



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Case No: PSH39-18/19

Commissioner: T ERASMUS

Date of award: 19 June 2018

In the matter between:

**NPSWU o.b.o. Z.A. WILLIAMS**

First Applicant

**TC FIKO**

Second Applicant

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for arbitration at the Public Health and Social Development Sectoral Bargaining Council in terms of section 191(5)(a)(iii) of the Labour Relations Act 66 of 1995 ("the LRA") and was heard at Western Cape College of Nursing, Klipfonteint Road, Athlone on 7 June 2018. Applicant was represented by Mr Z Menze from NPSWU, whilst the Respondent was represented by Mr A Mniki, Labour Relations Officer at Respondent.

## **ISSUE TO BE DECIDED**

2. I must decide whether the non-renewal of the Applicants' fixed term contracts amount to an unfair dismissal.

## **APPLICANTS' OPENING STATEMENT**

3. The Applicants believe that they have been unfairly dismissed in terms of section 198(a) and (b) of the LRA, 66 of 1995. The Applicants were at first employed by Masibambane Recruitment agency for more than three months. The First Applicant for a period from 2 January 2017 until 31 October 2017 and the Second Applicant from 1 November 2016 until 31 October 2017.
4. The First Applicant was appointed on a contract basis by Respondent from 7 November 2017 until 31 March 2018. The initial contract lasted from 7 November 2017 until 6 February 2018 and was extended until 31 March 2018.
5. The Second Applicant was also appointed by Masibambane Recruitment from 1 November 2016 until 31 October 2017 and by the Respondent from 8 November 2017 until 6 February 2017 which later contract was extended until 31 March 2018. In case of both Applicants it was continuous employment and in the same place. Both Applicants were employed as food service worker aids. Applicants seek reinstatement as from 31 March 2018.

## **RESPONDENT'S OPENING STATEMENT**

6. The Applicants were first employed by Masibambane agency until 31 October 2017. They only started with the Respondent on 7 November 2017 and 8 November 2017 respectively. This means there was a break in service, it was therefore not continuous service. If the Applicants had a dispute, their date of dismissal should have been 31 October 2017 with Masibambane and that should have been the date of dismissal. Applicants only had one contract with the Respondent from 7 November 2017 until 6

February 2018 and the contracts were renewed for a further two months until 31 March 2018.

7. Respondent employed the Applicants for a limited duration in terms of the first contract. Respondent had a lot of employees on leave at the time when they employed the Applicants on the first contract and some employees were being trained at the same time and there were also vacancies that had to be filled. The volume of the work was problematic, therefore the Respondent had to appoint people in contract positions. The contract was extended for a further two months, whilst the department advertised posts, but the process took longer than expected, therefore the Applicants' contracts were extended, as Respondent would be challenged in terms of service delivery. Respondent seeks a finding that the non-renewal of the fixed term contract does not amount to dismissal. There was a justifiable reason for the extension of the contract. They applied for the advertised posts, but they were not successful.

## **SURVEY OF THE EVIDENCE AND ARGUMENT**

### **APPLICANT'S CASE**

8. **ZELDA ANNA WILLIAMS testified in support of her own case (hereinafter referred to as "First Applicant")**
9. First Applicant testified that she commenced employment at New Somerset Hospital on 2 January 2017 with Masibambane agency. The agency's contract with the Respondent was terminated on 31 October 2017 at which point the kitchen manager, L Vermeulen, told Applicants that Respondent was going to advertise three contract positions for the hospital and that the Applicants should apply for the positions. This took place before 31 October 2017. They were interviewed for the positions prior to 31 October 2017. Vermeulen told Applicants that she would phone them the moment she heard whether they would be appointed. First Applicant was in constant contact with Vermeulen and by the time they left, Vermeulen had not heard from the decision-makers yet. Vermeulen telephoned Applicant on 6

November 2017 to inform her that her application was successful and that she must start working the following day, which she did.

