



# ARBITRATION AWARD

Commissioner: Ncumisa Bantwini

Case No: PSHS341-19/20

Date of award: 25 February 2020

In the matter between:

**Vukile Ngantweni**

(Applicant)

and

**Department of Social Development-Eastern Cape**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. This arbitration came before the PHSDSBC in terms of Section 186 (1) (a) of the Labour Relations Act No.66 of 1995 (the LRA) for an alleged termination of contract. It was heard at Bisho Advocate Chambers offices in East London on 07 November 2019, 03 February 2020 and was finalized on 03 February 2020. The applicant, Mr. Vukile Ngantweni was represented by Mr. Anthony Killian, an official from PSA. Advocate Lesley-Ann Brauns instructed by the State Attorney, appeared for the respondent.

## BACKGROUND TO THE DISPUTE

2. The applicant referred a dispute arising from his alleged unfair termination of a fixed term contract. The dispute was conciliated and it remained unresolved and the applicant, requested arbitration.

## SURVEY OF EVIDENCE

### The respondent's case

3. According to Advocate Bronze's opening statement the applicant's fixed term contract came to an end. The final contract was not different to the 3 other contracts and he was made aware that the position was not permanent. The applicant was advised that his position was put on contractual basis because there was an official, Mr. Duntsula who was seconded to the Department of Education. The applicant was given a notice of termination of his contract and that there was no unlawful or unfair dismissal as the contract came to an end.
4. The respondent's witness, Mrs. Andiswa Booï, testified as follows:
5. She works for the respondent as Director- Human Resources Administration and she is mainly responsible for recruitment and provisioning as well as PERSAL administration. She has been in the respondent's employ for 22 years.
6. The applicant's position falls within the ambit of her section. When there is need of a Director for fixed term period, a submission is made and approved by the Head of Department. The document is presented to the provisioning coordinating and monitoring committee (PMCT). The position was advertised in 2013 and the contract was extended for 3 years for a period of 12 months per term.
7. The witness was referred to the organogram which appears on page 1 of bundle A and stated that the position of a fixed term contract for contracts Manager position is not in the organogram hence an approval for a specific period has to be sought. The organogram was approved in 2015.
8. The witness testified further that the applicant signed a contract in 2015 because there was a need identified in the directorate and the position was added in the structure. The budget was available because the Deputy Director, Mr Duntsula was seconded in the Department of Education. Currently there are no funds or savings for the contract position as the Deputy Director returned to his position. The witness was referred to clause 1 of the applicant's last contract which reads:

9. (1). Appointment

*(1.1). The Employer hereby appoints the Employee, who agrees and accepts appointment as an Assistant Manager: Stakeholder Relations in the Department of Social Development in terms of section 9 of Public Service Act, 1994 (hereinafter referred to as the Act) commencing on the 1st day of January 2015 until the Post is filled. The Public Service Regulation 2001 (hereafter referred to the Regulations) and any other legal provisions applicable to the Employee". (Page 17 bundleA).*

10. The witness testified further that the word (Until the position is filled) is an error and that the requirements of a fixed term contract have a start and the end date. The contract cannot exceed 12 months. Clause 2.2 of the contract stipulates:

*(2.2). The salary and benefits will be payable in 12 equal monthly instalment."* This clause is linked to the duration of the contract period which is 12 calendar months.

11. The witness stated also that the applicant's termination letter was issued after the matter was presented at PMCT. No reasonable expectation was created by the respondent. The respondent cannot absorb the applicant to the position without following the normal recruitment processes.

12. Under cross-examination, the witness testified as follows:

13. The applicant's contract is contained from pages 17 to 22 of bundle A and she did not compile it but she was involved in the investigation, she found out there is a human error involved in clause 1.1. No expectation was created according to her understanding of the sentence (until the post is filled). The contract position cannot be filled permanently.

14. The second witness, Mr. Laurens Van Zuydam testified as follows:

15. He works for the Premiers' Office as Chief Provisioning Human Resources in Bhisho since May 2017. The role of the PMCT is to provide, co-ordinates and operates a monitoring team which was created by the provincial structure to make provision for the

governance to execute performance of the department. The committee monitors the expenditure and movement of employees in the departments. He is the secretariat of the team in the province. According to 2016 Regulations, an additional employee can only be employed for a period of 12 months.

