THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 322 / 15

In the matter between:

JAN CARL WILLEM RADEMEYER	**Applicant**
and	
AVENG MINING LTD	**First Respondent**
J D SELLO N.O. (AS ARBITRATOR)	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Heard: **27 October 2016**

Delivered: **28 June 2017**

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – Review concerning issue of jurisdiction – Test of rationality and reasonableness does not apply – award considered de novo on the basis of being right or wrong

Dismissal – expiry of fixed term contract of employment – fixed term contract automatically terminated – does not constitute dismissal as contemplated by Section 186(1)(a)

Dismissal – reasonable expectation – application of Section 186(1)(b) – principles considered – no proper case made out – Section 186(1)(b) not applicable

Dismissal – determination of existence of dismissal – finding that no dismissal exists upheld

Review of award – conclusion of arbitrator correct – Arbitration award upheld – review dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA ('the third respondent'). This application has been brought in terms of Section 145, as read with Section 158(1)(g), of the Labour Relations Act[1] ('the LRA').

[2] The second respondent was called upon to decide whether the applicant had been dismissed by the first respondent. According to the applicant, the first respondent in effect dismissed him unlawfully and without cause, whilst according to the first respondent, the applicant was not dismissed but his limited duration contract had come to an end. In an award dated 23 December 2014, the second respondent then decided that the applicant's limited duration contract had terminated, and he was not dismissed by the first respondent. The second respondent then dismissed the applicant's referral. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant.

[1] Act 66 of 1995.

[3] The arbitration award was served on the applicant on 23 December 2014. The applicant review application was filed on 2 March 2015, making the application out of time where it came to the 6(six) weeks' time limit in terms of Section 145 of the LRA. The applicant applied for condonation, and condonation was granted by Van Niekerk J on 22 June 2016. The review application is thus properly before me for determination, which I shall now attend to by first setting out the relevant background facts.

The relevant background

[4] The applicant had been employed by the first respondent in the past, also on a fixed term contract of employment, which ended in 2008. The applicant is a qualified boiler maker and was employed in that capacity.

[5] The applicant returned to the employment of the first respondent in 2010, again on the basis of a fixed term contract of employment. The parties concluded a written contact of employment, which was signed on 7 April 2010, and which will be referred to in this judgment as 'the contract'. The salient terms of the contract was as follows:

5.1 The contract was concluded specifically for the first respondent's mining contract at Thuselisha. As a result, and in clause 1.1 of the contract, it is recorded that 'the Employer is not in a position to offer permanent employment but is able to offer employment of a temporary nature'.

5.2 The applicant was employed as a boilermaker (grade 4), on a temporary basis, with his employment commencing 1 March 2010 and terminating upon completion of the employer's / employee's contractual obligations. It is stated in clause 1.2 that the contract 'will automatically cease to be in operation', in such event. The contractual obligations was the work on the Thuselisha contract.

5.3 The parties in clause 1.3 agreed that there will be no expectation of permanent or continued employment upon expiry of the contract, and that the expiry of the contract would not constitute a dismissal, but a termination of employment due to expiry of the contract.

[6] The contract endured until 2014. The circumstances as to how it came to an end will be set out hereunder. At the time of termination of the contract, the applicant stated he was earning a cost to company salary of R44 000.00 per month. The first respondent disputed this and said the applicant was earning R27 420.67. Nothing turns on this dispute.

[7] On 8 April 2014, the applicant was issued with a written notice by the first respondent, indicating that the contract was 'nearing completion'. The notice recorded that the contract would automatically terminate on 8 May 2014, and shall not be construed as a dismissal, but deemed to be completion of the contract. This notice is in line with the terms of the contract, referred to above.

[8] According to the first respondent, the applicant was issued with this notice because the contract it had at Thuselisha, and on which the applicant was specifically employed, had come to an end. It was actually common cause in the arbitration that this Thuselisha contract had come to an end, with only 'mopping up', as the applicant himself described it, to be completed.

[9] The applicant's case however was that it was not just as simple as reflected above. According to the applicant, a certain "Johannes" who worked in the first respondent's HR department, on 1 November 2013, handed him along with other employees a notice of termination of contract notifying them that their employment contracts would end at the end of November 2013. The applicant said he accepted this, and because this would mean that as from 1 December 2013 he would be unemployed, the applicant then sought alternative employment at Sasol Mining.

[10] According to the applicant, he had an offer of employment from Sasol Mining, which he received on 26 November 2013. However, circumstances intervened in that one of the first respondent's site foremen, Willem Meyer ('Meyer') informed the applicant that the earlier notice of termination issued to the applicant in November 2013 had been withdrawn and he would continue to work at Thuselisha.

