



ARBITRATION AWARD

Commissioner: **James Matshekga**

Case No: **PSHS488-16/17**

Date of award: **27 September 2018**

In the matter between:

ZOLEKA MBOTSHELWA AND 578 OTHERS

(Applicants)

and

DEPARTMENT OF HEALTH- GAUTENG

(1st respondent)

and

SMARTPURSE SOLUTIONS (PTY) LTD

(2nd respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration before me on several dates.¹ The hearing took place at the House of Movement Building situated at 123 Pritchard Street, Johannesburg.
2. There are 579 applicants in this matter. Their particulars appear on pages 28 to 53 of a bundle of documents titled "Correspondence Bundle".

¹ The arbitration was scheduled before me on 7-9 February, 7-August, and 18-22 September 2017, 7-9 March, 2-4 May and 10-14 September 2018.

3. The applicants were present and represented by Adv H Gray, on brief from Lawyers for Human Rights. Ms. J Lawrence from Lawyers for Human Rights was also in attendance.
4. Department of Health- Gauteng² and Smartpulse Solutions (Pty) Ltd³ were represented by Adv SI Vobi, on brief from the law firm Mdlulwa Nkuhlu Incorporated. Mr. A Tuswa from Mdlulwa Nkuhlu Incorporated was also in attendance.
5. The proceedings were digitally recorded.

ISSUE(S) TO BE DECIDED

6. The issue in dispute in this matter is very crisp. Has the 1st respondent demonstrated any other justifiable reason for fixing the term of the contract of the applicants within the meaning of section 198B(3)(b) of the Labour Relations Act?⁴

BACKGROUND TO THE ISSUE IN DISPUTE

7. The legal storming that has been blowing in this matter since the commencement of the arbitration has somewhat subsided.
8. When the matter came before me for the first time in 2017, various preliminary issues were raised, various postponement applications were brought, settlement proposals were made which never came to fruition, minutes of pre-arbitration meetings were not forthcoming and eventually the arbitration was finalized on 14 September 2018. On that date, several issues that were deemed to be in dispute were eventually agreed to as being common cause. Chief amongst those issues is that it is now common cause that the 1st respondent⁵ is the employer of the applicants. The applicants are employed as Community Healthcare Workers (CHWs). It is also now common cause that the applicants are so employed on a fixed term contract. It is also not in dispute that the offer to employ the applicants on the said fixed term contract or to renew or extend it does not

² Hereinafter referred to as the 1st respondent.

³ Hereinafter referred to as the 2nd respondent.

⁴ Act 66 of 1995, hereinafter referred to as the LRA.

⁵ And not the 2nd respondent.

comply with the provisions of section 198B(6)(b) in that the reasons contemplated in section 198B(3)(a) or (b) are not stated.⁶

SURVEY OF EVIDENCE AND ARGUMENT

THE 1ST RESPONDENT'S CASE

Documentary evidence

9. The 1st respondent did not submit any documentary evidence.

Oral evidence

10. The 1st respondent relied on the oral testimony of one (1) witness, namely Ms. Nomsa Mmope.⁷ The testimony led by Nomsa is fully captured on the record of proceedings. Therefore, it is not necessary for me to repeat it in this award.

11. The essence of Nomsa's testimony was that the 1st respondent cannot employ the applicants permanently because their salaries are paid from a conditional grant.⁸ Nomsa further testified that she and some employees of the respondent are permanently employed and derive their salaries from the same conditional grant.

The 1st respondent's argument

12. The arguments submitted by Adv. Vobi on behalf of the 1st respondent are a matter of record. I shall not repeat them in this award.⁹

⁶ Section 198B(6) of the LRA reads as follows:

"An offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract, must—

(a) be in writing; and

(b) state the reasons contemplated in subsection (3)(a) or (b)."

⁷ Hereinafter referred to as Nomsa.

⁸ Adv. Vobi stated on record that the conditional grant referred to by Nomsa is the "Conditional allocations to provinces" provided for in the Division of Revenue Act.

⁹ I will however refer to them where necessary.

THE APPLICANTS' CASE

Documentary evidence

13. The applicants submitted a number of bundles.¹⁰ The documents in the bundle were agreed as being what they purported to be and their contents were also not in dispute.¹¹ The individual documents are not listed here for the sake of brevity and due to the number of items involved.¹²

Oral evidence

14. The applicants chose not to lead any oral evidence after the 1st respondent closed its case.

The applicants' argument

15. The closing arguments submitted by Adv. Gray on behalf of the applicants are a matter of record. I shall also not repeat them in this award.¹³

ANALYSIS OF EVIDENCE AND ARGUMENTS

16. On 01 January 2015, significant legislative changes to South African labour law took place when provisions of the Labour Relations Amendment Act¹⁴ were effected. The amendments drastically changed the regulation on, amongst others, employees working under fixed term contracts, which is the subject matter of this dispute. The legislative changes are found under section 198B of the LRA. The section reads as follows:

198B. Fixed term contracts with employees earning below earnings threshold

(1) For the purpose of this section, a 'fixed term contract' means a contract of employment that terminates on—

¹⁰ These were NUPSAW 1, NUPSAW 2, Request for Admissions; Benjamin Case; Referral of Dispute; Bundle A; Bundle B; Correspondence Bundle; and Vote 4- Health.

