REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 875/2012

In the matter between:

KUSOKHANYA ELECTRICAL CONSTRUCTIONS CC **Applicant**

and

THEMBA HLATSWAYO N.O. **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

JABULANI MASHIANE AND 6 OTHERS **Third to Ninth Respondents**

Heard: **15 August 2013**

Delivered: **16 September 2013**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Issue concerns whether dismissal exists – test for review – not limited to the Sidumo test – determination of issue de novo**

Condonation – late filing of review application – principles stated – no proper

explanation for a material delay – condonation refused

Fixed term contracts – event defined fixed term contracts – event must be properly and objectively defined – cannot be left up to the employer when the event arises – employees dismissed

Fixed term contract – interpretation thereof – application of the parole evidence principle – contract must be applied as it reads

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The matter came before me on 15 August 2013 as an opposed review application. The applicant applied that the arbitration of the first respondent be reviewed and set aside and be replaced with an award that the third to ninth respondents were not dismissed. Because the applicant's review application was materially late, the applicant also applied for condonation for such late filing. After hearing the submissions by both parties on 15 August 2013, I issued the following order:

> '1. The applicant's condonation application is dismissed.
>
> 2. The applicant's review application is consequently dismissed.
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> 3. Written reasons will be provided on 16 September 2013.
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> 4. the applicant is ordered to pay the costs.'

[2] This judgment now constitutes the written reasons in terms of my order as set out above.

Background facts

[3] The applicant had procured a contract with the City Council of Johannesburg in terms of which the applicant was contracted to attend to the electrification of some 1 192 householders in the Doornkop/Lufhereng. Pursuant to obtaining this contract, the applicant then procured the services of the third to ninth respondents (hereinafter referred to as "the individual respondents") to work on this project. It was common cause that the individual respondents were employed on fixed term contracts of employment.

[4] It is, however, important to consider how these fixed term contracts were defined. These contracts did form part of the record of the evidence. In clause 1 of the contract, it is recorded that the contract is a fixed term contract and the term of the contract was defined as follows, specifically referring to the contract of the third respondent Jabulani Mashiane:

> 'The contract will commence on 15 November 2010 and will be terminated on (blank space), alternatively will be terminated on completion of the following project: LUFHERENG ELECTRIFICATION.'

The contracts of the other individual respondents are identical, save for different starting dates and on some instances the project being defined as 'DOORNKOP ELECTRIFICATION'. It was common cause that Lufhereng/Doornkop was the same project. This will, hereinafter, be referred to as "the project".

[5] The individual respondents were then informed that their services were terminated. According to their dispute referral to the CCMA, this took place on 14 August 2011. The applicant, in the record of proceedings, did not even provide the notices of termination or say exactly on what date the employment of the individual respondents terminated.

[6] What the applicant did discover in the record was minutes of a meeting with City Power, Johannesburg held on 1 August 2011. In this meeting, it was recorded that Eskom had supplied a temporary bulk supply point for the 1 192 stands. It

was recorded that 12 “casuals” were “laid off” on 22 July 2011. There is then reference to a “downsizing” of the remaining ten “casuals” on 5 August 2011. The individual respondents were part of these “casuals” referred to. What a proper reading of these minutes show is that the project was far from complete and still underway. The reason for termination of employment in terms of this minute was be a “lay off” or “downsizing”, the significance of which will appear hereunder.

[7] In the unfair dismissal proceedings before the CCMA, the applicant contended the individual respondents were not dismissed. According to the applicant, the project on which they were specifically employed was concluded and thus their fixed term contracts terminated. The individual respondents contended that the project was far from completed and was still ongoing. The individual respondents contended that only 490 out of the 1 192 households had been electrified. The individual respondents further contended that after their termination of employment, new employees were appointed to complete the project.

[8] In an arbitration award dated 31 October 2011, the first respondent then found that the individual respondents were indeed dismissed and that such dismissal was unfair. They were awarded compensation. It is this arbitration award which then gave rise to these proceedings.

