



# ARBITRATION AWARD

Commissioner: **THUTHUZELA NDZOMBANE**

Case No: **PSHS239-17/18**

Date of award: **08 May 2019**

In the matter between:

**ALETTA VAN ZYL**

(Applicant)

and

**DEPARTMENT OF EDUCATION-WESTERN CAPE**

(Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing was scheduled for and heard on 30 April 2019, under the auspices of the Public Health and Social Development Sectoral Bargaining Council at Eureka Youth Centre in Worcester. The applicant, Ms. Aletta van Zyl, represented herself. The respondent, Department of Education-Western Cape, was presented by a Labour Relations Officer, Mr. Scholtz. The respondent submitted a bundle of documents which was accepted and admitted as it purports to be except page 67 which was placed in dispute.
2. Mr. Scholtz stated that Mr. Oosthuizen was booked off-sick due to operation and he could not be present as a witness at these proceedings. He requested that Mr Oosthuizen should testify over the telephone but if, such was not granted, he requested the matter to be postponed.

3. The applicant stated that her family member is diagnosed with cancer. The person would relocate to Cape Town very soon. She intends to accompany the person to Cape Town. The process of recuperating will take long and she does not want any delays in the conclusion of this matter. Although I had some reservation to allow a witness to testify over the phone but I allowed such to happen because it was in the best interest of justice.

## **BACKGROUND**

4. The applicant stated that she was employed by the respondent on 1 July 2007 as a Professional Nurse. She earned a monthly salary of R27073.94 [twenty-seven thousand and seventy-three rand and ninety-four cents] prior to her dismissal on 31 April 2017. She worked for nine years and nine months for the respondent. She argued that she was a permanent employee when her contract was terminated by the respondent. The 37% benefit was not explained to her as to what it comprised of. The UIF deductions were not made and this has disadvantaged her. On many occasions her employment contract was renewed and she expected it to be renewed.
5. As a result of the termination of her contract she had to sell her house because she does not have an income. Her children are taking care of her. Because of her age the social grant has been approved and she will receive it.
6. In January 2017 the school became the skills school and she thought that she would be kept for a longer period because there was intake of the children who were using dagga.
7. The respondent stated that the applicant is not entitled to receive any compensation in this dispute. It is common cause the applicant was employed on contractual basis until 31 March 2017. The institution Eureka Youth Care Centre was converted in January 2017 to a school of skills. The department was aware that changes would affect the support staff. Indeed, the staff were worried about their employment security. Presentations were conducted with the staff by a Deputy Director, Mr Oosthuizen.
8. In December 2016 the permanent staff needed to know as to what would happen to them. The response was that the department would utilise the staff. In terms of the new organogram there is no position of a nurse in the structure. A decision was taken to accommodate the permanent employees. It was also decided that contract employees

who could not be accommodated their contracts would come to an end on 31 March 2017. The then Acting Principal, Mr. Cuttings, informed the applicant that her contract would not be renewed beyond 31 March 2017. A month notice was given to her.

9. She was appointed on contract basis which was renewed for six months periods and it was later renewed for three months periods. The applicant was never employed permanently. She was paid a benefit of 37% which covers for any shortfall. She knew that she was not entitled to benefits like the permanent staff. There was no expectation created that her contract would be renewed beyond 31 March 2017. Because of the new dispensation unfortunately there is no post of a nurse. This was the main reason that the applicant is no longer employed by the respondent. She has turned 65 years old and she is entitled to receive a social grant.

### **ISSUE TO BE DECIDED**

10. I am required to determine whether or not the respondent has created an expectation that the applicant's contract would be renewed after 31 March 2017 whether she was permanently employed by the respondent.

