Arbitration Award Rendered

Case Number: *MP7839-18*
Commissioner: *Letsema Mokoena*
Date of Award: *7-Apr-2019*

In the **ARBITRATION** between

Carol Nkambule
(Union/Applicant)

and

Mpumalanga Economic Growth Agency (MEGA)
(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

[1] The Arbitration hearing between **Nkambule, Carol** and **Mpumalanga Economic Development Agency** was held under the auspices of the Commission for Conciliation Mediation and Arbitration ("CCMA"), at CCMA Mpumalanga, Nelspruit on 28 March 2018 in terms of section 191(5)(a) of the Labour Relations Act 66 of 1996 ("LRA").

[2] The Applicant, **Nkambule, Carol** was represented by Mr S Mabaso from Mabaso Incorporated Attorneys while the Respondent, Mpumalanga Economic Development Agency was represented by Advocate Emmanuel Masombuka briefed by DM5 Attorneys. Both parties submitted a combined bundle of documents and they were marked bundle **"A"** for the Applicant and **"R"** for the Respondent.

PRELIMINARY ISSUES

Jurisdictional challenge

[3] The Respondent raised a point in limine that the CCMA lacked jurisdiction to arbitrate the matter as the referral forms i.e. LRA 7.11 and LRA 7.13, were not signed by the Applicant but Mr Mabaso an attorney, who was not supposed to sign them, rendering them defective. The Respondent relied on the principle from Oosthuizen v Imperial Logistics CC and Others (2013) 34 ILJ 683 LC.

[4] The Applicant argued that the principle of the abovementioned case did not apply to the facts of this matter and relied on Rule 4 of CCMA Rules, therefore the point in limine should be dismissed.

Ruling

[5] After considering both parties' respective submissions and arguments I found that indeed the case law being referred to did not apply to this matter. I considered Rule 4 read in conjunction with rule 25 of the CCMA Rules.

[6] Rule 4 provides that the documents in terms of the LRA may be signed by a person or party who is entitled in terms of the LRA or the CCMA Rules is entitled to represent that party in the proceedings. Rule 25 on the other hand provides that a party is not entitled to be represented by a legal practitioner if the dispute being arbitrated is among other things about the fairness of a dismissal relating to conduct or capacity.

[7] This dispute is about alleged reasonable expectation that the Applicant had that her contract of employment will be renewed by the Respondent on an indefinite basis but the Respondent did not renew it at all. Under the circumstances the Applicant is therefore entitled to be legally represented, consequently Mr Mabaso was not precluded to sign the forms.

[8] It is my ruling having regard to the aforementioned that the CCMA does have jurisdiction to arbitrate this matter.

I now continue to deal with the dispute at hand.

ISSUE TO BE DECIDED

[9] The purpose of this arbitration is to determine whether or not the Applicant who was employed by the Respondent in terms of a fixed term contract of employment reasonably expected the Respondent to retain her in employment on an indefinite basis but the Respondent, did not offer to retain her.

[10] The Applicant sought to be reinstated if I find in her favour.

BACKGROUND TO THE DISPUTE

[11] The Applicant commenced employment with the Respondent on 01 November 2013 and was employed as Senior Manager – Regional Finance and earned gross monthly salary of R126 737.99 and R78 138.00 net monthly salary. On 23 August 2018, the Respondent issued the Applicant with a notice that her contract will not be renewed beyond its expiry date of 31 October 2018. It was the Applicant's contention that she had reasonable expectation that her contract of employment will be renewed by the Respondent on an indefinite basis but the Respondent did not renew it at all.

[12] Myself together with the parties tried to narrow the issues and it was agreed that the following were common cause: the Applicant was on a fixed terms contract of employment from 01 November 2013 to 31 October 2018, on 23 August 2018 the Applicant was issued with a notice that her contract of employment will not be renewed beyond 31 October 2018, the Respondent underwent a restructuring process and in terms thereof the position the Applicant was contracted or employed on i.e. General Manager Housing was no longer available in the new structure and the Applicant was placed in a different position in the new structure i.e. Senior Manager – Regional Finance.

[13] All other issues were placed in dispute.

[14] In this matter the Applicant bears the onus of proof and she had to prove her case as alleged on a balance of probabilities.

[15] In order to prove their respective cases, the Applicant testified on her own and did not call any witnesses while the Applicants relied only on the testimony of Ms Tabitha Constance Mametja.

