

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: J 905/2010
Reportable

In the matter between:

M.C. De Villiers

Applicant

and

The Premier / Eastern Cape Provincial Government

First Respondent

The MEC: Transport, Safety & Liaison (Eastern
Cape Provincial Government)

Second Respondent

Date of hearing: 23 August 2011

Date of judgment: 31 August 2011

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant initially sought an order in the following terms :

1. That respondents' decision as per Annexure "E" to the accompanying founding affidavit that applicant's termination of service be one of voluntary resignation, be set aside pending a reconsideration of the matter.
2. That respondents be ordered to duly consider applicant's application

for early retirement alternatively the redetermination of her term of office as Head of Department: Department of Roads & Transport (Eastern Cape Provincial Government) as per Annexure “G” and “D” to the accompanying founding affidavit.

[2] This order was revised in the applicant’s heads of argument, given that prayer two had become moot, as follows:

- (a) That first respondent’s decision that applicant’s application for termination of service be one of voluntary resignation be set aside, and that respondents be ordered to reconsider applicant’s application as being one for early retirement, alternatively redetermination of service as per the applicable Senior Management Services (SMS) Handbook, Annexure “C” to the founding affidavit, within 15 working days of the order.
- (b) Costs in the event of opposition.

[3] The relief sought was further revised when the applicant’s counsel conceded, in view of the expiry of the extended fixed term contract on the date of this hearing, that the only appropriate relief would be to set aside the first respondent’s decision. The applicant therefore in essence seeks a declarator that her service contract ends today.

Common cause facts

[4] The applicant was appointed as Head of Department: Roads and Transport on 1 September 2005. Her initial appointment was for a three year period, but in August 2008 her term was extended for a further three years to expire on 23 August 2011 in terms of section 12 of the Public Service Act (“the PSA”).¹ The terms of her employment were governed by her service contract, the PSA as well as the Senior Management Service (“SMS”) handbook (2003 edition) which set out the terms and conditions of employment and the roles of SMS members.

¹ 103 of 1994.

[5] Clause 4 of the applicant's contract of service provides for termination in the following instances :

- 4.1.1 on reaching the prescribed retirement age;
- 4.1.2 on completing a term or extended term of office;
- 4.1.3 premature retirement at the request of the employee;
- 4.1.4 discharge in terms of section 17 of the PSA;
- 4.1.5 redetermination of original term or extended term of office by the employer;
- 4.1.6 voluntary resignation;
- 4.1.7 death of the employee.

[6] Clause 4.3 provides that : "[s]ubject to the provisions of sections 16(5) and 12(1) or (2) of the [Public Service] Act, and the Labour Relations Act, 1995, either party may, after consultation and agreement, terminate the *Contract* before the expiry of an original term of office or an extended term of office, by giving the other party three months' notice of termination, which notice shall –

- 4.3.1 be given in writing; and
- 4.3.2 be given on or before the last day of a month and take effect on the first day of the succeeding month."

[7] Clause 4.4 provides that "should notice of termination be given as contemplated in clause 4.3, the *Employer* has the right to require the *Employee* to vacate the office occupied by her/him and to leave the premises of the Department before the expiry of the three months' notice period on a day stipulated by the *Employer* and not to present herself/himself for duty any time thereafter."

[8] Subparagraph 23.6 of the SMS Handbook provides for the procedure and benefits applicable to redetermination of an extended term of office. It also provides that termination of service may be effected by means of an agreement between the SMS member and the member of the executive authority. In the applicant's case, the executive authority is the first respondent acting on the advice of the second respondent.

[9] A SMS member could also request early retirement in terms of section (16)(5) (a) of the Public Service Act, which is further dealt with in subparagraph 23.4 of the SMS handbook. This request may be acceded to if sufficient reason exists for early retirement. In terms of 23.4, a member (such as the applicant) whose term of office has been extended, will be entitled to an additional pension benefit.

[10] Mr T Mhlahlo, who occupied the position of the second respondent when the applicant concluded her service agreement and on whose request her term of service was extended to 23 August 2011, was replaced by Ms Ghishma Barry as MEC in 2009.

Merits of the application

[11] As a result of a tense relationship between the applicant and Ms Barry, the applicant formed the view that it would be better for all concerned that her extended term of service should be terminated prematurely. She was aware that at the time both her service agreement and the SMS Handbook made provision for such early termination, and accordingly made such a request in December 2008. However she withdrew this request following a discussion with the second respondent. Notwithstanding this withdrawal and an expression of confidence by Ms Barry in the applicant, she avers that the tension in their relationship continued.

[12] In 2009 the applicant was diagnosed with cardiac-related health problems and was advised to “take things slow” to prevent rapid deterioration of her condition. Consequently, on 31 January 2010 she addressed a letter to the second respondent giving notice of the termination in terms of clause 4.3 of her service contract, whilst simultaneously requesting that her service contract should be redetermined in terms of clause 4.1.5 thereof read with subparagraph 23.6 of the SMS handbook. Her letter states :

“..I hereby give notice of termination of employment as required in paragraph 4.3 of my contract (attached).

That the termination of my contract be in terms of 4.1.5, namely redetermination.

That 4.4 be invoked and that I vacate the office on 2 February 2010”.

