

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
Held in Johannesburg

Case no: DA 15/06

In the matter between

The University of KwaZulu-Natal

Appellant

And

Professor Lionel John Nicholas

Respondent

JUDGMENT

ZONDO JP

- [1] The appellant in this appeal is the University of Kwazulu-Natal which is the entity which resulted from the merger of the University of Natal and the University of Durban-Westville in Kwazulu-Natal. The respondent was employed by the University of the Western Cape from January 1982 to February 2003. In that University he occupied the post of professor and director of the Institute for Counselling.
- [2] On the 25th February 2003 the respondent and the University of Durban-Westville concluded a fixed-term contract of employment in terms of which the respondent would be employed by that University as a Deputy Vice-Chancellor (Strategic Development) for the period 1 March 2003 to

31 December 2003. The contract of employment which the two parties signed was in the form of a letter dated 25 February 2003 from Dr S Cooper, the then Vice-Chancellor of the University of Durban-Westville, addressed to the respondent. The respondent signed that letter to signal his acceptance of the terms and conditions thereof. The appointment was on a full-time basis and **“in accordance with the University’s standard conditions of service”** but subject to certain specific terms and conditions which were spelt out therein.

- [3] Clause 1.3 was to the effect that the contract was non-renewable and that the respondent warranted that he had no expectation that it would be renewed and that he waived any right of renewal **“howsoever acquired”**. Clause 4.1 of the contract read thus:

“1.4 Upon termination of this appointment, unless otherwise precluded, you may assume a substantive academic / administrative post at the level of Director on the terms and conditions applicable to the said post at the time of resumption, provided that you shall have no further right to the remuneration, benefits, allowances or privileges applicable to the Deputy Vice-Chancellor. You are encouraged to apply for any post that may become available in the new institution arising out of the merger.”

- [4] On the 30th May 2003 an agreement was concluded between the University of Natal and the University of Durban-Westville. At that time the two Universities were planning to merge in January 2004 and this agreement was entered into in order to facilitate the merger. On the 23rd

December 2003 – that is eight days before the expiry of the contract of employment between the respondent and the University of Durban-Westville – a contract was concluded between the respondent and the Executive Council of the University of Durban-Westville which purported to act on behalf of the University. Dr Cooper purported to act on behalf of the Executive Council. I assume that the Executive Council was the senior management of the University or the Executive Committee of the Council of the University. That agreement was concluded to extend the contract of employment then existing between the respondent and the University of Durban-Westville **“until the new council of the University of KwaZulu Natal finalises the organogram for the UKZN and accordingly makes substantive appointments.”** The contract that was sought to be extended was that of the respondent’s appointment as Deputy Vice-Chancellor of the University of Durban-Westville.

- [5] On the 31st December 2003 the contract of employment concluded in February 2003 expired if the extension of the same which was sought to be effected by the agreement of the 23rd December 2003 was not valid or effective in law but did not expire if the extension was valid or effective in law.

- [6] On the 31st December 2003 attorneys acting on behalf of the respondent addressed a letter to Prof M.W. Makgoba, then Vice-Chancellor of the University of Natal – now Vice-Chancellor of the University of KwaZulu Natal, in which they, among other things, made the point that **“in terms of a resolution of the Executive Council of the University of Durban-Westville held (sic) on the 11th December 2003 our client’s employment contract, in particular, his appointment as Deputy Vice-Chancellor (Strategic Development and Planning) was extended until**

the new Council of the University of KwaZulu-Natal (UKZN) finalised its organogram and accordingly was in a position to make substantive appointments in terms thereof.” In another paragraph of the letter the respondent’s attorneys informed Prof Makgoba that, apart from the issue of the extension of the respondent’s contract of employment, they were instructed that it was envisaged in terms of the respondent’s **“existing contract of employment, that [the respondent] would be employed in the new structure of the University of KwaZulu-Natal at a position similar to that occupied by him during his tenure at the University of Durban-Westville.”** What this meant was that the respondent expected to continue in the position of Deputy Vice-Chancellor in the merged entity because he had been Deputy Vice-Chancellor at the University of Durban -Westville. They threatened legal action if there was any attempt to give effect to paras (i) and (ii) of Prof Magoba’s email to Dr Cooper which had preceded 31 December 2003. Prof Makgoba seems to have previously expressed the view therein that the extension of the respondent’s contract that was effected by way of the agreement concluded on the 23rd December 2003 was not valid because the Executive Council of the University of Durban-Westville had had no authority to enter into such extension contract and that the contract would expire on the 31st December 2003.

