

SOUTH AFRICA / JUDGMENT

Food and Allied Workers Union and Another v Commission for Conciliation and Arbitration and Others (P167/17) [2022] ZALCPE 2 (3 February 2022)

[2022] ZALCPE 2

COURT

Labour Court Port Elizabeth

BEFORE

Lallie

CASE / FILE NUMBER

P167/17

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IN THE LABOUR COURT OF
SOUTH AFRICA, PORT ELIZABETH
CASE NO: P167/17

In the matter between:

FOOD
AND ALLIED WORKERS UNION
First
Applicant
Obo
BUTSHINGI, N & 17
OTHERS
Second Applicant
and
COMMISSION
FOR CONCILIATION,
MEDIATION
AND
ARBITRATION
First Respondent
COMMISISONER
MBULI
Second Respondent
COCA
COLA FORTUNE (PTY)
LTD

Third Respondent
Heard: 17 November
2021
Delivered: This
judgment was handed down electronically by circulation to the
Applicant Trade Union and the Third Respondent's
Legal
Representatives by email, publication on the Labour Court website and
release to SAFLII. The date and time for handing -
down is deemed to
be 15h00 on 3 February 2022.

JUDGMENT

LALLIE J

[1] This is an application to review and set aside the arbitration award of the second respondent who will be referred to as the commissioner in this judgment. The application is opposed by the third respondent. The applicants delayed in launching their review application and filed an application to have the delay condoned. The condonation application is opposed by the third respondent. The third respondent based its opposition on a number of grounds including the applicants'

failure to provide a reasonable explanation for their delay in filing the review application. I am not convinced that the third

respondent's averments are correct because the delay was, on the applicants' version, caused by an internal conflict between the applicant trade union (FAWU) and its official who was responsible for the individual applicants' case. The conflict resulted in the matter being allocated to another union official who died while it was still pending. It later came to FAWU's attention that the review application had not been filed. While the third respondent based part of its attack on the individual applicants' failure to take steps to ensure that their review application was pursued, I am not convinced that in the circumstances of this case the individual applicants should not be protected from the consequences of the delay which was caused by conduct of their trade union. It would be unjust to expose them to the prejudice of being denied their right to be heard in the circumstances. The prejudice out weighs by far prejudice the third respondent stands to suffer as a result of the delay in the finalisation of the review application. Granting condonation therefore would be in the interest of justice.

[2] The individual applicants who will be referred to as the applicants in this judgment consist of 2 groups of employees. The first was employed by the third respondent on fixed term contracts and the other by Temporary Employment Services (TES). They all rendered their services at the third respondent. Subsequent to the termination of their fixed term contracts of employment on 15 June 2015, they referred a dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) seeking an order

reinstating them as permanent employees with effect from the date of their alleged dismissal. They based their entitlement to the relief on section 198A and 198B of the Labour Relations Act[1] (the LRA). In an award dated 6 December 2016, the commissioner ruled that the applicants' claim in relation to the termination of their services had already been dealt with and finalised in an award issued on 17 June 2016 (the 17 June 2016 award). He concluded that the CCMA lacked jurisdiction to again entertain the dispute concerning the unfair termination of the applicants' contracts

and dismissed their matter.

[3] The applicants' main grounds for review are that the award under review is wrong. They sought an order reviewing and setting it aside. They further sought this court to adjudicate their unfair dismissal by exercising its powers in terms of section 158(1B) of the LRA. The third respondent opposed this application on the basis that the commissioner's decision is correct.

[4] The applicants attacked the collective agreement between FAWU and the third respondent dated 11 March 2015 for terminating the TES resulting in the termination of the contracts of employment of 18 employees on 30 June 2015. Paragraph 3 and 4 of the collective agreement provides as follows:

'[3] The Employer will not be using Temporary Employment Services (Labour Brokers) as of 1 April 2015, subject to the applicable termination clauses having been effected. Temporary Employment Services are not precluded in circumstances that are concluded from Section 198 of the Labour Relations Act.

[4] The current Fixed Term Contracts and Non-Continuous contracts will not be renewed. Flexible personnel requirements will be addressed with Limited Duration Contracts. This contract offers part-time employment on a flexible basis.'

[5] In the 17 June 2016 award, it was found that the applicants were on fixed term and non-continuous contracts. It was decided that the third respondent acted in terms of clause 3 and 4 of the collective agreement in terminating the contracts of the applicants and in doing so it did not contravene the provisions of the collective agreement dated 11 March

2015. Other than attacking the collective agreement in that it 'sold away the rights and protection that is (sic) supposed to be enjoyed by these employees under the above cited stipulation of the act (LRA)', the applicants made no submissions in support of their case that the award under review is wrong.

[6] The applicants argued that the commissioner overlooked that the termination date of TES was 11 March 2015 and that the applicants continued rendering services beyond that date. They added that the commissioner also failed to take into account that some applicants were not TES employees. This argument is incorrect. It fails to take into account that the collective agreement dealt with a number of issues. The issues of TES employees and employees on fixed term contracts formed but a portion of the issues. Clause 4 of the

collective agreement specifically deals with fixed term contracts and non-continuous contracts. The distinction between TES and the third respondent's employees on fixed term contracts which the applicants sought to rely on is of no moment. The significance the applicants sought to create of 1 April 2015 in clause 3 of the collective agreement is based on their incorrect reading of the clause as it overlooks the conditions that are referred to in that very same clause.

[7] It was argued on behalf of the third respondent that the collective agreement was concluded days before section 198B became operational. This argument is based on undisputed facts. The third respondent's argument that the applicant could not rely on the provisions of section 189B is correct. The reason is that section 198B (2)(c) provides that the section does not apply to an employee employed in terms of a fixed term contract which is permitted by a collective agreement. FAWU ousted the operation of section 198B it sought to rely on at arbitration by concluding the collective agreement with the third respondent. The consequences of that collective agreement did not render the award under review wrong. In the face of a binding arbitration award issued on 17 June 2016 that the applicants' contracts were terminated in terms of the collective agreement, the correctness of the award under review was not vitiated.

[8] I could find no reasons in fairness to grant a costs order against the applicants.

[9] In the premises the following order is made:

Order:

1. The late filing of the application for review is condoned.
2. The application for review is dismissed.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

[1] Act 66 of 1995, as amended.

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Prepared on 11 October 2026 · Esheria