

Council Name

# ARBITRATION AWARD

Panellist/s: MOLOKO EPHRAIM PHOOKO

Case No.: GPBC844/2018

Date of Award: 29 JANUARY 2020

In the ARBITRATION between:

**TUMELO NTHUTANG & 1 OTHER**

APPLICANTS

and

**DEPARTMENT OF TRADE & INDUSTRY**

RESPONDENT

**Employee's representative:** K. KAGISHO

Union/Applicant's address:

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Telephone:

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**Employer's representative:** Ms. D. GONDO

Respondent's address:

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Telefax:

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## **ARBITRATION AWARD**

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### **DETAILS OF HEARING AND REPRESENTATION:**

- [1] The arbitration hearing was held on 18 February 2019, 19 February 2019, 14 October 2019 and 15 October 2019 at the GPSSBC Offices, Centurion, Lyttleton, Gauteng Province.
- [2] The applicants were initially represented by Mr. Sithole a union official from the PSA and who was later substituted by Mr. K. Kagisho a union official from the PSA while the respondent was represented by Adv. D. Gondo.
- [3] The proceedings were electronically recorded. The parties also submitted written closing arguments.

### **ISSUE TO BE DECIDED:**

- [4] I am required to determine the termination of the applicants' fixed term contract constituted dismissal and if so; whether such dismissals were substantively and procedurally unfair and if so; what remedy to award.
- [5] I am also required to determine whether there is an outstanding leave pay due to the applicants.

### **BACKGROUND TO THE ISSUE:**

- [5] The applicants were employed by the respondent on a fixed term contract as Trade and Industry Advisers. Ms Sizakhele Mthimkhula "Mthimkhulu" commenced employment with the respondent on 20 April 2016 and her contract of employment was terminated on 20 April 2018. While Ms Tumelo Nthutang "Nthutang" commenced employment with the respondent on 1 February 2016 and her contract of employment was terminated on 31 March 2018.
- [6] In terms of their fixed term contract they were earning R281 418-00 per annum. They are of the view that the respondent created an expectation of renewal to permanent employment. The respondent denies creating the expectation of permanent employment.

### **SURVEY OF EVIDENCE AND ARGUMENTS FOR THE APPLICANT**

Tumelo Catherine Nthutang testified under oath as follows:-

- [7] She was employed by the respondent in 2015 as an intern until 31 March 2016 when she was offered a 24 months contract as Trade and Industry Adviser. Her duties included amongst others, market research and country profiling. They were initially 12 but one of them

fell ill and they remained as 12. She was reporting to Itumeleng Makane, the Deputy Director at Trade and Industry Africa, East and South Region. She was on salary level 8.

- [8] She received the termination of her contract letter on 5 March 2018. She was shocked as she expected permanent as the respondent created that expectation.
- [9] On 3 March 2017 they attended a meeting in which the Director General indicated that contract employees would become permanently employed. There is also a video in which it was stated by the respondent that no one would lose employment including the contract employees.
- [10] There was a submission prepared in June 2017 by Ms Tina regarding their absorption. The submission was followed by a discussion between Mr Terrance Mvana and Ms Tina Reddy with Mr. Riaan Le Roux who was the Acting Director-General in TISA division. Mr Mvana, the Deputy Director in TISA. When their contracts were terminated the submission was still pending.
- [11] The Chief Financial Officer recanted the recommendation for permanent absorption. This, contractors were absorbed, that is, nine contracts.
- [12] The decision not to renew her contract negatively affected her. She seeks compensation. They attempted to secure a meeting with the Deputy Director-General to discuss the issue of their contracts with him. The last person to deal with their issue was Ms Lerato Matoboge the newly appointed Deputy Director-General and they ended up lodging a grievance against her.
- [13] They moved from TIA division to TISA division on 7 April 2017. This followed a meeting with the Director-General who gave them the latitude to choose the movement from TIA to TISA. The monitoring and evaluation division and TIA were part of TISA.

Sizakhele Mthimkhulu testified under oath as follows:-

- [14] She is correctly unemployed. She had worked as an intern from April 2015 to March 2016. She was then given a two year contract to work as Trade and Industry Adviser from March 2016. Her contract was terminated on 5 March 2018. She was disturbed and shocked.
- [15] The Director-General promised them that their contracts would be extended. He assured them that no one would be without a job.
- [16] Their manager also generated a submission regarding their absorption. Having read the submission and the assurance from the Director-General, they had expectation that their contracts would be renewed.
- [17] During November 2017 they approached Mr Riaan Le Roux, who told them that they would be made permanent with their other colleagues.
- [18] The non-renewal of their contracts negatively affected her. She seeks reinstatement. The Chief Financial Officer had earlier indicated the availability of the funds for their absorption.

- [19] The Director-General did not differentiate between the permanent and contract workers when he said 1300 employees would not lose their jobs.

### **FOR THE RESPONDENT**

Lerato Dorothy Matoboge testified under oath as follows:-

- [20] She was the Deputy Director-General Trade and Industry South Africa, prior to that she was the acting Chief Executive Officer of Trade and Invest Africa. She was not given the submission to convert the fixed term contract to the permanent employment. Even the then acting Deputy Director-General Mr. Riaan Le Roux did not sign the submission.
- [21] She made the submission for the absorption of the fixed term contract employees of TIA at the time the applicant had voluntarily moved to TISA. The applicants lodged a grievance.
- [22] She made the submission for the absorption of the fixed term contract employees of TIA at the time the applicants had voluntarily moved to TISA. The applicants lodged a grievance.
- [23] The applicants were additional to the staff establishment of 1300.

