



# ARBITRATION AWARD

COMMISSIONER: JANINE CARELSE

CASE NO: PSHS15-18/19

DATE OF AWARD: 15 JUNE 2018

In the matter between:

**NYARAI HILLARY MIRONGA**

**APPLICANT**

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

**RESPONDENT**

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing commenced on 8 June 2018 and was concluded on said date. The Arbitration hearing took place at The Western Cape Nursing College in Cape Town in terms of Section 186(1)(b) of the Labour Relations Act 66 of 1995, as amended, ("the LRA"). The proceedings were digitally and manually recorded.
2. The applicant, Mrs Nyarai Hillary Mironga, was present and represented herself, whilst the respondent, Department of Health- Western Cape, was represented by its Labour Relations Officer, Mr Abraham Solomon (Mr Solomon).

3. Both parties handed in documentary evidence. The applicant handed in a one-page document and the respondent handed in a bundle of documents which was marked bundle "A".
4. The matter proceeded in English.

### **ISSUES TO BE DECIDED**

5. The issue to be determined is whether the applicant had a reasonable expectation to renewal of her fixed-term contract, and if so, whether the non-renewal constituted an unfair dismissal.

### **BACKGROUND TO THE DISPUTE**

6. The applicant was employed by the respondent as a Radiographer on a fixed-term contract from March 2015 to December 2017. The applicant alleged that she has a reasonable expectation that the respondent would renew her contract of employment on the basis of its communication with her and an advisory that was issued by the Department of Home Affairs indicating that all persons in possession of a Zimbabwean Special Permit (ZSP) and who applied for renewal of their work permit had to remain in employment and continue providing services to their employers. The respondent contests that an expectation was created that the applicant's contract would be renewed. The applicant claims that she was dismissed as a result and that her dismissal was unfair. She therefore seeks the renewal of her contract on the same terms.

### **SUMMARY OF EVIDENCE AND ARGUMENT**

#### **THE APPLICANT'S EVIDENCE AND ARGUMENT**

7. The applicant gave evidence under oath and stated that prior to her contract ending on 30 December 2017 she liaised with HR about the renewal of her contract and she

advised them that she had applied for the renewal of her work permit. She presented a letter in evidence that was drafted by LS Dingile who works for the respondent in its HR unit that states that a valid work permit is required before the applicant's employment contract can be renewed. She then used this correspondence to apply for the renewal of her work permit because Home Affairs required her to submit proof of employment when she applied for the renewal of her work permit. She stated that HR and specifically Nadine Wyngard (Wyngard) told her that she needed a new work permit from 31 December 2017 and onwards in order to renew her contract. Wyngard is an assistant director in HR. She averred that she applied for the renewal of her work permit on 20 November 2017. Wyngard further advised her that the head office required her to submit a valid work permit. She approached Home Affairs and they advised her that as long as she provides the respondent with a receipt that shows that she applied and paid for the work permit then it is sufficient for the renewal of her contract of employment. Wyngard said that she will send it to the head office and the head office came back to her and said that it was insufficient. The head office requested that Home Affairs provide a letter as to when the applicant will be issued with a valid work permit. She contended that home affairs informed her that all stakeholders have been communicated that proof of payment and receipt is sufficient proof but Wyngard stated that the head office insists on a valid work permit. From 1 January 2018 she did not go to work and her supervisor was communicating with her by email and asked her whether she was sorting her papers out. Wyngard eventually informed her on 9 January 2018 that HR instructed her to interview people for the position that the applicant occupied. She stated further that Wyngard informed her that if she receives her work permit before the post is filled then she must come and reapply for the position. Wyngard further advised that she will come in as a new applicant and that the same protocol will be followed and if she is successful then she will be reinstated. She averred that the post has been filled and she has not yet received her new work permit. She stated that Scalabrini advised her of the advisory that the Department of Home Affairs issued and it is dated 11 December 2017. She stated that the advisory applies to all SA banks, Employers and Learning Institutions and it states that people in possession of Zimbabwean Special Permits (ZSP) should be allowed, amongst other things, to continue working etc. She averred that if sufficient time was given to her situation then the advisory should have been sufficient to renew

her contract. She stated further that she is a current holder of a ZSP and it would be extended for a further four years as stated in the advisory. There is nothing that bars her from getting a new work permit and she will get a work permit. She contended that her supervisor, Estelle Horack, told her that HR had communicated to her that her contract would be renewed if she produced a valid work permit and this discussion occurred on 6 December 2017. At no stage did she get the impression that her contract would not be renewed. She stated that she did not give the respondent the advisory because she only became aware of the advisory on 23 March 2018.

