

REPUBLIC OF SOUTH AFRICA



Reportable

Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case: JS 382/07

In the matter between:

JABULISILE PEARL MTHETWA

Applicant

and

MKHONDO MUNICIPALITY

Respondent

JUDGMENT

HEAD NOTES: (Term of Municipal Manager- claim for balance of FT contract - amendment of MSA act)

LAGRANGE, J:

Introduction

1] The applicant in this matter is a former municipal manager of the respondent who was employed as such until the termination of their services on 13 February 2007. Although there is a dispute about which of two written contracts the applicant was employed under, it is common cause that at the time of her dismissal she had been employed for a fixed term period of five years at an annual salary of R 360,000-00. The respondent had initially filed a special plea to the effect that the dispute ought to have been referred to arbitration but this claim was subsequently withdrawn before trial.

2] At the heart of the dispute is a question about which contract the applicant was employed under at the time of her dismissal. While it is trite law that oral evidence will generally not be admitted for the purpose of interpreting a written contract, a dispute about which contract is applicable is not affected by the same concerns.

The two contracts

3] At issue are two versions of purported contracts, one dated 2 September 2002 and the other signed on 2 August 2002, which will be referred to as the September and August documents respectively. The applicant relies on the September document for her claim. The August document was not signed by the executive mayor of the municipality, Mr Gamede, but was signed by the applicant, whereas the September document was signed

both by the mayor and the applicant. The August contract also only bears the signature of one witness whereas two witnesses attest to the September document. It is useful to set out some of the salient comparable provisions of the two documents.

^{4]} The principal term relating to the duration of the contract in the August document reads:

"3.2 Notwithstanding the date of signature hereof, this agreement, and the appointment referred to in 3.1, shall commence and shall in all respects be deemed to have commenced on 2 January 2002 (date), shall endure for a fixed term of five (5) years and shall, subject to 3.3 below, terminate automatically onto the January 200[?]¹ (drafting note: section 57 (6) (a) of the Systems Act provides that the period may not be longer than 2 years after the election of the next Council of the Municipality)."

^{5]} The comparable provision in the September document reads:

"3.2 Notwithstanding the date of signature hereof, this agreement, and the appointment referred to in 3.1, shall commence and shall in all respects be deemed to have commenced on 2 January 2002 (date), shall endure up to the date of election and it will be extended for a

¹ Handwritten date unclear. See Mtshali's contention set out in paragraph [15] of the judgment.

further period of two years (drafting note: section 57 (6) (a) of the Systems Act provides that the period may not be longer than 2 years after the election of the next Council of the Municipality)."

6] Clauses 3.3 of each document are also not identical to each other. The provision in the August document reads:

"3.3 it is specifically recorded that there is no expectation that this agreement will be renewed or prolonged beyond the period referred to in 3.2, other than by agreement between the parties and provided that:..."

7] By contrast, Clause 3.3 in the September document reads:

"3.3 it is specifically recorded that this agreement may be renewed or prolonged beyond the period referred to in 3.2, by negotiation between the parties, provided the negotiations to renew this agreement shall be started not later than 3 (three) months before the expiry of this agreement."

8] Both documents contain the following provisions which are material to this dispute:

"3.3.3 the failure to renew or extend the period referred to in 3.2 above shall constitute a retirement of the Municipal Manager and the

Municipal Manager shall be entitled to have retirement benefits (Gratuity Pension Fund) and Medical Aid cover and any additional remuneration or compensation in respect of the completion of such period.

3.3.4 for the purposes of clarity, the party is specifically recorded this agreement will come to an automatic end on expiry of the fixed period, and shall not be construed as termination based on the municipality's operational requirements, nor as an unfair dismissal. Accordingly, the reference in clause 3.3.3 above to additional remuneration or compensation to which the municipal manager shall not be entitled, shall include but not be limited to, severance pay, notice pay, pensions/retirement and medical aid benefits to which an employee may otherwise be entitled to in the event of termination based on an employer's operational requirements."

^{9]} The two documents also contain a provision headed "Condition Precedent", the provisions of which are the same in both, which reads:

"4.1 Notwithstanding anything to the contrary contained in this agreement, the Municipal Manager shall be required to include a performance agreement with the Mayor of the Municipality within ... / 222² days of the appointment of the Municipal Manager (drafting note:

² The September contract contains no stipulation on the number of days for concluding a performance agreement. The August contract stipulates a 222 day period for this purpose.

section 57 (2) (k) of the Systems act stipulates that it should be "a reasonable period"), as contemplated by section 57 of the Systems act, failing which no agreement shall come into force or effect, alternatively this agreement shall automatically terminate immediately upon the expiry of the period referred to in this clause for which such performance agreement ought to have been concluded, or upon expiry of such reasonable extension of the period as may be agreed to by the Municipality for such purposes."

