- [25] In disputing the correctness of the arbitrator's conclusion that the failure to renew Matodzi's five-year contract as CFO amounted to a dismissal in terms of section 186 (1) (b), the applicant emphasises the following:
- 25.1 The arbitrator ignored the contractual provisions governing the renewal or extension of Matodzi's contract.

25.2 The email sent by Adams to the senior legal adviser could not have created a reasonable expectation that the contract would be renewed in the light of other evidence.

25.3 The email sent by the senior legal adviser to Khotsa also could not create a legitimate expectation of the renewal of the fixed term contract in the light of other evidence.

25.4 The email sent by Khotsa to Matodzi could not have created a legitimate expectation of the contract being renewed in the light of other evidence.

25.5 The fact that persons responsible for some of the positive representations were senior managers could not have reasonably created an impression in Matodzi's mind that those representations could be relied on, because he knew that those persons did not have the necessary authority to authorise the renewal of his contract and, in any event, the applicant could not be estopped from asserting their lack of authority.

25.6 The three short-term extensions of Matodzi's appointment could not give rise to an expectation that his five-year contract would be renewed, considered against the background of his knowledge of who was authorised to conclude the renewal, the terms of his contract and other factors, including the fact that he applied for the CFO post again when the post was advertised in September 2013.

[26] The third respondent cited a number of authorities in which the rolling over of fixed term contracts gave rise to a reasonable expectation of a contract being renewed. In the *Cadema* case the employee had been engaged on various fixed term contracts ranging in duration from one month to six months which ran on an uninterrupted and continuous basis from May 1999 to October 2003. There was no evidence in that case of any contract being concluded, which had terms similar to the five-year one entered into between the applicant and Matodzi. Similarly, in the case of *King Sabata Dalindyebo Municipality v Commission for Conciliation, Mediation &*

*Arbitration & others*³ the employees in question were employed on four successive one-year contracts and it was the failure to renew the contract on the fifth occasion which led to a claim of unfair dismissal. The last fixed term contract concluded with the employees in that case was the result of a settlement of the dispute in which they had demanded permanent employment, but had abandoned that demand. Commenting on the fixed term contracts concluded by the settlement agreement the Court said:

“They eschew all reference to any intention on the part of the applicant not to renew them”.

(emphasis added)

[27] In *Biggs v Rand Water* the court observed that:

“Section 186(b) was included in the LRA to prevent the unfair practice of keeping an employee in a position on a temporary basis without employment security until it suits the employer to dismiss such an employee without the unpleasant obligations imposed on employers by the LRA in respect of permanent employees.”⁴

[28] What the authorities above reveal is that where employees are engaged on a series of successive short-term fixed contracts, a reasonable expectation of renewal of such contracts can give rise to a dismissal when they are not renewed.

[29] It seems to me that the pattern of recurring appointments in those cases is clearly distinguishable from the appointment of Matodzi in a senior position for a long fixed term period of five years, which was subject to very clear provisions governing the renewal of the contract. The short-term renewals of varying lengths which occurred after the expiry of his contract could not reasonably provide the springboard for an expectation that they would ultimately be followed by a lengthy fixed term contract of five years, even though nearly a year had passed since the expiry of his initial five-year appointment. In the cases mentioned above it was the regular recurring pattern of short-term appointments which gave rise to an expectation of a further short-term appointment. I do not see how the mere fact that three

³ (2005) 26 ILJ 474 (LC)

⁴ (2003) 24 ILJ 1957 (LC) at 1961A-B.

short-term contracts of varying lengths were entered into after the expiry of a five-year contract can lead to an inference that a new five-year contract was in the offing. A new five year contract would not be a repetition of the preceding short term contracts, which in any event hardly established a recognisable pattern of renewal. Unlike the cases mentioned, the short-term appointments of Matodzi could not provide a pattern of appointment that could give rise to an expectation of a new contract of five years.

[30] The only relevance of the short-term appointments of Matodzi is whether or not they were merely temporary arrangements pending the conclusion of a new five-year contract. The third respondent's case does not comfortably fit into the category of recurrent temporary employment of a precarious nature which the court in *Biggs'* case identified as the practice which the legislature aimed to discourage in section 186 (b). Consequently, those authorities cannot assist Matodzi in my view.

[31] Further, there was no evidence in any of those judgements that the terms of the employees' contracts under consideration specifically provided for the circumstances under which a renewal would or would not take place, unlike the provisions of clause 11 in Matodzi's contract. The only reference to the terms of a contract in the *King Sabata Dalindyebo Municipality* matter was to the effect that the contracts contained nothing to indicate that they would *not* be renewed. By contrast, clause 11 of Matodzi's contract provided an unambiguous mechanism for the renewal or extension of the contract and 11.4, equally unambiguously made it clear that a failure to comply with the provisions of that section could not be relied on as a basis for assuming that the contract would be renewed or extended.

[32] It seems obvious that the intention of clause 11 was to circumscribe the conditions under which a renewal or extension would take place in order to eliminate any doubt about a rollover of the contract. If a renewal was not concluded in terms of those provisions, 11.4 was intended to eliminate any possible hope that simply because nothing was done to renew the contract that could be taken as a sign that there had been a tacit renewal or that there were positive prospects of it being renewed. In this regard, it is also

revealing that when Matodzi lodged his grievance in September 2013, it was precisely the employer's failure to act in terms of the provisions of that clause which was at the centre of his complaint. In other words, he was highlighting the fact that the employer had *not* acted in terms of that provision to renew his contract and therefore his current situation was uncertain.

[33] The arbitrator paid scant attention to the precautionary measures in clause 11 in arriving at his conclusion that the failure to renew the contract was a dismissal.

[34] Another consideration is that, even though Matodzi claims to have believed that, despite the expiry of the five-year contract and the failure to conclude a contract which renewed it, he never directly sought to communicate with the Board or the Secretariat to ascertain why matters had not progressed after he returned the amended draft contract in December 2012. It is very difficult to believe that over the ensuing nine months he could genuinely have held the view that the draft contract was still in the process of finalisation especially in the absence of any ongoing negotiations over the terms of any anticipated renewal and in circumstances where the draft contract would appear to have needed little material alteration. If he genuinely held a belief that he would be reappointed even after an interval of several months, it is also difficult to understand why he would have applied for his post when it was re-advertised, when it is more likely the advertisement would have incensed him and led him to challenge it. Applying for his own previous position which was being advertised nine months after his original five year appointment had ended seems incompatible with a genuinely held belief that there was merely an inordinately long delay in reappointing him on account of administrative issues.

[35] In light of the above, I am satisfied on a balance of probabilities that, third respondent failed to establish that he had a reasonable expectation of his initial five year fixed term contract being renewed on same or similar terms and accordingly the failure of the legislature to offer him such a contract did not amount to a dismissal.

[36] I accept the third respondent had an award in his favour and that his opposition was *bona fide*. Accordingly, it would not be appropriate to make an adverse cost order against him.

Order

1. The second respondent's arbitration award dated 17 March 2014 under case number LP 8637-13 is reviewed and set aside.
2. The award is substituted with a finding that the second respondent had no jurisdiction to determine the third respondent's dismissal dispute because the third respondent was not dismissed by the applicant.
3. No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

N Cassim SC instructed by
M M Baloyi Attorneys

THIRD RESPONDENT:

M Schnehage instructed by
A M Carrim Attorneys

LABOUR COURT