THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case: C 302/2020
OF INTEREST TO OTHER JUDGES

In the matter between:

SALDHANHA BAY MUNCIPALITY	**Applicant**
And	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
O. MOSES *N.O.*	**Second Respondent**
ADRIAAN PETRUS MOUTON	**Third Respondent**

Date of Hearing: 17 November 2022, 5 December 2023
Date of Judgment: 31 January 2024

Summary: (Deemed dismissal under s 186(1)(b) of the LRA – Expectation of renewal of a fixed term contract might relate to a fixed term contract the renewal of which was in abeyance pending measures to regularise the appointment – Fixed term contracts of strategic advisers to political municipal office bearers – Expectation of renewal of former fixed term contract based on a genuine and objectively justifiable expectation of renewal – deemed dismissal proven – no fair reason for dismissal provided – dismissal unfair – review limited to variation of relief owing to impossibility of giving effect to reinstatement)

JUDGMENT

LAGRANGE J

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Background

[1] This matter was enrolled for hearing of a reinstatement application and the review application if the reinstatement application succeeded. The applicant is the Saldanha Bay Municipality ('the municipality'). The third respondent, Mr A Mouton ('Mouton'), opposes both applications. At the hearing of the application, the hearing was adjourned to allow him to make supplementary representations regarding prospects of success in the review application because he had not filed an answering affidavit in the review application owing to it being deemed withdrawn.

[2] The hearing was postponed *sine die* until the parties had filed their representations and was to be re-enrolled on a date to be determined in consultation with both parties. As it happened, it appears the parties and the Registrar did not communicate to arrange another enrolment date. Subsequently, the court was advised by the municipality's attorneys that Mouton's attorneys of record had withdrawn in around May 2023, but no notice of withdrawal was received by the court. As a result of a misunderstanding on the part of the court that both parties had consented to the applications being decided in chambers, the court undertook to do so. However, it then came to light that there had been no communication from Mr Mouton to confirm if he was willing to accede to this. Ultimately, on or about 5 December 2023, he confirmed that he was content for the matter to proceed on the papers and the submissions made, without the need for a further oral hearing.

[3] In view of the incomplete record, the parties had agreed the matter could be decided on the evidence recorded in the arbitrator's award.

The arbitration award

[4] For the sake of providing some context to the reinstatement and review application it is useful to outline key features of the narrative and of the arbitrator's reasoning.

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[5] Mouton had been employed as a strategic adviser to the executive mayor during 2016 on a one-year fixed term contract. The contract was renewed in 2017 and 2018. In 2019 it was renewed only on a month-to-month basis until 21 November 2019, when the post was advertised for a fixed term appointment of one year, but at a significantly lower entry level salary scale. Mouton was notified of the advertisements by the municipal manager on 20 November. The advertisement made it clear that any appointment would terminate immediately on the termination of the current political office bearers' appointment. This had also been a provision in his previous twelve-month appointments. The strategic advisers were political support staff and that is why an incumbent's employment could not outrun the term of the political office bearer the incumbents were appointed to serve.

[6] The reason the contract was not renewed on an annual basis was because of a report from the auditor general's office to the effect that there was a problem with the way in which the previous twelve-month appointments were made. The municipality had been using an irregular nomination process rather than following normal recruitment procedures. The nomination process was irregular in terms of the municipality's own staffing policy and contrary to s 67 of Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'), which requires a municipality to follow a recruitment and selection process when making appointments.

[7] When the post was eventually advertised for the first time in late November 2019, Mouton did not apply for the post by the application deadline of 12h00 on 28 November 2019. Mouton said he did not have a problem with the post being advertised but had a problem with the lower salary appearing in the advertisement. He also claims he was prejudiced because he only received notice of the termination of his service after the time the advertisements had closed on that day. He alleged that he would have applied for the post if he had received the notice of his termination before that time.

