

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA87/2020

In the matter between:

GAUTENG PROVINCIAL LEGISLATURE

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

COMMISSIONER ERIC MYHILL N.O.

SIPHO MALEFANE

GIDEON WISSIE

COLLEEN MOGANE

ANDISWA NGCINGWANA

Heard: 26 August 2021

Appellant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Delivered: Deemed to be the date the judgment is emailed to the parties
(25 November 2021)

Coram: Waglay JP, Jappie et Coppin JJA

JUDGMENT

COPPIN JA

[1] The Labour Court (Kirstein AJ) dismissed an application to review and set aside an arbitration award of the second respondent (“the arbitrator”), acting under the auspices of the first respondent (“the CCMA”), in favour of the third to sixth respondents (collectively referred to as “the employees”) and in terms whereof it was, *inter alia*, found that the appellant (“the legislature”) had unfairly dismissed the employees and was ordered to reinstate them retrospectively with full backpay. This is an appeal against that decision with the leave of that court.

[2] The issue for resolution by the arbitrator essentially related to whether the legislature had dismissed the employees, or whether their employment contracts had been terminated through the effluxion of time. The employees, in their referral to the CCMA, essentially, contended that they were in permanent employment with the legislature when their contracts were terminated, albeit in terms of a tacit contract. The legislature, on the other hand, maintains that they were employed on fixed-term contracts that had come to an end.

Factual Matrix

[3] The appellant is a constitutional entity served, *inter-alia*, administratively by the Legislative Services Board (“the LSB”), created in terms of the Gauteng Provincial Legislature Services Act¹. The LSB is empowered in terms of that Act to determine the size and organisation of the fixed establishment and, *inter-alia*, to determine and prescribe conditions of service, appointments, et cetera.

[4] The third respondent (“Mr Malefane”) was employed by the legislature as director of Institutional Support Services. He commenced his employment with the legislature on 3 January 2005. On 9 December 2006, he entered into a four year fixed-term contract which was to terminate on 30 November 2010. Thereafter, he continued to be employed by the legislature on a fixed term basis, albeit tacitly and without an express, written contract to that effect. In accordance with a resolution of the LSB, to extend all fixed-term contracts of senior managers to 30 June 2015, Mr Malefane signed a further fixed term contract terminating on that date. His continued employment from 1 July 2015 forms the subject of the dispute that had to be resolved in this matter and is discussed in the course of this judgment.

[5] The fourth respondent (“Mr Wessie”) was employed by the legislature as Executive Director, Corporate Support Services. He was first employed on 3 January 2005. On 1 December 2006, he concluded a fixed-term contract with the legislature that was to expire after four years on 30 November 2010. Upon expiry of that contract, he continued to be employed by the legislature on a fixed-term basis, albeit tacitly, without an express, written contract to that effect, until 1 June 2014. In

¹ Act 5 of 1996.

accordance with a resolution of the LSB to extend all fixed-term contracts of senior managers to 30 June 2015, Mr Wessie also signed a further fixed-term contract terminating on that date. His continued employment from 1 July 2015 also forms the subject of the dispute that had to be resolved in this matter and is discussed in the course of this judgment.

[6] The fifth respondent (“Ms Mogane”) was employed by the legislature as Director, Member Affairs, Corporate Support Services. She commenced her employment on 1 February 2001 and on 1 December 2007 she also entered into a fixed-term employment contract for a period of three years terminating on 30 November 2012. After that date she remained employed by the legislature in the same position, albeit tacitly, without an express, written contract to that effect. Following the LSB resolution of 13 August 2013, she also concluded a written fixed-term contract of employment with the legislature that was to terminate on 30 June 2015. The basis of her continued employment by the legislature subsequent to that date is the subject of the dispute and is discussed in the course of this judgment.

[7] The sixth respondent (“Ms Ngcingwana”) was employed by the legislature as Manager, Budgeting and Planning, on a five year fixed-term contract that commenced on 1 October 2010 and terminated on 30 September 2014. On her version, her fixed term contract was extended for a year, and was to terminate on 30 September 2015. Subsequently she remained employed by the legislature, as with the other employees, without a written contract to that effect and, similarly to the other employees, the nature of her further employment by the legislature was the subject of a dispute which is discussed later in the judgment.