The relevant test for review

[9] I intend to make a few short comments about the appropriate test for review in the current matter because the very issue before the first respondent actually was whether the individual respondents were dismissed. It was patently clear that if it was so that the individual respondents were indeed dismissed, then such dismissal by logical and necessary consequence and, in the circumstances had to be unfair. Simply put, the applicant’s entire case is based on the simple defense that the individual respondents’ fixed term contracts of employment had expired and therefore they were not dismissed.

[10] The issue as to whether a dismissal exists is a jurisdictional fact. If there is no dismissal, then the CCMA will have no jurisdiction to determine the matter. Because of this, the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] does not apply. The Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[2] specifically interpreted the review test as determined in *Sidumo* and held as follows:

> 'Nothing said in *Sidumo*, supra, means that the grounds of review in section 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.' (emphasis added)

[11] The Labour Court thus, in what can be labeled a "jurisdictional" review of CCMA proceedings, is in fact entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong. In *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd*,[3] it was held that:

> 'Generally speaking a superior court always has the power to determine whether the preconditions for the exercise of a statutory power to act have been met 'even in the absence of any statutorily provided remedy by way of an appeal or

[1] (2007) 28 ILJ 2405 (CC)
[2] (2008) 29 ILJ 964 (LAC) at para 101.
[3] (1998) 19 ILJ 557 (LAC) at para 24.

review' (per Marais JA in *Minister of Public Works v Haffejee* NO 1996 (3) SA 745 (A) at 751G). Where the precondition is an objective fact or a question of law, its existence is objectively justiciable in a court of law and if the public authority made a wrong decision in this regard the decision may be set aside on review (*Minister of Public Works v Haffejee NO* at 751F-G; *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93A-B).' (emphasis added)

The Court concluded that:[4]

'Generally speaking, a public authority is obliged to determine the scope of its own powers before it can act (cf Baxter Administrative Law at 452). In doing so it cannot finally determine its competence, because if it wrongly decided that it had jurisdiction, its decision may be reviewed on objectively justiciable grounds. This kind of jurisdictional review does not depend on any statutorily provided remedy by way of appeal or review (*Minister of Public Works v Haffejee NO* at 751G-H). But, as noted above (para [23]), the determination of the existence of a jurisdictional precondition may be left to the public authority itself to determine and the nature and extent of judicial review of its decision will then depend on whether the determination was left to its subjective discretion in terms of the empowering statute, or whether the determination had to be made on objective grounds.'

[12] In *Zeuna-Starker Bop (Pty) Ltd v National Union of Metalworkers of SA,* it was said:[5]

'The commissioner could not finally decide whether he had jurisdiction because if he made a wrong decision, his decision could be reviewed by the Labour Court on objectively justiciable grounds....' (emphasis added)

[13] The Court, in *Solid Doors (Pty) Ltd v Commissioner Theron and Others,*[6] dealt with a jurisdictional review in the case of constructive dismissal and held that:

[4] Id at para 28.
[5] (1999) 20 ILJ 108 (LAC) at para 6:

'.... A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one - even on review - is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.' (emphasis added)

[14] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*[7] the Court stated the enquiry as follows:

'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court….'

[15] As to how the Labour Court has recently dealt with this issue, I refer to the judgment of *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[8] where the Court said:

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[6] (2004) 25 ILJ 2337 (LAC) at para 29.
[7] (2008) 29 ILJ 2218 (LAC) at paras 39 – 40
[8] (2012) 33 ILJ 363 (LC) at para 23.

> 'The test I have to apply, therefore, is not whether the conclusion reached by the commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in *Sidumo*, but whether the commissioner correctly found that Van Rooyen had been dismissed.'

The same approach was followed in *Hickman v Tsatsimpe NO and Others,*[9] *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others,*[10] *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others,*[11] *Workforce Group (Pty) Ltd v CCMA and Others*[12] and *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others.*[13]

[16] All of the above simply means that in determining the question whether the individual respondents were dismissed, I must decide the issue on the basis of whether the first respondent was right or wrong and, in essence, consider the issue *de novo*.

