IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

REPORTABLE
OF INTEREST TO OTHER
JUDGES

CASE NUMBER: C 934/01

In the matter between:

NOMAZA NKOPANE AND THREE OTHERS ***Applicants***

and

INDEPENDENT ELECTORAL COMMISSION ***Respondent***

JUDGMENT

KENNEDY AJ:

INTRODUCTION

1] The four applicants were previously employed by the Independent Electoral Commission ("*the IEC*") until they were retrenched with effect from 31 March 2001.

2] In these proceedings it was common cause that there was a general need on the part of the IEC to retrench some employees. The applicants, however, challenge the fairness of their retrenchment on two grounds:

- the first is a substantive attack on the fairness of the retrenchment, on the basis that the applicants had fixed term contracts which did not permit premature termination for operational reasons;

- the second attack is a procedural one, on the ground that although the IEC undertook a process of consultation, it was inadequate and unfair in relation to alleged deficiencies in the disclosure of information and the application of selection criteria.

THE IEC AND THE SITUATION IT FACED

3] The IEC is an organ of state and is one of the state institutions supporting constitutional democracy dealt with in Chapter 9 of the Constitution.[1] The objects and functions of the IEC include managing free and fair elections for the National Assembly,

1 Constitution of the Republic of South Africa 108 of 1996

provincial legislatures and municipal councils.[2]

4] The advent of democracy in all spheres of government has posed considerable organisational challenges for the IEC. One of these was uncertainty about the human and other resources that it needed to conduct the various elections and to maintain the organisation during the periods between elections. This has been compounded by uncertainty over the amounts that would be allocated by government for the financial needs of the IEC. In some years there were substantial cuts in the budget allocations for the IEC. This has had an inevitable impact on its ability to employ and retain staff.

5] Faced with this uncertainty, the IEC was understandably reluctant to appoint substantial numbers of personnel on an indefinite or permanent basis. That led it to enter into contracts of employment, particularly around the years 1998 and 1999, on what purported to be a fixed term basis for "*two to three years*". It is common cause that each of the four applicants signed a contract in the form of a letter of appointment signed both by the applicants and on behalf of the IEC by its Deputy Chief Electoral Officer, Mr Glen Mashinini. These letters all state that the appointment is "*for a contract period of two to three years…"*. In specifying this period, the objective of

2 S 190(1) of the Constitution; s 4(2) of the Independent Electoral Commission Act 150 of 1993; s 5 of the Electoral Commission Act 51 of 11996; and s 3 and s 4 of the Electoral Act 73 of 1998

the IEC was two fold -

- on the one hand, it was to ensure that the IEC had adequate personnel to meet the needs of the forthcoming national, provincial and municipal elections (the exact dates of which were at that stage uncertain), while

- on the other hand, the aim was to ensure that once the needs of those forthcoming elections were met, the IEC was not saddled with substantial numbers of personnel for whom there might not be sufficient work in future years (in the interim periods between elections) and for which the IEC might not get adequate funding from government.

6] The IEC did not have sufficient experience to project what component of its staff would need to be retained over time. Once the immediate task of conducting the 1999 and 2000 elections was completed, the IEC would have to be shaped into a more permanent structure. It is common cause that it was clear to all concerned that the ultimate reshaping of the IEC would probably result in a reduction of the total number of employees.

THE FACTS RELEVANT TO THE APPLICANTS

7] All four applicants were appointed in terms of these "*two to three years*" contracts, in various posts in the Western Cape. Their details are as follows:

- The first applicant, Ms Nomaza Nkopane, was appointed with effect from 1 December 1998 as Deputy Director : Logistics and Project Monitoring (Western Cape). Her position changed on 11 July 2000 to Deputy Director : Democracy/Electoral Support Services.
- The second applicant, Ms Louise Brockman, was appointed with effect from 1 October 1998 in the position of Deputy Director : Recruitment and Training.
- The third applicant, Ms Melody Tsolekile, was employed from 4 January 1999 as an administrative assistant, rendering administrative services to the Provincial Electoral Officer.
- The fourth applicant, Ms Veronica Adriaanse, was appointed with effect from 16 November 1998 as an

administrative officer.

THE CHANGES DURING 2000 AND 2001

8] It is common cause that during May 2000, the IEC took steps aimed at giving effect to the need to restructure the organisation by adopting a number of resolutions. These included a decision to promulgate new regulations pursuant to the provisions of s 12 and 23 of the Independent Electoral Commission Act, to prescribe conditions of service, remuneration, allowances and other benefits for the Chief Electoral Officer and other administrative staff. These regulations were duly promulgated in Government Notice R514 of 19 May 2000[3] ("*the 2000 Regulations*").

