



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Case no: J 1148/12

In the matter between:

MAMODUPI MOHLALA

Applicant

and

**DEPARTMENT OF TRADE AND
INDUSTRY**

First Respondent

MINISTER OF TRADE AND INDUSTRY

Second Respondent

**THE OFFICE OF THE DIRECTOR
GENERAL**

Third Respondent

Heard: 17 May 2012

Delivered: 18 May 2012

Summary: (Interpretation of contract – obligation to confer on non –renewal of contract – determination of term of appointment of Commissioner under Consumer Protection Act 88 of 2008)

JUDGMENT

LAGRANGE, J

Introduction

- 1] This is an application that was brought on an urgent basis to obtain interim relief effectively in the following terms, and pending the final determination of the relief:
 - 1.1 a declaration that the decision communicated in writing on 3 February 2012 by the second respondent not to automatically renew the applicant's contract of employment was invalid, unlawful and no legal force and effect.
 - 1.2 A declaration that the applicant was appointed for a period of five years within the contemplation of the Consumer Protection Act.
 - 1.3 Interdicting and restraining the minister and office of the director general from proceeding with the process of appointing another commissioner pending the determination of final relief.
- 2] In the course of the hearing, it was agreed that the court should determine the matter on a final basis and the question of urgency fell away as an issue.

Background

- 3] For the sake of contextualising matters, a brief chronology of events leading to the application without detailing every step along the way should suffice.
- 4] The applicant Ms M Mohlala, was previously appointed as head of Department of the Department of Communications under a three-year fixed term contract commencing on for September 2009 and due to terminate on 3 September 2012. A dispute arose between the applicant and her former employer which ended in a settlement agreement in terms of which she was to be placed in another post outside her former department. Eventually she was seconded to occupy the position of the

National Consumer Commissioner, a position created in terms of the Consumer Protection Act 88 of 2008 ('the CPA').

5] A letter of appointment dated 16 November 2010 was issued by the Minister. In terms of that letter, her appointment to the position would be effective from 1 November 2010 and end on 25 August 2012. On 29 November 2010, the applicant wrote to the Minister thanking him for the confidence he showed in her abilities and provisionally accepted the appointment letter. She stated that her acceptance of the appointment was:".... Subject to the following:

- *Firstly I would need to have sight of the proposed contract of employment and/or terms and conditions of employment which I have not to date have sight of or received a copy thereof;*
- *Secondly in my discussions with Minister Baloyi I had indicated that a period of appointment longer than two years, would be preferable due to the following:*
 - *In terms of my current contract with the Department of communication and in terms of a Cabinet decision all heads of Department have the option of renewal for an additional two years on the expiry of the fixed term contract;*
 - *Further in terms of section 87 (1) (b) of the consumer protection act there is reference to the Commissioners period being up to a maximum of five years;*
 - *I therefore request that the Minister must consider increasing the period of office to either five years as per the statute or at least reinstate the option of renewal for a further two years after expiration of the fixed term period;*

- *I will await the Minister's decision with respect to the above enumerated issue.*
- *Thirdly I note that my appointment letter makes no reference to the appointment being in terms of the provisions of the Consumer Protection Act. I would appreciate it if the appointment could be specifically in terms of the relevant section of the Consumer Protection Act."*

(sic)

(Emphasis added)

- 6] After some haggling over provisions of the contract, in particular those governing renewal of the contract, the applicant finally stated in an e-mail to the respondent's representative dated 13 April 2011:

"I have read through the contract of employment I think that it is the best I will get. I am ready to sign. Please forward the final copy to me for signature."

- 7] The final contract was then concluded in July 2011. For the purposes of this application it should be noted that the clause dealing with the duration of the contract states:

"4.1 This agreement shall commence on 1st November 2010 and terminate on 3rd September 2012."

- 8] In passing it should be mentioned that some of the later correspondence reference was made to the previous termination date of 25 August 2012, but that appears to have been a common mistake which is not material to the issues under consideration in this application.
- 9] Another provision clarified a point to query previously by the applicant letter mentioned above. Clause 3.1 of the contract reads:

"3.1 The Employer hereby appoints the Employee, who agrees to accept the appointment as National Consumer Commissioner of NCC in terms of section 87 (1) (a) of the Act.

3.2 The Employee's employment and conditions of service shall be governed by the Act, and any other legislation applicable to the Employee."