[8] Although the advertised salary level was at the lowest notch in the level 7 salary range, the arbitrator found that Mouton was informed that this was an oversight, well before the closing date for applications. He and the other political support staff whose

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twelve-month contracts had ended and were working on monthly contracts, were in fact encouraged to apply for the advertised posts. As it happened none of the successful candidates were employed on the advertised lowest notch of salary level 7, though it must be mentioned that the evidence did not show that they suffered no drop in salary.

[9] On 28 November 2019, when the advertisements had closed, the municipality issued Mouton with a letter that simply reminded him that, in compliance with the legal framework indicated by the auditor general his contract would terminate on 30 November, and he was reminded of the provisions in his contract providing for that. The letter also reminded him that the positions had been advertised and he was invited to apply for the positions. By implication, the termination of his one-month contract at the end of November was confirmed and his employment with the municipality terminated at the end of that month on the expiry of that contract.

[10] The arbitrator found that the fact that Mouton's contract had been continuously renewed seven times, that the post was still funded, and that the functions of a strategic advisor still needed to be performed, all of which indicated that he had a reasonable expectation of his contract being renewed. Further, because his service would end with that of the municipal manager, it was reasonable of him to expect he would remain in the post until the municipal manager vacated his post. The municipal manager he had been appointed to assist was still in the post in November 2019. The arbitrator concluded that even though Mouton had not applied for the advertised post, since that post was advertised at a salary significantly lower than his existing one, if he had been offered a renewal at that salary it would have been tantamount to an offer of appointment on less favourable terms than he had previously enjoyed and therefore would also have amounted to a dismissal in terms of section 186 [1] of the Labour Relations Act, 66 of 1995 [‘the LRA’]. The arbitrator found the advertised monthly salary was approximately R 9000-00 less than Mouton’s at the time. It is not clear from the award whether the arbitrator nevertheless took this as the basis for concluding that a dismissal took place, even though he was not actually offered a renewal on less favourable terms, or whether he decided the failure to offer him a new twelve-month contract at the time his one month contract expired amounted to a failure to renew a

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contract he reasonable expected to happen. In any event, he decided he had been dismissed on 30 November 2019.

[11] Having decided that Mouton was dismissed, the arbitrator considered whether the dismissal had been fair. Relying on the case of *Nowalaza and Others v Office of the Chief Justice and Another* (J1177/2017) [2017] ZALCJHB234 (15 June 2017) he found that merely because the original appointment had been irregular that could not be a bar to Mouton invoking his right to raise an unfair dismissal claim. In his view, it was unfair to terminate his contract because of the attorney-general's findings on the irregularity of the strategic advisers' previous appointments. Considering that the court in *Nowalaza* had held that it was unlawful to advertise the judges' secretaries' positions, the arbitrator found it was unfair of the municipality to require Mouton to re-apply and participate in a competitive process for the same position he was already appointed in, instead of simply renewing his fixed term contract. The termination of his contract was not for a legitimate reason such as misconduct, incapacity or operational requirements and was accordingly unfair.

[12] Taking account of the s 193(2) of the LRA, which requires an employee who has been substantively unfairly dismissed to be reinstated, unless certain other considerations apply, he awarded his retrospective reinstatement 'on a one year fixed-term contract, <u>as was advertised</u>, on the same terms that existed prior to his contract termination' (emphasis added).

<u>The reinstatement application</u>

[13] The arbitration award was issued on 17 July 2020. The municipality timeously launched the review application on 27 August 2020.

[14] On 7 September 2020, the second respondent ('the bargaining council') notified the applicant's attorneys that it had dispatched the records to the registrar of the court, but that the recording of the evidence was in the process of being copied. On 11 September, the applicant uplifted the record and on 23 September, at the bargaining council dispatched a link to a recording of the hearing, but the applicant's attorneys

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were unable to access it and asked for the council's assistance. Arrangements were made to have disc of the recording deposited at the Labour Court but by 14 October this should not been done. The courier company claimed that it had been unable to lodge the disc on 9 October because the court was closed. In any event, the applicant obtained the disc on 14 October and arranged for it's transcription. On 10 November 2020, they corresponded with the council about documents which were still missing from the record.