[8] It is common cause that in about 2013, there was a directive for a proposal to be made to the Remuneration Committee of the legislature for the fixed-term contracts of senior managers, that had expired or were to expire, to be replaced with a rigorous performance-based contractual regime. The proposal was presented to the Remuneration Committee and approved by that committee for recommendation to the LSB.

[9] The LSB held a meeting on 7 August 2013 where the recommendation of the Remuneration Committee was considered. (a) The memorandum from the committee proposed “a reconsideration of the five year fixed-term contracts to be replaced with rigorous performance-based contracts.” (b) the memorandum referred to the fact that “[a] number of contracts of senior managers had expired and the Executive Director of Corporate Support Services [i.e. Mr Wessie] had presented a proposal requesting that the expired contracts be extended retrospectively from the date on which they expired.” The argument in favour of their proposal being that the situation, where contracts had expired, created uncertainty; (c) the memorandum mentions that in terms of the proposal – there was no evidence that the fixed contract regime had achieved its intended goals, namely, institutional and individual performance; that fixed-term contracts provided the employees with no guarantee of renewal, even when there was evidence of consistent satisfactory performance; and it was also argued, that, the fixed-term contracts did not provide the employer “with the flexibility of separation where there is evidence of recurring unsatisfactory performance.”

[9] As per the proposal, the Remuneration Committee had recommended to the LSB “to extend the contracts and replace them with the performance-based contracts till 2015.” In terms of its resolution of 7 August 2013 the LSB, *inter-alia*, approved the proposal for “the extension of fixed term contracts for senior managers as recommended by the Performance and Remuneration Committee”, and adopted the report of that committee.

[11] It is not in issue that the resolution of the LSB was interpreted to mean that while the policy for the performance-based contract was still being developed – the contracts that had expired or were about to expire were to be extended until 30 June 2015. And that it was anticipated that the extension would allow enough time for the policy (i.e. on performance-based contracts) to be developed fully and to be communicated to the employees to whom it was to apply.

[12] It is also common cause that the affected senior managers, including the employees, were presented with written extensions of their employment contracts, i.e. presumably effective from the time when their existing contracts expired until 30

June 2015; that they were asked to consider and sign those extensions if they accepted them. It further appears to be common cause that the employees accepted and signed those extensions. Those documents have not been included in the record.

[13] There was no further express extension of the contracts before 30 June 2015, but as from 1 July 2015 the employees continued to be employed by the legislature in the same, respective, capacities, albeit tacitly. The ultimate issue for determination was on what basis they were employed from 1 July 2015, i.e. whether it was on a tacit, fixed-term basis, which was subsequently extended to 30 June 2016, as the legislature contends, or as the employees contend, on a tacit, but permanent basis.

[14] Before 30 June 2015, and particularly on 15 June 2015, Mr Malefane, the third respondent, who was responsible for human resources, prepared a memorandum in order to request the LSB to: (a) approve the extension of the contract of senior managers and; (b) to authorise the secretary of the appellant, Mr Skosana, to implement the revised performance management and development system framework for managers; and (c) to recommend that the revised performance management and development system framework be developed and approved by 15 August 2015.

[15] According to Mr Skosana, the Secretariat Committee of the legislature discussed the memorandum and he, as the secretary, prepared a memorandum for submission to the LSB containing all the options discussed and proposed to the committee in that regard. The presiding officers, at a meeting also attended by, *inter alia*, the fourth respondent (Mr Wessie), adopted a resolution in terms of which they rejected all the proposals in the memorandum and passed a resolution that all fixed-term contracts be extended to 30 June 2016; that the affected positions be advertised in January 2016; and that the entire process be finalised by the end of June 2016.

[16] On 11 December 2015, the LSB held a meeting where it, *inter-alia*, considered and accepted the resolution of the presiding officers, and in effect, resolved that the employment contracts of those same managers be extended by

one year, that is, retrospectively, from 1 July 2015 to 30 June 2016 and to terminate the services of all senior managers by 30 June 2016. The positions were to be advertised and the affected persons, including the employees, were required to re-apply for the positions they occupied up to 30 June 2016.

