THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR264/16

In the matter between**:**

ANDRIES MOFOKENG AND 4 OTHERS **Applicant**

and

ROTEK AND ROSCHON SOC LTD **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

JOYCE NKOPANE *N.O* **Third Respondent**

Heard: **25 October 2018**

Delivered: **13 December 2018**

Summary: **Condonation – delay could not be imputed on the applicants – section 186(1)(b) dismissal – operational requirement dispelled expectations that fixed term contracts would be renewed – prospects of success found to be deficient to grant condonation.**

JUDGMENT

NKUTHA - NKONTWANA. J

Introduction

[1] This is an application for an order reviewing and setting aside the arbitration award issued by the third respondent (commissioner) under the auspices of the second respondent, the Commission for Conciliation, Mediation and

Arbitration (CCMA) under case number GAJB 6998-15, dated 9 November 2015. The commissioner found that the applicants failed to prove that the first respondent's failure to renew their fixed term contracts of employment constitutes a dismissal in terms of section 186(1)(b) of the Labour Relations Act[1] (LRA).

[2] The applicants' main ground of review is that the commissioner committed a reviewable irregularity in that she rendered an unreasonable award as it could not be sustained on the evidence that was before her and the reasons given.

[3] The first respondent is opposing the application and raised the issue of condonation as a point *in limine*.

Condonation

[4] The applicants launched these proceedings outside the time period prescribed in terms of section 145(1)(a) of the LRA by about eight weeks. They are members of the National Union of Mineworkers (NUM) and blame the NUM officials for the delay. In turn, the union officials blame each other. According to Mr Radebe, NUM full time shop steward at Eskom, there was a miscommunication between him and Mr Zwane, NUM regional official. Both thought that one had already referred the matter and only realised in January 2016, after the December 2015 holidays, that the matter had not been referred.

[5] It is trite that where there is an unreasonable delay that is not satisfactorily explained, the applicant's prospects of success are immaterial.[2] The applicants in this case disavows any role in the delay and seek to impute blame on their representatives. In *Mashishi v Mdladla and Others*[3] this Court, per Van Niekerk J, reiterated that a mere issuing of instructions to a

[1] Act 66 of 1995 as amended.
[2] *Melane v Santam Insurance Co* Ltd 1962 (4) SA 531 (A); *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC); *Collett v Commission for Conciliation, Mediation and Arbitration [2014] 6 BLLR* 523 (LAC);
[3] [2018] ZALCJHB 116; [2018] 7 BLLR 693 (LC); (2018) 39 ILJ at para 10

representative is not good enough to escape blame. The applicant must show, over and above, that there was a constant follow up in order to ensure proper execution of those instructions.

[6] In the present case, the applicants assert that they were not aware that their matter had not been referred on time and this was confirmed by Mr Radebe. Unlike in *Mashishi*[4], where the delay was almost 5 years, in this instance the delay is not that extensive.

[7] I, accordingly, accept that the applicants should not be blamed for the delay hence I am inclined to consider the prospects of success.

Background

[8] The applicants were employed by the first respondent on fixed term contracts that had been renewed on several instances since 2007. The first respondent is a construction company contracted by Eskom to deal with infrastructure development, expansion and maintenance. The applicants were employed in the first respondent's Transmission Unit which is responsible for construction of high voltage power lines.

[9] The applicants' fixed terms contracts were project specific and over the years they moved from project to project. On 10 December 2014, the first respondent's Project Manager, Mr Werner Greef (Mr Greef), had a consultation meeting with the trade unions representing employees, in particular the NUM. In that meeting it was explained that the first respondent was affected by Eskom's budget reprioritisation which was part of the cost saving exercise it was undertaking.

[10] The employees from other projects like Oribi and Rigi/Sonland were transferred to the Lulamisa project when these projects were cancelled. The Lulamisa project was initially a two phased project but because of environmental issues, the second phase was deferred. As a result, the Lulamisa project was over-resourced and running at a loss of about 4 million

[4] *Supra* n 3.

Rand. Mr Greef was instructed to institute a restructuring process within the Transmission Unit.

[11] The NUM representatives agreed to the restructuring and that a principle of Last-In-First-Out (LIFO) would be applicable within the team structures. According to Mr Greef, there were three teams; the foundation team, steel team and floating team. The applicants were in the floating team. This was vehemently disputed by Mr Mnguni, the NUM official, who was part of the meeting of 10 December 2014. According to his testimony, there were only two teams and the first respondent concocted by the third one, floating team. The applicants were also adamant that they were part of the foundation team.