¹¹ Unless stated otherwise.

¹² I will also refer to relevant documents where necessary.

¹³ I will refer to them where necessary.

¹⁴ Act 6 of 2014.

- (a) the occurrence of a specified event;
 - (b) the completion of a specified task or project; or
 - (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).
- (2) This section does not apply to—
- (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act;
 - (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless—
 - (i) the employer conducts more than one business; or
 - (ii) the business was formed by the division or dissolution for any reason of an existing business; and
 - (c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.
- (3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if—
- (a) the nature of the work for which the employee is employed is of a limited or definite duration; or
 - (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.
- (4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee—
- (a) is replacing another employee who is temporarily absent from work;
 - (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
 - (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
 - (d) is employed to work exclusively on a specific project that has a limited or defined duration;
 - (e) is a non-citizen who has been granted a work permit for a defined period;
 - (f) is employed to perform seasonal work;
 - (g) is employed for the purpose of an official public works scheme or similar public job creation scheme;
 - (h) is employed in a position which is funded by an external source for a limited period; or
 - (i) has reached the normal or agreed retirement age applicable in the employer's business.
- (5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.
- (6) An offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract, must—
- (a) be in writing; and
 - (b) state the reasons contemplated in subsection (3)(a) or (b).
- (7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.
- (8)
- (a) An employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.

(9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10)

(a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act.

(b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.

(11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

17. The numb of the applicants' case is that their employment in terms of the fixed term contract was concluded or renewed in contravention of section 198B(3) and therefore the contracts should be deemed to be of indefinite duration in terms of section 198B(5) of the LRA.

18. The numb of the respondent's case is that it has a justifiable reason for employing the applicants on a fixed term contract. The justifiable reason proffered is that the applicants are remunerated from a conditional grant. Nothing more, nothing less.

19. Section 3 of the LRA requires that the LRA should be interpreted on a construction that complies with the Constitution and public international law that gives effect to the primary objects of the LRA.¹⁵ It is trite that in interpreting the LRA, the correct approach is purposive interpretation.¹⁶

¹⁵ The section reads as follows:

3. Interpretation of this Act

Any person applying *this Act* must interpret its provisions –

(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and

(c) in compliance with the public international law obligations of the *Republic*.

¹⁶ See in this regard *Steenkamp and Others v Edcon Limited* (2016) 37 *ILJ* 564 (CC) at para. 100-101.

20. In the Explanatory Memorandum accompanying the LRA Amendment Bill as tabled in 2012 in Parliament, it was stated that the substantive amendment to chapter IX of the LRA were made to protect three categories of non-standard employees: employees placed by temporary employment services (TESs), employees engaged on fixed term contracts and part-time employees. In so far as employees engaged on fixed term contracts are concerned, the Explanatory Memorandum stated that new section 198B introduces additional protection for more vulnerable workers and applies only to employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act.¹⁷
21. The Explanatory Memorandum further provides that “an employer who employs an employee to whom the section applies on a fixed term contract or who renews or extends a fixed term contract must do so in writing and must state the reason that justifies the fixed-term nature of the employment contract.” Section 198B(6) of the LRA requires that the justifiable reason must be stated in the offer. This means that the justifiable reason must be stated before and not after employment is concluded. That section 198B contemplates the stating of the justifiable reason before and not after conclusion of the fixed term finds further support from the provisions of section 198B(7) which state that “if it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.” The phrase “that the term was agreed” can only mean acceptance of the offer by the employee on the terms stated in the offer by the employer as contemplated in section 198B(6) of the LRA.
22. Section 198B(6) and 198B(7) of the LRA serve very important legislative functions: they are intended to curb abuse of vulnerable workers by employers who may want to advance justifiable reasons after the fact. In other words, Section 198B(6) and 198B(7) of the LRA prevent an employer from advancing or demonstrating a justifiable reason after the contract was concluded.
23. As already stated, it is common cause that the reason advanced by the 1st respondent in justifying the continued employment of the applicants on fixed term was not stated in the offer as required by section 198B(6) of the LRA. In other words, the fixed term

¹⁷ Act 75 of 1997.

contract and renewal thereof is contrary to the provisions of section 198B(6), read with section 198B(7) of the LRA. Since the justifiable reason was not stated as required by section 198B(6) LRA, it can reasonably be concluded that such a reason did not exist at the time of the offer. Accordingly, the respondent's claim that it has a justifiable reason as contemplated in section 198B(3) of the LRA stands to be dismissed on that ground alone. Section 198B does not permit demonstration of any other justifiable reasons *post facto*.

