



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEERHA

Not Reportable

Case no: PA11/2019

In the matter between:

TRANSNET t/a TRANSNET FREIGHT RAIL

Appellant

and

NUMSA on behalf of ZAMILE MANKU

First Respondent

NUMSA on behalf of ARCHIE BOTILE

Second Respondent

TRANSNET BARGAINING COUNCIL

Third Respondent

NALEDI BURWANA-BISIWE N.O.

Fourth Respondent

Heard: 1 June 2021

Delivered: 29 June 2021

Coram: Davis JA, Coppin JA and Savage AJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of this Court, is against the judgment and orders of the Labour Court (Lallie J) delivered on 9 March 2018 which dismissed the appellant's application to review the arbitration award of the fourth respondent

(‘the arbitrator’). At the outset of the hearing, the late filing of the appellants’ notice of appeal and power of attorney was condoned, with no opposition raised by the respondents.

[2] The first and second respondents, Mr Zamide Manku and Mr Archie Botile (‘the respondents’), both represented by the National Union of Metalworkers of South Africa (‘NUMSA’), were employed on one-year fixed term contracts in East London by the appellant, Transnet trading as Transnet Freight Rail (‘Transnet’). Mr Manku’s fixed term contract had been renewed nine times and Mr Botile’s contract renewed four times by Transnet. On 1 January 2015, a collective agreement between Transnet and representative trade unions was implemented in terms of which *inter alia* it was agreed that Transnet would from 1 April 2015 to 31 March 2016, using its Recruitment and Selection policy, appoint a minimum of 1472 employees on indefinite employment contracts. During January 2015, the respondents were informed by their supervisor that their fixed term contracts would be renewed for a further fixed term on the same terms and conditions. At the beginning of March 2015, the respondents were given letters to sign in which they were required to acknowledge that their fixed term contracts would end at the end of March 2015. The respondents refused to sign this acknowledgment as they claimed to be permanently employed and would not accept a further fixed term contract renewal as a result. On 31 March 2015, with other contract employees, they were notified that their fixed term contracts had expired. The respondents were not presented with new fixed term contracts given their refusal to acknowledge the expiry of their previous contracts and accept a further contract renewal.

[3] The respondents referred a dispute to the third respondent, the Transnet Bargaining Council, claiming that they had been unfairly dismissed in that they held a reasonable expectation that their contracts would be renewed. In support of this claim they relied on the repeated renewals of their fixed term contracts; that they had been told that some employees would be “made permanent” as indefinite positions were to be created by Transnet; and that

they had heard the President announce on television that contract employees who had worked for more than three months would be made permanent.

- [4] On 30 November 2015, the arbitrator found that the employees had been unfairly dismissed in that they had held a reasonable expectation of permanent employment. The arbitrator did not have regard to the collective agreement entered into between Transnet and representative trade unions in the workplace on the basis that, although the agreement had been included in the bundle of documents, it was only referred to by Transnet in its closing argument.
- [5] Dissatisfied with the arbitration award, Transnet sought that it be reviewed and set aside by the Labour Court. On 9 March 2018, Lallie J dismissed the review application with no order as to costs. The Court found that Transnet could not rely on the collective agreement concluded as, although available, as it was not disclosed at arbitration and that the arbitration award had fallen within the ambit of reasonableness required. Thereafter, leave to appeal was refused on 15 May 2019.
- [6] On appeal, Transnet disputed that the employees were unfairly dismissed since they had refused to accept a further renewal of their contract on the basis that they had considered themselves to be permanently employed. Consequently, the decision of the arbitrator that the respondents had been dismissed was not objectively justifiable. While Transnet in its notice of appeal and heads of argument took issue with the Labour Court's failure to consider the terms of the collective agreement concluded on 15 December 2014, in argument it was accepted that the agreement was not relevant for purposes of this appeal.
- [7] It was contended for the respondents on appeal that since they had been employed on numerous prior fixed-term contracts, they held a reasonable expectation to be appointed for an indefinite period but that they were not employed on that basis; and that the decision of the arbitrator that they had been unfairly dismissed was justifiable in the circumstances.

