IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JA 12/02

In the matter between:
PRASAD, ADEPU KOTESWARI Appellant

and

LEBEA, MOHALE First Respondent

UNIVERSITY OF VENDA Second Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Third Respondent

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J U D G M E N T

GOLDSTEIN AJA:

[1] The appellant was employed by the second respondent on a fixed term contract basis from 1 January 1991 to 31 December 1993, from 1 January 1994 to 31 December 1995, and finally from 1 January 1996 to 31 December 1998. Thereafter the second respondent failed to enter into a new contract of employment with the appellant.

[2] Appellant contends, and the second respondent disputes, that she was dismissed by it. In support by her contention she invokes the following provisions of section 186 of the Labour Relations Act 66 of 1995 (the LRA):

" 'dismissal' means that -

a) ...

b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer ... did not renew it; ..."

[3] The matter was eventually, in terms of section 136 and 191(5)(a)(i) of the LRA, referred for arbitration to the first respondent, who found that the requirements for dismissal reflected in the provisions of section 186 relied upon were not satisfied.

[4] The appellant took the matter on review to the Labour Court, where **Pillay AJ** (as she then was) dismissed the application with costs. With the leave of the learned Judge the appellant now appeals to this Court.

[5] In his award the first respondent deals with his decision in regard to section 186 in the following terms (I have numbered the paragraphs for ease of reference):

"1. Mr Le Roux argued on behalf of the employee that the employer's failure to appoint the employee amounted to a dismissal contemplated in Section 186(b) of the LRA. He relied on the unreported case of Andreas Dierks vs University of South Africa (unreported LCJ 399/98) and argued that the employee had the legitimate expectation that the employer will re-appoint her at the expiry of her contract in December 1998.

2. I do not agree with the reasoning advanced by Mr Le Roux in this regard. In the same case he is relying on, the court quoted with approval the view of Professor Olivier on the application of Section 186(b). In paragraph 136 the court relied on the following extract from Professor Olivier's article on this subject:

'What is required in order to activate the provisions of Section 186(b) is an expectation that the fixed-term contract in question would be <u>renewed</u> on the same or similar terms. It is evident that the Act does not require that or regulate the position where the expectation implies a permanent or indefinite relationship on an ongoing basis. (See the

Wood case discussed above, see also Colavita vs Sun International Bophuthatswana Limited (1995) BLLR 88 (IC) at 93E, and the obiter remarks made in FGWU vs Letabakop Farms (Pty) Limited 1995 BLLR 23 (IC) at 31B-C. The reference to renewal on the same or similar terms supports that this is the inference to be drawn from the wording of the subsection. What Section 186(b) apparently envisages is that an employer should not be allowed not to continue with fixed term employment in circumstances where an expectation of renewal is justified.'

3. It is clear from the above extract that the employee can only rely on legitimate expectation contained in Section 186(b) of the Labour Relations Act if her contract has been renewed in previous occasions. In this matter it is not in dispute that each time the employee's contract expired the contract was not renewed. The employer advertised the position and the employee competed with other external candidates.

4. In paragraph 149 of the **Andreas Dierks v/s University of South Africa** the court agreed with the view expressed by Professor Olivier that legitimate expectation as contained in section 186(b) of the Labour Relations Act does not include an expectation for permanent employment. It should therefore be confined to cases where there has been prior renewals of a fixed term contract. In the employee's situation, the employee was appointed after succeeding in an interview and therefore there was no renewal of the contract."

[6] There can be no objection to paragraphs 1 and 2 of the passage quoted. In paragraph 3 the first respondent expresses the view that, where an employer advertises a position and the employee competes with external candidates, the employee's contract is not renewed within the meaning of that term in section 186(b). This view of the law may well be correct. However, I need not decide the point finally because there is no question that the view is justifiable in relation to the reasons given for it. See **Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others** [2001] 9

BLLR 1011 at 1024 H-I. In this case at 1020A **Zondo JP** gleaned inter alia the following principles from **Pharmaceutical Manufacturers of SA : in re Ex Parte President of the RSA** 2000(2) SA 674 (CC):

> "(4) a court cannot interfere with a decision simply because it disagrees with it ...
>
> (5) a decision that is objectively irrational is likely to be made only rarely; ...."

[7] The remarks relating to an expectation of permanent employment in paragraph 4 of the passage quoted from the award, are justifiable, since they accord with the view of a Professor Olivier quoted with approval by the Labour Court in **Dierks v University of South Africa** (1999) 20 ILJ 1227(LC) at 1246J - 1247B. Moreover the statement as to an "expectation for permanent employment" is borne out by the appellant's evidence during the arbitration in the course of which she said that, once she had obtained South African citizenship on 2 December 1998, she expected to obtain permanent employment. Mr Cook who appeared for the appellant but did not draw the her heads, argued valiantly before us that the second sentence in paragraph 4 of the passage quoted did not rationally flow from the first. He stressed the word "therefore" in the second sentence. It may be that the connection between the two sentences is tenuous and that the award is not drafted as clearly and elegantly as it should have been. However, the context makes clear what the first respondent was conveying: section 186(b) does not apply to a situation where the expectation is one of permanent employment, and a contract is not renewed unless there have been prior renewals. The first of these propositions is not irrational and may even correctly reflect the law, and the second is, at best for the appellant,

questionable but not such as to justify intervention on review.

[8] Mr Cook submitted that the appellant's case was that she should not have been interviewed at all once she had obtained South African citizenship and should have been permanently appointed thereafter without further ado. The point does not avail the appellant because the first respondent found on a justifiable basis that section 186(b) does not cover an expectation of permanent employment. Moreover, on the day she obtained her South African citizenship the appellant herself called in writing for the second respondent "to arrange the interview" for her post. She did at one stage in evidence in a passage Mr Cook referred us to say that the second respondent's policy provided for her contract to be renewed without an interview. Later, however she watered this version down: when she was asked whether the obtaining of citizenship meant automatic appointment or the enhancement of her chance of employment she said the latter applied.

[9] Once the first respondent's finding that there had been no dismissal cannot be faulted on review, it is clear that the application before the Court a quo correctly failed. Mr Cook asked us not to award the second respondent its costs because the appellant is a single mother and she had been promised a permanent post by members of staff of the second respondent. Mr Laka, who appeared for the second respondent asked for costs and pointed to the weakness of the appellant's case. In my view none of the factors relied upon by Mr Cook justify us in not awarding the second respondent its costs. This appeal was entirely ill-advised. In the result:

The appeal is dismissed with costs.

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E L GOLDSTEIN
Acting Judge of Appeal

I agree

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R M M ZONDO
Judge President

I agree

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D Mlambo

Acting Judge of Appeal

For the Appellant:	A L COOK
Appellant's Attorney:	Van Zyl Roos
For the Second Respondent :	A P LAKA
Second Respondent's Attorney:	Lebea and Associates
Date of Hearing:	12 November 2002
Date of Judgment:	20 December 2002