24. Even if section 198B permitted the 1st respondent to demonstrate any other justifiable reason *post facto*, the reason advanced by the respondent in this matter cannot serve as justification for the continued employment of the applicants on fixed term contracts. I explain why.

25. Section 214 of the Constitution of the Republic of South Africa¹⁸ requires that every year a Division of Revenue Act determine the equitable division of nationally raised revenue

¹⁸ Constitution of the Republic of South Africa, 1996 hereinafter referred to as the Constitution. Section 214 reads as follows:

214 Equitable shares and allocations of revenue

(1) An Act of Parliament must provide for—

- (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
- (b) the determination of each province's equitable share of the provincial share of that revenue; and
- (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.

(2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the

Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—

- (a) the national interest;
- (b) any provision that must be made in respect of the national debt and other national obligations;
- (c) the needs and interests of the national government, determined by objective criteria;
- (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
- (e) the fiscal capacity and efficiency of the provinces and municipalities;
- (f) developmental and other needs of provinces, local government and municipalities;
- (g) economic disparities within and among the provinces;
- (h) obligations of the provinces and municipalities in terms of national legislation;

between national government, the nine provinces and 257 municipalities.¹⁹ Section 7 of the yearly Division of Revenue Act deal with allocations to provinces from the national government's share of revenue raised nationally. Part A of Schedule 5 specifies specific purpose allocations to provinces. Comprehensive HIV, AIDS and TB grant is allocated to Health²⁰ and its purpose is "to enable the health sector to develop and implement an effective response to HIV and AIDS and Tuberculosis." The allocation is conditional. The duties of the receiving officer are set out in section 12 of the yearly Division of Revenue Act, which requires that the receiving officer must ensure compliance with the relevant framework. An allocation can only be withheld in circumstances set out in section 18 of the yearly Division of Revenue Act. An allocation can be stopped at the discretion of National Treasury in circumstances described in section 19 of the yearly Division of Revenue Act, which include a serious or persistent material breach of the Division of Revenue Act, as envisaged in section 216(2) of the Constitution.²¹

26. Nomsa testified that National Treasury always allocates the 1st respondent money for the HIV, AIDS and TB programme. Nomsa also testified that the 1st respondent always complies with the conditions of the allocation. Therefore, on the 1st respondent's own version, there is no risk that National Treasury will stop the allocation.

27. The 1st respondent has a constitutional obligation to use the conditional allocation from the national fiscus in a manner that promotes the interests of South Africans as a whole.

(i) the desirability of stable and predictable allocations of revenue shares; and

(j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

¹⁹ 278 municipalities prior to the 2016 local government elections.

²⁰ Vote 16.

²¹ Section 216 of the Constitution reads:

216 Treasury control

(1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure

control in each sphere of government, by introducing—

(a) generally recognised accounting practice;

(b) uniform expenditure classifications; and

(c) uniform treasury norms and standards.

(2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.

If it does so, then national Treasury has an obligation to allocate resources to fund national projects, of which the Comprehensive HIV, AIDS and Tuberculosis is one.

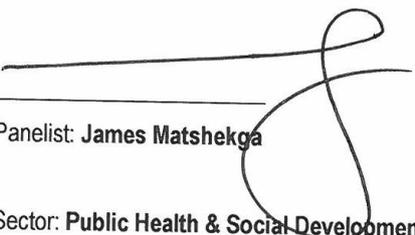
28. It could not have been the intention of the legislature that employees whose salaries are paid from the national fiscus in the form of conditional allocations must be employed on a fixed term contract. If that was the case, the legislature would have specified that reason as one of the justifiable reasons in section 198B(4) of the LRA. If the legislature could specify “official public works scheme or similar public job creation scheme” as a justifiable reason, it would surely have specified “conditional allocation” as a justifiable reason. Accordingly, I find that the 1st respondent failed to demonstrate any other justifiable reason for employing the applicants on fixed term contracts. I therefore make the following award:

AWARD

29. The 1st respondent failed to demonstrate any other justifiable reason for fixing the term of the contract of the applicants within the meaning of section 198B(3)(b) of the LRA.

30. The applicants are hereby deemed to be employed by the 1st respondent for an indefinite duration in terms of section 198B(5) of the LRA.

31. I make no order of costs.²²


Panelist: **James Matshekoa**
Sector: **Public Health & Social Development**

²² The applicants were represented *pro bono*. There is also an existing employer-employee relationship between the parties. Accordingly, a cost order will be inappropriate in this matter.