- 10] Also of particular importance in the context of the present dispute is the following provision:

"5. RENEWAL AND EXTENSION OF TERMS OF OFFICE

5.1 The Employer shall in writing confer with the Employee at least 2 (two) calendar months prior to the expiry of the term contemplated in clause 1(supra) whether she proposes to retain the Employee in service for an extended period not exceeding 5 (five) years 60 (sixty) calendar months), or not. If the Employee is so informed of such intention to retain her in service for an extended term, she shall in writing inform the Employer, within 1 (one) calendar months from the date of that communication, of her acceptance or not such extended employment.

5.2 In the event that agreement is reached the Employee shall enter into a further agreement on termination or completion of the agreement, the continued service of the Employee will be recognised under the new agreement so as to avoid any break in service and any accrued or pro rata entitlement will be carried forward into the new agreement.

5.3 Should the Employer not renew the agreement period beyond the initial period stated in clause 4, the Employee shall be entitled to the pension and other benefits directly linked to the specific section of the applicable Legislation."

(sic)

(Emphasis added)

- 11] Lastly, under the general provisions of the contract in clause 11, there are provisions governing the issue of changes to the contract, and its scope. The following subclauses are of interest in this regard:

"11.3 This Agreement constitutes the whole Agreement between the Parties as to the subject matter hereof and no Agreements, representations or warranties between the Parties regarding the subject matter hereof other than those set out herein are binding on the Parties.

11.4 No addition to or variation, consensual cancellation or novation of this Agreement and no waiver of any rights arising from this contract or its ritual termination shall be of any force and effect and this reduced into writing and signed by both Parties or their duly authorised representatives."

- 12] On 3 February 2012, the Minister sent the applicant a letter by e-mail, which stated:

"Appointment as Commissioner to the National Consumer Commission (NCC) for the period 1 November 2010 to 25 August 2012

The terms of your settlement agreement and your appointment letters stipulate that your contract term is from 1 November 2010 until 25 August 2012. Given this context, your contract will not be automatically renewed.

Rather, in the interests of good governance, the DTI will embark on an open recruitment process to appoint next commissioner. You are of course welcome to apply for this post as soon as the

recruitment process has been triggered."

(Emphasis added)

- 13] The applicant's initial response to this letter was circumspect and sought clarification about the provision in terms of her letter of appointment, settlement agreement or contract of employment, which the Minister relied on when issuing his letter. On 13 March 2012 through her attorney, the applicant placed on record that in terms of section 87 (1) (a) and (b) of the CPA, it was contemplated that her appointment as a commissioner should be for a period of five years and the purpose of this section would be defeated if the appointment was for a lesser period. She also claimed in the letter that when she had raised the issue it was agreed that after 25 August 2012 the agreement "*...will be extended for a period not exceeding five years, and should there be no extension a consultation process shall take place and reasons be given for non-appointment.*"
- 14] The letter further went on to state that the applicant was shocked by the Minister's letter because it was clearly a breach of the employment agreement and the purpose of section 87. She demanded immediate withdrawal of the letter. No response from the Ministry was forthcoming. The next development was that an advertisement for the position of Commissioner appeared in a newspaper on 10 May 2012, which mentioned 21 May 2012 as a closing date for submitting applications for the five-year appointment. It was the advertisement of the post, which galvanised the applicant to launch these proceedings. She stated in paragraph 8.2 of her founding affidavit:

"It is clear to me that after 21 May 2012, respondents will forge ahead with the filling of the post despite the unlawful action on the part of the second respondent to not renew and advertise my position. If another person is appointed whilst my cases pending before court, a[ny] relief that I may obtain will become academic. As demonstrated above I have had the least a clear right to be consulted upon before the position could be offered to others by way of an advert. If the court does not intervene, this right will be

negated.”

Merits

15] As agreed between the parties there are essentially two issues to determine. Firstly, was the appointment of the applicant as a Commissioner in terms of section 87 of the CPA necessarily an appointment for a five-year term, by virtue of the provisions of that section. Secondly, did the minister's letter of 3 February 2012 satisfy the requirements of clause 5.1 of the applicant's contract of employment?

The effect of section 87 of the CPA

16] The relevant portions of section 87 of the CPA read:

"87 Appointment of Commissioner

(1) the Minister must appoint a person with suitable qualifications and experience in economics, law, commerce, industry or Public affairs as Commissioner of the commission, who –

(a) is responsible for all matters pertaining to the functions of the commission under this act; and

(b) holds office for an agreed term not exceeding five years.

(2) before the Minister makes an appointment in terms of subsection (1), the relevant Parliamentary Committee must be consulted with respect to such an appointment.

(3) a person may be reappointed as Commissioner on the expiry of an agreed term of office.

