IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C359/17

In the matter between:

DEPARTMENT OF AGRICULTURE
FORESTRY AND FISHERIES **Applicant**

And

MISELWA PRICILLA TETO **First Respondent**

CHARLES RODGERS TITUS **Second Respondent**

RANDAL PETER JOHN KOOPMAN **Third Respondent**

GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL **Fourth Respondent**

COMMISSIONER JUSTICE NEDZAMBA **Fifth Respondent**

Date heard: 1 November 2018

Delivered: 6 February 2019

JUDGMENT

RABKIN-NAICKER, J

[1] This is an opposed application to review an award issued by the fifth respondent (the Arbitrator) under case number GPBC2071/2016. He found that the first to third respondents were dismissed and ordered the applicant to reinstate them with retrospective effect. The applicant was in addition ordered to pay back pay to the individual respondents in an amount equivalent to 8 months of their salary.

[2] The background to the dispute is set out in the Award as follows:

> "6. The applicants were initially employed by the respondent on a one year fixed-term contract from 15 July 2013 to 14 July 2014. Teto and Koopman were employed as Senior Administrators and on their last day of work they earned a gross salary in the amount of R18, 947.00. Titus was employed as Assistant Programme Manager earning a gross salary in the amount of R31,000 per month.

7. It is common cause that when the applicants' fixed term contract ended on 14 July 2014, they continued to work for the respondent until the date of their alleged dismissals on 26 August 2016.

8. The applicants' case is that they became permanent employees of the respondent when they were allowed to work beyond their fixed term contracts. They claim they were unfairly dismissed when the respondent's director telephonically instructed them to clear their offices and to hand the respondent's equipment and to vacate the respondent's premises. According to them there was no reason for their dismissal and they were not afforded an opportunity to explain why they should not be dismissed.

9. The respondent's case is that the applicants were not employed by the respondent. According to the respondent, when the applicants' fixed term contracts came to an end they ceased to be the respondent's employees and instead they became employees of Management for Excellence, a temporary employment services (TES).

10. Initially the respondent submitted that I should join Management for Excellence, as a second respondent and argued that the Council has no jurisdiction to arbitrate the dispute. Such submission was abandoned and the hearing consequently continued.

11. The applicants seek reinstatement."

[3] There are a number of issues raised by the applicant in this review. For the purposes of this judgment I focus on the submission that the Arbitrator failed to have regard to the fact that the Programme on which they worked was grant dependent for three years. His award is premised on the finding that the individual respondents became permanent employees.

[4] The transcript of the arbitration hearing reflects that on the 13 July 2014, one day before the fixed term contract expired, the applicant's Chief Director called them to meet in Denver Barron's office. He was the Programme Manager for the Applicant's Working for Fisheries Programme going forward. The evidence of Ms Teto is recorded as follows:

"…. And then it was myself, Charles and Randall Koopman and Denver and Ms Sue Middleton. And then Ms Sue Middleton asked to work with Denver since we were done with prep (?) 2013. And then Denver was busy setting up the Working for Fisheries Programme. And then we agreed. Unfortunately we were not told up until when…."

[5] Under cross-examination she confirmed her understanding that the contract had become open ended. Teto testified that the individual respondents were on PERSAL for the fixed term contract and because of that they were getting 37% on top of what they were getting subsequent to that. She stated :"..and all I can tell now is that what we used to get, from 2013 to 2014 as well as from 2014 to 2016, there was a difference on my salary. I got less from 2014 to 2016 because 37% was not added."

[6] The arbitration record reflects that Denver Baron was also employed on a 12 month fixed term contract. He testified that the applicant decided that one of the service providers implementing a project of the applicant should be approached to pay "our staff" and that additional funds would be added to their budget. At the time of the expiry of the fixed term contract it was Jaymat Enviro Consultants one of the applicant's implementers. Two other implementers were used later on. The arrangement is explained as follows:

"We would add the funds to the implementer's contract in order pay the staff for the work that they were performing at DAFF. But why the arrangement was agreed to in-house was that whilst that was happening we would then go

through the process of establishing this unit, the approval process within DAFF, then the advertisements, and of course then the appointment, and until such time, because the function was required, until such time we would then – everyone would be employed and paid through a – whichever service provider we could utilize at the time."

[7] Baron insisted that there was never an employment arrangement between the individual respondents and the implementers. It was a payment arrangement:

"I mean, everyone was working at DAFF. They came to work at DAFF. They reported to, when I was here, to me. When I was not here they reported to whoever the supervisor superior was. And all the functions that we – the unit did, the individuals, was for DAFF. …..There was never a contract with any of the implementers between these employees…..When the individual employees would go out to go monitor projects that were implemented by the various implementers and the service providers they would be representing DAFF when they do that."

[8] Under cross-examination by the applicant's representative at the arbitration, he testified that the arrangement was sanctioned at the highest level of the Department:

"…there'd be a business plan that was attached to the implementer's contract, and in this business plan the provision would be made for the funding – or the payment of the salaries for the individuals and the DDG would sign those business plans. That was the process. So that was your contractual arrangement in place. Thereafter on a monthly basis, the times – the payments to be made to the individuals would be signed off by the Chief Director, Ms Middleton, and that timesheets – or the payment instruction would then be given to the – or submitted to the implementer for payment…"

[9] It is of note that Baron did not agree that the arrangement was open-ended and explained that the Programme's funding Cycles were for a period of three years:

"Every year by November National Treasury would inform the Department what the funding cycle is for the next three years. So at any given stage there would be a three-year period whereby which the Department would be informed whether funding would be available from Treasury for the programme or not. So hence that is why the DG at the time approved the contracts for a three year period, because the funding was always guaranteed for a three year period from treasury."