The issue of condonation

[17] Condonation for the late filing of the applicant's review application was very much an issue in this matter and, in my view, justifiably so. In terms of the provisions of section 145(1) of the LRA, an applicant for review has six weeks from the date upon which such applicant became aware of an arbitration award to serve and file a review application.

[18] The applicant received the arbitration award on 1 November 2011. That means that the applicant had to serve and file its review application on or before 13 December 2011. The review application was, however, only served and filed on 12 April 2012. The review application is thus some four months' out of time. A

[9] (2012) 33 ILJ 1179 (LC) at para 10.
[10] (2013) 34 ILJ 392 (LC) at paras 5 – 6.
[11] (2012) 33 ILJ 1171 (LC) at para 14.
[12] (2012) 33 ILJ 738 (LC) at para 2.
[13] (2013) 34 ILJ 1272 (LC) at para 21.

delay of four months, in the context of review applications, is a material delay, which in itself mitigates against the granting of condonation.[14] In fact and in *Academic and Professional Staff Association v Pretorius No and Others,*[15] even a three weeks' delay was found to be excessive when it comes to review applications. It is thus my view that a four month delay in a review application is certainly material and requires, as will be discussed hereunder, an excellent explanation for the delay.

[19] The general principles applicable for condonation to be granted is set out in the case of *Melane v Santam Insurance Co Ltd*[16] where it was said:

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation.'

[20] In specifically dealing with an application for condonation for the late filing of a review application, the Labour Appeal Court in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[17] referred with approval to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[18] and said:

> 'The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words the excuse for non-compliance with the six-week

[14] See *Jayes v Radebe and Others* (2003) 24 ILJ 399 (LC); *National Education Health and Allied Workers Union on Behalf of Mofekeng and Others v Charlotte Theron Children's Home* (2003) 24 ILJ 1572 (LC); *Moolman Brothers v Gaylard NO and Others* (1998) 19 ILJ 150 (LC).
[15] (2008) 29 ILJ 318 (LC).
[16] 1962 (4) SA 531 (A) at 532C-E.
[17] (2002) 23 ILJ 1229 (LAC).
[18] (2000) 21 ILJ 166 (LAC).

> time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, ie of the kind that resulted in a miscarriage of justice.'

[21] What is clear from the judgment in *A Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to condonation applications for the late filing of a review application. The explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reasons for this is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.

[22] The Court, in *Academic and Professional Staff Association,*[19] said the following, also in a matter concerning a condonation application for the late filing of a review application:

> 'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC). It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors

[19] *Academic and Professional Staff Association* (*supra*) at paras 17–18.

> for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[23] As to how the explanation must be presented by an applicant in an application for condonation for the late filing of a review application, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[20] said the following:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[24] It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the principles set out above.[21] There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with[22]

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[20] (2010) 31 ILJ 1413 (LC) at para 13.
[21] See *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC); *Flexware (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 1149 (LC); *Zeuna-Starker Bop (Pty) Ltd v NUMSA* (1999) 20 ILJ 108 (LAC) at 108 - 109; *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (*supra*).
[22] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (*supra*); *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* (2010) 31 ILJ 273 (CC) at para 46; *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at paras 12–13.

and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law.

[25] Now that I have set out the applicable principles in deciding whether the applicant has shown good cause for the granting of condonation, I will then deal with the explanation provided by the applicant. The explanation is dismal to say the least and in essence is as follows:

25.1 After receiving the award on 1 November 2011, the chief executive officer of the applicant instructed one of his project coordinators to send the award to the applicant's labour consultant for advice. It is not stated when this instruction was given. It is not stated to whom this instruction was given, as this "project coordinator" remains unidentified;

25.2 As some point in time the labour consultants gave advice that the review application should proceed and they asked on 28 November 2011 to be given the "go ahead" to apply for review. Again, it is not stated from whom these instructions were requested, what these requested instructions in fact entailed, and who at the labour consultants (which are also unidentified) dealt with the matter;

