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ARBITRATION AWARD

Panellist/s: Mohau C Ntaopane
Case No.: GPBC1032/2020
Date of Award: 31 March 2021

In the ARBITRATION between:

NEHAWU OBO N MASETI & 62 OTHERS

(Union / Applicant)

and

DEPARTMENT OF PUBLIC WORKS & INFRASTRUCTURE

(Respondent)

Union/Applicant's representative: Adv. NV Ntebe
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

[1] This is the arbitration award in the arbitration between NEHAWU obo N Maseti and 62 others, the applicants, and the Department of Public Works and Infrastructure, the respondent.

[2] The arbitration was held under the auspices of the General Public Service Sector Bargaining Council (GPSSBC) in terms of section 191(5)(a)(iii) of the Labour Relations Act, 1995 as amended ("the Act") and the ruling was issued in terms of section 138(7) of the Act.

[3] The arbitration was heard over a number of days at the Lyttelton Office Village, 260 Basden Avenue in Centurion and at 236 CGO Building, Corner Bosman and Madiba in Pretoria . There were a number of adjournments for justifiable reasons. The applicants were represented by Advocate NV Ntebe as instructed by Monyapelo Attorneys, while the respondent was represented by Attorney, Ms. Moeder Leso.

[4] The process was conducted in English and digitally recorded. Both parties submitted bundles of documents into the record.

ISSUE TO BE DECIDED:

[5] I am required to determine whether or not the respondent, in not renewing the fixed-term contracts of the applicants as they expired on 31 December 2019, dismissed the applicants in terms of section 186(1)(b)(ii) of the Act. Should I find in the affirmative, I am also required to determine the fairness of the dismissals and the appropriate relief.

BACKGROUND TO THE MATTER:

[6] The parties held a pre-arbitration conference on 02 and 06 July 2020 and agreed on common cause facts and issues in dispute. The dispute was brought about by the contracts that were concluded in February 2018 to September 2019, renewed/extended to December 2019. Some of the contracts started in 2015. From January 2020 the contracts of the applicants were not extended and/or renewed.

[7] The issues to be considered are whether the respondent's failure to extend the contracts amount to a dismissal in terms of section 186(1)(b)(ii); whether the respondent created a reasonable expectation that the applicants' contracts will be extended and subsequently absorb them; whether the respondent failed to give the applicants notice of termination of contract; whether the respondent was inconsistent in the renewal and appointments of

22 of the applicants; whether the nature of the business of the respondent justified non-renewal; and whether the contracts, being of a fixed-term, terminated naturally by effluxion of time. The relief sought is for the contracts to be renewed and for the applicants to be appointed permanently.

[8] At arbitration the applicants called four (4) witnesses, while the respondent called two (2) witnesses. No preliminary points were raised by the parties.

SURVEY OF EVIDENCE AND ARGUMENT:

Evidence of the applicant

[9] Ms. Naledi Maseti, NEHAWU shopsteward within DPWI and Admin Clerk at salary Level 5 was the first to testify in support of the applicants' case. She was appointed under PMTE as a contract worker since 20 March 2015 with contract terms ranging between 36 months, 24 months, 12 months, 6 months, and lastly 3 months. She worked under the supervision of Mr. Govender Daya at Real Estate Management Services (REMS). She testified to a norm within the department of renewal of contracts on the date of expiry or thereafter and that between the renewal of her contract of 30 October 2019 – 31 December 2019 she did not receive notice of expiry and only heard HR addressing others during signing of contracts that contracts will not be renewed. She was, however, informed by her REMS supervisor that their contracts will be renewed, as such they should report for duty in January 2020. Indeed when they did report they were granted access, but later informed that their contracts were not renewed.

[10] Ms. Maseti testified further that in October 2019 they were introduced to the Director General (DG), Mr. Sam Vukela, the newly appointed NEHAWU Executive in the department and sought the absorption of contract workers whose contracts were expiring. On his request, they outlined the challenges in writing in November 2019 as they appear on pages 38-39 of the respondent's bundle and on pages 41-42 of the same bundle the DG responded to the effect that no absorption policy existed in the public sector and that positions would be advertised for those who qualify to apply for. Upon being informed that their contracts were not renewed Ms. Maseti submitted that a referral was filed with the council as a legitimate expectation had been created based on practice and the work they performed. She identified her position in the National Department of Public Works Functional Organisational Structure for PMTE approved in 2016, on page 76 of the applicants' bundle, as that of Senior Admin Officer. She held that she and the other applicants were part of the approved 2016 structure as PMTE was a core function of the department.

