

REPORTABLE (11)

TOBACCO PROCESSORS ZIMBABWE (PRIVATE) LIMITED
v
(1) TONGOONA MUTASA (2) ROBIN MATORA (3) ALEXIOUS SVINURAI (4) TIRANOS MADZANA (5) SLADGE MUSANHU (6) CHAKANYUKA TSVINA (7) TRYNOS BHUNU (8) VERYSON HLOZANI (9) ANTONY MURINGISI (10) ELPHAS UTETE (11) WILLARD MARUFU (12) MICHAEL MUKUNGWA

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & CHATUKUTA AJA
HARARE: 24 JULY 2020 & 15 MARCH, 2021**

T. Mpofo and *T. Nyamagura*, for the appellant

C. Mucheche, for the respondents

MAKONI JA: This is an appeal against the whole judgment of the Labour Court upholding the National Employment Council- Tobacco Grievance and Disciplinary Committee's ('NEC GDC Committee') finding that the appellant tacitly renewed the respondents' contracts of employment.

FACTUAL BACKGROUND

The following facts are common cause. The respondents were employed by the appellant on two-year fixed contracts beginning 1 May 2011 to 30 April 2013. After the expiry of their contracts of employment, they continued to work for the appellant for eleven months following which the appellant offered them new contracts with the same terms as the expired ones. The respondents signed the new contract which effectively regularised their employment in retrospect for the period of 1 May 2013 to 30 April 2015.

Upon expiry of the contracts, on 30 April 2015, the appellant retained the respondents until 22 June 2015 on the same terms as the expired contracts. It then offered them one-year fixed-term contracts. The proposed contracts had a two-months probation clause and other less favourable conditions. The respondents rejected the appellant's offer. The appellant terminated their contracts of employment by letter dated 7 July 2015 on the basis that the negotiations between the parties had collapsed.

Aggrieved by the termination of their employment, the respondents noted a grievance of unfair dismissal with the appellant's Works Council. The Works Council upheld the decision by the appellant's Human Resources department to offer the appellants one-year contracts after the expiry of the two-year contracts. It reasoned that there was no legal impediment to the appellant replacing the expired two-year contracts with other contracts which had different terms and conditions from the expired contracts. The Work's Council further found that the respondents suffered no prejudice as they were paid for the period they worked whilst the parties were negotiating.

Thereafter, the respondents appealed to the NEC GDC Committee. They submitted that in instances where an employer allows an employee to work after a fixed-term contract had expired, the contract is deemed to have been tacitly relocated on the same terms and conditions. Therefore, they submitted, there was no basis for the new contracts as there had been tacit renewal. They also averred that the alleged negotiations were inconsequential as they ensued after the tacit renewal.

In response, the appellant submitted that the NEC GDC Committee had no power to interfere with the findings of facts made by the lower tribunal unless the findings

were outrageous in their defiance of logic. The appellant contended that the two-month delay in notifying the respondents of the new offer could not be inferred to mean there was tacit renewal. It did not intend to renew the two-year contracts.

The NEC GDC ruled in favour of the respondents. It held that tacit relocation could be safely presumed since the appellant did not communicate its intention to change the terms of the respondents' contracts before their termination and that the respondents were engaged on the same terms and conditions as before. It accordingly ordered the reinstatement of the respondents for the unexpired period of their contracts without loss of pay and benefits or payment of their salaries and benefits up to 30 April 2017.

Aggrieved by this decision, the appellant appealed to the Labour Court (the court *a quo*) on the ground that the NEC GDC grossly misdirected itself when it made a finding that there was a tacit renewal of the respondents' two-year employment contracts simply because the appellant allowed the respondents to continue reporting for duty after the expiry of their contracts. It argued that where there are clear indications that the other party did not intend to be bound by the old contract, there could not be tacit relocation of a contract that extended beyond the contractual period. The appellant submitted that tacit relocation could not occur where the parties are engaged in negotiations over a new agreement. It contended that the respondents were allowed to work and were paid for the period when their new contracts were being attended to.

To the contrary, the respondents argued that there was tacit relocation in that the appellant allowed them to continue working on the same conditions from 1 May 2015 to 22 June 2015 notwithstanding that their contracts expired on 30 April 2015. They also

emphasized that the parties did not agree on a new arrangement. The respondents further indicated that the appellant had the option of terminating their contracts of employment but allowed them to render their services and subsequently introduced unfavourable conditions. It was submitted that a finding against tacit relocation in the circumstances of the case would be contrary to social justice and fair labour standards of equity and fairness in the workplace.

