



ARBITRATION

AWARD

Panellist/s: **PJ GREYLING**

Case No.: **GPBC2330/2019**

Date of Award: **12 AUGUST 2020**

In the ARBITRATION between:

MM MOADIRA

(Union / Applicant)

and

THE DEPARTMENT OF LOCAL GOVERNMENT AND HOUSING

(Respondent)

Union/Applicant's representative: NONE

Union/Applicant's address: PO BOX 12815

BRANDHOF

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Respondent's representative: N BONGA

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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration proceeded on 03 August 2020 at 09h00 at the Respondent's offices in Mmabatho. The Applicant, Mr Matshediso Moses Moadira represented himself. The Respondent, the Department of Local Government and Housing was represented by a legal adviser, Ms N Bonga.

ISSUE TO BE DECIDED:

2. It is to be decided whether the Respondent's refusal to extend the Applicant's contract of employment after 31 August 2019 constitutes an unfair labour practice as envisaged in terms of Section 186(2)(b) of the Labour Relations Act ("LRA").
3. Both parties submitted bundles of documents The Applicant's bundle consists of 66 pages and will be referred to as Bundle A. The Respondents bundle consists of 12 pages and will be referred to as Bundle R. Reference to documents will be made in the following manner, BoD __, p__.

BACKGROUND TO THE MATTER:

4. The Applicant filed on 25 November 2019 a referral describing the dispute as an unfair labour practice, but also indicated a date of dismissal as 21 September 2019. It is stated in the referral that no reasons were provided for termination of the contract. Two other support staffs' contracts were not terminated.
5. Attached to the referral was a summary of facts in which the Applicant explains that the North West Provincial Executive Committee resolved on 05 December 2018 to place Mahikeng Local Municipality under Administration as per Section 139(1)(b) of the Constitution. The expectation was that the Administration will be for a period of a minimum of six months to a maximum period



of 12 months. The Applicant was appointed as the Administrator of the Municipality for a period of six months, effective from February 2019. His contract was, after completion of the six-month period at 31 July 2019, extended to 31 August 2019. The Applicant submitted that the contracts of other support staff were extended for a period of six months and not one month, as was in his case.

6. The Applicant indicated that he seeks to be reinstated for the balance of the 12 months period of Administration. He further submitted that he should have been paid for the month of September 2019 as he continued to carry out his responsibilities during that month. He further stated that his salary was not fully paid for the month of August 2019, and that an order should be made for payment of the outstanding amount.

ANALYSIS OF EVIDENCE AND ARGUMENT:

The Applicant's Evidence

7. The Applicant, **Mr MM Moadira** testified under oath to the following:
 - 7.1 The Applicant confirmed that after the completion of the six-month contract, the contract was extended for a further month until 31 August 2019. He further submitted that the extension was ordered by the MEC. He believes that the MEC did not have the authority to extend his contract. This decision should have been taken by the Executive Committee. He believes that his contract should have continued or be renewed until the completion of the 12 month period.
 - 7.2 The Applicant stated that his supporting staff were also appointed for purposes of the administration and their contracts were extended for a further period of six months and that they assumed his responsibilities. He further stated that he wanted to turn the municipality around, but was not given the opportunity. He further testified that he did not receive his full salary for the month of August 2019.
 - 7.3 Under cross-examination, the witness confirmed that his initial appointment was for a period of six months. The witness was also shown his pay slip for September 2019, which reflects a payment to the Applicant of R58,410.00, which was allegedly the balance payment of his salary for August 2019.



The Respondent's Evidence

8. The Respondent's representative informed the proceedings that the Respondent does not intend to call any witnesses.

SUBMISSIONS BY THE PARTIES

9. The parties requested that written heads of argument be submitted. The parties were given the opportunity to submit heads of argument by no later than 10h00 on 09 August 2020. Both parties have the right to reply, which replies have to be submitted by no later than 10h00 on 10 August 2020.

Submissions by the Applicant

10. The Applicant submitted that after the failure to renew his contract he enquired from the chief director and the head of the department the reason for his contract not being extended. He received no response. He further believes that during the short tenure as Administrator he made massive strides in improving the municipality's financial stability as well as enhancing service delivery. He also took steps to recover wrongfully paid monies.
11. According to the Applicant it is required of the Commissioner to establish whether the termination of the contract of employment was procedurally and/or substantively fair. The Applicant wants compensation.

Submissions by the Respondent

12. The Respondent did not make any submissions. The Commissioner made an enquiry about the outstanding heads of argument but received no response.

SURVEY OF EVIDENCE AND ARGUMENT

13. During the proceedings, I reflected that I have concerns about the exact nature of the dispute, i.e. is the dispute referred in respect of an unfair labour practice dispute or an unfair dismissal. I have pointed out that if the dispute is about an unfair dismissal, there is the possibility that the



dispute has been referred late and that the Council therefore does not have jurisdiction to arbitrate the dispute.

14. The Applicant insisted that his dispute relates to an unfair labour practice. Due to the Applicant's insistence that the dispute is about an unfair labour practice, I decided to follow the example of the Labour Court in **Wardlaw v Supreme Mouldings [2005] 11 BLLR 1084 (LC)**. I therefore provisionally assumed jurisdiction based on the allegation of the Applicant until the facts on which the dispute is based, is properly presented.
15. It is imperative that a presiding commissioner establish the true nature of the dispute between the parties. To that end, it is necessary to establish the relevant facts and to construe the category of dispute correctly. An arbitrator must make an objective finding of what the dispute entails (see **Hospersa obo Tshambi v Department of Health, Kwazulu Natal [2016] 7 BLLR 649 (LAC)**).
16. It is evident from the Applicant's evidence that the dispute is about the fact that the Respondent failed to renew his contract after 31 August 2019. He is further aggrieved that the Respondent renewed the contracts of his subordinates, and that they are currently performing his duties. He further submitted that he believes that his contract was for all practical purposes for a 12 month period and that the failure to renew it after 31 August 2019 constitutes a dismissal.
17. The Applicant in his heads of argument (para16.1) requires from the presiding Commissioner to make a decision in respect of: "*The termination of the Applicant's contract of employment as Administrator was procedurally and/or substantively unfair.*" It is therefore evident that the actual dispute is about an unfair dismissal and not an unfair labour practice as presented in the referral and the certificate of non-resolution.
18. From the stated facts it is evident that the refusal to renew the fixed term contract occurred before or on 31 August 2019. According to the certificate issued in terms of Section 135(5) of the LRA, the dispute was referred for conciliation on 25 November 2019. In terms of Section 191(1)(b)(i) a dispute in respect of an unfair dismissal must be referred within 30 days from the date of dismissal. This dispute was therefore referred 56 days outside the 30-day period.



19. In terms of Section 191(2) of the LRA an employee can apply for condonation for the late referral. However, until such time as the Commission has granted condonation, a commissioner does not have the jurisdiction to arbitrate the dispute.

AWARD:

20. In view of the above, I must conclude that the Council does not have jurisdiction to arbitrate the dispute.
21. The matter is therefore dismissed.



Name: PJ GREYLING
(GPSSBC) Arbitrator