IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.1/2016

In the matter between:-

LESOTHO REVEVUE AUTHORITY **APPELLANT**

and

'MAMONYANE BOHLOKO **1ST RESPONDENT**

M. KETA ARBITRATOR **2ND RESPONDENT**

DIRECTORATE OF DISPUTE

PREVENTION AND RESOLUTION **3RD RESPONDENT**

CORAM : FARLAM, A.P.
LOUW, A.J.A.
DR MUSONDA, A.J.A.

HEARD : 20TH OCTOBER, 2016

DELIVERED : 28TH OCTOBER, 2016

SUMMARY

Failure to renew a fixed contract of employment for poor performance – employee aware–whether there can be legitimate expectation of renewal – whether there is distinction between the disciplinary process for dismissal and renewal of a fixed term contract – A valid legitimate expectation of renewal if not effected can be unfair dismissal within the context of Section 68 (3).

JUDGMENT

MUSONDA AJA

[1] This is an appeal with certificate of leave from the Labour Appeal Court to this Court on a point of law.

[2] The point of law certified was, whether the Arbitrator's decision confirmed by the Labour Court and Labour Appeal Court that an expectation of renewal must always be lawful and reasonable (however egregious the levels of incompetence might be) if the employer has not prior to the effluxion of the contract, followed procedural steps by which a

dismissal can be effectuated on the grounds of such incompetence?

[3] The Labour Court considered whether the arbitration award handed down by Arbitrator Mr Keta on 20th September 2011, was reviewable on the grounds set out by the appellant in the application for review, a matter that entailed an examination of the lawfulness of the reasoning of the Arbitrator.

[4] In making his decisions, the Arbitrator held that an employee might expect the contract to continue unless he or she had been subjected to disciplinary procedures which an employer must comply with in order to effectuate a fair dismissal. The Arbitrator held the Appellant's failure to implement these procedures as a decisive factor that the contract might be expected to continue. The question is, whether in coming to this conclusion, the Arbitrator and subsequently the Labour Court and the Labour Appeal Court committed an error of law that induced both the Arbitrator and at both courts to fail to take into account circumstances that were relevant to the issue under consideration.

[5] The 1st Respondent was employed on a fixed term contract which provided for termination date of 30th September 2009. After the expiration of the term, the contract was not renewed as she was alleged not be performing up to the required standard. The 1st Respondent's contract contained a provision that she was to be informed of renewal or otherwise of her contract not less than (three) 3 months before expiry. Sometime in June the 1st Respondent and other employees were informed that their fixed term contracts were not going to be renewed automatically, but they were going to be renewed on the basis of individual performance. It was further decided by management that an employee who scores less than 50 per cent after the assessment will not be eligible for renewal.

[6] The applicant and her supervisor agreed on a score of 67.8 per cent which placed the applicant above the threshold. After the review the recommendation of renewal of the appellant's contract was forwarded to Mr Letjama (Acting Commissioner General).

[7] The Acting Commissioner General lowered the 1st Respondent's score to 46 per cent, placing the 1st Respondent below the threshold. The 1st Respondent was invited to a meeting to make representations regarding the score of 46 per cent. After the meeting the Acting Commissioner General ruled on the 13th July that the applicant's contract was not going to be renewed.

[8] It was common cause that the non-renewal of the contract was based on the under performance of the 1st Respondent throughout the terms of her contract. The 2nd Respondent in his award acknowledged the existence of evidence that the 1st Respondent had been cautioned on her poor performance and urged to improve in those areas throughout her contract.

[9] Significant to note is a finding of fact by the Arbitrator that the 1st Respondent was being economic with the truth when she denied knowledge of the score off 55 per cent despite the score having been agreed to by the supervisor and the 1st Respondent.

[10] Reasons for the Award:

The learned Arbitrator held that

> *"In terms of the common law, a fixed term contract terminates at the expiration of the term for which it was entered into. The termination follows automatically and it is not considered to be a dismissal. The position of the common law was altered by the Labour Code No.24 pf 1992 which provides that –*

For the purposes of Section 66 "*dismissal shall include –*

(a) Termination of employment on the initiative of the employer;

(b) the ending of any contract for a period of fixed duration or for the performance of a specific task or journey without such contract being renewed, but only in cases where the contract provided for the possibility of renewal;

(c) *the employee must prove on the balance of probabilities that he had a reasonable and legitimate expectation that his contract was going to be renewed. The test to be used to determine whether a reasonable expectation existed or not is an objective test. The employee must prove the existence of facts that would in the ordinary course, lead a reasonable person to anticipate a renewal of a fixed term contract.*

[11] The learned Arbitrator cited the case of *Dieks V University of South Africa*,[1] in which case it was held:

> "*That failure to renew a fixed term contract amounts to dismissal only if the employee can show that he reasonably expected renewal of his fixed term contract. The court enumerated the criteria that have to be considered in an attempt to establish whether a reasonable expectation has come into existence on an objective basis.*

[1] (1999) 4 BLLR 304

[12] Submissions:

The appellants contended that the non-renewal of the contract was justifiable given the poor performance of the 1st Respondent. The 1st Respondent should prove the existence of a dismissal within the contemplation of the statutory unfair dismissal regime and demonstrate the existence of an expectation, which is reasonable in the circumstances, that the contract will be renewed.