25.3 The only explanation that is then offered is that the chief executive officer gave instructions to his manager to give instructions to the labour consultant to proceed with the review application. This explanation, at its very core, is manifestly unacceptable. Firstly and immediately, why did the chief executive officer not deal with the labour consultant himself? Secondly, none of the parties referred to in this paragraph are even identified. Thirdly, there is no indication as to when this alleged instruction was given by the chief executive officer to the manager and what this manager actually did after that;

25.4 The final part of the explanation is then simply that the chief executive officer was satisfied that the matter has been dealt with and he was of the "bona fide" belief that this was the case. This was the position until the sheriff arrived at the applicant's premises on 4 April 2012 to execute the award. The applicant was then spurred into action and filed the review application just short of two weeks later.

[26] From the above explanation or better described lack of it, it is clear that the applicant has provided no explanation at all for the delay as required by law. In fact and considering the period of the delay, the explanation had to be "compelling". There is not a shred of any explanation as to what the chief executive officer did to follow up on the matter after purportedly giving instructions to proceed. On the applicant's own version, the applicant's senior management simply sat back and did nothing further to follow up on their matter until the sheriff arrived. This kind of conduct in itself is grossly remiss and negligent. In this regard, the following *dictum* from the often quoted judgment in *Saloojee and Another NNO v Minister of Community Development*[23] is particularly apt where it was held as follows:

> 'If, as here, the stage is reached where it must become obvious also to layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney and expect to be exonerated of all blame; and if, as here, the explanation offered to this court is patently insufficient, he cannot be heard to claim that insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he realises upon the aptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself. That has not been done in this case.'

[23] 1965 (2) SA 135 (A).

[27] Considering the explanation the applicant sought to offer, the insurmountable problem the applicant has, in my view, is the fact that the Court has on numerous occasions made it clear that an applicant can simply not sit by without regularly following up on its litigation and the progress therein.[24] Specifically, the Court in *Superb Meat Supplies CC v Maritz*[25] held as follows:

> 'The case of appellant is firmly grounded in the delinquency of Majola and that is manifest and self-evident... I also am of the judgement that the appellant through the agency of its member Schreiber was negligent in not monitoring progress of its case from the time of the service of the claim in August 1999 to the set down for the trial on 12 March 2001, a period of nearly 18 months. The appellant appointed new attorneys and the file was available to them and would have indicated what contact took place between Majola and Schreiber during that period. The court has not been informed of any communication and it can be inferred that the appellant took no active interest in its own litigation, a further reason to conclude that it was negligent.
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> As I have indicated Trengove AJA held in the *De Wet* case that disinterest and failure to keep in touch with an attorney barred relief. Attorneys cannot be blamed and the appellants - as in this matter - were the authors of their own problems. The present respondent has not erred and it would be inequitable to visit him with the prejudice and inconvenience flowing from such conduct.'

In my view, the above *dictum* would find direct application in the current matter. The applicant blames all on the lack of conduct by the unidentified manager without presenting any evidence or explanation as to what the applicant, by way of its chief executive officer who had actually been seized with the matter, did to follow up on the same.

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[24] See *Arnott v Kunene Solutions and Services (Pty) Ltd* (2002) 23 ILJ 1367 (LC); *Parker v V3 Consulting Engineers (Pty) Ltd* (2000) 21 ILJ 1192 (LC); *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others* (2010) 31 ILJ 1413 (LC); *GIWUSA obo Heynecke v Klein Karoo Kooperasie BPK* (2005) 26 ILJ 1083 (LC); *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A) at 365; *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC).

[25] (2004) 25 ILJ 96 (LAC).

[28] With the applicant, in my view, and the very least, being remiss and negligent, the consequence has to be that as set out in *National Union Of Metalworkers of SA on behalf of Nkuna and Others v Wilson Drills-Bore (Pty) Ltd t/a A and G Electrical,*[26] where the Court said the following:

> 'In *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd* 1975 (1) SA 612 (D), the court held that good cause is shown by the applicant giving an explanation that shows how and why the default occurred. It was further held in this case that the court could decline the granting of condonation if it appears that the default was wilful or was due to gross negligence on the part of the applicant. In fact, the court could on this ground alone decline to grant an indulgence to the applicant.'