[11] Also, the applicant contended that he was verbally offered a position at the first respondent's contract at Shondoni Shaft ('Shondoni contract'), once the

work at Thuselisha had been completed. This verbal offer was, according to the applicant, made by one John Sinclair ('Sinclair'). The applicant said that Sinclair told him to simply send through his CV for the position and there was no need for him to go to an interview.

[12] The applicant stated that because of the first respondent's conduct, as set out above, he decided not to accept the offer he had from Sasol and continued working at Thuselisha, but now without a fixed term contract.

[13] When the applicant then received the notice of termination of the contract on 8 April 2014, he initially refused to sign it, but Sinclair then assured him that the notice was just a formality and he would be offered permanent employment on the Shondoni contract. The applicant then signed the notice, but after he signed the notice, he was told there was no work for him on the Shondoni contract. He then referred a dispute to the CCMA.

[14] The first respondent's case differed sharply from the aforesaid case of the applicant. According to the first respondent, there was no notice of termination of contract ever issued to the applicant in November 2013. The first respondent explained that the applicant had indeed been part of a first batch, called 'batch A', of employees who would have been given notice on 1 October 2013 that their contracts would come to an end at the end of October 2013, but this batch was withdrawn and the notices were never issued to the employees, because the work was not yet completed. There was another batch of employees, called 'batch B', who indeed were issued with notices of termination of contract on 1 October 2013 that their contract would end on 31 October 2013, because the work of these employees did end. The applicant was not part of 'batch B'. According to the first respondent, the applicant at all times remained working, based on the contract, at the Thuselisha contract, because his work had not yet been concluded.

[15] The first respondent contended that the applicant was never offered a permanent position on the Shondoni contract. According to the first respondent, any fixed term contract employee that wanted a permanent position had to follow the proper recruitment processes and apply for the position, once advertisements for the position has been sent out. Also, Sinclair could not have offered the applicant such a position, as he simply did not have

the power to do so and it was only the operations director, Hein Liebenberg, who could make such an offer.

[16] The first respondent's case was that when the applicant's work was coming to an end at Thuselisha, he was given the notice of termination of the contract on 8 April 2014, and the contract automatically terminated on 8 May 2014, meaning there was no dismissal of the applicant.

[17] The above was, in summary, the facts as they came before the second respondent as arbitrator. The second respondent decided, based on these facts, and other considerations I address hereunder, that the applicant had not been dismissed by the first respondent, but that his fixed term contract of employment had ended on 8 May 2014. The second respondent then dismissed the applicant's referral, giving rise to the current review application.

The test for review

[18] In *Mnguti v Commission for Conciliation, Mediation and Arbitration and Others*[2] the Court held as follows:

> 'The issue whether or not a dismissal exists concerns the jurisdiction of the CCMA. If there is no dismissal, then the CCMA has no jurisdiction to entertain an unfair dismissal claim. Where a commissioner thus finds that no dismissal exists, that commissioner in essence determines that the CCMA does not have jurisdiction and the matter is then dismissed on that basis.'

[19] The above being the case, the first question to be answered is where such a determination by a commissioner is then challenged on review to the Labour Court, on what basis is such review then decided?

[20] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3] the Court considered the review test postulated by *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] and said:

[2] (2015) 36 ILJ 3111 (LC) at para 14.
[3] (2008) 29 ILJ 964 (LAC) at para 101.
[4] (2007) 28 ILJ 2405 (CC).

> '…. Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise …. ' (emphasis added)

[21] In simple terms, where the issue to be considered on review is about the jurisdiction of the CCMA, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the commissioner on jurisdiction is right or wrong. In *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* the Court held:[5]

> 'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds....' (emphasis added)

[22] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[6] the Labour Appeal Court articulated the enquiry as follows:

> 'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.
>
> The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court…'

[23] I have had the opportunity to deal with this kind of review test, specifically in the context of whether a dismissal exists, in *Trio Glass t/a The Glass Group v Molapo NO and Others*[7] and said:

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[5] (1999) 20 ILJ 108 (LAC) at para 6.
[6] (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40.
[7] (2013) 34 *ILJ* 2662 (LC) at para 22.