10. First Applicant testified that they started work at 07:00 whilst employed by Masibambane, but she was informed that they had to start at 06:30, whilst working for Respondent. She still had her uniform with which she was issued by Masibambane. Vermeulen told her that Respondent was going to order uniforms for her, but she never stopped wearing the Masibambane uniform, which was the same, except for the colour of the pants and the Masibambane uniform did not have the hospital logo on it.
11. Her duties were to prepare and cook food for patients, cleaning and scullery duty (cleaning of equipment) and help pack stock away after deliveries and collect trollies from the different wards. Reference was made to page 8 of bundle R, where all her duties were outlined and she confirmed that her duties were exactly the same, whilst working for Masibambane and when she was working for Respondent. The post advertised was exactly the same duties that she was doing, whilst working for Masibambane. Reference was made to page 15 of bundle A, being a letter of reference from Masibambane, dated 2 May 2018, where the period of employment is confirmed as ten months.
12. Reference was made to page 17 of bundle A, in terms of which Respondent confirmed First Applicant's employment at New Somerset Hospital in Green Point, Cape Town was for a period of one year and three months. This means from January 2017 until February 2018, which includes the period at Masibambane. The three people who signed were her supervisors for the whole period since she started working for Masibambane, including the period which she worked for Respondent. Reference was made to page 21 of bundle A, being e-mail correspondence between Applicants' representative and Nadine Wyngaard from Respondent, in terms of which Applicants' representative questioned the termination of First Applicant's fixed term contract and the non-renewal thereof.

## **THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

13. Reference was made to the letter evidenced on page 17 of bundle A, in terms of which First Applicant's employment as contract worker is stated as one year and three months at the New Somerset Hospital. First Applicant confirmed that the three people who signed the letter were all employed by the Respondent.
14. First Applicant confirmed that when she reported for duty on 4 April 2018, Mr Kampala called her to his office and told her that she was not allowed to work, as she was not an official employee of the Respondent. He told her that if she entered the kitchen, it will be construed as trespassing and if anything happened to her whilst working without a contract, Respondent will be in contravention of the Occupational Health and Safety Act.
15. Reference was made to page 10 of Bundle R, being First Applicant's letter of appointment, in terms of which she was appointed from 7 November 2017 until 6 February 2018 and on page 11 the contract was extended from 1 March 2018 until 31 March 2018. First Applicant testified that she expected the contract to expire on 30 April 2018, but just before they signed they were informed that the contract will expire on 31 March 2018. Therefore, she was aware that the contract will expire on 31 March 2018 prior to 31 March 2018.
16. First Applicant testified that she applied for all the food service aid positions that were advertised, as there was a vacant position at the time. The Respondent would always inform them of vacant positions in the past. According to First Applicant she was not informed that she was not good enough for the position at the time when the first contract was extended. First Applicant conceded that her position was initially planned to be for three months only. First Applicant confirmed that there were two employees employed on a contract basis for more than a year, the third person was only employed for a few months. There was never an issue with their performance.
17. It was put to First Applicant that the Respondent followed the correct procedure by advertising the posts, but that she felt aggrieved with the fact that she was not

appointed. First Applicant responded that she felt that she should have been appointed without the advertisement, as they were already doing the work for a period of a year. It was put to First Applicant that in terms of the Public Service Act, the Respondent has an obligation to advertise vacant positions to allow everyone an opportunity to apply. First Applicant stated that if it is the law that vacancies should be advertised, she accepts it, but she feels that they should have been appointed without the post being advertised. It was put to First Applicant that the reason why she was not successful in the recruitment, was based on the shortlisting criteria. The criteria determine that people with two years' experience in the health food services will qualify.