4.2 The Municipal Manager specifically acknowledges and agrees that the termination of this agreement, for the reasons set out in clause 4.1 above, and of any employment relationship that may have arisen prior to the conclusion of a performance agreement, shall constitute a fair and lawful termination."

^{10]} A further provision common to both contracts that needs to be mentioned is clause 17.1, which stated:

"17.1 The parties to this agreement agree that this agreement constitutes the whole of the agreement and arrangement for the employment of the municipal manager with effect from 02-01-2002 /.....³ (date) and that with effect from such date supersedes all previous agreements and arrangements relating to

³ The September document stipulated 2 January 2002, as the effective date, but the August document did not stipulate any date in this provision, though it did specify the same date in clause 3.2.

the engagement of employment of the municipal manager by the municipality, its predecessors or any of its associated entities.

17.2 This agreement therefore constitutes the sole agreement between the parties and no representation not contained herein shall be of any force between the parties."

(emphasis added)

^{11]} Both documents contained an identical non-variation clause, which states:

"Except by resolution of the executive authority of the municipality, no variation, modification or waiver of any provision of this agreement, or consent to any departure therefrom, shall in any way be of any force or affect unless confirmed in writing and signed by the parties and then such variation, modification, waiver or consent shall be effective only in the specific instance and for that purpose and to the extent for which it was made or given."

The evidence

^{12]} The advertisement for the post of municipal manager contained a subtitle

'5-year performance-based contract'. The applicant testified when she received a letter of appointment issued on 28 November 2001, she merely accepted the appointment and the employment contract and performance contract was still to be signed. In the letter of appointment signed by the mayor stated:

"It is a pleasure to inform you that you were appointed as municipal manager with effect from 2 January 2002 on a five-year contract.

Your salary package will be R 242 465, 83 until such time that performance management agreement is negotiated and signed when you're remuneration package will be confirmed which will be before the end of February 2002." (*sic*)

13] The applicant acknowledged that she signed the August contract but that she did so only in the sense that she was acknowledging the draft under consideration at that stage. She claimed that the draft was discussed with the mayor and she pointed out to him in areas that need to be dealt with. The person who had signed as a witness according to her was a deputy director and accordingly her subordinate. She disputed that the mayor had later signed this first document, when it was suggested to her in cross-

examination. Certainly, no documentary or oral evidence was tendered by the respondent in support of the claim that he had.

^{14]} Regarding the September contract, the applicant maintained that this was the correct contract because the executive mayor, as the political head, had signed it and it was witnessed by the directors of Corporate Services and Finance, respectively. According to her understanding of the duration of the contract it should have run from January 2002 to February 2008. The municipal elections were held on 1 March 2006 and consequently, if clause 3.2 of the September document was relied upon, her employment was due to end on 29 February 2008.

^{15]} Although these are issues bordering on the interpretation of the contract the applicant, also pointed out in her testimony that clause 3.2 of the August document did not clearly identified a year on which the contract was due to automatically terminate. Mtshali in his testimony claimed that it should have read '2007'.

^{16]} On 13 February 2007, the executive mayor, who by then was Mrs B MK, issued a letter terminating the applicant's services with immediate effect, in terms of a resolution of the Council at a special meeting held on the same day. The termination letter confirmed that the applicant would receive her full salary for February and March that year.

17] According to the minutes of the special council meeting, the purpose of the meeting was convened to hear a report on recent developments concerning the municipal manager's contract term and to finalise the matter. It appears from the minute that at an earlier meeting held on 24 January 2007 it was decided that the executive mayor should negotiate a settlement amount with the municipal manager to buy her out and then report to the council for a final decision. Evidently, this did not happen and the executive mayor tabled a report before the council requesting it to finalise the termination of the municipal manager's contract. The report noted that in terms of the letter of appointment her five-year contract lapsed on 2 January 2007. The mayor's report stated that it was only when the council had to appoint a new municipal manager that it was discovered that the applicant had a "running employment contract until 28 February 2008." When this was discovered, the council sought legal opinion before making a decision on the matter, because it had recently emerged that the applicant had signed "another contract" on 2 August 2002 in terms of which her services terminated automatically after five years on 2 January 2007. Moreover, the report continued, in terms of clause 4 of the contract it could not be varied except by resolution of the Council. Accordingly, the mayor concluded that the contract dated 2 August 2002 and the appointment letter bound the applicant.

