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Njikelana v Kruger NO & others (2019) 40 ILJ 2380 (LC)

Citation	(2019) 40 ILJ 2380 (LC)
Case No	JR1834/2017
Court	Labour Court
Judge	Mahosi J
Heard	April 18, 2019
Judgment	May 7, 2019
Counsel	*Adv B Ford*for the applicant. *Attorney D Norton* for the third respondent.
Annotations	No annotations to date

Flynote : Sleutelwoorde

CCMA—Jurisdiction—Section 186(1)(b) of LRA 1995—Dismissal must be F established for CCMA to have jurisdiction—Where dismissal not proved CCMA lacks jurisdiction to entertain dispute.

CCMA arbitration proceedings—Review of proceedings, decisions and awards of commissioners—Test for review—Where issue for determination whether G there had been dismissal, and accordingly whether CCMA had jurisdiction, applicable test that of correctness as opposed to reasonableness—Correctness of commissioner's decision to be determined from objective facts properly before him.

Contract of employment—Fixed-term contract—Renewal—Reasonable expectation H of renewal—Employee found to be dishonest cannot have reasonable expectation of renewal.

Contract of employment—Fixed-term contract—Renewal—Reasonable expectation of renewal—Section 186(1)(b) of LRA 1995—Reasonable expectation of permanent employment not covered by section—Failure to appoint to I permanent position not amounting to dismissal.

Headnote : Kopnota

The applicant employee was employed by the third respondent company as human resources: generalist on a fixed-term contract from 1 August 2015 for a period of 12 months. The termination date was 31 July 2016. It was renewed for two J consecutive periods. The first from 1 August 2016 to 31 December 2016 and the second from 1 January 2017 to 31 March 2017. It was company practice

that an employee joining the company was required to undergo various verification exercises such as credit, qualification and criminal checks, which were performed by the forensic department. Prior to joining the company, the employee was also subjected to these verification exercises. However, in July 2016, the company commissioned a service provider to conduct a further verification exercise, which established that the employee had a criminal record. A The employee was informed that she was under investigation; she denied knowledge of any criminal record but undertook to enquire about the status of her criminal record. This she did, and she discovered that she indeed had a criminal record that arose from an incident in 1990 when she was arrested and fined R150 for stealing sweets, chocolate and biltong. The employee B approached the Department of Justice to apply for the expungement of her criminal record. In February 2017 the company advertised two positions and the employee applied for a permanent position of human resources: business partner. She was interviewed for the position and was requested to complete a declaration form in respect of which she disclosed her criminal record. She further deposed to an affidavit confirming her criminal record, which was C submitted to the company. Her application for the permanent position was unsuccessful and she was informed that her fixed-term contract would not be renewed. On 31 March 2017, the company issued two letters, one confirming her non-appointment and the other confirming the non-renewal of her fixed-term contract. D

The employee referred an unfair dismissal dispute to the CCMA in terms of s 186(1)*(b)* of the LRA 1995. The commissioner issued an award in terms of which he dismissed the employee's claim on the basis that she had failed to prove that, despite the non-disclosure of her criminal record, she had a reasonable expectation that her fixed-term contract would be renewed or extended as E provided for under s 186(1)*(b)*. The basis for his finding was that she was appointed in a temporary position and that this position no longer existed. Further that the employee was not asking for her fixed-term contract to be renewed on the same terms and conditions, but that she be appointed to a new position.

In the Labour Court the employee sought to review the award on the basis that F the commissioner failed to consider the evidence that her expectation was reasonable and therefore arrived at an award that no reasonable decision maker could have arrived at.

The court confirmed that, because the issue for determination was whether there had been a dismissal, and accordingly whether the CCMA had jurisdiction, G the applicable test was that of 'correctness' as opposed to 'reasonableness'. The correctness of the commissioner's decision had to be determined from the objective facts that were properly before him.

The employee's contention was that she had a reasonable expectation of permanent employment. The court considered the findings in *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 *ILJ* 183 (LAC)H and found that the employee's reliance on s 186(1)*(b)* to claim her non-appointment to a permanent position was misplaced. Section 186(1)*(b)* covers instances where the employee alleges a reasonable expectation of renewal of a fixed-term contract that has expired. It does not cover reasonable expectation of appointment in a permanent position subsequent to several I renewals of a fixed-term contract. Therefore, the employee's claim that her non-appointment on a permanent basis amounted to dismissal as envisaged in s 186(1)*(b)* was found to be meritless.

The court went on to consider whether the employee had a reasonable expectation that her contract would be renewed and found that there was no evidence before the commissioner and before the court that there was an expectation J

created by the company that the contract of employment would be renewed. The court found further that she had been dishonest in failing to disclose her criminal record and that, in the face of such dishonesty, she could not have harboured an objectively reasonable expectation of

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the renewal of her fixed-term contract or permanent appointment.

