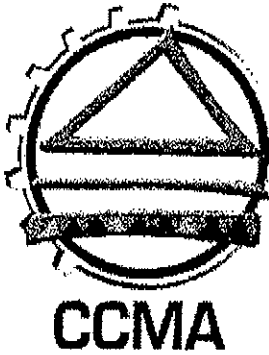


2014-09-17



# Arbitration Award Rendered

Case Number: LP8637-13  
 Commissioner: Khutso Elias Mpa  
 Date of Award: 13-Oct-2014

In the **ARBITRATION** between

PSA obo Matodzi, G.R

(Union/Applicant)

and

Limpopo Legislature

(Respondent)

Union/Employee's representative: Mr M Mkhize (Union Official)  
 Union/Applicant's address: PO Box 1747  
Polokwane  
0700

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 E-mail: mike.mkhize@psa.co.za

Employer's representative: Adv J S Mphahlanl  
 Respondent's address: Private Bag X 9309  
Polokwane  
0709

Telephone: \_\_\_\_\_  
 Telefax: 015 633-8185, 011 674-1427  
 E-mail: \_\_\_\_\_

**DETAILS OF THE HEARING AND REPRESENTATION**

- [1] The Arbitration hearing was held on several dates and finalized on the 26<sup>th</sup> September 2014 at 09h00 at CCMA House, 104 Hans Van Rensburg Street, Polokwane, Limpopo Province. The Applicant, Mr. G.R. Matodzi appeared in person assisted by Mr. M. Mkhize, a union official from PSA a registered trade union while the Respondent was represented by Adv. J.S. Mphahlanl.
- [2] Various people interpreted in these proceedings, while Mr. V.L. Mashau interpreted on the last two days and the proceedings were digitally recorded.

**BACKGROUND TO THE ISSUE**

- [3] The Applicant was employed by the Respondent as the Chief Financial Officer (CFO) on a fixed term contract effective from the 01<sup>st</sup> December 2007 and ending on the 30<sup>th</sup> November 2012. His annual salary was R1 232 204-16.
- [4] At the end of his fixed term contract, he was given an extension of eight (8) months which was again extended for one (1) month and further extended for three (3) months.
- [5] On the 29<sup>th</sup> November 2013 he was given a termination letter and he feels that he was dismissed on the 29<sup>th</sup> November 2013 as per the said letter. His dispute is based on section 186(1)(b) of the Labour Relations Act, 66 of 1995 (LRA).
- [6] The Respondent denied having dismissed the Applicant and argued that the Applicant's contract came to an end.

**ISSUE TO BE DECIDED**

- [7] I have to decide whether or not there was a dismissal of the Applicant. Should I find that the Applicant was dismissed, I will have to decide whether or not the dismissal was substantively fair.
- [8] Should I find the dismissal to have been unfair, I will then have to determine the appropriate relief in line with the Applicant's prayer for reinstatement.

**SURVEY OF EVIDENCE**

Only signed awards that contain the CCMA approved watermark are authorised.

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The parties' witnesses testified and their evidence is briefly as follows:-

Evidence for the Applicant.

Gumani Robert Matodzi.