[11] Ms. Maseti testified further with reference to the National Department of Public Works and Infrastructure Strategic Plan 2020/25, as it appears on pages 1-42 of the applicants bundle, that her understanding was that in terms of the plan PMTE held approximately 75% of work of the department and that there were additional duties which would render it impossible for the department to fulfill its mandate with less staff. She did not consider her position to have been additional to the establishment as she identified position in the structure. Ms.

Maseti disputed having received or signing for the extension of the contract from 01 October 2019 to 31 December 2019 which contained a notice that the contract will not be renewed. She submitted that the respondent had failed to advertise positions that are in the structure so that they can compete for them and created an expectation that their contracts will continue to be extended or that they will be permanently appointed. The respondent instead selectively re-employed twenty two (22) of the applicants whose contracts had been terminated without advertising those positions.

[12] Ms. Nompumelelo Sylvia Matsebula, Director – Water Resources Infrastructure since 2015, was the second witness to testify in support of the applicants' case. She located her position within the post establishment in Engineering Services, has also been employed on contracts since October 2015 and those contracts were renewed multiple times through contract renewals that were signed. Email communication would be received indicating that they must report for duty and they would then report to HR for the finalization of papework, which with the last contract happened on 1 October 2019. She submitted that the Minister stated that there would be placing and matching, although she was not aware of this happening with her position, which remained vacant. She testified that she did not receive a notice of termination of her contract and that except for those in the regional office of Limpopo, none of her subordinates received them either. She submitted that when the employees that received the letters inquired at Head Office they were told to ignore such notices by the Deputy Director General (DDG) Ms. Nyeleti Makhubela. She added that they were informed that they may take leave in December 2019 and return in January 2020 because their contracts will not be terminated. She confirmed that contracts were renewed on the date of expiry or thereafter throughout the duration of her employment. She also held the view that the re-appointment of the twenty two (22) applicants without following recruitment processes was selective. She claimed a legitimate expectation of contract renewal as a result.

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[13] Ms. Constance Jane Tshokolo, Technician under PMTE since October 2015, was the third witness to testify in support of the applicants' case. She was based at the Polokwane office and has had her contract renewed four (4) number of times since commencement of employment. She referred to page 173 of the applicants' bundle and confirmed that she and her colleagues received letters of extension of contracts containing a clause that they will not be renewed from the Regional HR. They inquired with Head Office and spoke to Ms. Matsebula who informed them that she was not aware of these letters but would confirm at a later stage. Ms. Matsebula later informed them that DDG Makhubela indicated that the letters must be ignored and that they may even take annual leave and return in January 2020.

[14] She confirmed that it was the norm for contracts to be renewed on the date of expiry or thereafter through contract renewals that reflected that contracts will not be extended and that when they receive notice of termination through email they are required to sign for them as appears on page 171 of the applicants' bundle. She alleged a legitimate expectation that her contract would have been renewed based on the constant renewal and having been told to come back in January 2020. She also submitted that the HR Chief Director, Mr. Dheyi, had visited their office to inform them that their positions were in the approved structure of 2016 and that they

would be appointed permanently because there was a shortage of water technicians. Ms Tshokolo stated that if matching and placing had happened, she would have been told if she qualified, and if she did not, she would not have applied if they advertised. Their positions were critical in her view and she believed that recalling twenty two (22) of her colleagues in Finance and Audit indicated that their positions were as critical. She sought reinstatement, although she couldn't state the form it should take.

[15] Mr. Mahalingun Dhaya Govender, DDG REMS until 31 December 2019, was the fourth and last witness to testify in support of the applicants' case. He was previously DDG of the Department from 1 July 2012 heading the Turn Around Strategy, then head of PMTE from 2013 to 2015. Pages 93-107 of the respondent contained submissions he had made as to the importance of PMTE and he explained that PMTE was mandated by the Auditor-General in 2002 to ensure separation of core business and supports services so as to enable accounting and departmental functioning integrity. He submitted that the 2016 PMTE structure reflected the positions of the applicants and explained that being additional to the staff establishment does not mean that a position is not on the structure as this merely denotes whether a post is permanent or on contract. He therefore traced the positions of those REMS applicants employed on contract on the structure as permanent posts. He confirmed that the currently were no appointments that had been made for REMS positions on the staff establishment that had been occupied by the applicants on a contractual basis. He also confirmed the practice that contracts would be renewed on the date of expiry or thereafter, as such when contracts expired employees would return to work and gain authorized access through their supervisors.

