



**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

Of interest to other judges

CASE NO: J 683/15

In the matter between:

**INDEPENDENT MUNICIPAL AND
ALLIED TRADE UNION**

First Applicant

EMPLOYEES LISTED IN ANNEXURE 1

Second Applicant

and

**EKURHULENI METROPOLITAN
MUNICIPALITY**

First Respondent

KHAYA NGEMA (N.O.)

Second Respondent

Heard: 21 April 2015

Delivered: 28 April 2015

Summary: (Urgent – lack of urgency – applicants waiting until foreseen event already passed – no reason to wait until it did – applicants delayed approximately two months after they should have launched application)

JUDGMENT

Introduction

- [1] This is an urgent application for final relief launched on 13 April 2015. It first came before Prinsloo AJ, and was stood down until 21 April 2015. The applicants seeks an order declaring the termination of the fixed term employment contracts of 19 of its members invalid and reinstating those contracts. In the course of argument, the applicants proposed that they should at least be given interim relief pending the outcome of the dispute referred to the SALGBC on 24 March 2015, though they had given no warning of this as an alternative form of relief in the notice of motion.
- [2] There was some dispute whether all nineteen of the applicants had been equally affected. On or about 18 March, three applicants had received letters notifying them of the termination of their “temporary appointment/fixed term appointment”. However, in view of my decision, it is not necessary to determine this.

Existence of a clear right

- [3] On 21 February 2006, IMATU and SAMWU entered into a settlement agreement with SALGA concerning the appointment of various persons on fixed term contracts as if they were covered by section 57 of the Systems Act 32 of 2000 . Two provisions of that agreement are relevant for present purposes, namely:

“2.1. The respondent’s members will not-

... 2.1.1 offer employment to and/or appoint or place persons on fixed term contract of employment without having agreed with Applicants what happened to the relevant persons upon the expiry of the fixed term contracts; or...

...

2.4 In respect of current fixed term contracts concluded with non-Section 57 employees, these contracts will run for their agreed terms, whereafter the employees concerned will remain employed on the SAL

GBC terms and conditions of employment and the applicable SALGBC grades and salary scales, unless otherwise agreed division of the SALGA be seen, or a unless exemption is granted in terms of clause 7 hereof.”

(emphasis added)

- [4] The settlement agreement was made an arbitration award. The applicants claimed in their founding affidavit that there is an appeal pending before the LAC to review and set aside the arbitration award and contend that the award is binding pending the outcome of the appeal. Accordingly, any terminations affected contrary to the provisions of clause 2.4 of the award are in breach thereof. The respondents pointed out that the arbitration award was in fact rescinded in January 2008, a fact not mentioned by the applicants. They further state that, the appeal pending before the LAC is an appeal against the refusal of the Labour Court to set aside the settlement agreement. In the applicants' heads of argument they too state that the pending appeal is against a decision by Van Niekerk J, which dismissed an application for a declaratory order that the settlement agreement was not binding. I note in passing that no apology was made by the applicants for misleading the Court in the founding affidavit about the true nature of the dispute before Van Niekerk J.
- [5] Confronted with the difficulty of an award which appears to have been set aside on rescission ruling, the applicants then sought to argue that their case was equally firmly grounded on the settlement agreement itself. In the founding affidavit, the settlement agreement, as such, was not pleaded as an alternative basis for the relief sought. The applicants placed sole reliance on the enforcement of the settlement agreement as an arbitration award. This alternative basis for the applicants' claim is essentially a cause of action which was not pleaded in the founding affidavit and the respondents have applied for the paragraphs setting out this claim in the replying affidavit to be struck out.

- [6] In reply, the applicants also sought to argue that the rescission ruling applied only to the City of Cape Town which had successfully rescinded the award based on an obiter comments made by the Honourable Justice Basson, in her judgement in ***Independent Municipal & Allied Workers Union & others v City of Tshwane Metropolitan Municipality & others***¹ before the rescission application had been determined. However, there was no evidence that since the award was rescinded that any party sought to set aside the rescission ruling.
- [7] From the foregoing, it would appear that the arbitration award remains rescinded but the settlement agreement is undisturbed pending outcome of the appeal. Thus, if the applicants were permitted to rely on the settlement agreement itself, they could argue that the binding nature of the award establishes the rights they wish to enforce.
- [8] Assuming for the moment that the provisions of clause 2.4 and 2.1.1 of the agreement are enforceable, would that afford rights to the applicants? The applicants maintain that the effect of the two clauses is that, fixed term contracts relating to non-section 57 employees were to be phased out and on the termination of the applicants' fixed term contracts, as extended until 31 March 2015, they ought to have been retained in employment on the applicable SALGBC scales.
- [9] However, it is not apparent from the founding papers when the applicants first commenced employment on fixed term contracts. Consequently, it is impossible to determine if any of the applicants were employed at the time of the settlement agreement on 22 February 2007 or whether that they were employed on fixed term contracts thereafter. This is important because it would appear from the wording of clause 2.4 that the phasing in of fixed term employees into permanent employment was specifically concerned with employees who were currently on fixed term contracts at the time of the settlement agreement. Clause 2.1.1 seems to have been intended to prevent the future use of fixed term contracts for non-section 57 employees. If any of the applicants were on fixed term contracts at the time of the

¹ (2008) 29 ILJ 171 (LC) at 175, para[13].