18. First Applicant responded that she asked Liezel Vermeulen why she was unsuccessful and Liezel responded that one must have at least one-year experience in the Department of Health. Reference was made to page 29 of bundle R. It was put to First Applicant that she did not meet the criteria. Her score did not make the cut-off criteria as per page 37 of bundle R. Only people who scored 40% and above met the criteria, whilst the First Applicant scored 20%. First Applicant stated that she had no response to the allegation that she did not meet the criteria. It was put to First Applicant that the reason why the Respondent could not appoint her, was because she was only appointed for a limited period of three months and the reason why the contract was extended for another two months, was because of the delay with the recruitment process. It was put to First Applicant that the other reason why she was appointed on a contract, was because a number of staff were on leave during this period. First Applicant responded that she cannot think of anyone that was on leave during this period. When she started working in January 2018, there were only two people on leave and she questioned why their contracts were extended in spite thereof on their return. It was put to First Applicant that Respondent had to appoint her on a three months contract, because there was a transition period where staff was being trained at the same time when there were posts vacant. First Applicant conceded that some members of staff was on training. She is however unaware of vacant posts.

**THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

19. First Applicant stated that on 4 April 2018 when she reported for duty, Liezel Vermeulen did not know what to do. She then went to Ms Hartnick, she also was unsure what to do and they then referred her to Mr Sonkwala, who informed her that her contract had ended.
20. **THOBELA CYNTHIA FIKO testified in support of her own case (hereinafter referred to as “Second Applicant”)**
21. Second Applicant confirmed that she was employed at the New Somerset Hospital on a temporary contract with Respondent from 1 November 2016 until 31 October 2017. Second Applicant’s contract with Masibambane is evidenced on page 23 of bundle A. Second Applicant was employed from 1 November 2016 until 31 October 2017, which is equal to eleven months. Second Applicant’s last contract with Respondent commenced on 8 March 2017 as per page 25 of bundle A. According to Second Applicant there were no days in between 31 October 2017 and 1 November 2017, therefore her employment was continuous.
22. Second Applicant testified that she was informed that First Applicant was chased away by the Securities. When she arrived, First Applicant told her that she would be chased away as well. Second Applicant agrees with the testimony put forward by First Applicant.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

23. Second Applicant confirmed that she was employed at the New Somerset Hospital until 31 October 2017 with Masibambane and she started with Respondent on 8 November 2017 on the second shift, therefore there was a period of six days between 1 to 6 November 2017. It was put to Second Applicant that she was appointed on a limited duration contract which was extended until 31 March 2018 due to the fact that the filling of the permanent posts were still underway. Second Applicant was challenged on whether any employees were on leave during the November 2017 to February 2018 period. She could not reply to this.

24. Reference was made to page 41 of bundle R, where seventeen employees' names in the food services department who were on leave were listed. Second Applicant could not reply to this. It was put to Second Applicant that there were three vacant positions in the food services department at the time. She was also not sure of that, she only knows of one who was on leave. Second Applicant confirmed that she was given an opportunity to apply for the vacant position, which she did. It was put to Second Applicant that she was unsuccessful, due to the fact that she had less than three years' experience. Second Applicant conceded that this is what she was told at the time. Second Applicant commenced employment from 1 November 2016 until 31 October 2017, which is eleven months.

#### **THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

25. It was put to Second Applicant that contract employees were employed during this period when people are on leave.

#### **RESPONDENT'S CASE**

26. **BEVAN MASHEDI testified on behalf of Respondent (hereinafter referred to as "Mashedi")**
27. Mashedi testified that he is the Deputy-Director and facilities management at the New Somerset Hospital. His responsibilities include food services management. The Applicants were first appointed on contract by Masibambane and once Masibambane's contract came to an end on 31 October 2017, Respondent realised that they would lose manpower. There were also pending vacancies at the time and certain staff were on leave. Respondent had to continue rendering a service and they had to look at short term contracts to allow them to render the service. Applicants were employed for three months; the permanent positions have not been filled yet. Respondent had to ensure that due diligence is followed in the recruitment process. Respondent wanted to commence with the formal recruitment once the advertisements closed.

28. Neo-natal babies' feeding had to be mixed, there were various discussions that the services had to be integrated in the system. Staff had to be sent on training and this takes them away from the environment. Therefore, short term staff had to be employed.