[15] The applicant's attorney of record believed that at this time the only record which had not been served on Mouton's attorneys of record was the transcript. Early February 2021 it became apparent that the transcript was incomplete, and the applicant's attorney liaised with the bargaining council to rectify the situation. It was only by 24 March that the bargaining council said that the arbitrator would make himself available to reconstruct the record.

[16] A significant delay occurred at this point, and it was only on 6 September 2021 that the still incomplete record was filed and served on the respondents. The explanation offered for the delay, which resulted in the record not being filed in accordance with the 60-day period stipulated in clause 11 of the Labour Court Practise Manual ('the manual'), was multifaceted. In part it was attributed to the failure of the applicant's attorneys to ensure a proper handover of the case file from an associate who had resigned with effect from the end of January 2021. Furthermore, the partner responsible for the case was handicapped by undergoing cancer treatment, which included chemotherapy and surgery followed by radiation treatment. To make matters worse, the attorney contracted the Covid-19 virus. All these developments impacted adversely on her ability to prosecute the review during the period 24 March until 6 September 2021. Regrettably, she succumbed to the cancer in May 2022. In addition, the applicant was in a genuine quandary whether to attempt to reconstruct the record, or simply to prosecute the review with an incomplete record on the basis that the record might be unnecessary if the review turned on a legal point. Ultimately, on 6 September 2021 a decision was made to proceed without filing an additional record.

[17] Mouton argues that the record should have been delivered by 6 November 2020 and that accordingly the delay in filing an incomplete record on 6 September

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2021, was nearly ten months late. Moreover, in terms of clause 11.2.7 of the practise manual, all the necessary court process should have been concluded by 26 August 2021, being 12 months from the date on which the application was launched. The supplementary affidavit was also substantially late. Accordingly, he submits that the delay is egregious, and that the explanation provided is insufficient. In particular, he points out that no explanation was provided why the bargaining council was only notified three and a half months after the transcription had been received that a portion of it was missing. Give these considerations, he argues that the application for reinstatement ought to be dismissed on this basis alone, without consideration of the merits of the review application.

[18] As Mouton correctly points out, the LAC held in *Samuels v Old Mutual Bank* (2017) 38 *ILJ* 1790 (LAC) that an application for reinstatement of a review application is essentially a condonation application in which the applicant must show good cause for their non-compliance with the practise manual. This requires the applicant to demonstrate that they have a reasonable explanation for the entire period of the default, that they have a reasonable prospect of success and that it would be in the interests of justice to grant the order.

[19] In considering whether these requirements have been met, the first point that needs to be made is that the calculation of the 60-day period is made using court days and not calendar days. Accordingly, the period expired at the end of November 2020 and not at the beginning of that month. Be that as it may, it is unclear when it became apparent that the available transcript was incomplete and why it was only in early February that this became known, even if some allowance is made for the end of year period. Nonetheless, the applicant did pursue the problem of the incomplete record with the council, but it was only towards the end of March 2021 that the council eventually advised that to fill in the missing portion of the record, the arbitrator would have to be used to reconstruct the record.

[20] During this time, the attorney responsible for the matter was trying to cope with a grievous medical condition. While it can be argued that the matter should have been handed over to another attorney at the firm, her condition at the time is not a matter of dispute. There is no reason to suggest that there was any wilful delay or *mala fides* on

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her part. It was her incapacity which seems to have been the primary cause of the inaction on the file. It is apparent that the applicant had commenced proceedings timeously, and had uplifted that portion of the record, which had been made available, timeously. While there is a period of delay between uplifting the record and receiving an incomplete transcript which is not fully explained, once the municipality became aware of the deficiencies in the transcript, the bargaining council was approached to see if it could recover the remainder. About a month passed before it became apparent that a reconstruction exercise would have to be undertaken.

[21] Considering the above, arrangements should have been made within the firm of the applicant's attorneys to minimise the impact of the senior attorney's incapacity on the management of the case. In that sense some of the periods of delay were not fully justified as alternative internal arrangements should have been made to assist her, but I accept that this failure was not on account of *bad faith* on their part.