9] The 2000 Regulations replaced an earlier set of regulations, promulgated in 1998,[4] which had dealt with similar matters in the sparsest of terms.

10] The provisions of the 2000 Regulations which have a bearing on the present dispute are Regulations 8, 9 and 10. They read as follows:

> "***Termination of employment by the employer***
>
> *8(1) The employer may terminate the employment of an*

3 Government Gazette No 21213 of 19 May 2000

4 Government Notice R848 in Government Gazette 18992 of 26 June 1998

employee by giving to the employee at least thirty days notice of termination and the reason for the termination must be stated in the notice.

(2) If the reason for the termination of employment is the abolishment [sic] of the post in which the employee has been serving, or the reduction of staff, or the fact that the employee has reached the age of 65, the minimum period of notice to be given in terms of sub-regulation (1) is increased by fifteen days for every period of twelve months that the employee has been in the service of the employer.

(3) The employer may decide to pay to the employee in lieu of the required minimum period of notice or part thereof, the remuneration the employee would have been entitled to for that period or part thereof.

(4) When the employer terminates the employment for a reason mentioned in sub-regulation (2), the employee may demand, and is entitled to be paid the remuneration mentioned in sub-regulation (3) in lieu of the required minimum period of notice.

Termination of employment by employee

9(1) The employee may terminate his or her employment by giving to the employer at least thirty days notice of resignation.

Limited term of employment

10(1) The employer and employee may enter into a written agreement that the employment will terminate at the latest on a specified future date.

(2) In such a case, and unless the employment is terminated before that date in terms of Regulation 8 or 9, the employment terminates on that date."

11] Each member of staff was furnished with a copy of the 2000 Regulations, together with a document headed "*The Electoral Commission - Its Workforce and Its Future*" ("*the Workforce Document*"). The relevant parts thereof include the following:

> "***Organogram and staff***
>
> *Having reviewed its functions and future, the Commission gave attention to the organogram and staff. The following resolution was adopted.*
>
> *1 The adoption of the new organogram as an organisational structure for the Commission's head office is confirmed. Each PEO [Provincial Electoral Officer] must motivate to the Commission her/his staff requirements. The Commission will thereupon determine the provincial organograms and posts.*
>
> *2 The employees presently occupying posts in the new organogram are confirmed in those positions. The CEO [Chief Electoral Officer] must make a list of these incumbents and posts and submit it to the Commission.*
>
> *3 Where a filled post in the old organogram has been replaced by a post in the new organogram with a substantial change in work content, the new post is declared a vacant post while the old post is transferred to the new organogram as an additional post. The CEO must table a list of these vacant posts and the accompanying additional posts, together with the incumbents of the additional posts.*

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4 Where two or more similarly graded posts in the old organogram have been reduced to a smaller number of similarly graded posts in the new organogram, the posts in the new organogram are declared vacant posts and the posts in the old organogram are transferred to the new organogram as additional posts. The CEO must table to the Commission a list of the vacant posts, together with the related additional posts and the incumbents of the additional posts.

5 Vacant posts in the new organogram where neither paragraph 3 nor paragraph 4 applies, must be submitted to the Commission by the CEO with a recommendation whether these posts must be filled or left vacant. The Commission will thereafter make a determination in respect of each of these posts. The senior manager positions in IT, financial management and financial administration must be filled.

6 Where the position of an individual now in the employ of the Commission is not covered elsewhere in this resolution, it must be submitted to the Commission for an ad hoc decision.

7 All new appointments are made under the regulations on terms and conditions of service and will be permanent in the sense that there is no predetermined date on when the employment ends.

8 The 2 - 3 year contract appointments of all present employees are confirmed, operative from the date of commencement of employment. There is a facility for those whose contracts end before July 2001 to extend the term of their contracts until 31 July 2001.

9 The regulations on conditions of service [of 2000] will apply to all employees, including those mentioned in

paragraph 8. If any of the paragraph 8 employees prefer their employment to be governed by an existing contract, they must sign and deliver to the Commission a confirmation letter to that effect." (emphasis added)

The Workforce Document circulated to staff members further stated:

"*(c)* ***New appointments***

All new appointments will henceforth be made under these [2000] regulations and individual contracts will not be entered into. Appointments will therefore be on what is commonly known as a permanent basis.