### **APPLICANT'S CASE**

11. **Ms. Aletta van Zyl** stated that she is the applicant in this matter and she presented the following evidence under oath. She was employed by the respondent on a six months contract which started from 1 July 2007 to 31 December 2007. A second contract of another six months was given to her and it started from 1 January 2008 to 30 June 2008. Various fixed term contracts were concluded by the parties until 31 July 2014. Thereafter the parties concluded three months contracts until 31 March 2017.
12. During the presentation sessions in December 2016 she spoke to Ms. Daniels who informed her that her contract would come to an end. There are two schools for the blind whereby one nurse was serving the two schools. This particular nurse was not coping to serve two schools. Ms. Daniels indicated to her that she would see that the applicant is offered one of the positions. This discussion was between her and Ms. Daniels. There was nothing that was reduced into writing.

13. After some time, she called Ms. Daniels to get a feedback on the issue. The response was that she was in a process to submit a motivation in this regard. After that she did not hear anything from Ms. Daniels. The Acting Principal, Mr. Liebenberg, gave her the termination letter. Part of the content of the letter stated that if the respondent can accommodate a contract worker the contract should be extended. Her understanding of the letter is that permanent employees would be accommodated in the new structure and they would be retained. The letter further stated that if contract employees could be accommodated their contract should be extended. All contract employees' employment contracts would come to end on 31 March 2017.
14. There was a need for a professional nurse in the school and at that stage she turned 63 years old. The contract should have been extended until December 2017 or beyond. They should have made a motivation that she could be placed to a position. She does not remember that Mr Oosthuizen made a presentation at the school because she might have been at a hospital. She agrees that the organogram does not have the post of a nurse. She admitted that it was this sole reason that her contract was not renewed. She understands that she earns more than the statutory threshold hence her dispute could not trigger section 198B of the Labour Relations Act. If she succeeds with her dispute, she requested to be paid severance package.

### **RESPONDENT'S CASE**

15. **Mr. Rudolf Oosthuizen** stated that he is employed by the respondent as Deputy Director and he presented the following evidence under oath. He has been in his current post for a period of nine years. His duties are to issue approved organizational structure and to maintain the structures. The Centre used to belong to Department of Social Development. As required by the Children's Act the respondent took over the centers and the department approved the repurpose plan. This was a decision of the cabinet in 2015. The Centre was changed to a skills school in order to implement real education. School of skills has a particular curriculum with norms and standards.
16. This process prompted an engagement with the staff on the new programme and how such would affect them. They conducted two sessions with educators and public service staff. Unions were present and participated as to how the roll up would be done and what impact it would cause. The concern was how the permanent staff would be

accommodated and how they would be redeployed. Ms. Daniels was present in those presentations in December 2016.

17. All the staff members were affected by the new development. They needed to do the placement of the permanent staff. There was also implication on the contract employees because preference was given to permanent staff for placement. If there were available posts then contract staff could be accommodated. He did not personally engage with the staff members.
18. The option for the employees was to apply for vacant posts in the institution or to consider retirement. There are no schools of skills which have a professional nurse in their structures. They do have professional nurse posts only at specialized schools. The assurance to employees was that permanent employees would not lose their jobs. And those permanent staff who could not be accommodated would be in excess. If a certain job category does not exist employees would be placed in a district or other districts.
19. The department would look at how many contract staff could be accommodated in the new structure. If there are no posts then the department could not employ them any further. If the posts are not provided in the establishment like professional nurses and they could not be accommodated in specialized schools, employees were informed that their contracts would not be renewed beyond 31 March 2017. All contract staff who could not be accommodated was given one month notice in advance that their contracts would not be extended. If there was any promise made to the applicant that was not done by him and such is outside his scope of authority.
20. **Ms. Terence Daniels** stated that she is employed by the respondent as a Director for Specialized Education Support and she presented the following evidence under oath. There is Pioneer School for blind learners and learners with disabilities. A decision was made to split the school into two schools. Langeberg School is for disability. There is a motivation that this school should get an additional nurse. A number of employees came to speak to them after the presentations. There was no post available at Langeberg at that stage and now but they are still in a process to create a post for a nurse. She could not have promised the applicant a post that does not exist.
21. I will refer to closing arguments and cross examination where necessary in my analysis.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

22. Section 186(1)(b) of the LRA states that “dismissal means that—an employee employed in terms of a fixed term contract of employment reasonably expected the employer-

- i. to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it, or
- ii. to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.