[22] I must also consider if the prospects of success might have a bearing on the decision whether to revive the application or not. As mentioned, the main criticism of the award is that the arbitrator effectively misconstrued the length of the fixed term contract against which any expectation of renewal had to be evaluated. In this regard it is common cause that Mouton was employed on two more twelve-month contracts following his initial appointment in 2016. When the last twelve-month contract expired at the end of June 2019, he was subsequently employed on one-month contracts until the end of November that year. It appears to be common cause that Mouton was aware that the reason the contracts were only renewed monthly after June 2019 was because of the attorney-general questioning the appointment process which had prevailed previously, in terms of which the posts were not advertised. The appointment of staff by means of a nomination process was contrary to the municipality's staff recruitment policy. The situation was rectified by advertising Mouton's post and similar ones for twelve-month appointments, terminable earlier in the event of the political officer bearer's termination of service during that period.

[23] The municipality points out that Mouton did not claim he had been dismissed at the end of June 2019 when his last twelve-month contract expired. It claims that if he could only argue he had a legitimate expectation of a renewal of a twelve-month

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contract, if he had expected that renewal to have arisen on 1 July 2019 and he would have disputed his unfair dismissal at that point. However, he thereafter entered into five successive one-month contracts. It was only when the last of these ended on 30 November 2019 that he claimed that he was dismissed in circumstances where he still had an expectation of renewal of his normal twelve-month contract.

[24] In terms of the test enunciated in *Samuels*, the LAC stated that for the purposes of reinstatement, "it is sufficient for the appellant at this stage to place facts that if established will entitle her to a successful review application."[1] In this case, the material facts about the failure to roll the contract over at the end of June 2019 and why a twelve month contract was later only offered subject to a standard advertisement and selection process on a potentially less favourable salary are common cause. The parties differ in how the events which unfolded could have objectively speaking given rise to a belief that his previous twelve-month contract ending in June 2019 would be renewed on the same, or not less favourable terms from December 2019.

[25] I am satisfied the municipality has advanced a *prima facie* case in terms of which it would be entitled to succeed if its reasons for arguing that there was no objective basis for Mouton to have believed that he would be employed for another twelve months are correct. Further, given the fact that the effect of the outcome of the review being favourable to it would not be negligible, just as the effect of upholding the award is significant for Mouton, in my view the interests of justice warrant permitting the review to proceed by reinstating the application.

<u>Evaluation of the review</u>

[26] The crux of the review application turns on if, and when, a dismissal occurred, as defined by s 186(1)(b). There are also other issues, which concern whether the arbitrator had the power to grant the particular relief he did, assuming he was correct in finding that Mouton had been unfairly dismissed.

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[1] At paragraph [22].

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Was there a deemed dismissal under s 186(1)(b) of the LRA?

[27] In the unfair dismissal dispute referral form, Mouton identified the date on which he was dismissed as 30 November 2019. He claimed he was notified of his dismissal on 28 November 2019, which was the date the municipality confirmed in writing that it would not be renewing his contract. He referred his unfair dismissal dispute on 2 December 2019.

[28] S 186(1)(b) of the LRA reads:

"186 Meaning of dismissal and unfair labour practice

(1) 'Dismissal' means that-

(a) …;

(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-

(i) 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; or

(ii) 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;…"

(emphasis added)

[29] S 190(2) of the LRA determines the date when such a dismissal occurs, viz:

"190 Date of dismissal

(1) The date of dismissal is the earlier of-

(a) the date on which the contract of employment terminated; or

(b) the date on which the employee left the service of the employer.

(2) Despite subsection (1)-

(a) if an employer has offered to renew on less favourable terms, or has failed to renew, a fixed-term contract of employment, the date of dismissal is the date on which the employer offered the less favourable terms or the date the employer notified the employee of the intention not to renew the contract;…"

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[30] The arbitrator found correctly that Mouton's termination occurred on 30 November 2019, it came to 'a natural end' in terms of clause 1 of the November contract. The pertinent provisions of clause 1, which had appeared in the same form in each of the three preceding one-month contracts, were the following:

"1. APPOINTMENT

The contract shall commence on 1 November 2019 and shall be terminated on 30 November 2019.