- [9] He was employed as a Chief Financial Officer for five years which was to end on the 30<sup>th</sup> November 2012. Mr. Adams, the Divisional Manager Human Resource Management and Labour Relations wrote an email to Advocate Ntsomela dated the 18<sup>th</sup> October 2012 titled "Drafting of Employment Contract: Matodzi G.R. (CFO)". It indicated that his contract will be extended for a further period of five (5) years which he understood to mean that he still had five (5) years with the Respondent until 2017.
- [10] On the 01<sup>st</sup> November 2012 he received an email from Mr. Khotsa which was cc'd to Adv. Ntsomela which dealt with the Contract of Employment coupled with an Addendum and he was happy that the issue of the extension of his contract for five (5) years was being finalized. He had an expectation that his contract will be extended for a period of five (5) years. Reading through the addendum he found some mistakes which he corrected and sent same back to him. He was not given the 5 years extension contract which was discussed instead he was given eight (8) months extension dated the 31<sup>st</sup> May 2013, which he did not sign followed by a one (1) month extension.
- [11] On the 30<sup>th</sup> August 2013 he received a three (3) month's extension letter and in September 2013, the Respondent advertised the CFO position in a national newspaper with the closing date being the 31<sup>st</sup> October 2013. He applied and he was shortlisted and later called for interviews which showed sufficient interest in his services by the Respondent. On the 29<sup>th</sup> November 2013 he was invited to a meeting to discuss the budget which showed that the Respondent still needed his services. He made recordings in his diary to prove that there was a reasonable expectation that was created by the Respondent that he will be employed until the year 2017.
- [12] On the 01<sup>st</sup> August 2012 he discussed the extension of his contract by 5 years with the Secretary who came to his (witness's) office and on other dates. He was congratulated by Mr. Masehela, the divisional manager for research. On the 12<sup>th</sup> October 2012 he had a meeting with the Secretary who told him that Mr. Nkuna and Mr. Adams were handling the matter. When he questioned Mr. Adams on his contract he said it was already with Adv. Ntsomela. He had a meeting with Adv. Ntsomela who acknowledged that his contract will be extended by five years and it was with Mr. Khotsa. He had a meeting with the Secretary where they discussed about his contract amongst others.

- [13] The addendum that was given to him made reference to the main agreement which is the 2007 fixed term contract which provided in clause 1.1 that anything not recorded herein will not be binding. When he was employed by the Respondent and signed the fixed term contract, he negotiated with the Secretary who had to get a mandate from the Legislature Services Board. When you ask for something and I say I have no mandate, it means that I have no powers.
- [14] The Legislature Services Board has a final say on the approval of the general conditions of service of the Respondent's employees. As per *paragraph 11.1 the extension or renewal of the contract had to be in writing and signed by the parties thereto. As per paragraph 11.4, an omission by the employer to give written notice shall not imply or create an expectation that an agreement will be renewed or extended. In terms of paragraph 11.5, the employer may, 6 months prior to the expiry, initiate the extension of the contract.* The addendum was never signed between him and the Respondent.
- [15] The Speaker considered that his contract was ending in November 2012 and he decided to extend it by 8 months under the same terms and conditions as in the main agreement, to allow the process and any considerations by the executive authority. He then executed his services freely and voluntarily for the duration thereof.
- [16] When the addendum was not reviewed, enforced or signed, he did not refer a dispute to the Commission. Given the addendum, he was expected to consider it and advise if there were any issues that he felt should be included for consideration by the Secretary. He never had discussions with Mr. Kotsa regarding the extension of his contract prior to him writing the email with the addendum and he could not have raised his expectations. The email from Mr. Adams to Adv. Ntsumela in October 2012 was not cc'd to him and he did not co-author it. He did not discuss the details of his contract with Adv. Ntsumela, Mr. Kotsa and Mr. Mphahull.
- [17] As per his diary, the recordings reflect a contract but it is not specified as to whose contract was discussed with the Secretary, but it was his contract. Mr. Maselela is his colleague in a team of senior managers but he is his junior in position. There are service providers in the Legislature and they are very instrumental in his functions and he deals with their contracts. The Legislature still needed his services and he believed that the Secretary did what he was supposed to do.
- [18] Adv. Ntsumela drafting the contract meant that people from legal services responsible for drafting the contract were dealing with it and not involved in the negotiations of the conditions thereof. Mr Adams was to ensure that he was in the institution in a proper manner and in the right way and deals with the

conditions of employment. His contract was never discussed with Adv. Ntsumela. When the CFO position was advertised, he was on the 3<sup>rd</sup> extension of his fixed term contract but he believed that the 5 years contract was still coming. He applied for the position as advertised by the Speaker. He requested the Secretary to arrange a meeting for him to meet with the Speaker and he had a meeting with the Speaker. He lodged a complaint against the whole process around the 27<sup>th</sup> September 2013. The fact that he was invited for the interviews is an indication that the Respondent still needed him and he was advised to apply for the post. The advertisement did not raise his expectations of the renewal of his contract and he never challenged the Respondent to stop the advertisement. The advertisement invited people to apply for a vacant CFO position but that did not mean that the position was vacant or available for grabs as he was still occupying the position. The invitation to attend the interviews also raised his expectations of the renewal of his employment contract as it indicated that the employer still needed his services but the letter did not say that you will be appointed.

