NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

Case no: CA&R6/15
Date heard: 5 June 2015
Date delivered: 11 June 2015

In the matter between

NANDIPA BAM	**Appellant**
vs	
ALFRED NZO DEVELOPMENT AGENCY (Pty) LTD	**First Respondent**
THE CHAIRPERSON, ALFRED NZO DEVELOPMENT AGENCY	**Second Respondent**
THE MAYOR: ALFRED NZO MUNICIPALITY	**Third Respondent**
NOLUBABALO NCUME	**Fourth Respondent**

JUDGMENT

PICKERING J:

[1] This is an appeal to the Full Bench of this Division against the judgment of Goosen J dismissing the appellant's application with costs. The appeal is with the leave of the court a quo.

[2] The appellant was employed as the Chief Executive Officer of Alfred Nzo Development Agency (Pty) Ltd. She was, at first, seconded to act in that position during 2008. On 1 June 2011 she was appointed, in terms of a written contract, as Chief Executive Officer (CEO) until 30 May 2012.

[3] First respondent is Alfred Nzo Development Agency (Pty) Ltd. Second respondent is the Chairperson (Alfred Nzo Development Agency). Third respondent is the Mayor of Alfred Nzo District Municipality. Fourth

respondent is Nolubabalo Ncume, an adult female, cited as the person who had been selected for appointed of the position of CEO of the first respondent.

[4] In her notice of motion applicant seeks, inter alia, the following orders:

"*1. ...*

2. ...

3. ...

4. That the First Respondent's resolutions and/or decisions:

4.1 taken in its meeting of the 12 July 2013 and, in terms whereof the Applicant's employment as First Respondent's Chief Executive Officer was extended for a period of 2 (two) years be and is hereby declared valid with effect from the 12 July 2013;

4.2 taken in its special meeting held on a date between the 12 July 2013 and the 25 July 2013 in terms whereof the First Respondent resolved to offer to the Applicant an extension of contract of employment for a period of six (6) months reckoned from 01 June 2013 to 30 November 2013 be and is hereby reviewed, declared unlawful, void ab initio *and set aside;*

4.3 and/or processes of the First Respondent taken and/or undertaken after the 12 July 2013 in terms whereof the First Respondent purported to engage in the appointment of a Chief Executive Officer with effect from the 30 November 2013 be and is hereby reviewed, declared void ab initio*, unlawful and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the Principle of Legality.*

5. ...

6. That costs of this application be payable by the First Respondent and any other opposing Respondent, jointly and severally the one paying the others to be absolved with the First Respondent."

[5] The facts of this matter are largely common cause.

[6] Appellant's contract of employment was extended in writing until 30 June 2012. Thereafter it was again extended for a further unspecified time period.

[7] During this time a process was underway to appoint new non-executive members to the Board of first respondent. These non-executive members were appointed to the Board on November 2012 by the municipality. The municipality also appointed two councillors to serve as its representatives on the Board with effect from January 2013.

[8] The newly constituted Board held its first meeting on 18 and 19 January 2013. At this meeting appellant was required to present a performance agreement for herself for the six months up until 30 June 2013. She duly did so. This was accepted by the Board and appellant continued to act as CEO.

[9] The next meeting of the Board was held on 3 and 4 May 2013. According to appellant the Board resolved at that meeting to offer her a contract extension for a period of one year commencing on 1 June 2013. The minutes of this meeting have not been filed.

[10] On 13 May 2013 appellant met second respondent who told her that first respondent intended to extend her contract of employment for a further period of two years but that third respondent's view was that the extension should only be for a period of six months. According to appellant this came as a surprise in the light of the Board's resolution on 3/4 May 2013 to extend her contract for one year.

[11] On 14 May 2013 appellant received a letter dated 13 May 2013 addressed to her by the second respondent. This letter states, inter alia, as follows:

"*Re: <u>Extension of Employment Contract</u>*

We are pleased to advise that the Board has approved the extension of the existing contract on the same terms and conditions contained therein for a period of six months from 1 June 2013 to 31 December 2013 subject to a conclusion of a performance agreement."

[12] Appellant responded somewhat belatedly to this letter on 4 June 2013, seeking clarification in light of the Board's resolution of 3/4 May and appellant's conversation with second respondent on 13 May.

[13] On 7 June second respondent wrote to appellant confirming the offer of a six month extension of her contract from June to 30 November 2013.

