

LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case: J 1686/11

In the matter between:

BEYA ZELINZIMA ABRAM

Applicant

and

DR KENNETH KAUNDA DISTRICT MUNICIPALITY

First Respondent

S. K. SEBOLAI (N.O.)

Second Respondent

JUDGMENT

LAGRANGE, J:

Background

[1] The applicant was employed by the first respondent on 6 July 2006 as a secretary/receptionist to the Single Whip of the district municipality. From 11 December 2008 he was employed as Coordinator: Office of the Chief Whip and from 3 August 2009 as Public Participation Officer: Office of the Speaker until the termination of his employment on 30 June 2011. His letter of appointment to the last position, like that of his previous appointments, contained the following provision:

"This appointment is subject to the term of office of the Speaker. Should the Speaker vacate office for whatever reason, your appointment shall be automatically terminated, unless the Municipal Manager at his and discretion decide to retain the service of the employee."

[2] On 18 January 2011, he was advised that his contract of employment was amended with immediate effect as a result of a settlement agreement concluded under SALGBC case number HQ 070502. Clause 2.4 of that agreement stated:

"In respect of current fixed term contracts concluded with non-section 57 employees, these contracts will run for the agreed terms, where after the employees concerned or remain employed on the SALGBC terms and conditions of employment and at the applicable SALGBC grades and

salary scales, unless otherwise agreed in the division of the SALGBC, or unless exemption is granted in terms of clause 7 hereof."

[3] In mid May 2011, the applicant was issued with a letter dated 28 April 2011 in which he was told that his contract of employment would end on 31 May 2011. The reason given for the termination of the contract was that:

"This serves as an official notice in terms of clause 6.1 of your contract and appointment later that year fixed contract of employment comes to its conclusion on 31 May 2011 as a result of the stipulations contained in clause 2.2 the mentioned contract."

[4] The letter further advised that his contract would be extended on a month-to-month basis until further notice. The applicant says he does not ever recall signing the contract to which the letter refers, and argues out that he had been continuously employed by the first respondent.. Although no copy of the most recent contract is provided, a copy of a signed contract was attached to the first respondent's answering affidavit. That contract contains a clause 2.2 which does link the term of the contract to the terms of the councillor occupying the position of the Single Whip.

[5] On 15 June 2011, the applicant received another letter extending his contract of employment until the end of June 2011. That letter also stated that the extension in no way created expectations of permanent employment. Finally, on 23 June 2011 a further letter was issued notifying the applicant of the termination of his fixed term employment contract. This letter referred to the previous letters of 28 April and 31 May 2011. It further stated:

"1. In terms of clause 2.2 of employment contract you were employed as Public Participation Officer in office of the Speaker for a fixed period of time which period of employment endured concurrently with the term of office of the Speaker of Councillor Mike Khauoe within the Dr Kenneth Kaunda District Municipality.

2. As you are aware, the term of office of the Speaker came to an end on 18 May 2011. Due to this fact, you were notified of the termination of the employment contract in writing, and provided with the required one month's notice (period 1 June until 30 June 2011).

3. This letter serves as a final reminder that your employment contract would be terminated on 30 June 2011 referred to paragraph 3 above." (sic)

[6] On 22 July 2011 an advertisement appeared in the local newspaper advertising his position. The closing date for applications was 30 July 2011.

[7] The applicant seeks to enforce what he regard as a term and condition of his employment, namely the provisions of section 2.4 of the Settlement Agreement in terms of which he believed he was entitled to remain employed on the SALGBC terms and conditions of employment. He also claims that the amendment of his contract, irrespective of the applicability of the arbitration award, resulted in his contract of employment becoming "open ended". Somewhat confusingly, he claims that, on the basis of the three contracts of employment entered into between himself and the first respondent, a legitimate expectation was created of the renewal of a fixed term contract and the court should accept that such a fixed term contract existed. He further claims that the termination of the service was unlawful as *"the terms of my conditions of employment should not be regarded as a fixed term contract in the true sense."* It is clear there are some apparently contradictory contractual entitlements he asserts, but for the reasons below it is not necessary to unravel these.

[8] These are not the only rights on which the applicant bases his claim for relief. Further on in his affidavit, he also seeks to rely on an alleged infringement of a right to work and his right to human dignity caused by the termination.

[9] By way of explaining the timing of this application, he claims that when he received the letters in April and May, he and some of his colleagues raised their concerns with the Speaker during a staff meeting and he allegedly advised them that he was attending the matter and that they would be placed in permanent

positions to give effect to the arbitration award and would receive an appointment letter during August 2011. The Speaker denies having informed the applicant and other employees as alleged, and points out that he would not have referred to the settlement agreement as the applicant claims because he had no knowledge of its contents.

[10] The applicant also says he approached his manager, after receiving the termination letter of 23 June 2011, and was advised by the latter that he was seeking legal advice and would keep them updated. Even though he did not hear from his manager, the applicant says he was not too concerned because of the previous assurance he had received from the Speaker.

[11] In early August 2011, one of the applicant's colleagues apparently obtained some urgent relief from this court based on a similar claim to that of the applicant. When he heard of this, the applicant felt he was being "made a fool of" by the respondent and it was time to take immediate action. Accordingly, he held consultations with his attorney on 16 August 2011. Following the consultation a letter of demand was sent to the first respondent on 18 August 2011. The applicant required a written undertaking that the first respondent would not replace the applicant pending determination of the legality of the termination of his contract.