[17] In an e-mail dated 15 March 2016, bearing the subject heading, “Mandate to recruit for the positions of Director Institutional Support Services and Director Members’ Affairs”, addressed to the fourth respondent, Mr Wessie and copied, *inter alia*, to the third respondent, Mr Malefane, the secretary of the legislature, Mr Skosana, informed as follows: “as you are aware, the position of Directors: Institutional Support Services (ISS) and Members’ Affairs will become vacant when the contract of employment expires in June 2016. In order to ensure a smoother transition, the legislature’s Services Board decided that all positions expiring in June 2016 must be advertised. In line with the LSB decision, kindly receive herewith a mandate to recruit for the position of Directors: ISS and Members’ Affairs. Please sign the memo and submit to Ms Wanda Els and send me a copy.”

[18] In March 2016, Mr Skosana also notified the senior managers (including the employees) that their contracts would terminate at the end of June 2016 and urged them to apply for their positions as per the resolution of the LSB. The employees did not apply for their positions. Instead, in response, the employees’ attorneys of record wrote letters to, *inter alia*, the Speaker and Deputy Speaker of the legislature and to the secretary, Mr Skosana, all dated 23 March 2016 and with more or less identical content, demanding on threat of legal action, *inter alia*, (a) an immediate withdrawal of the “termination” letter in respect of each of the employees; (b) an undertaking before 12 April 2015 that the legislature would not proceed with the advertisement of those employees’ positions or proceed with the “headhunting of people to fill in their positions”; and significantly, (c) an undertaking that their clients’ “fixed term contracts of employment have been automatically renewed and/or with an expectation to be retained as permanent employees of” the legislature.

[19] Importantly, these letters briefly record the history of employment of each of the employees and, *inter alia*, states the following:

‘3. Our clients instruct us that the fixed term contracts cannot legally be extended retrospectively as in any event there is no existence of such a retrospective one (1) year extended fixed term contracts of employment entered into and signed by them and the GPL effective [from] 1 July 2015 to 30 June 2016. We are instructed further by our clients that when their fixed term contracts of employment lapsed the GPL allowed them to continue fulfilling their duties and responsibilities to date, thus effectively automatically renewing their contracts.

4. Indeed it must be recorded that our clients are as a matter of fact, de facto employed by the GPL on the basis that there has been an automatic renewal of their fixed term contracts of employment of five (5) years which have been renewed in certain instances on more than a single extra term.

5. Given the aforesaid facts, our instructions are that the decision by the GPL to terminate our clients’ employment in your letter dated 15 March 2016 cannot be countenanced as it constitutes an unfair dismissal which is liable to be challenged and set aside.’

[20] In its penultimate paragraph, the letter informs of the employees’ willingness “to entertain other reasonable suggestions concerning their employment with the GPL...”

[21] Pursuant to the letter, the employees brought an urgent application in the Labour Court seeking to interdict the recruitment process, but it was struck from the roll for lack of urgency. Those senior managers who did re-apply for their positions, including Mr Skosana, and save possibly for one, were appointed on performance-based contracts for a fixed term of five years (i.e. from 1 July 2016).

[22] On 7 July 2016, the employees referred an unfair dismissal dispute, relying on section 186(1)(b)(ii) of the Labour Relations Act (“the LRA”), to the CCMA. On 4 August 2016, the dispute was conciliated, albeit unsuccessfully.

[23] Section 186(1)(b)(ii) provides that a “dismissal” means that “an employee employed in terms of the fixed term contract of employment reasonably expected the employer... 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.”

The arbitration

[24] In his award, which was rendered on 17 January 2017, the arbitrator described the issues to be decided as follows:

“8. Whether the applicants were employed on a permanent basis, alternatively on fixed term contracts at the time of the termination of their services.

9. Whether, in the event of finding that the applicants were employed on a permanent basis at the time of termination of their services, they were dismissed in terms of s 186 of the [LRA], and, if so, whether their dismissals were procedurally and substantively fair.

10. If held that they were employed on fixed term contracts at the time of termination of their services, whether:

10.1 the applicants reasonably expected the respondents to retain them in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the respondents did not retain them (section 186(1)(b)(ii) of the [LRA]);

10.2 alternatively, whether Ngcingwana had a reasonable expectation of renewal of her fixed term contract on the same or similar terms (section 186(1)(b)(i))

11. If they were unfairly dismissed, what relief would be appropriate.”

[25] Having concluded (*inter-alia*) - that “the probabilities favour the conclusion that the [legislature] envisaged replacing the fixed-term contract applicable to senior managers with an indefinite/permanent one” and that Mr Skosana’s exclusion from the performance-based contracts was probably the reason why the contract that was later concluded with him was a five year contract -the arbitrator went on to consider the status of the other employees after their fixed-term contracts had expired on 30 June 2015.