[14] Appellant then met second respondent on 25 June 2013 and requested an opportunity to make a presentation to the Board to enable her to "*table a counter offer*".

[15] The Board then met on 12 July. It is common cause that appellant was given the opportunity at this meeting "*to motivate for my counter offer for extension of my contract of employment for two years as opposed to excepting the offer of one year extension.*"

[16] The minutes of this meeting read, inter alia, as follows:

"*The Chairperson informed the Board of matters which occurred since the previous Board meeting held on 03 and 04 May 2013.*

The Chairperson informed the Board that subsequently she had met with the Executive Mayor with regard to the offer of extension of employment of one year, which decision was taken at the previous meeting.

The Executive Mayor has informed that

- *She has serious concerns regarding the offer of one year;*
- *That the matter is taking too long to be resolved;*

- *She is imploring the Board to review the decision;*
- *It is suggested that the CEO is offered a six month contract.*

The Chairperson informs that subsequent to the meeting she had been in contact with the Board members except for Mr. Mtimde, whom she had been unable to contact at the time. Consequently a letter offering a extension for a period of six months has been submitted to the CEO."

[17] The Board duly resolved as follows:

- I*t is agreed that the Board will invite the Executive Mayor to meet with members today (12 July) during which meeting the Board will convey to the Executive Mayor its reasons for its intention to offer the CEO an extension to her employment contract for a period of two years.*
- *It is advisable to seek an audience with the Executive Mayor today during which meeting reasons for the Board's decision is explained to her, should the Mayor not be able to attend the meeting today it should be established when she can avail herself for a teleconference with the Board members today.*
- *After the meeting with the Executive Mayor, the Board must prepare a memorandum and submit to the Executive Mayor in which the Board motivates its reasons for the decision to offer the CEO an extension of two years. This period will align with the term of office of the political leadership; it will also contribute towards stability within ANDA; assist in service delivery and focus the energy of the Board.*"

Appellant avers that it is clear from this resolution that her counter-offer of an extension of her contract for 2 years had been accepted by the Board and that she had accordingly been validly appointed as CEO with effect from 12 July 2013 up to 11 July 2015.

[18] On 15 July 2013, however the following resolution was passed by the Board after it had consulted with the Executive Mayor and obtained her opinion that an extension of no more than 6 months should be granted:

> "*RESOLUTION BY WAY OF ROUND ROBIN PASSED BY THE BOARD OF DIRECTORS OF THE ALFRED NZO DEVELOPMENT AGENCY*
>
> *NOW THEREFORE it is resolved as follows:*
>
> - *The Board offers the CEO an extension of her current employment contract with the same conditions for a period of six months, which period commences on 01 June 2013 and terminates on 30 November 2013.*
> - *The Board to initiate process of recruitment within this period in order to attain the services of a suitable candidate for the position of CEO*
> - *The current CEO will be invited to apply for the position and given equal consideration.*"

[19] On 25 July 2013, second respondent advised appellant of the fact that the Board had resolved to offer her a six month extension of her contract. The letter setting out the Board's offer reads as follows:

> "*You are hereby informed that the Board resolved that its offer remains which offer is the extension to your current employment contract for a period of six months effective from 01 June 2013 terminating on 30 November 2013. You are kindly requested to indicate your acceptance hereof by appending your signature at the end of this letter and submit same to the Chairperson of the Board on or before 16h00 on Tuesday 30 July 2013.*"

[20] Appellant did not sign her acceptance of this offer which, so she stated, had been made in terms of an invalid and unlawful resolution. She reiterated, in any event, that her contract of employment had been validly extended for a

period of two years and that in the light thereof she "*remained the Chief Executive Officer of first respondent since 12 July 2013 to 11 July 2015.*"

[21] According to appellant she continued in her employment until 12 December 2013 when she received a letter, dated 30 November 2013, in which second respondent stated as follows:

> "*It has come to the attention of the Board that the erstwhile Chief Executive Officer, Ms. Nandipa Bam is currently unlawfully occupying the office of the CEO.*
> *We are informed that Ms. Bam insists that she is the CEO despite the fact that her employment contract expired on 30 November 2013 and the Board subsequently appointed Ms. Thabiso Ntsalla as Acting Chief Executive Officer.*"

Appellant was thereafter evicted from her office.

