IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA8/2019

In the matter between:

DEPARTMENT OF AGRICULTURE, FORESTRY	
AND FISHERIES	**Appellant**
and	
MISELWA PRISCILLA TETO	**First Respondent**
CHARLES RODGER TITUS	**Second Respondent**
RANDALL PETER JOHN KOOPMAN	**Third Respondent**
GENERAL PUBLIC SERVICE SECTORAL	
BARGAINING COUNCIL	**Fourth Respondent**
COMMISSIONER JUSTICE NEDZAMBA N.O	**Fifth Respondent**

Heard: **07 May 2020**

Delivered: **28 May 2020**

Summary: Dismissal----employees continued working beyond their fixed-term contract and dismissed thereafter---court finding that contract deemed to be tacitly relocated or novated and unless contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract

to be of indefinite duration, terminable by reasonable notice given by either party.

Dismissal---remedies----in the absence of exceptional circumstances specified in s 193(2) of the LRA, primary remedy of reinstatement the appropriate remedy.

Coram: Phatshoane ADJP, Davis JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant, the Department of Agriculture, Forestry and Fisheries ("DAFF"), appeals against the judgment of the Labour Court (Rabkin-Naiker J) setting aside the arbitration award of the fifth respondent, Mr. Justice Nedzamba, ("the commissioner") and substituting it with an order upholding the commissioner's finding that the first to third respondents ("the respondents") were unfairly dismissed by DAFF but awarding them a "*solatium*" for their unfair dismissal instead of reinstatement. DAFF contends that the Labour Court erred in finding that the respondents were employed by it at the date of their dismissal. It maintains that the respondents were not its employees beyond the expiration of their fixed-term contracts and that their continued employment thereafter was not with DAFF but with one of its implementing agencies.

[2] The respondents have filed a cross-appeal raising various grounds. Most importantly, they contend that the Labour Court erred firstly in entertaining a fatally defective review application in that the original papers were not filed with the court and various affidavits of the appellant did not comply with the Justices of the Peace and Commissioners of Oaths Act[1] and its regulations.[2] Secondly, they allege that the Labour Court erred in ordering the payment of a *solatium* instead of granting the primary remedy of reinstatement.

[3] The respondents were initially employed by DAFF on a one-year fixed-term contract from 15 July 2013 to 14 July 2014. The first and third respondents

[1] Act 16 of 1963.
[2] The Labour Court did not make a ruling on this point *in limine* and accepted a fresh review application weeks after the application was heard in court.

(Teto and Koopman respectively) were employed as Senior Administrators and the second respondent (Titus) as an Assistant Programme Manager in the Working for Fisheries Programme ("WFFP") of DAFF. It is common cause that when their fixed-term contracts expired on 14 July 2014, they continued working in their positions performing the same tasks until they were dismissed on 26 August 2016.

[4] After their dismissal, the respondents referred an unfair dismissal dispute to the General Public Service Sectoral Bargaining Council for conciliation and arbitration.

[5] At the arbitration, DAFF contended that beyond the expiration of the fixed-term contracts, the respondents ceased to be employed by it and that Management for Excellence ("ME"), a temporary employment service and one of its implementing agents, had taken over as their employer. It, in effect, challenged the jurisdiction of the commissioner to determine the dispute.

[6] The respondents testified that on 13 July 2014 (one day before their fixed-term contracts expired) they were called to a meeting with Mr. Denver Barron, the WFFP Project Manager, and Ms Sue Middleton, the Chief Director of DAFF. During the meeting, it was agreed that, although their contracts had come to an end, they would continue working on the WFFP on an indefinite basis. They were told that their salaries would no longer be paid through the Persal system (the government payment system) but that an arrangement would be made with one of the service providers or implementing agencies to pay their salaries. Over the next two years, they were paid by Jaymat Environ Solutions CC, Cederberg Municipality and ME. The arrangement involved DAFF paying the respondents' salaries to one of these agencies which in turn paid the respondents. The reason for this arrangement was that the respondents' posts were not on the establishment organogram and therefore could not be paid directly by DAFF. Middleton initiated a process to get approval for the WFFP organogram, which was accepted in late 2014 and the vacant new establishment positions were then advertised.

