IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA43/2020

In the matter between:

ANDRIES MOFOKENG & 4 OTHERS **Appellants**

and

ROTEK AND ROSCHON SOC LTD **Respondent**

Heard: 11 May 2021. Decided on record and appellants' submissions.

Delivered: Deemed to be the date the Judgment is emailed to the parties for the first time (**Friday 25 June 2021**).

Summary: Refusal of condonation for the late filing of a review confirmed on appeal.

CORAM: Waglay JP, Coppin JA *et* Molefe AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the judgment of the Labour Court (Nkutha-Nkontwana J) dismissing, in favour of the respondent, the appellants' application to condone the late filing of an application to review an arbitration award of a commissioner ("arbitrator") of the Commission for Conciliation, Mediation and Arbitration (CCMA), concerning their alleged unfair dismissal by the respondent. Leave to appeal was granted on petition.

[2] The issue is whether the Labour Court erred in refusing to grant the condonation sought and, in particular, whether it erred in concluding that the review had no reasonable prospect of success.

The background facts

[3] The appellants are Mr Andries Mofokeng, Mr Thapelo Molane, Mr Dingaan Radebe, Mr Edward Mokoena and Mr Bongani Maphumelo.

[4] The respondent is a private company that was contracted by ESKOM Soc Ltd ("ESKOM") to perform specified work in its infrastructure, expansion and maintenance projects.

[5] The appellants were employed by the respondent on fixed term contracts that were renewed several times since 2007. The exact nature of the work they performed appears to be in contention, but it was essentially project specific, depending on the nature of the project. They were members of the National Union of Metalworkers ("NUM").

[6] The last project they were engaged on was the "Lulamisa" project. It was initially conceived as a two phase project, but the second phase was delayed due to environmental issues. Because of financial constraints, employees of the respondent who were engaged in other projects were transferred to the Lulamisa project, which, in turn, exacerbated the respondent's adverse financial position.

[7] On 10 December 2014, the respondent's manager, Mr Werner Greef, had a consultation meeting with the unions representing its employees, including NUM, to discuss restructuring allegedly necessitated by ESKOM's "budget reprioritisation for cost saving".

[8] At the meeting, *inter alia*, the restructuring was agreed to and that the LIFO principle would be applied to the respondent's respective team structures. There were essentially three teams, the foundation team, the steel team and the floating team.

[9] The respondent categorised the appellants as having been part of the floating team. The appellants have contested this categorisation and aver that they were part of the foundation team. This latter aspect is dealt with later.

[10] The appellants' fixed term contracts were to expire on 31 January 2015, but the respondent extended their contracts to the end of February 2015. On 26 January 2015, the appellants signed new contracts that were to commence on 1 February 2015 and terminate on 28 February 2015.

[11] On the same day, i.e. 26 January, the appellants were issued with letters stating that their new contracts were going to end on 26 February 2015.

[12] At a meeting held on 12 February 2015, Mr Greef, the respondent's project manager, on behalf of the respondent, informed the appellants that they were selected for early termination because they were part of the floating team, whose work ranked behind the other teams in order of importance. Their positions, as well as those of other employees who were engaged through labour brokers, were to be made redundant.

[13] The appellants' employment with the respondent terminated at the end of February 2015 and was not extended or renewed by the respondent beyond that date.

[14] The appellants were especially aggrieved by the fact that certain of their co-employees, who had been employed with or after them, had not been similarly affected and continued to be employed by the respondent.

[15] Consequently they referred an unfair dismissal dispute to the CCMA. The issues that were to be resolved by the CCMA were, essentially, the following: (a) Whether the non-renewal of the appellants' fixed term contracts (i.e. at the end of February 2015) constituted a dismissal of the respective appellants, as contemplated in section 186(1)(6) of the Labour Relations Act (LRA); (b) If so, whether their dismissal(s) was procedurally and substantively fair; and (c) to grant appropriate relief.

[16] The appellants essentially contended that they (individually) had a reasonable expectation that their contracts would be renewed further, possibly, effectively converted into permanent employment, and that they would have retained their employment with the respondent if LIFO had been applied. In respect of the latter, they essentially contested their categorisation by the respondent as members of the "floating team".