(d) ***Present employees***

The regulations will also be applicable to present employees with two to three year contract appointments. These employees may however choose to continue on their contract appointments, which means that their employment will end on a pre-determined date and will not be permanent. Those whose contracts end before 31 July 2001 will be allowed to ask for their contracts to end on that date; but they will have to do so now.

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(e) ***Redundancy or abolition of posts***

A feature of the new regulations on conditions of service is that provision is made for cash payments to employees with more than one year service who is given notice because of staff reduction. This benefit will not apply to limited time contract employees.

f) The way forward

Every staff member will receive a written communication confirming the post in which she or he will be serving. Where the staff member has a choice to continue on a two - three year contract appointment basis, the implications of that choice will be explained and a cut off date for him or her to exercise that choice will be given.

Conclusion

The Commission trusts that the information given will set the minds of its employees at rest and enable each of them to make the choices that are right for him or herself. In approving the resolution and in making the regulations the Commission has attempted to be as fair as possible to especially the present corps of employees, who are the people that have taken us all

through the 1999 elections and who are the people that will hopefully form and remain the corps of excellence of this organisation on the way into the future…" (emphasis added).

12] This document was followed shortly thereafter by a letter, dated 30 June 2000, sent to each affected employee who had signed a "*two to three year*" contract, including the applicants. The letter read as follows:

"***CONFIRMATION OF EMPLOYMENT***

It is hereby confirmed that you are currently in the employ of the Electoral Commission as a ….. [the position relevant to each recipient is here inserted] … with the remuneration package of ….. in the Western Cape Provincial Office.

As a brief background, kindly note that in terms of s 12 of the Electoral Commission Act, 1996 (Act 51 of 1996), the Chief Electoral Officer must, in consultation with the Commission, appoint such officers and employees of the Commission as he or she may consider necessary to enable the Commission to exercise its duties and to perform its functions effectively. It furthermore requires that the conditions of service, remuneration, allowances, subsidies and other benefits be prescribed by the Commissioner.

The Regulations on the Conditions of Service Remuneration, Allowances and Other Benefits of the Chief Electoral Officer and Other Administrative Staff published in Government Gazette No 21213, dated 19 May 2000… govern your

employment with the Electoral Commission. You will notice that the conditions of employment are essentially the same as those that applied previously.

If however you were appointed on 2 to 3 year basis, you may elect that your term of employment should be governed by the contract that came into existence as a result of that appointment. You can exercise this choice by completing the attached form… and delivering it to the Provincial Electoral Officer on or before 14 July 2000.

Should you decide to continue on the 2 to 3 year appointment basis and your term of employment ends before 31 July 2001, you have the further choice to extend your term of employment until the 31 July 2001. You must however do so by means of the attached … form which must be completed and delivered to the Human Resources Officer by the PEO on or before 14 July 2000.

You are also made aware of the opportunity to apply for positions within the organisation when certain vacant positions are advertised in the near future.
….” (emphasis added)

13] Accompanying this letter from the CEO was a form which had to be filled in and signed by each affected employee. The form read as

follows:

"***CONFIRMATION OF EMPLOYMENT***

1 *I acknowledge receipt and thank you for your letter dated …. I understand the terms and conditions of my employment as contained in the regulations.*

2 *I was appointed on a 2 - 3 year basis and my term of employment commenced on (date/month/year)… and will end on … (date/month/year).*

I choose only one of the following options stated below:

I tick in the box provided to indicate my choice.

Option A :

I choose that my term of employment as stated in paragraph 2 above be applicable.

Option B :

I choose that my term of employment be extended to end on the 31 July 2001.

Option C :

I choose that my term of employment be governed by the

regulations.

…." (underlining added)

14] It is common cause that all of the individual applicants (and various other employees whose position was similar to theirs) signed and submitted such a form. It is also common cause that the applicants selected Option A in the form confirming that they all "*choose that [our] term of employment as stated in paragraph 2 above be applicable*".

- The first applicant, Ms Nkopane, confirmed that her period of employment would end on 14 December 2001.

- The second applicant, Ms Brockman, confirmed that her employment would terminate on 4 October 2001.

- The third applicant, Ms Tsolekile, confirmed that her employment would end on 4 January 2002.

- In the case of the fourth applicant, Ms Adriaanse, there was at the outset of the trial disagreement between the parties as to what form she had submitted and what option she had selected. By the end of the trial, this

disagreement was resolved on the basis that the form appearing at page 39 of the papers was the one that applied in her case. In terms of that form, she elected to have her term of employment end on 16 November 2001.