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[24] This 'right or wrong' review approach has been consistently applied in a number of judgments, in instances where the issue for determination on review concerned the jurisdiction of the CCMA where the commissioner had to decide whether a dismissal exists.[8] In particular, and in circumstances very similar to the matter *in casu*, the LAC in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others*[9] held:

> 'Thus the issue before the commissioner, whether or not there had been a dismissal, was a jurisdictional issue. This means that if there was no dismissal the bargaining council did not have jurisdiction to entertain the dispute referred to it by the appellant …'

[25] I will therefore decide whether the determination of the second respondent that the applicant was not dismissed, but his fixed term contract of employment automatically terminated, was right or wrong, by way of a *de novo* consideration of the justiciable facts on record, and the relevant principles of law.

The grounds of review

[8] See *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 *ILJ* 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21; *Mnguti* (*supra*) at para 20.

[9] (2013) 34 ILJ 1427 (LAC) at para 24.

[26] The applicant's case and grounds for review must be made out in the founding affidavit, and supplementary affidavit.[10] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[11]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[27] Because this review application entails a *de novo* consideration as to whether the decision of the second respondent that the applicant was dismissed, is right or wrong, the actual reasoning of the second respondent as contained in his award is of lesser importance. The review grounds are thus not aimed at showing that this reasoning is unreasonable, but would rather be setting out a basis as to why the applicant contends the correct finding should have been that he was indeed dismissed.

[28] The applicant accepts, which is confirmed in the founding affidavit, that he was employed on a fixed term contract of employment. The applicant's case is that he was issued with an end of contract notice in November, ending this contract at the end of November 2013, but he continued to work unabated after that. This meant that he was no longer continuing his work under a fixed term contract of employment.

[29] The applicant further contends that the end of contract notice of 8 April 2014 was unlawful, as the first respondent had undertaken to transfer him to the Shondoni contract as a permanent employee. This undertaking was either in the form of a promise, or an actual offer. For this reason, according to the applicant, the end of contract notice was thus a dismissal, which dismissal was unfair.

Analysis

[10] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.
[11] (2010) 31 ILJ 713 (LC) at para 27.

[30] In deciding whether the applicant was dismissed, the point of departure has to be the consideration that the applicant had the *onus* to prove that he was dismissed.[12]

[31] As the applicant himself conceded, his employment at the first respondent was on the basis of a fixed term contract of employment. The written memorandum of this contract was part of the evidence, and was undisputed. This was the only contract in existence between the applicant and the first respondent. The terms of this contract were clear. The applicant was not guaranteed permanent employment and did not have any expectation of continued employment on expiry of the contract. His continued employment was directly linked to him having duties on the first respondent's Thubelisha contract. His employment would automatically end on expiry of the contract term.

[32] There is in my view nothing on the evidence that contradicts these clear contract terms. The applicant's work on the Thubelisha contract ended, and he was then given notice of termination of the contract fully in line with the terms of that contract. That would mean that his employment automatically came to an end on 8 May 2014, which is when the term of the contract expired. In turn, this means the applicant was not dismissed.

[33] It is because of the above clear facts that the applicant sought to rely on two contentions to try and contradict the contract, its application, and the consequences of its application. The first is the alleged notice of end of contract in November 2013, which according to the applicant meant that he continued to work after the end November 2013 without any fixed term contract. The second contention is the promise / offer of employment on the Shondoni contract allegedly made to him, which according to the applicant was a new permanent contract and he was thus dismissed from this permanent contract.

[34] Dealing with the alleged notice of end of contract given the applicant on 1 November 2013, I have little hesitation in rejecting this contention. There was no proper evidence of the applicant ever being given such a notice. The first

[12] See Section 192(1) which reads: 'In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal'. See also *De Milander* (*supra*) at para 25; *Nongcantsi v Mnquma Local Municipality and Others* (2017) 38 ILJ 595 (LAC) at para 18; *Mnguti* (*supra*) at para 21.

respondent discovered all the end of contract notices given at the end of 2013 to the employees on the Thubelisha contract. It is clear to me that there were indeed two batches of notices, being batch A and batch B. A simple consideration of these notices show that all batch A notices were not signed by any of the employees concerned, whilst all the batch B notices were signed by the employees. This fully corresponds with the first respondent's version that the batch A notices were prepared but never issued to the employees concerned, whilst the batch B notices were at the same time prepared and then indeed issued to the employees concerned. The explanation by the first respondent for this was that because the work of the batch A employees was not finished, this is why the notices were not issued. The first respondent's version in this respect made complete sense, and is in my view the true and correct version. It was in any event uncontradicted.