Janine Steyn testified under oath as follows:-

- [24] She is the Director: Recruitment and Human Resource Operation. The submissions normally come from the divisions. Tina Reddy was the Deputy Directors do not have the decision making powers. The Director-General in the video clip does not differentiate between permanent and contract employees.
- [25] She does not agree that the non-renewal of the applicants' contract was unfair.

Riaan Le Roux testified under oath as follows:-

- [26] He was the Deputy Director-General TISA until 28 February 2017. He was the Chief Operating Officer of TISA previously. He was involved in the termination of the contracts of the applicants. At the time there were co-strains on the budget especially compensation budget. The submission marked "C" did not follow the correct channels. He did not create the expectations. He denies having a meeting with the applicants in June 2017 in which he promised them absorption.
- [27] Ms Matoboge should have dealt with the submissions as the new Deputy Director-General. He did not attend a meeting where the Director-General made the promise to retain 1300 employees. There was moratorium which made it difficult to absorb the two applicants. He conceded that once the applicants saw the submissions they had expectations.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

- [28] Section 186 (1)(b) of the Labour Relations Act 66 of 1995 provides that "an employee employed in terms of a fixed-term contract of employment reasonable expected the employer.
- (ii) "to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee"

[29] In *SA Rugby Pty Ltd v CCMA & other* [2006] 1 BLLR 27 (LC), it was held that for an employee to establish a reasonable expectation of renewal of a contract for the purpose of section 186 (1) (b), the employee was required to establish at least the following:

- a) A subjective expectation that the employer would renew the fixed-term contract on the same or similar terms;
- b) The expectation was reasonable. See also *University of Pretoria v CCMA & others* [2012] 2 BLLR 164 (LAC)

#### **Did the applicants have subjective expectation**

[30] The test whether or not an employee has discharged the onus is objective, namely, whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his/her fixed-term contract on the same or similar conditions, *vide, United People is Union of South Africa obo Khumalo v Maxiprest Tyre (Pty) Ltd* 920090 30 ILJ 1379 (LC) at paras 42 and 52.

[31] According to the applicants their expectations were created by the Director-General's comments that no employee would lose a job. The confirmation made by the Chief Financial Officer on the availability of the funds if their posts were to be converted into permanency. Further, there was a submission made with a view to absorb them permanently. Their other 11 colleagues in TIA were eventually absorbed. In my opinion, the applicants subjectively expected that they would be absorbed permanently based on all of the above.

#### **Was the expectation reasonable**

[32] The motion of a reasonable expectation calls for an objective inquiry to determine whether the facts proved would lead a reasonable employee to expect renewal. One of the factors to be taken into account in this regard is assurances that the contract would be renewed. The applicants' other 11 colleagues were absorbed permanently following the assurance made by the Director-General that no one would lose their jobs. The Director-General did not come to testify to dispel the motion that he referred to the permanent employees only. Further, the applicants were not warned that their migration from TIA to TISA would disadvantage them regarding the impending absorption.

[33] The cumulative effects of the above lead one to arrive at the conclusive that the subjective expectations of the applicants are reasonable. I am satisfied that the applicants proved the second requirement of reasonable expectation.

[34] The applicants did not adduce an of iota evidence regarding their claims for outstanding leave. Accordingly, those claims must fail.

[35] It follows that the applicants were dismissed and that their dismissals were substantively and procedurally unfair.

[36] Ms Tumelo Nthutang sought compensation; I find no reason on the facts before me and in fairness why I cannot award this remedy. In arriving at the appropriate sum of compensation, I take into account that the dismissal was substantively and procedurally unfair. I also take into account that she worked for a period of two years. In my view, the sum of compensation equivalent to her twelve months' salary would be fair.

[37] Ms. Sizakhele Mthimkhulu seeks reinstatement. This is a primary remedy and there is no basis for deviation from this remedy

**AWARD:**

[38] I find that the applicants were dismissed, and that their dismissals were substantively and procedurally unfair;

[39] I order the respondent to pay Ms. Tumelo Nthutang the sum of **R281 418-00 [TWO HUNDRED AND EIGHTY ONE THOUSAND FOUR HUNDRED AND EIGHTEEN RAND]** being the an equivalent of her twelve months salary calculated on the annual salary of R281 418-00, as compensation;

[40] I order the respondent to reinstate Ms. Sizakhele Mthimkhulu to her former position and on the same terms and conditions that prevailed prior to the dismissal;

[41] I order that Ms. Sizakhele Mthimkhulu must resume duties on 2 March 2020;

[42] I order the respondent to pay Ms. Sizakhele Mthimkhulu the sum of **R562 836-00 [FIVE HUNDRED AND SIXTY TWO THOUSAND EIGHT HUNDRED AND THIRTY SIX RAND]** being her arrear salaries from March 2018 to end February 2020 calculated on her annual salary of R281 418-00.

[43] I order the respondent to pay the applicants sum of compensation envisaged in paragraph [37 ] and arrear salaries envisaged in paragraph [44 ] on or before 2 March 2020;

[44] The applicants' claims for leave pay are hereby dismissed.

[45] I make no costs order.



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**MOLOKO EPHRAIM PHOOKO**

**GPSSBC- ARBITRATOR**