16. Pages 23 to page 45 contain the presentation which was made to the PCMT regarding the position of the applicant. A decision made was the approval for salary payment of the applicant for February and March 2019 and that a termination letter be drafted for his termination on 31 March 2019. The decision was based on the fact that there was no budget for the position and the seconded official (Mr Duntsula) had returned from the Department of Education. The PCMT committee was created by the cabinet to look into appointments and look into whether the positions are in line with the human resources plan or not.
17. Additional positions are approved by the committee and Treasury Department issue budget for filling of the positions. The PCMT was made aware about the filling of the applicant's position. (Page 33). The applicant's contract could only be extended by the Premier, MEC or the PCMT. Even the PERSAL system automatically terminates the appointment after 12 months.
18. Under cross-examination, the witness testified as follows:
19. In terms of the Public Service Regulations, if someone is appointed on contract, it is on consecutive 12 months. Prior to 2016 there were no specifics. Only the MEC for Public Administration can allow an extension beyond 12 months. The contract that is contained from pages 17 to 22 of bundle A means that the contract is fixed for 12 months. It would be unreasonable for the applicant to expect to be employed until the position is filled. It would be a questionable expectation if the position is not in the organogram. It was explained that the applicant was standing in for someone else.
20. In closing Advocate Brauns argued as follows:
21. Mrs. Booie testified that the position was advertised to fill a gap due to secondment of a Deputy Director with the Department of Education. No reasonable expectation was

created by the respondent. The 2 weeks' notice of termination of the applicant's contract was sufficient.

22. The PCMT called for the immediate termination of the applicant's contract after endorsing a memo for payment of salary for 2 months (January and February 2019 which was not paid. The applicant cannot be compensated without the recommendation of the PCMT as that would be against the Public Service Regulations.

23. The contract was project specific and its termination was fair as it expired.

24. According to Mr. Killian's opening statement, the applicant was employed by the respondent as a Manager: Stake Holder Relations from 01 May 2013 to 30 April 2014. The contract was extended on various occasions until he was advised on 26 May 2019 that his contract will be terminated on 31 March 2019. The last contract signed by parties indicates that the contract will run until the post is filled. The remedy sought is reinstatement of the applicant's contract until the post is filled.

25. The applicant, Mr. Vukile Ngantweni, testified as follows:

26. He was employed by the respondent as an Assistant Director Stakeholder Relations on a 12 months contract which was extended for 3 times. He was given a termination notice and it does not say anything about the secondment of the Deputy Director. He (the applicant) was being paid by the respondent and not by the Department of Education. He was earning R376 596 + 37% per annum at the time of termination of his contract of employment. Mr Duntsula was a Deputy Director while he was an Assistant Director.

27. The applicant made reference to his contracts from 01 May 2013 to 30 April 2015, 01 May 2014 to 30 October 2014, 01 November 2014 to 31 December 2014 and 01 January 2018 until the post is filled. The applicant made reference to clause 1.1 of the last contract whose end date is until the post is filled. The position has not been filled to date.

28. The applicant testified further that his understanding was that he would be occupying the position until the post is filled permanently. The contract does not have an end date.

He has never seen the final organogram of the respondent as there were many changes.

29. Under cross-examination the applicant testified as follows:

30. During his 5 years in the respondent's employ, the position has never been in the organogram. Clause 2.2 under remuneration the contract reads:

*"The salary and benefits will be payable in 12 monthly instalments".*

31. When it was put to the applicant that the position was linked to the above clause, the applicant's response was that during the last contract, his salary was only paid in April 2019. There was no communication issued by the respondent suggesting that his contract will expire in December 2018.

32. The applicant was referred to a letter written by the PCMT which reads:

*"Payment of contract workers whose contracts of employment already expired is regarded as irregular expenditure and will be recorded as such in the Financial Management Framework and consequence management for this negative occurrence should be adhered to" (page 45 bundle A).*

33. When it was put to the applicant that clause 2.2 of his contract stipulates that the salary and benefit will be payable in 12 monthly instalment, his response was that it depends on the scenario. He further stated that during the last contract he signed with the respondent, his salary was paid beyond 12 months (January 2019 to March 2019).

