IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

NOT REPORTABLE CASE NO. P437/03

In the matter between:-

KING SABATA DALINDYEBO MUNICIPALITY **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

MXOLISI MDUZULWANA **Second Respondent**

LINDILE THISO AND OTHERS **Third and Further Respondents**

J U D G M E N T

CORAM FARBER AJ:

On 8 October 2003 the second respondent, under the auspices of the first respondent, issued an arbitration award in the following terms:-

"**6 AWARD**

The following is my award:

6.1 The employees expectation of the renewal of their 12 month fixed term contracts was reasonable and the employer's refusal to renew was not fair therefore the non-renewal constituted an unfair dismissal of the employees (as envisaged in Section 186(1)(b) of the Act);

6.2 The employer, King Sabata Dalindyebo Municipality is ordered to reinstate all the applicant employees whose names appear in annexure "AA" and "BB" attached to this order retrospectively from the 1st July 2003 on the same terms and conditions of employment which governed their employment prior to their dismissal on the 30th June 2003;

6.3 King Sabata Dalindyebo Municipality is ordered to pay the applicants whose names appear in annexure "AA" and "BB" a total sum of R124 678,56 cash, to be paid to them as reflected in annexure "AA" and "BB" by no later than 30th October 2003;

6.4 The applicants must report for duty at the offices of King Sabata Dalindyebo Municipality on the 25th October 2003; and

6.5 There is no order as to costs."

The applicant municipality seeks to review and set aside this award.

The facts and circumstances which give rise to the matter may be detailed as follows:-

During October 1999 and pursuant to the conclusion by them of a series of independent written agreements, the applicant engaged the services of the

third and further respondents (hereinafter referred to as the employees) [1] to perform what has been described as "cleaning work" within one of its areas of jurisdiction, namely that of the Municipality of Umtata. The work entailed the cleaning of gutter drains, the cutting of grass and the removal of litter. The engagements were in each instance for a fixed period, terminating at the end of June 2000. I may mention that the employees were required to provide the equipment necessary for the work.

Arising from the conclusion of the agreements in question, the employees commenced to perform the services stipulated for thereunder. The funds for their monthly wages were provided for by the O.R. Tambo District Municipality.

During June 2000 the applicant renewed the engagement of the employees for the period, 1 July 2000 to 30 June 2001. Their wages were during this period funded directly by the applicant. On this score, it appears that the applicant was not able to secure the requisite funding from an outside source.

1 They numbered 44 in all.

On 4 May 2001, and little less than two months before their then current engagements were to expire by effluxion of time, the employees addressed a letter to the City Engineer of the Municipality of Umtata in the following terms:-

"We are the contract workers currently doing cleansing work around the city. We request that when our contract expires at the end of June this year, we be employed on permanent basis.

Our request is based on the following reasons:

1. When we started work here, these areas were all decayed, dirty and the tarred roads were closed from the rubble. Vehicles were travelling one side of the road without any refuse dumping place. We cleaned up the place under difficult conditions and we tried to beautify those dumping

areas, such as schools, corner places that are in the public eye.

2. With the R500 we are earning, we have to purchase our own working utensils e.g. wheel barrows, spades, rakes, protective gloves etc. and yet we have to look after our families out of the same R500, even when one is injured at work, we get no help nor Workmen's Compensation.

3. We humbly request you Sir, to have the above quoted items considered so that we don't lose our jobs as we have already sacrificed and obeyed our contract rules and regulations. We have watched some of our colleagues getting employed permanently, thinking and hoping that we would also be considered as we all started at the same time.

We are very worried and concerned that our contracts are expiring because we were told that they would be renewed and end up being made manages ourselves.

Hoping that our requests will receive your favourable consideration.

Thank You"

This letter was, so it appears, not responded to and despite the call for permanent employment embodied therein the applicant seemingly, without demur or protest, engaged the services of the employees for a further year from 1 July 2001 to 30 June 2002.

During the period, May to June 2002, the employees were advised by the applicant that their engagements would not be renewed. This was apparently because the employees had again called for the retention of their services on a permanent basis.

As had been advised, the engagements were not renewed, and in the result the employees declared a dispute which was referred to the first respondent for conciliation, and failing that, for resolution through the mechanisms available to it.

The employees abandoned their demand for permanent engagement and the dispute was resolved by the parties on 21 November 2002 in terms of a written agreement of settlement in the following terms:-

"Settlement Agreement

1.

New contracts will be entered into with the applicants for the period 1/12/2002 to 30/6/2003.

2.

The applicants will receive a 8% increase in their monthly amount (as per their 2002 contracts).

3.

The budgetary monthly amount for the period 1/7/2002 until 30/11/2002, in respect of the applicants, will be referred to Council (at their next sitting) for consideration as additional remuneration for the applicants.

4.

