IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2580/09

In the matter between:

SONNYBOY BEKENG MAOKO **Applicant**

and

METAL AND ENGINEERING BARGAINING COUNCIL **1st Respondent**

THEMBAKEILE NSIBANYONI **2nd Respondent**

HENELEC SWITCHBOARD **3rd Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. This is an unopposed review application brought by the Applicant, Mr Moako, who represented himself. Even though the application was unopposed, in order to succeed the applicant must establish one of the recognised grounds of review. These are set out in section 145 of the Labour Relations Act 66 of 1995. Section 145 provides that an arbitration award may be set aside if it is found to have one of the following defects specified in Section 145(2):

> (2) A defect referred to in subsection (1), means-
> (a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

2. The Constitutional Court has also stated that an award may be set aside if it is unreasonable, but has set a relatively low standard which an award has to meet to be acceptable. The Constitutional Court has described the standard of unreasonableness an award must meet in order to be set aside on review thus:[1] it must be an award "…that a reasonable decision-maker could not reach." It is also important to emphasise that a review is not an appeal. Even if the Labour Court thinks that the arbitrator arrived at the wrong conclusions that does not mean the award can be set aside unless it displays the kind of defects mentioned above.

3. The Applicant approached his former employer, the Third Respondent ('Henlec'), for work as he was currently working as a security guard and not earning enough to support himself and his family. Henlec offered him work as a trainee guillotine operator on a six month contract. The Applicant understood that this would be made permanent based on his performance. He started on 18 June 2007 and resigned from his previous employment. At the end of this period, instead of being made permanent he was asked to sign another contract for three months. Although he initially refused, the employer persuaded him to sign that contract as well. He says he was reluctant to sign it, but felt he had no choice. The new contract ran from 14 January 2008 to 20 March 2008.

4. Towards the end of that contract, the employer's attitude towards the Applicant became abusive. He entered another six month contract which ended on 24 September 2008. He was advised that this was the last contract he would be on. The Applicant interpreted this to mean that he would be permanently employed thereafter. That contract expired and he carried on working, but in January 2009 the Applicant was given another contract to sign which ran from 12 January to 9

[1] ***Sidumo & Another v Rustenburg Plantinum Mines Ltd & Others*** **(2007) 28 ILJ 2405 (CC)** at par [110]

April 2009. He signed this despite his previous belief that he ought to have been permanently employed at the end of September 2008.

5. The Applicant complains that a person employed after him was made permanent, but he conceded that this person was a qualified CNC machine operator who was able to programme the machine whereas he could not.

6. The Applicant had sought reinstatement as a permanent employee and at a better rate than he was earning.

The Award

7. The essence of the arbitration award is that the arbitrator found that the Applicant had knowingly entered into the fixed term contracts and if he complained that he had been forced to do this, that issue was not one the arbitrator could investigate, because only the Labour Court could deal with the interpretation of the contract. Having found that the Applicant knowingly undertook engagements on a fixed term basis, the arbitrator concluded that the Applicant had not been dismissed as he knew the contract was due to end on 9 April 2009.

8. As was explained to the Applicant during the hearing of this matter, when a person signs a contract out of economic necessity the courts are very reluctant to recognise that fact as a good reason for setting aside a contract. This was confirmed by the Supreme Court of Appeal in the matter of ***Medscheme Holdings (Pty) Ltd & Another v Bhamjee*** **2005 (5) SA 339 (SCA)**. There Nugent JA, writing for the Court, said:

> "[18] English 4 and American 5 law both recognise that economic pressure may, in appropriate cases, constitute duress that allows for the avoidance of a contract. As pointed out by Van den Heever AJ in Van den Berg & Kie Rekenkundige Beamptes v Boomprops 1028 BK 1999 (1) SA 780 (T), <u>that principle has yet to be authoritatively accepted in our law</u>. While there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare. (The point is underlined by the dearth of English cases in which economic

duress was found to have existed.) For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in Van den Berg & Kie Rekenkundige Beamptes at 795E - 796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more - which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress."[2]

(emphasis added)

9. Even if the commissioner had ventured to consider the question of economic pressure on the Applicant and its effect on the enforceability of the contracts, in the light of what the SCA said about economic duress in *Bhamjee's* case, the result would not have been different. Accordingly, even if the arbitrator might have erred in believing she could not consider that aspect of the case, it would not have affected the outcome of the award.