8. Under cross-examination she stated that Wyngard told her that she needs a valid work permit. She further told Harock that she had applied for the renewal of her work permit. Harock did not say that a new contract will be given if she produces a work permit and she only told her that her post is going to be filled but she did not say that it was a permanent post. Wyngard told her that there are conditions attached to the contract and even if she did not have a permit, a letter from Home Affairs indicating when she would receive her work permit would have been sufficient. According to Wyngard the letter from Home Affairs must state when she will receive her work permit. She averred that Home Affairs indicated that they do not issue such letters and that the receipts were sufficient. She contended that it became obvious to her that her contract would not be renewed and she assumed that because she did not have a valid work permit or the letter. She also submitted her receipts as proof that she applied for her work permit. She contended that she assumed that her permit would be renewed and she believes that the advisory gives her permission to continue working. She further assumed that the respondent must have known of the advisory issued by Home Affairs. She felt that HR should have taken some extra time to look into her matter and the reason why she did not submit the advisory at the hospital was because her post was already filled and she believes that more time should have been given to investigate things around her case. She read out a policy of the respondent that states that a foreign national will only be appointed to a post if there is no South African that is suitable for the position. She further read out that all foreign nationals will be appointed on a fixed term contract of three years valid for the period of their work permits. She continued reading the respondent's policies in relation to the employment of foreign nationals and read that the respondent cannot employ a foreign national without a valid work permit. According

to the respondent policies a foreign national cannot displace a South African citizen in his or her post. Furthermore, foreign nationals must be appointed on a fixed term contract basis and the term of employment must not exceed the term of the relevant work permit. She however contended that the Department of Home Affairs was insistent that if she submits her receipt and proof of submissions, then she is fine and she felt that she had a basis for the case. After the advisory that was issued by the Department of Home Affairs she felt that the respondent should have considered those documents as proof of her permit being issued. She maintained that HR should have investigated and asked whether they could help her as an employee.

9. Under re-examination she stated that she will be issued with a new work permit and that it was simply procedural for her to apply for a new work permit.

## **THE RESPONDENT'S EVIDENCE AND ARGUMENT**

10. Mrs Nadine Wyngard (Wyngard) testified under oath for the respondent and stated that she is in charge of the HR department and she oversees the recruitment, selection and the whole of the HR department. She stated that she knows the applicant because she appointed her as a radiographer and from 18 March 2015 to 30 December 2017. She averred that the letter that the applicant presented in evidence stating that her contract would be renewed if she had a valid work permit was given by a clerk in the HR department. She contended that the applicant's work permit came to an end at the end of December 2017 and that the applicant's contract of employment must be the same as the expiry date of the applicant's work permit. The applicant was supposed to submit as valid work permit from the first date after the expiry date of her last permit. She stated further that there was communication between the applicant and HR because there was an enquiry from the HR regional office about whether they will renew the applicant's contract. She averred that the advisory from the Department of Home Affairs is not applicable to the departments in the public sector and if it was applicable then it would have mentioned government departments. Moreover, Somerset Hospital was not aware of the advisory letter because it is not applicable to them. Usually they will receive a cover letter and it will come from the head office as a circular. She stated that according to their policies, there must be a valid work permit

and preference is given to South African citizens and if the applicant had a valid work permit then they must see if there are other South African citizens who applied and the applicant would then have to reapply for the position. She averred that they did not receive an application from the application for that post, as the applicant's post is a critical post and there must be an application. She stated that they would not exclude the applicant from the post and if all of her documents are in order but a valid permit is required. The applicant's post has since been filled with a South African citizen. She averred that the advisory issued by the Department of Home Affairs is not relevant to government departments because it would have been issued to them by the DPSA and it was not.