- [7] In a letter or memorandum dated 9 January 2004 addressed to Prof Makgoba the respondent stated that his status was still that of Deputy Vice-Chancellor. He said that he was on leave at the time. By a letter dated 23 January 2004 Prof Makgoba responded to the respondent’s memorandum or letter of the 9th January 2004. In the letter he pointed out that a legal opinion obtained by the appellant was that to the effect the Executive Committee of the University of Durban-Westville had no

authority to extend the respondent's contract of employment as Deputy Vice-Chancellor. He further pointed out that the contract of employment that the respondent and the University of Durban-Westville had concluded in February 2003 had expired on the 31st December 2003.

- [8] A deadlock seems to have been reached between the parties about the end of January 2004 or in February 2004 about whether there was any contract of employment that was in existence then between them. In March 2004 the respondent launched an application in the Labour Court for an order declaring that **“the purported termination of the [respondent's] employment by the [appellant] is unconstitutional and unlawful”**, directing the appellant **“to pay the [respondent's] salary and to comply with the [respondent's] terms and conditions of employment which ensued (sic) prior (sic) to the purported termination”** and for further and alternative relief and costs. The appellant opposed the application.

Proceedings in the Labour Court

- [9] In his founding affidavit the respondent's case was that his contract of employment as a Deputy Vice – Chancellor of the University of Durban-Westville, which had initially been intended to expire on the 31st December 2003, had been extended by the Executive Committee of the University of Durban-Westville by way of the agreement of the 23rd December 2003 and that, beyond the 31st December 2003, he was still employed by the appellant – pursuant to the merger of the two Universities and that the appellant was required to comply with its obligations in terms of that extended contract. He in effect said that the appellant had purported to terminate his contract of employment. This explains why he sought an order declaring that the purported termination

was unconstitutional and unlawful. The appellant's attitude was simply that the respondent's contract had not been validly extended because the Executive Committee of the University of Durban- Westville had lacked authority to extend the contract and that there was, therefore, no contract of employment between itself and the respondent after the 31st December 2003.

- [10] In the Labour Court the matter came before Broster AJ. He found that Dr Cooper or the Executive Committee of the University of Durban-Westville had no authority to extend the respondent's contract of employment as he and the committee had purported to do by way of the letter of the 23rd December 2003. However, he found that the contract of employment signed in February 2003 between the respondent and the University of Durban-Westville survived beyond the 31st December 2003 and was still of full force and effect as at the time of the judgment. This was as at 31 March 2006. By virtue of the merger the agreement was now between the respondent and the appellant.
- [11] Broster AJ then issued an order declaring **“that the termination of the [respondent's] contract of employment concluded on 25th February 2003 is unlawful”** and ordered the appellant to pay the respondents' costs. That was substantially the order that the respondent had asked for in paragraphs (a) and (d) of his notice of motion. Broster AJ refrained from granting the respondent the order that he sought in par (b) of his notice of motion. That was the prayer for an order that the appellant be ordered to pay the respondent's salary and to comply with the respondent's terms and conditions of employment **“which ensued prior (sic) to the purported termination.”** I have no idea what **“ensued prior to the purported termination”** means but I suppose that the respondent

meant terms and conditions of employment which existed prior to the purported termination. The Labour Court did not give any reasons why it did not grant the order which the respondent had also asked for to the effect that the appellant pay his salary and comply with all his other terms and conditions of employment. I shall deal with this later. The appellant subsequently sought and was granted leave to appeal to this Court against that order of the Labour Court.

The appeal

- [12] The Labour Court examined certain provisions of the February 2003 agreement and concluded that that contract did not expire on 31 December 2003 but what expired was the respondent's appointment as Deputy Vice - Chancellor and **"not his contract of employment with the University"**. Later, it went on to say: **"The right conferred upon the [respondent] to assume a position at the level of director contained in clause 1.4 of the first contract of employment is one which is not extinguished by the fact that the merger occurred on 1st December 2003 and does not in itself require that the [respondent] should have previously occupied a post at the level of director at UDW as suggested by the Respondent. In my view clause 1.4 merely identifies the post which the [respondent] may assume and provides that his employment in that post will be subject to the terms and conditions applicable at the time that he assumes that position."**
- [13] The Labour Court took the view that the word **"assume"** in clause 1.4, where the clause says **".... You may assume a substantive academic/administrative post at the level of director"** means **"undertake (an office or duty)"**. It also said that the use of the word

“may” gave to the respondent “the right to choose whether to occupy a post at the level of director.” Broster AJ later said: “I think the word ‘may’ is used in the sense of affording the [respondent] an opportunity to take up a position at the level of director if he so wishes. This is an opportunity afforded to him.”