[10] The applicant's witness at the arbitration Mr Marinus' evidence was also to the effect that the applicant was the employer of the individual respondents. The arbitrator summarises his evidence as follows:

"Mr Desmond Marinus (Marinus) is employed by the respondent as Techical Manager for fishing harbours. During October 2016 until 31 March 2017 he acted as programme manager. He worked with the applicants in some of the harbours. According to him, applicants were employed and worked for the respondent. During 2014 there was a submission for the structure and 11 positions were approved but only four of the positions were filled. He tried to fill the remaining seven but that was not approved. He is currently using data capturers to perform the fisheries duties."

[11] As referred to above, the applicant challenges the Award on various basis and contends that the result of the award is unreasonable. The challenge at its core relates to the following reasoning in the Award:

"Applicants' employment status

40. It is common cause that the applicants were all employed on a one year fixed term contract. Their fixed term contracts ended on 14 July 2014 and they were not renewed or extended. Evidence shows that the applicant (sic) continued to work beyond the expiry of their fixed term contract until 30 August 2016. For the period between 14 July 2014 and 30 August 2016 the applicants worked without a contract. According to the applicants they became permanent employees of the respondent.

41. There is an established principle that if an employee is allowed to work beyond the end of a fixed term contract the relationship is tacitly converted into a permanent contract. In this regard, see the Labour Court case in Owen & Others v Department of Health, KwaZulu-Natal (2009) 30 ILJ 2461 (LC). In that case the employer allowed employees (Medical Doctors) to continue to work on the same terms and conditions of employment after their fixed term contract had expired. The Court accepted and commended the approach suggested by a labour law author, John Grogan, that a tacit renewal of the contract on the same terms but for an employment relationship of indefinite duration."

42. Having applied the principles to the facts before me, I find that the applicants' fixed term contracts transformed into a permanent employment on 14 July 2014 when they verbally accepted to continue working for the respondent."

[12] A reading of **Owen & others v Department of Health, KwaZulu-Natal** [1]however does not accord with the Arbitrator's understanding recorded above. In that case the Court per Van Niekerk J stated the following:

"…..The issue is whether, after 1 August 2005, the applicants were party to an implied contract that limited their continued employment to 31 January 2006 and whether it can be said in those circumstances, that they were

[1] (2009) 30 ILJ 2461 (LC)

dismissed for the purposes of the Act when that contract terminated by the effluxion of time on that date.

The approach suggested by Grogan, ie that a tacit renewal of the contract on the same terms but for an employment relationship of indefinite duration, is commendable at the level of principle, but each case is fact and context specific and the application of the principle must account for this."

[13] The fact specific context of this case was not taken into account by the Arbitrator. On the evidence before him, the terms and conditions of the individual respondents did not remain the same after the expiry of their fixed term contracts, in that they were no longer on Persal and received less remuneration as a result. In addition, the evidence from Baron (who was a witness for the individual respondents) was that the Programme was funded in three year cycles on the say so of National Treasury.

[14] On the evidence before the Commissioner an employment relationship existed between the parties after the expiration of the one year fixed term contract, from the 14 July 2014 until the 26 August 2016, a period of some two years. The submissions made in this Court (but abandoned in the Bargaining Council) that the service providers were of the nature of a TES were without merit. In the Court's view, the Arbitrator dealt succinctly and, with respect, correctly with this issue in his Award:

"Evidence shows that Managing for Excellence or any implementing agent neither procured nor provided applicants to the respondent. The evidence suggests that the applicants were in fact procured and offered employment by the respondent. It is clear that Managing for Excellence Company was not a TES and therefore not the applicants' employer for the purposes of the LRA….I agree with the applicants that the Managing for Excellence's

involvement in their employment relationship was to act as a conduit through which their salaries were paid…"

[15] In the Court's view, the Arbitrator's finding that an employment relationship existed between the parties and that the individual respondents were dismissed is well within the bounds of reasonableness. However, given the evidence of the three year cycles for the funding of the Programme, the employment of the individual respondents after the expiry of the one year fixed term contract, could not be considered as permanent.

[16] The sudden manner of the individual respondents' dismissal, without explanation or a hearing, deserves some form of solatium. Whatever the nature of the Programme, a state employer cannot ignore and indeed attempt to avoid the employment laws established under our Constitution in the manner it tried to do in this case. In all the circumstances, the Award should be set aside. This is a matter in which no purpose would be served in remitting the Award. It is also a case in which, on grounds of equity, I am of the view that applicant should pay the costs, even though partially successful.

[17] It is not necessary for me to deal with the point in limine raised by the respondents in the proceedings as the original papers of the applicant were filed subsequent to that hearing.

[18] I make the following order:

<u>Order</u>

1. The award under case numberCPBC2071/16 is reviewed and set aside and substituted as follows:

2. The dismissal of the First, Second and Third Respondents was substantively and procedurally unfair;
3. The applicant is to pay the First, Second and Third Respondents compensation in an amount equivalent to 12 months salary less deductions as follows:

    3.1 An amount of R18,940 X 12 =R 227 280 (Two hundred and twenty seven thousand and two hundred and eighty Rand) each to the First and Third Respondent;

    3.2 An amount of R31,000 X12 = R372,000 (Three hundred and seventy-two thousand Rand) to the Second Respondent.

4. The amounts in 3.1 and 3.2 above are to be paid within 20 court days of this order.

5. The applicant is to pay the costs of this application.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Thabani Masuku S.C. instructed by the State Attorney

First to Third Respondents: Veronique Barthus instructed by Weber Wentzel