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[16] Mr. Govender submitted further that renewal of contracts was occasioned by the needs of the department through motivation by immediate supervisors in terms of the recommendation of the DDG concerned, such motivation then going through to HR and approved by the DG. He confirmed that he personally informed his subordinates that their contracts will be renewed beyond 31 December 2019 following submissions made to the DG and DDG, who agreed to those renewals, at a meeting held in Cape Town on 19 December 2019. He held the view that the applicants had a reasonable expectation of renewal of their contracts because the mandate for which they were contracted had not changed and the respondent had failed to advertise positions that are in the structure to enable them to compete for those posts. The fact that their contracts were repeatedly renewed while posts remained vacant made it reasonable for the applicants to believe that they will still have jobs as duties still needed to be performed. He also did not believe that the respondent was fair in only re-employing twenty (22) of the applicants when all the positions occupied by the applicants were crucial positions.

<u>Evidence of the respondent</u>

[17] Mr Satishi Chance Zaba, Director HR Planning and Recruitment since 2007, was the first witness to testify in support of the respondent's case. He testified that the respondent needed employees for a specific period to perform a specific job. As such the applicants' contracts terminated automatically by effluxion of time or died a natural death. He submitted further that as a result the respondent could not legally renew the expired contracts, although budgetary constraints also meant that they could not be retained as well as the fact that the

duties the applicants were called upon to perform were completed. He submitted that the applicants had to apply for positions that they qualified for if they are advertised. He submitted that there could not have been a blanket renewal of contracts because the contract positions were not funded. He held the view that an employee had the right to take leave if they had days and if it was authorized just like any other employee, although he was unsure whether there was authority to inform the applicants to report for duty in January 2020 when they had been issued with notices of termination. Mr. Zaba did not consider the practice of contract renewals on the date of expiry as a norm, but a standard way of signing contracts. He also stated that renewals were occasioned by needs identified and motivation submitted by heads. The business model and the budget justified renewals and some projects were completed hence contracts were stopped, while new contracts were taken up when the strategy was revised. He confirmed, however, that PMTE was not a project, but its operationalization was amongst the 18 projects identified and approved by Minister Thulasizwe.

[18] Mr. Zaba explained that there had been no recruitment done between 2012 and 2017 and that when Minister. Nhleko arrived he identified too many employees additional to the staff establishment, something he termed a parallel structure. This set in motion a recruitment drive aimed at reducing the number of employees additional to the staff establishment. He confirmed that there was a duplication as there were employees appointed on contract while the approved organizational structure provided for the same position. He referred to Regulation 57(2) to (6) of the Public Service Regulations 8 2016 in terms of which an EA may, unless otherwise authorized by the Act, and within the available budget and a salary level linked to a grade determined through job evaluation or as determined in the OSD, employ persons additional to the staff establishment where there is a temporary increase of work or a need to temporarily bolster the staff in the department. He submitted that the 2016 structure was not fully budgeted for, hence not all positions could be filled, and they worked within what they called a streamlined structure. He submitted that the 22 applicants that were recalled were needed to assist in phase 2 of the lease review project as well as the PMTE program management office for 12 months. He explained that employees on contract may perform functions in the structure but it does not imply their contract must be extended or the person must be appointed on a permanent basis, which appointment cannot happen without advertising the post.

[19] Ms. Reuben Mahlatsi, Director: Organisational Development, was the second and last witness to be called in support of the respondent's case. His responsibilities cover organizational design, employee health and wellness, and Human Resources Information System (Persal – used to manage establishment, which must be distinguished from structure). He confirmed that the applicants' positions in PMTE were additional to the structure. He understood that people would want to claim positions that are on the structure as theirs because employees would approach him when they see positions in the structure that they have performed for a long period and he would advise that they must apply when positions are advertised. He explained that the respondent could not simply make contract workers permanent as some employees preferred being employed on a contract basis with no intention of being employed permanently. He explained that in 2017 priority positions were advertised and that it was not possible to fill all the positions, some of which are still vacant to

this day. He confirmed that in 2012 PMTE was establish and operationalized as part of a functional structure approved in 2016 in order to ensure compliance with treasury regulation. He confirmed that contracts are usually renewed on the last day of the expiry, which always caused a persal nightmare.

