



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Mr Martin Sambo _____
Case No.: GPBC1988/2019 _____
Date of Award: 11 March 2022 _____

In the ARBITRATION between:

PSA obo AP MLANGENI

(Union / Applicant)

AND

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

(Respondent)

Union representative: Mr Flip Van Der Walt _____
Applicant's address: PSA Offices _____
Nelpruit _____

Telephone: _____
Telefax: _____

Respondent's representative: Mr Dan Silawule _____
Respondent's address: Department of Justice and Constitutional Development _____

Telephone: _____
Telefax: _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for arbitration at 9h00am on 21 April 2021, 05 August 2021, 27 September 2021, 28 September 2021, 02 November 2021, 03 December 2021 at the offices of the Department of Justice and Constitutional Development, Nedbank building, Brown Street in Nelspruit.

The employee party, Ms Audrey Mlangeni (hereinafter referred to as the Applicant), was represented by her union representative of PSA Flip Van Der Walt. The employer party, Department of Justice and Constitutional Development (hereinafter referred to as the Respondent), was represented by its labour relations official Mr Dan Silawule

The proceedings were electronically recorded.

ISSUE TO BE DECIDED

The Applicant's fixed contract of employment was terminated on the 30th September 2019 when it was renewed 8 times. I have to decide whether, in the circumstances detailed hereunder, whether the termination constituted a dismissal and if so whether such dismissal was unfair.

BACKGROUND TO THE ISSUES

The Applicant Ms AP Mlangeni was employed by the Respondent on the on 01 January 2015 as a Data Capturer/ Secretary/ Admin Clerk on a fixed term contract. The Respondent is a national government department responsible justice and constitutional development.

The parties agreed as common cause that the Applicant was employed on fixed term contract since 01 January 2015 until 30 September 2019. It is further common cause that the Applicant's contract was renewed 8 times in that period and that the Applicant was earning below the threshold. The Applicant claims that she was still called by the Respondent in 2021 to perform her duties without remuneration after termination of her contract. The Respondent disputes that she was called to assist after termination and further disputes that there was dismissal and contends that the contract came to an end.

The Applicant referred the dispute to Council, but could not be resolved through conciliation. The Applicants seeks r reinstatement as a remedy.

The Applicant indicated that at the end she will further argue that she me the requirements of the deeming provisions of section 198B of the LRA and she should therefore have been deemed to be a permanent employee. The Respondent had raised a point in *limine* that section 198(B) of the LRA cannot be applicable since the dispute is referred in terms of section 186 of the LRA. The Applicant insisted that section 198(B) is applicable even in case of disputes referred in terms of section 186 LRA. The ruling was made in favor of the Applicant. The parties submitted several bundles of documents (Bundles A for Applicant,

B1, B2 and B3 for the Respondent). The Applicant called two witnesses for her case, whereas the Respondent called five witnesses for its case.

ANALYSIS OF EVIDENCE AND ARGUMENTS

Section 186(1)(b) of the LRA, as amended states that “Dismissal” means that:

- (a) an employer has terminated a contract of employment with or without notice;*
- (b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer—*
 - (i) 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; or*
 - (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.”*

The Applicant claims she was dismissed but the Respondent in this case disputes the existence of a dismissal and asserts that the contract came to an end. The onus therefore falls on the Applicant to prove that there was dismissal by showing that the Respondent created the reasonable expectation to renew the fixed term contract or to retain him permanently, in both occasions, on the same or more favourable terms but the Respondent offered to renew or retain on less favourable terms or not to renew or retain at all. The Applicant further argue that the deeming provision of section 198B LRA is applicable to her and her contract should be deemed to be of indefinite duration.

The principle in the *Nama Koi Local Municipality v SALGBC*[2019] 8 BLLR 830 (LC) matter is that an employee may challenge the dispute relating to section 198B by referring the dispute in terms of section 198D when the employee is still in the employ of the Respondent since he/she will be seeking a declaratory order. Such cannot be done once the employee’s services are terminated. In that case an unfair dismissal dispute referral would be appropriate and section 198B may be part of that unfair dismissal enquiry.

