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ARBITRATION AWARD

Panellist/s: P M NGAKO
Case No.: GPBC1686/2018
Date of Award: 14 AUGUST 2020

In the ARBITRATION between:

CECILIA WILLIAMS AND 15 OTHERS

(Union / Applicant)

and

DEPARTMENT OF TRANSPORT (DLCA)

(Respondent)

Union/Applicant's representative: VUYISWA MIYA
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Respondent's representative: ADV BT MOELETSI
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1.1 This matter was set down before me on the following dates: 8 October 2019, 28 and 29 January 2020 and 22 July 2020. Appearing before me were the applicants who were represented by Attorney V Miya. The respondent was represented by Adv BT Moeletsi instructed by State Attorney. After conclusion of oral evidence, parties submitted written heads of arguments as agreed

ISSUE TO BE DECIDED:

2. According to the pre-arb minutes I am required to decide:

   2.1 Whether the applicants were dismissed within the meaning of Section 186 (1) (b) of the Labour Relations Act 66 of 1995;

   2.2 Whether the fixed term contract offered to the applicants in July 2018 was the same or less favourable terms as the contract initially offered by the applicants in May 2015;

   2.3 Whether the failure by the respondent to renew the fixed terms contracts amounted to an unfair dismissal;

   2.4 Did the applicants have reasonable expectation that they would become permanent staff of the respondent?

BACKGROUND TO THE MATTER:

According to the pre-arb the following facts are common cause between the parties:

3.1 The applicants were employed by Labour Outsourcing Companies, namely, Highveld PFS and HR Options. This two companies to Face Technologies (Prodiba's parent company) and placed at Prodiba from 1998 on fixed term contracts that were renewed from time to time.

3.2 Prodiba provided drivers licence card manufacturing services for the respondent.

3.3 In May 2015, the contract between Prodiba and the respondent was terminated by agreement. In terms of this agreement, the respondent would chose the individuals it wanted to retain, and while those it did not want to retain would be retrenched.

3.4 In May 2015, the respondent and each applicant entered into a fixed term contract. Some of the contracts for the applicants were valid for 6 months whilst others were valid for 12 months. The contracts were renewed on the same or similar terms and conditions from time to time, until 30 July 2018.

3.5 In July 2018 the respondent provided the applicants with new contracts of employment. The applicant failed to sign the new contracts of employment.

3.6 The respondent gave each applicant notice on 2 August 2018 that in view of the failure to sign the new contract offered to them, they should return all of the respondent's assets in their possession in the meantime, as they pursue other avenues.

3.7 On 6 August 2019, the applicants referred an unfair dismissal dispute to the above honourable forum.

3.8 Pursuant to discussions between the applicants and respondent an on 3rd December 2018, the applicants signed the new fixed term contracts valid for 12 months.

The following facts are in dispute

4.1 Whether the applicants were dismissed by the respondent;

4.2 Whether the fixed term contract offered to the applicants in July 2018 contained the same or similar terms as the contract initially signed by the parties in May 2015;

4.3 The respondent contends that the commissioner had to decide whether the offer in July 2018 contained the same or similar terms as the contract offered in 2017.

4.4 Whether the applicants had reasonable expectation that they would be in employment with the respondent on an indefinite basis but otherwise on the same or similar terms as the fixed term contract;

SURVEY OF EVIDENCE AND ARGUMENT:

APPLICANTS' CASE

5.1 C K Williams as one of the applicant after being duly sworn in testified on behalf of all the applicants as follows. They joined DLCA on contract basis, the 1st contract was for six months, her first contract is at page 169 of Bundle "A", and this is the original contract they have signed, and the contents of the contracts are at page 172-173 of bundle "A". According to the witness the amount they were receiving was without any benefits.

5.2 It was the evidence of the witness that she worked for Prodiba since 1998 on contract basis and were taken over by DLCA and believed that they were taken over by the DLCA as going concern in terms of S197. It was her evidence that they were told by the DG that immediately after the structure has been completed they are going to be permanetly employed and this was confirmed by Mpolokeng Mokone. It was her evidence that when they received renewal contract at page 17 of bundle "R", they had a number of concerns as they expected to be employed permanetly by DLCA, and the contracts contained clauses different from the original contract they have signed, and also their concern that this contract stated that they were not taken over in terms of section 197 and also another concern was that their salary were now inclusive of 37 in lieu of benefits and clause precluding them seeking advice before signing the contracts. They wrote an email at page 19 and 20 of bundle "A raising their concerns.

