



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

CASE NO: JR 1263/12

In the matter between:

JAN CHARLY MSIZA

First Applicant

BOY MGIJI SKOSANA

Second Applicant

and

THE SOUTH AFRICAN LOCAL GOVERNMENT

First Respondent

BARAGAINING COUNCIL

COMMISSIONER THOMAS NTIMBANA

Second Respondent

THEMBISILE HANI LOCAL MUNICIPALITY

Third Respondent

Heard : 16 January 2015.

Judgment : 22 April 2015.

Summary : A termination of a fixed-term contract of employment does not constitute a dismissal in circumstances where the employee has waived his right arising from a collective agreement to cancel such a fixed-term agreement and conclude a permanent employment contract.

JUDGMENT

Introduction

- [1] This is an application for the reviewing and setting aside of an arbitration award ("the award"), dated 8 March 2012, made by the second respondent and issued under the auspices of the first respondent. The application is opposed.
- [2] The second respondent concluded that the applicants had not been dismissed by the third respondent, but their fixed-term contracts had expired.

Condonation

- [3] The applicants made an application for condonation of the late filing of this application. The application is unopposed.
- [4] In this regard, the applicants made the following submissions:
 - 4.1 The applicants received the award on 22 March 2012. The following day, they telephonically contacted Mr Croucamp, their legal representative, to set up a meeting to consult on the matter. A meeting was scheduled for 13 April 2012, being the first date on which Mr Croucamp would be available.
 - 4.2 On 13 April 2012, the applicants submitted a bundle of documents, which formed part of the arbitration hearing, to Mr Croucamp to enable him to advise them on their prospects on the matter. Mr Croucamp undertook to familiarise himself with the matter and revert to them within a week.
 - 4.3 On 26 April 2012, the applicants had another meeting with Mr Croucamp wherein he advised them that they had very strong prospects of succeeding in this application. Thereupon, the applicants instructed Mr Croucamp to prepare the review application and represent them when such application is heard.
 - 4.4 On 24 May 2012, the applicants called Mr Croucamp's offices enquiring when the documents would be ready for signature. Mr Croucamp was surprised that the applicants had not yet signed the documents, for he was under the impression that they had already

been served on the respondents and filed with this Court. Upon investigation, Mr Croucamp discovered that Anandi Grobler, his typist had failed to arrange with the applicants to sign their affidavits.

- 4.5 Mr Croucamp had granted Ms Grobler an early maternity leave, due to complications with her pregnancy. Before her departure, he had been under the impression that she had made arrangements for the applicants to sign the affidavits and had also served and filed the review application.

Grounds of review

[5] The applicant seeks to review the award on the following grounds:

- 5.1 The second respondent disregarded material and relevant evidence;
- 5.2 The second respondent failed to properly assess the evidence put before him;
- 5.3 The second respondent failed to apply the rules of evidence;
- 5.4 The second respondent committed a gross irregularity in finding that applicants were not unfairly dismissed; and
- 5.5 The second respondent, notwithstanding his ruling that the parties submit their closing statements on 15 March 2012, proceeded and made his award on 8 March 2012.

Background

[6] On 1 April 2000, the KwaMhlanga Transitional Local Council employed the first applicant and second applicant as Chief Executive Officer and Senior Administration Officer, respectively.

[7] Following a merger between KwaMhlanga Local Transitional Council and Mkobola Transitional Council, the third respondent was established. On 9 November 2005, the third respondents engaged the applicants as Assistant Managers on an annual salary of R 145 336.00.

- [8] During 2006, the third respondent's council took a resolution to upgrade the salaries of Assistant Managers to the total package of R 330 000.00 per annum. The applicants' salary levels were, consequently, upgraded.
- [9] Thereafter, the third respondent and the applicants entered into five year fixed-term employment contracts.
- [10] On 11 July 2008, the third respondent and the South African Municipal Workers Union ("SAMWU") entered into a collective agreement in terms of which the Assistant Manager positions would be converted into full time positions and their fixed-term contracts of employment be cancelled.
- [11] On 19 November 2008, the Assistant Managers, including the applicants, in the third respondent's employ signed an internal memorandum stating that the collective agreement entered into between the third respondent and SAMWU was not them, for they had already signed employment contracts with the third respondent.
- [12] On 1 May 2011, the third respondent advised the applicants in writing that their contracts of employment would terminate on 30 July 2011.
- [13] During July 2011, the third respondent extended the applicants' contracts for a period of two months until 30 September 2011. At the expiry of the extension, the third respondent also reminded the applicants of the termination of their contracts of employment.
- [14] The third respondent advertised the applicant's positions and gave the applicants an opportunity to reapply. The applicants applied. However, the positions were later frozen.