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settlement agreement in 2007, it is a mystery why they would have not been made permanent employees within a few years. On the other hand, if they were engaged on new fixed term contracts after that date, it is not explained why the applicants did not challenge their fixed term appointments earlier. This brings me to the question of urgency.

Urgency

- [10] The applicants contend that in terms of clause 2.4 of the settlement agreement they were entitled on the expiry of their contracts to remain employed on SALGBC terms and conditions. During 2014 the second respondent underwent an institutional review process. In July 2014, the municipality extended the fixed term contracts of the applicants and other employees until the end of December 2014 and thereafter extended them again until the end of March 2015. The applicants contend that neither of these fixed term appointments was in compliance with the settlement agreement. In any event when it learnt of the first respondent's intention in December 2014 to extend some of the contracts to the end of March 2015 while a "recruitment process" was finalised during that period. IMATU challenged the need for these employees to apply for the very positions they occupied when their appointment should simply be made permanent.
- [11] The respondents claimed that the organisational review process was only finalised in March 2015 and that the individual applicants all knew that they had been appointed on a fixed term basis. The respondents also point out that when IMATU requested the extension of its members' contracts in its letter of 26 November 2014, it did not make any mention of the arbitration award as the basis for its request but simply appealed on the basis that they needed to remain in employment until the institutional review process was finalised. Similarly, in none of IMATU's subsequent correspondence in January and February did it make reference to the arbitration award or, for that matter, to the settlement agreement.
- [12] The number of the applicants' justification on urgency is that they claim the termination of their employment could not have been foreseen until the

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municipality refused to agree to the sixth undertaking which they sought on 24 March 2015 to the effect that their contracts would not be terminated pending the resolution of a new dispute referred to the SALGBC. That dispute concerns whether or not the respondents had unfairly appointed the applicants on fixed term contracts instead of employing them on a permanent basis. The respondents claim that the applicants already knew in December 2014 that the contracts of the applicants would only be extended until the end of March 2015. They argue that the letter from IMATU 24 March 2015 calling upon them to extend the applicants' fixed term contracts pending the outcome of the dispute referred to the SALGBC, was simply a device to create urgency. The applicants retort that it was only when the respondents indicated that the applicants on fixed term contracts expiring at the end of March 2015 would not be allowed to remain in their positions as per clause 2.4 of the settlement agreement that the question of urgency arose.

[13] What is clear from the interaction between the union and the municipality is that it was only when the union sought the undertaking on 24 March 2015 that the fixed term contracts would be extended, that it expressly raised the issue that they should have been permanently appointed in the first place. There is no evidence that this was raised in December 2014, when it ought to have been patently obvious that the respondent was not intending to prolong the applicants' appointment on fixed term contracts beyond the finalisation of the restructuring. The applicants' explanation that the urgency only arose when the undertaking was not given is hard to understand: it begs the question why the undertaking was only sought when the termination date of the fixed term contract was confirmed. If the applicants were of the view that they were entitled to permanent employment in terms of the provisions of clause 2.4, it is inexplicable why they waited until the final letter of termination. If one has regard to IMATU's letter of 26 November 2014 it makes no mention of the applicants' claim that they ought to be permanently employed. Rather, the letter focuses on the extension of the contracts until the finalisation of the institutional review process.

[14] It is only on 28 January 2015 that IMATU for the first time raises the contention that the recruitment process which led to the appointment of the employees on

extended fixed term contracts should have been one that "...led to permanent appointments". That letter motivated the retention of fixed term contract appointees who occupied positions on the structure. When a response was not forthcoming on 6 February 2015, the matter was referred to the SALGBC.

[15] In light of the above, it appears to me that at the very latest, this application ought to have been launched in mid-February this year and not *after* the expiry of the extension of the contract periods at the end of March. As mentioned above there is also no explanation why the applicants had not sought in any event to assert their rights to be employed on a permanent basis pursuant to clause 2.1.1.

[16] The matter only became 'urgent' because the applicants left a challenge based on the award or the settlement agreement so late, not because the non-continuation of their contracts could have come as a surprise. In the circumstances I am not satisfied that the applicants have demonstrated that they have brought this application timeously and accordingly it must fail on this basis

Order

[17] The application is struck off the roll for lack of urgency with costs.



R LAGRANGE

Judge of the Labour Court

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Appearance

For the Applicants: T Ngcukaitobi and R Tulk

Instructed by: Ndumiso Voyi Inc.

For the Respondents: C De Heus of Du Plessis, Heus & Van Wyk

LABOUR COURT