29. Mashedi confirmed that training was still underway during March/April 2018. Reference was made to page 40 of bundle R, being part of the Public Service Regulations, more specifically point C2.1. thereof where the following is stated:

**“C.2 Advertising**

*C.2.1 An executing authority shall ensure that vacant posts in the department are so advertised as to reach, as efficiently and effectively as possible, the entire pool of potential applicants, especially persons historically disadvantaged.”*

30. It was put to Mashedi that the Applicants testified that they should have been employed indefinitely and that Respondent did not have to advertise the post. Mashedi responded that it is not possible as Respondent must comply with the law as evidenced on page 40 of the Public Service Regulations, 5 of 2001. The post is being advertised permanently and the Applicants are not appointed. Mashedi responded that when they initially advertised the posts, they obtained permission to do an informal recruitment process, by putting a notice on the notice board with a more relaxed criteria. Respondent did not have a too stringent criteria in terms of the short-term contract. The advert for the permanent positions already closed during October 2017. The contract employees also had an opportunity to apply for the permanent positions. Respondent received as many as 350 applications for the permanent positions. The Respondent therefore had to be more rigid with their criteria in filling the permanent post. The advertised criteria evidenced on page 29 of bundle R. The Applicants fell short with their KPA'S. The preparation of meals in the health facilities had to comply with the Health and Safety Act in a hospital kitchen. If a person has less than one-year experience in any KPA a scoring system was decided on. If an employee has less than one-year service he/she will score (1). The scoring was done during November 2017; therefore, the experience was calculated

up to November 2017 when the shortlisting was done. Scoring worked as follows: between 0 and 1 year = 1 point and between 1 and 2 years = 2 points.

31. The Applicants' contracts were extended as per page 11 of bundle R. The initial contract was extended from 1 March 2018 to 31 March 2018 and signed by all parties. There was no expectation for the Applicants to be appointed beyond 31 March 2018. The letter which was issued clearly spelled out the expiry date. It was a specific term and the extension was also for a specific term. There was no expectation of permanent employment. Reference was made to page 17 of bundle A, being a letter of reference according to Mashedi. This was a very well written letter of reference. The period is however a bit of a concern, as there is also an agency period included in this letter. The recruitment was done by the Respondent in November 2017. The period was less than a year. The Applicants were only employed by the Respondent from 7 November 2017 until 31 March 2018. The people who signed the letter, Francois Smith, Sarah Adams and Lebogang Lesige were not from HR. The agency relationship between Masibambane and Respondent came to an end on 31 October 2017.

#### **THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

32. The Applicants scored a (1), which means they had between 0 and 1 years' service, in terms of their CV'S presented to the panel. The panel would have made a decision based on the documents before them. At the time when the short listing was done, the Applicants worked in the Health facility for less than a year. The panel scored them accordingly. The shortlisting took place in November 2017. The scoring was done with experience up to and including 9 November 2017. All experience up to 9 November 2017 was taken into consideration for the permanent post. The First Applicant commenced employment with Respondent on 7 November 2017 and Second Applicant on 8 November 2017. Mashedi confirmed that Respondent was still busy doing the short listing when people were appointed in the contract posts to cover the interim period.

33. Reference was made to page 8 of bundle R, in terms of which the *CORE TITLE: HEALTH ASSOCIATED SCIENCES AND SUPPORT PERSONNEL* duties are set out. The closing date for the permanent post was 13 October 2017. When the Applicants were interviewed for the contract posts the applications for the permanent post have already been received. The contract posts were initiated prior to the permanent post being advertised. The contract posts were advertised on the notice board and the closing date as per page 9 of bundle R was 12 September 2017. Mashedi was challenged on the similarities between the duties on pages 8 and 9. It was put to Mashedi that there were more duties listed on page 9 than on page 8. Mashedi confirmed that the duties were the same, although they were set out in a more condensed form on page 8. The advert closed on the 13<sup>th</sup> of October 2017, but the applications still had to be captured by HR and the panel would only receive it thereafter. The Respondent would have received all the applications by 13 October 2017, whereafter it had to be captured and contract positions continued in the meantime, whilst they were busy making the appointments.
34. Reference was made to page 17 of bundle R. Mashedi was challenged on why employees were granted leave if Respondent was short staffed and why people had to be employed on contract positions. Mashedi confirmed the reason why people were employed on contract positions, was due to the fact that some members of staff were on leave. It was one of the key reasons, sick leave is unfortunate and unplanned. They only focused on planned leave, any operational manager will focus on it. Respondent was obliged to grant leave to employees although they had capacity problems, which they could not foresee and the leave would expire if not granted.
35. Reference was made to page 3 of bundle R, being a Government Gazette dated 18 August 2014, dealing with part time employees, whilst the Public Service Relations Regulations is 5 January 2001. "*Indefinite*" means ongoing. The Applicants were employed at the New Somerset Hospital for a period of four months by Respondent.