[17] An arbitration followed after an unsuccessful conciliation process. The appellants, represented by their union NUM, gave evidence and called witnesses in support of their case. The respondent also called witnesses at the arbitration. The arbitrator issued an award on 9 November 2015 in which he dismissed the appellants' claim(s).

[18] Having analysed the evidence, the arbitrator concluded that it was difficult to find that the objective facts supported the case of the appellants regarding their expectation that their contracts would be renewed or extended. The arbitrator found that they did not prove that their positions at the respondent had been retained; that they were notified well in advance that their contracts were not going to be renewed any further; that there was a consultation with them, which included the respondent's management and their union, where that matter was discussed and that all of that could clearly not have caused them to have a contrary, yet reasonable expectation.

[19] The arbitrator further found that the appellants were effectively of the belief that they ought to have received preferential treatment in relation to other employees who were employed by the temporary employment service ("TES"). This notwithstanding the fact that the evidence showed that as early as 2013 the respondent had started a process of "targeted selection" of employees and that some of the TES employees had also been with the respondent for substantial periods. The appellants were not the only employees affected by the restructuring. Other TES employees were also affected. The arbitrator concluded that the appellants had failed to discharge their onus of proving that they were dismissed by the respondent.

[20] The appellants brought an application in the Labour Court to review the award. It was late, thus their application for condonation, which was opposed by the respondent.

[21] Having concluded that the delay had been caused by the appellants' union, but that such negligence should not be held against the appellants personally, the Labour Court found that the arbitrator's award was "unassailable", and that the prospects of the review succeeding "are explicitly deficient".

Evaluation

[22] It is trite that an applicant for condonation must make out a proper case for the grant of that relief.[1] This not only includes giving a satisfactory explanation for the delay, but also demonstrating that the applicant had reasonable prospects of succeeding in the principal matter. No matter how good the explanation, if there are no prospects of success the application for condonation may have to be refused, because there would be no point in granting condonation in those circumstances.[2]

[23] The appellants seemingly relied on more than one 'cause of action' for their claim for reinstatement. They alleged, *inter alia*, that they, respectively, had a reasonable expectation that their fixed-term contracts would be renewed, or extended further, implying that the non-renewal of those contracts by the respondent was tantamount to a dismissal, but they also allege that the termination of their employment for operational reasons was flawed because the LIFO principle was not properly applied.

[24] In a dismissal dispute, the onus is on the employee to establish the existence of the dismissal.[3] If there is a dismissal, it is for the employer to prove that the dismissal was fair[4].

[1] See generally, *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532 C-F; *National Union of Mineworkers v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) para 10.
[2] See *National Union of Mineworkers v Council for Mineral Technology (above)* para 10*; Collet v Commission for Conciliation, Mediation and Arbitration* [2014] 6 BLLR 532 (LAC).
[3] Section 190(2)(a) of the Labour Relations Act 66 of 1995 ("LRA").
[4] Section 192(2) of the LRA.

[25] A "dismissal", in terms of section 186[5] of the LRA, means in respect of an employee employed in terms of a fixed-term contract of employment – one where there is a reasonable expectation that the contract would be renewed on the same or similar terms, but the employer had offered to renew it on less favourable terms, or did not renew it at all - or if the expectation was that the contract would be extended indefinitely on the same or similar terms, where the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee at all.

[26] The employee bears the onus to prove the reasonable expectation on a balance of probabilities.[6] The test is objective and it is whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his or her contact on the same or similar terms (or would have extended it indefinitely on the same or similar terms).[7]

[27] The test ultimately is whether an employee in the position of each of the appellants (taking into account all the circumstances objectively) could reasonably have expected the employer to renew their individual contracts as they allege. In this instance, the answer is clearly negative.

[28] As found by the arbitrator, the appellants had been part of consultation meetings where the issue of restructuring was discussed and where it had been made clear to them and their Union, in good time, that their contracts would not be extended beyond the end of February 2015 and that their positions were to be made redundant. In light of all the evidence, they could not have entertained a reasonable expectation that their contracts would yet again be extended (let alone indefinitely), notwithstanding the adverse economic situation the respondent found itself in, and due to the ensuing restructuring process, that not only affected them, but also affected a number of other employees who had been retained on a temporary basis.