18] The applicant felt that her services had been terminated prematurely and

without regard to the clause requiring the municipality to negotiate with her prior to the end of the contract. Under cross-examination, the applicant claimed that the executive mayor had finalised the contract with her, acting under powers delegated to him by the council in terms of the Municipal System's Act. In support of this she referred to a summary of decisions of the council in which the following appeared under an item headed "Interview - Vacancy of Municipal Manager":

"1. That it was noted that the 1st preferred candidate, Mbileleni Ambrose Ngcobo, was not considered due to his financial demands being unaffordable.

2. That the 2nd preferred candidate, J Mtethwa, was then considered subject to final negotiations with her."

(emphasis added)

^{19]} She was also asked why the executive mayor did not approve the draft contract of August. Her explanation was that the draft document was still based on the conditions in town clerks' contracts and SALGA had issued an amended document. For example, town clerks were previously entitled to a 100% housing allowance which was no longer part of the new conditions. The applicant could not say with any precision when the new draft had been prepared by SALGA. When asked why she maintained that

the August document was only a draft the main reasons she gave was that it was not signed by the mayor and contained no figure for remuneration. She had signed it as a document drawn up in preparation for the signing of the contract and she had been a party to the preparation of the document.

20] It was put to the applicant that the respondent would say that the council had decided to appoint a municipal manager for five years, advertised the post on those terms and stipulated a five-year term in the letter of appointment. The applicant's response was simply that they did not constitute a written contract of employment. She agreed that she could not point to a council resolution extending the term by a further two years but maintained that the council had delegated authority to conclude a contract of employment to the executive mayor. The applicant did not dispute that the special meeting held on 24 January 2007, which delegated the mayor to negotiate a settlement amount with her, was prompted by the fact that she had just produced the copy of the contract which she relied on, and did not mean that the council accepted the validity of that contract.

21] The applicant also conceded that she had applied for the post of municipal manager when it was advertised in 2006 even though she believed that her contract was due to run for another two years after the 2006 municipal elections. If I understand her evidence correctly she did so as a precaution in case the municipality tried to repudiate her contract. She later clarified that she did so in anticipation of her contract lapsing within a year and she

was aware that the appointment process would take a while.

22] It was also suggested to the applicant that in her position as municipal manager she was able to have drafted the September document and had access to administration. She accepted that she might have had easier access to the records but denied drafting the document and pointed out that it had been signed by the mayor. The respondent's representative subsequently clarified that it was not disputing the authenticity of the signature of the mayor on the September document, but was only disputing his authority to sign it.

23] Mr N M Mtshali testified for the respondent. He had been a member of the executive committee since 2000 and member of the mayoral committee since 2006. As a member of EXCO he had interviewed the applicant when she first applied for the municipal manager's post. He recalled that the council had delegated the mayor to appoint a municipal manager for a five-year term. He maintained that if the term was to be extended, it should have been approved by the Council, but the September document was never placed before the Council for consideration.

24] It was only when the council had to consider a number of posts in which the incumbent terms of office were expiring in 2006 that the council became aware of the September document. He claimed that if the executive mayor had recommended an extension of the applicant's term of

office by two years he would not have objected to this but would have needed an explanation for the extension.

25] Mtshali accepted that the extract from the Council minutes relating to the interviews conducted for the vacant municipal manager's post, when the applicant first applied for it, delegated authority to the executive mayor to negotiate final terms and conditions of the municipal manager's employment. However, he could not point to any resolution in which a five-year term had been stipulated. Under cross-examination, Mtshali qualified his statement that the executive mayor had been delegated to finalise the applicant's terms of employment, by stating that the negotiation only related to her remuneration and not to the contract itself. He was adamant that if the applicant had suggested in negotiations that the term be longer then that issue should have been referred back to the council. He also maintained that it had been the executive mayor's responsibility to report back on his negotiations, but also could not identify any decision of the Council where this was stipulated.

26] Mtshali conceded that the purported August contract should have been signed by both parties and acknowledged that the signatures on the September document did give it the appearance of a concluded contract of employment. He also agreed that the salary of R 242,000 set out in the August document was a figure still subject to further negotiation between the applicant and the executive mayor. Under cross-examination, Mtshali

was repeatedly challenged on why the council had taken a resolution on 24 January 2007 to empower the executive mayor to negotiate a settlement amount with the applicant to buy her out, if her contract should have terminated on 2 January 2007 according to the respondent's version that her contract automatically ended after five years.

27] Mtshali could not provide any explanation why the September document did not supersede whatever had been stated in the advertisement, the letter of appointment and the alleged August contract.

Evaluation

28] Before considering the evidence, the statutory framework for the conclusion of contracts of employment of Municipal Managers should be considered.

The Municipal Systems Act 32 of 2000 ('the MSA')

29] The MSA contains provisions which are directly relevant to this matter. The pertinent provisions of Section 57 of the MSA reads:

“57 Employment contracts for municipal managers and managers directly accountable to municipal managers

(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 subsection (2).

