

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A78/11

In the appeal between:

MOEKETSI FREDDIE TLALI

Appellant

and

MANTSOPA LOCAL MUNICIPALITY

First Respondent

CONSTANCE L M RAMPAI

Second Respondent

MAPULENG ANNA MAJARA

Third Respondent

CORAM: HANCKE, J *et* VAN ZYL, J *et* NAIDOO, AJ

HEARD ON: 28 NOVEMBER 2011

JUDGMENT BY: HANCKE, J

DELIVERED ON: 1 DECEMBER 2011

[1] This is an appeal against the judgment of C J Musi, J dismissing the appellant's application in which the appellant sought a declaratory order that a resolution passed by the first respondent on 28 August 2009 be declared null and void, thus of no force and effect on the grounds of being unlawful and/or unconstitutional.

- [2] A further prayer asking for the resolution to be set aside and for the reinstatement of the appellant in his position as manager technical services was abandoned by the appellant during the proceedings in the court *a quo*.
- [3] The sole issue that remained to be adjudicated upon was appellant's entitlement to a declaratory order that the resolution passed by the first respondent on 28 August 2009 be declared null and void, thus of no force or effect on the grounds of being unlawful.
- [4] Before arguing the merits, Mr. Grobler, on behalf of the respondents, submitted that in view of the abandonment of prayers 1.2 and 2, the court *a quo* was merely to deal with the application on the principles of administrative law. He argued that it was an abandonment of fact and not based on an incorrect understanding of the law and that the appellant's present approach was not legally attainable.
- [5] As far as the powers of a court of appeal are concerned, it is necessary to have regard to section 22 of the Supreme Court Act, 59 of 1959, which provides that:

“The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power-

(a)

(b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.”

In his discussion of section 22 H J Erasmus **Superior Court Practice** stated the following on A1-60:

“Give any judgment or make any order which the circumstances may require.” “The powers conferred upon a court of appeal by the provisions of the paragraph are not limited to matters arising directly from the appeal itself: a court of appeal has wide powers to give a judgment or make an order which the circumstances of a particular case might require.”

I am therefore of the view that the appellant is entitled to follow the present approach and to raise new issues of law.¹

[6] It appears from the papers that during August 2004 the appellant and the first respondent entered into a written fixed

¹ See **ALEXKOR LTD AND ANOTHER v THE RICHTERSVELD COMMUNITY AND OTHERS** 2004 (5) SA 460 (CC) where it was decided that it was open for a party to raise a legal contention which it had previously abandoned in the SCA as long as the contention was covered by the pleadings and the evidence and its consideration involve no unfairness to the other party.

term contract of employment in terms whereof the appellant was appointed as manager: technical services of the first respondent; the contract would commence on 1 September 2004 and terminate on 5 December 2007; it also appears that the contract would terminate automatically on 5 December 2007, unless the parties thereto before that date agreed to renew or extend the contract. It was also agreed that a renewal or extension of the contract may be on the same or different terms.

[7] Two renewals occurred: on 29 March 2006 the first respondent resolved that the appellant's employment contract be renewed for a period of two years, such renewal to be effective from 6 December 2007 to 5 December 2009, on the same conditions as were then applicable to the appellant.

[8] The second renewal occurred on 16 April 2008 when the first respondent resolved that the appellant's employment contract be renewed for a period of one year, such renewal to be effective from 6 December 2009 to 5 December 2010.

- [9] However, on 28 August 2009, the first respondent resolved that, notwithstanding the second renewal, the appellant's employment contract would expire on 9 December 2009 (as opposed to 5 December 2010 as per the second renewal). The first respondent advanced the following in support of its resolution:

“The contract was renewed before expiry, and this matter to be corrected by council.”

- [10] On 10 December 2009 the appellant was served with a certificate of service, issued by the first respondent, which recorded that the termination date of the appellant's employment contract was 9 December 2009. The reason for the termination was “contract expired”.

- [11] In terms of the provisions of section 120 of Local Government: Municipal Systems Act, No. 32 of 2000, (“the Act”), the Minister, during 2006, made certain regulations that pertain to managers appointed in terms of section 56 of the Act and in particular regulations that pertain to employment contracts as contemplated in section 57 of the

Act. After having heard argument in relation to regulation 17 the court *a quo* held that:

“The argument relating to regulation 17(2) is bafflingly bad. The regulation deals with the employer – employee relationship between the first respondent and its employees. The applicant argues that the first respondent dismissed him unlawfully without adherence to the principles of natural justice and a fair procedure. If the first respondent as employer takes a decision that falls foul of regulation 17 then the employee’s recourse is via the internal dispute resolution structures and the Labour Relations Act. This court has no jurisdiction to deal with such issues. The Labour Court was created to adjudicate such disputes. If the first respondent takes a decision as an employer, such decision is not an administrative decision.”

[12] Mr. Van Niekerk, counsel for the appellant, submitted that the court *a quo* erred in not distinguishing between the *lawfulness* of the termination of the appellant’s services *per se* and the *fairness* of such termination and therefore not finding that what the appellant sought was to declare the act of terminating his services as unlawful and as such of no force and effect. The court therefore erred in concluding that it was not vested with the necessary jurisdiction to grant the

declaratory order sought by the appellant.