[22] Appellant's contentions concerning the alleged two year extension of her contract were denied by the respondents who submitted in response thereto that in terms of the Service Delivery Agreement entered into between first respondent and the Alfred Nzo Municipality the first respondent was obliged to consult with the Executive Mayor prior to any final decision being taken to extend appellant's contract and that accordingly appellant's counter-offer had not been accepted.

[23] In her replying affidavit appellant had stated that "*the service level agreement is irrelevant and I do not even know why relevance is placed on it. In fact it is non-existent which ever way one looks at and reads it.*"

[24] In his submissions before us Mr. Bodlani stated that this somewhat cryptic averment was in fact intended to be a reference to the following paragraph of the Service Delivery Agreement:

> "*Notwithstanding the date of signature of this agreement hereof the effective date of this agreement is the first July 2009 and it shall persist for a period of three years reviewable annually.*"

He submitted accordingly that by July 2012 the Agreement had come to an end.

[25] Mr. Dukada S.C., who appeared for the respondents, submitted, however, that because the issue of the duration of the Agreement had never pertinently been raised by appellant the respondent had been denied the opportunity of dealing with the status of the Agreement and with any possible extension thereof.

[26] In my view, Mr. Dukada's submissions must be upheld. In circumstances where respondent placed direct reliance on the Agreement it would have been a simple matter for appellant in reply to have set out clearly and pertinently the basis upon which she alleged that the Agreement was "*irrelevant*" and "*non-existent*". I am accordingly of the view that it is not now open to appellant to challenge the validity of the Agreement.

[27] I turn therefore to deal with the terms of the Agreement relating to the appointment of a CEO.

[28] Section 93J(i) of the Local Government Municipal Systems Act 32 of 2000 enjoins the Board of directors of a municipal entity such as first respondent to appoint a CEO of the entity. The Service Level Agreement entered into between first respondent and the Municipality provides as follows:

> "*11. Appointment of Chief Executive Officer*
>
> *11.1. It is recorded that Nandipa Nwabisa Sibongile Bam has been seconded to act as Chief Executive Officer of the Agency pending the appointment of the Chief Executive Officer.*

11.2 All future appointments of Chief Executive Officer shall be made by the Board of Directors of the Agency after *consultation with the Executive Mayor.*" (My emphasis)

[29] In Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) Brand JA stated as follows at page 206 D – F, para 13 with reference to the requirement of consultation:

"*Support for this argument was sought in those cases where a distinction had been drawn between* 'in consultation with' *and* 'after consultation with'. *According to these authorities, a decision* 'in consultation with' *another functionary requires the concurrence of that functionary while a decision* 'after consultation with' *another functionary requires no more than that the decision must be taken in good faith, after consulting and giving serious consideration to the views of the other functionary (see eg* Premier, Western Cape v President of the Republic of South Africa *1999 (3) SA 657 (CC) and* President of the Republic of South African and Others v South African Rugby Football Union and Others *1999 (4) SA 147 (CC))."*

[30] This principle was reiterated in McDonald v Minister of Minerals and Energy 2007 (5) SA 642 (CPD) at 649D – E, para 18, where the following is stated:

"*Likewise, where the law requires a functionary to act* 'in consultation with' *another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act* 'after consultation with' *another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.*"

[31] The provisions of s 11(2) of the Agreement are couched in peremptory terms, providing as they do that the appointment of a CEO <u>shall</u> be made <u>after</u> consultation with the Executive Mayor.

[32] The Board of first respondent was therefore obliged, in terms of the Service Level Agreement, to consult with the Executive Mayor before coming to a final or ultimate decision as to the extension of appellant's contract and it was required to give serious consideration to her views.

[33] Put differently, until such time as the requisite consultation had taken place any decision which purported to be final was of no force and effect. In the circumstances if the Board were to have taken a final decision appointing appellant as CEO <u>before</u> having consulted with the Executive Mayor, that decision would have been a nullity. Compare: <u>Gokal v Moti</u> 1941 AD 304; <u>Government of the Republic of South Africa and Another v Government of Kwa-Zulu and Another</u> 1983 (1) SA 164 (AD).

[34] The resolution of 12 July 2013 therefore did not come into operation and appellant's contract was not extended for a period of two years.

[35] In any event, even were I to be wrong in my conclusion as to the applicability of the Agreement, I am of the view that the Board's resolution of 12 July 2013 was clearly not an unequivocal offer of a two year contract but was merely the expression of an intention to make such offer, subject to the views of the Executive Mayor having first been elicited. Despite the submissions of Mr. Bodlani to the contrary the resolution is, in my view, unambiguous and can in no way be construed as being an unequivocal acceptance of appellant's alleged "*counter offer*." As was pointed out by Goosen J, if that were not the case, no purpose would have been served at all in the Board consulting with the Executive Mayor.