- [14] With regard to the contract of the 23rd December 2003 purporting to extend the February 2003 contract of the respondent, the Labour Court found that the Executive Council or Executive Committee of the University of Durban-Westville had no authority to extend the respondent’s contract and that, therefore, that contract was not extended. On appeal the respondent did not challenge the correctness of this finding. What the respondent contended on appeal was that the February 2003 contract of employment had survived beyond the 31st December 2003 and continued to exist but that the respondent no longer occupied the post of Deputy Vice-Chancellor which he occupied at the University of Durban-Westville prior to 31 December 2003. In pursuing this line of argument Counsel was supporting the line of reasoning that had been adopted by the Labour Court in support of the order that it made.
- [15] I cannot agree that the February 2003 contract between the respondent and the University of Durban-Westville – now the appellant – survived beyond the 31st of December 2003 if the contract of 23 December 2003 which purported to extend it was not valid. The terms and conditions of that agreement were clear. They were to the effect that that agreement was for a fixed term. A fixed term agreement is called a fixed term agreement because it operates for a fixed term only and, unless it is extended, it comes to an end at the end of the fixed term by the mere effluxion of time. In this case it was common cause on appeal that the

matter had to be decided on the basis that there had been no valid extension of the February 2003 agreement. Save with regard to clause 1.4 of that agreement all the contents of that agreement relate to the appointment of the respondent as Deputy Vice-Chancellor **“for a period commencing March 2003 and terminating on 31 December 2003 ...”**

- [16] The Labour Court did not attempt to reconcile its finding that the February 2003 agreement continued after 31 December 2003 with the clear terms of clauses 1 and 1.3 of the agreement nor did Counsel for the respondent during argument. I am of the view that, upon a proper reading of the respondent’s founding affidavit, the Court a quo was not entitled to find in the respondent’s favour on the basis that the February 2003 agreement continued beyond 31 December 2003 once it had found that the purported extension of the 23rd December 2003 was not valid. This is so because it was not the respondent’s case that his continued employment by the appellant beyond 31 December 2003 was as anything other than as Deputy Vice-Chancellor. The respondent’s case in his founding affidavit was that his contract of employment of February 2003 had been extended on 23 December 2003 beyond 31 December and that his position after the 31st December was still that of Deputy Vice-Chancellor. That he took that attitude is understandable because his case was based on the extension of his contract of employment as Deputy Vice-Chancellor being valid. The case that he was still employed after 31 December 2003 but not as Deputy Vice Chancellor was never his case.

- [17] The difficulty which Counsel for the respondent had in the contenting that the respondent’s contract of employment of February 2003 continued beyond 31 December 2003 but with him no longer being Deputy Vice

Chancellor was that he had to rely on clause 1.4 of the February 2003 agreement. The Court a quo dealt with this issue in a manner that appears to me to be contradictory. On the one hand the Court a quo said that clause 1.4 afforded the respondent **“an opportunity to take up a position at the level of director if he so wishes”** but, on the other, it said that this was a right conferred upon the respondent **“to assume a position at the level of director contained in clause 1.4 ...”**

[18] An opportunity to occupy a certain position is not the same thing as a right to occupy that position. When you have applied for a certain vacant position and you are called for an interview, such interview presents you with an opportunity to occupy that position if you are ultimately appointed but you do not have a right to occupy that position. Where a contract of employment has been concluded between you and a certain employer in terms of which you have been appointed to a certain position, you have a right to occupy that position. Because you have a right to occupy that position you may not be prevented from occupying it or be removed from it in breach of your contract of employment or some other law. But if you have an opportunity as opposed to a right, and you are prevented from occupying such a position it cannot be said that your right to that position, has been infringed because you have none. At best for you, you may have a right to be considered for appointment to that position but not a right to the position.

[19] In my view clause 1.4 sought to ensure the accommodation of the respondent in an academic or administrative post after the 31st December 2003 once such a post was identified and he indicated his wish to be appointed to it. In a way clause 1.4 sought to give the respondent an election whether to be appointed to such a post or to pursue another post.