36. Reference was made to point 3: “*An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment if ..... justifiable reason for fixing the term of the contract*” exist.
37. Mashedi was also challenged that the other reason for appointing people on fixed term contracts, was because of the training that was going on at the time. Mashedi confirmed that training of staff commenced during December 2017. He was challenged on whether it was Respondent’s policy to appoint people on contracts when staff was being trained. He responded that it is not necessarily the case, it is not a generally accepted practice, but it was for operational reasons. Reference was made to page 17 of bundle A. He confirmed that people who signed the letter, were supervisors in the kitchen. They must give account of the duties of the kitchen work.
38. **LIEZEL VERMEULEN testified on behalf of Respondent (hereinafter referred to as “Vermeulen”)**
39. Vermeulen testified that she is the Chief Food Service Manager in the unit. She has one principal food service post that reports to her and three supervisors to whom food service aids reports. Currently the baby feeding is also included in her department. Reference was made to page 10 of bundle R, namely First Applicant’s letter of appointment. Vermeulen was challenged whether she told the Applicants when they were first appointed by Respondent that they would be appointed in permanent positions. She replied that she certainly did not. The contract clearly specifies a specific time period. She gave them the time period as stipulated by HR.
40. It was put to Vermeulen that First Applicant testified that whilst she was awaiting the outcome of the shortlisting, she phoned Vermeulen and Vermeulen told her that she was not shortlisted, because she had less than a year experience. Vermeulen explained that 1 point is granted for less than one-year experience and for more than one, two points. At the time of the shortlisting First Applicant did not have 12 months experience yet and that is what Vermeulen communicated to First Applicant. Reference was made to page 37 of bundle R. Vermeulen confirmed that she was the chairperson in the recruitment process and she signed the recruitment shortlisting

in her capacity as Chairperson. The Applicants' experience did not reach two years yet, they were under two years and that is why they scored (1). First Applicant only had one-year experience. Vermeulen was challenged on how the decision was made about the experience. She stated that it is not her decision, but that of the panel. They looked at each one's CV, period of employment and where they were employed. Specific experience in the environment is sought, as they are working with sick people. There is a skill involved and they only looked at experience in a health facility. There were vacancies at the time when the applicants were appointed, but their appointment is not within her power, it is the Respondent's decision to appoint them.

41. Vermeulen confirmed that the following vacancies existed in the Department: That of Mr Fleur, food services manager who was transferred to Worcester Hospital, Ernest Mandolo who gave 24 hours' notice, Elizabeth Nel, principal food services manager, who resigned and left at the end of November 2017. The three vacancies had a huge effect on the volume of work in her department, where they have to prepare in the excess of 1 000 quality meals on a daily basis.
  
42. Reference was made to page 41 of bundle R, being the staff leave period profile of the food service workers' annual and sick leave. All staff has to book their leave by January each year, she cannot deny them leave, as it runs over to the next year. It was part of their working conditions to get leave and a legal requirement. It was scheduled and rostered leave. At the time, it had an impact on her department. In 2017 her supervisor told her that the milk kitchen must come over to her department and the feeding of babies will form part of her kitchen. Vermeulen and her entire unit had to be trained. She had to break up the training in three clusters. The training commenced during in December 2017 and ended in May 2018. She also had new people who had to be trained, with less hands, vacancies and people on leave. Mr Mashengu (her line manager) said there was a deadline when all her staff had to be trained. The transition from the milk kitchen to food services was a permanent transition and the whole unit came over and formed part of her responsibility. Her staff had to be trained before 1 May 2018, which was the due date for taking over the milk kitchen from nursing. The training had to be completed on that date as well. She relied on HR for advertising the vacancies and she had to follow protocol. She

denies that she ever created an expectation with the Applicants that their contracts would become permanent.