…

1.2 It is expressly agreed that this shall not be a permanent position and that the Employee shall not have any perception or expectation of ongoing or permanent employment."

Clause 11.6 of the contract is also pertinent. The clause appeared both in the twelve-month contracts and the one-month contracts. It read:

"11.6 Special Conditions For Termination Of Contract

If any actions by the employee bring the Council or the Office of the Mayor in disregard, the employee's contract will be cancelled with immediate effect.

The Employee's contract is linked to the current political office bearers and will be deemed null and void with immediate effect, if the current political office bearers' contracts should be terminated."

(original emphasis)

[31] The parties were in dispute as to whether that termination of Mouton's employment on 30 November 2019 amounted to a dismissal or simply flowed from the terms of the one-month fixed-term employment contract ending on that date. It is trite that the determination of the existence of a dismissal is an objective question, and the arbitrator was either wrong or right in his finding of the matter[2].

[32] Before this enquiry can be taken further, it is important to be clear about which contract is under consideration so that the test is applied to the correct factual circumstances.

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[2] *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 *ILJ* 2218 (LAC) at paras [39]-[41].

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[33] In this case, two fixed term contracts of Mouton's had not been renewed. The first was the last of his twelve-month contracts which expired on 30 June 2019. The second was his last one-month contract which ended on 30 November 2019. Mouton claimed he expected that his twelve-month contract would be renewed and the basis for this expectation was the provision in clause 11.6 of this contract which stated that his contract would end automatically if the mayor left office. As the mayor's term had not yet expired his contract ought to have been renewed. He also relied on the fact that his appointment had been renewed seven times up to the end of November 2019 and he had even been asked to fill in an application for annual leave in December 2019. It appears that his twelve-month contracts were the same as the one-month contracts except in relation to their duration.

[34] As mentioned, the arbitrator took all these considerations on board in arriving at his decision. Importantly, it seems he concurred with Mouton that the one-month contracts which succeeded the twelve-month contracts, were all simply extensions of the same contract to give effect to the idea that he would remain employed as long as the incumbent mayor remained in office. This created a reasonable and objective expectation 'for employment'. The arbitrator effectively concluded Mouton was entitled to expect a new twelve-month employment contract, based on his appointment being tied to the five-year term of office of the mayor. Consequently, when a new twelve-month appointment became available in November 2019, he was entitled to have been appointed for that period. Even though the contract under which his employment came to an end was only a one-month contract expiring at the end of November, the arbitrator concluded that it was the municipality's failure at the end of that month to renew the last twelve-month contract which had elapsed five months' earlier, which brought the employer's conduct within the definition of a dismissal under s 186(1)(b)(i).

[35] The date of a deemed dismissal under s 186(1)(b)(i) is the date on which the employer notified the employee of its intention not to renew "the contract", or only offered to do so on less favourable terms. The first point that must be made is that at the end of November 2019 no offer was made to Mouton to employ him on less favourable terms under either of his former fixed term contracts. What became available during that month was an opportunity to apply for the post for a twelve-month

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appointment, which was advertised at the lowest salary notch for the job level of the post. When Mouton queried the advertised salary, it was explained that the exact salary paid would depend on the successful candidate's experience and was not limited to the lowest notch in the salary range. However, even if he had stood a very good chance of being appointed if he applied, the advertisement cannot be construed as an offer made to him to renew his employment for a fixed term on less favourable terms. To the extent that the arbitrator might have reasoned this way, his reasoning was wrong.

[36] Under s186(1)(b)(i), the only other way Mouton could be deemed to have been dismissed at the end of November 2019, was the municipality's failure to renew a fixed term contract, which he reasonably expected to be renewed. He maintained that the fixed term contract in question, was the previous twelve-month contract which had ended five months earlier in June 2019. The arbitrator accepted this was the contract he reasonably expected to be renewed.

