

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable

Case No: PR 103/2016

In the matter between:

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

First Applicant

Z. QHOBESHIYANE AND 32 OTHERS

Second – Further Applicants

And

TRANSNET SOC t/a TRANSNET FREIGHT RAIL

First Respondent

TRANSNET BARGAINING COUNCIL

Second Respondent

MALUSI MBULI N.O

Third Respondent

Heard: 14 June 2018

Delivered: 26 March 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicants seek an order reviewing and setting aside the arbitration award issued by the third respondent (Arbitrator) under the auspices of the first respondent (TBC). In the award, the Arbitrator dismissed the individual applicants' claim that they were dismissed by the second respondent (Transnet), as they had failed to demonstrate that they held a reasonable expectation of a renewal of their limited duration contracts of employment.
- [2] The individual applicants commenced employment in terms of fixed term contracts of employment with Transnet as general workers in 2011 and August 2013 respectively. The contracts were renewed annually until 31 March 2015 when Transnet refused to renew them. The individual applicants were informed of Transnet's intention in writing on 25 February 2015 and also in a meeting held with them in the same month that the contracts would not be renewed.
- [3] Aggrieved, the individual applicants as assisted by NUMSA had approached the TBC with a referral, alleging that they were unfairly dismissed as they had a reasonable expectation that their fixed term contracts would be renewed on the same or similar terms.

The arbitration proceedings:

- [4] When the matter came before the Arbitrator for arbitration, the applicants' case as per the testimony of Messrs Zukile Mthotywa and Mziyanda Tshali was that the expectation of a renewal was based on the following;

- 4.1 They confirmed that before the contracts came to an end, they were notified in writing that the contracts would not be renewed. This was also followed up with a meeting held with all the affected employees.
- 4.2 An expectation was however created that the contracts would be renewed as Transnet had done so in the past, and further since they were advised by Transnet that 1472 permanent posts were to be created after the expiry of the contracts.
- 4.3 The individual applicants had skills, were trained on the job, and were further advised that they would be expected to apply for the permanent positions to be created.
- 4.4 Vacant posts were indeed made available and the applicants had an opportunity to apply for those posts.
- 4.5 The nature of the work done by the individual applicants involved ongoing maintenance for the rail, and there was thus still work available for them.
- 4.6 In the same vein, they confirmed that some of them were employed on specific projects, and management had not specifically guaranteed that the jobs would continue.

[5] Transnet's case as presented by its witness, Arthur Mdingi was essentially that the individual applicants were employed on specific project based operations. He had called the affected employees to a meeting to advise them of the non-renewal of the contracts, with the reason being that the specific projects had come to an end. He had confirmed that the individual applicants

were trained on the job, but however contended that this was an inherent requirement of the jobs, and pertained mainly to safety.

- [6] Mdingi had further testified that the individual applicants could only be employed if there were projects that required their services, or where budgets were allocated in respect of those projects. He had denied that the individual applicants were replaced or that they were at any stage informed that their contracts would be renewed.

The Arbitrator's conclusions:

- [7] The Arbitrator's conclusions were as follows;

7.1 To the extent that the individual applicants had conceded that Transnet had advertised some posts and that they were encouraged to apply, if they were not appointed, their dispute related to an unfair labour practice in respect of non-promotion, which dispute they had not referred.

7.2 There were no provisions in the fixed term contracts that guaranteed a renewal, and the onus was upon the applicants to prove that indeed a reasonable expectation of a renewal was created.

7.3 There was however no evidence to suggest that any of Transnet's managers had made a promise to the applicants that the contracts would be renewed, which was consistent with Mdingi's testimony that the individual applicants always knew that they were on fixed term

contracts, and that they would be advised at some point of the terminations of those contracts.

7.4 The fact that the contracts were previously renewed did not mean that a reasonable expectation of renewal was created. There was no representation made by Transnet that the contracts would be renewed.

7.5 Since the individual applicants were employed on specific projects, they had not demonstrated that other similarly employed employees were still employed on those projects, or that those projects were still on-going.

7.6 The applicants had failed to discharge the onus of proving that Transnet had created a legitimate expectation that their fixed term contracts would be renewed.

The legal framework:

[8] Section 186(1)(b) of the Labour Relations Act (LRA)¹ upon which the applicants relied in claiming a dismissal provides that;

“[A]n employee employed in terms of a fixed term contract of employment reasonably expected the employer—

- (i) 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; or

¹ Act 66 of 1995 (as amended)

- (ii) (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.”

[9] As it was correctly stated on behalf of the applicants, an enquiry into whether there was a dismissal in terms of section 186(1)(b) of the LRA goes to jurisdiction. The applicable test on review in such cases is therefore not whether the arbitrator acted reasonably, but whether he was correct in determining that the individual applicants were not dismissed on account of them failing to demonstrate that they had a legitimate expectation that their fixed term contracts of employment would be renewed. Once the arbitrator came to a conclusion that the applicants had not discharged the onus placed on them under the provisions of section 192(1) of the LRA to demonstrate that they were dismissed, it followed that the TBC lacked jurisdiction.

[10] Still on the question of onus, an employee relying on the provisions of section 186(1)(b) of the LRA when claiming an unfair dismissal, bears the onus of establishing that he/she had a reasonable expectation that his/her contract would be renewed. In *SAPRA & Others v SARPU & others*² the court explained the test as follows:

“The appellants carried the onus to establish that they had a ‘reasonable expectation’ that their contracts were to be renewed. They had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms.... A mere *ipse dixit* that there is an expectation, based on flimsy grounds, would not suffice”.