DETERMINATION OF THE COURT A *QUO*

The court dealt with the issue of whether or not the NEC GDC erred in finding that the contracts of employment had been tacitly relocated. In doing so, it considered the employment status of the respondents at the time their contracts were terminated. The court *a quo* found that there was no evidence to the effect that the new contracts were as a result of any negotiation process as no negotiations were done from 1 May to 22 June 2015. It reasoned that the old contracts were tacitly relocated in that the appellant had allowed the respondents to continue working on the same terms and conditions as before, and did not communicate any intention to change the terms and conditions of the employment.

The court *a quo* also had regard to the precedent that the appellant did not immediately terminate or renew the respondent's contracts but allowed them to continue working, for some period, on the same terms and conditions of the expired contracts. It reasoned that had the appellant not wished to be bound by the old expired contracts, it would have expressed that intention. The court accordingly concluded that the NEC GDC Committee's decision did not constitute an outrageous defiance of logic since the facts indicated that there was tacit relocation of the two year contracts.

Aggrieved by that decision the appellant noted the present appeal on the following grounds:

GROUND OF APPEAL

1. “Having accepted that the fixed term contracts between appellant and each of the various respondents had come to an end and that new fixed term contracts have been offered within two months of the expiry of respondent’s contracts, the court *a quo* erred in finding notwithstanding those agreed facts, that the old contracts had been relocated.
2. The court *a quo* erred in not coming to the conclusion that the negotiation that took place after the expiry of the contracts were such as negated any finding that there was an extension of the contractual relationship between the parties by the *quasi mutual assent*.
3. The court *a quo* erred in imposing upon appellant a contract it had not concluded to prejudice the clear terms it had actually offered. (*sic*)
4. Respondents having rejected the terms of the contract offered by appellant, the court *a quo* erred in concluding that respondents had a contract to enforce.”

SUBMISSIONS BEFORE THIS COURT

At the hearing, *Mr Mpofu*, for the appellant submitted that the court *a quo* asked itself the wrong question and ultimately gave itself the wrong answer. The wrong question was whether it had been shown that there had been negotiations between the parties from the 1 May 2015 to the 22 June 2015 and if not what the effect of the absence of negotiations, during that period, would be. The court *a quo*’s *ratio* was that upon the expiry of the contract they only engaged in negotiations after a period of six weeks. Because of that silence there was tacit relocation of the contract. He contended that the real dispute between the parties was not that the respondents’ contracts had been relocated but that the respondents were aggrieved by the terms of the new contracts. *Mr Mpofu* submitted that the respondents admitted that there were negotiations and that they did not refuse to sign the one-year contracts but were looking forward to working under the old two-year contracts.

Mr Mpofu further contended that a holistic analysis of the facts would show that relocation of contracts in 2015 could not have been the appellant's intention. The parties knew of the need for a written contract at all material times as evidenced by the fact that in 2013 the respondents worked for eleven months without contracts and later signed contracts backdated to the period when they were without contracts. The parties haggled over the terms of the one year contracts as the employees did not like the new terms of the contract. They did not argue that the old contracts had relocated. To confirm the appellant's position some of the employees signed the one year contracts.

He concluded by saying that tacit relocation can not be inferred from the facts of this matter. On being asked the date when the negotiations started he was unable to pinpoint a date. He however submitted that even if there were no negotiations between 1 May and 20 June 2015 a tacit relocation could not be inferred when the parties subsequently negotiated. He further submitted that the fact that parties were negotiating shows that there was no intention on the part of the appellant to revert to the old contract. He relied for that proposition on the case of *Justin Kwangwari v Commercial Bank of Zimbabwe* HH 79/03. He submitted that there is no period set in our law between the expiry of a fixed term contract and the conclusion of a new one for it to be held that there was tacit relocation. He urged that the court to considers all the facts holistically in order to draw inferences consistent with the proven facts.

On being asked what would be the status of the employees in the 7 weeks, before the offer, he submitted that the status was determined by the new contract.

Mr *Mucheche*, for the respondents, submitted that the facts of the matter point to tacit relocation. He indicated that the root of the dispute lies in the determination of the respondents' employment status in the 7 week period. Accordingly, he referred to s 12 (1) of

the Labour Act [*Chapter 28:01*](The Act), for the proposition that the legislature envisaged the existence of ‘deemed contracts’ in respect of an employee who works for an employer and is receiving or entitled to receive any remuneration notwithstanding that such contract has not been reduced to writing. He also referred s 12 (2) of the Act, which, so he argues, demands mandatory compliance by the employer to inform the employee in writing the period in terms of which they are engaged and s 12(3)(a) of the Act which provides that where a contract does not specify its duration or date of termination, it is deemed to be one without a limit of time.