- [19] The Respondent later cancelled the interviews but he cannot say that it was because they were no longer interested in his services. The acting Secretary's response to his grievance reflected under recommendations that the renewal or non-renewal of the CFO is the jurisdiction of the Legislature Services Board. Prior to the termination of his contract, he had a 5 years contract with the Respondent ending on the 30<sup>th</sup> November 2012 but it was not terminated instead, the Respondent extended his contract meaning that he still needed his services for 8 months.

Evidence for the Respondent.

Simon Mothoa

- [20] He started working for the Respondent around August/September 2002 as a researcher reporting to the senior manager research unit, Mr. Masehela. When the Applicant was employed as the CFO on a 5 years fixed term contract, he was senior to him (witness). When he started acting as a secretary, he (witness) was appointed around 2011 when the secretary, Adv. Lambani left.
- [21] In terms of reporting, the CFO comes immediately after the Secretary. The Applicant reported to him and he is still the acting Secretary till date of the Arbitration hearing. He never had any discussions with Mr. Adams regarding the contents of the email dated the 18<sup>th</sup> October 2012 dealing with the addendum addressed to Adv. Ntsumela and cc'd to Tladi.
- [22] That email was never sent to him nor was it cc'd to him. The discussions between the Secretary and the CFO happened daily and they are not fully fledged meetings. He does not remember convening a

meeting on the 01<sup>st</sup> August 2012 to discuss the issues mentioned by the Applicant on his diary records. He never told the Applicant that his contract will be renewed for 5 years as the renewal or non-renewal of the CFO's contract lies with the Legislature Services Board and he has no powers to do so. He received the Applicant's grievance on the 27<sup>th</sup> September 2013. He never raised the Applicant's expectations that his contract will be renewed as he never had a communication to that effect with him.

- [23] He signed the Applicant's extension contract by virtue of him being the Secretary as per Exhibit "A38". The Speaker is the chairman of the board and he acts on behalf of the board and articulate its decisions. Those who gave Mr. Matodzi a five months addendum were supposed to have been authorized by the Secretary and as the Secretary was not aware, it was not procedural to do so. It should have started with an instruction from the Board to the Secretary and then the Secretary delegates the relevant section to deal with that.

### ANALYSIS OF EVIDENCE AND SUBMISSIONS

- [24] The parties led evidence by one witness from each side supported by bundles of documents, with the Applicant submitting bundle "A" while the Respondent submitted bundle "B". They then submitted written closing heads of argument. I will not repeat the contents of their closing arguments for purposes of brevity. The Applicant must establish the existence of a dismissal in line with section 192(1) of the LRA read with section 186(1)(b) of the LRA. It is important to note from the onset, that the Respondent disputed the existence of a dismissal in line with section 186(1)(b) of the LRA.

- [25] The said section defines dismissal to mean that "an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it". From the definition, it is clear that the employee should have expected a renewal on same or similar terms but the employer did not renew or he renewed at less favourable terms.

- [26] In the Applicant's case, he worked on a fixed term contract of five (5) years which was renewed or extended by eight (8) months, then one (1) month and later three (3) months. It is also important to note that the Applicant never raised any challenges against the non-renewal of his fixed term contract by 5 years instead he served the shortened terms of renewal as provided by the Respondent. He only stood up to challenge the non-renewal for 5 years almost at the time of his last extension of his fixed term contract. It is not in dispute that the Applicant was given an addendum for a further period of 5 years on the 01<sup>st</sup> November 2012 which was towards the end of his initial fixed term contract, called the main

contract. He was called upon to read through it and make correction/inputs and he did and sent same back to the Respondent. However he did not receive any correspondence from the Respondent related to the said 5 years extension on his contract. At the end of his initial 5 years contract, he was given periodical renewals which he worked without complaining.

