

REPORTABLE (16)

MEDECINS SANS FRONTIERS (MSF) BELGIUM

v

**(1) VENGAI NHOPI (2) THERESA MANDIVAVARIRA (3)
ANDREW SARATIEL (4) JAPI CLEMENCE (5) TICHAONA
CHIPEME (6) POTERAI MATIZAMOZHO (7) ASIMU REYI (8)
ZETTY MAKIE (9) TAWABARIRA KADIWIRIRE (10) CHARLES
NYATANDO (11) JACOB TINARWO (12) EMMANUEL KUFA**

**SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, PATEL JA & MAVANGIRA JA
HARARE, SEPTEMBER 12, 2017 & FEBRUARY 22, 2019**

T. Zhuwarara, for the appellant

L. Chimuriwo, for the respondents

MAVANGIRA JA: This is an appeal against the entire judgment of the Labour Court upholding the arbitrator’s decision that by inviting the respondents for interviews after the termination of their fixed term contracts, the appellant had created in them, a legitimate expectation for their re-engagement as provided for and within the contemplation of s 12B (3) (b) of the Labour Act [*Chapter 28:01*] (hereinafter referred to as “the Act”).

The facts leading to this appeal are as follows:

BACKGROUND

The appellant is an international non-governmental organization providing medical humanitarian services in Zimbabwe. The respondents were employed by the appellant on fixed term contracts for various periods running between one month to a full year from 2008 and 2011 in the capacity of guards, with some being employed as “security guard/gardener”. During the period 2008 and 2011, the appellant had from time to time renewed the respondents’ contracts of employment. The appellant then faced funding challenges which resulted in the respondents’ contracts not being renewed beyond 2011. (Meanwhile, the appellant had since obtained funding for projects in Mbare, Gutu and Chikomba which required guards and gardeners from the areas in which the projects would run.)

The respondents claimed, at some time that is not specified in the papers before the court, that they had been unfairly dismissed. They collectively alleged that the appellant still needed their services and still had the funds to continue to engage them after their contracts had expired, and that they therefore had a legitimate expectation to be re-engaged which expectation was unlawfully frustrated by the appellant.

At the time that the collective dispute of the alleged unfair dismissal of the respondents by the appellant arose, none of the respondents were employed by the appellant, all their contracts having expired at the end of the specified periods in their various contracts of employment. The allegation was made on the strength of s 12B (3)(b) of the Act which reads as follows:

- “(3) An employee is deemed to have been unfairly dismissed—
- (a) ... ;
 - (b) if, on termination of an employment contract of fixed duration, the employee—
 - (i) had a legitimate expectation of being re-engaged; and

(ii) another person was engaged instead of the employee.”

After conciliation had failed to settle the dispute, it was referred to arbitration, the terms of reference being to ascertain whether or not the respondents had been unfairly dismissed and if so, to find the appropriate remedy.

In their statement of claim before the arbitrator, the respondents alleged that sometime in 2010 they were advised that their contracts would not be renewed due to funding constraints then afflicting the appellant, unless the appellant managed to secure funding for projects in Mbare, Gutu and Chikomba. They further alleged that they were advised to apply for the same posts for renewal which they did and they were duly interviewed, along with other people. All the respondents were unsuccessful and twelve other people were engaged in their stead. They made checks regarding the appellant’s given reason for taking other people, which was to the effect that the appellant wanted to promote the communities where it would be operating from. Their checks verified that indeed the people engaged in their stead were people from the said communities.

Nonetheless, the respondents maintained that they had formed a legitimate expectation of renewal and that this was based on previous renewals of their contracts of employment and also on “the undertaking that the contracts would be renewed” allegedly made by the appellant. According to the respondents, the explanation that the appellant had failed to renew their contracts because they wanted to promote local people from the places that they were going to operate from was not a legally valid excuse.

The appellant's defence was that there was no basis for the respondents to have formed a legitimate expectation of the renewal of their contracts. The appellant denied that there was any undertaking that the contracts would be renewed if funding was secured.

The arbitrator found in favour of the respondents. She found that having invited the respondents for interviews, the appellant had thereafter flouted s 12B (3)(b) of the Act because the respondents' hopes for re-engagement were raised yet the appellant employed other people instead. The arbitrator also found that the Act justifies legitimate expectation where the fixed-term contract of employment of an employee is terminated and another employee is engaged. The arbitrator dismissed the appellant's defence that it **had to** employ people from other communities on the basis of lack of evidence to justify such defence. Thereafter, an award was made reinstating the respondents to their original positions within the appellant's employ without loss of salary and benefits from the date of unlawful dismissal or alternatively one year's salary each in *lieu* of reinstatement.