SURVEY OF SUBMISSIONS AND ARGUMENTS

[16] I considered all relevant evidence and arguments raised by the parties including written closing arguments, because section 138(7) of the LRA requires brief reasons, I have therefore only referred to evidence and arguments I regard necessary to substantiate my findings and resolve the dispute.

THE APPLICANT`S CASE:

Witness: Carol Mildred Nkambule testified under oath that:

[17] She possesses the following qualifications:- B. Com, B. Com Honours and Masters in Business Administration.

[18] She reported to the Respondent's CEO during her employment an in terms of her contract of employment, the CEO was supposed to do performance appraisals but were never done. The new CEO was appointed in 2015 and in November 2015 restructuring was communicated. She was issued with a letter which indicated that her position was affected by restructuring as per letter dated 15 November 2015, page 15 bundle A and she responded and sought clarity in relation to her affected position as per letter dated 27 November 2015, page 17 bundle "A".

[19] The CEO responded as per pages 18 – 19 bundle "A" and among other things provided that the positions were changed not abolished as she was to continue with her normal duties. According to her it meant that her services were still required by the Respondent.

[20] In January 2016, Mr Gijimani Dladla was appointed the new General Manager Funding. As per her letter dated 16 February 2016, page 20 bundle "A" she raised issues pertaining to her employment and the Respondent responded as per letter dated 16 February 2016 page 21 bundle "A" where she was

referred to letter dated 26 November 2015 and was advised to apply for executive positions and available positions.

[21] In 2017 as per migration strategy an assessment for placement was conducted and she was placed as Senior Manager – Regional Finance, direct placement, which placement she accepted. Page 22 of bundle "A" was the offer which she accepted and second paragraph from the bottom thereof read *"Please note that this offer of placement shall not in no way be interpreted as varying or extending the period of your initial contract of employment with MEGA."*

[22] As per email dated 04 July 2017 page 51 bundle "A" it confirmed that the position she was placed on was graded D and provided clarity that it was a permanent position.

[23] Page 52 bundle "A" was a memorandum dated 23 August 2017 confirmed her placement and that of two other i.e. Mr PJ Velelo and Ms Z Sibanda in Senior Manager Finance – SMME, Co-ops, Agriculture & Housing. The position came with added duties and responsibilities but they were within her area of work and expertise.

[24] She sought clarity from Ms Mametja as per page 54 bundle "A" as to which contract was applicable to her whether or not she was permanent. Ms Mametja's response as per page 56 bundle "A" was that she will revert in due course. She instead received a response from the CEO, Mr Xola Sithole as per pages 59 – 59, which response was confusing because as per page 52 bundle "A" she was placed on a permanent position, the letter indicated that the placement did not vary her fixed term contract.

[25] Pages 96 – 97 bundle "A" was a letter dated 03 August 2018 she addressed to the CEO where she sought clarity, there was no response but letter dated 22 August 2018 as per page 98 bundle "A" which was a notice of termination of her employment.

[26] She is not sure if the position is vacant but the remedy she is seeking is reinstatement.

[27] Under cross examination she confirmed that clause 17 of her contract of employment was about variation. She accepted the placement offer in terms of the new structure and her contract of employment was varied when she accepted the placement as her position did not exist in the new structure.

[28] She provided that page 51 bundle "A" was never retracted. She continued to seek clarity but clarity provided was confusing as the CEO kept on referring to the old position which no longer exist.

[29] She confirmed that placements of Mr PJ Velelo and Ms Z Sibanda in Senior Manager Finance – SMME, Co-ops, Agriculture & Housing were full time position or contracts.

[30] She clarified that Mr PJ Velelo and Ms Z Sibanda were still employed on permanent basis.

The Applicant closed her case.

RESPONDENT'S CASE

Tabitha Constance Mametja testified under oath that:

[31] She is employed by the Respondent as General Manager Corporate Services.

[32] Paragraph 17 of the employment contract referred to a variation clause and could only be varied in writing and both parties signed.

[33] The Applicant was allowed to serve remainder of her contract under a new position. The placement was very clear hence the clause second last paragraph of the placement letter.

[34] Page 51 of bundle "A" was to correct an error relating to D graded positions. The Applicant, Mr PJ Velelo and Ms Z Sibanda were placed on permanent contracts hence after restructuring Mr PJ Velelo and Ms Z Sibanda were permanent. Has to be careful with placement of the Applicant and Mr PJ Velelo and Ms Z Sibanda as the CEO is the only one who has the authority to conclude contracts.

