



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Mandla Nkabinde.
Case No.: GPBC 295/2020.
Date of Award: 4 February 2021

In the ARBITRATION between:

PSA OBO NYAMBI.
(Union / Applicant)

and

DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS.
(Respondent)

Union/Applicant's representative: PSA OBO NYAMBI
Union/Applicant's address: P.O. Box 1022
Nelspruit
Telephone: 0137417513
Telefax: 0872347704

Respondent's representative: Department of co-operative governance and traditional affairs.
Respondent's address: Private bag 11259
Telephone: 013 7666436
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

The matter was referred as an unfair dismissal. A *point in limine* was raised by respondent that it is not a dismissal but a termination of an employment contract in line with the definition of dismissal section 186.1(a) of the LRA. The matter was arbitrated on 26 August 2020 and parties agreed to file written closing arguments on 02 September 2020.

The applicant Sibusiso Elias Nyambi, was represented by PSA labour relations officer, Asnath Sedibane. The respondent, the department of co-operative government and traditional affairs, was represented by Goodman Malatjie, an assistant director.

The services of an interpreter Mr Daniel Jiyane were used. The hearing was held at the department building in Mbombela. The arbitration was recorded and not verbatim notes were kept. Two indexed, paginated and labelled bundles of documents were exchanged for easy of reference.

ISSUE TO BE DECIDED:

I am required to decide whether or not the respondent dismissed (terminated contract of employment of) the applicant procedurally and substantively fair.

BACKGROUND TO THE MATTER:

The department has the position of the chairperson of the Mpumalanga Provincial House of Traditional leaders as a structural position and the incumbent is an employee of the department. Through policy consideration, a temporary position, fixed term position was created, also remunerated by the department. The position was advertised, the applicant applied and got the job.

A contract of employment was entered into between the department and the applicant. The contract gave the terms and conditions of its existence. It also spelled out how it would be terminated. It came into effect on 01 March 2018 and was renewed on 01 March 2019 to 29 February 2020 as per the clauses of the contract.

On 13 February 2020, the department issued the applicant with a termination letter. The applicant was earning R152,862 per annum. He earned a salary till end May 2020, effectively three months and 2 weeks after the termination letter.

The applicant was employed as a driver/messenger from 01 March 2018. The employment was a fixed term from 01 March 2018 to 29 February 2023. This contract would be annually renewed till expiry, which is extendable on negotiations.

The duties were driving the chairperson and doing messenger duties for the chairperson. The fixed term was aligned to the term of the chairperson, 2023.

The desired outcome is re-instatement.

SURVEY OF EVIDENCE AND ARGUMENT:

The evidence of the applicant was tendered through the applicant as the only one who testified. The respondent also called one witness to attest for the department, a senior legal officer in the COGTA directorate. Both parties' witnesses were sworn in, led their evidences, cross-examined, re-examined and closed their cases.

Evidence

The respondent.

This position of a driver/messenger is not in the structure of the department. It is a temporary position.

The duties of the employee are attached to the driver/messenger of the chairperson.

The position will be governed by The Public Service Regulations 2016 and any other legal provisions and policies applicable to the employee.

On termination/transfer for any reason, the employee will hand back to the department any assets in his possession.

The contract is renewable each year till 28 February 2023. Aligned to the term of the chairperson, extendable on negotiations.

The applicant was called in, the contract read to him and he signed the contract.

He was also given a vehicle he would use to commute to and from the chairperson and doing the messenger duties for the chairperson. Tool of work).

If he were to drive the chairperson, the vehicle would be with the chairperson.

Contract termination circumstances:

1. The date when this contract of employment ends between the parties, namely 28 February 2019, subject to clause 5 above, of this employment contract;
2. Discharge of the employee in terms of section 17 of the PSA.
3. Voluntary resignation, giving 1-month notice of service termination.
4. Death of the employee.

The terms and conditions set out herein constitute the entire contract between parties. No amendment or variation of whatever nature shall be binding unless reduced to writing and signed by both parties.

One extension addendum signed on 04 April 2019, on same conditions of the principal contract.

Three letters sent by the chairperson requesting the termination and or non-renewal of the contract.

The department did not immediately terminate as the respected the terms of this contract.

The department therefore waited until its expiry date, 29 February 2020.

The termination notice of principal contract signed on 13 February 2020 for 29 February 2020 as the expiry date.

The termination is in line with the above stated contract termination circumstance number one.

Full salary for three months after the contract expiry date.

The notice period is not a term of this contract, even if it were, the applicant was paid three months after the termination date.

The respondent prays for the upholding of the termination of this contract of temporary employment in line with the stipulated termination clause.

The applicant

He was employed in the department since 2018. The position was advertised, he applied, interviewed, got the position. he was called in to sign a contract, with the terms and conditions of his work.

He understood the contract, he accepted the position and signed contract, he understood that he would be working till 2023.

The first renewal process in 2019 was not negotiated, but a signing exercise.

He worked as per the contract, the relations with the chairperson were smooth. he used two cars, one to drive the chairperson another to collect parcels and people as the chairperson would require of him.