10. In any event, the arbitrator was dealing with the question whether or not a dismissal took place on 9 April 2009. In terms of section 186(1)(b) of the Labour Relations Act, a dismissal will occur if "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".

11. Whether or not a reasonable expectation is created depends on the facts of the case. Factors which will be considered are the actual terms of the contract, the history of previous renewals. The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time the contract was concluded or thereafter, and the motive for terminating the relationship have been cited as factors to be considered when determining whether an employer implied that a fixed-term contract would be renewed.

[2] At 346 of the judgment.

12. The Applicant's contention was that after the expiry of his contract in September 2008, he ought to have been considered permanently, or indefinitely employed. Yet he still signed another short term contract in January which expressly stated it was for a 'maximum' of three months and would terminate on 9 April 2009. The second clause of the contract stated:

> "On completion of the contract as detailed in (a) above, this contract shall automatically terminate. Such termination shall not be construed as being retrenchment but shall be completion of contract. No enquiry is required when this contract terminates through effluxion of time. The employee shall nonetheless be given one shifts notice of expiry of the contract period."

13. Clearly if the provisions of clause 2 are considered, the contract very clearly did not hold out any promise of renewal. Secondly, the Applicant does not rely on section 186(1)(b). The Applicant does not claim there was a reasonable expectation of renewal of the three month contract: he claims he had an expectation of permanent employment. The first difficulty with this is that his own action in signing the short term contract in January 2009, runs contrary to his claim that he was permanently employed after September 2008. Secondly, the courts have generally been reluctant to accept that the definition of a dismissal in section 186(1)(b) also includes cases where the employee did not have an expectation of renewal of a fixed term contract but had an expectation of permanent employment. As the learned author, Grogan J puts it: "The case law is divided on whether employees can claim to have been dismissed in terms of section 186(1)(b) if they claim an expectation of indefinite employment after the lapse of a fixed-term contract."[3]

14. It is clear that even though the arbitrator did not refer to section 186(1)(b) in the award she clearly had it in mind when making her decision. I cannot say she was unreasonable in reaching the conclusion that the Applicant was not dismissed. Her conclusion was at least one reasonable conclusion that could have been reached on the evidence before her. Moreover, if she had decided that the Applicant had

[3] Grogan J, Workplace Law, 10th edition, 2009, p150

demonstrated he was entitled to permanent employment after the expiry of the last contract, that conclusion would have been harder to support.

15. Although he did not raise it as a ground of review as such, the Applicant mentioned that the arbitrator had spoken with members of the employer delegation before and after the hearing, which appears to have given him misgivings about the arbitrator's impartiality. If this had disturbed him at the start of the hearing there was no evidence that he raised his concern about it during the hearing, which he ought to have, and it appears that the thrust of his complaint is about the arbitrator's conclusions rather than anything improper she did in the conduct of the enquiry.

16. The Constitutional Court has restated the test for bias as follows: "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel." [4]

17. While it is probably generally not advisable for an arbitrator to talk to members of one party before or after a hearing, it is not in itself sufficient in itself to give cause for suspicion. In the less formal environment of the CCMA hearings, it is not uncommon that parties might engage a commissioner in conversation before or after a hearing. If the arbitrator had attempted to exclude the Applicant from joining the conversation or if his evidence was that he overheard them discussing the case then there might have been more substantial cause for complaint. In the absence of more specific detail about the arbitrator's interactions with the employer party, I don't believe the evidence of the conversations is sufficient to give rise to concern by a reasonable, objective and informed person. I am reinforced in this conclusion because there is nothing untoward about the commissioner's reasoning which might suggest she was influenced by anything other than the evidence before her.

[4] ***President of the RSA & others v SA Rugby Football Union & others*** **1999 (4) SA 147 (CC)** para 48

18. In all the circumstances, I cannot find grounds for setting aside the commissioner's award on review.

19. As an aside, I will mention that part of the Applicant's complaint appears to have been that the employer did not honour the commitments he claims it made to him. It might be that the Applicant believes he has a provable claim against Henlec for a breach of contract in the sense that he argues that the employer had undertaken to employ him permanently after a trial period, but that is a separate civil claim under the law of contract which cannot be entertained in these review proceedings.

Order

20. Accordingly, the application to review and set aside the aribtrator's ruling in this matter is dismissed. No order is made as to costs.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing : 18 May 2010
Date of judgment: 27 May 2010

Appearances:
The Applicant
No appearance for the Respondent.