[5] Section 186(1)(b) of the LRA.
[6] See, inter alia, *SA Rugby Players Association and Others v SA Rugby Limited and Others* [2008] 9 BLLR 845 (LAC)para 44.
[7] Ibid.

[29] The last contracts the appellants signed were only for one month, i.e for February 2015, and this after they had been told that their services were going to be utilised beyond that date.

[30] The appellants also have no reasonable prospect of showing that the LIFO principle had not been properly applied by the respondent. The latter had categorised them as part of the "floating" team. Despite their contestation of this categorisation, the evidence indicates that they were only employed and utilised when needed, and were not dedicated to doing the same work on every project they were engaged on. In that sense they were "floating". As their counsel put it in the heads of argument submitted on their behalf "the appellants were employed for any work available to the respondent at any time which they could do."

[31] According to Mr Greef, none of the appellants were foundation workers. Mr Mokoena and Mr Radebe were drivers, but were used by the respondent as (extra) storemen. The other appellants were "climbers" and "lines men" who performed a stringing function which was usually subcontracted out, and so they were utilised wherever they were needed. For example, they would assist the foundation team with a foundation project, and Messrs Mokoena and Radebe would be utilised in the stores (even if you could only have one storemen per site). According to Mr Greef, the appellants were essentially supplementing the teams in each instance.

[32] The other colleagues whom the appellants tried to use for comparative purposes, namely, Messrs Msibi, Tsubela and Makola, were not shown to have been "floating" in that sense. Even though Mr Msibi had started with the appellants in 2007 he is not shown not to have been part of the dedicated foundation team of workers. The appellants also did not show that Messrs Tsubela and Makola were not dedicated to the steel and foundation teams. According to Mr Greef, they were appointed at the same time as the appellants. The documents relied upon by the appellants' representative at the CCMA hearing largely confirms that fact, but goes on to show, for example, that Mr Tsubela was appointed on 1 October 2007 and Mr Mokoena only on 10 January 2008. Mr Makola was appointed on 21 February 2007.

[33] The document shows that, of the appellants, Mr Mofokeng was appointed on 1 January 2007, Mr Molane on 1 October 2007, Mr Radebe on 1 May 2007, and Mr Maphumelo on 1 January 2007. So, in fact, Mr Tsubela was appointed at the same time as Mr Molane, but before Mr Mokoena. Mr Makola was appointed before Messrs Mokoena, Molane and Radebe. So the contention is not correct that "the appellants were appointed before [Messrs] Tsabela and Makola". The statement is also not correct in relation to Mr Msibi. He was appointed on 1 January 2007, that is before Messrs Mokoena, Molane and Radebe, albeit at the same time as Messrs Mofokeng and Maphumelo.

[34] In any event, Mr Greef testified that LIFO was applied within the team structures. Mr Msibi was a foundation team worker, and even though the appellants (excluding Messrs Mokoena and Radebe) were assisting the foundation team in the Lulamisa Project, they were "lines men" and were not part of the core foundation team. They were also not the only employees affected.

[35] The fact that the appellants' (respective) fixed-term contracts may have been renewed by the respondent each time since about 2007, could not on its own have given rise to a reasonable expectation that they would be renewed or extended yet again beyond February 2015. If that effect were to be regarded as decisive, as the appellants would have it, it would mean that the change in the respondent's financial position since about 2014, which called for restructuring and retrenchment, and the notice given to the appellants and their union that their contracts would not be extended because of the respondent's adverse financial situation, would have to be ignored. That cannot be correct.

[36] It has not been shown by the appellants that their application to review the arbitrator's award has any reasonable prospect of success, and the Labour Court was correct in its conclusion that in those circumstances condonation ought to be refused.

[35] In the result, the following order is made:

1. The appeal is dismissed.

2. No order is made in respect of the costs of the appeal.

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P Coppin

Judge of the Labour Appeal Court

Waglay JP and Molefe AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: F Baloyi

Instructed by Mohale Attorneys Inc.

FOR THE RESPONDENT: Edward Nathan Sonnenberg Inc