The relations with chairperson soured on their way from Secunda on 05 May 2019.

He thinks that was as a result that he offered the chairperson colleague Lunga (half-brother) to collect him someone from Likazi the following day, Lunga helped him even before. he took Lunga to the chairperson and the chairperson directed him for the next day's duties.

Only to be surprised the next day on 06 May 2020 he received an sms, he reacted as directed by it he also wrote a letter to apologise, no response to that letter of apology was received..

The sms message was written partly in isiSwati, translated loosely as "take the government car back, you no longer working for me, do it today, I will be not begging/beseeching a young boy like you."

I last drove the chairperson on 06 May 2019, I handed the chairperson's car back on the same day and the following day I submitted the department's car back to the department.

I was since advised by the union to report for work, I reported at to Vuyelwa, chief director for three months, without signing anywhere as proof of attendance. They would send me to take/collect documents between departments, helped in supply chain and logistics issuing cars.

There was no communication between me and the employer since 06 May 2019, Only payslips I got on the day of the arbitration.

I never spoke to the chairperson (Inkosi) since 06 May 2019 to date, we are related, my father and him are brothers. No discussion in the family about this. I don't feel safe to work with him. I desire to be given work elsewhere in the department, due to this relation with the chairperson.

On 13 February was given a termination letter, I signed for the receipt of the document, not that I agreed with content.

The letters of complaints from Inkosi, I never saw them before, only in this arbitration. I dispute having been uncontactable, I always had my phone with me. Not aware of allegation on those letters. Never saw my replacement letter by Lunga.

I expected the contract to continue because I did not do anything wrong. Thulani is working for the chairperson since 06 May 2019.

Arguments

The notice period is not on the contract as it would relate to the termination thereof, save on resignation and resignation does not arise in this situation.

The respondent submits it is because the contract is having a termination date upfront, whereas the applicant believes the BCEA notice period should apply.

Respondent: The contract terminates every year if not renewed each year as was the case in 2019. It was not renewed in 2020 as the applicant was not honouring the contract. He last reported for work on 06 May 2019.

Applicant: the contract is coupled to the chairperson's term of office, five years, thus terminates in 2023.

Respondent: the applicant was no longer fulfilling his part of the contract, as he last served the chairperson in May 2019, but the department paid him till May 2020.

Applicant: was serving in logistics and business support, not signing anywhere as proof of attendance.

Respondent: the applicant was not dismissed but terminated as the contract stipulations.

Applicant: the dismissal does not comply with the LRA reasons for dismissals.

ANALYSIS OF EVIDENCE AND ARGUMENT:

I am persuaded about the validity of the contract, the terms and the service the applicant had to render to the fulfilment/honouring of his part of the contract. (law of contract and the common law).

The fact that the applicant was no longer serving his contractual obligation, is common cause.

When he returned the tools of work, as a stipulation of a term of his contract of work, that was supposed to mean something the next day of work.

I noted the submission that he was advised by the union to report elsewhere in government for work, but also alludes that the union is not a party to the contract and neither the union nor the applicant engaged the respondent of this development.

The applicant was paid 12 months after he returned his tools of trade, not servicing the contract but did nothing to challenge the employer about this situation.

The fact that the applicant withdrew his personal service having less than two months of contract renewal is concerning. He did nothing to challenge the situation.

He was notified of the termination in two weeks before the actual termination. The contract stipulates the termination and the renewal every year, and has been renewed once. He still did not challenge even the termination letter.

He continued to receive his full salary for three more months after termination, he saw nothing wrong still, yet he knew he had a union to assist him or he could engage the employer himself.

He also submitted a statement to say because he did not do anything wrong, that was creating a reasonable expectation for the next renewal.

I don't believe this expectation is reasonable, there is a contract of employment governing this relationship, it is more reasonable to ask the department when something out of the ordinary happens after 14 months since his first signature on the contract.

It is a more reasonable to expect either a termination or renewal towards the end of each year as per the contract stipulation, especially now that he had withdrawn his labour, as part of this contract.

Indeed, he received a letter of notice of termination, any reasonable expectation should be brought to question/or dashed by this notice which is explicit.

It would be more reasonable to raise it with the employer as the letter of termination dashes the reasonable expectation you had if you had any. The applicant did nothing even at this stage.

After the termination date, there is no reasonable expectation to persist beyond a written letter signed by the parties to the contract.

There are three months of salary after the termination, it is my view that the conduct of the applicant did not display any reasonable expectation, it did not exist and cannot suddenly gain its life due to a salary payment.

Instant I am of the view that the relationship he had with the chairperson as a brother to his father was over-shadowing the contract obligations he had with the department.

The safety concerns of both the chairperson and the applicant were raised as well, but that would not override a written contract of employment if it were renewed and the applicant was honouring it.

AWARD:

- 1.The respondent complied with the terms of the contract in terminating the employment of the applicant, both procedurally and substantively.
- 2.The application of the applicant is dismissed.

Mandla Nkabinde

Name:

GPSSBC

(Council name) Arbitrator

A handwritten signature in black ink, appearing to be 'Mandla Nkabinde', written in a cursive style.