**THE FOLLOWING ENSUED FROM CROSS-EXAMINATION:**

43. The First Applicant worked under her supervision under Masibambane from 2 January 2017 and Second Applicant was employed from 1 November 2016 by Masibambane and she inherited the agency staff. Legislation prohibited Respondent from employing agency staff. When the Masibambane contracts terminated, there were three vacancies and the posts had to be filled with permanent staff. The duties of Masibambane staff were cleaning, cutting vegetables, making sandwiches and plating meals. Reference was made to page 8 of bundle R. She was challenged on whether these duties were performed by the Applicants. She confirmed that apart from the fact that Applicants were not cooking when they were in Masibambane's employment, for in case they hurt themselves, the duties were the same. A food service aid must be able to cook. It was put to her that the Applicants stated that they were cooking. She denied this and stated that it was not the case whilst she was on duty. Respondent had to employ permanent staff when vacancies arose. She was challenged on whether the date of the short listing was 1 February 2018, which she confirmed. Reference was made to page 30 of bundle R, being the scoring by the panel. Vermeulen confirmed that she needed hands to adhere to Health and Safety requirements.

**THE FOLLOWING ENSUED FROM RE-EXAMINATION:**

44. Ernest Mandula was a food service aid worker.

## APPLICANT'S CLOSING ARGUMENT

45. The evidence confirmed continuous employment for Masibambane staff members to the Department of Health. The evidence presented, especially with Vermeulen that when Applicants were employed on contract positions, they were replacing Masibambane employees. Their contracts of employment were continuously renewed, whilst other positions were being filled. There was no special project, because people were going on leave. There was not a policy at Respondent that staff were employed on contracts when people go on training. Section 198 2(b) – does not comply with this.

## RESPONDENT'S CLOSING ARGUMENT

46. “Reasonable expectation for the renewal of the contract”. There was no reasonable expectation, because the duration of the contracts was clearly communicated to the Applicants as being until 31 March 2018 on the letters of appointment. Applicants were aware that the contracts they entered into with the Respondent were for a limited duration. Their manager indicated that nowhere were they promised of an extension of their contract. Permanent posts were advertised. When the Applicants decided to apply, they showed they were aware that they were employed on temporary contracts, otherwise why would they apply for a permanent contract, if they were already employed as such. “Continuous employment”: It is clear in their contracts with Masibambane that their contracts with Masibambane terminated on 31 October 2017. Applicants’ contracts with Respondent started on 7 and 8 November 2017 respectively, therefore there was a break in service. Applicants understood that the contract was for a fixed duration. The implication for introducing the contracts was for a justifiable reason, the nature of the work was for a limited duration or any other justifiable reason. Once they have a vacancy the Respondent is obliged to advertise the vacancy. In the Public Service, approval must first be obtained before the position can be advertised. Respondent could not fill those posts permanently, prior to advertising the posts. The seriousness of the lack of service in that unit was emphasized by both witnesses. In terms of Section 198 (2) (b) Respondent established a justifiable reason for extending the fixed term contract.