The A court found that the commissioner's finding that the requirements of s 186(1)*(b)* had not been satisfied was correct and accordingly dismissed the application for review.

Case information

Application to the Labour Court for the review of an arbitration award handed down by the CCMA. The facts and further findings appear from the reasons B for judgment.

Cases Considered

Annotations:

Enforce Security Group v Fikile & others (2017) 38 *ILJ* 1041 (LAC) (referred to)

Independent Municipal & Allied Trade Union & another v City of Johannesburg C Metropolitan Municipality & others [2014] 6 BLLR 545 (LAC) (referred to)

SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (2008) 29 *ILJ* 2218 (LAC) (referred to)

University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others D(2012) 33 *ILJ* 183 (LAC) (relied on)

Statutes Considered

Labour Relations Act 66 of 1995 s 186, s 186(1)*(b)*

Adv B Ford for the applicant.

Attorney D Norton for the third respondent. E

Judgment reserved.

Judgment

Mahosi J:

Introduction F

[1] This is an application in terms of s 145 of the Labour Relations Act (LRA) [1] to review and set aside the arbitration award issued by the first respondent (the commissioner), under the auspices of the second respondent, the Commission for Conciliation, Mediation G & Arbitration (the CCMA), dated 15 July 2017 under case no GATW5386-17.

[2] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the dispute, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

Material background facts H

[3] The applicant was employed by the third respondent as human resources: generalist on a fixed-term contract from 1 August 2015 for a period of 12 months. The termination date was 31 July 2016. I It was renewed for two consecutive periods, the first from 1 August 2016 to 31 December 2016 and the second from 1 January 2017 to 31 March 2017.

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[4] It is common cause that prior to an employee joining the third respondent, he/she is required to undergo various verification exercises such as credit, qualification and criminal checks which are performed by the third respondent's forensic department. Prior to joining the third respondent, the applicant was also subjected to A these verification exercises.

[5] On or about July 2016, the third respondent commissioned a service provider, Lexis Nexis, to conduct another verification exercise on the applicant, which established that the applicant had a criminal record. On 10 October 2016, the applicant was invited to a meeting by the B internal audit unit during which she was requested to complete a forensic interview information sheet. The applicant completed the form and indicated that she had no past, current or pending criminal record against her name.

[6] Subsequently, the applicant was informed that she was under C investigation owing to the fact that the Lexis Nexis report disclosed that there was a criminal record against her name. The applicant denied knowledge of any criminal record against her name. It was then agreed that the applicant would enquire about the status of her D criminal record.

[7] On 11 October 2016, the applicant approached the Pretoria Criminal Record Centre where it was confirmed that she indeed had a criminal record that arose from an incident in 1990 when she was arrested and fined R150 for stealing sweets, chocolate and biltong. The applicant then approached the Department of Justice to apply for E the expungement of her criminal record.

[8] On or about 8 February 2017, the third respondent advertised two positions and the applicant applied for a permanent position of human resources business partner. On 13 March 2017, the applicant F was interviewed for the position she applied for and was requested to complete a declaration form in respect of which she disclosed her criminal record. The applicant further deposed to an affidavit on 23 March 2017 confirming her criminal record, which was submitted to the respondent on 27 March 2017.

[9] A meeting was held between the applicant and the third respondent's G representatives on 30 March 2017 in which the applicant was informed that her application for the permanent position was unsuccessful and that her fixed-term contract would not be renewed. On 31 March 2017, the third respondent issued two letters to the H applicant confirming her non-appointment and non-renewal of her fixed-term contract.

[10] Aggrieved by the third respondent's decision not to renew her fixed-term contract and not to appoint her, the applicant referred an unfair dismissal dispute to the CCMA in terms of s 186(1)*(b)* of the LRA. I The dispute could not be resolved at conciliation and as a result, a certificate of non-resolution was issued. The dispute was arbitrated on 12 July 2017. On 15 July 2017, the commissioner issued an award in terms of which he dismissed the applicant's claim. It is this award J that is the subject of this application.

The arbitration award

[11] The issue before the commissioner appears in the parties' pre-arbitration minute as follows:

'6.1 Whether the respondent dismissed the applicant. A

6.1.1 The respondent submits that the contract simply expired on termination date of 31 March 2017.

6.1.2 The applicant submits that the respondent dismissed her.

6.2 Whether the applicant had a reasonable expectation of renewal or B appointment into a permanent position.

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> 6.3 If the CCMA finds that there was a dismissal, then whether the dismissal was procedurally and substantively unfair.'

[12] In his award, the commissioner recorded the issue in dispute as whether the applicant had a reasonable expectation that her fixed-term C contract would be renewed or extended as provided for under s 186(1)*(b)* of the LRA.