15] Accordingly, each of the applicants chose to fix a specific date for the termination of their contracts which had previously been somewhat vaguely stated to be for the period of "*two to three years*". A definite termination date was now set. This option was selected by them rather than their electing to become indefinite permanent employees (which would have been the case had they selected Option C).

16] The selection of Option A with the specific dates set out in the forms submitted by the applicants was accepted by the IEC.

17] The question whether the agreement between the applicants and the respondent on a fixed termination date permitted earlier termination in the form of retrenchment prior to that agreed termination date is at the heart of the present dispute and will be considered below.

18] It is common cause that towards the end of 2000, the IEC was informed of the precise amount which the National Treasury would

allocate to it for the next financial year, beginning on 1 April 2001. The amount was R100 million - substantially less than the R741 million for the 1998/99 financial year and R980 million for 1999/2000. The projected allocation for 2001/2002 was R105 million and for 2002/2003 R400 million.

19] This reinforced the realisation that the IEC would have to reach finality on the long term shape and structure of its organisation at the beginning of 2001. It undertook a review of its core functions and operations. On its completion, it made clear that the retrenchment of some of the IEC's employees was a real possibility.

20] This resulted in the IEC starting a process of consultation from early February 2001 with a view to possible retrenchments.

21] All IEC members have access to a personal computer and the IEC use an e-mail system for communication purposes. During February and March 2001 it was in a position to release staff members from their usual activities where necessary, making it possible to allow many and at certain times all employees to focus their energies exclusively on the restructuring process.

22] Through the e-mail system, all staff were informed that a meeting would be held at the IEC head office on 9 February 2001 where the

IEC would inform staff about its proposals on restructuring and the process it intended to follow.

23] All PEOs and all head office staff attended the meeting held on that day. At the meeting, the IEC distributed a document regarding its proposed rationalisation. In this document it motivated why restructuring had become necessary and outlined the process it planned to follow. A document containing time frames in which the restructuring process was planned to be finalised was also distributed, together with a proposed structural organogram reflecting the positions which the IEC proposed in the new permanent structure.

24] In the absence of a trade union or an organised staff association at the IEC's workplace, the IEC proposed that employees should organise themselves into a staff consultative team that would consult with the IEC on their proposed restructuring.

25] At the meeting held on 9 February 2001, the head office staff elected their representatives for the staff consultative team. It was proposed that employees in each of the provincial offices would at their provincial report back meetings, arranged for Monday 12 February 2001, elect two members to represent them in the staff consultative team. The second applicant, Ms Brockman, was elected as one of

the two representatives for the Western Cape office. The PEOs and the senior managers in the IEC's national office each established a separate consultative forum.

26] In addition, all employees were informed that they were free to make individual submissions on any issue of concern during the consultation process. It was arranged that the staff consultative team would focus on a regular basis, interact with their constituency to disseminate information and to obtain input and mandates. All the IEC's proposals and other important announcements were distributed through the e-mail system to all employees.

27] To define its point of departure, the staff consultative team distributed two documents, being a draft statement of intent and a set of negotiating principles, to all employees and to the IEC.

28] After constituting itself as a representative body within the contemplation of s 198(1)(d) of the Labour Relations Act ("*LRA*"),[5] the staff consultative team deliberated and interacted with its constituency and eventually responded in writing to the documents tabled by the IEC at the meeting of 9 February 2001. This presentation, entitled "*Staff Position 2001*", was presented to the IEC at a meeting held on 19 February 2001. The presentation

5 Labour Relations Act 66 of 1995

included a request for information.

29] On 21 February 2001, the IEC responded in writing to the staff's request for information.

30] At a meeting held on 21 February 2001, the staff consultative team submitted its submissions on the IEC's proposed organogram. The IEC in turn submitted a document on proposed options for redundancy selection criteria. This document was distributed to all staff after the meeting.

31] The staff consultative forum submitted its proposals concerning selection criteria on 23 February 2001. The parties agreed that incumbents in posts included in the new structure would be retained and thereafter applications for new positions would be invited from remaining employees.

32] The IEC conveyed its response to the staff proposals on 23 February 2001. It submitted a further draft of its organogram on the same day, and final drafts thereof on 26 February 2001.

33] On 26 February 2001 the staff team submitted their proposals on the exit and social plans.

34] On 27 February 2001 the selection process for positions below PEOs and senior managers commenced.