[7] Titus testified that in 2015 he was interviewed for the Deputy Programme Manager position on the new organogram. He was informed by Barron that he "was the number one candidate" for the position. While waiting for the finalisation of the appointment, he was told that the Deputy Director General of DAFF ("the DDG") had decided not to make any of the new appointments. No reasons were provided for the decision. Middleton, however, asked Titus to continue working. He had the expectation that he would continue working permanently on the WFFP, which he saw as part of DAFF and in time would be incorporated on the DAFF organogram. In July 2015, Barron was dismissed, Titus took over as the Project Manager of WFFP and reported directly to Middleton and the DDG. In June 2016, his request for physical accommodation for the WFFP project team at DAFF was granted. On 25 August 2016, while on assignment in Durban, he was contacted by Middleton who informed him that he and the other respondents had been dismissed on the instructions of the DDG, for reasons that were not clearly explained.

[8] Teto confirmed the evidence of Titus regarding the continuation of work after the expiry of the fixed-term contracts. She testified that she was phoned by Koopman on 25 August 2016 who told her that she was no longer needed and in effect was being dismissed with immediate effect. No explanation was given to her or Koopman as to why this was done. Koopman testified that he was informed by Titus that he too had been dismissed without explanation.

[9] None of the relevant evidence of the respondents regarding the events of 25 August 2016 was contested meaningfully during cross-examination.

[10] Mr. Denver Barron, who was the Programme Manager of the WFFP, testified on behalf of the respondents. He was employed by DAFF to establish the WFFP as part of the government's Expanded Public Works Project. He described the process whereby he began employing employees for the WFFP and how the respondents had first been employed on fixed-term contracts and were accountable to him. Once the fixed-term contracts expired, DAFF needed to find a mechanism "to keep everyone on board" and to have the respondent's salaries paid until appointments were made to DAFF in accordance with an approved WFFP organogram. It was decided to approach one of the service

providers to pay the salaries and DAFF would add the additional payments to the service provider's budget. However, it was understood that the respondents worked for DAFF and that the arrangement with the service providers was simply "a payment arrangement". The DDG approved the arrangement and the payments would be signed off by the Chief Director on a monthly basis. The respondents worked at the premises of DAFF, they reported to Barron and there was no employment contract between any of the service providers and any of the respondents. Moreover, when the respondents travelled for work, DAFF would make the arrangements and would pay their daily subsistence allowances.

[11] When asked in cross-examination whether the respondents were on an "open-ended" contract after the expiry of their fixed-term contracts, Barron explained that once appointments were made to an approved WFFP organogram, the intention was for the newly appointed employees to be appointed on three-year fixed-term contracts, as funding was initially guaranteed for that period. This intention was never realised and none of the respondents was appointed on this basis. They were employed by DAFF in terms of a verbal contract on a monthly basis.

[12] The only witness to testify on behalf of DAFF was Mr. Desmond Marinus, its Technical Manager for Fishing Harbours in the Directorate of Agriculture, Socioeconomic Development. He was appointed by the DDG to act as the Programme Manager for the WFFP after Barron was dismissed in 2017. Thus he did not work in the WFFP at the time of the respondents' dismissal, but had worked with them on "the harbour related projects". He understood the respondents to be employees of DAFF because the WFFP fell under DAFF. He testified that the WFFP had 11 posts but that only four were currently filled because there was some reluctance on the part of DAFF to fill them.

[13] The commissioner held that the respondents were employees of DAFF and had been unfairly dismissed. He reasoned lucidly and concisely as follows:

> 'Since the respondent's defence is that it was not the applicants' employer, it is important to determine whether or not they were re-appointed by the

> respondent when their fixed term contracts terminated. The respondent's argument is based on the fact that the applicants were not paid directly by the respondent and that they were not on respondent's persal system. To my mind, that cannot be the only determining factor; the evidence suggests that the applicants continuously performed their work under the sole control of the respondent. Their workplan and performance agreements were signed for by the respondent. They were responsible to the respondent in their daily duties. The role of implementing agents like Managing for Excellence insofar as it relates to their employment relationship with the respondent was simply intended to administer their salaries….Evidence shows that Managing for Excellence or any implementing agent neither procured nor provided applicants to the respondent….The applicants had no employment contract with Managing for Excellence…I accordingly find that the respondent remained the applicants' sole employer..(sic)'

[14] The commissioner then referred to the established principle that if an employee is allowed to work beyond the end of a fixed-term contract, the contract is tacitly converted into a permanent one of indefinite duration, terminable on reasonable notice.[3] On that basis, he concluded that the respondents had remained employed with DAFF until their dismissal. In effect, he held that he had jurisdiction in relation to the dispute because there was a "dismissal" as contemplated in section 186 of the Labour Relations Act[4] ("the LRA"). The employer, DAFF, terminated the employment of the respondents.