[13] In his analysis, the commissioner made a finding that the applicant did not meet the requirements of s 186(1)*(b)* of the LRA. The basis for his finding was that the applicant was appointed in a temporary D position and that this position no longer existed. Further that the applicant was not asking for her fixed-term contract to be renewed on the same terms and conditions, but that she be appointed to a new position.

[14] On the issue of dishonesty, regarding the applicant's criminal record, E the commissioner rejected the applicant's submission that during her interview, she had forgotten that she had a criminal record. This appears on para 22 of his award where he stated as follows:

> 'It is highly improbable that the applicant did not remember during the F interview that she was arrested. In all likelihood this would have been a traumatic experience and it is difficult to see how she could forget it. Furthermore, she kept quiet and only informed the respondent of the incident on 23 March some five months after the first interview.'

[15] The commissioner further found that the applicant failed to prove G that, despite the fact that she did not disclose her criminal record, she had a reasonable expectation for the renewal of her fixed-term contract or permanent appointment. As a result, the commissioner dismissed the applicant's claim.

[16] Dissatisfied with the arbitrator's award, the applicant brought this H application.

The grounds for review

[17] The applicant seeks to review the award on the basis that the I commissioner failed to consider the evidence that the applicant's expectation was reasonable and therefore arrived at an award that no reasonable decision maker could have arrived at.

The applicable law and analysis

[18] The issue before the commissioner was whether the applicant was J dismissed. Dismissal is defined in s 186(1)*(b)* of the LRA as follows:

> '(1) Dismissal means that —
>
> *(a)* an employer has terminated employment with or without notice;
>
> *(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 A renew it.'

[19] In *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*, [2] the Labour Appeal Court (LAC) dealt with a similar matter and stated as follows:

> '[39] The issue that was before the commissioner was whether there had B 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 C Act. ...
>
> [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 D 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. ...
>
> [43] What s 186(1)*(b)* provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer E to renew a fixed-term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in s 186(1)*(b)* are in my view, that the employee should have a reasonable expectation, and the employer fails to renew a fixed-term contract or renew it on less favourable terms. The fixed-term contract should also be capable of G renewal.
>
> [44] 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 G expectation. Because the test is objective, the enquiry is whether a reasonable employee in the circumstances prevailing at the time would 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 s 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.' H

[20] The applicable test is, therefore, that of 'correctness' as opposed to 'reasonableness'. The correctness of the commissioner's decision has to be determined from the objective facts that were properly before him. This was confirmed by the Labour Appeal Court (LAC) in I *Enforce Security Group v Fikile & others*[3] where it stated as follows:

> 'The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties' dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a A finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding. To the extent that the court a quo found that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner.'

[21] As B aforementioned, the applicant's contention was not only that she had a reasonable expectation that her fixed-term contract would be renewed but also that she would be appointed permanently. To support her contention, the applicant relied on the evidence that C her fixed-term contract had been renewed twice before, that the third respondent conceded that, but for the alleged dishonesty, she would have been appointed and further that her criminal record was expunged on 15 March 2017.

[22] The applicant's argument that she harboured a reasonable expectation D to be appointed on a permanent position is equally not sustainable. In *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & others*, [4] the following was said:

> '[18] The words employed in s 186 envisage that two requirements must be met in order for an employer's action to constitute a dismissal:
>
> (1) a reasonable expectation on the part of the employee that a fixed-term E contract on the same or similar terms will be renewed; and
>
> (2) a failure by the employer to renew the contract on the same terms or a failure to renew it at all.
>
> These words do not however carry the meaning which is urged by third respondent, namely that, by being employed on the basis of a F series of fixed-term contracts, an employee has without more a reasonable expectation of a permanent appointment. The distinction between the fixed-term contract and a permanent contract has a clear economic rationale. An employer in the position of the appellant may have discretionary funds for a limited period. During this period, it G offers a series of fixed-term contracts to a particular employee. At some point these funds are depleted and the employer can no longer afford a further fixed-term contract. By contrast, the creation of a permanent post would necessitate a more permanent source of funding.
>
> [19] Although a draft bill has no significant interpretative weight, it is H instructive to refer to the Labour Relations Amendment Bill of 2010 in which the following amendment was proposed to s 186:
>
> "Section 186 of the principal Act is amended by —
>
> *(b)* an employee engaged under a fixed term contract of employment reasonably expected the employer —
>
> (i) to renew a fixed term contract of employment on the same I or similar terms but the employer offered to renew it on less favorable terms, or did not renew it; or
>
> (ii) to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it