5.3 They received a response from DLCA, HR on 27th of July 2018, however they were not happy with the respond they then wrote an email on the 30th of July 2018, they brought to the attention of DLCA that they were taken over in terms of the court order, and informed DLCA when they joined it in 2015 they were never told that their salary in inclusive of 37% in lieu of benefits, and also have right to seek legal advice on their contracts. There was no response from DLCA they were sent for training, they were called back on the 2nd of August 2018 and informed that because they have refused to sign a new contract with DLCA dated 13 July 2018 they are kindly requested to return all DLC assets in their possession.

5.4 Under cross examination the witness conceded that contract that was offered to them on 31 July 2018 was for a longer one than the one that expired. That she did not do any calculations as the salary they were offered per annum was the same as that initially offered per month. She further conceded that the contract they ultimately signed on 3 December 2018 was the same with the exception that reference to Section 197 was taken out, she failed or could explain where in the court order does it states they were taken over as going concern.it was further her evidence under cross examination that they were told by Mokone Mpolokeng that they were going to be permanetly employed immediately after the structure has been completed. She insisted that the letters they received on 2 August 2018 were dismissal letter as it stated they were no longer employees.

JACOBUS JOHANNES HERMANUS TERBLANS

6.1 The second witness called by the applicants was **JACOBUS JOHANNES HERMANUS TERBLANS** who after being duly sworn in testified as follows: he started to work for Prodiba in 2015, it was his evidence that he recognised the contract at page 146 of bundle "A" as 1^{st} contract he signed when DLCA took over, it was his contract, in contract in dispute, there was no deduction in salary and it was for period of year. The concern they had with this new contract at page 120 of bundle "A" was it included a clause referring to 37% in lieu of benefits and clause referring to section 197. It was his evidence that Lefuno told them to scratch clause they were unhappy with and sign the contract. On 2 August 2018 when they refused to sign the contracts he requested tags and asked that they give them escort out of the respondent building. According to him the letter he received at page 162 of bundle "A" meant he was fired. It was his evidence that on the 1^{st} and 2^{nd} August 2018, they were working as they were attending a course.

6.2 Under cross examination it was his evidence that they were promised permanent employment by Lefuno and Mpolokeng and this would be done after completion of the structure. It was his evidence that he read the court order, and conceded the salary he is receiving is not less. I was his evidence that there is difference between the contract they refused to sign with section 197 and the one they signed which did not mention section 197.

LEBOGANG DANIEL SEKGALA

7.1 The third witness called by the applicants' was **LEBOGANG DANIEL SEKGALA** who after being duly sworn in testified as follows: he identified page 367 of bundle "A" as first contract he entered into with DLCA as Machine operator. He testified on July 2018 they were given a new contract with a clause talking about section 197 and they said they needed clarity on that, as they understood they were transferred as going concern, and there was further 37% in lieu of benefits. It was his evidence that they were told by management that they were still busy with the structure and when it is complete, they are going to be made permanent and he could recall it was letsoalo who told them.

7.2 Under cross examination the witness insisted that when they were chased away and this amounted to dismissal, he conceded that Lefuno said the post will be advertised internally. He conceded that without a structure you can't be employed permanently.

RESPONDENT'S CASE

8.1 The first witness called by the respondent was **LUFUNO LEFIKA** who after being duly sworn in testified as follows: he is employed by DLCA as Senior Manager Risk, and it was his evidence that DLCA its mandate is production of licence cards, before the service was outsourced and DLCA played project management role. It was his evidence the only person who is permanently employed with DLCA is the Acting Head. It wa his evidence that he was given a contract for renewal on the 13th of May 2018 by HR. he identified page 32 of bundle "R" as email from Cecelia Williams to HR addressed and Mpolokeng and he was not copied. It was his evidence that the email raised concerns about the clauses relating to 37% in lieu of benefit, clarity on S197, he then responded to the email at page 33 of bundle "R" and informed them the contract does not stop them from seeking outside advice before signing the contract. what it does, it prohibits employees from disclosing information acquired in the employ of DLCA.

8.2 In relation to S197 DLCA was formed in terms of the regulation and they are not sure it is going to exist beyond the next financial year. It was his evidence that according to a court order between Prodiba and DOT; the applicants were not taken over in terms of S197. The issue of 37% is regulated in terms of the Public Service Act. The C Williams after receiving his response, she said they do not agree with the terms of the contract. The applicants were then sent on training as they had no intention of letting anyone go. On the 31st of August applicants were called to the meeting and this meeting he chaired the meeting and he was together with other senior managers, the applicants insisted that they are permanent, they were then requested to return the properties of DLCA and leave the premises, they insisted that they be provided with a letter to that effect. They were provided with the letter which informed them because they refused to renew their contracts that ended on the 31st of July 2018 they are requested to return the assets of DLCA while they pursue other avenues.