35] It was agreed that members of the staff consultative team would monitor and assess the fairness of the process of selections of employees below the senior management level.

36] For those posts not confirmed, the remaining posts were advertised internally.

37] The process was completed by 6 March 2001. Those employees who were not confirmed or selected for employment in advertised posts were retrenched.

38] The parties agreed on payment of an exit package calculated as follows:

- one month's salary in lieu of notice;
- a sum equivalent to 15 days' salary for each completed year of service;
- two weeks' salary for each year of service with the IEC; and

- leave pay due to each retrenchee.

39] All four applicants were sent notices early in March 2001 that their employment would be terminated at the end of that month. They were paid the relevant benefits in accordance with the retrenchment package scheme referred to above.

SUBSTANTIVE FAIRNESS

40] The essential question for purposes of assessing the substantive fairness of the retrenchment is whether the applicants were employed in terms of *fixed term* contracts of employment.

41] If an employment contract is truly a fixed term contract - of the type contemplated in *Tiopaizi v Bulawayo Municipality* 1923 AD 317 - it is legally incapable of valid premature cancellation for any reason other than material breach.[6] An employee whose fixed term contract has been terminated for a reason other than breach is not confined to a contractual claim for damages. The dismissal can also be challenged as being unfair and relief for this can be claimed under the provisions of the LRA.

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6 *Fedlife Insurance Ltd v Wolfaardt* (2001) 222 ILJ 2407 (SCA); 2002 (1) SA 49 (SCA); [2002] 2 All SA 295 (A)

42] In *Buthelezi v Municipal Demarcation Board,*[7] Jafta AJA (with whom Zondo JP and Davis AJA concurred) stated:

> "*… There is no doubt that at common law a party to a fixed-term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled later to seek to escape its obligations in terms of the contract on the basis that*

7 (2004) 25 ILJ 2317 (LAC) paras 9 and 11

an assessment of the future had been erroneous or had overlooked certain things. Under the common law there is no right to terminate a fixed-term contract of the employment prematurely in the absence of a material breach of such contract by the other party… I have no hesitation in concluding that there is no unfairness in such a situation. This is so simply because the employer is free not to enter into a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If he chooses to enter into a fixed-term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materialises. The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in the exercise of that choice."

43] The Labour Appeal Court in the *Buthelezi* case rejected a claim for unfair dismissal based on operational requirements on the ground that the employer had acted unfairly by retrenching the employee prior to the expiry of the fixed term of the employment contract.

44] In the present matter, the pivotal question is whether the specific contracts concluded with the individual applicants are true fixed-term contracts. If that is the case, the contracts could not fairly be terminated before the expiry of that term.

45] It is important at the outset to note that the contracts originally concluded with the applicants, in the form of the letter of appointment issued to each of them, provided that the "*contract period*" was to be "*of two to three years*". This provision is vague and clearly does not fix with any certainty the term of the contract. At best, it is to the effect that the term of the contract is to be no less than two years and no more than three years, but it fails to specify how and by whom the actual date of termination is to be determined. From the evidence led, in particular that of Ms Brockman (the second applicant), it appears that there was a general understanding that the parties would reach agreement at some stage between two and three years after the conclusion of the employment contract as to the actual termination date.

46] This brings us to a consideration of the effect of the form that was completed and correspondence that was exchanged at the stage when employees were given various options, to which reference has been made above.

47] Option A in the form - being the option selected by each of the applicants - stated :

> "*I choose that my term of employment as stated in paragraph 2 above be applicable*".

48] The standard form, as completed by Ms Brockman, stated in paragraph 2 that:

> "*I was appointed on a 2 to 3 year basis and my term of employment commenced on [Date/Month/Year] 5 October 1998 and will end on 4 October 2001 …*"

49] All of the applicants filled in similar forms, specifying the relevant date that applied to each of them, with the termination date being at the end of a full three year period.

50] It is common cause that all of these forms were accepted by the respondent.

51] On the face of it, what is contained in paragraph 2 and Option A in the form indicates that the contract of employment would indeed be for a fixed term of three years, with the termination date now

specified by the employee and accepted by the employer.

52] That is not the end of the enquiry. For regard must be had to other relevant provisions of the form and the correspondence that was exchanged as well as the 2000 Regulations.