34. The applicant testified further that he does not accept that it was human error for his contract to reflect that he will be in service "until the Post is filled". He conceded that it must have been an error that his position is reflected as Assistant Manager Communication instead of Assistant Manager Stake Holder Relations. The contract was extended for 3 times and the only error is to omit Stake Holder Relations.

35. In closing, Mr. Killian argued as follows:



36. The applicant was appointed on a fixed term contract as an Assistant Manager Stake Holder Relations from 01 April 2013 and the contract was extended for 3 times. The last contract signed from 01 January 2018 is open until the post is filled. The applicant's understanding of the clause was that he was appointed in the position until the post is filled. On 26 February 2019 the applicant was informed that the contract would be terminated on 31 March 2019.
37. The respondent's first witness, Mrs. Booï testified that she was not involved in the applicant's appointment although she stated under cross-examination that the clause in her understanding is human error. Her evidence cannot be accepted.
38. If the compiler of the contract was not called to testify to this alleged error, this could have been a different story. From pages 4 to page 27 each contract has a start and end date except for the last one which is an extension of the existing contract. The applicant seeks that his contract be reinstated retrospectively so that he can resume duties.

#### **ANALYSIS OF EVIDENCE AND ARGUMENTS**

39. It is the applicant's case that the termination of his contract was unfair and as such constitutes dismissal in terms of section 186 (1) (b) of the LRA.
40. It is the respondent's contention that the applicant was never dismissed but his fixed term contract was terminated due to fruition of time as it was fixed for 12 months, save the human error that indicates that the applicant's last contract will run until the position is filled.
41. It is common cause that the position in question has not been filled to date.
42. It must be noted that neither the compiler of the contract nor any of the signatories were called by the respondent to testify on the "alleged error".
43. I disagree with the respondent's contention to the fact that clause 2.2 of the contract is tied to the duration of the contract as the applicant was paid until March 2019, which is 3 months beyond the 12 months.

44. I also disagree with the respondent's contention that the contract was project based.

45. It is also my view that if the contract was tied to the position of the Deputy Director who was seconded with the Department of Education or any specific funding or project, this should have been clearly specified by the respondent in the contract.

46. It is also interesting to note that if the words, "until the post is filled" were used erroneously; one would be interested to know as to what happened to the compiler of the contract in terms of being discipline.

47. *In Buthelezi vs Municipal Demarcation Board (2004) 25 ILJ 2317 {LAC} the Court held that when parties enter into a fixed-term contract they bound themselves for a specific period and no party can escape its obligation under the terms of the contract unless there is a material breach. If an employer has taken the risk of offering a fixed – term contract rather than a contract for an indefinite period, he cannot later complain.*

48. *The Court held further that when compensation is calculated consideration should be given to the loss of income the employee will suffer as a result of the early termination".*

49. The facts put before me supports that the termination of the applicant's contract signed on 01 January 2018 amounted to a dismissal as defined in section 186 (1) (b) of the LRA. The dismissal was unfair as the respondent did not advance any valid procedural or substantive grounds.

50. I therefore make the following award:



**AWARD**

51. The fixed term contract of employment entered into between the respondent, the Department of Social Development -Eastern Cape and Mr Vukile Ngantweni, the applicant, on 01 January 2018 was terminated unfairly, the contract will endure until the position is filled.

52. I order the respondent, the Department of Social Development-Eastern Cape to reinstate the applicant, Mr. Vukile Ngantweni to his former position on 01 April 2020.

53. The respondent is further ordered to pay the applicants' salary as back pay as follows;  
An amount of R343, 957.68 calculated as R31 383.00 monthly salary +37% for benefits  
= R42 994.71 X 8 months on 01 April 2020.

54. The applicant is ordered to report for duties on 01 April 2020.

55. There is no order as to costs.

Signature:



PHSDSBC Commissioner:

**Ncumisa Bantwini**