As such, he argued, the legislature sought to protect employees from unscrupulous employers who have more bargaining power than the employees. He emphasized that there was tacit relocation in that the respondents reported for work and were remunerated under the old contracts. He further indicated that the respondents’ concerns did not only relate to their disgruntlement with the new offer but also spoke to the issue of tacit relocation. He further submitted that the appellant’s offer of new contracts of employment was immaterial to the concept of tacit relocation. Additionally, he stated that the one-year contracts offered by the appellant were unjust, unfair and violated the respondents’ right to fair and safe labour practices and standards provided for in s 65 of the Constitution of Zimbabwe, 2013.

In rebuttal Mr *Mpofu* submitted that there can be a delay after the expiry of the contract and the delay does not amount to relocation. It would be wrong to say once there is a delay then s12 of the Act is the answer. He submitted that s12 uses “shall” in a directory sense and not in a peremptory manner. Failure to comply with it does not render conduct void. He concluded by saying that s12 of the Act is what the employer was complying with in the 7 weeks.

ISSUE FOR DETERMINATION

From a consideration of the grounds of appeal raised and the submissions made, one issue falls for determination which is:

Whether or not the court *a quo* erred in finding that the contracts of employment in question had been tacitly relocated

A reading of the record reflects that the *ratio* of the court *a quo*'s ruling was that the respondents' continued rendering of services from 1 May 2015 to 22 June 2015 in terms of the expired contracts constituted tacit relocation of the contracts by the appellant.

That tacit relocation was at the centre of the parties' dispute is also evidenced in the way the matter progressed before the various *fora*. This will be shown by a perusal of the minutes of the appeal hearing of 26 October 2015 before the Work's Council to the respondents' appeal before the NEC GDC Committee and the subsequent proceedings in the court *a quo*.

THE LAW

It is settled law that a fixed-term contract of employment automatically expires at the end of the specified period unless the parties thereto mutually agree to its termination. (See *ZIMRA v Mudzimuwaona* SC 4/18). However, in certain instances, despite the expiry of the period of employment, the employer-employee relationship may be found to exist owing to the parties' conduct under the concept of tacit relocation.

Tacit relocation, as it applies to contracts of employment, entails that where an employee's fixed-term contract expires without renewal and the employee continues to render his services to the employer with the employer paying the previously agreed remuneration, the

expired contract is deemed to be relocated. Therefore, the employee is deemed to be employed on the same terms and conditions as the previous contract.

In *Gumbo v Air Zimbabwe (Pvt) Ltd* 2000 (2) ZLR 126 at 130 A-D the court made the following pertinent remarks regarding the principle of tacit relocation;

“Finally, the best that can be said for the applicant is that in certain cases akin to the present there is a presumption that when the parties continue the employer-employee relationship beyond the contractual period without agreeing new terms there is a tacit relocation of the expired contract on the same terms and for the same duration. In other words, all things being equal, it could be said that on 1 October 1999, the applicant commenced a new probationary period. However, this presumption does not operate when it is clear that one of the parties has no intention of continuing on the terms of the expired contract. See *Lilford v Black* 1943 SR 46 at 47, where BLAKEWAY J said:

‘The renewal of a lease or of a contract for services to be performed can take place either by express agreement or tacitly. If, after the expiration of the period provided for the duration of the contract, the parties continue their relationship without any fresh agreement the law presumes, in the absence of indications to the contrary, that they have agreed to enter upon a new lease on the same terms as the expired lease. But this presumption does not operate when it is clear that the parties or one of them does not intend to carry on with the contract on the old terms.’” (Emphasis added)

John Grogan in his book “*Workplace Law*” 8th ed at pages 41-42 states the following:

“If after the agreed date for the termination of the contract the employee remains in service and the employer continues to pay the agreed remuneration, the contract is deemed to have been tacitly renewed, provided that an intention to renew is consistent with the parties’ conduct. The relocated contract will continue on exactly the same terms and conditions as the previous fixed-term contract, except that the duration of the contract need not be the same as that of the original contract; the life of the relocated contract must be determined in light of the particular circumstances of each case.” (emphasis added)

In *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC & Ors* 2002(1) SA 822(SCA)

at 825 D-F the court held:

“After the termination of the initial agreement and prior to this letter the parties (in the light of the facts recited) conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before. Taken together, those facts establish a tacit relocation of a franchise agreement (comparable to a tacit relocation of a lease)

between the appellant and *Sirad (Shell South Africa (Pty) Ltd v Bezuidenhout and Others* 1978 (3) SA 981 (N) 984B-E). A tacit relocation of an agreement is a new agreement and not a continuation of the old agreement (*Fiat S A v Kolbe Motors* 1975 (2) SA 129 (O) 139D-E; *Shell* 985B-C). The fact that the appellant had forgotten that the agreement had lapsed is beside the point because in determining whether a tacit contract was concluded a court has regard to the external manifestations and not the subjective workings of minds (*Fiat S A* 138H -139D).” (emphasis added)

The principle that can be drawn from the cited authorities is that an inference of tacit relocation is dependent upon the continued existence of an employer-employee relationship after the expiration of the contract. The employee will continue rendering his services to the employer who in turn pays remuneration in terms of the expired contract. Tacit relocation is based on the intention of the parties which must be consistent with their conduct. The court, in determining such an issue, considers all the facts holistically as it draws inferences which are consistent with the proved facts.

The principle of tacit relocation of contracts of employment appears to be embodied in statute, in particular s 12 of the Labour Court Act [*Chapter 28:01*] which provides:

“12 Duration, particulars and termination of employment contract

- (1) Every person who is employed by or working for any other person and receiving or entitled to receive any remuneration in respect of such employment or work shall be deemed to be under a contract of employment with that other person, whether such contract is reduced to writing or not.
- (2) An employer shall, upon engagement of an employee, inform the employee in writing of the following particulars—
 - (a) the name and address of the employer;
 - (b) the period of time, if limited, for which the employee is engaged;
 - (c) the terms of probation, if any;
 - (d) the terms of any employment code;
 - (e) particulars of the employee’s remuneration, its manner of calculation and the intervals at which it will be paid;
 - (f) particulars of the benefits receivable in the event of sickness or pregnancy;
 - (g) hours of work;
 - (h) particulars of any bonus or incentive production scheme;
 - (i) particulars of vacation leave and vacation pay;
 - (j) particulars of any other benefits provided under the contract of employment.

- (3) A contract of employment that does not specify its duration or date of termination, other than a contract for casual work or seasonal work or for the performance of some specific service, shall be deemed to be a contract without limit of time:
Provided that a casual worker shall be deemed to have become an employee on a contract of employment without limit of time on the day that his period of engagement with a particular employer exceeds a total of six weeks in any four consecutive months.
- (3a) A contract of employment that specifies its duration or date of termination, including a contract for casual work or seasonal work or for the performance of some specific service, shall, despite such specification, be deemed to be a contract of employment without limitation of time upon the expiry of such period of continuous service as is—
- (a) fixed by the appropriate employment council; or
 - (b) prescribed by the Minister, if there is no employment council for the undertaking concerned, or where the employment council fixes no such period; and thereupon the employee concerned shall be afforded the same benefits as are in this Act or any collective bargaining agreement provided for those employees who are engaged without limit of time.”

Section 12(2) has been interpreted to merely impose an obligation on the employer to supply the information and does not require the parties to sign a written contract. See *Rumbles v Kwa Bat Marketing (Pty) Ltd* (2003) 8 BLLR 811 LC. The statement of particulars is not the contract itself nor is it even conclusive evidence of the contract. See L. Madhuku, *Labour Law in Zimbabwe*, 2015 at p 31.

However, a proper construction of s 12(1) yields the result that where an employee renders services in return for remuneration, a contract of employment exists notwithstanding that such a contract has not been reduced to writing. Tacit relocation is therefore presumed.

This is made clearer by the provisions of s 12(3a) which states that a fixed term contract shall be deemed to be a contract without limit of time upon the expiry of such period of continuous service.

APPLICATION OF THE LAW TO THE FACTS

A determination of whether a written contract was automatically renewed in accordance with the principle of tacit relocation is a question of fact which has to be answered after an analysis of the particular facts and circumstances of each case. (See *Sun International (South Africa) Ltd v Crocodile Enterprises* [2014] ZANWHC 52).

In *casu*, it is not in dispute that the parties' relationship was governed by a written contract of employment which terminated by effluxion of time on 30 April 2015. As at that date, the respondents would have ceased to be the appellant's employees. However, the appellant allowed the respondents to continue working on the old terms and conditions of their contracts until 22 June 2015 when it then offered the respondents one-year contracts with less favourable conditions. It can be reasonably inferred from this conduct of the parties that a new contract had come into existence by the principle of tacit relocation.