[35] Under cross examination she indicated that, all employees including the Applicant were engaged during the restructuring process. Mr PJ Velelo and Ms Z Sibanda including the Applicant were placed, they did not apply.

[36] She explained that the restructuring was two phased and the Applicant did not apply she was placed and placed means that a person is offered a job with the new conditions that did not vary term of her employment contract. What was varied was the name of the position, level, duties and responsibilities.

[37] She tellingly said that she understood the dispute was about legitimate expectation not about contract and that the aspects and the tasks of the Applicant were still there.

The Respondent closed its case.

ANALYSIS OF EVIDENCE AND ARGUMENT

[38] This matter is in terms of section 186(1)(b)(ii) of the LRA and in terms of which "Dismissal" means that an employee employed in terms of a fixed term contract of employment reasonably expected the employer to retain the employee in employment on an indefinite basis but the employer did not offer to retain the employee. An employee relying on this section when claiming dismissal, bears the onus of establishing that he/she had reasonable expectation.

[39] The aforesaid therefore means that an employee who was employed in terms of a fixed term contract is entitled to claim legitimate expectation to be indefinitely employed. This entitlement is not just a mere entitlement, it is a twofold enquiry as per University of Cape Town v Thomas auf der Heyde [2001] 12 BLLR 1316 (LAC) where it was held that the first is to determine whether the employee actually expected the contract to be renewed and the second is whether the expectation was reasonable.

[40] In NUM obo Mpaki v CCMA &Others JR1983/2014 (handed down on 09 September 2016) the Court held that the second part of the inquiry into a reasonable expectation is whether the subjective expectation, objectively assessed is considered to be reasonable. Apart from the subjective perception, there must be an objective basis for the expectation, whis determine through the evaluation of all surrounding circumstances including the significance or otherwise of the contractual stipulations. The court identified a number of factors, which may influence such a finding namely:-

(a) agreements;

(b) undertakings by the employer;

(c) custom or practice in regard to renewal;

(d) the availability of the post;

(e) the purpose or reason for conclusion of the fixed term contract;

(f) inconsistent conduct;

(g) failure to give reasonable notice;

(h) the nature of the business

[40] What is important to note is that the list referred to above is not exhaustive.

[41] In McInnes v Technikon Natal (2000) 21 ILJ 1138 (LC), [2000] 6 BLLR 701 (LC) the Labour Court found that an employee had an expectation of permanent employment which was created by her employer and the court ordered reinstatement.

[42] It was the Applicant's submission among other things that the LAC in the matter of Tulwana and Another v City of Johannesburg (JA/15) [2016] ZALAC 85 (26 July 2016) said the following about inference to be drawn in civil case, it is submitted that including this forum, "[30] In proceedings of this nature, the inference sought to be drawn must be consistent with all the proven facts, although it needs not be the only reasonable inference. It is sufficient if it is the most probable inference. See Katz v Katz [2004] 4 All SA 545 (C) at para 95 and AA Onderlinge Assuransie Bpk v De Beer 1982 (2) SA 603 (A) at 614-615 where it was held that a plaintiff who relies on circumstantial evidence needs not prove that the inference which he or she asks the court to draw is the only reasonable inference. He or she will discharge the burden of proof if he or she can convince the court that the inference advocated is the most readily apparent and acceptable inference to be drawn from a number of possible instances. "The inference that has to be drawn is that the respondent created an expectation however upon realising that the applicant regarded the conduct of the employer as a permanent employment it wanted to change the permanency to contract.

[43] The Respondent on the other hand submitted that the test for the reasonableness of an expectation the Labour Appeal Court in South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others [2008] 9 BLLR 845 (LAC) stated the following: *"The appellants carried the onus to establish that they had a "reasonable expectation" that their contracts were to be renewed. They had to place facts which, objectively considered, established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his or her fixed-term contract on the same or similar terms. As soon as the other requirements of section 186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent ("SA Rugby") would have to establish that the dismissal was both procedurally and substantively fair."* In a subsequent decision the LAC in Joseph v University of Limpopo and Others 12 BLLR 1166 (LAC) stated the following: *"The onus is on an employee to prove the existence of a reasonable or legitimate expectation. He or she does so by placing evidence before an arbitrator that there are circumstances which justifies such an expectation. Such circumstances could be for instance, the previous regular renewals of his or her contract of employment, provisions of the contract, the nature of the business and so forth. The aforesaid is not a closed list. It all depends on the given circumstances and is a question of fact."*

[44] In dealing with the variation clause the Respondent further submitted that a "non variation" clause is premised on the "Shifren principle" which came about in the Appellate decision of SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A). This principle is set out in Brisley v Drotsky 2002 (4) SA 1 (SCA) as follows: 'contracting parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject matter of a contract, which they may alter only by again resorting to writing'.