The above amount, if approved by Council, will be paid in monthly instalments (for the duration of the contract) with the first instalment paid within 2 working days of the Council's resolution. The remainder of the instalments will be paid together with the applicants monthly remuneration.

5.

The above is in full & final settlement of the dispute."

The contracts referred to in paragraph 1 of the deed of settlement were negotiated and concluded. They eschew all reference to any intention on the part of the applicant not to renew them.

On 3 December 2002 the applicant's Council ratified the settlement. According to Mr Mzamo Alexander Gumbi, the applicant's municipal manager and the deponent to its founding affidavit, the Council on that occasion resolved that the employees were to be reminded that their engagements would not be renewed after 30 June 2003, and that with effect from 1 July 2003 the employment base for the cleaning of Umtata would be broadened by the employment, for example, of "fifty (50) persons for three (3) months, and thereafter fifty (50) different persons for another three (3) months, etc. ...". [2] [3]

During May 2003 the applicant advised the employees that their engagements were due to expire on 30 June 2003, and on 3 June 2003 the applicant's Acting Director of Engineering Services addressed a letter to them in the following terms:-

[2] It merits mention that the applicant contends that, during negotiations leading up to the conclusion of the fresh contracts referred to in paragraph 9 hereof, the employees were

advised of the Council's resolve that there would be no further renewals after 30 June 2003. This fact was not placed before the second respondent during the course of the hearing before him. There was moreover not a hint of it during the cross-examination of Mr Ntondini, the employees' sole witness in the arbitration.

3 I pause to interpose that the relevant resolutions were not produced by the applicant as part of its papers in the application. It, however, appears that they were produced during the course of the hearing before the second respondent. The employees state that they were not advised of the resolution at the time of the adoption thereof or at any time prior to the subsequent failure of the applicant to renew the engagements which were then in force.

"You are kindly reminded that in terms of the settlement agreement with CCMA on the 21st November 2002 the new contracts you entered into with KSD Municipality will expire on the 30th June 2003. The minute of the Council held on the 03rd December 2003 also backed the CCMA agreement as far as the period of the contract is concerned.

Therefore the 30th June 2003 will mark the last day of your contract with KSD Municipality.

You are thanked for the good service you rendered for the community of KSD."

On 30 May 2003 the employees addressed a letter to the applicant's manager in the following terms:-

"We are a group of 44 workers on contract that is expiring on the 30th of June 2003. We want to point out that we do not have jobs at this stage.

In the circumstances we are requesting for the extension of contract with the Municipality to enable us to continue. It will be recalled that we have been loyal to the Municipality in abiding by all the rules and regulations of the Municipality, as such we have been loyal throughout our period. Please note the list of all the workers referred to as per the annexure revolving around this request."

On 26 June 2003 the applicant declined to accede thereto, despite the fact that the

services in question were still required and that the applicant had the funds necessary to pay therefor.

In the result, the engagements in question were not renewed. Aggrieved thereby, the employees declared a dispute and referred the matter to the first respondent for resolution. It was unable to resolve it - hence the arbitration before the second respondent.

I have already referred to the terms of the second respondent's award. The reasoning which underpins it is to be found in the following extract therefrom:-

"**ANALYSIS OF EVIDENCE AND ARGUMENT**

Section 186(1)(b) of the Act provides that a dismissal takes place in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms and the employer offers to renew it on less favourable terms or did not renew it.

The employer admitted that it renewed the employees contracts automatically on the 1st July 2000, at the employees' request on the 1st July 2001 and at the CCMA on 1st July 2002. The employer's refusal to renew their contracts on 1st July 2002 at first was caused by the employees' demand that they be employed on a permanent basis and when they dropped that demand at the CCMA conciliation the employer agreed to renew their fixed term contracts. The employer confirmed that work and funds for the Community Cleaning Project are available. The reason the employer did not renew the employees' fixed term contracts on the 1st July 2003 is that the employer has decided on the 3rd December 2002 to review the system of employing workers so that in the place of the employees, the employer will take unemployed people from the community to work in the employer's Community Cleaning Project on three months rotational basis. The employer has not denied that the rolling renewal of the employees' fixed term contracts on 1st July 2000, 1st July 2001, 1st July 2002; the availability of funds and work for the Community Cleaning Project has created reasonable expectation on the employees of renewal of their fixed term contracts. When I asked the employer's main witness Mr. Gladstone Lutho Mkaba, a manager if the employer has money to renew the employee's fixed term contracts his reply was:
`Yes, there is money to renew their contracts on fixed term contracts, but not on

permanent employment.'

I am convinced that the employer's conduct of rolling renewal of the employee's fixed term contracts every year since 1999 and the fact that work and money to renew the employees' contracts is available, has created a reasonable expectation to the employees of renewal of their contracts.

