Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 398/15

In the matter between:

MINISTER OF BASIC EDUCATION	**Applicant**
and	
T MTONGANA	**First Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Second Respondent**
MTOMBEKHYA SESANA (*N.O.*)	**Third Respondent**

Heard: 23 November 2017

Delivered: 31 July 2018

Summary: (Review – appointment on fixed term contract not equivalent to transfer or secondment – termination arising on expiry of contract – no expectation of renewal established – termination not a dismissal)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review an award in which the arbitrator found that the late Mr L Mtongana's employment was unfairly terminated at the end of an expiry of a two-year contract he entered into with a unit falling under the Department of Basic Education ('the Department'). The arbitrator ordered the applicant to reinstate Mr Mtongana ('Mtongana'), in a position similar to that of a Deputy Director: Initial Teacher Training and to pay him compensation for the salary he had lost since his dismissal. Payment was to be made within 30 days of the date of the award, 17 December 2014. The Department now seeks to review the award.

[2] As Mtongana has passed away, his estate, as represented by his executrix, Ms T Mtongana, continues to oppose the review. Ms Mtongana was substituted as the first respondent in the proceedings for Mtongana, in terms of an order dated 30 August 2016. Ms Mtongana has also brought an order to make the arbitration award an order of court.

Background

[3] The arbitrator found that when Mtongana took up a two-year appointment with the National Education Evaluation and Development Unit ('NEEDU') he had applied for, he was not advised that taking up the appointment would lead to the termination of his existing permanent employment contract with the applicant. Consequently, the arbitrator found that Mtongana's employment was terminated by the applicant at the end of his two-year contract when in fact, he ought to have remained permanently employed. As a result, she ordered his reinstatement in a position similar to that he previously held with back pay.

[4] Mtongana was employed by the Department since 1986. After responding to an advertisement and successfully completing the recruitment process Mtongana was appointed to the post of Team Leader East London on a two-year renewable contract starting from the date he assumed duties. The preamble to the advertisement read:

> In 20[illegible] a ministerial committee was appointed to investigate and advise the ministry on how the quality of education can be enhanced through an independent evaluation. Work of this committee culminated in the establishment of a Unit, commonly known as the National Education Evaluation and Development Unit (NEEDU). The main task of this unit is to provide the ministry with an authoritative, analytical and accurate account of the state of education in South Africa, in particular, on the status of teaching and learning in all schools. To accomplish this task,NEEDU is inviting applications from interested individuals, with the required expertise and experience, to be appointed as NEEDU evaluators in all provinces <u>on a two-year renewable contract, subject to satisfactory performance</u>…

(emphasis added)

[5] Mtongana’s letter of appointment stated:

> CONTRACT APPOINTMENT
>
> I am pleased to inform you that your contract appointment post of team Leader Eastern Cape province: National Education Evaluation and Development Unit (‘Needu’) <u>on a two-year renewable contract</u> has been approved with effect from your date of assumption of duty.
>
> … You are requested to <u>confirm in writing if you accept the post and conditions of service attached to it</u>…

(emphasis added)

The letter also provided him with the contact details of the person to communicate with if he had any further inquiries “concerning his salary or other appointment benefits”.

[6] A few days after being given notification of his appointment he wrote to the manager of Staffing Services in the Department stating that he had accepted the offer of employment to the unit “albeit on the same level (Deputy Director)”. He enquired whether his pay point would remain same as it was where he was currently attached to Initial Teacher Education. Subsequent to his request to be retained on the same level that he was on previously, a motivation was made that because his contract appointment was within the Department, and is continuous, as well as to ensure that his living standard was not affected it was proposed “…that his salary be

retained and the salary level and package that was paid to him by the department during his permanent appointment" (emphasis added).

[7] On 21 January 2014, Mtongana was notified that his contract had expired and would not be renewed because of the poor performance of his unit. The two-year contract expired on 23 January 2014.

[8] Mtongana disputed the reasons for non-renewal of his contract and asserted his status as a permanent employee of the Department. He ultimately appealed to the Minister emphasising the unfairness of the termination. In her response dismissing his appeal, the Minister set out the circumstances of his appointment and asserted that, amongst other things:

8.1 Mtongana accepted appointment to the unit and there was no proviso on the appointment and no reference to being redeployed or seconded.