This is understandable when regard is had to the fact that the last sentence of clause 1.4 was to the effect that the respondent was free to apply for other positions. What this means is that at the end of the fixed term contract on the 31st December 2003 the respondent was required to communicate to the appellant or the University of Durban-Westville whether he sought to be given a post as provided for in clause 1.4 or whether he wished to pursue other avenues. It is not the respondent's case that he communicated to the appellant or the University of Durban-Westville that he sought to be given a post as contemplated in clause 1.4. That he did not do so is understandable because he believed at the time that his February 2003 contract of employment as Deputy Vice-Chancellor had been validly extended on 23 December 2003 beyond 31 December 2003. Probably, the position of Deputy Vice-Chancellor was higher than the position that he could get under clause 1.4.

[20] Since the respondent did not communicate to the University authorities his wish to be given a post such as was contemplated in clause 1.4, he could not complain that he was not given a post contemplated by clause 1.4. On that ground and on the ground that his case was not based on clause 1.4 but on the extension of the agreement on 23 December 2003 the respondent's application should have been dismissed.

[21] In any event, as I have said above, clause 1.4 envisaged the assumption of “a” post and such post could be an “**academic/administrative**”. Contrary to what the Labour Court said, clause 1.4 did not identify the post that the respondent could take up after 31 December 2003. Nor did it specify what his duties would be. Clause 1.4 only identified the level at which such a post would be. In my view the post was to be identified once the respondent had told the University authorities that he wished to

take a post envisaged in clause 1.4. Once the University identified it and he knew what his duties would be, he might have liked it or he might not have liked it. Whether he explored other avenues might also have depended on whether he liked it or not.

[22] In any event Counsel for the respondent conceded that as things presently stand the duties which the respondent would have to carry out once he was given a post contemplated in clause 1.4. are unknown. However, he submitted that that fact did not have the result that there was no contract of employment between the appellant and the respondent. He said that the duties would still be discussed later between the parties but that this did not derogate for the existence of a valid contract. He submitted that there could be a contract of employment between parties even if they have not yet agreed on what the employee's duties will be. In my view this can simply not be correct in law. You cannot have a contract of employment without the duties which the employee must perform. In my view this is as clear as saying that you cannot have a sale agreement without an agreement on the thing that the seller sells and the buyer buys. If in law one could have a contract of employment when the parties to such contract do not know what the duties of the employee are, that would mean that that is a contract which the employee could never be in breach of. The question arises: would the employee be entitled to be paid any remuneration in terms of a contract of employment which did not oblige him to perform any specific duties?

[23] I said earlier on that the Labour Court did not give any reasons why it did not grant the order, sought by the respondent, that the appellant pay the respondent his salary and comply with his terms and conditions of employment. It is difficult to resist the temptation to think that it is

because it realised that there were no duties that had been agreed and no terms and conditions had been agreed. In this regard clause 1.4 said that the terms and conditions would be the terms and conditions of the post concerned. Without the post having been identified, there could be no certainty about what the terms and conditions of employment would be or were.

[24] I have no hesitation in concluding that after the 31st December 2003 the respondent had no contract of employment with either the University of Durban-Westville or the appellant. Accordingly, the appellant did not terminate any contract of employment between itself and the respondent in January 2004 or at any time thereafter as the February 2003 agreement expired by the effluxion of time on the 31st December 2003, was not extended and no new contract was entered into between the parties.

[25] In those circumstances the Court a quo should have dismissed the respondent's application. With regard to costs the attorney for the appellant, very properly, indicated that he would leave the issue of costs in the hands of the Court. In the light of the test for the granting of costs in these types of matters I am of the opinion that this Court should exercise its discretion against making any cost order.

[26] In the result I make the following order:

1. The appeal is upheld.
2. There is no order as to costs.
3. The order of the Labour Court is hereby set aside and, for it, is substituted the following order:

(a) "The application is dismissed.

(b) **There is to be no order as to costs.”**

Zondo JP

I agree

Waglay JA

[27] I agree that the purported extension on 23rd December 2003 of the contract entered into between parties on 25th February 2003 was invalid. I am not sure, however, that the contract of 25th February 2003 did not survive after 31st December 2003 and that the respondent did not have the right to be retained at the level director if he made such an election. Nevertheless, in the application before the court a quo the respondent nowhere alleged that he had elected to be retained at the level of director. He could not as this would have been inconsistent with the case which he brought.

Broster AJ was therefore wrong to have come to the respondent's assistance. For slightly different reasons, I agree with the order of Zondo JP.

Willis JA

Appearances

On behalf of the Appellants:	Mr R Pemberton
Instructed by :	Garlicke & Bousfield Inc Durban
On behalf of the Repondents:	Mr V Soni SC
Instructed by :	Naidoo Maharaj Inc Durban
Date of judgment :	08 November 2007