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> on less favorable terms, or did not offer it, where there was reasonable expectation."
>
> The draft therefore makes a clear distinction between an expectation to renew a fixed-term contract and the offer of an indefinite contract of employment.
>
> [20] The facts of this case illustrate this distinction. Third respondent enjoyed A seven fixed-term contracts prior to her application for a permanent position. In this case, she chose "to put her hat in the ring" for a permanent appointment. In other words, her own conduct illustrates the distinction between the expectation of the renewal of a fixed-term contract and another form of contract, in this case a permanent post. B Had she not been offered a further fixed-term contract, then depending on the evidence, she could be entitled to proceed in terms of s 186(1)*(b)* That would, however, not be a case based, as is this one, on a different form of employment, being a permanent contract.
>
> [21] The words chosen by the legislature, absent an amendment to the legislation, cannot carry the burden of the third respondent's case C in that it covers a restrictive set of circumstances, namely a reasonable expectation of a renewal of that which had previously governed the employment relationship, namely a fixed-term contract which had previously been enjoyed, which had now expired and, by virtue of the factual matrix created, at best, a reasonable expectation of a renewal.' D

[23] In view of the above authority, the applicant's reliance on s 186(1)*(b)* of the LRA to claim her non-appointment to a permanent position is misplaced. Section 186(1)*(b)* of the LRA covers instances where the employee alleges a reasonable expectation of renewal of a fixed-term E contract that has expired. It does not cover reasonable expectation of appointment in a permanent position subsequent to several renewals of a fixed-term contract. Therefore, the applicant's claim that her non-appointment on a permanent basis amounted to dismissal as envisaged in s 186(1)*(b)* of the LRA is meritless.

[24] The next question is whether on the facts that were placed before F the commissioner, the applicant established that she held a reasonable expectation that her contract would be renewed. In *Independent Municipal & Allied Trade Union & another v City of Johannesburg Metropolitan Municipality & others*[5] the Labour Appeal Court held:

> 'When assessing whether an expectation is reasonable all the surrounding facts G and circumstances should be considered including the terms of the contract of employment, promises made by the employer — regardless of contractual terms which gainsay what the employer promised and the general conduct of the parties.'

[25] There was no evidence whatsoever before the commissioner and H before this court, that there was an expectation created by the third respondent that the applicant's contract of employment would be renewed. The applicant's case was that, in finding that she failed to prove her legitimate expectation, the commissioner did not consider I the circumstances that gave rise to her expectation. In making her

case, the applicant relied on the fact that while still employed, there were no performance issues, she committed no misconduct and the third respondent renewed her contract because they were happy with her. Regrettably, the circumstances relied on by the applicant do not A establish that the third respondent created an expectation that her contract would be renewed.

[26] The applicant's strong reliance on the fact that the incident she was arrested for occurred 26 years ago is also not helpful to her case because it is apparent from the evidence that, after having being made B aware of the criminal record, she did not immediately confirm the existence thereof with the third respondent. Instead, the applicant sought to apply for the expungement of the criminal record and gave the third respondent the impression that there had been a mistake that she was in a process of rectifying. It was only after five months C or so and after being requested to depose to an affidavit that she confirmed that she indeed had a criminal record. So, even if she had forgotten about her criminal record, she was afforded an opportunity to set the record straight, but she failed. The third respondent gave evidence on its code of ethics, which requires honesty and integrity D from all its employees.

[27] As such, in failing to 'come clean' and to admit that there was a criminal record against her name, the applicant was dishonest. In the face of such dishonesty, the applicant could not have harboured an objectively reasonable expectation of the renewal of her fixed-term E contract or permanent appointment.

[28] The commissioner correctly found on the evidence before him that it was difficult to comprehend how it could be expected of the third respondent to renew or appoint the applicant given that she did not only fail to disclose her criminal record, but also denied its existence. F For that reason, he found that the requirements of s 186(1)*(b)* of the LRA had not been satisfied in that the applicant failed to establish that she had a reasonable expectation of renewal. It was on the basis of his finding that he dismissed the applicant's claim.

[29] It is my view that the commissioner's finding was correct. There is G consequently no reason for this court to interfere with his ruling. The application to review and set aside the arbitration award in the circumstances falls to be dismissed.

[30] I have had regard to the issue of costs and I find that taking into account the requirements of law and equity, there should be no order as to costs.

[31] In the circumstances, I make the following order. H

Order

1 The application to review and set aside the arbitration award issued by I the first respondent under the auspices of the second respondent dated 15 July 2017 under case no GATW5386-17 is dismissed.

2 There is no order as to costs.

Applicant's Attorneys: *Nkuna & Mabunda Inc Attorneys.*

Third Respondent's Attorneys: *Mkhabela Huntly Attorneys.* J

1 66 of 1995 as amended.
2 (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 (LAC).
3 (2017) 38 *ILJ* 1041 (LAC); [2017] 8 BLLR 745 (LAC) at para 16.
4 (2012) 33 *ILJ* 183 (LAC); [2012] 2 BLLR 164 (LAC).
5 [2014] 6 BLLR 545 (LAC) at para 34.

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