I will start with the section 186(1)(b) existence of dismissal contentions of the parties. The Applicant testified that her contract was renewed 8 times from 01 January 2015 until 30 September 2019. She testified that she was appointed as a Data Capturer to deal with historical sexual offence cases but her contract was renewed due to workload and addition of current cases. As such an expectation was created that she will always work for the Respondent as current cases will always be there. She was at times during other renewals told by the Respondent that they are still sorting out the budget or that her contract is renewed due to workload. She was further given the duties of Admin Assistant to deal with the loss register and to do secretarial work in the office of the Director Legal Services the late Mr Mthimunye. She testified that the Respondent even proceeded to call her to come and assist the legal service section with all her duties even after her contract was terminated. She testified she performed those duties without remuneration until the date

this arbitration started on 05 August 2021. She further testified that around 30 September 2018 the Respondent produced a circular 62/2018 that indicated critical positions that were made permanent/3 year contract positions and were encouraged to apply. She has applied and was not considered. She testified that her post of data capturer was not advertised but was approved as a position to be advertised as permanent position/3 year contract position in terms of annexure C of the circular. She testified that as a result she had an expectation that she will be absorbed permanently. The Respondent argued that the circular did not speak of absorption but of following recruitment process. She testified that her contract was then renewed one last time from the 01 October 2018 to September 2019. She testified she was later told verbally that there was challenge with the budget and that her contract will terminate on September 2019. She contended that the sexual offence register was still not up to date, the loss register still had no one to manage it and there was still no one appointed to the secretarial post. She testified that the Respondent proceeded to call her to come and performs those duties after termination of her contract without remuneration but Mr Mthimunye was only paying her taxi fare.

The Respondent does not dispute the alleged 8 times renewal of the Applicant's contract and its reasons from 01 January 2015 to 30 September 2019. However the Respondent dispute that circular 62/2018 created an expectation of permanent employment or further renewal of fixed contract since the circular was about following recruitment processes and not absorption. The Respondent further disputed that the Applicant was dismissed but that her contract came to an end and that she was informed of such. The Respondent further disputed that they called the Applicant to continue to assist even after terminating her contract.

The Applicant witness Advocate Faith Phala (Senior Legal Admin Officer) testified and confirmed that Mr Mthimunye called the Applicant even after termination to assist in her duties. She testified that the Applicant would come about three times a week. She confirmed the emails that indicated that the Applicant was assigned duties by Legal Service section after termination of her contract. The testimony that the Applicant came to work even after termination of her contract to assist legal service section was confirmed by the Respondent's witnesses including acting Director Legal Services Mr Maseko who said he was not aware of this arrangement but saw her in Mr Mthimunye's office, Advocate Moshibudi Nkosi who confirmed she would have asked her to assist with the printing of documents and Ms Evidence Petersen.

The Respondent also called Mr Stephen Masuku to dispute the Applicant's assertion that during this proceedings Mr Masuku made a promise that the matter be postponed as there was a memo that indicated she will be promoted and they are awaiting the approval of principals. Mr Masuku disputed the assertion stating that if the memo was approved the Applicant would still have to undergo recruitment process and that it was not about absorption but it was requesting that the position be funded. I have found this assertion by the Applicant to be irrelevant as it was made after her contract was terminated and in the process of attempting to settle the dispute.

The Respondent also called the Senior HR Officer who testified that the Applicant's email access should have been terminated that from HR point of view her contract has been terminated and she had no further relationship with the Respondent. She testified that the post of the Applicant was not funded and suppressed. She testified that funds were requested through a memorandum but that the memorandum did not return. She asserted that it is the Applicant's view that having her contract renewed 8 times created a legitimate expectation of renewal or permanent employment as the Respondent was going to

advertise if the funds were granted as such is Respondent's policy. She testified that the extensions contract renewals were based on the need of the Respondent and the availability of the funds.

When one considers the submissions of the parties, it is clear that the Respondent does not dispute that the Applicant was its contract employee whose duties were increased in the four years from data capture to admin assistant and secretary in four years, the Applicant was earning under the ministerial threshold until September 2018, the Respondent does not dispute her meeting the requirements of section 198B LRA, the Respondent has in September 2018 recognized her position as a critical post that should be advertised as permanent or 3 year contract position, the Respondent did not advertise her position stating budgetary constraints in the notice given to her in July 2019, the Respondent has renewed the Applicant's contract 7 times since January 2015 to 30 September 2019, the Respondent has continued to use the services of the Applicant even after termination of her contract. As a result of the constant renewals, by the time the Respondent gave the Applicant notice of termination, the Respondent had already created a legitimate expectation either that her contract will be renewed or made of indefinite duration. I therefore find on a balance of probabilities that the Respondent has dismissed the Applicant and that the dismissal was unfair.

In rendering the award I am mindful of the fact that the position might not be funded and could render the award not able to be implemented.

AWARD

1. The Respondent is ordered to compensate the Applicant an amount equals to her 12 months salary calculated as follows: R19 831,09 x 12 = **R237 973,08**
2. The Applicant is not reinstated or re-employed
3. The Respondent is ordered to effect payment in clause 1 above on or before 15 April 2022
4. I make no order as to costs.



PANELLIST: MARTIN SAMBO

Date: 11 March 2022