

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 4583/2010

In the matter between:

CARIN STRICKETT

Plaintiff/Respondent

and

MATJHABENG LOCAL MUNICIPALITY

Defendant/Excipient

JUDGMENT: HANCKE, J

HEARD ON: 12 AUGUST 2011

DELIVERED ON: 18 AUGUST 2011

[1] This is an exception against the plaintiff's particulars of claim on the basis of not disclosing a cause of action, alternatively being vague and embarrassing. The plaintiff is seeking damages in the amount of R3 466 684,00 from the defendant, arising from the alleged breach of a fixed term contract of employment.

[2] In relation to the said contract of employment, the plaintiff pleads as follows in her particulars of claim:

"3.1 On 1 December 2009 and at Welkom, the plaintiff, acting

personally and the defendant represented by its Municipal Manager, T. H. E. Pietersen, entered into an oral contract of employment in terms whereof the defendant employed the plaintiff as Chief Financial Officer of the defendant;

3.2 The employment of the plaintiff by the defendant as aforesaid was done under the provisions of Section 57 of the Local Government: Municipal Systems Act No. 32 of 2000 (“the Act”);

3.3 In contemplation of the provisions of Section 57 of the Act read together with the provision of Section 29 of the Basic Conditions of Employment Act, No. 75 of 1997, the defendant, represented by its Municipal Manager, T. H. E. Pietersen, presented the plaintiff, on 1 December 2009, with annexure “**A**” hereto, being written Conditions of Employment, the terms and conditions whereof plaintiff orally accepted at the time of concluding the oral agreement referred to in paragraph 3.1 above.”

[3] It is the defendant’s case that in order to disclose a cause of action the plaintiff has to allege that a *written* contract of employment was entered into and that a performance agreement was entered into in compliance with section 57 of the Act. Furthermore, the particulars of claim do not disclose a cause of action in that there is no allegation that there was compliance with all the conditions as provided for

in section 57 of the Act in that:

- (a) A written contract of employment was entered into; and
- (b) A performance agreement was entered into.

[4] Section 57 of the Act provides as follows:

“(1) A person to be appointed as the Municipal Manager of a Municipality, and a person to be appointed as a Manager directly accountable to the Municipal Manager, may be appointed to that position only:

- a) in terms of a written employment contract with the Municipality complying with the provisions of this section; and
- b) subject to a separate performance agreement concluded annually as provided for in sub-section 2.

(2) The performance agreement referred to in sub-section (1)(b) must:

- (a) be concluded within a reasonable time after a person has been appointed as the Municipal Manager or as a Manager directly accountable to the Municipal Manager, and thereafter, within one (1) month after the beginning of the financial year of the Municipality;
- (b) in the case of the Municipal Manager, be entered into with the Municipality as represented by the

Mayor or Executive Mayor, as the case may be; and
 (c) in the case of a Manager directly accountable to the
 Municipal Manager, being entered into with the
 Municipal Manager.

- (3) The employment contract referred to in sub-section (1)
 - (a) must include, subject to the applicable labour legislation, details of duties, remuneration, benefits and other terms and conditions of employment.
- (4) The performance agreement referred to in sub-section (1)(b) must include:
 - (a) performance objectives and targets that must be met, and the time frames within which those performance objectives and targets must be met;
 - (b) standards and procedures for evaluating performance and intervals for evaluation; and
 - (c) the consequence of substandard performance.”

[5] Mr Louw, counsel for the plaintiff, submitted that the above provisions do not require a written contract that has been signed by the parties. This is in contrast to the provisions of certain other statutes that prescribe formalities for the conclusion of enforceable agreements, where *signature* is an express requirement. In this regard he relied on **MAFIHLA v GOVAN MBEKI MUNICIPALITY** [2005] 4 BLLR 334 (LC) where the following was stated at para [29]:

“It is clear from this provision and from the provisions of many other similarly worded statutes that if the Legislature requires that a written agreement must be signed by the parties, it says so expressly. ... What is required is an agreement in writing, it is sufficient that a written document has been adopted and acted upon by the parties.”¹

[6] It is important to note that section 57(1) does not require that the written agreement must be *signed* by the parties. What is required is an agreement in writing that has been adopted and acted upon by the parties. It appears from the particulars of claim that the parties have adopted a written agreement, annexed to the plaintiff’s particulars of claim and acted upon by the parties in view of the fact that the plaintiff’s employment commenced on 1 December 2009 and existed for a period of more than 6 months until it was cancelled on 12 June 2010.