[35] But added to that, the applicant had said that he was given an end of contract notice on 1 November 2013, in terms of which his employment would end at the end of November 2013. The applicant said 'nothing happened' in October 2013. But the applicant provided no such notice. There is no evidence of any end of contract notices ever being issued on 1 November 2013. This version is also contradicted by the actual end of contract notices discovered by the first respondent, as referred to above, which was undisputed, and which reflects that all the notices were dated 1 October 2013 and those in batch B that were issued with notice were issued with the notices on the same date. In short, there were no November 2013 end of contract notices. This material contradiction further confirms why the first respondent's version in this respect was indeed the true and correct one, and that of the applicant untruthful.

[36] The aforesaid means that the applicant was never issued with an end of contract notice in 2013. He remained working on the contract throughout 2013 and into 2014, because his work on the contract was not completed. The contract clearly continued to exist. He was issued with an end of contract notice on 8 April 2014 when his work on the contract finished. I may add that those employees in batch B whose work finished in 2013, and who did receive end of contract notices then, indeed left at the end of October 2013. As a result, there is no merit in the case advanced by the applicant that he continued to work after his contract ended on 30 November 2013, on the basis

of a contract other than a fixed term contract, for the simple reason that the contract never ended. The notice of end of contract on 8 April 2014 was therefore entirely legitimate and valid, and issued in line with the still existing fixed term contract ('the contract') when the applicant's work on the Thubelisha contract actually concluded.

[37] The above means, in a nutshell, that there was no dismissal as contemplated by Section 186(1) of the LRA. In *Enforce Security Group v Fikile and Others*[13] the Court said:

> 'It is clear from the wording of s 186(1) above that there are specifically defined instances that bring about the termination of employment I which would be regarded as dismissal. This means therefore that an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in s 186(1) of the LRA. One such instance would be a fixed-term employment contract entered into for a specific period or upon the happening of a particular event. An event that comes to mind would include a conclusion of a project or the cancellation or expiry of a contract between an employer and a third party. Once the event agreed to between an employer and its employee takes place or materialises, there would ordinarily be no dismissal. It has been the position in common law that the expiry of a fixed-term contract of employment does not constitute termination of the contract by any of the parties. It constituted an automatic termination of the contract by operation of law and not a dismissal …'

[38] The Court in *Enforce Security*[14] referred with approval to the following *dictum* from the judgment in *Sindane v Prestige Cleaning Services*[15]:

> 'It is accepted that apart from a resignation by an employee (unless constructive dismissal is claimed consequent to resignation), an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in s 186(1) of the LRA, and more particularly, in terms of s 186(1)*(a)*. These circumstances include the following: (i) the death of the employee; (ii) the natural expiry of a fixed-term employment contract entered into for a specific period, or upon the happening of a particular event, eg the

[13] (2017) 38 ILJ 1041 (LAC) at para 18.
[14] (supra) at para 18
[15] (2010) 31 *ILJ* 733 (LC) at para 16.

conclusion of a project or contract between an employer and a third party. In the first instance, if the fixed-term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed-term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) (subject to what is stated below in respect of the remedies provided for by the LRA to an employee who has signed such a contract) constitute a "dismissal", as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. The same holds true for a fixed-term employment contract linked to the completion of a project or building contract. These fixed-term employment contracts are typical in circumstances where it is not possible to agree on a fixed time period of employment, ie a definitive start and end date, as it is not certain on what exact date the project or building contract will be completed, and hence, the termination date is stipulated to be the completion date of the project or building contract. Similarly as in a fixed-term employment contract with a stipulated time period, when a fixed-term employment contract linked to the completion of a project or building contract terminates, such termination will not (necessarily) be construed to be a dismissal as contemplated in s 186(1)*(a)*. Thus, the contract terminates automatically when the termination date arrives, otherwise, it is no longer a fixed-term contract … It must, however, be pointed out that the LRA does provide a remedy to an employee who has entered into fixed-term employment contracts as referred to in s 186(1)*(b)* of the LRA in terms whereof an employee, who 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, can claim a dismissal occasioned thereby. In such a case the "act" of the employer which is the failure or refusal to renew the fixed-term employment contract on the same or similar terms, or to renew it at all is the proximate cause of the dismissal. …'

[39] Although not specifically dealt with in the award of the second respondent, it is now trite that these kind of fixed term employment contracts and the automatic expiry thereof upon the expiry of a period or the occurrence of an event, is

entirely legitimate, and in line with the LRA.[16] As said in *Nongcantsi v Mnquma Local Municipality and Others*[17]:

> '… A conditional contract of employment is a commercial reality. The LRA is not against such contracts. …'

