

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

4/7/2012
DATE

Me//rake
SIGNATURE



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO.: JS600/11

In the matter between:

SOLIDARITY obo A J VAN NIEKERK

Applicant

and

DENEL (PTY) LTD (DENEL DYNAMICS)

Respondent

Date heads submitted: 15 June 2012

Date of judgment: 4 July 2012

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The referral to this court embraces a contractual claim as well as a claim in terms of section 10(6) (a) of the Employment Equity Act 55 of 1998 (the EEA). The parties agreed that the contractual claim would be argued on the common cause

facts, and that the discrimination claim would be set down for trial, if needs be, after the court has determined the contractual issues.

- [2] The parties agreed further that they would submit heads of argument in respect of the contractual issue and that if necessary, the matter would proceed thereafter in respect of the discrimination claim.

Factual background

- [3] The relevant facts are those listed as common cause in the pre-trial minute. These are, in essence, that Ms. van Niekerk (the employee) was employed as senior secretary (electronic engineering) from 9 February 2009 to 28 February 2011 on a series of seven consecutive three-month contracts and a final one-month contract. During this period, her position was advertised four times, both internally and externally. Each advertisement indicated that an "HDI" candidate would be preferred, and one proclaimed that the respondent is an "employment equity employer" and that preference would be given to candidates who would "add diversity" to the company. Two advertisements further stated:

"A pleasant, service- orientated person with a suitable profile and experience is urgently required, regardless of ethnicity or gender"

- [4] The employee applied for the post twice, but was unsuccessful. On the third occasion the employee applied for the post, she was not even interviewed. On 2 February 2011 the applicant lodged a grievance regarding, *inter alia*, the respondent's failure to appoint her as a permanent employee. The employee was subsequently informed that the post was an "ACI" (African, Coloured, Indian) position, and that an offer had been made to a suitable candidate on 9 February 2011, while the employee was still in service.
- [5] Nothing came of the formal grievance lodged by the employee. She was informed that the post was "defined as a temporary position" and that "[e]mployment transformation is a company objective and this vacancy, as well as the specific job category, is a company transformation target". The employee's

final one-month contract was not renewed, and the employment relationship with the respondent terminated.

- [6] It is clear from the above facts and from the respondent's pleadings that the reasons for the termination of the employee's services with the respondent were that the post occupied by the employee was made "permanent" and advertised as such, and that the respondent did not appoint the employee to the post solely because she is white.

The terms of the contract

- [7] The relevant express terms of the final fixed term contract of employment are as follows:

'With reference to the discussion we had with you, we would like to extend your fixed term contract at Electronic Engineering. Your present remuneration and other fringe benefits will remain the same. For ease of reference we have highlighted the more important issues of your conditions of employment. Note that your complete conditions of employment are contained in the Das Conditions of Employment for Temporary Hourly Employees...

1.1 Period – 1 February 2011 to 28 February 2011 after which it will expire without further notice.

Please note that this agreement is a fixed term contract, therefore you do not qualify for any other benefits or fringe benefits in terms of the Denel Conditions of Employment. Denel's disciplinary code and grievance procedure and the Das Conditions of Employment for Temporary Hourly Employees, COSAD-00256-618 is nevertheless applicable to you.'

- [8] The Conditions of Employment for Temporary Hourly Employees ('the conditions of employment') contains *inter alia* the following relevant provisions:

'Synopsis

This document describes the conditions of employment applicable to temporary hourly Denel Dynamics employees. It also defines the parameters of service benefits and the duties of the employees in this regard.

1 Introduction

... Unless otherwise agreed to in writing, these Conditions of Employment will be regarded as an integral part of the service contract between the employee and Denel Dynamics.

When somebody accepts an appointment at Denel Dynamics, it will be deemed that he or she has accepted these Conditions of Employment....

3 Abbreviations and definitions ...

Service/Employment Contract

A written agreement between the employer and the employee, which forms the contractual basis for a working relationship....

6 Fringe benefits;

6.1 Retirement scheme

The employee does not qualify for membership.

6.2 Medical scheme

The employee does not qualify for membership....