8.3 Under cross examination it was his evidence that the applicants contract expired, even though on the 2nd of August they were still at training. It was his evidence he is not sure why they included Section 10 what he meant is that they were not transferred to DLCA and not sure whether they were moving to DOT or RTMCA. It was his evidence that 37% inclusive is total cost to company and no benefits. It was his evidence that the structure of DLCA was with the DG.

MPOLOKENG MOKONE

9.1 The second witness called by the respondent was **MPOLOKENG MOKONE** who after being duly sworn in testified as follows: she joined DLCA on the 8th of May 2015 and she is also on contract and it was renewed on July. She testified in the meeting of the 2nd of August 2018, the applicants wanted a clause relating to S197 be removed and demanded to be made permanent. It was her evidence that she told them they can't be appointed as their positions were not in the structure, and in relation to the clauses they were not happy, informed them they can scratch the clauses and initial next to it, but they insisted that the clauses be taken out. After applicants refused to renew their contracts, they were asked to leave the premises of DOT as there were no more employer and employee relationship. She denied that she promised the applicants that applicants they are going to be employed permanetly as she does not have authority to do so.

9.2 Under cross examination she conceded that the contract they entered with the applicants after their return the clause relating to S197 was removed from the contract, she denied that on the 2nd of August the applicants were still employees of DLCA, but conceded that DLCA had sent them for training during that last week. It was her evidence that when she told production team that their jobs were safe, she meant that they were the only once in the country that are able to produce licence cards in their present form.

9.2 Under re-examination it was her evidence that the structure of DLCA in 2018 was not approved.

ANALYSIS OF EVIDENCE AND ARGUMENT:

10. Whether the applicants were dismissed within the meaning of Section 186(1) (b) of the Labour Relations Act

10.1 Section 186 (1) (b) of the LRA provides that:

"Dismissal means that-

(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 at all;

(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, or did not offer to retain the employee".

10.2 The applicants contend that the contract that they were offered was less favourable than the initial contract they signed when they joined DLCA. In relation to the duration of the contract both parties agreed that the new contract was more favourable as the contract was for 12 months not 8 months. On the concern of the inclusion of clause 10 which was not in their initial contract, it can't be correct that it made the condition less favourable because according to the court order between Prodiba and DOT applicants' were not taken over as going concern. At page 144 of bundle "A" para 2 provides:

"2 in relation to the position regarding the employees of our client, we confirm that the following was agreed at court:

2.1 The applicants will advise within 3 business days of signature Date which employees it wishes to employ"

10.2 As result, this clause did not make the conditions less favourable as the applicants were not taken over by DOT from Prodiba as going concern. It does not matter whether the clause was removed and respondent could not give plausible explanation why it was initially included in the contract.

10.3 In relation to the salary, the salaries applicants were going to receive in terms of the new contract were not different from the old contract, the 37% in lieu of benefits is amount that is included in the salary for benefits as they are not permanent employees and this is calculated by DPSA in line with the Public Service Act. As result this clause did not make their conditions less favourable.

10.4 Whether there was any reasonable impression that the applicants will be employed permanetly, I do agree with Mpolokeng she does not have the authority to promise the applicants permanent employment, as she does not have the authority, it lies with the DG, as result it is immaterial whether is true or not that Mpolokeng had promised applicant's permanent employment. I also agree with the respondent that because the applicants are saying they were promised permanent appointment after the structure was completed on the 31st of July 2018 the structure had not been concluded, and as result they could not expect to be permanently appointed while the structure was not complete. As result the applicants on balance of probabilities have failed to prove that they had reasonable believe they will; be employed permanently in terms of Section 186(1) (b) of the LRA.

10.5 Was the failure by the respondents to renew the fixed term contract amounting to unfair dismissal; the applicants if they had made themselves familiar with the conditions of their employment for contractual workers within the Public Service, they would have found that the 37% in lieu of benefits is included in their salaries, and further been aware when they were employed by respondent they were never taken over as going concern. The clause dealing with S197 could not be said it made conditions less favourable as with or without the clause, applicants were not taken over by respondent as a going concern. As result I find the applicants were not dismissed but refused to sign extension of their contracts, after their contracts came to an end. As result I find that the applicants were not dismissed but their contracts came to end by effluxion of time.

AWARD:

11.1 I therefore find on balance of probabilities that the applicants' were not dismissed within the meaning of Section 186(1) (b) of the LRA;

11.2 As result the applicants' dispute is hereby dismissed;

11.3 There is no order as to costs

Name: P M NGAKO

(GPSSBC) Arbitrator