(2) The performance agreement referred to in subsection (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 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, be entered into with the municipal manager.

(3) The employment contract referred to in subsection (1) (a) must include, subject to applicable labour legislation, details of duties, remuneration, benefits and other terms and conditions of employment.

(4) The performance agreement referred to in subsection (1) (b) must include-

....

(6) The employment contract for a municipal manager must-

(a) be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year after the election of the next council of the municipality;

(b) include a provision for cancellation of the contract, in the case of non-compliance with the employment contract or, where applicable, the performance agreement;

(c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; and

(d) reflect the values and principles referred to in section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51.

30] A number of inferences may be drawn from the documents and oral evidence.

31] The August document was materially incomplete in a number of importance respects, lacking as it did a number of entries that were necessary to create a coherent agreement. No remuneration was stipulated in clause 7.1. and it contained no effective date of implementation in clause 17.1. Most importantly, it was not signed by the employer party. Although the expiry date of the contract set out in clause 3.2 was incomplete, from the rest of that clause it seems clear it should have been '2 January 2007'.

32] The omissions in the August document do not relate to incidental issues. Remuneration is an essential term of an employment contract. The draft clearly places much emphasis on it being signed. This much is evident from the non-variation clause which only permitted variations if they were reduced to writing and signed by the parties. Likewise, clause 3.2 of the same document anticipated the signature of the document and distinguished that date from the effective date of commencement. It is inconceivable that the parties would have concluded a document with a stipulation that both parties must sign any written variations without applying the same principle to the founding document.

33] Obversely, all the items omitted in the August document were completed in the September document. For all intents and purposes the September document is a complete contract in respect of its material terms. There was no dispute that the executive mayor at the time had signed this document.

The respondent's defence was that he did not have authority to do so. However, the only documentary record of any resolution of the council governing the conclusion of the contract is the one produced by the applicant, which the respondent did not dispute the authenticity of. That resolution clearly anticipates the appointment of the applicant as Municipal Manager, subject to finalising negotiations with her. It makes no mention of a limit to the contractual term that could be negotiated, nor does it expressly delegate the task of negotiation to the executive mayor. Against this is the oral evidence of Mtshali who recollects that the council stipulated a contractual term of five years and would not have departed from what is set out in the letter of appointment and the advertisement for the post. However, he conceded that the salary mentioned in letter of appointment was subject to negotiations between the applicant and the respondent.

34.] As to the oral evidence in support of the August document being the correct document, it should be mentioned that before the Local Government Laws Amendment Act 19 of 2008, section 57(6) of the MSA read:

“ The employment contract for a municipal manager must—

(a) be for a fixed term of employment not exceeding a period ending two years after the election of the next council of the municipality;...”

After the amendment, the fixed terms period was limited to a period ending one year after the election of the next municipal council.

^{35]} In my view, the analysis of the evidence of the parties and the two purported contracts above demonstrates that everything points to the September document being the final contract. Even if the August document could conceivably have constituted a contract, in order to constitute a valid contract it must comply with the provisions of section 57 of the MSA. Sub-section 57(1) of the MSA requires that a Municipal Manager may only be employed in terms of a contract which complies with the provisions of section 57. One of the requirements of such a contract under sub-section 57(3) is that it must stipulate remuneration, which the August document does not. As such, it is non-compliant with the MSA and could not constitute a valid employment contract for a municipal manager.

^{36]} By terminating the applicant's contract eleven months' early, the employer committed a fundamental breach of the contract, entitling the applicant to accept the respondent's repudiation and claim damages.

Relief

^{37]} According to clause 3.2 of the September contract the applicant's



employment should have ended two years after the last local government election on 1 March 2006, which would have taken the applicant's employment to 28 February 2008. Instead, her services were terminated on 13 February 2007 and she was paid up to the end of March 2007. If she had continued working until the end of her contract she would have received remuneration from 1 April 2007 to 28 February 2008, a period of 11 months.

38] The applicant's monthly remuneration was R 330,000-00. Although the applicant had claimed she had suffered damages in the region of R 477,000-00 she did not attempt to prove damages beyond the loss of her salary. Her uncontested testimony is that she only obtained employment in April 2008, so she was unemployed for the duration of the unexpired portion of her contract.

Order

39] Accordingly, an order is made in the following terms:

- a. The respondent is ordered to pay the applicant R 330,000-00 within 14 days of the date of this judgment.

The respondent must pay the applicant's costs.

R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of trial: 13 - 14 July 2010

Date of Judgment: 16 November 2011

Appearances

For the applicant: M M Van Niekerk of Van Niekerk Attorneys

For the respondent: Z S Sibeko instructed by TMN Kgomo Attorneys