[40] The Court in *Enforce Security* dealt with contractual provisions very similar to the provisions of the contract *in casu*. In comparison, and on the facts in *Enforce Security*[18], the end of the fixed term was defined by the completion of a specified task, being the termination of what was called the Boardwalk contract, which was a contract between the employer, and its client, Boardwalk. The employees were employed specifically for the contract between the employer and Boardwalk. The termination of the Boardwalk contract was an agreed defined event that would give rise to automatic termination of the employment contracts. As stated, this is virtually on all fours with what is now before me. Based on these facts, the Court in *Enforce Security* concluded:[19]

> 'In this case clause 3.2(i) provides that 'the period of employment would endure until the termination of the contract … [with] Boardwalk'. This clause is in my view sufficient on its own to convey that it is a fixed-term contract that will run until the contract with the client is terminated. The fact that clause 3.2(ii) provides that 'the employee agrees that … the contract of employment shall terminate automatically [upon termination of the Boardwalk contract and that such] termination shall not be construed as a retrenchment but a completion of contract' does not, in my view, render a termination of the contract of employment upon termination of the contract with Boardwalk to be something else. It may merely serve to amplify the consequences of the agreed terms. The clause itself does not constitute termination of the employment agreement. The affected employees are free to challenge the termination if it does fall within the exclusions in s 5(4) of the LRA. They may also challenge the termination of their employment in terms of s 186(1)*(b)*. … It does not follow that the inclusion in a contract of employment of a clause similar to the one in this case should automatically render a termination of that

[16] See *Enforce Security* (*supra*) at para 20; *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at paras 17-18.
[17] (2017) 38 ILJ 595 (LAC) at para 36.
[18] See para 23 of the judgment.
[19] Id at para 42.

> contract, based solely on its legitimate terms, a dismissal. That would in my view defeat the whole purpose of concluding fixed-term contracts concluded for legitimate reasons.'

[41] Applying the aforesaid principles, the applicant's fixed term contract of employment thus automatically terminated on 8 May 2014. The notice of 8 April 2014 was nothing else but a notification to the applicant specifically referring to the terms of the contract he had agreed to, and the fact that it specifically provided for the automatic termination of the contract upon completion of the work at Thubelisha, which completion on the common cause evidence indeed happened. This is clearly a fixed term contract for a legitimate reason, which is consistent with the provisions of the LRA. All thus said, the applicant was not dismissed. The first part of the applicant's case must therefore fail.

[42] Turning next to the second part of the applicant's case, being the alleged promise or offer of permanent employment on the Shondoni contract made to him when the contract on the Thubelisha project finished, the applicant similarly faces a number of obstacles. The first obstacle is a legal one. Such a promise or offer cannot change the underlying nature of the contract. In simple terms, the promise or offer does not change what is a fixed term contract of employment into a permanent contract of employment. It also does not change the fact that the contract automatically terminates when the applicant's work ends on the Thubelisha contract. All that this promise or offer can achieve is to possibly prove an act of dismissal as contemplated by Section 186(1)(b), which Section provides:

> '"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.'

[43] The applicant's case was that he was dismissed on 8 May 2014. The arbitration award was handed down end December 2014. This all took place prior to the amendment to Section 186(1)(b) of the LRA.[20] The amendment of

[20] The Section was amended by Section 30*(a)* of Act 6 of 2014 with effect from 1 January 2015), and added the following as Section 186(1)(b)(ii): 'to retain the *employee* in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the *employee* on less favourable terms, or did not offer to retain the *employee'*

Section 186(1)(b) of the LRA has no retrospective application, and can only apply to disputes that arise as from 1 January 2015. In *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others,*[21] the Court said:

> '... no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the Legislature clearly intended the statute to have that effect (see also, inter alia, *Bartman v Dempers* 1952 (2) SA 577 (A) at 580C). …'

Similarly, and in *Bellairs v Hodnett and Another*[22] the Court held:

> 'There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of a contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation.'

[44] The Labour Court in *Fouldien and Others v House of Trucks (Pty) Ltd*[23] had the opportunity to consider the issue of the retrospectivity of an earlier amendment of the LRA in 2002, and said the following:

> 'The rules of interpretation of statutes regarding the operation, ie the retrospectivity or prospectivity of amendments to statutes, have been crystallized. These rules which are of particular importance to this matter, may be summarized as follows:
>
> 1 No statute is to be construed as having retrospective operation. See *Petersen v Cuthbert* 1945 AD 420 at 430.
>
> 2 The presumption against retrospectivity addresses 'elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly'. Per Steven, J in *Landgraf v USI Film Products* et al 511

[21] 1999 (4) SA 1 (SCA) at paras 12 – 13.
[22] 1978 (1) SA 1109 (A) at 1148F-G.
[23] (2002) 23 *ILJ* 2259 (LC) at para 9. See also *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) at para 14.