[29] In addition to the above difficulties the applicant faces, I also find that the truth of the applicant's explanation to in any event be suspect. If the applicant sought advice from and was advised by a labour consultant, as to a review application, then surely the applicant would have been advised as to what is needed to bring this application. Surely, the applicant would be advised that an affidavit had to be signed, which could only be done by the applicant itself. The applicant does not deal with this at all. The applicant must surely have realised quite quickly after an instruction to proceed that no affidavit had found its way to the applicant to be signed, had it simply given this matter any kind of attention. Added to the aforesaid is the fact that none of the players in this sorry saga are even identified or have sought to confirm the events referred to. In my view, therefore, probabilities indicate that what the applicant did was to actually simply ignore the matter hoping it would go away, and was only spurred into action when it did not and the sheriff arrived. This exhibits clear comparisons with the judgment in

[26] (2007) 28 ILJ 2030 (LC).

Basson v Oosthuizen No and Others,[27] where the Court held as follows, in refusing condonation:

> '… The impression that this court is left with is that once the applicant had entrusted the matter to Pitzer he adopted a laid back approach and was only prompted to do so after the sheriff had called at his premises... The applicant has therefore failed to give an adequate explanation for the delay in filing the review application timeously. Strictly speaking it becomes unnecessary to consider the issue of prospects of success. There is merit in the third respondent's contention that the applicant has attempted to mislead this court.'

[30] The manner in which the applicant deals with the issue of prejudice leaves much to be desired. The applicant has to show the potential of a miscarriage of justice, where it comes to the issue of prejudice. Instead, all the applicant says is that the amount awarded by the first respondent to the individual respondents would seriously affect the applicant's business operations. No basis has been provided for this bald statement. In fact and considering the total sum of the award is the princely amount of R64 000,00, I find this hard to believe.

[31] The applicant has thus provided no explanation for what is a material delay. The applicant has not demonstrated proper prejudice in support of its application. This should be the end of the matter for the applicant without even considering the requirement of prospects of success. It was said in *Mziya v Putco Ltd*[28] that 'there is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial'. Also in *NUM v Council for Mineral Technology,*[29] it was said that 'there is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial'. Finally and in *National Education Health and Allied Workers Union*

[27] (2008) 29 ILJ 1875 (LC).
[28] (1999) 3 BLLR 103 (LAC).
[29] (1999) 3 BLLR 209 (LAC) at 211G-H.

on behalf of Mofokeng and Others v Charlotte Theron Children's Home,[30] the Court held that 'this court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial'.

[32] In my view, the approach of the applicant in the condonation application is that condonation was there for the asking. This is simply not so. In this regard, I can do little better than to refer what was said in *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*[31] where the Court held:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

[33] For the above reasons alone, it is my view that the applicant's condonation application must fail and, consequently, its review application as well, without even having to consider the prospects of success in its review application. However, and for the sake of completeness, I will nonetheless shortly deal with the merits of the applicant's review application.

The merits of the review application

[34] Even if prospects of success are considered, I am of the view that the applicant's review application has no merit. It is in fact clear that the individual respondents were dismissed. As I have said above and, in deciding this issue, I will not confine myself to the first respondent's reasoning or determination but will consider the issue *de novo*.

[30] (2004) 25 ILJ 2195 (LAC).
[31] (2011) 32 ILJ 2206 (LC) at para 27.

[35] The insurmountable difficulty to the applicant is that the automatic termination clause in the employment contracts of the individual applicants it seeks to rely upon simply does not support its case. The clause is poorly defined. The applicant argued that the clause should be interpreted to mean only phase 1 of the project and whilst the project was continuing, this was on other phases. A simple reading of this clause does not support this interpretation. If the intention was to limit the employment of the individual respondents to specific phases of the project, the contract should have said so. It is the duty of the applicant to properly define its fixed term contracts, where it wants to rely on automatic termination of employment in terms of such contracts. Simply put, the more particularity in such definition, the better.