[45] The facts of this matter are so common cause that I do not deem it necessary to refer to them. What is captivating and actually stands out in this matter is the parties' respective arguments as captured. It shows that their respective cases can stand and fall by their arguments.

[46] Despite most issues being common cause those that were in dispute were a matter of interpretation and the witnesses' point of view needless to say when dealing with one on one witnesses cautionary rule is applicable.

[47] From adduced evidence I find that on a balance of probabilities the Applicant managed to show that her expectation was reasonable. While restructuring of the Respondent appears to have been a lengthy and tedious process, one need not lose focus.

[48] The Respondent's conduct juxtaposed to all surrounding circumstances and factors of this matter may have been blunder in that by interfering with the Applicant's contract of employment by varying the position but not the term and announcing placement of the Applicant with the other two employees whom were permanently employed and continued to be. All what the Applicant sought was clarity as it was confusing to as to what was happening with her employment. It was telling enough to hear from Mr Mametja that the Applicant's position remained unfilled.

[49] Taking into consideration that it was clear from the onset were are dealing not with the law of contract but labour and the issue at hand being legitimate expectation. It is important to note the provisions of section 210 of the LRA, which reads "Application of Act when in conflict with other laws.—If any conflict, relating to the matters dealt with in *this Act*, arises between *this Act* and the provisions of any other law save the Constitution or any Act expressly amending *this Act*, the provisions of *this Act* will prevail." In my view the LRA as per aforementioned section it is a piece of social legislation. Section 186(1)(b)(ii) can clearly be attributed to preventing employers from bringing an employee's contract of employment to an end without having to provide any other reason but that the contract expired.

[50] Despite all the legal jargon used by the respondent to try and worm out of the situation, it is my finding that all the Applicant sought was clarity relating to her employment status as there were lots of confusing correspondence and communication, instead the Respondent terminated her employment whereas there were outstanding issues that were supposed to have been cleared. The Applicant therefore managed to subjectively show her expectation and when objectively assessed is considered to be reasonable.

[51] Under the circumstances it is my conclusion having regard to all of the above including case law I referred to that the Applicant managed to discharge her onus.

[52] In dealing with the remedy sought i.e. retrospective reinstatement. Section 193 of the LRA which provides that if dismissal is found to be substantively unfair, reinstatement or re-employment should be considered unless it is impossible. In this matter it is not impossible as the position is still available and not filled.

[53] Despite accepting that for the purposes of dismissal relating to legitimate expectation that dismissal is the date the employee was informed of the non-renewal, for the purpose of retrospective reinstatement dismissal date shall therefore be considered to be the last date the employee left and was paid her salaries, which is 31 October 2018.

[54] The Respondent must therefore reinstate the Applicant with retrospective effect to the same terms and conditions of employment which governed the employment relationship prior to 31 October 2018, with back pay. The back pay amount to be paid to the Applicant is to be calculated as follows: - R78 138.00 x 06 months = R468 828.00 and report for duty on 06 May 2019.

Award

[1] The Applicant's dismissal was substantively unfair.

[2] As a result of the aforesaid, the Respondent, **Mpumalanga Economic Growth Agency (MEGA)** is ordered to retrospectively reinstate the Applicant, **Nkambule, Carol** to the same terms and conditions of employment which governed the employment relationship prior to 31 October 2018, with back pay.

[3] The back pay amount to be paid to the Applicant is to be calculated as follows: - R78 138.00 x 06 months = R468 828.00 (four hundred and sixty eight thousand rand eight hundred and twenty eight rand only) and the Applicant must report for duty on 06 May 2019.

[4] The above-mentioned amount must therefore be paid into the Applicant's bank account by no later than 03 May 2019.

Mokoena.

Signature: ______________________

Commissioner: ***Letsema Mokoena***
Sector: ***Business/Professional services***