[20] Mr. Mahlatsi also confirmed that while the structure was being designed within the 4 years prior to 2016 the mandate did not stop, hence contracts additional to the structure were issued since people could not be employed permanently at that stage. He confirmed that being additional to the structure simply meant that one was employed on contract, performing a permanent function that existed on the structure. He also stated that an employee who is employed on contract could not be matched, as only those who are employed permanently are matched. Therefore, an employee could claim that they are performing a function that appears on the structure, not that they could claim that the position is theirs when they are appointed on contract additional to the structure. He also submitted that it could not be normal that they continued with employees being additional to the structure when embarking on a permanent structure and that at some point appointments would have to be made to fill the permanent structure. In other words, contracts could not continue being extended indefinitely.

Argument

Applicants' submissions

[21] The applicants argued for dismissal in terms of section 186(1)(b) that they had firstly been employed as contract workers for durations varying from six (6) months to five (5) years which were renewable as per their different contracts from 2012 until 2019. They had also been appointed for more than twelve (12) calendar months additional to the post establishment without any directive from the Minister prior the approval of the structure in the September 2016. Most of the applicants' contracts were occasioned by the establishment of the PMTE which served as the operational and/or core business of the Department and as such all the applicants were performing core business functions. The 2016 approved streamlined structure as it followed strategy reflected their posts and was fully budgeted for according to Mr. Mahlatsi, contrary to Mr. Zaba's assertion, and while they had been performing those duties, no employees had been appointed into the posts. Their contracts would simply be renewed on the date of expiry or thereafter, which was confirmed by Mr. Mahlatsi as something that affect persal and created an administrative hassle, and if they were not renewed, the applicants would report for duty and gain access through the access control securities authorized by their supervisors.

[22] The last period of renewal of the applicants' contract was 01 October 2019 to 31 December 2019 and at the end of that period the applicants, save for those based in Limpopo, did not receive notices of termination, and those that received them were told to ignore them by their supervisors. The continuous "rolling over" of the contracts created an expectation that the contracts will be renewed beyond 31 December 2019. Reference was made to **Thiso & others v King Sabata Dalindyebo Municipality** (P437/03)[2005]ZALC47, in terms of which the employer's refusal to renew fixed term contracts after it had automatically renewed them for four (4) consecutive years was held to constitute a dismissal. Reference was also made to **Dierks v University of**

South Africa (J339/98)[1998]ZALC126 in which factors that must be taken account into to determine whether a reasonable expectation of renewal exist were outlined as follows:

(1) The significance or otherwise of any contractual stipulation;

(2) Undertakings by the employer ;

(3) The practice of the employer with regard to the renewal of employment;

(4) The availability of work;

(5) The purpose of concluding the fixed term contracts;

(6) Failure to give reasonable notice; and

(7) The nature of the employer's business.

[23] Further reference was made to **Luvuyo Nowalaza and others v Office of the Chief Justice and Another** (J1177/2017), in which the above requirements were confirmed and additions were made to the fact that if the employer is selective in renewing contracts of other employees in the instance of the employer's business having not changed, that creates a reasonable expectation that other contracts will also be renewed, as well as in instances where the employer is selective in employment of the employees whether in the form of extension, renewal and /or re-employment. The applicants further rely on the undertakings that were made by two of their Deputy Director Generals who indicated that their contracts will be renewed and that as per the Human Resources principles and the need for their services for purposes of implementing the strategy, submissions for the extension of their contracts had been made for approval and as such they should ignore any hearsay about non-renewal and/or extension of their contracts. The fact that the 2020-2025 Strategic Plan reflected their posts and additional responsibilities of the Department that required their services indicated that the business of the respondent had not changed. In January 2021 the respondent reappointed twenty two (22) of the sixty three (63) applicants on contracts of six months which have to date been extended to twelve months within the Finance and Auditing Unit under the pretext that their positions were critical whilst leaving some within the same unit.

[24] The applicants further pointed out that Mr. Govender's testimony that "additional to the staff establishment" does not denote whether the post is in the structure or not but simply means that the post is permanent or on contract was corroborated by Mr. Mahlatsi. Mr. Govender's testimony that he told his subordinates that their contracts will be renewed as per his discussion with DG Vukela and DDG Dakela in the meeting of the 19 December in Cape Town was also not disputed. The respondent further failed to dispute evidence an HR Representative visited Polokwane offices and identified the Water Technicians positions as permanent in the structure and informed the applicants that they will be appointed permanently in those positions, something which created a legitimate expectation when considering the facts and the decision in **Pretorius vs Sasol Polymers** (2008, 1 BALR 10).