8.2 The Minister asserted that Mtongana signed a 24 month performance-based contract and therefore it was incorrect that he was a permanent employee of the Department. The letter further claimed that he was deemed to have resigned when he took up the new appointment with the unit because he could not have two contracts that were concurrent and the new contract superseded his previous one.

[9] When the matter was referred to arbitration, the issues in dispute were characterised, firstly, as whether his employment status with the department was contractual or permanent and, secondly, whether the termination of his employment was substantively and procedurally fair. The employer accepted the onus of proving the fairness of his termination.

The arbitration award

[10] The arbitrator initially identified the issue she had to decide as whether by taking the two-year contract, the applicant relinquished permanent employment or whether his move to NEEDU was a transfer or an appointment. Later, before starting to analyse the evidence and argument, the arbitrator characterised "(t)he main issue [in] this matter was whether the applicant was aware that signing the two-year contract at NEEDU

resulted in termination of his permanent contract with the respondent or not."

[11] In her summary of the evidence, which adequately reflects most of the evidence before her, the arbitrator recorded:

11.1 The Deputy Director of Staffing Services: Personnel, Ms B Le Roux ('Le Roux') testified that Mtongana's status was translated from a permanent to a contractual employee, which would not have been the case if he had been seconded. She conceded that his letter of appointment did not say that he would be relinquishing his permanent status but claimed that this was explained to him during the interviews. However, she could not tell whether he was advised that the expiry of his contract would lead to the termination of his permanent employment or not. She also claimed that he asked that his pension moneys only be paid after the expiry of his two year contract, which he disputed. Le Roux also had made a note recording Mtongana's request to retain his normal paydate on the 15th of the month, instead of the end of the month when contract employees were paid. This request was acceded to.

11.2 The Director of the Labour Relations, Mr D Ntloane ('Ntloane'),said that he advised Mtongana of the consequences of taking up two-year contract and raised his concerns with him about the possible non-renewal of the contract. He had advised him to get a secondment to ensure that he stayed within the system. He claimed also to have asked the HR staff to delay giving Mtongana his appointment letter before he had advised him of the risk he was taken. Mtongana disputed this also. Had he been seconded, his permanent status would have been suspended. Recommendations had been made to maintain his salary and its former level.

11.3 The scribe at the job interviews, an Assistant Director: Recruitment and Selection, Ms H Nemabaka, testified that the chairperson of the panel advised the candidates, including Mtongana, that the positions were for a two-year period and they the applicants had said they did not have a problem resigning from their current jobs. She confirmed the correctness of minutes of interviews which recorded that.

11.4 The Deputy CEO of NEEDU, who had been a panellist in the job interviews, testified that the most common question from the candidates was to ask about their employment status and whether they would have to resign or not, but he could not specifically remember whether the applicant had asked that question.

11.5 Mtongana denied being told that he had to resign before taking up the new position. He did not ask about resigning because he was already employed with the respondent at the time and expected that he would return to his old post or another available post at the same level when the contract expired. He also did not withdraw his pension at the time of taking up the new appointment.

[12] The arbitrator found that a concession by the applicant's witnesses that they treated him differently from the other candidates because he was already on the system was a factor that the respondent ought to have taken into consideration and ensured that he was advised to resign from his permanent position. To avoid any misunderstanding he should have been ensured that he submitted his letter of resignation and that his pension was paid out. The department also should have ensured that his salary advice was altered to reflect an employment commencement date in January 2012. She concluded that the failure to attend to these things might have misled the applicant.

[13] The arbitrator accepted that if Mtongana had not already been employed by the applicant at the time of the contract been concluded, the letter of appointment stating that the contract was only two years and that his employment would end if it was not renewed, 'would have made sense'.

[14] She also accepted that an incidental email directly confirming his permanent employment status issued by an employee who would not have known of his circumstances, corroborated his version. The arbitrator appeared to agree that Mtongana could not be employed under two contracts concurrently but was of the view that this did not take account the nature of the relationship between the parties which was an unequal one. The

arbitrator also felt that the applicant could not rely on this principle when it suited them yet flout its own principles and policies whenever convenient to do so. In other words, it should not have allowed him to continue working without resigning which was in contravention of its own rule that employees had to resign before taking up a position with NEEDU.