[12] The respondent district municipality replied, disputing the unlawfulness of the applicant's termination and disputing the applicability of the settlement agreement to the applicant. The basis for disputing its applicability was that it regarded the applicant as "a political appointee". The first respondent in its defence portrays the applicant's claim as a claim of unfair dismissal and consequently argues that the applicant should have made use of the mechanisms provided in the Labour Relations Act 66 of 1995 ("the LRA") to resolve it.

[13] On a factual level, the municipality disputes the authority of the erstwhile Municipal Manager to have issued the letters to individuals in the applicant's position purporting to make their employment permanent in line with the settlement agreement. The first respondent claims that the former Municipal Manager did not have the necessary authority to extend the terms without being authorised to do so by the Municipal Council. The municipality also claims to have been unaware of the letters issued by the erstwhile Municipal Manager shortly before his suspension in January 2011.

[14] It argues too that, since the decision to create the positions was made by a Council resolution which also stated that the contracts of fixed and linked to the tenure of the incumbent political head, the purported extension of those contracts was unlawful and *ultra vires*.

[15] The applicant for his part disputes this interpretation of the Council resolution and claims it merely resolved that the existing positions be filled as a matter of urgency. However, it must be noted that the Council resolution of 12 April 2008 specifically states that the contracts in question should be "*...linked to the term of office of the Office Bearers*". The applicant argued further that the Municipal Manager's actions must be considered valid until such time as they are set aside as unlawful.

[16] The employer also submits that the settlement agreement only applied to people referred to in it during 2006, and was intended to cater for completely different circumstances in which certain person's employment was changed to fixed term contracts without any consultation or agreement with them.

Applications for final relief

[17] The applicant is seeking final relief in this matter. It is well established that the principles governing the grounds of final relief on an urgent basis are that, apart from satisfying the court that the matter is brought with the necessary degree of urgency, the applicant must demonstrate an actual or potential infringement of a clear right and the absence of a suitable alternative remedies.¹

¹ *Setlogelo v Setlogelo* 1914 AD 221

[18] In this application there are some clear disputes of fact on the central issue of which contractual arrangements covered the applicant. There is also a plethora of what appear to be conflicting contractual entitlements which the applicant lays claim to. My *prima facie* view is that the applicant would probably not succeed in establishing a clear right, or the infringement of one, on the papers. Be that as it may, the matter turns on the question of urgency in any event for the reasons set out below.

Urgency

[19] The greatest difficulty I have with the applicant's claim relates to the issue of urgency. If he believed that his contract of employment had been amended to make him a permanent employee in mid January 2011 in terms of the letter from the former Municipal Manager, then at the very least the letter on 28th of April 2011 purporting to terminate his contract should have spurred him to action.

[20] His claim that he approached the Speaker at the time and was given reassuring undertakings is denied by the respondent. Although a confirmatory affidavit of the Speaker attached to the first respondent's answering affidavit was not signed, a signed version dated 26 August 2011 was handed up in court. Accordingly I must accept the first respondent's version in this regard. Furthermore, in any event, when the second letter was received in May 2011, even if I accepted that the applicant had approached the Speaker in April, any

reasonable person in his position would have realised that despite the Speaker's reassurances there was a serious disjuncture between what the Speaker was saying and what the Acting Municipal Manager was doing.

[21] The letters of impending termination were all issued by the Acting Municipal Manager, yet no direct approach was made to him to obtain clarity why he was issuing letters which appeared to be at odds with the letter issued by his predecessor in January 2011. Even when the final termination letter was issued in June, this did not prompt a single enquiry on the part of the applicant to the originator of the letter. The applicant merely spoke to his own manager, who was also in the same position regarding the imminent termination of his contract. The fact that no approach was made to the incumbent Acting Municipal Manager is hard to understand, if the applicant believed that the letter issued by his predecessor in January was valid and proper.

[22] Similarly, there is no explanation why the applicant did not revert back to the Speaker to obtain the necessary re-assurance that, despite the letter of 23 June, there was no reason to doubt that he would obtain a permanent contract in August. It is difficult to accept that the applicant could have continued to place such trust in those alleged assurances, even if I accepted that they had been made, given the regular correspondence he was receiving from the Acting Municipal Manager which indicated quite the opposite of what he had supposedly been told.

[23] Thus, even if the applicant's allegations about his communications with the Speaker were correct, it is implausible he would not have seen the need to act earlier to secure what he believed he was entitled to. The application was only launched on 22 August 2011, nearly 6 weeks after the applicants termination of service had already been implemented, whereas it was clear from the letters of 28 April and 1 June 2011 that the first respondent's most senior executive officer was of the view that his contract of employment ended at the end of May and that any subsequent employment was on a purely temporary month-by-month basis.

[24] in the circumstances, I'm not satisfied that the applicant acted promptly enough to protect the rights he believed were being infringed and he has approached the court too late in the day to qualify for urgent relief, even if his claim had any merit.

Order

[25] In the circumstances -

- a. The application is struck off the roll for lack of urgency, and
- b. The applicant is ordered to pay the respondents' costs.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 26 August 2011

Date of judgment: 30 August 2011

Attendance:

For the Applicant: W P Scholtz of Scholtz Attorneys

For the Respondent: J G Rautenbach instructed by Cheadle, Thompson & Haysom

LABOUR COURT