There was no expectation that a permanent position was created. People were on leave, training and vacancies and Respondent had to get hands. The latter was not disputed by the Applicants at all.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

47. The First Applicant was employed by Masibambane Recruitment Agency for a period of 10 (ten) months and Second Applicant for a period of 12 months. Both Applicants were employed on a fixed term contract by Respondent from 7 November 2017 and 8 November 2017 respectfully until 7 February 2018. Their fixed term contracts came to an end on 7 February 2018, at which stage their contracts were extended until 28 February 2018 and for a further period from 1 March 2018 until 31 March 2018.
48. Applicants seek an order in terms whereof they are appointed to the permanent positions, which was advertised by Respondent, as they submit that an expectation for a permanent appointment has been created by virtue of the continuous renewal of their fixed term contracts.
49. Respondent avers that the renewal of the fixed term contract is justifiable and does not create the expectation for the appointment into a permanent position, based on the following:
  - 49.1 There was no reasonable expectation for the renewal of the fixed term contract, because the duration of the contracts was clearly communicated to the Applicants in writing, namely the termination date of 31 March 2018.
  - 49.2 Applicants were aware that the contracts they entered into with the Respondent were for a limited duration.
  - 49.3 Their manager, Vermuelen, confirmed that she did not promise them of an extension of their contracts.
  - 49.4 Posts for permanent positions were advertised. When Applicants applied for the positions, they showed that they were aware that their contracts are

of a temporary nature only, otherwise they would not have applied for permanent contracts, if they were already employed.

- 49.5 Applicants were not employed for a continuous period by both Masibambane and Respondent, their contracts with Masibambane terminated on 31 October 2017. Applicants' contracts with Respondent started on 7 November 2017, therefore there was a break in service.
- 49.6 Applicants understood that the contract was for a fixed duration.
- 49.7 The fixed term contracts were introduced for a justifiable reason, the nature of the work was for a limited duration or any other justifiable reason. Once they have a vacancy the Respondent is obliged to advertise the vacancy.
- 49.8 In the Public Service, approval must first be obtained before the position can be advertised. Respondent could not fill those posts permanently, prior to advertising the posts.
- 49.9 The seriousness of the lack of service in that unit was emphasized by both Respondents' witnesses.
- 49.10 Respondent established a justifiable reason for extending the fixed term contract established in terms of Section 198 (2) (B) of the LRA 66/1995.
- 49.11 Respondent did not create an expectation for a permanent position.
- 49.12 Some members of staff were on leave, some on training and three posts became vacant and Respondent had to get hands.

50. In terms of common law principles, when a contract of employment is entered into for a fixed period of time, the contract terminates automatically when the time period lapses and this is not regarded as a dismissal. The same applies if the parties agree that the contract will terminate if a certain event occurs.

51. It is self-evident that the contractual mechanism of a 'fixed-term contract' can be used by employers to limit their potential liability for unfair dismissals. If there is an automatic termination of employment there can, in contractual terms at least, be no dismissal and therefore no unfair dismissal.

52. In section 186(1)(b). It provided that a dismissal took place if –

*'... 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.'*

53. LRA recognised the legitimacy of the use of fixed -term contracts of employment. But the possibility that such a mechanism could be utilised to evade the provisions of the LRA and to limit an employee's right not to be unfairly dismissed remains. There have been a number of cases where the Labour Court has had to confront this problem, often in the context of the use of fixed -term contracts by temporary employment services and contractors.

54. The 2015 Amendments to the LRA provides as follows:

The new section 198B of the LRA, as well as an amendment to section 187 of the LRA, introduce a significantly greater degree of regulation of fixed-term contracts. Section 198B defines a fixed-term contract as a contract of employment that terminates:

- on the occurrence of a specific event;
- on the completion of a specified task or project;

- on a fixed date, other than an employee's normal or agreed retirement age. In terms of the amended section 187(2)(b)(ii) employees who can establish that they had a reasonable expectation of their continued employment by the employer on an indefinite basis after the expiry of their fixed-term contract would be able to claim that they were dismissed if the employer does not retain them on this basis.

55. Section 198B introduces two important changes. The first is to address the issue that employees employed on fixed-term contracts are often afforded less favourable terms and conditions of employment than employees employed on an indefinite basis. (Sometimes referred to as 'permanent employees'.)

56. Section 198B(8)(a) provides that an employee employed on a fixed-term contract for longer than three months must not be treated less favourably than a permanent employee doing the same or similar work unless there is a justifiable reason for this less favourable treatment.