Aggrieved by that decision, the appellant noted an appeal in the Labour Court. As with the arbitrator, the Labour Court did not accord any significance or validity to the appellant's reason that it had to engage people from communities that they were to operate from. The Labour Court found that once an employee shows that another person was employed in their stead, they would have met the legal requirements set out in the Act for claim to legitimate expectation to succeed. The Labour Court also concurred with the arbitrator's finding that the invitation of the respondents to interviews created on their part a reasonable expectation of re-engagement.

On the question of the award for damages, the Labour Court found that the arbitrator erred in awarding damages without any evidence having been led before her. In the result, the Labour Court upheld the award in part, overturning it only in so far as it related to damages. The appellant in turn now appeals against that decision before this Court on the following grounds,

1. The honourable court *a quo* erred in finding that the Honourable Arbitrator did not misdirect herself in concluding that the requirements of s 12B(3)(b) of the Labour Act [Chapter 28:01] had been met.
2. The court *a quo* erred and misdirected itself in that it failed to appreciate fully the circumstances under which an expectation of re-engagement is legitimate. The court failed to fully appreciate all the circumstances of the case and accordingly arrived at a wrong conclusion.
3. More particularly the court *a quo* erred at law in confirming the arbitrator's decision that the fact that some respondents were called for interviews created a legitimate expectation of renewal of employment on respondents' part.
4. The court *a quo* seriously misdirected itself on the facts and or failed to appreciate all the facts of the matter which misdirection is unreasonable in the circumstances and amounts to a misdirection at law.

SUBMISSIONS ON APPEAL

Mr *Zhuwarara* for the appellant argued that the arbitrator erred in finding that by inviting the respondents for interviews after their contracts had terminated the appellant created a legitimate expectation that they would be re-engaged. He submitted that an interview is merely a process of assessment and thus one cannot form a legitimate expectation by simply being called

for an interview in the absence of communication that one would be guaranteed a job placement whether or not one performed satisfactorily in the interview.

In order to emphasise that the appellant did not plant the idea of any legitimate expectation of re-engagement in the minds of the respondents, the appellant's counsel relied on a provision in the letter that terminated the respondents' employment and para 2 of all the respondents' contracts. The appellant's counsel relied on one part of the letter which reads as follows,

“This letter serves to notify you that your contract of employment which is terminating on ... will not be renewed.”

Paragraph 2 of the contract in turn provided as follows:

“2. Duration

The contract is for a fixed duration starting on the ... to **At the expiration of the period contracted for, this contract shall terminate automatically. The Employer does not guarantee employment beyond this contract.**” (own emphasis)

In light of the above, the appellant argued that there could be no way that the respondents could have rationally formed a legitimate expectation of being re-engaged by the appellant even if they had been called in for interviews.

On the other hand, Mr *Chimuriwo* for the respondents argued that as it was known to the appellant that the funds for the grant after the expiration of the respondents' contracts were location specific, the question arising was why it then invited the respondents for interviews when it was known that they would not qualify on that basis. Questioned on the significance that ought

to be given to the contents of the letters written by the appellant terminating the respondents' contracts of employment, Mr *Chimuriwo* conceded that there could not be read therein any guarantee that the subsequent invitations for interviews was an assurance of re-engagement by the appellant.

ISSUE ARISING FOR DETERMINATION

The sole issue for determination is whether an employer's invitation to his former employee for an interview for the same post that the employee held during the subsistence of the fixed contract is conduct which the employee can act on to form a legitimate expectation of re-employment by the employer in terms of s 12B(3)(b) of the Act. In other words, can an employee who was employed on a fixed-term contract basis successfully argue that after the fixed-term contract of employment expired he legitimately expected to be re-employed because his former employer invited him for an interview to fill in the same position? As stated earlier, the issue emanates originally from the arbitrator's finding that the employer flouted the provisions of s 12B (3) (b), which finding the Labour Court upheld.

THE LAW

In *Magodora v Care International* 2014 (1) ZLR 397 (S) at 402F-G, PATEL JA pronounced an interpretation on s 12B (3) (b) of the Act. He stated that the plain meaning of s 12B(3)(b) of the Act is that an employee on a contract of fixed duration must have had a legitimate expectation of being re-engaged upon its termination and was supplanted by another person who was engaged in his stead. He further stated at 403A-C that these requirements are

patently conjunctive and the mere existence of an expectation without the concomitant engagement of another employee does not suffice.