- [27] The people who issued the email which raised the issue of the renewal/extension of the Applicant's fixed term contract are employees of the Respondent. They occupied senior managerial positions within the Respondent such as Divisional Manager HRM & Labour Relations (Mr. Adams) and Mr Kotsa from Legal Services while Adv. Ntsomela is said to be the Head of the Legal Services. They used the materials of the Respondent to convey their messages and from the wording of their emails, they appear to have been authorized to convey the message that they sent across. The Applicant was even given an addendum which is said to have been sanctioned by the Secretary to be forwarded to him.
- [28] Though the Secretary denied having sanctioned the communique, it is however not in dispute that the said email by Romeo Adams dated the 16<sup>th</sup> October 2012 addressed to Adv. Ntsomela made reference to the discussions that were held with the Acting Secretary on Wednesday, 17<sup>th</sup> November 2012 wherein the Acting Secretary indicated that the employment contract of Matodzi G.R will be extended as same had to be drafted with the time period of extension being five (5) years. Though the email was not emailed nor cc'd to the Applicant, it had an element of raising the Applicant's expectation of renewal of his fixed term contract.
- [29] This was further compounded by the fact that he was later sent an email by Mr Kotsa cc'd to Adv. Ntsomela wherein he was given the addendum for him to peruse, make corrections and submissions for the Respondent's further consideration. It is again important to note that the addendum which was to be the extension of the Applicant's fixed term contract also made reference to Mr Simon Mothoa, in his capacity as the Acting Secretary of the Limpopo Legislature. It cannot reasonably be expected that the officers who issued the addendum to the Applicant would have done so on their own without a mandate. It is also important to note that it could not have been by coincident that these correspondences arose within the period of six (6) months towards the expiry of the initial fixed term contract while the main contract made provision for the initiation of extension of the employment contract. The parties called on me to decide whether the several emails that were referred to by the Applicant created a legitimate expectation of renewal of his fixed term contract. The Applicant indicated those that did and those that did not raise his expectations. However, it is important to note that various circumstances and events have a bearing on the expectations created.

- [30] Having considered the emails that were referred to, the circumstances under which they were issued, as well as the timing thereof, to have created legitimate expectations on the Applicant that his fixed term contract will be renewed.
- [31] The fact that the Applicant was given several extensions to his initial contract also added to the Applicant's expectations as he indicated that he understood that his five years contract was being finalized. It cannot be said that the Applicant was unreasonable by believing that his contract is being finalized. It would again not be said that the Applicant was unreasonable in expecting that his contract would be extended/renewed. Even if we were to think away the addendum dealing with five years extension of his contract, the legitimate expectations were created for the further renewal of his fixed term contract by the repeated short term extensions. However the Respondent went on to terminate the Applicant's contract by not renewing it, thereby dismissing the Applicant.
- [32] The Labour Court held in *SACTWU & Others v Cadema Industries (Pty) Ltd* [2008] 8 BLLR 790 (LC) that: "*several renewals of a relatively short term contracts over a number of years must have led the employee to believe that her final contract would be renewed.*" The Applicant made reference to several other decided cases in his closing arguments which supported his argument that there was a dismissal in terms of section 186(1)(b) of the LRA. However for brevity's sake, I will not repeat the contents thereof herein.
- [33] The Respondent did not furnish any reason why he was not renewing the Applicant's contract after renewing same on three occasions over a period of twelve (12) months. Having applied my mind to the circumstances surrounding the Applicant's case, I find that there was a dismissal of the Applicant in line with section 186(1)(b) of the LRA, by the non-renewal of a fixed term contract.
- [34] With the Applicant having succeeded in establishing the existence of dismissal, then section 192(2) of the LRA read with section 188 of the LRA further read with Schedule 8: Code of Good Practice; Dismissal, the burden then shifts to the Respondent to prove the fairness of the dismissal.
- [35] The Respondent did not submit any reasons to justify the Applicant's dismissal. Even in the termination letter, there were no reasons furnished for the termination of the Applicant's services. The disturbing factor is that the Respondent advertised the Applicant's position while he was still employed by the Respondent. The Applicant was even expected to render other services such as budget within the Respondent while his post was so advertised.