[13] The 1st Respondent's assessment was done between her and the supervisor, which assessment was submitted to the Acting Commissioner General for consideration as a recommended outcome. If the Acting Commissioner General considered the assessment was wrong, he would entertain the representations of the employee and supervisor before finally determining the matter.

[14] The process of appraisal was concerned with the issue of renewal and not the disciplinary procedure. The Arbitrator failed properly to appreciate the distinction between renewal and the role played by

disciplinary proceeding. This was a palpable misdirection.

[15] The appellant heavily relied on the dicta of the Labour Appeal Court as having reflected the proper approach when the court said:

> "*In order to assess the issue whether the first respondent had a reasonable expectation that the contract would be renewed and that the appellant's failure to renew it constituted a dismissal, it was first necessary to determine whether she in fact expected her contract to be renewed which is the subjective element. Secondly if she did have such an expectations, whether taking into account all the facts, that expectation was reasonable, which is an objective element – Once it is found that there had been a dismissal, the onus shifts to the employer to justify its fairness.*

[16] The appellant faulted the Labour Appeal Court, which despite its earlier dicta, affirmed the Labour Court's finding and contented that;

> "the learned Arbitrator failed to consider the effect of poor work performance when deciding the veracity of the 1st Respondent's alleged expectation of renewal of the contract and the evidence that the Commissioner

> General reserved the right to interrrogate the scores prior to the renewal of the contract."

[17] The Labour Appeal Court felt obliged to agree that:

> "*having disqualified the evidence of poor work performance, as he did, it would only have served academic purpose for the Arbitrator to evaluate both the effect of poor work performance, as well as the professed role of the Commissioner General in the renewal process".*

[18] Underplaying the 1st Respondent's non-performance as academic, and so irrelevant constituted a material irregularity, which warrants the review of the Arbitrator's decision, which should be set aside and the upholding of the lawfulness of the termination of 1st Respondent's contract.

[19] Mr Mofilikoane augmented the filed grounds of appeal with oral arguments. He argued that the 1st Respondent's position was that of a manager. The renewal was not automatic, she had to show she had performed well. Her under performance was common cause in the DPPR, Labour Court and Labour Appeal Court. Section 14 does not apply to a manager. The

conclusion arrived at by the arbitrator was therefore wrong.

[20] It was canvassed on behalf of the 1st Respondent that the only grounds for review are:

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding office;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or rejection of admissible or competent evidence. See *The Practice of the Supreme Court of South Africa, 4th Ed by Herbstein and Van Winsen.*

[21] On behalf of the Respondent it were strenuously argued that the proceedings before us were an appeal disguised as a review. Reference was made to *Jda Trading (Pty) t/a Supreme Furniture v M Monoko & others*[2] where the learned Judge said:

[2] LAC/REV/39/04 (unreported)

> "where the reason for wanting to have the *judgment set aside is that the court came to the wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where on the other hand, the real grievance is against the method of trial, it is proper to bring the case on review. An appeal is thus in reality a re-evaluation of the record of proceedings in the court a quo."*

[22] In para 16 of the award, the arbitrator referred to the evidence which showed the first respondent's poor work performance and the evidence that she had been cautioned on her performance and was urged to improve on those areas.

However, the arbitrator went further to state:

> *"I will mention that a fixed term contract is not a substitute for taking action for poor work performance. There is a procedure to be flowed when dealing with an employee who is under performing. The respondent cannot sit back and watch an employee who is not performing without taking any action and when is time to renew the contract, bring up the issue of non performance as a reason for non renewal."*

[23] The Arbitrator considered compliance with proper (disciplinary) procedure to be a precondition which must be satisfied before an employer can refuse to renew a contract of employment on the grounds of poor performance. In the result the Arbitrator failed to apply his mind to the evidence relating to poor performance by the first respondent as a factor in determining whether she had a reasonable expectation that the contract would be renewed.

[24] In approaching the enquiry regarding whether there had been a deemed dismissal of the first respondent on the basis of whether a procedure had been followed, the Arbitrator failed to deal with the question whether non renewal amounted to a deemed dismissal on the correct footing. In the result the Arbitrator considered the evidence regarding non performance to be irrelevant and did not consider such evidence in deciding whether the non renewal constituted a deemed dismissal of the first respondent. This constitutes a failure by the Arbitrator to consider the merits of the relevant evidence of poor performance and its effect on the reasonableness or otherwise of the first respondents expectation of a renewal and thus, the question

whether he non renewal of the contract amounted to a deemed dismissal.