11. Under cross-examination she stated that the regional office oversees what they do and when it comes to contracts the regional office will ask what is happening to the post that is going to expire. She contended that at the time when she did enquiries there was no application from a South African citizen and if the applicant had submitted her work permit before the expiry of her contract on 30 December 2017 then they could have extended the contract before the contract expired. She stated that an extension of the contract and renewal is the same thing and that if there are other applicants then it is a reappointment. She admitted that there was an option for the applicant's contract to be renewed if she had a valid work permit and they would have applied for an extension if she had a valid work permit. The renewal was always subject to the applicant obtaining a work permit. She alleged that the onus is on the applicant to find out what must happen and not the respondent. For example, the applicant was supposed to ask her for an application to enquire about the post. She contended that should the applicant have said that she does have her work permit then that is enough grounds. The applicant simply came to her and said that her contract came to an end and asked what she must do. She reiterated that if there were applicants who are South African citizens then they must be considered first and she averred that foreign nationals are only given three-year fixed term contracts at a time. The applicant was required to make application and provide a valid work permit.

12. Under re-examination she stated that they are prohibited by law to employ people who do not have valid work permits.

## ANALYSIS OF EVIDENCE AND ARGUMENT

13. I have deemed it proper for purposes of brevity to address the survey and the analysis of the evidence and arguments, simultaneously. I have, in making a determination on the issues in dispute, given due consideration to all evidence placed before me. I will however only refer to those parts of the evidence and argument relevant to the issues to be determined.
14. According to the common-law a fixed-term contract of employment terminates at the expiration of the term for which it was entered into. The termination follows automatically and is not seen as a dismissal or termination by the employer. However, Section 186 of the LRA states that a dismissal occurs, amongst other, where an employee reasonably expected the employer 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. The view seems to be that the expectation must be reasonable in the objective sense. The question that one has to ask is whether the circumstances were such that any reasonable employee would, in the circumstances, have expected the contract to be renewed on the same or similar terms.
15. In **McInnes v Technickon Natal** (2000) 21 ILJ 1138 (LC) the Court adopted the following approach:

*[15] Here the court has to conduct a two-stage enquiry. The first stage is to determine what the applicant's subjective expectation actually was in relation to renewal. This is a question of fact. Only once the subjective expectation has been established as a fact does the court then go on to decide the second stage, namely whether this expectation was reasonable in the circumstances.*

*[16] As to the former, what is required is that the applicant must subjectively have held the expectation that her contract of*

*employment would be renewed on terms which are the same or are similar to the terms which prevailed during her fixed-term contract.”*

16. In **Auf der Heyde v University of Cape Town** (2000) 21 ILJ 1758 (LC) the Court said:

*“[26] The gravamen of s 186(b) in the context of what an employee would be entitled, all other things being equal, reasonably to expect at the conclusion of the specified period of a fixed-term contract, was examined by this court in Dierks v University of South Africa. The issue for determination in that matter bore a basic similarity, insofar as the interpretation and applicability of s 186(b) of the Act was concerned, to that in this case. The applicant was employed by the university on successive fixed-term contracts, at the eventual conclusion of which he was not given a permanent post in the face of what the court determined was in fact a reasonable expectation on his part that this would be the case. Citing Olivier with apparent approval, the court (Oosthuizen AJ), noting that the concept of 'reasonable expectation' as expressed in s 186(b) has no statutory definition, characterized it as including, essentially, 'an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law would not foresee a remedy'. Whether or not the employee's expectation was reasonable, the court commented, must be deduced on the basis that 'apart from subjective say-so or perception there is an objective basis for the creation of his expectation'. This must be assessed on an analysis of the facts and relevant circumstances bearing upon it (at 1246).”*

17. In **Dierks v University of South Africa** [1999] 4 BLLR 304 (LC), the Labour Court enumerated criteria that should be considered to establish whether a reasonable expectation exists. There should be, it was held, an evaluation of all the surrounding circumstances including *“the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed-term contract, inconsistent conduct, failure to give reasonable notice and nature of the employer’s business”*. The list is not exhaustive.
18. In **SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others** (2008) 29 ILJ 2218 (LAC) the Labour Appeal Court summarised the test as follows: *“The enquiry is whether a reasonable employee, in the circumstances prevailing at the time, would have expected the employer to renew his or her fixed-term contract on the same or similar terms.”* (at [44]). The Court also stated that the language used in the contract is not necessarily decisive and also confirmed the principle that the person creating the expectation should have the authority to bind the employer.
19. In this case the reason why the respondent entered into a fixed term contract with the applicant is because she is a Zimbabwean National. According to the respondent’s policies on the employment of Foreign Nationals, it can only enter into fixed term contracts of employment with foreign nationals and the term of employment must not exceed the term of the relevant work permit. The respondent’s policies further provide that foreign nationals must be in possession of a valid work permit before assuming their duties. It is not in dispute that the applicant’s contract of employment was directly linked to the expiry date of her work permit.
20. As the evidence unfolded it became clear that the renewal of the applicant’s contract of employment depended on the renewal of her work permit. Wyngard and Horack enquired about whether she had applied for the renewal of her work permit prior to the expiration of her employment contract. Wyngard’s enquiries to the applicant was brought upon by the regional HR office’s enquiries to her about the applicant’s fixed term contract and whether her contract was going to be renewed. Moreover, under cross examination Wyngard testified that at the time when she did enquiries with the