US 244 (1994) at 265. This passage was cited with approval in *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at 1139C-D.

3 Even a statute, which is expressly stated to be retrospective, is not to be treated as affecting matters which are the subject of pending litigation, save in the absence of a clear indication to the contrary. See *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1148F.

4 A distinction is made between true retrospectivity, ie where an Act provides that from a past date, the new Act or amendment is deemed to have been in operation and cases where the question is merely whether a new statute or an amendment of a statute interferes with or is applicable to existing rights. ….

5 Where the court is left in doubt it should favour an approach to the law which is conservative. …'

[45] Therefore, it is clear that the amendments to the LRA effective 1 January 2015 has, as I have said, no retrospective operation. This means that if Section 186(1)(b) is to be considered in this case, it can only be done on the basis of Section 186(1)(b) as it stood prior to the 1 January 2015 amendment.

[46] Turning then to Section 186(1)(b), the applicant faces an insurmountable obstacle, being that he did not pursue a case that he was dismissed as contemplated by Section 186(1)(b). His case was that he was dismissed on the basis of Section 186(1)(a)[24]. This is evident from his evidence in the arbitration, as well as from the very first paragraph of the written submissions he presented to the second respondent at the conclusion of the arbitration, which reads: 'The Applicant's claim is founded on section 186(1)(a) of the Labour Relations Act …'. In *De Milander*[25] the Court said:

'… The question whether the employer's failure to renew the fixed-term contract of employment constitutes a dismissal within the meaning of s 186 (1)*(b)* is a legal one. In other words the commissioner hearing the matter is called upon to determine the conclusion of law. It is therefore incumbent upon an employee who brings an unfair dismissal dispute in terms of s 186 (1)*(b)* to set out the material facts upon which he relies for the conclusion of law he

[24] The Section reads: '"Dismissal" means that- *(a)* an employer has terminated a contract of employment with or without notice …'
[25] (*supra*) at para 35.

> wishes the commissioner to draw from those facts and it will not be sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it. The mere ipse dixit of an employee, without further evidence, is not sufficient. The setting of this standard will prevent the opening of the floodgates for large numbers of other cases involving claims based on s 186 (1)*(b)*.'

[47] It was therefore incumbent upon the applicant to have pertinently raised and pleaded a case of dismissal based on Section 186(1)(b) in the arbitration proceedings before the second respondent.[26] His failure to do so must be fatal to him being able to establish that he was dismissed. This is so, because it has already been established that there is no dismissal as contemplated by Section 186(1)(a).

[48] It is in fact precisely for the reason that the expiry of a fixed term contract of employment would ordinarily not be a dismissal that Section 186(1)(b) was introduced into the LRA. This gives the employee the opportunity to still contend that he or she has been dismissed, even though the reality is that there was indeed a fixed term contract in existence which expired. But in order to prove such a dismissal as contemplated by Section 186(1)(b), the employee party must of course rely on such Section, bring a dismissal case in terms of such Section, and satisfy the requirements to establish a dismissal under that Section. These requirements are, as summarized in *De Milander*[27]:

> 'The test whether or not an employee has discharged the onus is objective, namely, 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 conditions.'

The Court concluded:[28]

[26] Compare *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd* (2009) 30 ILJ 1379 (LC) at paras 42 and 52; *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) at para 30; *SA Transport and Allied Workers Union v Old Mutual Life Assurance Co SA Ltd* (2005) 26 ILJ 293 (LC) at para 112; *Owen and Others v Department of Health, KwaZulu-Natal* (2009) 30 ILJ 2461 (LC) at 2466.
[27] (*supra*) at para 26.
[28] Id at para 29.

> '… In order to assess the correctness of Mr *Le Roux's* contention that the appellant had a reasonable expectation that her contract would be renewed and that the MEC's failure to renew it constituted a dismissal, it is 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 expectation, whether taking into account all the facts, that expectation was reasonable, which is the objective element. Whether or not her expectation was reasonable will depend on whether it was actually and genuinely entertained …'

[49] *In casu*, and as I have said, the applicant has made out no such case. The applicant has in fact never said that he expected his fixed term contract to be renewed. He has said that he was promised a new and permanent job. Also, the applicant, even if it can be said that he had a subjective expectation of remaining employed, there was a complete and utter failure on his part to prove this expectation was reasonable, especially considering that the applicant was not truthful about receiving a termination notice in November 2013, that the person who made him the promise of employment at another site was not in control of that site and did not have the power to make such a promise, that no recruitment processes for the new site had been followed, and that no actual contract had been concluded. In the end, and simply put, the promise of a permanent job is not an expectation of the renewal of the fixed term contract, which is one of the reasons for the addition of Section 186(1)(b)(ii) in order to cater for this kind of eventuality. This was recognized in *University of Pretoria v Commission for Conciliation, Mediation and Arbitration and Others*[29] where the Court said:

> '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 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.'