[15] The arbitrator also held that the applicant had failed to advise Mtongana that taking up the position would amount to termination of his permanent employment and that he did not relinquish it when he took up two-year appointment. She then concluded that the dismissal was unfair.

<u>Grounds of review</u>

[16] Firstly, the department contends that when the arbitrator embarked on her analysis and evaluation of the evidence and argument, she wrongly characterised the issue before her: the issue she had to decide was whether or not Mtongana had been dismissed or whether his contract had expired through the effluxion of time, not whether he understood the terms of the contract or whether he relinquished his permanent employment when he took up the two-year appointment. This required her to consider the ordinary meaning of the words in the written contract. Had she done so, she would have concluded that he was employed on a two-year fixed term contract that expired through the effluxion of time, and accordingly Mtongana was not dismissed when it expired.

[17] In the alternative, the department contends that even if the nonrenewal of Mtongana's contract was construed as a dismissal, the arbitrator could not reasonably have concluded that his dismissal was unfair. Apart from claiming that the arbitrator considered irrelevant evidence, she provided no explanation why the dismissal was unfair. On the face of her award, having found that Mtongana was dismissed, she simply concluded on the basis of the dismissal that it was also unfair. Her conflation of the dismissal with the unfairness of the dismissal is evident from her failure to provide any reasons why she found the dismissal was unfair, once she concluded that Mtongana had been dismissed.

[18] In concluding that Mtongana was not advised that by taking the position at NEEDU entailed the termination of his permanent employment status, the arbitrator simply ignored the material evidence of Le Roux and Ntloane, and she could not have rationally reached this conclusion had she considered that evidence.

[19] The arbitrator's reasoning that fixed term appointment should only have been construed as such if Mtongana had not been employed by the Department at the time he was appointed, was illogical because there was nothing to prevent an employee taking up a contractual post despite being permanently employed at the time. Taken to its logical conclusion, the arbitrator's reasoning would mean that a permanent employee cannot enter into a fixed term contract, which is an absurd proposition.

[20] The arbitrator also misconstrued the onus in relation to the question of determining if Mtongana had been dismissed or not. She ought to have recognised that the onus fell on Mtongana to prove that he had been transferred or seconded if he maintained that his permanent employment relationship persisted, despite accepting that two-year appointment.

[21] In finding that a letter sent by a junior employee on 12 July 2013 corroborated Mtongana's version that he was still permanent employee, the department alleges that the arbitrator acted unreasonably because she failed to consider that the employee in question had no authority to determine Mtongana's employment status and the arbitrator ignored the evidence of Le Roux and Ntloane about what Mtongana knew in February 2012, in arriving at this conclusion.

[22] The arbitrator irrationally rejected the legal effect of the principle that Mtongana could not be employed under two contracts concurrently on the irrelevant basis that the relationship between Mtongana and the department was an unequal one.

<u>Evaluation</u>

[23] At the outset, it must be mentioned that whether or not Mtongana's employment came to an end by virtue of the effluxion of the fixed term contract or whether he was dismissed when it expired is an objective matter

as it deals with a jurisdictional question. Thus the court must determine simply whether the arbitrator was correct in concluding that Mtongana was dismissed rather than his employment terminating by agreement under the two-year contract. Assuming it is found that the termination of Mtongana's service at the end of the fixed term contract did amount to a dismissal then the court is required to consider if the conclusion that his dismissal was unfair was one no reasonable arbitrator could have reached on all the evidence before her.

[24] In ***Food & Allied Workers Union v Commission for Conciliation, Mediation & Arbitration & others***, it was held that:

> 'What is accordingly very clear is that, where a court, or a commissioner of the CCMA for that matter, is tasked to interpret a written contract, or as in the present case, a collective agreement, it must give to the words used by the parties their plain, ordinary and popular meaning and if there is no ambiguity in the words of the contract, they must be given their plain, ordinary and popular meaning.'[1]

[25] On the face of the fixed term contract, there was no room for ambiguity about its nature, namely that his employment was for a fixed term of two years but could be renewed. When he accepted the appointment, the only qualification he sought was to retain his previous salary scale which was higher. The appointment letter made no mention of his new position being a secondment or a transfer. On an ordinary construction of the contract he relinquished his permanent post for a fixed term contract one. At best for Mtongana he needed to prove that his appointment amounted to a transfer or a secondment. He advanced no cogent evidence in support of either such alternatives, and did not even claim that his appointment at NEEDU took the form of a transfer or secondment. He simply maintained that his permanent employment status was unchanged by the two year appointment. However, nothing in the wording of the appointment letter suggests that.