[25] This amounted to a reviewable failure by the Arbitrator to consider the relevant consideration and he ignored the relevant evidence. *Hira & Another v Booysen and Another*[3] *Goldfields Investments Ltd and Another v City Council of Johannesburg and Another*[4] 1938 TPD 551 at 560-1.

[26] The 1st Respondent relied on five factors for her expectation of renew and these were:

(a) The continuous nature of the appellant's business and availability of her post which was advertised after her contract was not renewed;

(b) The fact that no disciplinary action had been taken against her for non-performance during the tenure of her employment;

(c) The fact that the score agreed between her and her immediate supervisor had placed her above

[3] (1992) (4) SA 69 (AD) at 6 G-J
[4] (1938) TTD 55 at 506-1

the threshold of 50 per cent gave her a reasonable expectation of renewal;

(d) Having scored above the threshold the supervisor, recommended the renewal of contract; and

(e) She had been invited to indicate whether she wanted to renew the contract.

[27] In argumenting the filed grounds Mr Ntaote reiterated that unless dismissal proceedings are taken before the contract comes to a termination, a legitimate expectation will be generated. A score of 67, and then later 55 will make a reasonable employee entertain a legitimate expectation.

[28] In this appeal we can only deal with the point of law certified by the Labour Appeal Court. The fact that the 1st Respondent was under performing, is common cause, so is the fact that she was warned.

[29] The issues therefore are:-

(a) Did she have an expectation of renewal?;
(b) Was it reasonably held?

The case stands and falls with the answer to the second question.

[30] The learned Arbitrator had made a factual finding that the Respondent was economic with the truth, as she pretended before him that she was not aware of the 55 per cent score. Her credibility was deeply wounded by that finding.

[31] She had been warned by senior management of her under performance. The independent auditors had brought this to her attention. She was invited with her supervisor to make representations, when she was scored 46 by the Acting Commissioner General. She was not treated unfairly. Regard should have been had to the fact that she was one of the architects of the non-automatic renewal of fixed contract regime.

[32] The Acting Commissioner General's downward assessment of her performance was based on an independent audit report by external auditors. To paint a picture with broad strokes, some damning aspects of the audit report were:

3.2.4.1 no approved supplier list was in place;

3.2.4.2 Documentation submitted by suppliers was not necessarily sufficiently comprehensive and there is no evidence that suppliers were formally evaluated by the procurement manager (1st Respondent); and

3.2.8.5.4 LEDS was paid for the services despite a request from the Debt Management Section to pay the M94,000 to the LRA as a down payment towards taxes owing.

[33] The management and the auditors did not sit back they warned the 1st Respondent. She and the supervisor agreed that something had to be done, but it was not done. The management had given the 1st Respondent reasonable time to improve within the context of Section 14 (2) of the Labour Code (Code of Good Practice) 2003.

[34] Section 14 (3) states that:

"If the employee continues to perform unsatisfactorily, the employer must warn the employee that he or she may be

dismissed if there is no improvement. An opportunity to improve may be dispensed with if –

(a) The employee is a manager or senior employee whose knowledge and experience qualify him or her to judge whether he or she is meeting the standards set by the employer

(b) The degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify dismissal.

[35] It is common cause that the 1st Respondent was a professional who ignored the primary functions of the purchase department as alluded to in the Audit Report. She kept on promising she was going to change not only to the LRA senior management, but to the external auditors as well.

[36] The 1st Respondent failed to maintain a transparent procurement process and made the appellant vulnerable to be defrauded. She ought to have known that the LRA is the cash cow of government, If her department was made the source the haemorrhage of

financial resources of government, which are intended for the provision of social services by government, there can be serious social and political ramification.

[37] The question is can any reasonable professional in view of warnings of under performance, and was adverse audit report, entertain a reasonable expectation that the contract will be renewed. Had the learned arbitrator properly directed his mind to the question to be decided, would he have reached the decision, given the evidence of under performing, promises to improve and the adverse audit report? The decision was "Wednesbury unreasonable" as was held in *Provincial Picture Houses v Wednesbury Corporation*[5].

[38] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*[6], the Constitutional Court of South Africa said:

[5] (1948) KB 548
[6](1976) (1) SA 888

> *"A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field".*

The Acting Commissioner General and the external auditors had adjudged the 1st Respondent incompetent.

He failed to take into account relevant considerations and took irrelevant ones into consideration, which makes his decision amenable to "Judicial Review".

[39] The Acting Commissioner General did not act in a mala fide fashion. There being no reasonable or objective expectation, there was no deemed dismissal.

[40] The following order is made:

1. The appeal is upheld.

2. The decision of the arbitrator is reviewed and is set aside.

3. It is declared that the first respondent's contract of employment was lawfully terminated when the appellant elected not to renew it.

4. No order as to costs.

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DR MUSONDA, A.J.A

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FARLAM, A.P.

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LOUW, A.J.A.

For the appellant : **Adv. L.A. Mofilikoane**

For the Respondent: **Adv.N.T. Ntaote**