[36] Since the contracts were in writing, the principle of the parole evidence rule must apply and the contracts must be read as they stood. Because the relationship between the parties have been reduced to writing in a contract, it is a fundamental principle of our law of contract that the resulting document will be accepted as the sole evidence of the terms of the contract. In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*[32], the Court held:

> 'Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence.'

[37] The very reason for the parole evidence rule to avoid parties relying on defences which are not in accordance with the specific terms of such contract, as the

[32] 1941 AD 43 at 47.

applicant is actually trying to do in this instance. In *Johnson v Leal,*[33] the Court said:

> '[T]he aim of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.'

[38] In specifically applying the parole evidence rule in the context of employment law, the Court in *LAD Brokers (Pty) Ltd v Mandla*[34] said the following:

> 'To determine this issue the terms and conditions of the relevant contracts should be studied. The legal relationship between the parties is to be determined primarily from a construction of the contract between them…'

[39] The above means simply that on the specific contract terms as contained in the employment contracts themselves, the individual respondents will remain employed until the completion of the project as a whole. The word "completed" in clause 1 must surely make this clear. Also, the project as a whole is described as that which must be completed. There is no reference to a particular "phase" thereof and this contention can only be introduced by leading extrinsic evidence outside the contract, which is precluded by the parole evidence rule. I fully align myself with the following extract from the judgment in *Malandoh v SA Broadcasting Corporation,*[35] which I am of the view is the correct approach to follow in the current matter:

> '… In my view the relationship between the parties was regulated by this contract and I am of the view that I should give effect to such contract. I am loath to incorporate other factors in the parties' agreement as by doing so I would be imposing a different contract to that which the parties entered into.'

[33] 1980 (3) SA 927 (A) at 943B.
[34] (2001) 22 ILJ 1813 (LAC) at para 15.
[35] (1997) 18 ILJ 544 (LC) at 547H-I.

[40] There is another reason why this rule should be strictly applied in matters such as the current matter. The reason is simply that the application of an automatic termination provision in a fixed term contract of employment means that an employee would normally be excluded from the unfair dismissal protection in terms of the LRA and thus these kind of instances must always be interpreted and applied with great circumspection. After all, fundamental rights of employees are at stake. Of importance in this regard is the judgment in *Mahlamu v CCMA and Others.*[36] The Court, in that matter, dealt with an automatic termination clause in an employment contract which provided for the automatic termination of the employment contract in the event of a particular customer of the employer no longer requiring the services of the particular employee or wishing to deal with the particular employee. The Court held as follows in this regard:[37]

> 'In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of s 188 of the LRA, is precisely the mischief that s 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in s 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.'

The Court in *Mahlamu,* however, did not determine that automatic termination provisions in fixed term contracts of employment are *per se* unlawful and in breach of the LRA. The Court concluded as follows:[38]

> 'This is not to say that there is a 'dismissal' for the purposes of s 186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. This is what I understand the ratio of *Sindane* to be - that ordinarily, there is no dismissal when the agreed and anticipated event

[36] (2011) 32 ILJ 1122 (LC).
[37] Id at para 22.
[38] Id at para 23.

> materializes (to use the example in *Sindane*, the completion of a project or building project), subject to the employee's right in terms of s 186(1)*(b)* to contend that a dismissal has occurred where the employer fails or refuses to renew a fixed-term contract and an employee reasonably expected the employer to renew the contract. In other words, if parties to an employment contract agree that the employee will be engaged for a fixed-term, the end of the term being defined by the happening of a specified event, there is no conversion of a right not to be unfairly dismissed into a conditional right. Without wishing to identify all of the events the occurrence of which might have the effect of unacceptably converting a substantive right into a conditional one, it seems to me that these might include, for example, a defined act of misconduct or incapacity, or, as in the present instance, a decision by a third party that has the consequence of a termination of employment.'