[25] The applicants pointed out that in many cases, contracts that contain the standard clause stating that the employee had no right of renewal or expectation of renewal, i.e. the so-called disavowal clause, can still create

a reasonable expectation. Reference was made to **Mediterranean Woollen Mills (Pty) Ltd v SACTWU**1998 (2) SA 1099 (SCA), where it was held that despite these clauses, a reasonable expectation could still arise during employment if assurances, existing practices and the conduct of an employer led the employee to believe that there was hope for a renewal, whether on a temporary or an indefinite basis and even then these factors are still subject to an objective assessment as highlighted in Pikitup Johannesburg (SOC) Limited v Muguto and Others [2019] 10 BLLR 1146 (LC). For these reasons the applicants held the view that the respondent had unfairly dismissed them and prayed that their contracts be renewed and/or that they be permanently employed.

<u>Respondent's submissions</u>

[26] The respondent argued against dismissal in terms of section 186(1)(b) because firstly employees were needed to perform specific jobs for a specific period, as such the applicants' contracts terminated automatically by effluxion of time or had died a natural death. The respondent could also not retain the applicants because there was no budget and the duties they had been called upon to perform had been completed. The procedure for the renewal of the contracts was not a norm since their renewals were prompted by requests from different Unit Managers after identifying a need and the duration for which the applicants should be employed, hence the twenty-two (22) had been re-employed for a specific purpose. The applicants would accept and sign the extensions with the understanding that the contracts were for a specific purpose and for a specific period.

[27] The respondent pointed out that Mr. Zaba's testimony that Ms. Maseti had signed a contract for three (3) months which enabled her to continue with employment was not disputed, but in fact corroborated by the testimony of Ms Tshokolo and Ms Matsebula who confirmed before starting work renewal of contracts must first be signed, Ms. Tshokolo also confirming that all her renewal of contracts contained a provision that they will not be extended further. Ms. Maseti's testimony was therefore considered unreliable in this regard. The respondent held the view that whether or not there was a reasonable expectation of renewal of the contracts was inconsequential because the applicants rely on Section 191, that they had a legitimate expectation that their contracts will be renewed because of the norm or because their contracts were renewed on the eve of or on the expiry of the contract, while the test for a legitimate expectation is an objective test.

[28] The respondent argued further that it was impractical and improbable that Ms. Maseti would have a position in the 2016 structure while her contract of employment was concluded in 2015 and her appointment and those of others were additional to the establishment and merely to operationalize PMTE in terms of the strategic plan of 2014. The respondent relied also on the testimony of Mr. Zaba and Mr. Mahlatsi who had testified that posts additional to the establishment are not funded, nor are they in the structure. While Ms. Maseti and Ms. Tshokolo denied that their positions were not additional to the establishment, another witness for the applicants, Mr. Govender, conceded to this fact. The respondent held the view that evidence had shown that a person could not claim that a position in the structure belonged to them because processes must be followed and positions must be advertised. A view was also held that the applicants' versions were inconsistent and

conflicting and at times irrelevant. The respondent highlighted the fact that a recruitment drive was undertaken in 2017 for the purposes of creating jobs and limiting the number of contract workers additional to the establishment and that it was Ms. Tshokolo's concession that a position was advertised for duties she performed and she simply did not apply.

[29] The respondent also held the view that reliance on the 2020-2025 strategy was irrelevant because the relationship with the applicants ended in 2019, while it was not the applicants' case that the objectives incorporated therein created an expectation that their services will still be needed or that they should be employed permanently. Mr. Zaba's testimony that signing contract extensions on the eve of the expiry of contracts was a standard way of contract renewal, and not a norm, was found plausible in conjunction with the submission that some contracts that were concluded when the projects started in 2012 were not renewed as the services were not needed while new contracts were signed because of the revised strategy. The respondent could see no other way for the applicants to sign for their contract renewals. The respondent found irreconcilable the assertion by Ms. Matsebula that the respondent did not follow recruitment procedures in appointing the twenty-two (22) applicants in January 2020 while she still held the view that she was entitled to a permanent position when she did not apply. The respondent submitted that only a survival clause in the original contract allows a contract to exist beyond date of expiry. Reference was made to **Reardon Smith Line v Hansen - Tangen** [1976] 3 All ER 570 (HL) in which principles of the purpose of the contract outlined therein applied to the current matter. The respondent held that the common cause fact that the applicants' union negotiated their absorption after the expiry of their contracts was divorced from the applicants' case that they expected renewal.

