THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR298/18

In the matter between:

CORNELIUS GABRIEL VOLSCHENK	**Applicant**
And	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER PAUL PHUNDU *N.O*	**Second Respondent**
DELOITTE CONSULTING (PTY) LTD	**Third Respondent**

Heard: 30 January 2020

Judgment delivered: 31 January 2020

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside a rescission ruling made by the second respondent (the commissioner). In his ruling, the commissioner refused to condone the applicant's late referral of an unfair dismissal dispute.

[2] The ruling is terse, and reads as follows:

> I accept the Applicant's reasons for lateness. I find that the application is not lengthy. The Applicant conceded that he was temporarily employed on a fixed term contract.
>
> I accept the Respondent's submission that the Applicant was not dismissed but the employment contract ended on 31-08-2017, upon the natural expiration of his fixed term contract/employment.
>
> It is my finding that the Applicant's prospects of success are poor.
>
> The prejudice that the Respondent will suffer if it is granted outweighs the prejudice that he Applicant will suffer if it is not granted.

[3] The applicable threshold is one of reasonableness. This court is entitled to intervene if and only if the arbitrator's decision is so unreasonable that no reasonable decision-maker could come to that decision on the available evidence.

[4] The evidence available to the commissioner comprises a founding and answering affidavit. It was not in dispute that the applicant was employed by the third respondent in June 2005, in terms of a series of fixed term contracts, until 31 August 2017, i.e. for more than 12 continuous years. In May 2017, the

applicant was advised that the business unit in which he was engaged was not doing well and that his fixed term contract would not be renewed. He was given a further fixed term contract, to expire on the completion of the project on which the applicant was engaged on 31 August 2017, whichever came first. It is not disputed that a Mr. Rheede advised the applicant that he would be paid a severance package on the termination of his employment. On 31 August 2017, the applicant's employment was terminated. On 25 September 2017, the applicant's accrued leave was paid, but not the severance package. The package was never paid. On 23 November 2017, the third respondent advised the applicant that he would not be paid a package since his contract had expired by the effluxion of time and no authorized undertaking to pay a severance package had been made. An unfair dismissal dispute was referred to the first respondent on 1 December 2017, together with the application for condonation that is the subject of these proceedings. In relation to his prospects of success (the only relevant factor for the purposes of this application), the applicant averred that he had been in the third respondent's employ for more than 12 uninterrupted years, that the functions he performed continued beyond the termination of his employment, that he 'had every expectation reasonably possible' that his employment would continue and that his contract would be renewed, as he for all intents and purposes was permanently employed despite the fact that he was engaged in terms of fixed term contracts concluded on a continuous basis. The applicant further averred that his dismissal was substantively and procedurally unfair since the third respondent could have found suitable alternative employment, and because it had followed no procedures whatever in effecting his dismissal. In regard to the factor of prejudice, the applicant contended that he would suffer irreparable harm should he be denied the opportunity to refer his dispute to the CCMA.

[5] In the answering affidavit, the third respondent averred that the applicant had not been dismissed because his fixed term contract came to an end. Further, the applicant's contracts had always been linked to specific project 'deliverables'. Further, it was improbable that the applicant could have expected a continued

employment relationship as he was aware that the renewal of the project on which he was engaged was not envisaged. In regard to the severance package, the third respondent averred that Rheeder had no authority to offer the payment of a package and that in any event, the applicant was 'paid significantly over the earnings threshold' and thus had no legitimate claim to a package.

[6] In his replying affidavit, the applicant averred that on consulting his legal representative on the issue of severance pay, he realised that the decision to terminate his employment may fall foul of the law, and reiterated his contention that the termination of his contract constituted an unfair dismissal.

[7] The test that the commissioner was obliged to apply is well-established, and has its roots in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). Condonation is not there merely for the asking, nor are applications for condonation a mere formality (see *NUMSA v Hillside Aluminium* [2005] 6 BLLR 601 (LC); *Derrick Grootboom v National Prosecuting Authority & another* [2014] 1 BLLR (CC)). A party seeking condonation must make out a case for the indulgence sought and bears the onus to satisfy the court that condonation should be granted. The commissioner was required to exercise a discretion, having regard to the extent of the delay, the explanation proffered for that delay, the applicant's prospects of success, and the relative prejudice to the parties that would be occasioned by the application being granted or refused.

[8] As I have indicated, the parties are agreed that the commissioner's dealing with the factors of the extent of the delay and the explanation for it are not disputed. The present case turns on whether the commissioner's decision on the applicant's prospects of success (the point on which his decision turned) can be said to be reasonable, having regard to the material that served before him. In this regard, the applicable threshold is one that enables the court to assess, on a prima facie basis, whether there are prospects of success. The formulation is often expressed as a requirement that the applicant provide enough information about the prospects of success that, if proved in the main action, he or she would be entitled to relief.

[9] The only discernible reason for finding that the applicant had poor prospects of success is the fact that he was engaged in terms of a fixed contract that expired on 31 August 2017, and that there was therefore no dismissal. This formulation begs the question of the existence of a dismissal as defined in the LRA, a definition that transcends the termination of an employment contract in purely contractual terms. Section 186 (1)(b) of the LRA defines a dismissal to include a refusal or failure to renew a fixed term contract on the same or similar terms in circumstances where the employee reasonably expected the employer to renew the contract. This provision was incorporated into the LRA to prevent employers from circumventing unfair dismissal laws by entering into a series of fixed term contracts and then relying on the termination of one of them as a termination of employment consequent on the effluxion of time. The test to be applied is one that requires the determination of the existence or otherwise of a reasonable expectation of renewal. This requires an examination of all of the relevant factors, including the number of times that the contract has been 'rolled over', the terms of the contract, the nature of employment, and the like. In short, there must be a subjective expectation of renewal that is objectively reasonable.

[10] This is not the enquiry that the commissioner undertook, even to determine whether the applicant has made out a prima facie case for the purposes of establishing his prospects of success. Had the commissioner applied himself to the evidence, the subjective expectation of renewal was undisputed, and while the reasonableness of the expectation was contested, none of the relevant factors was considered. Of particular significance is the fact that the applicant had been employed by the third respondent for more than 12 years on a series of fixed term contracts, all of which were renewed but for the contract that expired on 31 August 2017. The commissioner failed to apply the correct test and failed to consider all of the relevant facts. In these circumstances, in my view, it was unreasonable to conclude, on the basis of the affidavits before him, that the applicant had poor prospects of success simply on account of the expiry of his fixed term contract. The commissioner's ruling thus stands to be set aside.

[11] The parties were agreed that in the event of the condonation ruling being set aside, the court should substitute the ruling with a ruling to the effect that condonation is granted. Finally, this is a matter where for the purposes of s 162 the interests of the law and fairness are best served by there being no order as to costs.

I make the following order:

1. The condonation ruling issued by the second respondent on 12 January 2018 is reviewed and set aside.

2. The ruling is substituted by the following:

   'The late referral of the applicant's unfair dismissal dispute is condoned'.

3. The first respondent is directed to convene a conciliation meeting within 30 days of the date of this judgment.

André van Niekerk

Judge

REPRESENTATION

For the Applicant: In person

For the Respondent: Mr. D Short, Fairbridges Wertheim Becker