57. In addition, section 198B(9) provides that an employee who is employed on a fixed-term contract must be afforded equal access to opportunities to apply for job vacancies.

58. The second is of more relevance to this contribution; it introduces a restriction on the use of fixed-term contracts of employment.

59. Section 198B(3) states that an employer may only employ an employee on a fixed-term contract, or a succession of fixed-term contracts, for longer than three months if certain requirements are met. These are that

- the nature of the work for which the employee is employed is of a limited or definite duration; or
- the employer can demonstrate any **other justifiable reason** for fixing the term of the contract.

60. Section 198B(4) then lists nine reasons that will justify entering into a fixed-term contract. These include
- if the employee is replacing another employee who is temporarily absent from work;
  - if the employee is employed because of a temporary increase in the volume of work which is not expected to endure beyond twelve months;
  - if the employee is employed to work exclusively on a specific project which has a limited or defined duration;
  - if the employee is employed on seasonal work; and,
  - if the employee has reached the normal or agreed retirement age applicable in the employer's business.
61. These provisions, at least in the situation where section 198B applies, describe when there will be a permissible use of fixed-term contracts and section 5(4) will therefore not find application. It should also be noted that this is not a closed list and an employer may be able to justify the use of fixed-term contracts on another basis.
62. Section 198B(5) states that if the fixed-term contract cannot be justified it is deemed to be one for an indefinite duration; it will therefore not expire automatically as envisaged in the agreement.
63. However, it is important to note that section 189B does not apply to employees who earn above the threshold salary determined in terms of section 6(3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA) or to employees who are employed on fixed-term contracts permitted by a statute, a sectoral determination or a collective agreement. It also does not apply to small employers as defined in the section. Applicants earned below the threshold salary determined as aforesaid.
64. Section 198B(6) provides that an offer to employ an employee on a fixed-term contract (irrespective of the period of the contract), or to renew such a contract, must be in writing and must state the reason for offering such a fixed-term contract. It is submitted that the failure by an employer to comply with this requirement will not affect the validity of the provision but it may make it more difficult for the employer to prove and justify the reason for the fixed-term contract being concluded.

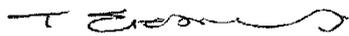
65. In terms of the evidence before me, Respondent could extend and/renew Applicants contracts until the vacant positions for which both Applicants applied, were filled, demonstrating a "*justifiable reason*" to extend their contracts beyond the three-month period.
66. The undisputed evidence before me, was that the department in which the two Applicants were employed, is responsible for supplying in the excess of 1000 balanced meals per day for sick people in the New Somerset Hospital.
67. Vermeulen's evidence that the baby feeding had to be integrated in her department by May 2018 and the training of staff for this purpose commenced, during December 2017 and had to be completed by no later than 1 May 2018 was not placed in dispute.
68. It is common cause that there were vacant positions in the food services department and that Applicants applied for these positions, thus conceding that they were aware that they were not employed on indefinite contracts.
69. The list evidenced on page 41 of Respondent's bundle, was not placed in dispute by Applicants, other than to question the justification for granting leave to these employees and Vermeulen gave a reasonable explanation for this decision, in that leave is granted in January of each year and staff are entitled to leave.
70. I am therefore satisfied that Applicants' contracts of employment came to an end by operation of law.
71. Applicants had been in Respondent's employment for longer than 3 months and their contracts of employment were continuously renewed for a period five months. There was evidence before me that the duration of Applicant's contract of employment was attached to the filling of vacant positions, training of staff and return of staff from leave.

72. Applicants were given a fair opportunity to apply for the vacant positions, but they were not appointed as they did not comply with the minimum criteria for the permanent positions. They applied for these positions prior to the expiration of their contracts with Masibambane.

73. Respondent's evidence that less stringent requirements were applied to the appointment of temporary staff was not placed in dispute by Applicants.

#### **AWARD**

74. I find that Applicants were not dismissed, due to the non-renewal of their fixed term contracts, therefore they are not entitled to any relief.



**COMMISSIONER: T ERASMUS**