In *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S) ZIYAMBI JA made the point that the onus is on the employee to prove the two requirements stipulated in s 12B(3)(b) of the Act. The same reasoning is also found in the South African case *Ferrant v Key Delta* (1993) 14 ILJ 464 (IC), where the court held that the onus of proving reasonable expectation rests on the employee. In another South African case *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA), the court **found** that to discharge that onus, the employee must prove that he or she actually expected the contract to be renewed and that only then would the question whether the expectation was reasonable arise.

Professor Madhuku L, *Labour Law in Zimbabwe*, Weaver Press, 2015 at page 101 states:

“The test for legitimate expectation is objective: would a reasonable person expect re-engagement? This requires an assessment of all the circumstances of the case. To be ‘legitimate’, the expectation must arise from impressions created by the employer.”

In other words, in order for an employee to show that he or she reasonably expected that his or her fixed term employment contract would be renewed, he or she must convince the court that there was an objective basis for the creation of the “reasonable expectation”.

APPLICATION OF THE LAW TO THE FACTS

The question that arises is whether it is reasonable for an employee to expect to be re-employed solely on the basis that he or she was invited for an interview? According to the Cambridge Advanced Learner's Dictionary, "reasonable" means based on or using good judgment and therefore fair and practical. The Collins English Dictionary defines "reasonable" as using or showing reason, or sound judgment; sensible. On the basis of these definitions of the word "reasonable" could it be said that the appellant, by extending the invitation for interviews to the respondents, gave them the impression that it would re-engage them and was this a practical or sensible basis upon which the respondents could legitimately expect to be re-engaged? Clearly not. An employer anywhere invites people for interviews but that is not a guarantee that the prospective employees will be engaged after the interviews.

In *casu*, it was accepted by the respondents in their papers that the appellant wanted to engage people in the communities that it would operate from as a matter of policy. On that basis the respondents could not have expected to be re-engaged; moreso, if none of the respondents had shown that they lived in the said places. On the facts of this case, no basis has been shown for the respondents to have reasonably expected to be re-engaged.

Some of the contracts of employment were headed "Employment Contract for a Fixed Period." Paragraph 2 thereof headed "Duration" provided:

"The contract is for a fixed duration, starting on the ... to ... At the expiration of the period contracted for, this contract shall terminate automatically. The employer does not guarantee employment beyond this contract."

Others were headed “Fixed Term Employment Contract.” Under the heading “Term of Contract” the provision reads”

“The present contract is for fixed term duration, starting from ... and finishing on ...”

That the contracts of employment were fixed term contracts can therefore not be open to any doubt on a plain reading of the provisions thereof.

A reading of the provisions of the contracts of employment in conjunction with the letters that were written to the respondents terminating their contracts exposes the fallacy of the respondents’ claim to justification for entertaining a reasonable expectation of renewal. The letters read in relevant part:

“This letter serves to notify you that your contract of employment for a contract period of up to ... will not be renewed.”

The letters further stated:

“We would like to thank you for your services and dedicated time and to wish you luck in your endeavours. We will however consider you for interviews should any need arise within the organization in the future.”

None of the quoted provisions could be attributed with the capacity to have blinded the respondents to the nature of their employment with the appellant. Clear and unambiguous language stated the terms of the contracts of employment. Clear language used in the termination letters also laid beyond doubt that the clearly expressed employment contract had finally come to an end. An indication of possible consideration should the need arise in the future coupled with

the indication that interviews would be conducted for the satisfaction of such future need does not create a reasonable expectation of renewal.

The relevant clause of the employment contracts stated in clear terms further employment or renewal was not guaranteed upon expiry. In the *Magodora* and the *UZ-UCSF* cases (*supra*), the point is made that the terms of a contract are relevant in the determination of whether non-renewal of a fixed-term contract constitutes a dismissal. That is so because the contract itself indicates the intention of the parties. In the case of a fixed term contract, the intention of the parties is that the contract and employment relationship terminates on the date mentioned therein.

In addition, Grogan J in *Workplace Law*, (11th edition, Juta and Co (Pty) Ltd, 2014) at page 171 makes reference to *Foster v Steward Inc* (1997) ILJ 367 (LAC) where the South African Labour Appeal Court held that when establishing whether the non-renewal of a fixed term contract constitutes a dismissal, the terms of the contract remain relevant. The contract itself is an important indication that the parties in fact intended the contract relationship to terminate on the date mentioned. Reference is also made to the case of *Swissport (Pty) Ltd v Smith NO* (2003) 24 ILJ 618 (LC) where the point is made that it is a fundamental principle of the law of contract that, once parties have decided to reduce a contract to writing, the document that they produce will be accepted as the sole evidence of the terms of the contract.