[29] (2012) 33 ILJ 183 (LAC) at para 18.

The Court considered what was then the proposed amendments to the LRA, and in particular the proposed amendment to Section 186(1)(b), and said:[30]

> '… 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.
>
> The facts of this case illustrate this distinction. Third respondent enjoyed 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. 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. …'

Identical considerations would clearly apply to the matter now before me. The applicant's case of being promised a permanent position on the Shondoni contract, which then did not materialize, can simply not constitute a dismissal as contemplated by Section 186(1)(b) of the LRA. Again, that should in reality be the end of the matter for the applicant

[50] Even if I consider the applicant's case of a promise or offer made by the first respondent, this case on the merits thereof in any event has no substance. The applicant testified that the promise / offer was made to him by Sinclair. It is true that Sinclair never testified to contradict this version of the applicant, so one had to consider this part of the applicant's case based on his testimony. Should it be accepted that Sinclair indeed made this promise or offer, the difficulty the applicant still faces (which the second respondent actually appreciated) is that it was common cause that Sinclair never had the power to make such a promise or offer, and in fact could not do so. The testimony by the first respondent's witnesses, that it was imperative that proper recruitment processes be followed for any permanent appointments, remained undisputed.

[30] Id at paras 19 – 20.

This means that whatever Sinclair may have said to the applicant, simply cannot bind the first respondent. The situation *in casu* is comparable to what transpired in *Amplats Management Services (Pty) Ltd v Van Jaarsveld*[31], and in that judgment the Court dealt with the issue as follows:[32]

> 'Menne undoubtedly had authority to enter into a contract of secondment with the respondent (and with Rustenburg Platinum Mines). This was confirmed by Emmett. But he clearly had no authority to bind the appellant to the contract of employment which, it is alleged, he entered into with the respondent. Menne was a senior member of staff, he knew full well the procedures involved for the appointment of personnel to head office and the need for such appointments to be approved by the ADCO. … In these circumstances, it is most unlikely that he would ever have purported to bind the appellant in the manner alleged by the respondent. The probabilities are overwhelming that he would have done no more than express a view, however strongly, that at the end of the secondment period the respondent was likely to be appointed or that he, Menne, would use his best endeavours to procure an appointment for the respondent. On the respondent's case Menne would have had to deliberately exceed his authority knowing full well what the appointment procedures were. This is unlikely, to say the least.'

Similar considerations clearly apply *in casu*.

[51] Insofar as the applicant may rely on the contention that the first respondent is somehow prohibited from relying on the lack of authority of Sinclair, or the need to have followed proper recruitment processes, this would be nothing else but a case of estoppel. That being so, the difficulty the applicant has is that a case of estoppel was never pleaded or made out in evidence. In *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter*[33] the requirements for establishing estoppel were enunciated as follows:

> 'Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee

[31] (2007) 28 ILJ 2669 (SCA)
[32] Id at para 13.
[33] 2004 (6) SA 491 (SCA) at para 7

> acted reasonably in construing the representation in the sense in which the representee did so.'

Applying the *dictum* in *Concor Holdings*, the Court in *Bester NO and Others v Schmidt Bou Ontwikkelings CC*[34] said:

> 'Broadly stated, the concept of estoppel, borrowed from English law as applied by our courts, amounts to this: when a person (the representor) has by words or conduct made a representation to another (the representee) and the latter acted upon the representation to his or her detriment, the representor is estopped, that is precluded, from denying the truth of the representation (see eg *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 49).'

[52] It is however a fundamental principle that where it comes to any consideration of estoppel by the Court, it must be specifically pleaded by one of the parties. This was dealt with in *Absa Bank Limited v IW Blumberg and Wilkinson*[35] as follows:

> 'Plainly a party wishing to rely on estoppel must plead it and prove its essentials ….'.

And in *Maluti Transport Corporation Ltd v MRTAWU and Others*[36] it was said:

> 'It is trite that an estoppel must be pleaded. At the very least it must be debated in cross-examination. ….'.