Discussion

- [8] A dismissal is defined in section 186(1)(b) of the Labour Relations Act 66 of 1995 ('the LRA') to include circumstances in which –

'...(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.'

- [9] Whether there has been a dismissal or not is a jurisdictional issue, since the Commission for Conciliation Mediation and Arbitration ('the CCMA') or a bargaining council lacks jurisdiction in a dismissal dispute where there is no dismissal.¹ This Court in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & Others*² made it clear that a jurisdictional ruling is subject to review by the Labour Court on objectively justifiable grounds and not on the reasonableness test set out in *Sidumo*.³ The Court must in such instance determine whether, objectively speaking, the facts existed which gave the CCMA or bargaining council jurisdiction to entertain the dispute.
- [10] The onus rests on the respondents to show that they had a reasonable expectation that their contracts were to be renewed. The test to determine whether this onus has been discharged is an objective one and involves a determination 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. But once it is found that there had been a dismissal as contemplated in s 186(1)(b), the onus shifts to the employer to justify its fairness.'*⁴

- [11] The facts relied upon by the respondents to bring their claim of dismissal within the ambit of section 186(1)(b) were that their contracts had been

¹ *SA Rugby Players' Association (SARPA) and Others v SA Rugby(Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another (SA Rugby Players)* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC) at para 39.

² (2013) 34 ILJ 1427 (LAC) at para 24.

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110.

⁴ *SA Rugby Players* n.1 at para 44.

repeatedly renewed; they had been told that some employees would be “made permanent” as indefinite positions were to be created by Transnet; that they had heard the President announce on television that contract employees who had worked for more than three months would be made permanent; and that they considered themselves to be permanently employed.

[12] None of these facts supports a finding that the respondents discharged the onus that rested upon them. On their own version the respondents did not expect a renewal of their fixed term contract, since they considered themselves already to be permanently employed. This is fatal to the respondents’ case. This was the reason they refused to accept that their contract had expired and why they therefore did not receive an offer of a further fixed term contract. The respondents knew that Transnet intended to renew fixed term contracts of employment, including their own. They were told as much by their supervisor in January 2015 when they were informed that fixed term contracts would be renewed on the same terms and conditions. After they were informed in writing of the expiry of their fixed term contracts the respondents refused to accept a further fixed term contract renewal. Any announcement made by the President regarding employment contracts does not support the respondents’ claim that they had been employed for an indefinite duration. Even if their case had been that they held an expectation that their fixed term contracts would be renewed from 1 April 2015, which it was not, the facts and their own conduct were destructive of such a claim.

[13] It follows for these reasons that the arbitrator erred in finding that the respondents had proved their dismissal in terms of section 186(1)(b); and the Labour Court erroneously found that the facts existed which gave the bargaining council jurisdiction to entertain the dispute. For these reasons, the appeal must be upheld and the order of the Labour Court set aside and substituted with an order that the bargaining council lacked jurisdiction to determine the dispute since the respondents had not proved that they were dismissed from their employment with Transnet.

[14] There is no reason in law or fairness why an order of costs should be made in this matter, nor did the appellant seek such an order.

Order

[15] For these reasons, the following order is made:

1. The appeal is upheld.
2. The order of the Labour Court is set aside and replaced as follows:
 - “1. The review application succeeds.
 2. The arbitration award is set aside and substituted with a finding that the Transnet Bargaining Council lacks jurisdiction to determine the dispute given that the employees failed to prove a dismissal in terms of section 186(1)(b) of the Labour Relations Act 66 of 1995.”

SAVAGE AJA

Davis JA and Coppin JA agree.

APPEARANCES:

APPELLANT:

Adv C Bester with Adv N Jongani

Instructed by Knowles Husain
Lindsay Inc.

FIRST AND SECOND RESPONDENTS:

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Attorneys