[30] The respondent referred to **Ouwehand v Hout Bay Fishing Industries (**2004) 8 BLLR 815 LC and argued that the coming to an end of the applicants' contracts was no action taken by the respondent that can be proximate cause of the alleged dismissal. The respondent found the facts in **Mabizela v Commission for Conciliation Mediation and Arbitration and Others** (JR2602/17) [2019] ZALCJHB 339 (29 November 2019) similar to those in this matter. The applicant testified that a memorandum in 2012 stating freelances should be converted to permanency created a reasonable expectation. His evidence however was at odds with his signing of a fixed term contract in 2014 because if he had an expectation he would not have signed the fixed term contract. His failure to lodge a dispute with the employer when he was not converted was therefore indicative of the fact that no expectation was created. The respondent with reference to **IMATU and Others vs City of Johannesburg Metropolitan Municipality and Others** [2014] 6 BLLR 545 (LAC) at para 34 prayed that the applicants' case be dismissed as no reasonable expectation was created by either the respondent, the contract or the conduct of the parties.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[31] Section 192(1) of the Act requires the employee to establish the existence of a dismissal. Should it be found that the applicants have failed to prove that a dismissal took place, they will accordingly not be entitled to a remedy in terms of the Act. As held by the Court in **Matatiele Local Municipality v Shaik and others**[1], the jurisdictional threshold for a dispute about an unfair dismissal is that the employee must prove that he or she has been dismissed from employment. The arbitrator would have no jurisdiction to order reinstatement, re-employment or awarding compensation where there is no dismissal.

[32] Section 186 (1)(b) of the Act identifies as a dismissal where 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.

[33] In **University of Cape Town v Thomas auf der Heyde**[2] the Court held that the test for reasonable expectation was twofold. They first dealt with whether the employee actually expected the contract to be renewed and the second, whether the expectation was reasonable. In **MEC for the Department of Finances, Eastern Cape v De Milander and others**[3] a similar test was applied. The first inquiry is into the subjective element, while the second is whether the subjective expectation, objectively assessed, is considered reasonable. The latter therefore requires an evaluation of all surrounding circumstances including the significance or otherwise of the contractual stipulations. A number of factors that may influence such a finding, which do not constitute an exhaustive list, are agreements; undertakings by the employer; custom or practice in regard to renewal; the availability of the post; the purpose or reason for the conclusion of the fixed-term contract; inconsistent conduct; failure to give reasonable notice; the nature of the business[4]. This is the test to be applied to the facts and arguments of the parties in this matter to determine whether a reasonable expectation of renewal of contracts existed in this matter.

[34] In **Nolwaza and others v The Office of the Chief Justice and others and another**[5] for a number of years the practice had been that the Applicants had have had their yearly fixed-term contracts automatically renewed. The number of automatic renewals ranged between one and eight years. The applicants were judges' secretaries and were now employed by the OCJ, previously by the Department of Justice. The OCJ decided to appoint on a permanent basis and adopted the stance that, in order to comply with the PSA and its regulations, the posts would be advertised and that Applicants would have to apply for the positions they occupied in terms of their

[1] (DA3/2016) [2017] ZALAC 37 (handed down on 13 Jun 2017)
[2] [2001] 12 BLLR 1316 (LAC)
[3] [2011] 9 BLLR 893 (LC)
[4] NUM obo Mpaki v CCMA and others JR 1983/2014 (handed down on 9 September 2016)
[55] (J1177/2017) [2017] ZALCJHB 234 (handed down on 15 June 2017)

fixed-term contracts. The applicants relied on section 186(1)(b) claiming an reasonable expectation of permanent employment. The Court found that reliance on the PSA and its regulations had serious consequences, it means that a temporary employee in the public service could never rely on the protection of section 186(1)(b). There being a clear conflict between the provisions of the LRA and the PSA and its regulations, the LRA applied in terms of section 210 of the LRA. The Court granted a declaratory order to the effect that the Applicants were permanent employees employed on the same terms and conditions in the fixed term contracts they had entered into.