In the case of *South African Rugby Players Association & Ors v SA Rugby & Ors* (2008) 29 ILJ 2218 (LAC), some professional rugby players alleged that failure by their employer

to renew their contracts of employment on the same terms and conditions constituted constructive dismissal. Their contracts of employment included a provision which was captured as follows;

“3.2 As this is a fixed term contract, it shall automatically terminate on the date set out in paragraph 1.2 of schedule 11 hereof (30 November 2003) and the player acknowledges that he has no expectation that this contract will be renewed on the terms herein contained, or on any other terms.”

In interpreting the contract in the determination of the dispute that had arisen, the South African Labour Appeal Court held as follows;

“[46] Clause 3.2 stating that the contracts automatically terminated on the dates set out and that the players acknowledged that they had no expectation that their contracts would be renewed on the terms contained therein or any other terms is to me of critical importance. This clause and other exclusionary clauses referred to above were deliberately included in the contracts in order for them to be part of the contracts and to mean what they were intended for. It would therefore, be expected of the appellants to place more credible facts to make their expectation reasonable in the face of clause 3.2. A mere ipse dixit that there is an expectation, based on flimsy grounds, would not suffice.” (my emphasis)

From the authorities cited above, it is clear that the employee’s burden to prove that they had a legitimate expectation of re-engagement after the expiration of the contract of employment must be discharged. The employee has to show that despite the contract of employment having been one for a fixed term, the employer acted in a manner upon which the employee could have formed a legitimate expectation to be re-engaged.

In *casu*, the contracts expressly provided that the employer did not guarantee employment beyond the duration of the fixed term. I agree with the appellant’s counsel that there was thus no reasonable basis to justify the expectations by the respondents to be re-employed after termination. In the South African case of *Magubane & Ors v Amalgamated Beverages* (1997) 18

ILJ 1112 (CCMA), the court held that whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee. In light of the duration clause of the contracts of employment in *casu*, it is evident that from the perspective of the employer, no reasonable expectation of renewal could have been formed. Neither could the respondents have reasonably expected to be re-employed because the contract that they entered into with the appellant was clear that there was no guarantee of employment beyond the contract.

Counsel for the respondents failed to direct us to any evidence that the appellant acted in a way that could have resulted in the respondents forming a reasonable and legitimate expectation of re-engagement beyond the duration of their fixed term contracts. In the absence of evidence showing that the employer guaranteed an employee employment notwithstanding the former employee's performance in the interview, it cannot be said that by merely inviting employees for an interview the employer gave the employee reason to entertain a legitimate expectation for re-engagement.

As correctly argued by *Mr Zhuwarara*, an interview provides a platform for an employer to assess, among other things, the competence of a prospective employee. The employer has the discretion to engage an employee on the basis of his or her findings and satisfaction regarding the suitability of the interviewee as exposed by the interview. It is an interviewee's performance in the interview which forms the basis of whether one will be employed. In the absence of evidence that the employer guaranteed employment regardless of performance in the interview, there can be no justification for forming a legitimate expectation of re-engagement before the establishment of the employee's performance in the interview. An invitation to attend

an interview cannot be reasonable basis upon which the employee forms a legitimate expectation for re-engagement. This is more so considering that the employer conducts the interview or in this case, intended to conduct the interviews, in order to be satisfied that the interviewees suit the employer's requirements.

The arbitrator and consequently the court *a quo* erred in finding that an employee can reasonably form a legitimate expectation for re-employment by the mere fact of being invited for an interview by a former employer. In addition, the contracts that the respondents in *casu* had with the appellant clearly stated each was for a fixed term. By reason of the burden that the law places on them, the respondents had to place more evidence before the court to show that in light of all the circumstances pertaining to their matter, they reasonably expected to be re-engaged in the appellant's employ which they failed to do.

In the result it is ordered as follows,

1. The appeal be and is hereby allowed with costs.
2. The judgment of the Labour Court be and is hereby set aside in its entirety and substituted as follows:

“i. The appeal against the arbitral award dated 8 May 2014 be and is hereby allowed.
ii. The arbitral award be and is hereby set aside in its entirety.”

HLATSHWAYO JA:

I agree

PATEL JA:

I agree

Kantor & Immerman, appellant's legal practitioners

Lawman Chimuriwo Attorneys, respondents' legal practitioners