10 General

10.8 Amendments

The employer reserves the right to change these Conditions of Service as may be necessary. Such changes shall take place according to fair procedure and may be changed with one calendar month's written notice.

10.9 Contract period

Should employees be contracted for periods longer than 24 months, they will be obliged to convert to standard conditions of employment. Membership of the retirement scheme and the medical scheme will then be compulsory (own emphasis).

This is applicable to all employees appointed after 30 September 2008.'

The issue

- [9] The parties do not dispute that the employee was appointed after 30 September 2008, and that the conditions of employment for temporary hourly employees, including clause 10.9 thereof, form part of the express terms of each of the employment contracts between Denel and the employee. This much is apparent from the wording of the final fixed term contract and others, which specifically provide that these conditions of employment are applicable to the employee.

Analysis

- [10] The applicant contends that the plain import of clause 10.9 is that any "contracted" employees - i.e. those on fixed-term contracts - are bound to accept permanent employment after two years, because "standard conditions of service" are of indefinite duration and only permanent employees can become members of the respondent's pension fund and medical aid scheme. Since an employee on one or more fixed-term contracts totaling a period of longer than 24 months cannot compel the respondent to appoint them permanently or admit her to the fund or scheme, it follows that the respondent was under a reciprocal obligation to do so.
- [11] The respondent contends that the common intention of the parties was that the employee was employed on a temporary fixed-term contract, and that this common intention never changed. No person could reasonably assume from a reading of a fixed term contract that they were being offered permanent employment. Read as a whole, on the ordinary grammatical meaning of the words, the employment contract is one of fixed term temporary employment. The express terms of the final contract could not have been clearer as to the nature of employment – the contract expressly states that it is operative from 1 to 28 February 2011, 'after which it will expire without further notice'. Previous fixed term contracts were equally explicit as to the nature of employment. The final

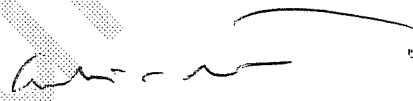
contract is an extension of previous fixed term contracts. Clause 10.9 does not indicate a conversion in the nature of employment from temporary to permanent employment – rather it creates an obligation on the employee to convert to certain other terms and conditions of employment, and in particular, membership of the medical and retirement schemes. Clause 10.9 does not serve to override the express written terms of the employment contract.

- [12] In my view, the respondent's submissions beg the question of the employee's right to appointment on the respondent's standard conditions of employment. Although each of the eight fixed-term contracts signed by the employee provided for employment for a fixed term, each of them makes direct reference to the conditions of employment for temporary hourly employees, and incorporates them as terms of the contract. The reference to "Standard conditions of employment" in clause 10.9 can only refer to those not specified in the document applicable to temporary hourly employees. Clause 6 of the conditions of employment for temporary employees expressly provides that they do not qualify for membership of either the retirement or medical schemes. It must follow as a matter of logic that "standard conditions" are those that apply to permanent employees, which include compulsory membership of the retirement and medical schemes, and are of indefinite duration. It also follows logically that the membership of the company's retirement scheme implies employment of indefinite duration.
- [13] Clause 10.9 of the policy, repeated in all the employee's fixed-term contracts, is clear and unambiguous: once a "temporary employee" has been employed for 24 months (which the employee was on 10 February 2011) the employee becomes entitled to be employed and the respondent is under a reciprocal obligation to employ her, on "standard" (i.e. indefinite) terms. The employee is therefore entitled to appointment in the post of senior secretary or such comparable position as may be available, on the respondent's standard conditions of employment, with effect from the date on which she had been contracted as a temporary employee for longer than 24 months, i.e. 10 February 2011.

[14] The parties are in agreement that costs should follow the result.

I accordingly make the following order:

1. The respondent is ordered to abide by clause 10.9 of its Conditions of Employment for Temporary Hourly Employees, and to appoint the employee to the post of senior secretary (or such comparable position as may be available) on its standard conditions of employment, with effect from 10 February 2011.
2. The respondent is to pay the costs of these proceedings



ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Representation

For the applicant: Adv. J Grogan

For the respondent: Heads drafted by Adv. G Fourie, instructed by Crawford & Associates