[13] To her shock and dismay however, she received a reply from the second respondent dated 10 February 2010 accepting her “resignation”. The applicant alleges that she had not intended to resign even though this was provided for in subparagraph 4.1.6 of her service contract as a means of termination thereof. Voluntary resignation, she submitted was from a financial perspective a far less favourable way of exiting the senior management service than redetermination or early retirement. The redetermination of an SMS member’s term of office has significant financial and other implications for the member as well as the branch of the provincial government concerned, and envisages a process of engagement and obtaining further information between the parties. In the case of early retirement as well, the applicant submitted, the financial and other implications of early retirement both for the member and the branch of the provincial government concerned required a thorough consideration and if necessary a call for further information and discussion with the member and other officials.

[14] The applicant replied to this letter in an attempt to clarify the position and was again informed that he was considered to have resigned. On 16 March 2010, she sought, through her attorneys, to negotiate early retirement, which would have been financially more beneficial to her. This was to no avail and she launched this application.

[15] In her opposing affidavit, the first respondent Ms Noxolo Kieviet states that although she was disappointed to receive the applicant’s “letter of resignation” of 31 January 2010, forwarded to her by the second respondent, she accepted her decision and conveyed this to the second respondent. She is aware that the second respondent then prepared a communiqué to the applicant advising of acceptance of her resignation with effect from 3 February 2010. The first respondent states that the leadership of the applicant was solely needed when she resigned given the publicity relating to allegations of corruption and irregularities relating to a fleet contract in the provincial department, and hence she was disappointed to lose her. She accepted however, as stated in the letter, that there were medical reasons for the immediate resignation. In regard to the relief sought, that the first respondent should be ordered

to consider the letter as an application for early retirement alternatively redetermination of her term of office, the applicant fails to set out even a *prima facie* right to this relief. The application is ill-advised and ill-founded since her letter was unambiguous and she has not applied for early retirement nor for redetermination of her contract.

[16] In her affidavit, the second respondent states *inter alia* that there was a good working relationship between her and the applicant and that the letter was one of unequivocal resignation. In addition, the applicant's letter makes no reference to early retirement and the applicant is now seeking to introduce that option belatedly.

[17] In her replying affidavit, the applicant admits that her letter of 31 January 2010 could have been more elegantly phrased, but states that to regard this as a letter of resignation was intended to "get rid of her in the cheapest possible way". Even if this were unclear, the further correspondence from her attorneys would have made it clear that she was willing to discuss a phased departure. Accordingly, the respondents did not act in good faith.

[18] The applicant submits that she has a clear alternatively *prima facie* right in terms of her contract of employment to apply for redetermination of her term of service or for early retirement in terms of the SMS Handbook and the PSA as articulated in her correspondence of 31 January and 16 March 2010. She has a well-grounded apprehension of irreparable harm should the relief not be granted in that termination of service by means of early retirement due to medical reasons or redetermination of service will be a substantially more advantageous means of leaving the public service. The balance of convenience favours her in that a financially more beneficial exit outweighs the temporary inconvenience to the respondents in performing what should be part of their ordinary duties. The applicant submits furthermore that she has no alternative remedy but to approach this court for relief.

[19] Mr Goosen submitted on behalf of the respondents that it would not have been possible for the applicant to enforce the right to redetermination in any event since this is clearly an option to be invoked at the behest of the employer as

provided for in clause 4.1.5. Also, insofar as the applicant states in reply that there was implied consent since the suggestion of early retirement arose from the second respondent, this amounts to making out a case in reply and cannot be countenanced. In any event, this offer is disputed and is also improbable given (on the applicant's own version), the tense relationship that existed between the parties and which largely prompted her resignation. There was therefore no preceding consultation and /or agreement in respect of early retirement or redetermination.

[20] The relief sought is more correctly, as was submitted by Mr Pio, a *mandamus* declaring 23 August 2011 as the date on which her extended contract expired. The applicant concedes that she is not entitled to remuneration for the period February 2010 to date, but is entitled to benefits for this period.

[21] If regard is had to the applicant's submissions in the context of the facts and the applicable law, the conclusion that the application was ill-conceived from its very inception is inescapable. In essence she gave one day's notice instead of the requisite three months' in that she sought permission to vacate her office sooner than she was required to do in terms of clause 4.3. For all intents and purposes, she resigned and having realised the financial implications of her decision, sought to reverse it. It is trite that resignation is a unilateral act and does not have to be accepted by the employer although its communication has to be unequivocal: *African National Congress v Municipal Manager, George Local Municipality and Others*.² The applicant's letter of resignation therefore terminated her contract of employment and there was no application for either early retirement or redetermination pending before the respondents even though the applicant sought subsequently to seek either remedy. The applicant has therefore failed to demonstrate even a *prima facie* right to the relief sought.

[22] Therefore, I make the following order:

The application is dismissed with costs, including the costs of two counsel.

² (2010) 31 ILJ 69 (SCA).

Bhoola J

Judge of the Labour Court of South Africa

Appearance:

For the Applicant: Advocate P C Pio instructed by Len Dekker Attorneys

For the Respondents: Advocate Goosen SC and Advocate N Gqamana instructed by
Ms Govender of the State Attorney