[26] The arbitrator concluded, in effect, that the no-variation clause, in the contracts that had been extended until then, precluded the coming into existence of the proposed, extended fixed term contracts and that their status was dependant on whether it was proved on a balance of probabilities that the parties entered into “a tacit agreement that their continued employment would be of an indefinite nature.” According to the arbitrator, the question was whether that could “reasonably be inferred from their conduct.”

[27] The arbitrator then went on to reason as follows: “ 96... There was a delay of almost 6 months in resolving to extend their contracts retrospectively without any consultation with the [affected employees]. Prior to the termination letters they received on 18 March 2016 there is no documentary evidence that they were informed that their contracts would terminate on 30 June 2016 and that they could apply for their jobs. As stated above, there is documentary evidence supporting their view that the fixed-term regime would be replaced by a permanent performance-based regime. The decision made by the LSB on 11 December 2015 was contrary to the resolution made by the LSB on 7 August 2013 and the steps taken thereafter by the administration of the [legislature] to prepare for the implementation of the new regime is consistent with the understanding of the [employees]. I agree with Mr Goosen that there is no documentary evidence to support the notion that the LSB resolved to replace the fixed term regime was another fixed term regime which the [legislature] claims took place.... 97. While it is common cause that the applicants did not refuse to sign an extension of their fixed term contracts to 30 June 2016 (such were not presented to them) their opposition to this is consistent with their belief that their fixed term contracts would be replaced by an indefinite performance-based regime....98. In these circumstances, it can reasonably be inferred from the

conduct of the parties that they entered a tacit agreement that the continued employment of the applicants would be of an indefinite nature from 1 July 2015....

99. On the same grounds, I also find that [the employees] proved, on a balance of probabilities, that after their fixed term contracts expired on 30 June 2015, they reasonably expected the [legislature] to retain them on an indefinite basis but the [legislature] did not offer to retain [the affected employees]. Instead, it unlawfully extended such contracts with retrospective effect to 1 July 2015 and informed [the employees] on 18 March 2016 that such contracts would terminate on 30 June 2016.... 100. This amounted to a dismissal in terms of s 186(1)(b) (ii) of the [LRA].”

[28] The arbitrator then proceeded to make an award in the following terms:

“104. The [employees] proved on a balance of probabilities that they were dismissed by the [legislature]....105. The [legislature] failed to prove that these dismissals are procedurally and substantively fair....106. The [legislature] is ordered to reinstate the applicants... to the indefinite contracts of employment they had with the respondent from 1 July 2015 with retrospective effect from the date of their dismissal, i.e. 1 July 2016....107. The [employees] must report for duty at the [legislature] on 1 February 2017.... 108. The respondent is to pay...”

[29] Thus, in sum, the arbitrator found that the employees had proved that when their fixed term contracts, that had been extended in terms of the LSB resolution of 7 August 2013, to 30 June 2015, had expired, they continued to be employed by the legislature in terms of a tacit agreement on an indefinite/permanent basis and that the notice given to them on 18 March 2016 to the effect that their contracts would terminate after 30 June 2016, constituted a dismissal in terms of s 186(1)(b)(ii) of the LRA because the employees had a reasonable expectation that they would be employed on an indefinite/permanent basis.

The Labour Court (“the court a quo”)

[30] The court *a quo* concluded that the determination of the arbitrator that after 30 June 2015 the employees remained employed in terms of tacit indefinite contracts

was “based on justifiable inferences on facts presented at the arbitration and therefore the determination does not fall within the ambit of a defect as referred to in section 145 of the LRA.”

[31] The court *a quo* then referred to a passage of this Court’s decision in the matter of *Department of Agriculture Forestry and Fisheries v Teto & others*² (“Teto”) where it was held that if after the expiry of a fixed-term contract an employee continues to render services to an employer and to be remunerated for them “the contract is deemed to be tacitly located or novated” and that “[t]he new contract may be on varied terms and its duration period must be determined in light of the circumstances of each case”, and that “unless a contrary intention can be inferred from the facts, it will generally be assumed that the new contract [is] of indefinite duration, terminable by reasonable notice given by either party.”