Applying the *dicta* in *Golden Fried Chicken* case, *supra*, that tacit relocation of an agreement is a new agreement and not a continuation of the old agreement, it follows that a new agreement between the parties came into effect on 1 May 2015 owing to the appellant's conduct of retaining the respondents in its employ on the same terms and conditions of the expired contracts. Such a finding would have resolved the matter; however, a secondary issue arises from the parties' submissions.

The issue for consideration is the effect of the alleged negotiations, if any, on the relocated contract. This is necessitated by the appellant's position that the existence of negotiations regarding a new contract negates any finding to the effect that the old contracts were relocated. It is the appellant's position that the engagements between the parties after the

expiration of the contract are a clear indication that it had no intention of continuing on the old terms. It relied on communication by the appellant's Human Resources Manager dated 7 July 2015 informing the respondents that the negotiations had collapsed, thus a new contract would not materialize and the Work's Council determination to that effect.

Per *contra*, the respondents aver that negotiations regarding the new offer made by the appellant did not have any legal effect on tacit relocation as a new contract had already materialised. In their written submissions, they aver that the purported negotiations were induced by duress as the appellant's Human Resources' Manager threatened to dismiss them if they did not abandon the claim for tacit relocation and dispense with the services of their legal practitioners. As such, they submitted that the 'alleged collapse of negotiations' in the circumstances, could not be a basis for the termination of employment.

Since tacit relocation is inferred from the presumed intention of the parties to the contract and their conduct, where it is established that both parties accepted that the old contract had terminated and engaged in negotiations regarding a new contract, tacit relocation will be negated. This is for the reason that neither of the parties would have conducted themselves in a manner that gave rise to the inescapable inference that both desired the revival of their former contractual relationship on the same terms as existed before.

In this regard, the court *a quo* made a factual finding that there was no evidence to the effect that there were any negotiations between the parties from 1 May 2015. It further found that although the appellant may have intended to terminate the contracts, it failed to communicate that intention. It also took into account the manner in which the parties dealt with the same issue in the past. When the initial two year contracts expired the employer did not

immediately renew the contracts. It merely allowed the employees to continue rendering services on the same terms and conditions of the expired contracts. It only regularised the contracts after 11 months.

It is settled law that an appellate court may only interfere with the decision reached by a lower court based on factual findings where gross misdirection has been established. [See *Hama v National Railways of Zimbabwe* 1996(1) ZLR 664 (S)]. The appellant has not alleged such a gross misdirection which necessitates this court's interference.

More importantly, there is nothing on record to show that the parties engaged in negotiations during the period 1 May 2015 to 22 June 2015 when they were without contracts. There is no evidence that during this period the appellant communicated to the respondents its intention as to whether or not the two-year contracts would be renewed or terminated. The first meeting on record occurred in the appellant's board room on 29 June 2015, notably after the period upon which the respondents base their claim for tacit relocation. This is followed by the appellant's letter of 7 July 2015 indicating the collapse of the alleged negotiations. Given this, the court *a quo*'s finding cannot be assailed. Its decision was based on a correct application of the principle of tacit relocation as enunciated in the *Gumbo* case, *supra*.

The fact of the matter is that for the two-month period, that is 1 May 2015 to 22 June 2015, the conduct of the parties reflects that they intended to be bound by the expired contracts. Those contracts were therefore tacitly relocated and were to expire after two years, just like the expired contracts. In the circumstances of this case, a mere attempt to negotiate a

new contract does not operate to vary an existing binding contract. The appellant's new offer thus amounted to an attempt to unilaterally vary the respondents' relocated contracts.

This is a classical case of the application of subsections 12(1) and (3a) of the Labour Act which seek to protect employees by estopping an employer from alleging the non-existence of a contract of employment where there has been continued service in terms of an expired contract. Mr *Mpofu* argued that it would be wrong to invoke s 12 everytime there is a delay in renegotiating an expired contract. He contended that s 12 uses "shall" in a directory sense and not in peremptory terms.

It is the generally accepted rule of interpretation that the use of the word "shall" as opposed to "may" is indicative of a peremptory intent on the part of the legislature. Failure to comply with the mandatory dictates of law renders the act done a nullity. However, where the legislature has not explicitly provided that non-compliance is fatal, there is a presumption that the legislature left it to the courts to determine the consequences of non-compliance.