Applicants' Submissions

- [14] In support of this application, the applicants made the following submissions:
- 14.1 The second respondent ignored the evidence by the applicants that the third respondent had no authority to present them with fixed-term contracts as if they were Section 57 employees.
- 14.2 The second respondent disregarded the applicants' evidence that they placed in dispute their conditions of employment and had directed

numerous letters to the management of the third respondent in this regard.

14.3 The second respondent disregarded the applicants' evidence that in terms of the collective agreement between SAMWU and the third respondent the positions of Assistant Managers should be converted to permanent positions, but the third respondent failed to do so and allowed the applicants' fixed-term contracts to run for the duration stated therein.

14.4 The second respondent failed to have regard to the parties' closing statements in that he made his award prior to the date on which he had ordered the parties to submit their closing statements.

Third respondent's Submissions

[15] In opposing this application, the third respondent made the following submissions:

15.1 The second respondent reached his decision after careful consideration of all the evidence presented before him.

15.2 The second respondent found, after considering and analysing the evidence, that the applicants were not dismissed.

Applicable legal principles

[16] It is well established that this Court has the power to condone the late filing of any document on good cause shown. In this regard, the Court has, in determining whether there is a good cause, considered the factors mentioned in *Melane v Santam Insurance Co Ltd*¹.

[17] In my view, the delay is not excessive and the explanation therefor is not unreasonable. However, I am not convinced that the applicants have reasonable prospects of success as it will become clear herein below. This notwithstanding, I am guided by the Labour Appeal Court in *NUM v Council for Mineral Technology*² where Myburgh J stated that:

¹ 1962 (4) SA 531(A) at 532C-F

² [1999] 10 BLLR 431 (LAC)

“These facts are inter-related. They are not individually decisive...A slight delay and a good explanation may help to compensate for prospects of success which are not strong...an unsatisfactory and unacceptable explanation for the delay remains so, whatever the prospects of success on the merits.”

- [18] The test for the review of the arbitration award was set out in the majority judgment of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³. The court stated that:

“Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

- [19] The second respondent was enjoined to determine whether the third respondent had dismissed the applicants. In this respect, the applicants bore the onus to establish the existence of their dismissal as envisaged by Section 192 of the Labour Relations Act⁴ (“the LRA”).

- [20] The evidence before the second respondent was that the applicants had on 14 August 2006 entered into fixed-term contracts of employment with the third respondent.

- [21] There was evidence that on 11 July 2008, the third respondent and SAMWU concluded a collective agreement in terms of which the positions of Assistant Managers, including the applicants, would be converted into permanent positions and their fixed-term contracts be cancelled.

- [22] Subsequently, the applicants signed an internal memorandum stating that:

“2 The Assistant Managers on (sic) its meeting held on the 19th November 2008 resolved among others:

2.1 That the agreement entered into between South African Workers Union and Thembisile Hani Municipality Management on 11 July 2008 is not binding to (sic) Thembisile Hani Local Municipality Assistant Managers, as they have already signed employment contract (sic) with the employer.”

- [23] Mr Croucamp submitted on behalf of the applicants that the second respondent disregarded that they had entered into the fixed-term contracts

³ [2007] 12 BLLR 1097 (CC) at paragraph 110

⁴ Act 66,1995

under duress and that those contracts should have been also cancelled in accordance with the collective agreement. The evidence, viewed in its totality, cannot, in my view, support the applicants' version in this regard. The applicants had, unequivocally, waived their rights emanating from the collective agreement.

[24] According to the second respondent's award, both parties had agreed to submit their written closing statements on 15 March 2012. However, the second respondent proceeded and finalised his award which is dated 8 March 2012. Mr Croucamp submitted that the second respondent's conduct in this respect constituted an irregularity.

[25] I have hereinabove found that the second respondent considered the totality of the evidence before him when he concluded that the third respondent had not dismissed the applicants. While he had finalised his award without considering the parties' closing statements, in my view his conduct does not amount to an irregularity that would vitiate his award. In this connection, it is apposite to make reference to *Herholdt v Nedbank Ltd*⁵ where the court stated that:

"...an error...by the arbitrator would not justify the setting –aside of the award, unless it had the result that the arbitrator was diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination in the arbitration."

[26] In my view, the second respondent's award passes the *Sidumo* test.

Order

[27] I make the following order:

27.1 Condonation for the late filing of this application is granted.

27.2 The application is dismissed.

27.3 I make no order as to costs.

Mzungulu Mthombeni

⁵ [2012] 9 BLLR 857 (LAC) at para 19.

Appearances

For the Applicants : Mr JA Croucamp

Instructed by : Buks Croucamp Attorneys

For the Respondent: Advocate Bodlani

Instructed by : Knowles Husain Lindsay Incorporated