[15] With regard to the fairness of the dismissals the commissioner held:

> 'Since the respondent relied only on its contention that it was not the applicants' employer and that it could not have dismissed them, it failed to lead evidence to prove that the applicants' dismissals were procedurally and substantively fair. Under the circumstances and having considered the evidence in totality, I find that the respondent has failed to discharge the onus to show me that the applicants' dismissals were fair. I accordingly find that their dismissals were both procedurally and substantively fair.'

[3] *Owen & others v Department of Health, KwaZulu-Natal* (2009) 30 ILJ 2461 (LC).
[4] Act 66 of 1995.

[16] The commissioner, after considering the provisions of section 193(2) of the LRA, and concluding that reinstatement was reasonably practicable and a continued employment relationship was not intolerable, ordered the retrospective reinstatement of the respondents.

[17] In its review application before the Labour Court, DAFF contended that the commissioner had erred in finding that the respondents were employed by DAFF and in awarding reinstatement.

[18] The Labour Court held that the terms and conditions of the respondents did not remain the same after the expiry of their fixed-term contracts as they were not on the Persal system and received less remuneration. However, it accepted that an employment relationship existed between the respondents and DAFF but not one that was permanent. This and "the sudden manner" of the dismissals justified some form of *solatium*. The Labour Court then set aside the award of the commissioner, declared the dismissals substantively and procedurally unfair and awarded payment of compensation in an amount equal to 12 months' remuneration.

[19] The contention by DAFF on appeal that the respondents were not its employees is not sustainable for the reasons accepted by the commissioner. DAFF's own witness confirmed that the respondents were employees of DAFF and their payment by the implementing agents was intended to be a temporary expedient. The respondents were subject to the control and direction of DAFF in all their work activities and received remuneration from DAFF although their payment was channelled through the implementing agent. There is no evidence of any kind supporting the contention that the employees concluded contracts of employment with the implementing agent. After the expiry of their fixed-term contracts with DAFF, the respondents continued to work at the same workplace performing the same functions under the direction of the Programme Manager.

[20] The fact that some of the terms and conditions of the respondents' employment may have altered is not decisive. They remained employed by the same employer, albeit on different terms. If after the expiry of a fixed-term contract, an employee continues to render services to an employer and receives

remuneration for the rendering of those services, the contract is deemed to be tacitly relocated or novated. The new contract may be on varied terms and its duration period must be determined in the light of the circumstances of each case. Unless a contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration, terminable by reasonable notice given by either party.[5] The commissioner correctly held that this is what happened in this case. His reference to the new contract as a "permanent" contract was perhaps a mischaracterisation, but he clearly meant that the new contract was one of an indefinite nature terminable by reasonable notice. His finding that the respondents were employees of DAFF, and thus that he had jurisdiction to determine the unfair dismissal dispute, was unassailably correct; as was his finding that since DAFF failed to lead any evidence justifying the dismissals it did not discharge its onus to prove their fairness.

[21] In the premises, there is no merit in the appeal and it must be dismissed.

[22] The cross-appeal is on firmer ground. Section 193(2) of the LRA provides that unless the employee does not seek to be reinstated, or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not practicable for the employer to reinstate the employee, or the dismissal is only found to be procedurally unfair, the commissioner must reinstate the employee. Thus, the employer bears the onus to prove that there are exceptional reasons not to afford the primary remedy of reinstatement. The Labour Court made no reference to section 193(2) of the LRA in deciding to set aside the award of reinstatement. DAFF presented no evidence that reinstatement was not practicable or that the continuation of an employment relationship was intolerable. Indeed, DAFF's own witness, Mr Marinus, stated during his testimony that the respondents' skills were still needed and their posts had not been filled. Accordingly, there was no evidentiary basis for the Labour Court to interfere with the commissioner's decision to award reinstatement.

[5] J Grogan *Workplace Law* (10th Edition) 41-42; *Redman v Colbeck* 1917 EDL 35 at 38; and *Braund v Baker, Baker & Co.* (1905) 19 EDC 54.

[23] Given our view of the merits, there is no need to pronounce on the preliminary point that the application for review was technically defective and should have been dismissed on that ground alone.

[24] Equity demands that costs should follow the result in this case.

[25] In the result, the following orders are made:

25.1. The appeal is dismissed with costs.

25.2 The cross-appeal is upheld with costs and the order of the Labour Court is substituted with an order dismissing the application for review with costs.

_____

JR Murphy

Acting Judge of Appeal

I agree

_____

M Phatshoane

Acting Deputy Judge President

I agree

_____

DM Davis

Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:	Adv T Masuku SC
	Instructed by The state attorney
FOR THE RESPONDENTS:	Adv V Barthus
	Instructed by Webber Wentzel