[13] It is important to note that the appellant's employment contract was for a fixed term, extended on 16 April 2008, for a further period of one year with effect from 6 December 2009 to 5 December 2010.

[14] In **FEDLIFE ASSURANCE LTD v WOLFAARDT** 2002 (1) SA 49 (SCA) the court dealt with the question of whether a claim for damages arising from the premature termination of a fixed term contract of employment was a matter that fell within the exclusive jurisdiction of the Labour Court as provided for in section 157(1) of the Labour Relations Act, 66 of 1995. Nugent AJA (as he then was) stated the following on p. 58:

“[17] The 1995 Act does not expressly abrogate an employee's common-law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the Legislature had no intention of doing so.

[18] The clearest indication that it had no such intention is s 186(b), which extends the meaning of 'dismissal' to

include the following circumstances:

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

It is significant that although the Legislature dealt specifically with fixed-term contracts in this definition it did not include the premature termination of such a contract notwithstanding that such a termination would be manifestly unfair. The reason for that is plain: The common-law right to enforce such a term remained intact and it was thus not necessary to declare a premature termination to be an unfair dismissal. The very reference to fixed term contracts makes it clear that the Legislature recognised their continued enforceability and any other construction would render the definition absurd.”

- [15] The question whether a dispute falls within the terms of section 191 of the Labour Relations Act, No. 66 of 1995, depends on what is in dispute. The fact that an unlawful dismissal might also be unfair appears to be irrelevant in this regard. A dispute falls within the terms of section 191 of the Labour Relations Act only if the fairness of the dismissal is the subject of the employee’s complaint. The present matter

is one where the subject of the dispute is the *lawfulness* of the dismissal, and the fact that it might also be unfair is quite incidental, for that is not what the employee's complaint is about, see **FEDLIFE ASSURANCE LTD v WOLFAARDT**, *supra*, at 61 par. [27].

- [16] The fact that the appellant's claim is based on a breach of contract also confers jurisdiction on the High Court. In **BOXER SUPERSTORES MTHATHA AND ANOTHER v MBENYA** 2007 (5) SA 450 (SCA) Cameron JA stated the following on 453 – 454:

“The novel question it raises is whether an employee may sue in the High Court for relief on the basis that the disciplinary proceedings and the dismissal were 'unlawful', without alleging any loss apart from salary. In my view, the answer can only be Yes. This Court has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing... This means that every employee now has a common-law contractual claim - not merely a statutory unfair labour practice right - to a pre-dismissal hearing. Contractual claims are cognisable in the High Court. The fact that they may also be

cognisable in the Labour Court through that court's unfair labour practice jurisdiction does not detract from the High Court's jurisdiction."

See also **SOUTH AFRICAN MARITIME SAFETY AUTHORITY v McKENZIE** 2010 (3) SA 601 (SCA) at p. 625 par. [46] – [47].

[17] It is clear that the dispute as formulated in prayer 1.1 of the appellant's notice of motion pertains to the *lawfulness* of the 28 August 2009 resolution. The court *a quo* was therefore vested with the necessary jurisdiction to entertain the present application.

[18] The court *a quo* should have found that the second renewal and consequent extension of the appellant's fixed term employment contract was effected in accordance with clause 34 of the appellant's employment contract and regulation 17(1)(a).² Therefore, any premature termination of the appellant's fixed term contract, as extended, would constitute a repudiation of such contract and as such be unlawful. The

2 Regulation 17(1)(a) reads as follows:
 "(1) The employment contract will terminate-
 (a) automatically on expiry of the term referred to in the contract, subject to any extension or renewal."

28 August 2009 resolution, which purported to terminate the services of the appellant due to the fact that “the contract was renewed before expiry and this matter to be corrected by council” is nonsensical as the appellant’s contract was extended, which extension could only be effected prior to the expiry of the contract and therefore it was not a valid reason recognised by regulation 17(2) or any other law.³

[19] The said resolution was thus contrary to the provisions of regulation 17(2) which provides that the first respondent may only terminate the services of the appellant “for any sufficient reason recognised by law”. The first respondent could therefore not lawfully adopt a resolution that was contrary to regulation 17(2).

[20] Accordingly the appeal succeeds with costs. The order of the court *a quo* is set aside and substituted with the following order:

“1. Resolution number 1469/28/8/2009 passed by

³ Regulation 17(2) provides as follows:

“The employer will be entitled to terminate the employee’s contract for any sufficient reason *recognised by law*, provided that the employer must comply with its disciplinary code and procedures, in the absence of which disciplinary code and procedures of the South African Local Government bargaining Council will apply, as well as in accordance with Labour Relations Act, 1995 (Act No. 66 of 1995).” (My italics)

Mantsopa Local Municipality on 28 August 2009 is hereby declared null and void *ab initio* thus of no force and effect on the grounds of being unlawful;

2. Respondents are ordered jointly and severally to pay the costs of the application.”

S.P.B. HANCKE, J

I agree.

C. VAN ZYL. J

I agree.

S. NAIDOO, AJ

On behalf of the appellant:

Adv. D. van Niekerk
Instructed by:
Majola Attorneys
BLOEMFONTEIN

On behalf of the respondents:

Adv. S. Grobler
Instructed by:

Mabalane Seobe Inc
BLOEMFONTEIN

/sp