[35] The expectation being subjective is evident in the testimony of the applicants. The expectation from the evidence of the applicants is largely one of renewal of contracts on similar terms, although argument and evidence to some extent also implies one of permanent employment. The argument by the respondent with reference to the **Mabizela** matter and how the facts therein are similar to those in this matter is incorrect in that the applicants are not relying on an event that has passed and one that they should have exercised an election to pursue a dispute failing which it will have been regarded that they accepted their situation. The fact that they continued to sign fixed-term contracts may be indication of vulnerable employees, those who would rather continue to be employed notwithstanding the precarious nature of that employment. The conclusion of the respondent can also not be reconciled with the concession that it was common cause that negotiations with the union after notice of non-renewal was given was for absorption as this shows action having been taken by the applicants to address the issue of perpetual contracting.

[36] When considering the employment relationship in terms of a fixed-term contract, however, very few instances give rise to a reasonable expectation of permanent employment as opposed to the reasonable expectation that the contract will be renewed. The applicants' argument centered mostly around an expectation of renewal. However, apart from the allusion to the promise by the HR Representative that the applicants will be made permanent since the Water Technician posts were permanent on the structure, there is testimony of Ms. Maseti regarding the request for the Director-General to approve the absorption of contract workers submitted on 30 October 2019 in anticipation of the expiry of the contracts. It is this testimony the respondent held was common cause. Ms. Maseti's testimony was that they wanted all contracts workers to be absorbed permanently or for posts to be advertised so that they can compete for them. This implies that the applicants expected permanent employment, at least at some point.

[37] As to whether the expectation of renewal of their contracts was reasonable the applicants highlighted the perpetual nature of their contract renewal. The applicants' testimony was that upon contract expiry their contracts would be renewed and if not they would simply report for duty and that their contracts would be renewed sometime thereafter. The respondent's view was that this was not a norm but a standard of renewal. I submit that the distinction is superficial as it does not diminish the impact that one may expect a similar renewal at the end of the contract term. The norm that was created was that the applicants would be issued with contract renewals and letters of termination clearly stating that contracts will not be renewed, but have those contracts continue to be renewed a number of times. The respondent also held that no norm was created because renewals

would be occasioned by requests from different Unit Managers after identifying a need and the duration for which the applicants should be employed, hence the twenty-two (22) had been re-employed for a specific purpose.

[38] It was, however, the first time in all the years since the 63 applicants had been employed that only a small number of them were called back. When speaking of practice, the question is not whether the respondent had a reason for renewing contracts as it did, but whether when it did, the employees came to expect that it will happen again. The respondent pointed out that Ms. Tshokolo stated that every one of her contract renewals contained a non-renewal clause or a provision that there should not be an expectation of renewal. As stated above, this might have indicated to an employee the first time a fixed term contract is signed that it will not be renewed, but it might also indicate that little value should be attached to that provision by an employee who has seen it a number of times. Case law therefore highlights the fact that a non-renewal clause may become meaningless when the practice or the conduct of the parties indicate that a contract will likely be renewed, objectively speaking. An objective inquiry to determine whether the facts proved would lead to a reasonable expectation, however, involves other facts that are relevant, such as whether reasonable notice of non-renewal of the contract was given[6].

[39] It has been said that a contract that is fixed by definition stipulates notice of termination. There might, however, be a further obligation to inform an employee that this time the contract will not be renewed, when it has been renewed a number of time in spite of the non-renewal clause. It was the testimony of the applicants that only those in Limpopo received notices of termination and that upon receiving them were told to ignore them by their supervisors. The respondent found improbable that Ms. Maseti was not aware that her contract will not be renewed because she testified to having been aware that this was said, her issue with the information having been that it was not said to her. It seems improbable that some of the applicants were issued with notices of termination while others were not. The respondent, however, did not convincingly discredit the evidence that the applicants were still informed that they should report for duty despite having been notified that contracts will not be renewed. Mr. Zaba simply expressed a view that he was not sure whether the supervisor in Limpopo had the authority to tell the applicants to report for duty in January 2020, while Mr. Govender's testimony in this regard was considered irrelevant by the respondent.

[40] The respondent held that it was the applicants had a right to go on leave if authorized. The Basic Conditions of Employment Act, 75 of 1997, provides that no employee may take leave during any notice period, for obvious reasons. It therefore seems probable that employees being told to go on leave while they have been served with notice would be under the impression that they are doing so because they are returning. Where contracts have been renewed a number of times and there appears to be uncertainty and conflicting information as to whether they will renewed, the expectation of renewal might still persist. The applicants' case is that as a result of the establishment of PMTE, a core business of the Department, they performed core business functions. While the respondent argued that the applicants needed to perform specific jobs for a specific period and that the duties they had been called upon to perform had been completed, the respondent did concede that PMTE was the core

[6] Price v National Health Laboratory Services [2011] 8 BALR 860 (CCMA)

business of the Department. The applicants held the view that the 2016 strategy reflected their posts, which were fully budgeted for, the respondent held that posts additional to the establishment were not budgeted for, and the limited budget was one of the reasons they could not be retained. The respondent's two witnesses, however, did not corroborate each other on the issue of the budget. The respondent argued that contracts concluded before the 2016 strategy was approved could not lead to a claim of a position in that strategy, however, there appears to have been positions for which the applicants could have applied for in the structure.