- [36] The fact that his position was advertised shows that the position which the Applicant occupied was still available and not redundant. I was not appraised of the reasons for entering into a fixed term contract with the Applicant nor were there reasons furnished for granting the extensions, except to say that it was so decided. This is still an indication that the position was still available. The Applicant expected an extension of his contract but the Respondent did not extend same. There has been a suggestion that the Respondent did not renew the applicant's contract as he did not require his services anymore. However there was no evidence tendered to justify the non-renewal of the Applicant's contract nor was there any indication of the reason why his services were no longer required.
- [37] I therefore find that the Respondent failed to prove on a balance of probabilities that the Applicant's dismissal was fair. The Applicant made an application for his reinstatement to his position as the CFO. Section 193(1)(a) of the LRA defines reinstatement as the primary remedy for unfair dismissal. I was never addressed of on breakdown in the trust relationship between the parties while on the other hand, I found no grounds that justified the Applicant's dismissal.
- [38] The Labour Appeal Court in *SA Rugby (Pty) Ltd v CCMA & Others* (2006) 1 BLLR 27 at page 29 at paragraph 7, made reference to the decision of the Supreme Court of Appeal in *Fedlife Assurance Ltd v Wolfaardi* 2002 (1) SA 49 (SCA) at page 58 wherein it was stated that "section 186(1)(b) of the LRA extends the meaning of dismissal. By enacting section 186(1)(b), Parliament intended to bestow upon an employee whose fixed term contract has run its course, a new remedy designed to provide.... Compensation... if the employer refuses to agree to renew the contract where there was a reasonable expectation that such would occur."
- [39] The Applicant indicated in his closing arguments that he would like to be paid compensation equal to twelve (12) months. He never made an application for his reinstatement in terms of his closing argument instead he requested for compensation. My understanding is that when he made the decision to request compensation, he took into consideration the relevant forms of relief that are catered for by section 193 of the LRA. This is so because he even cited section 193(1)(c) read with section 194(1) of the LRA which deals with compensation.
- [40] Section 193(2) of the LRA makes provisions for the exception whereby reinstatement or re-employment cannot be awarded, amongst other in case the employee does not wish to be reinstated. I have no powers to force the Applicant to return back to work if he does not wish to do so. If the Applicant wished to go back to work, I would have expected him to have specifically stated so.

[41] With the Applicant having prayed for compensation, I find compensation to be the appropriate relief. I have observed that the Applicant is out of employment since the 30<sup>th</sup> November 2013 which will be a period of eleven (11) months on the 30<sup>th</sup> October 2014.

[42] I therefore find payment of the Applicant's salary for the period eleven (11) months during which he was out of employment to be the appropriate under the circumstances.

[43] The Applicant indicated that his salary package was equal to that reflected on the advertisement of his post as per Exhibit "A3," same being R1 232 204-16 per annum and that was never disputed by the Respondent. Having divided the said amount by thirteen (13) cheques, I find that his monthly salary to have been R94 784-93.

**AWARD**

[44] There was a dismissal of the Applicant.

[45] The Applicant's dismissal was substantively unfair.

[46] The Respondent, Limpopo Legislature is hereby ordered to pay the Applicant, Gumanl Robert Matodzi the amount of R1 042 634-20 as compensation for the eleven (11) months during which he was out of employment.

[47] Payment of the above amount shall be effected on the Applicant by not later than the 15<sup>th</sup> November 2014 at 15H00.

**APPROVED**



Signature: \_\_\_\_\_

Commissioner: *Khutso Elias Mpani*

Sector: *Public Service (General)*