The above *ratios* in *Mahlamu* is precisely the reason why the contentions of the applicant must fail. At best for the case of the applicant, what constitutes an end of the project as defined in the agreement is left up to its own determination. It decided what "completion of the project" means. This is not an objective definition linked to the occurrence of a specified and objective external fact. If the project was indeed completed, as a whole, then this would be such a fact. But it was not. It was a case of the employer deciding what is meant by the completion of the project, when the actual project itself was still continuing. This kind of conduct and approach is in breach of the LRA and impermissible. Therefore and where it is clear action by the employer that gives rise to the termination event, in other words, there is a direct nexus between the conduct of the employer itself and the occurrence of the event, then this can never be considered to be automatic termination and is a dismissal. Examples of this can be found in the judgments of *SA Post Office Ltd v Mampeule*[39] and *Chillibush Communications*

[39] (2010) 31 ILJ 2051 (LAC) at para 21.

(Pty) Ltd v Johnston NO and Others.[40] This is the effect of what the applicant did in this instance.

[41] On the clear evidence in this matter, the project was far from completed. I not only accept the evidence presented by the individual respondents in the arbitration to this effect but I find support for this conclusion in the very minute of the meeting of 1 August 2011 the applicant sought to discover. Because the project was not completed, there could not have been automatic termination of the individual respondents' contracts of employment in terms of clause 1 thereof. As a result, the termination of the employment of the individual respondents on 14 August 2011 had to constitute a dismissal. Also, and as I have referred to above, the meeting minute of 1 August 2011 refers to "lay off" and "downsizing" of employees, which is consistent with acts of termination by an employer. 'Dismissal' inter alia means that 'an employer has terminated a contract of employment with or without notice'.[41] In terms of this definition, there must be an act by the employer itself which terminates the contract of employment. In *National Union of Leather Workers v Barnard NO and Another,*[42] it was said:

> 'In analysing s 186*(a)* Brassey submits that s 186*(a)* means that an employee is dismissed only when the employer brings the contract of employment to an end in the manner recognized by the law. M S M Brassey *Employment and Labour Law* vol 3 at A8:8.
>
> With regard to the phrase 'with or without notice' Brassey writes as follows at A8:9:
>
> > ''With notice' has a slightly different connotation from ''on notice': the latter makes the expiry of notice properly given the occasion for the termination, whereas the former signifies only that notice accompanies a termination and so leaves the basis of this dismissal unstated. It is unnecessary to

[40] (2010) 31 ILJ 1358 (LC) at paras 28 and 38 – 39.
[41] See Section 186(1)(a).
[42] (2001) 22 ILJ 2290 (LAC) at para 22 – 23.

> consider which meaning the legislature intended. Under the sub-section the giving of notice is a matter of no consequence - what counts is whether the contract was legally terminated ''with or without notice'. It was, it seems, included to make it clear that summary determination is embraced by the sub-section."
>
> The key issue in the interpretation of the phrase 'an employer has terminated the contract of employment with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognized as valid by the law.'

In the circumstances of this matters, and for the reasons I have given above, it is clear that it was the conduct of the applicant itself that brought the employment contracts of the individual respondents to an end. They were clearly dismissed as a matter of law, and that has to be the end of the matter for the applicant.

[42] I, therefore, conclude that the applicant's review application has no prospects of success on the merits thereof, even should this be considered. For this reason as well, the condonation application must fail and with it, the review application.

Conclusion

[43] Based on what has been set out above, I conclude that the applicant's condonation application cannot succeed. The applicant has failed to demonstrate good cause as required by law.

[44] In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I exercise this discretion in favour of the individual respondents, as the applicant has, in essence, failed to provide any explanation why it did not bring its review application timeously and simply did not take the Court into its confidence. In my view, it would be appropriate in this instance that the applicant pay the costs of the failed review application.

[45] It is then for all the above reasons that I made the order that I did on 15 August 2013.

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Snyman AJ

Acting Judge of the Labour Court

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