53] When these various documents and provisions are read together, they are regrettably far from being a model of clarity and certainty. To the extent that they are vague and uncertain, and capable of more than one interpretation, it would in my view be appropriate to prefer a construction which is the most practical and sensible, and if there are two equally practical interpretations capable of being reached, the one favouring the employee should be preferred, having regard to the fact that the employer was the party which drafted the relevant provisions. This approach accords with applicable principles under the law of contract for the interpretation of contractual terms. The applicants' claim is not a contractual one, but relies instead on the provisions of the LRA dealing with unfair dismissals. Despite this, the principles of contractual interpretation to which I have referred apply in a matter such as this, because those principles and particularly the *contra proferentem* rule,[8] are aimed at achieving what is sensible and fair - considerations which must inform the

8 *Cairns (Pty) Ltd v Playdon and Co Ltd* 1948 (3) SA 99 (A); *British American Assurance Co v Cash Wholesale* 1932 AD 70 at 74 - 5

approach of this court to dismissal disputes on the basis of what is lawful and equitable.

54] Paragraph 1 of the form states:

> "*I acknowledge receipt and thank you for your letter dated … I understand the terms and conditions of my employment* ***as contained in the regulations***" (emphasis added).

The reference to the regulations is a reference to the 2000 Regulations. I shall consider their contents and effect at a later stage of this judgment.

55] It was contended by Ms Brockman in her evidence that by selecting Option A, she and the other applicants were not subject at all to the 2000 Regulations and that none of their terms and conditions of employment were governed by the regulations.

56] This contention is in my view unsustainable. This is particularly so where paragraph 1 of the form (which I have quoted above) specifically records the statement by each employee that "*I understand the terms and conditions of my employment as contained in the regulations*". The contention is also not capable of being reconciled with what is contained in the Workforce Document, to

which reference has been made above. In particular paragraphs 8 and 9 of that document state:

> "*8. The 2 - 3 year contract appointments of all present employees are confirmed, operative from the date of commencement of the employment. There is a facility for those whose contracts end before July 2001 to extend the terms of their contracts until 31 July 2001.*
>
> *9.* ***The regulations on conditions of service will apply to all employees, including those mentioned in paragraph 8. If any of the paragraph 8 employees prefer their employment to be governed by an existing contract, they must sign and deliver to the Commission a confirmation letter to that effect."*** (emphasis added)

57] In each of the three Options A, B and C, there is reference to "*my* ***term*** *of employment"***.**

- Option A is a choice that *"my* ***term*** *of employment as stated in paragraph 2 above be applicable*".

- Option B involves a choice that *"my **term** of employment be extended to end on the 31 July 2001"*.

- Option C is a choice that *"my **term** of employment be governed **by the regulations**"*

58] The phrase "***term** of employment*" must, read in its context, be understood to refer to the period or duration of the employment relationship. While the period or duration of employment is one of the *terms* and conditions of employment, the expression "*term*" in the singular, and read in the context of the options, must in my view be confined to the period or duration of employment and not be regarded as relating to all terms and conditions of employment in their entirety.

59] The contention to the contrary to Ms Brockman in her testimony therefore cannot be sustained. It was rightly accepted by counsel for both parties that the opinion of any of the applicants as to the legal effect of the form is not decisive and that the interpretation and effect of the provision is a legal question to be determined by the court applying the normal principles of interpretation.

60] I accordingly conclude that the applicants - and all other employees

in a similar situation - were indeed subject to the relevant provisions of the 2000 Regulations. This requires us now to turn to the effect of the provisions of the regulations and in particular Regulations 8, 9 and 10 which have been quoted in paragraph 10 of this judgment above.

61] Regulation 8 provides for termination of employment by the employer on thirty days notice. Provision is also made for additional notice to be given in the case of a redundancy.

62] Regulation 9 deals with termination of employment by employees, in other words resignation. This has no particular significance in the present context.

63] Regulation 10 is headed "*Limited Term of Employment*" and provides as follows:

> "*10(1)* *The employer and employee* ***may enter into a written agreement*** *that the employment will terminate* ***at the latest*** *on a specified future date.*
>
> *(2)* *In such a case, and* ***unless the employment is terminated before that date in terms of***

Regulation 8 or 9, *the employment terminates on that date."* (emphasis added)

64] An agreement "*that the employment will terminate* ***at the latest*** *on a specified date*" as contemplated in Regulation 10(1) would not constitute the classic form of fixed term contracts such as those referred to in the *Tiopaizi* case.[9] It would instead constitute a *maximum* term contract, as referred to by Todd AJ in *Mafihla v Govan Mbeki Municipality.*[10]

65] The regulations do not specify that all existing "*2 to 3 year*" contracts of the type entered into by the applicants would be covered by or converted to maximum term contracts governed by Regulation 10.