applicant about the applicant's work permit, there was no application from a South African citizen and if the applicant had submitted her work permit before the expiry of her contract on 30 December 2017 then they could have extended the contract before the contract expired. She stated that an extension and renewal of a contract is the same thing. She further admitted that there was an option for the applicant's contract to be renewed if she had a valid work permit and they would have applied for an extension if she had a valid work permit. The renewal was always subject to the applicant obtaining a work permit. In view of this evidence, I reject Wyngard's evidence that she informed the applicant that the applicant had to reapply for the post prior to the expiration of the contract of employment. I do however accept that she did inform the applicant to reapply for the post after the expiration of the applicant's contract. The applicant testified that Wyngard informed her that she was advised to interview people for the applicant's post and if the applicant obtained her work permit before the position is filled then she must reapply for the position. Wyngard did not advise the applicant to re-apply for the post. The only communication between her and the applicant was that the applicant needed to apply for the renewal of her work permit. It is further clear from Wyngard's evidence that the applicant's contract would likely have been renewed or extended if she had a new valid work permit.

21. The applicant testified that Wyngard told her that she needs a valid work permit and her supervisor, Harock, also understood that the applicant requires a valid work permit before her contract can be renewed. The applicant averred that Wyngard told her that there are conditions attached to the contract and even if she did not have a permit, a letter from Home Affairs indicating when she would receive her work permit would have been sufficient but Home Affairs indicated that they do not issue such letters and that the receipts were sufficient. The applicant's version that a letter from Home Affairs stating when she will receive her work permit was not put to Wyngard during cross-examination and therefore I cannot accept this evidence. Again, the evidence is clear that the renewal or extension of the applicant's contract of employment was conditional and that it was subject to the applicant obtaining a new work permit that would be valid from the date after her contract of employment expired.

22. It is common cause that the applicant did not provide Wyngard with a new work permit and that accordingly she did not meet this condition and as a result her contract was not renewed or extended. On the applicant's own version, she stated that it became obvious to her that her contract would not be renewed and she assumed this because she did not have a valid work permit or the letter. It is therefore clear that the applicant could not have reasonably formed a subjective expectation of renewal of her contract of employment if the condition of her obtaining her work permit was not met. To this end, I do not find that the applicant has met the standard as enunciated in the SA Rugby case where the court stated that: "The enquiry is whether a reasonable employee, in the circumstances prevailing at the time, would have expected the employer to renew his or her fixed-term contract on the same or similar terms".
23. Whether a reasonable expectation was created on the basis of the advisory that was issued by the Department of Home Affairs – The applicant became aware of this advisory during March 2018. She stated that she assumed that the respondent would have been aware of this advisory prior to the expiration of her contract of employment because the advisory was issued on 11 December 2017. Alternatively, that the respondent should have investigated her matter. Wyngard stated that the respondent was not aware of the advisory and that it did not apply to the respondent. She stated that if the advisory applied to government employees then it would have said so. Since the applicant only became aware of the advisory in March 2018, it goes without saying that she could not have formed a subjective expectation that her contract would be renewed on the basis of the advisory, as the advisory was not part of the circumstances that prevailed at the time. An expectation is formed at the time that the applicant's contract is in fact not renewed. What is more, her assumption that the respondent knew about the advisory is not sufficient. Furthermore, it is required that an expectation of renewal of contract must be created by an employer and not by an external source. To bind the respondent to an advisory which the applicant assumes it was aware of prior to the expiration of her contract of employment is not reasonable and I find that there is no objective basis for the applicant's expectation in this regard.
24. On a conspectus of the above-mentioned factors as a whole, I find that the non-renewal of the applicant's fixed-term contract does not amount to a dismissal.

**AWARD**

25. The non-renewal of the applicant's fixed-term contract does not amount to a dismissal.

26. The applicant's application for arbitration is dismissed.

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**Janine Carelse**  
**COMMISSIONER**