[32] The court *a quo* then concluded with reference to the facts of this case that the intention can be inferred that the employees’ employment became contracts of indefinite duration after 30 June 2015 and notably, that the resolution of the LSB of 11 December 2015 “was not implemented and/or agreed upon and therefore had no legal effect.”

[33] The court *a quo* then went on to find that the termination of the employees’ employment on 30 June 2016 “amounted to a dismissal in terms of section 186(1)(a) of the LRA.” Crucially, this was contrary to the conclusion of the arbitrator, namely, that it was a dismissal as contemplated in section 186(1) (b)(ii) of the LRA. However, the court *a quo* attached no significance to this difference in finding and, instead, went on to hold that the arbitrator did not have to determine whether the dismissal amounted to one as contemplated in section 186(1)(b) of the LRA and that the arbitrator’s finding to that effect “is not a defect to the extent that the arbitration award should be reviewed and set aside”, i.e. the court *a quo* found that the arbitrator’s reference to a different section of the LRA was immaterial.

[34] Having dismissed an argument that the CCMA lacked jurisdiction to entertain the dispute for arbitration because of an alleged late referral to that body, and having

² [2020] ZALAC 19 (28 May 2020); (2020) 41 ILJ 2086 (LAC).

found that the appellant had failed to prove that the dismissal was fair, the court *a quo* dismissed the legislature's application to review and set aside the arbitrator's award and made no order as to costs.

Discussion

[35] Briefly, regarding the lack of jurisdiction point - The appellant repeated this point in argument before this court, but in a further note and in response to the supplementary argument on behalf of the employees on the point, the appellant, i.e. the legislature, opted not to pursue the jurisdictional point any further, ostensibly because of this court's decision in *Epstein*³, where it was held that the CCMA had jurisdiction to arbitrate the dispute even though the certificate of conciliation was invalid and would only have been deprived of such jurisdiction to arbitrate if the certificate had been set aside on review.

[36] While the withdrawal of the jurisdictional point is noted, it is necessary to emphasise that in fact the point lacked merit for a more obvious and fundamental reason. The referral of the dispute to the CCMA was not late. It is common cause that the employees left the service of the appellant on 30 June 2016. In terms of section 190(1)(b) of the LRA that would have been the date of their dismissal. In terms of section 191(1)(b)(i), the referral to the CCMA must be made within 30 days of the date of dismissal. The referral in this case was made on 7 July 2016. The 30 days – reckoned in accordance with section 4 of the Interpretation Act⁴ would only have expired, at the earliest, on 30 July 2016. The referral was therefore in time. The conciliation certificate was not invalid and the CCMA had jurisdiction to arbitrate the dispute.

[37] Turning to the merits - in terms of section 192 of the LRA, it was incumbent on the employees to establish the existence of the dismissal (section 192(1)) and then the employer was to prove the fairness of the dismissal (section 192(2)).

³ *Fidelity Guards Holding (Pty) Ltd v Epstein NO and Others* [2000] 12 BLLR 1389 (LAC).

⁴ Act 35 of 1957.

[38] Section 186 defines “dismissal”. The two relevant subsections for discussion in this matter are subsections 186(1)(a) and (b). In terms of the former, a dismissal occurs when the employer terminates the employment with or without notice. And section 186(1)(b) refers to instances where the employer did not terminate the employment, but the employment would have come to an end through the effluxion of time (i.e. the so-called, “fixed-term contract”), and the employee had specific, reasonable expectations that the contract of employment would be renewed, but those expectations were thwarted by the employer.

[39] More particularly, it is envisaged in terms of section 186(1)(b)(i) that the employee has a reasonable expectation that the fixed-term contract would be renewed on the same or similar terms, but the employer offers to renew it on less favourable terms, or does not renew it. And, in terms of section 186(1)(b)(ii), it is envisaged that the employee reasonably expected to be retained, i.e. after the fixed-term contract had come to an end, on an indefinite basis, and 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.

[40] There is a fundamental difference between the dismissal postulated in the scenario contemplated in section 186(1)(a) and that envisaged in section 186(1)(b). The former is common where employees are in permanent or indefinite employment, and the latter, as the subsection expressly contemplates, are confined to situations where the employee is employed on a fixed-term basis.