[53] The applicant never, in the arbitration, pleaded or sought to rely on estoppel. He never, despite being legally represented, debated the issue with the witnesses for the first respondent under cross examination. As such, this is simply not a competent consideration in this matter.

[54] The applicant did seek to contend that he acted to his prejudice because of the conduct of the first respondent in not ultimately offering him the promised

[34] 2013 (1) SA 125 (SCA) at para 17. See also *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at para 44; *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) at para 19.
[35] 1997 (3) SA 669 (SCA) at 681G-H.
[36] [1999] 9 BLLR 887 (LAC) at para 57.

position on the Shondoni contract, in that he turned down a permanent job offer from Sasol. Presumably, this is raised in the context of seeking to establish prejudice as part of an estoppel consideration. The applicant's case in this respect is contrived and unsustainable. The immediate answer to this is his own testimony. It was clear that the offer from Sasol was for far less than what he earned at the first respondent. He made it clear in the arbitration that we would not be willing to work for this money, and specifically uttered in Afrikaans "ek sal nie vir daardie fokken geld kan werk nie". It can thus hardly be legitimately said that he turned down the offer because of what the first respondent may, or may not, have said to him about future work.

[55] I shall next consider the actual testimony of the applicant about what this alleged offer or promise to him in fact entailed. The complete lack of particularity in this promise or offer, where it comes to any of the *essentialia* of the employment contract, is a critical consideration. The high water mark of the applicant's own testimony is that he was promised permanent employment on the Shondoni contract. But there is no evidence as to what position he was going to occupy, what he would be paid, what benefits he would enjoy, where he would live, what his working hours would be, and in fact when he would even start working there. In any offer or promise of permanent employment, susceptible to being accepted by an employee and so become enforceable against the employer, at least deal with all these essential requirements must be dealt with.

[56] The applicant testified that he declined the offer at Sasol because the money he was offered by the first respondent was 'better' that what he would get at Sasol. But not once could the applicant even show what he was allegedly offered by the first respondent as a salary to work on the Shondoni contract. He testified that salary was never discussed. He conceded there was no written offer or contract. Considering the testimony of the applicant about the reason why he did not accept the Sasol offer, as discussed above, I simply do not accept that the applicant was ever offered any salary amount by the first respondent, and thus one of the central *essentialia* of any employment

contract was always absent. As held in *Wienand v Pharma Natura (Pty) Ltd and Others*[37]:

> '… what is important as an essential element of a contract of employment , is that there must be an agreement on the remuneration payable.'

[57] In short, the applicant is relying on a promise of a permanent job. But this falls far short of establishing a case that he would be entitled to it. The applicant needed to show that he and Sinclair achieved consensus on all the material terms of this job, as I have set out above. In the absence of this being shown, nothing binding could have been agreed to between the applicant, and Sinclair, and that would the end of his case.

[58] In summary, the applicant failed to prove that he was dismissed as contemplated by Section 186(1)(a) of the LRA. The applicant's fixed term contract of employment had expired at the end of its term, and his employment consequently had automatically come to an end. Insofar as the applicant sought to rely on a promise or offer of alternative employment made the first respondent, this was ill conceived as Sinclair did not have the authority or power to make such a promise or offer, the prescribed recruitment processes were never followed, and the applicant in any event did not pursue or make out a case as contemplated by Section 186(1)(b) of the LRA. Finally, a proper offer of alternative employment was not even proven by the applicant.

[59] All being said, the award of the second respondent was thus correct. The second respondent properly considered the evidence and all the applicable legal principles. The second respondent's award must thus be sustained, and the applicant's review application falls to be dismissed.

[60] This then only leaves the issue of costs. In terms of Section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. I do not think the applicant acted unreasonably in wanting to pursue his matter to finality, in the Labour Court. After all, this was an issue of jurisdiction, which the Labour

[37] (2013) 34 ILJ 1012 (LC) at para 17. See also *Northern Cape Provincial Administration v Commissioner Hambidge NO and Others* (1999) 20 *ILJ* 1910 (LC) at para 13; *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 2970 (LC) at para 21; *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) at para 26.

Court finally had to decide. Therefore, and although the applicant was not successful, I consider it to be in the interest of fairness that no costs order be made.

Order

[61] In the premises, I make the following order:

1. The applicant's review application is dismissed.

2. There is no order as to costs.

_____

S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv E Loyson
Instructed by:	Cronje De Waal Skhosana Inc Attorneys
For the First Respondent:	Mr F Malan of ENS Africa Attorneys