² [2008] 9 BLLR 845 (LAC) at paragraphs [44] and [46]

[11] An enquiry into the existence of a legitimate expectation is a factual one, with the primary focus being on the objective facts giving rise to the alleged expectation³. This therefore implies that the Arbitrator in this case was required to determine whether on the facts before him, objectively considered, it had been established that the individual applicants held a reasonable expectation that their fixed term contracts of employment would be renewed.

The grounds of review and evaluation:

[12] In seeking that the award be reviewed, it was submitted on behalf of the applicants that the Arbitrator's finding that no dismissal had occurred for the purposes of section 186(1)(b)(i) of the LRA was wrong, as the issue before him was whether the expectation existed, and not whether Transnet had created the expectation. It was submitted that in coming to a wrong finding, the Arbitrator ignored certain material evidence including that;

12.1 Transnet's management had given assurances to the individual applicants that attempts would be made to secure work for them;

12.2 That Transnet despite advising the individual applicants of the termination of their contracts had nonetheless invested in their training, and continued with the contracts until 30 June 2015

12.3 That Transnet Bargaining Council had issued a circular containing a favourable forecast as to the availability of employment opportunities within Transnet, and thus predicted the creation of 1 400 jobs;

³ *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC)

12.4 That Transnet had conveyed to the individual applicants that employees with the longest service and highest skills would be retained, and further that employees with shorter service were however retained.

12.5 That work was available at other projects in the area.

12.6 That the individual applicants were aware that they would be redeployed to other projects during the currency or upon the expiry of the contracts.

12.7 That on the evidence of Mdingi, there was still work available even though they were not employed on those projects.

[13] Transnet contends that the applicants' grounds of review are unsustainable. I agree that the facts as were placed before the Arbitrator when objectively considered, cannot have led to any conclusion that a reasonable expectation existed or was created by Transnet that the fixed term contracts of the individual applicants would be renewed for the following reasons;

13.1 The Arbitrator's findings that a previous renewal on its own could not have created an expectation of a future renewal are unassailable. Various considerations leading to a renewal should be taken into account specifically since it was common cause that the individual applicants were employed to render their services in specific projects, which I did not understand from the facts to be infinite.

13.2 Any assurances from Transnet to the individual applicants that future or permanent placement would be created for them even if made, were

meaningless as it was more a question of whether any such post were available. As it was correctly pointed out on behalf of Transnet, any assurances or promises to find future jobs could only have been realised if those jobs were available. Thus those assurances or promises even if made, cannot be said to have created a legitimate expectation.

13.3 To further put paid to any contention that the promises of future employment could not have created any expectation, at the time that those promises were made, a month later, the individual applicants were given notices of termination, which can only imply that those promises could not be fulfilled at the time, as the work was no longer available.

13.4 At best for the individual applicants, the only assurances made by Transnet were that they could be required to apply for positions as and when they became available in the future after the expiry of their contracts. Even then, where there is a requirement to apply for a post when it arises, I fail to appreciate how based on that fact alone one can claim a legitimate expectation that work would be provided, or that the individual would be successful.

13.5 The reliance by the individual applicants on the fact that they were trained and thus an expectation was created is equally misplaced. On Transnet's version, the training was merely part of the inherent requirements of the work that the individual applicants performed. Furthermore, such training was related to safety, which is obviously mandatory depending on the nature of functions they were required to perform during the tenure of the fixed term contracts. The training done by the individual applicants in order to assist them to perform their functions during the tenure of the fixed term contracts could not have

created an expectation that work, especially of a nature that is project specific would always be available.

13.6 The applicants' contention that the TBC had issued a circular to the effect that opportunities of employment at Transnet were predicted and thus created an expectation is equally red-herring. According to Transnet, any reference to future job creation by the TBC was merely in reference to a collective agreement concluded between the parties to the main agreement, which had equally provided that fixed term contracts were to come to an end at the end of their term, and that previous renewals did not justify an expectation of further renewals. I therefore fail to appreciate the basis of any reliance on a circular issued by the TBC in that regard.

13.7 It was common cause that the individual applicants were placed at specific projects in terms of their fixed term contracts. There were further other projects undertaken by Transnet in other areas where it had employed other employees under similar conditions as the individual applicants. The fact that other projects may have been on-going at the time that the individual applicants' contracts came to an end, cannot by any stretch of imagination have create an expectation. This is so, in that, each project had its own specifics, and the fact that some of the individual applicants could have been deployed to other projects during the tenure of their contracts could not have raised any expectation that they would remain on their redeployed projects when their own came to an end.

[14] Having had regard to the evidence and documentary material adduced at the arbitration proceedings, I am satisfied that the Arbitrator was alive to the issues he was required to determine. The Arbitrator had also objectively applied his mind to those issues, and came to a correct conclusion. In the end, any reasonable employee in the position of the individual applicants in

the circumstances prevailing at the time could not have claimed that he/she had expected Transnet to renew his or her fixed term contract on the same or similar terms. Any grounds of an expectation as argued by or on behalf of the applicants was at best imagined or based on flimsy grounds, and were thus unsustainable.

[15] I have had regard to the requirements of law and fairness, and hold the view that a costs order is not warranted in this case.

[16] Accordingly, the following order is made;

Order:

1. The applicants' application to review and set aside the arbitration award issued by the third respondent is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhamajie

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

F Le Roux

Instructed by:

Gray Moodliar Attorneys

For the Second Respondent:

Xolani Njokweni of Knowles
Husain Lindsay

LABOUR COURT