[37] The municipality contends that if a fixed term contract is not renewed when it comes to an end and the employee has an expectation of its renewal then it is the failure to renew that fixed term contract ends which constitutes a dismissal under s 186(1)(b)(i). It argued that his twelve-month contract was not renewed on 1 July 2019 and therefore he should have declared a dispute then. The same conclusion should be reached if the one-month contract, which he was offered and accepted with effect form 1 July, is construed as an offer of renewal on less favourable terms. The municipality's main criticism of the arbitrator is that the contract which had just lapsed on 30 November 2019 and terminated Mouton's employment was only a one-month contract, and he could not legitimately contend he was dismissed on that date because he still reasonably expected the renewal of the longer fixed term contract which ended five months ago. In relation to the termination of his service on that date, he could only claim to have been dismissed at that time because he believed the monthly contract which had just expired would be renewed.

[38] The interpretation of s 186(1)(b) and s 190(2)(a) underlying Mouton's and the arbitrator's reasoning might seem somewhat strained. It entails that when an employee already knows that their expectation of a regular renewal of a contract has

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not been met, they have an election not to invoke the provisions of s 186(1)(b) at the time that original fixed term contract is not renewed, even though the requirements of a deemed dismissal under s186(1)(b) might have been met at that point. Instead, they can do so later when a subsequent fixed term contract expires, not because they were expecting that later contract to be renewed, but because the employer did not revert to the original fixed term contract which the employee was still expecting to be renewed despite having lapsed some time ago.

[39] However, in this case it seems that Mouton had accepted the one-month renewals of his appointment, not because he had abandoned any expectation of a renewal of the contract on a twelve-month basis but as at temporary measure pending the municipality's decision on what process would be followed in making appointments to the strategic advisor's posts going forward. The municipality accepted that the incumbents of the strategic advisor posts were advised that they would be on monthly contracts pending the finalisation of the auditor general's report on the legality of the appointments. Thus, it is quite probable he would have assumed that once the technicalities of re-appointing himself and his colleagues had been resolved he would have been re-appointed for another twelve-month stint, given that the political incumbent, on whose appointment his own depended, was still in office. In this type of case, the time when the employee justifiably anticipates that their expectation of renewal will be realised might not coincide with the expiry date of the contract in question ended, but they can still rely on s 186(1)(b)(i) provided they can justify why the reasonable expectation of renewal only fully materialised at a later date.

[40] Mouton retained the expectation that once the appointment process was determined he would be re-appointed at least for another twelve-month period. While he stood a good chance of re-appointment if he had applied for the advertised post, there was no assurance given to him that he would be remunerated at a rate very close to what he was being paid. It has been mentioned that the gap between the advertised salary level and Mouton's remuneration was considerable, and the employer did not tender any evidence that the highest notch on the salary scale attached to the advertised post was close to or equivalent to what he was earning. Consequently, there was no evidence, demonstrating that he would not suffer any material reduction in income if he was successful in applying for the post. Therefore,

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it was reasonable for Mouton to believe that the advertised job did not match his expectation of retaining employment in the same position at his current salary. In addition, it should be mentioned that the auditor general's report did not identify any irregularity relating to the remuneration paid to the advisors, so there was no reason for him to believe that any changes in the appointment process flowing from the auditor general's report would also encompass any prospect of reduced remuneration.

[41] In light of the above considerations, I am persuaded that Mouton had a genuine and objectively justifiable expectation that he would then be re-appointed in accordance with his twelve-month contract, after a temporary interval during which the technicalities of how he and his fellow strategic advisers could be re-appointed would be resolved by the municipality. As a result, the failure to reappoint him on those or very similar terms when his last monthly contract ended amounted to a dismissal in terms of s 186(1)(b)(i) of the LRA.