[12] The applicants' fixed term contracts were going to be terminated on 31 January 2015, but were extended for a month. On 26 January 2015, the applicants signed new fixed term contracts that commenced on 1 February 2015 to 28 February 2015 to work on the Lulamisa project. On the same day, 26 January 2015, the applicants were issued with termination letters that clearly stated that their fixed terms contracts would come to an end on 26 February 2015.

[13] There was another meeting held on 12 February 2015, wherein Mr Greef informed the applicants that they had been selected for termination because they were part of the floating team and the duties they were performing at that time did not fall within the core functions of the foundation and steel teams. All these positions were made redundant and the labour broker employees were equally affected.

[14] The applicants' main gripe is the fact that three of their colleagues who were "last in" in terms of employment by the first respondent were never affected by the restructuring.

<u>Evaluation</u>

[15] Recently, in an unreported decision in *Dube and 63 Others v University of Zululand and Others,*[5] I pertinently dealt with applicable legal principles in these instances. In summary, the Labour Appeal Court (LAC) in *Enforce Security Group v Fikile and Others,*[6] reaffirmed the review test in these instances as one of correctness as opposed to reasonableness. When it comes to section 186(1)(b), the burden was on the applicants to show the basis of the expectation that their contracts of employment would be renewed and the reasonableness thereof.[7]

[16] Coming to the present case, I agree with the submission by the counsel for the first respondent that the applicants clearly misconceived the applicable review test as their impugn is hinged on the reasonableness as opposed to the correctness test.

[17] Typically, in the construction industry there is no guarantee for job security given the assignment bound projects. It is understandable that for seven years prior to the termination of applicants' contracts of employment the first respondent had enough work to move them from project to project hence their contracts were renewed with ease. However, it is common cause that the first respondent's operational requirements changed in 2014.

[18] The commissioner was spot-on in her finding that the meeting of 10 December 2014 ought to have dispelled the applicants' expectation that their fixed term contracts would be renewed automatically as was the case previously. The applicants conceded that they were aware, at least by 11 December 2014, that not all fixed terms contracts would be renewed and that LIFO would be applied to select those affected.

[19] Also, on 26 January 2015, the applicant signed one-month employment contracts specifically on the Lulamisa project and were also issued with

[5] (D956/17) [2018] ZALCD 22 (8 November 2018) at para 11-14.
[6] [2017] 8 BLLR 745 (LAC) at para 16, see also *SA Rugby (Pty) Ltd v SARPU and Another* [2008] 9 BLLR 845 (LAC) at paras 39 – 40.
[7] *SA Rugby* above n 2 at para 44.

notices stating that their services would terminate on 26 February 2015 straightaway. By that time, it was clear that the first respondent was proceeding with restructuring and they were definitely affected. Even if the applicants were still operating under a false hope that their contracts of employment would be renewed, the meeting of 12 February 2015 should have finally driven home the fact that they would not be returning to work after 26 February 2015.

[20] The first respondent's evidence that the Lulamisa project was concluded in March of 2015 was not seriously challenged. I agree with the commissioner that nothing turns on what transpired after the conclusion of the Lulamisa project as the applicants had already been terminated.

[21] In *Enforce,*[8] the LAC provided a crucial succory as it distinguished between an enquiry on whether a dismissal occurred and the fairness or otherwise of the dismissal; stating that '[t]he fact that the appellant had an option to retrench the employees or could have considered other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. Put differently, one cannot simply use the considerations of the fairness or otherwise of a dismissal to determine whether an employee has been dismissed'.

Conclusion

[22] In all the circumstances, I am convinced that the arbitration award is unassailable. Undoubtedly, the condonation application stands to be dismissed as the prospects of success are explicitly deficient.

Costs

[8] *Supra* n 2 at para 24.

[23] It is trite that costs do not follow the result in this Court, particularly, in instances such as this one where NUM and the first respondent are involved in a persisting collective bargaining relationship.

[24] In the premises, I make the following order:

<u>Order</u>

1. The application for condonation of the late filing of the review application is dismissed.

2. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the applicant:	Mr MES Makinta from ES Makinta Attorneys
For the first respondent:	Mr D Masher from Edward Nathan Sonnenbergs Inc.