66] It was argued by Mr Moahloli, who appeared for the applicants, that the 2000 Regulations could not act retrospectively and could only apply to new contracts that were concluded after the regulations came into force. On this basis, so he contended, the regulations could have no bearing on the applicants. In my view this loses sight of the fact that the form containing the option selected by each of the applicants was submitted by them and accepted by the respondent after the regulations came into force. As I have indicated earlier,

9 *Supra*
10 [2005] 4 BLLR 334 (LC)

prior to the selection of the option, the "*2 to 3 year*" contract was uncertain as to the actual termination date. The selection of the option with a specified termination date, which was accepted by the employer, for the first time determined the actual termination date. Accordingly, an agreement was now reached between the parties - after the regulations had come into force - as to when the employment relationship would come to an end.

67] However, for Regulation 10 to apply, the agreement must be one which is to the effect that "*the employment will terminate* ***at the latest*** *on a specified future date*" (emphasis added). The question which remains is whether the agreement reached between the parties on the basis of the option selected by means of the form was to the effect that employment would terminate *at the latest* on the dates specified, or whether it would terminate definitely on the date specified, without leaving it open to the employer to terminate the employment relationship prematurely.

68] As I have indicated above, the form and the related documents are not drafted in a suitably clear manner. I am of the view however that the appropriate interpretation is that the true effect of what was selected in terms of Option A was that this was truly a fixed term - rather than a maximum term - employment contract. As seen above, the wording of paragraph 2 specifies a particular date on

which the "*term of employment… will end"*. There is no indication in that paragraph to this being merely the "*latest*" date by which the contract would end. Similarly, in the wording of Option A itself, an employee who selects that option states that the choice is made "*that my term of employment as stated in paragraph 2 above be applicable"* - without any indication that what was being selected was merely a maximum period rather than the actual date of termination.

69] Similarly, in Option B, the choice is "*that my term of employment be extended to end on the 31 July 2001*". This, as the other documents indicate, was to apply to those employees whose "*2 to 3 year*" contracts were due to expire before 31 July 2001, and they were now given an option to extend this to 31 July 2001. Again, there is no indication that this was merely to be the *latest* date for termination, leaving it open to the employer to terminate the employment at any earlier stage.

70] It is also significant that in relation to Option C, the choice is that "*my term of employment be governed by the regulations*". This in my view is strongly indicative of an intention that only employees who selected Option C would be subject, in relation to the term or period of their employment, to the regulations while any employees, who selected either Option A or Option B, would not be subject to

the specific provisions in the regulations governing termination of employment by the employer under Regulations 8 and 10.

71] It is also significant in my view that in the letter of 30 June 2000, which accompanied the form, there is reference to the 2000 Regulations, the contents of which are stated to be "*essentially the same as those* [conditions of employment] *that applied previously*" but the letter continues:

> "*If **however** you were appointed on a 2 to 3 year basis, you may elect that your term of employment should be governed by the **contract** that came into existence as a result of that appointment. You can exercise this choice by completing the attached form … by delivering it to the Provincial Electoral Officer on or before 14 July 2000.*
>
> *Should you decide to continue on the 2 to 3 year appointment basis and your term of employment ends before 31 July 2001, you have the further choice to extend your term of employment **until the 31 July 2001..**".*

This wording - fairly vague as it is - is suggestive at least that by selecting either Option A or B, an employee would be fixing the actual date of appointment and would not be subject to those

provisions of the 2000 Regulations that deal specifically with termination on notice by the employer.

72] The point is reinforced by the reference in para (d) of the Workforce Document (quoted above) which indicates that employments with "*2 to 3 year*" contracts would have the choice of continuing their appointments and that this "*means that their employment* ***will end on a pre-determined date***" (emphasis added). Again, this indicates that the date selected would be the definite or actual date of termination and not merely "*the latest*" date for termination.

73] The interpretation which I favour, as set out above, is in my view the most sensible and practical one. To the extent that the provisions of the documents, including the form, are equally capable of different interpretations, it must be borne in mind that the respondent was the author of the relevant documents. It could easily have worded the form and the related documents to make it clear that the employment would terminate "*at the latest*" on the date specified and was subject to earlier termination for operational reasons. To the extent that it failed to make its intention clear, the interpretation which favours the employee must, in accordance with the *contra proferentem* rule, be preferred.