[42] The municipality's justification for not renewing his appointment, was that it was obliged to advertise the post, and that he would have been well placed to succeed, so it was fair of it not to re-appoint him despite his reasonable expectations, and despite the fact that it did not establish that he would not suffer a substantial drop in earnings if he was not successful. But it did not attempt to offer one of the substantively fair reasons for m1's dismissal, in the event it was deemed to have occurred. Had the municipality perhaps approached the problem it was trying to address from a different angle, such as treating the matter as a question of operational needs and incorporating the job application process as a potential first step in trying avoiding retrenchment in the context of a retrenchment consultation process, then the it might have bridged the gap between the conflicting demands of not frustrating Mouton's legitimate expectation and achieving its need to comply with its own recruitment policy. Be that as it may, the municipality's approach was that the termination of Mouton's employment was not a dismissal and accordingly it did not furnish a legitimate reason for one. In the circumstances the dismissal was substantively and procedurally unfair.

<u>Relief</u>

[43] The municipality also contended that the relief awarded was at odds with the fact that Mouton was last employed on a one-month contract and therefore could not expect to be awarded reinstatement on a twelve-month contract. For the reasons discussed above, it is apparent that the expectation of renewal of the twelve-month contract would have fully ripened only when the municipality ended the one-month contracts and advertised the twelve-month appointments, which heralded the return to the previous fixed term contract norm. Accordingly, the award of a twelve-month contract was commensurate with the expected duration of a renewed contract.

[44] However, the relief awarded does need further consideration. It was expressed in the following terms in the award issued on 14 July 2020:
"54. I find no evidence place before me indicates that the Applicant cannot be reinstated from 1 December 2020. The Applicant is reinstated from the date of dismissal and must be paid for the loss of earnings from the date of dismissal to the date of reinstatement on 1 August 2020 amounting to R254,745.60 (two hundred and fifty four thousand and seven hundred and forty five rand sixty cents)."
Plainly the reference to 1 December 2020 should have been a reference to 1 December 2019, when the anticipated renewal should have occurred. Further on under the heading "Award", the arbitrator, expressed the relief slightly differently:
"56. The Applicant is reinstated on a one-year fixed term contract, as was advertised, on the same terms that existed prior to his contract termination."
The arbitrator also stipulated 1 August 2020 as the date for reporting for duty and that the backpay mentioned had to be paid no later than 31 July 2020.

[45] Despite paragraph 54 of the award, which can be interpreted to mean that Mouton should have been reinstated on an indefinite basis, paragraph 56 clearly envisaged he was only entitled at that stage to a retrospective appointment on a fixed term contract of twelve months, starting on 1 December 2019. This is all the arbitrator could have awarded because Mouton never claimed anything more than renewal of his twelve month contract. He had not claimed he was entitled to indefinite employment. The ambiguity in the relief must be eliminated to cure the apparently irreconcilable pronouncements on the relief due.

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[46] As things currently stand, the reinstatement order also cannot be given effect to because the period of the fixed term contract expired on 30 November 2020. The relief needs to be varied to address this also.

Order

[1] The Applicant's review application is reinstated.

[2] The review application is dismissed, except insofar as it is necessary to review and set aside the relief awarded to resolve ambiguities and to take account of the impossibility of giving effect to the relief originally awarded, owing the elapse of time.

[3] Paragraph 54 of the award is reviewed, set aside and replaced with the following:

"54 I find no evidence place before me indicates that the Applicant ought not be reinstated from 1 December 2020 on a twelve-month fixed term contract or, if it is not reasonably practicable to do so, he ought to be paid the equivalent of one year's remuneration as compensation, calculated at the rate of remuneration he was receiving on 30 November 2019."

[4] Paragraphs 56, 57 and 58 of the award are reviewed, set aside and replaced with the following:

"56 In the event the Respondent is not obliged to give effect to the award for a period of time, and when that time expires the one-year contract commencing on 1 December 2019 would have elapsed, the Respondent must pay the Applicant compensation of one year's remuneration, calculated at the rate he was earning on 30 November 2019. "

[5] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

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Appearances/Representatives

For the Applicant: E Tolmay instreuvcted by
Fairbridges Wertheim Bekker

For the Third respondent : L Van Dyk instructed by
Geldenhuys Jonker Inc

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