[41] An employee is not employed permanently and on a fixed-term basis at the same time by the same employer. It is either one or the other. An employee who is in permanent, or indefinite, employment at the time of his or her dismissal, does not have an expectation that his or her employment is going to be converted into permanent or indefinite employment, as envisaged in section 186(1)(b), as that expectation has already been met.

[42] In this matter the arbitrator, unfortunately, treated the scenarios envisaged in those subsections, essentially, as the same. This is apparent, from both, his description of the issues to be decided and his findings in the award. The arbitrator

seemingly found at once that the employees were employed by the legislature on an indefinite basis from 1 July 2015 and, effectively, that during that same period they were employed on fixed-term contracts – hence his conclusion that they had proved that they were dismissed in terms of section 186(1)(b)(ii) of the LRA.

[43] The arbitrator also clearly failed to take into account that if there was a dismissal it would only have occurred on or after 30 June 2016, since it is common cause that the employees were employed by the legislature until then. They left the service of the legislature on or after 30 June 2016. Irrespective of the nature of the employment from 1 July 2015 – in terms of section 190 of the LRA that date would have constituted the date of their dismissal, that is, if the dismissal had been proved as envisaged, either in section 186(1)(a), or (b).

[44] The arbitrator, seemingly, was not critical of the opening statement made on behalf of the employees by their legal representative, Mr Goosen, who stated: “... Essentially what we are saying, is that at the time that we, our services were terminated, our argument ... is that we were actually already at that point in time permanent employees” (Emphasis added).

[45] If that was their contention, then they could not also rely on section 186(1)(b). By, also relying on that subsection, they were, essentially, contradicting themselves, in that they could be taken thereby to have implicitly conceded that as from 1 July 2015 they were employed on a fixed-term basis, as was contended by the legislature.

[46] The court *a quo* wrongly attached no significance, to what was, essentially, a pointer to a contradictory finding of the arbitrator concerning the nature of the employees’ employment from 1 July 2015 to 30 June 2016. The court *a quo* was of the view that it was not a material defect, whereas it was. It effectively showed that the arbitrator did not appreciate the true nature of the issues that had to be decided, and of the enquiry(-ies) that had to be conducted in that regard. All of which were

material irregularities that impacted the outcome of the arbitration and therefore, reviewable⁵.

[47] Another material, reviewable, error by the arbitrator, and seemingly, the court *a quo*, was to effectively apply the reasonable expectation test, contemplated in section 186(1)(b), to the period starting 1 July 2015, that is, after the fixed-term contracts, that had been extended in terms of the LSB's resolution of August 2013, were supposed to have ended; and then to reason (in effect) that the "expectation", in this instance, of permanence, at that point automatically translated into the employees being permanently, or indefinitely, employed from 1 July 2015, because their (individual) expectation in that regard was reasonable. But that approach clearly ignored the relevance of actual consensus and the probabilities regarding the employees' status as from 1 July 2015.

[48] Both, the arbitrator and the court *a quo*, found that from 1 July 2015 the employees had been employed on a permanent/indefinite basis pursuant to a tacit agreement to that effect between the parties. That conclusion was not reasonable, in light of all the relevant facts. In *Teto*, this court made it clear that if employees continued to be employed by the employer after their fixed-term contracts had terminated, the new contract would be deemed to be of indefinite duration only if "a contrary intention could not be inferred from the facts"⁶.

[49] The mere fact that an employee continues to work in the same position for the same employer after his fixed-term contract had come to an end does not mean that his fixed-term contract had now "morphed" into permanent employment, or into employment of indefinite duration⁷. It may still be on a fixed-term basis, albeit tacitly. Ultimately, it depends on the facts, or the inferences that may be drawn from the facts.

⁵ See, inter alia, *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC).

⁶ See *Teto* (above) at para 20.

⁷ *Ukweza Holdings (Pty) Ltd v Nyondo and others* (2020) 41 ILJ 1354 (LAC) para 14.

[50] Different and conflicting tests have been applied for inferring a tacit contract⁸. It is trite that, in terms of one test, the “preponderance of probabilities” test⁹, in order for a party to prove a tacit contract it is necessary, to not only allege, but to prove unequivocal conduct that establishes on a preponderance of probabilities, usually by a reasonable inference drawn from the relevant admitted facts, that the parties intended to and did in fact contract on the terms alleged. Another test, which is referred to as the traditional or “no other reasonable interpretation” test, had been formulated in *Ocean Commodities*¹⁰ as follows: “In order to establish a tacit contact it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.”