I therefore find that the employees have discharged the onus to establish the existence of their dismissal as envisaged by Section 192(1) of the Act as the employees have proved:

(a) The existence of their fixed term contracts of employment (annexure "G" and "H");

(b) The employer's conduct of rolling renewal for three years of their contracts, the fact that money and work are available to renew their contracts led to the employees reasonable expectation of renewal of their fixed term contracts; and

(c) The employer agreed that it did not renew the employees contracts despite the fact that it (the employer) created the reasonable expectation because the employer had decided on the 3rd December 2002 to change the 12 month contracts to 3 month contracts with the proviso that the employees will give opportunity other unemployed people to be employed for 3 months in their positions.

As the employees have established the existence of their dismissal, the onus, to prove that the dismissal (non-renewal) has been effected in accordance with a fair procedure and for a fair reason shifts to the employer as provided by Section 192(2) of the Act.

It is common cause that the employees were not consulted before taking the decision on the 3 December 2002 to change the fixed term contracts to 3 months and that employees should now give other people a chance to be employed in their positions, therefore the decision was not effected in accordance with a fair procedure.

The employer's decision that the employees must give a chance other unemployed people to be employed in their positions while the employees will be unemployed is unfair. Therefore there is no fair reason for the employees' dismissal on the 30th June 2003.

The employer has therefore failed to prove that it complied with a fair procedure in taking the decision that employees should give a chance to other unemployed people to be employed in their positions while the employees will take a turn to stay unemployed and that it (the employer) had a fair reason in refusing to renew the employees' 12 months fixed term contracts of employment.

The employees have asked me to reinstate them and order the employer to compensate them for the lost wages, if I find in their favour.

The employees were dismissed on the 30th June 2003 and have now finished 3 months unemployed and without an income, I therefore find that it is just and equitable that the employer must be ordered to reinstate the employees and to compensate the employees by paying them an equivalent of 3 months

remuneration calculated at R1015,48 per month for the 4 team leaders and R933,44 per month for the 40 general workers whose names appear in the annexure "BB" and "AA" respectively attached to this award."

Section 186(1)(b) of the Labour Relations Act of 1995 reads as follows:-

"**186. Meaning of dismissal and unfair labour practice.-** (1) `Dismissal' means that -

(a).....
(b) an *employee* reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

(c).....
(d).....
(e).....
(f)....."

The scope and operation of Section 186(1)(b) was closely analysed by OOSTHUIZEN AJ in *Dierks v University of South Africa* 1999 ILJ 2012 27 (LC) at 1243I-1246H.[4] Given that analysis and the application of it to the facts *in casu*, it seems to me that the approach which the second respondent adopted was

4 See also *SACTWU v Mediterranean Woollen Mills (Pty) Ltd* (1995) 16 ILJ 366 (LAC); *Malandoh v S A Broadcasting Corporation* (1997) 18 ILJ 544 (LC).

perfectly justified. On this score, it must be borne in mind that the applicant renewed the employees' engagements in June 2000 and June 2001, seemingly without demur or protest. It only failed to effect a renewal thereof in June 2002 by virtue of the employees' demand for permanent employment. Once that

demand had been withdrawn the renewal was effected, again seemingly without demur or protest. It must also be borne in mind that at the relevant time it was known that the services which the employees had been engaged to perform were still required on a regular and ongoing basis. The applicant was moreover sufficiently in funds to sustain the renewal for a further year, albeit not on a permanent basis. Additionally, sight must not be lost of the fact that the employees had served the applicant well over a period of several years and, to boot, with equipment which they themselves had purchased.

In short, the second respondent's decision was justifiable in relation to the evidence which had been placed before him and there is no basis for impeaching it.

One practical difficulty does arise. The reasonable expectation of the employees must be confined to the renewal of their engagements for a further fixed term of one year, reckoned from 1 July 2003. Given the dispute, and the delay which has been occasioned thereby, paragraphs 6.2 and 6.4 of the award are no longer capable of implementation. To this end, the dates, 1 July 2003 and 25 October 2003, referred to respectively therein, fall to be appropriately extended. I propose to do precisely that, and on this score it seems to me that an extension to 1 May 2005 will afford the employees sufficient time to tender their services to the applicant.**5**

The employees have enjoyed substantial success and costs ought in my judgment to follow the event.

In the result, the following orders will issue:-

5 The employees number 44. Although they are represented by an attorney, he will have to locate them to advise them of the terms of this judgment, more especially in respect of the requirement relating to the need for them to tender their services to the applicant by a particular date.

Save that the dates, 1 July 2003 and 25 October 2003, referred to in paragraphs 6.2 and 6.4 respectively of the award are to be deleted and substituted with the date, 1 May 2005, the application is dismissed.

The costs of the application are to be paid by the applicant.

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G FARBER
ACTING JUDGE OF THE
LABOUR COURT

DATE OF HEARING:
16 NOVEMBER 2004

DATE OF JUDGMENT:
01 **FEBRUARY 2005**

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