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[1] (2007) 28 *ILJ* 382 (LC) at para 35. See also *National Union of Mineworkers v Commission for Conciliation, Mediation & Arbitration & others* (2013) 34 *ILJ* 2913 (LC) at 2927-8 at paras 58-63.

[26] Moreover, to succeed in proving that the his new appointment did not alter his current permanent employment, in the absence of an express term, he would have to have proven the existence of a tacit term or a term implied by law, which operated during the fixed term contract. The real difficulty Mtongana had is that, the contract he was appointed under specifically dealt with the duration of his employment and to infer that it was subject to a tacit term that there was another ongoing permanent employment relationship that would revive at the end of the two year period if the fixed term contract was not renewed would clearly be at odds with the fixed term period of employment specified. As Bradfield *et al* express it in *The Law of Contract in South Africa*:

> Nor can a tacit term be imported on any question to which the parties have applied their minds and for which they have made express provision in the contract, so no tacit term can be imported in contradiction of an express term. The principle was well expressed by Van Winsen JA in *SA Mutual Aid Society v Cape Town Chamber of Commerce*:
>
> > 'A term is sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See *Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 454.[2]

[27] Even if regard is had to the surrounding circumstances, Mtongana acknowledged himself in his application for the new post that he would have to give one month's notice before he could take up the appointment. Le Roux's evidence that she and Mtongana had interacted over retaining his pay date despite his new status as a contract employee was plausible and strongly supports the contention that he was not unaware of the change in his employment status. The only document he could rely on was a document issued towards the end of the two-year appointment, in circumstances where it is plausible that the person issuing it relied on the pay code which appeared on his payslips to determine his employment

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[2] Butterworths, 7th Edition (2016) at 197-8 (footnotes omitted).

status, which had been retained for his own convenience so that his pay date would not alter. In any event, that occurred late in the two-year period of the contract and could hardly be construed as a representation by the employer which misled him into entering the contract.

[28] It emerged during the evidence that the attraction of the post for Mtongana was that he would be located in the Eastern Cape rather than in Pretoria where he was stationed in his permanent capacity. It may have been that Mtongana was confident of future renewals of the contract and it is true that the contract spoke of it being renewable and that the advertisement said it was renewable, subject to satisfactory performance. However, Mtongana's entire case in the arbitration did not rest on whether he had an expectation of it being renewed, but solely on the basis that the termination of the two year contract did not terminate his permanent employment relationship with the Department, because it never ceased when he was appointed to the contractual post.

[29] In the circumstances, it is not necessary for me to go into the other grounds of review because I am satisfied that Mtongana's service terminated when the contract expired. Moreover, because of the way in which Mtongana conducted his case, he did not lay an evidentiary basis for inferring that he had a reasonable expectation of its renewal. Consequently, it was not open to the arbitrator, nor is it open to the court, on the evidence available to conclude that the termination of his contract constituted a dismissal because it was not renewed despite him having a reasonable expectation that it would be.

<u>Costs</u>

[30] I accept that the opposition to the review application was *bona fide* given Mtongana's success in the original application even if it would have been necessary to substitute the relief of reinstatement had the review application been dismissed. In the circumstances, it would not be appropriate to make an adverse cost award against the first respondent.

<u>Order</u>

[1] The arbitration award of the third respondent dated 17 December under case number GPBC 812/2014, is reviewed and set aside.

[2] The third respondent's findings are substituted with a finding that the late Mr Mtongana's termination of service on 23 January 2014 did not constitute a dismissal by the applicant but occurred as a result of the expiry of his fixed term contract.

[3] No order is made as to costs.

R Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	L Pillay instructed by the State Attorney (Pretoria)
FIRST RESPONDENT:	M Simoyi instructed by Gubevu Hlalukana Inc.