[51] Because of the difference of emphasis in these two tests a synthesis of the two has been accepted and applied to infer the existence (and terms) of a tacit contract¹¹. It incorporates the best of the two tests. In *Christie’s The Law of Contract in South Africa*¹² the synthesis has been summarised as follows: “In order to establish a tacit contact it is necessary to prove, on a preponderance of probabilities, conduct and circumstances that are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the preponderance of probabilities that the parties reached agreement in that manner, it may find that tacit contract established.”

[52] The synthesis, essentially, requires the court to embark on a three-stage, as opposed to a two-stage, process¹³. The first stage would be to decide on a balance of probabilities what facts have been established. The second stage would be to decide, also on a balance of probabilities, what conclusion, consistent with those established facts, is correct, and a third stage would be interposed between those two, in terms of which the court has to decide how the proved facts, that is including the conduct of each party and the relevant circumstances, was probably interpreted

⁸ See GB Bradfield *Christie’s Law of Contract in South Africa* (7ed) (“*Christie’s*”) at 98 et seq.

⁹ See *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) at 165B.

¹⁰ *Standard Bank of SA Ltd v Ocean Commodities Inc.* 1983 (1) SA 276 (A) at 292.

¹¹ See, *inter alia*, *Christie’s* (above) at 101 et seq and the cases cited in fn. 609.

¹² See *Christie’s* (above) at 101.

¹³ See *Christie’s* (above) at 100-101.

by each of the parties. It is said that at the third stage the court is essentially looking at the matter “through the eyes of the parties – at their conduct and the circumstances” and “unless the conduct in those circumstances was so clear, so unequivocal, so unambiguous that the parties must have regarded themselves in agreement, there is no contract.”¹⁴

[53] In this instance, the following, *inter alia*, was established: (a) that the employees had been employed on the basis of fixed-term contracts for a long period of time (Mr Malefane from 2006; Mr Wessie from 2007; Ms Mogane from 2007, and Ms Ngcingwana from 2010); (b) there were previous tacit extensions of the contracts of senior managers, including these employees (possibly with the exception of Ms Ngcingwana) i.e. on the same terms as those that previously applied; (c) the fixed term regime they had been employed under also had some performance-base, which was admittedly regarded as weak and ineffective; (d) on 7 August 2013 the LSB adopted a resolution in terms of which, *inter alia*, (i) the existing contractual regime for senior managers was to be replaced with a more rigorous and effective, performance-based, one; and (ii) all fixed term contracts that had expired, or were about to expire, were extended to 30 June 2015, to allow for the new regime to be developed.

[54] Furthermore, it was established: (e) that written contracts with expiry date 30 June 2015 were signed by the individual employees (Ms Ncingwana’s position in this respect is equivocal); (f) that there was no written extension of those contracts; (g) that, notwithstanding, the employees remained in the employment of the legislature beyond that date; (h) that the rigorous, performance-based system that was to be developed had not been finalised by 30 June 2015; (i) that some proposal was made by, *inter alia*, Mr Malefane that the performance system been developed by, *inter alia*, his unit, be adopted by October 2015; (j) that the proposal was not accepted by either the presiding officers, or the LSB; (k) that instead, on 11 December 2015 the LSB resolved (i) that all fixed-term contracts that would have expired on 30 June 2015 were to be extended from that date to 30 June 2016, when they were to expire; and (ii) that the positions of those affected by the change (i.e. those in senior

¹⁴ See *Christie’s* (above) at 101.

management positions, including the employees) should be advertised and that the entire process be finalised by the end of June 2016.

[55] It was also established: (l) that the employees were informed of the resolution of the LSB through Mr Malefane and Mr Wissie; (m) that in March 2016, the employees were again informed of the resolution of the LSB, namely, that their fixed-term contracts were to expire on 30 June 2016 and they were urged to re-apply for their positions; (n) that the senior managers who applied (possibly with one exception) were re-employed to their positions on a fixed-term, subject to a rigorous performance-based system; and (o) the employees refused to accept the resolution of the LSB and did not re-apply for their positions.