[36] The submission that appellant's employment was extended by the resolution of 12 July is therefore, in my view, devoid of merit.

[37] The relief sought by appellant in the application before Goosen J was premised on the resolution of 12 July having constituted a valid acceptance of her "*counter-offer*." In my view, once the contrary conclusion has been reached and appellant's contentions with regard to the counter-offer are rejected, that should be the end of the matter.

[38] Mr. Bodlani submitted further, however, that the so-called "*Round Robin*" resolution of 15 July 2015 in terms of which appellant was offered a 6 months extension of her contract, terminating on 30 November 2013, was invalid, inasmuch as it did not meet the requirements of section 74 of the Companies Act no 71 of 2008 which provides, *inter alia*, that a decision that could be voted on at a meeting of the board of a company "*may instead be adopted by written consent of a majority of directors, given in person, or by electronic communication, <u>provided that each director has received a notice of the matter to be decided</u>*". (My emphasis).

[39] Mr. Bodlani referred in this regard to the preamble to the "*Round Robin*" resolution set out in a memorandum addressed by second respondent to the Board in which she stated, *inter alia*, that "*I telephonically spoke to each of you (except Mr. Mtimkulu) whom I have not been able to reach*." He submitted that inasmuch as it was common cause that Mr. Mtimkulu had not received notice of the matter to be decided the Round Robin resolution was invalid.

[40] In my view the immediate problem confronting appellant is that the reliance on s 74, as opposed to s 73 of the Act, was never raised in appellant's founding affidavit nor, as appears from the judgments of Goosen J both on the merits and with regard to the application for leave to appeal, was it relied upon by appellant when the matter was first argued before him. In this regard Goosen J stated as follows in his judgment granting leave to appeal:

> "*It was argued that s 74 stipulates that a decision may only be taken in terms of the section if all the directors are given due notice of the*

decision to be taken. Since that was not the case the resolution of 15 July did not meet the requirements of s 74. The applicant did not rely upon s 74 in advancing her case. The applicant's contention was that the adoption of the resolution of 15 July did not comply with s 73(3). The full import and effect of s 74 was therefore not addressed in argument."

[41] In these circumstances, as was stressed by Mr. Dukada, respondent never had the opportunity of dealing in its answering affidavits with the issues arising from the applicability of s 74. The reasons for second respondent's inability to contact Mr. Mtimkulu were therefore never explored. Even if the provisions of s 74 are to be construed as being peremptory in nature respondent may have been in a position to satisfy the court that exceptional circumstances existed for her inability to have contacted him and that, in the circumstances, there had been substantial compliance with the provisions of the section. In my view, appellant has only herself to blame for the inept manner in which her founding affidavit was drafted. As matters stand, however, any reliance on the provisions of s 74 by appellant will occasion prejudice to the respondent.

[42] In any event, even if the Round Robin resolution were to be set aside as being invalid for non-compliance with the provisions of s 74 I am at a loss to understand how this would be of any assistance to appellant in the circumstances of this appeal.

[43] In this regard Mr. Bodlani contended, if I understood him correctly, that if it were to be found that appellant's contract had not been extended for a period of two years and that the Round Robin resolution was itself invalid then this Court should find that appellant had continued in her employment on the basis of a month to month contract, which contract of employment, so he submitted, had never validly been terminated to date hereof.

[44] The issue of the wrongful termination of appellant's alleged monthly contract during December 2013 was never canvassed in the application

before Goosen J nor was any relief sought in the alternative in that regard, appellant's entire case being premised, as I have said, on the basis that her counter-offer of a two year contract had been accepted. If appellant has any claim arising out of the alleged wrongful termination of her monthly contract during December 2013 then that is a matter for another Court. It is irrelevant to the present application.

[45] Accordingly the following order will issue:

The appeal is dismissed with costs.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

____

D. CHETTY
JUDGE OF THE HIGH COURT

I agree,

____

F. DAWOOD
JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant: Mr. Bodlani
Instructed by: Messrs. Mnikelo Dalasile & Associates

Appearing on behalf of Respondent: Mr. Dukada S.C.
Instructed by: X.M. Petse Incorporated