[41] If the applicants were also merely employed to operationalize PMTE in terms of the strategic plan of 2014, then the assumption is that PMTE was not a core function throughout the 2016/20 strategic term for which positions could be filled. The respondent relied on the Regulation 57(2) to (6) of the Public Service Regulations 8 2016 in terms of which an Executive Authority may, unless otherwise authorised by the Act, with the availability of a budget and at a salary level linked to a grade determined through job evaluation or as determined in an OSD, employ persons additional to the establishment where a temporary increase in work occurs or it is necessary for other reasons to temporarily increase the staff of the Department. Evidence has not shown that the appointment of the applicants additional to the establishment was as a result of a temporary increase on work or a similar reason. Mr. Zaba, who had referred to this regulation, confirmed that PMTE was not a project, as such anything but fleeting. Mr. Mahlatsi confirmed that the applicants were performing functions attached to permanent posts on the structure, and although he confirmed the need to apply when posts are advertised, his testimony also demonstrated empathy to the plight of contract workers.

[42] The applicants argued that the relevance of their posts was reflected even in the 2020-25 strategic plan while it was the respondent's view that reliance on that strategy is misleading since the relationship between the applicants and the respondent ended in 2019. While the respondent's case was that those that were re-employed in 2020 were there to perform functions pursuant to a clean audit, the strategic objective can likely be traced within the 2020/25 plan, and if other functions of those whose employment did not continue, then there might be a legitimate claim of inconsistent conduct on the part of the respondent. It appears to be an indication that the business of the respondent has not changed and this is supported by evidence. The respondent seems to straddle between there being no budget to enable the continued employment of the applicants, and their posts being additional to the establishment, suggesting that they are separate to the structure, and there being positions in the structure that the applicants could apply for if recruitment procedures are followed. I submit that considering all the facts before me, the applicants have established a dismissal in terms of section 186(1)(b)(ii) in that a reasonable expectation of renewal on the same terms and conditions was created.

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[43] The applicants also argued that they should be employed permanently since the 2020/25 strategy was reflective of their functions. As conceded by the respondent, it was common cause that there had been a negotiation between the applicants' union and the respondent for the applicants on contract to be absorbed. The response was that there was no absorption policy which the respondent could follow and that appointment into positions had to follow the recruitment policy. The respondent alluded to a recruitment drive in 2017 the purpose of which

was to create jobs and to reduce the number of contract workers. A witness of the applicant said to have not applied in the respondent's argument only said that she was not aware of matching and placing regarding her position. The applicants sought to be absorbed as a result of having had their contracts renewed a number of times and the respondent not advertising positions, but were met with similar hurdle faced by the applicants in the **Nolwaza** matter in that their contracts ended up not being renewed because the respondent seeks to follow the recruitment process. Some of those positions, however, continue to carry duties that have been performed by the applicants for a number of years. While I believe that the protection afforded by section 186(1)(b)(ii) should apply to public service employees in that the respondent should promote employment security, simply ordering the respondent to appoint the applicants permanently in light of regulations that govern the public service human resources environment would seem reckless as it disregards the reasons for which they are in place. It is therefore my view that an order that the respondent reinstate the fixed-term contracts of the 41 applicants from the date those of the 22 were extended is more appropriate. The respondent is encouraged to fast track the recruitment process so that employees employed on contract can apply, not only to promote employment security, but to also avoid these disputes.

AWARD:

[44] The applicants, NEHAWU obo N Maseti and 62 others have established a dismissal in terms of section 186(1)(b)(ii) and such dismissal is considered unfair as it did not comply with section 188 of the Act.

[45] The respondent, Department of Public Works and Infrastructure is ordered to reinstate the 41 applicants' fixed term contracts from the date on which those of the 22 applicants were extended, and for a period not less than that of those 22 contracts, without the loss of any benefits.

Name: Mohau Clement Ntaopane