[56] A conclusion that the employees automatically became employed permanently after 30 June 2015 cannot be correct for a number of reasons. The LSB never, at any stage, be it before, or on 7 August 2013, or thereafter, resolved that the employees would be employed on a permanent basis after 30 June 2015. The resolution of 7 August 2013 to extend fixed-term contracts to 30 June 2015 was unarguably to allow for the development of the rigorous performance regime that was to replace a weak and ineffective one. At the time of the resolution it must have been generally anticipated that the new regime would be finalised and accepted for implementation before or by 30 June 2015. Accordingly, it must follow that if the new regime had not been finalised and accepted by then, the *status quo* would remain until that occurred.

[57] Further, there is no evidence that the regime that was to be developed by, *inter alia*, Mr Malefane's unit, was finalised by 30 June 2015, let alone, soon after that date, or that it would have been acceptable to the LSB in all respects. Clearly the new system could only have been implemented after it had been accepted and approved by the LSB. Conceptually, therefore, extending the fixed-term contracts, albeit retrospectively, from 1 July 2015 to 30 June 2016, requiring the positions of senior managers that were affected to be advertised and requiring the incumbents to re-apply for them, may well have been the LSB's additions to ensure, from its perspective, that the system that was to be introduced was rigorous and effective. Further, viewed from the perspective of the legislature and the employees,

converting the employees' contracts to permanent (or indefinite) contracts, without further ado, and without the new performance system, as accepted by the LSB, being in place, would have defeated the very rationale for the resolution of 7 August 2013.

[58] It is further apparent that from the outset, i.e. immediately before and upon adoption of the resolution of 7 August 2013, all those in senior management positions, including the employees, were treated the same in respect of the extension of their contracts. The resolution of that date was to extend, both, contracts that had already expired, and those there were about to expire (conceivably such as that of Ms Ngcingwana, which was only to expire in September of 2014) to 30 June 2015. Thus, all fixed-term contracts envisaged in terms of that resolution were to expire on 30 June 2015, including that of Ms Ngcingwana. The contention, to the effect that her contract extended beyond 30 June 2015, despite the resolution of 7 August 2013, is therefore misconceived. In any event, at no stage before us was a written contract produced to prove that it would have expired beyond that date.

[59] Even if I may be wrong in regard to Ms Ngcingwana (which in my view, I am not), and one accepts, that the written (extension) contract signed by Ms Ngcingwana pursuant to the resolution of 7 August 2013, states that the expiry date of her contract is some time at the end of September 2015, there was, clearly, a tacit contract extending her employment beyond that date. However, for the same reasons stated above, it cannot be correct that she would have been automatically, tacitly employed on a permanent, or indefinite, basis after that date, before or in the absence of the finalisation and acceptance by the LSB of a rigorous performance-based system that had been developed to replace the previous one, otherwise the entire rationale of the resolution of 7 August 2013 would have been undermined and defeated.

[60] In light of all the established facts and circumstances, including those briefly referred to above, the correct conclusion is in line with the legislature's contention, namely, that as from 1 July 2015 the employees were still employed by it on a fixed-term basis, albeit tacitly, until 30 June 2016, after which the rigorous, performance

based system was to be implemented. They had effectively rejected the LSB's resolution regarding the new system and its implementation, by not applying for their positions and by unilaterally concluding that they had already reached their self-created nirvana.

[61] Since it was the employee's contention throughout that they were not employed on a fixed-term basis, but, tacitly on a permanent basis for the period as from 1 July 2015, they could not rely on section 186(1)(b) of the LRA, i.e. they could not have had any of the reasonable expectations as contemplated in that section. They could not pursue contradictory courses at once, or at the same time. Essentially, they thus failed to prove that they were dismissed. A reasonable arbitrator would have found accordingly. The court *a quo* erred in effectively finding the contrary.

Costs and order

[60] Taking into account all the facts and circumstances, the law and fairness, a costs order is not appropriate.

[61] In the result, the following order is made:

61.1 The appeal is upheld;

61.2 The order of the court *a quo* is set aside and is replaced with the following order: "1. The arbitration award rendered by the second respondent, under the auspices of the first respondent, in case GAJB 14830/16 dated 19 January 2017, is reviewed and set aside, and is replaced with the following: 'The claims of the employees are dismissed'."

61.3 There is no costs order.

P Coppin
Judge of the Labour Appeal Court

Waglay JP and Jappie JA concur in the judgment of Coppin JA.

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SC

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