[7] Mr Semenya, on behalf of the defendant, submitted that the particulars of plaintiff’s claim do not disclose a cause of action in view of the fact that paragraph 3 of the particulars of claim is inconsistent of the language of the statute, more

¹ An example of a statute where signature is expressly required is section 2(1) of the Alienation of Land Act 68 of 1981.

particularly section 57(1)(a) of the Act. In the alternative he submitted that it was vague and embarrassing for the same reason.

- [8] Although paragraph 3.1 of the particulars of claim refers to “an oral agreement” it appears from paragraph 3.3 thereof that the plaintiff relies on the fact that the defendant’s municipal manager presented the plaintiff with annexure “A” annexed to the particulars of claim, “being the written conditions of employment, the terms and conditions whereof plaintiff orally excepted at the time of concluding the oral agreement referred to paragraph 3.1 above.”

Although the reference to the words “oral contract” is unfortunate and may even be vague and embarrassing, I am of the view that on a proper reading of paragraph 3.3 the particulars of claim disclose a cause of action.

- [9] It is important to note that in order to succeed an excipient has a duty to persuade the court that upon every interpretation which a pleading in question, and in particular the document on which it is based can reasonably bear, no cause of action or defence is disclosed: Failing this, the

exception ought not to be upheld.²

[10] With regard to the defendant's contention that the plaintiff does not allege in his particulars of claim that there was compliance with the provisions of section 57 of the Act, it appears from paragraph 6.6 of the particulars of claim that the defendant did not allow the plaintiff "to comply with the various legislative provisions imposed on her by the MFMA, alternatively by not allowing the plaintiff to effectively perform her duties towards the defendant, whether express or implied".

[11] On a proper construction the plaintiff clearly alleges that the provisions of section 57 of the Act have been complied with and it cannot be contended that upon every interpretation of the particulars of claim, no cause of action has been disclosed.

[12] As far as non-compliance with section 57(2) (referring to the performance agreement) is concerned it is important to note that the said agreement must include performance objective targets that must be met within certain time

² **PETE'S WAREHOUSING & SALES CC v BOWSNIK INVESTMENTS CC** 2000 (3) SA 833 (E) at 839

G-H; **FIRST NATIONAL BANK OF SOUTH AFRICA LTD v PERRY N.O.** [2001] 3 ALL SA 331 (A); **VERMEULEN v GOOSE VALLEY INVESTMENTS (PTY) LTD** [2001] 3 ALL SA 350 (A).

frames as well as standards and procedures for evaluating performance as well as intervals for evaluation. It also refers to the consequences of substandard performance. This section is clearly to the benefit of the employer because it would be ridiculous to expect an employer to be the author of these targets and objectives. The onus was therefore on the defendant to see to it that section 57(2) has been complied with within a reasonable time. In any event it cannot be decided at this stage whether a reasonable time has expired.

[13] In view of the foregoing I am of the view that a valid contract of employment complying with the provisions of section 57(2) of the Act had been concluded, notwithstanding the fact that no performance agreement was entered into.³

[14] The only question which remains is whether the exception can succeed on the grounds that plaintiff's particulars of claim are vague and embarrassing. In this regard, Mr Louw, on behalf of the plaintiff, submitted that the exception was not taken correctly.

³ **MAFIHLA** *supra* at para [28].

[15] The defendant did give the plaintiff a notice to remove the cause of complaint. There is no substance in the first ground relied on by the defendant, namely that the plaintiff failed to comply with the requirements of Rule 18(6).

Second, the defendant's contention that the plaintiff failed to plead that the parties reached an agreement on the terms contained in annexure "A" is without merit. It is clear from plaintiff's particulars of claim that the parties agreed on those terms.

Third, as to the plaintiff's allegation of the defendants' breach of contract by repudiation the breach has been pleaded with sufficient particularity to enable the defendant to a respond thereto in its plea.

[16] It is also important to note that

"an exception that the pleading is vague or embarrassing will not be allowed unless the excipient will be seriously prejudiced if the offending allegations were not expunged."⁴

⁴ Superior Court Practice by H J Erasmus *et al* page B1-154; **NEVETON v NEWHAVEN HOLIDAY ENTERPRISES CC** 1991 (2) SA 297 (C) at 298A.

I am not persuaded that the defendant has established that in view of the wording of the particulars of claim it will be seriously prejudiced.

[17] It follows from the foregoing that the defendant has not made out the case for the relief claimed.

Accordingly, the exception is dismissed with costs.

S. P. B. HANCKE, J

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