23. Fixed term contracts are part and parcel of employment options to employ employees. It is trite law that employers should offer genuine fixed term contracts and, in doing so, not to avoid offering indefinite employment. It should be remembered that one of the core elements of our Constitution is the employment security. The comment made by Cheadle is relevant in this case where he contended that “*the very purpose of s186 (1)(b) was to prevent employers from concluding a series of short term contracts with employees which can then be brought to an end without reason at the termination of the fixed term contract and, as a result of which, employees could then be denied a range of protection, including social security and other benefits which are enjoyed by employees in an indefinite contracts of employment. Accordingly, the interpretation of s 186(1) (b) should be informed by this purpose, that is to prevent employers from using their freedom to contract to avoid what would be otherwise be the creation of obligations in terms of the LRA and thus erode the concomitant rights of employees*”.

24. The above view is well supported by the Constitutional Court in *NUMSA v Bader Bop (Pty) Ltd and Another* (2003) 24 ILJ at 305 (CC) at paragraph 37 where the court reasoned as follows “if (that provision) is capable of a broader interpretation that does not limit fundamental rights, that interpretation is preferred. Thus, when the section refers to the renewal of a “fixed term contact”, its purpose is to prevent the abuse of a “rolling over contracts” in order to avoid the fair labour practice obligations which are set out in 23 of the Republic of South Africa Constitution Act 108 of 1996 and which, in turn, are given content in the LRA”.

25. The crux of this dispute is premised on the fact that there was a roll-over of the contracts. This occurred on several occasions. The contracts were renewed on six months periods and were later renewed for three months durations. The issue of roll over of contracts was addressed in *King Sabata Dalindyebo Municipality v CCMA and Others* [2005] 7 BLLR 695 where the Court held that the employer's conduct in rolling renewals of the employee's fixed term contract every year and the fact that work and money to renew it was available created an expectation of renewal.
26. It is common cause that the applicant's contracts were rolled over on more than one occasion which created an expectation that the contract would be renewed in future. It is trite law that the expectation should be reasonable. In the circumstances it can be said that prior to December 2016 the applicant could not be faulted to reasonable believe that her contract would be renewed in future. However, on the closer look of the duration of the last contracts, it is clear that it was reduced and that should have raised alarm bells to the applicant that it may not be renewed in future at all.
27. There was an intervention in December 2016 whereby contract employees were informed that their contracts may not be renewed. This obviously debunked any reasonable expectation in the minds of the contract employees. At that stage the applicant was aware that a professional post was no longer forms part and parcel of the organogram of the establishment. This situation should have strongly created an impression that her contract would not be renewed if a post is not found in the specialized schools to place her. I note that the termination letter also clearly shows that if she could not be placed, she would be terminated. As from December 2016 she was aware that there was no guarantee that her contract would be renewed with the respondent.
28. It is common cause that there was a discussion regarding a nursing post between her and Ms. Daniels. Under-cross examination she conceded that she never raised this issue at the first arbitration hearing. For these reasons, I find it highly improbable that she would have been promised a post that does not even exist.
29. The applicant earned more than the statutory threshold and therefore she could not trigger section 198B. It stands to reason therefore that she cannot source any rights that flow from that section. Having considered the evidence before me, I find on balance of probabilities that the applicant failed to discharge the onus that the respondent created

a reasonable expectation that her contract of employment would be renewed beyond 31 March 2017 or that she will be retained indefinitely beyond that date.

**AWARD**

30. I find that the applicant has failed to prove that the respondent created a reasonable expectation that her contract would be renewed after 31 March 2017 that she will be retained indefinitely beyond that date. Consequently, the application is hereby dismissed.

A handwritten signature in black ink, enclosed in a faint rectangular border. The signature is stylized and appears to read 'Thuthuzela Ndzombane'.

**Thuthuzela Ndzombane**

**Sector: Public Health**