In *Shumba & Anor v The Zimbabwe Electoral Commission & Anor* SC 11/08 at p 21 the court had occasion to deal with the issue of interpreting a Statute that does not prescribe the consequences of non-compliance with a statutory provision. In interpreting the provisions of the Zimbabwe Electoral Commission Act, CHIDYAUSIKU CJ remarked as follows at pp. 21-23 of the cyclostyled judgment:

"It is the generally accepted rule of interpretation that the use of peremptory words such as 'shall' as opposed to 'may' is indicative of the legislature's intention to make the provision peremptory. The use of the word 'may' as opposed to 'shall' is construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is not fatal. In both of the above instances no difficulty arises. The difficulty

usually arises where the legislature has made no specific indication as to whether failure to comply is fatal or not.

In the present case, the consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the Courts to determine what the consequences of failure to comply should be.

The learned author Francis Bennion in his work *Statutory Interpretation* suggests that the courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He had this to say at pp 21-22:

'Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequence Parliament intended should follow from breach of the duty.'

In *Sutter v Scheepers*¹ the court gave guidelines on how the real intention of legislature can be arrived at. These were summarised in *Pio v Franklin NO and Another* 1949

(3) SA 442 (C) as follows:

- “(1) The word shall when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.
- (2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.
- (3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
- (4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.
- (5) The history of the legislation also will afford a clue in some cases.”

¹ (1932 AD 165 at pp. 173, 174)

The principle which comes out of the guidelines is that where strict adherence to the wording of a statute leads to an injustice or even fraud, in instances where no penalty is prescribed, it may be desirable to lean in favour of making the provision directory.

From the cited authorities, it is the general position that the use of the word ‘shall’ in a statutory provision requires mandatory compliance. Where the penalty for infraction of the provision is not explicitly stated, it is for the courts to determine what the consequences of failure to comply should be. In doing so, the court must interrogate the purpose of the relevant statute and pronounce a penalty which is proportionate to the mischief the legislature sought to remedy.

It is my considered view that both provisions are peremptory owing to the specific use of the word “shall” which has mandatory connotations. Section 12(1) provides:

“12 Duration, particulars and termination of employment contract

(1) Every person who is employed by or working for any other person and receiving or entitled to receive any remuneration in respect of such employment or work shall be deemed to be under a contract of employment with that other person, whether such contract is reduced to writing or not.”

It is accepted that there is no explicit obligation on an employer under this provision to reduce a contract into writing. However, that fact alone does not render the provision directory. The use of the word “shall” after a description of a factual set of facts in an employment set up followed by the pronouncement of a specific outcome is indicative of the fact that the legislature intended the provision to be peremptory. In enacting s 12(1), it appears that the legislature envisaged a situation where services are rendered in return for remuneration but the recipient of the services later disputes the existence of a contract of employment.

The peremptory nature of s 12(1) is not dependent on whether or not a particular act is done which in this case would be a mandate on the employer to reduce a contract into writing. The peremptory nature of the provision lies in the deemed existence of a contract of employment which follows the rendering of services and remuneration for such services. Once it is established that services have been rendered and there is a correlative entitlement to remuneration or actual remuneration, a contract is deemed to be in existence. It is *prima facie* proof of employment.

A similar interpretation can be ascribed to s 12 (3). The peremptory nature of the provision stems from the fact that a contract is deemed to be without limit of time where no specific details of its duration are provided. The same applies to a casual worker who continues rendering services notwithstanding the expiry of the specific period for which he was engaged. Therefore the onus to disprove the continued existence of the contract rests on the party disputing its existence.

It is my considered view that the legislature must have been cognisant of the fact that employees are vulnerable under some unscrupulous employers, hence the use of such peremptory provisions in s 12 of the Act.

Having said the above, the circumstances of this case fall into the ambit of the sentiments of the court in *Melamed and Hurwitz v Vornier Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 165B-C: that:

“...a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence ...”

Applying this approach to the matter at hand, an inference of tacit relocation was justified on the facts of this case. The court *a quo*'s finding that that respondents' contracts were tacitly renewed from 1 May 2015 is unassailable. Therefore, the appellant's termination of the respondent's contracts of employment in the circumstances was grossly irregular.

An employer clearly cannot terminate a contract that has expired even though it has been tacitly renewed

The appeal therefore lacks merit and ought to be dismissed. Costs will follow the cause.

It is accordingly ordered as follows:

“The appeal is dismissed with costs.”

MAVANGIRA JA

I agree

CHATUKUTA AJA

I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Caleb Muccheche & Partners, respondent's legal practitioners