74] Accordingly, I conclude that what was agreed to between the parties

in terms of the form had the effect of a fixed term - rather than a maximum term - contract of employment. It must follow that the respondent had no lawful basis - and therefore acted unfairly - in its premature termination of the contracts of employment of the applicants.

PROCEDURAL FAIRNESS

75] Because of my conclusion above that the dismissals were substantively unfair it is not strictly necessary for me to consider the remaining issue of procedural fairness. Had it been necessary for me to decide that issue, I would have been inclined to find there was nothing unfair from a procedural point of view. There was in my view a lengthy and comprehensive consultation process. The contention that insufficient information was provided is in my judgment unpersuasive. This is particularly so where the team elected to represent the staff itself had divergent views as to the adequacy of the information and there was no serious attempt to bring matters to a head by a clear request for information that was allegedly deficient. It was not demonstrated that the information allegedly lacking was needed for proper and meaningful consultation. Nor is there any merit in the complaint that the application of selection criteria was unfair.

APPROPRIATE RELIEF

76] The relief claimed takes the form of compensation. There was a faint attempt made during the trial to contend that in the event of my finding that the dismissal was unfair, the appropriate relief would be to award compensation equivalent to twelve months salary.

77] In my view, this cannot be sustained. Where the very basis of the finding of substantive unfairness is that the employment relationship was agreed to endure until the specified termination date, there can be no basis in law or in equity for any compensation for a period which extends beyond that termination date. Ultimately this was conceded by Mr Moahloli during argument on behalf of the applicants, and correctly so.

78] Although the dismissals occurred prior to the amendments to s 194 of the Labour Relations Act brought about by the Labour Relations Amendment Act 12 of 2002, it is appropriate to apply the amendments to a matter such as this. This has the effect that the Labour Court has the discretion to award such compensation as it determines to be "*just and equitable in all the circumstances*" but not more than the equivalent of 12 months' remuneration.[11]

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11 *Fouldien v House of Trucks (Pty) Ltd* [2002] 12 BLLR 1176 (LC); *Cutts v Izinga Access (Pty) Ltd* [2004] 8 BLLR 755 (LC), para 31; *FAWU v S A Breweries Ltd* [2004] 11 BLLR 1093 (LC)

79] Counsel for the respondent, Mr van der Riet, argued that it was incumbent on the applicants to mitigate their damages and that they had failed to show that this has been satisfied. He referred also to the fact that Ms Brockman had, on her own evidence, secured alternative employment immediately after her retrenchment.

80] Fairness dictates that meaningful compensation should be awarded against the respondent for its unfair and premature termination of the fixed term contracts of employment. In my view, the appropriate and fairest measure of compensation is an amount equivalent to the applicants' remuneration for the remaining period of their employment contracts, but from this should be deducted the severance package which each received, which equated to approximately three months' remuneration.

81] The calculations are as follows:

- <u>First applicant</u>

Remaining period of appointment: 8 months

Severance package paid	- 3 months
Period to be compensated	= 5 months
Monthly remuneration at dismissal	xR 21 434,42
Total compensation payable	=R107 172,10

- Second applicant

Remaining period of appointment: 6 months

Severance package paid	- 3 months
Period to be compensated	= 3 months
Monthly remuneration at dismissal	xR19 044,00
Total compensation payable	=R57 132,00

- Third applicant

Remaining period of appointment: 9 months

Severance package paid	- 3 months
Period to be compensated	= 6 months
Monthly remuneration at dismissal	xR 8 145,92
Total compensation payable	=R48 875,52

- Fourth applicant

Remaining period of appointment: 7,5 months

Severance package paid	- 3 months
Period to be compensated	= 4,5 months
Monthly remuneration at dismissal	xR 9 676,42
Total compensation payable	=R43 543,89

ORDER

82] In the result, I make the following order:

[a] The respondent is to pay compensation to the applicants as follows:

- the first applicant R107 172,10
- the second applicant R 57 132,00
- the third applicant R 48 875,52
- the fourth applicant R 43 543,89

[b] interest shall be paid by the respondent on the above amounts at the rate of 15,5% per annum from the date of judgment to date of payment;

[c] the respondent is to pay the applicants' costs.

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Paul Kennedy
Acting Judge of the

09052

Labour Court

Counsel for the applicants:	*Adv K Moahloli instructed by Bagraims Attorneys*
Counsel for the respondent:	*Adv J G van der Riet SC, instructed by Cheadle Thompson and Haysom*
Date of Judgment:	*27 October 2006*