(Emphasis added)

- 17] A plain reading of s 87(1) and (3), with reference to the emphasised portions of those provisions demonstrates, in my view, a clear intention that the term of office of the National Commissioner was a matter that had to be agreed upon, but could not exceed a five-year period. I see nothing in the provision that requires the minister to appoint a Commissioner for a five-year term, whatever the merits of doing so might be. The applicant's appointment to the position in terms of s 87(1)(b) for the period stipulated in the contract is perfectly compatible with the provision itself.
- 18] Even if there had been some other agreement reached about a longer term of appointment, the applicant still has to overcome the obstacle presented by clauses 11.3 and 11.4 of the contract. The effect of those clauses is that unless and until any variation of the contract is reduced to writing and signed by both parties, their rights and obligations on the issues dealt with in the contract must be determined with reference to that document alone.
- 19] The applicant was fully alive to the importance of the terms of the contract, as demonstrated by her close scrutiny of it and of her letter of appointment. She would have known that, in the absence of an amendment of the term of her engagement set out in clause 4.1 of the contract, there would have been no scope for contending a longer term was intended.
- 20] On the papers before me, there is no basis for concluding that the parties had agreed on a five-year term of appointment of the applicant as the National Commissioner, nor do the provisions of the CPA oblige the Minister to appoint the applicant for that period in spite of what is stated in her contract of employment.

The Minister's letter and clause 5.1 of the employment contract

- 21] The central issue that remains to be determined is whether the minister's letter of 3 February 2012 was a clear breach of the applicant's entitlements in terms of clause 5.1 of the contract and if so, what remedy, if any, might be appropriate.

- 22] The first aspect which can be easily dispensed with is whether the Minister was entitled to act in terms of clause 5.1 more than two months before the agreed termination date of the contract. It is clear that the wording of the provision simply requires that he should act in terms of the provision 'at least' two months before that date. Consequently, if he acted in terms of the provision on 3 February 2012 nothing would be untoward about that. It also follows that, if he elected to act in terms of clause 5.1 on a date earlier than 3 July 2012, his action would have to satisfy the requirements of that provision. The respondent contended in argument that the notice from the Minister 'fell squarely within the ambit of the clause' which 'required him to confer in writing'.
- 23] The parties agreed that the interpretation of clause 5 and in particular clause 5.1 was therefore critical to deciding whether the letter of 3 February 2012 complied with its provisions.
- 24] The respondents objected to the emphasis given by the applicant to the meaning of the word 'confer', and her treatment of the word as being synonymous with the word 'consult'. In particular, the respondents argued that the particular interpretation of the word 'confer' contended for by the applicant was only set out in her answering affidavit. As illustrated by paragraph 8.2 of the applicants founding affidavit cited above, the applicant did assert a right to be consulted in terms of clause 5.1 at the outset, so even though she may have placed more emphasis on this in her replying affidavit, the matter was squarely on the table for the respondents to consider when they filed an answering affidavit. Moreover, the respondents directly address this in the Minister's answering affidavit at paragraph 43, where he deals with the contention in the applicant's letter of 13 March 2012 in which she argued that if there was no extension a consultation process should take place and reasons should be given for the non-appointment. Addressing this contention, the Minister says:

"In respect of this contention, the applicant cannot be entitled to an order which she seeks. At best, she could be entitled to a relief intending to address the consultation process and the reasons for non-appointment. This relief she does not seek. Legal argument

will be addressed in this regard at the hearing of this matter.”

- 25] Further on in the answering affidavit and in direct reply to paragraph 8 to 12 of the applicants founding affidavit, the respondents reiterate that the allegations in those paragraphs constitute matters for legal argument, which were disputed and would be addressed at the hearing. I am satisfied on the face of the pleadings that the issue of interpretation of the provisions of clause 5 and in particular, what it means to ‘confer in writing’, were pertinently raised as part of the applicant’s case. In any event, it is impossible to interpret clause 5.1 without considering the meaning of the phrase.
- 26] Turning to the interpretation of clause 5 itself, the respondents correctly pointed out that the dictionary definition of a word is not the be-all and end-all of legal interpretation principles, and that the context in which a term is used is also of cardinal importance.¹ However, that does not avoid the need to attribute meaning to the actual words used by the parties in interpreting the provisions of clause 5. That process is obviously inherent in applying the golden rule of interpretation, which the respondents cited namely that, the language of the document must be given its grammatical and ordinary meaning unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the document.²
- 27] Looked at as a whole, Clause 5 deals with what might transpire on the termination of the original term of appointment, which is set out in clause 4.1 of the contract. It addresses two scenarios: firstly it deals with the possibility of an extension of the contract for a period not exceeding five years and secondly it addresses the other alternative that the termination date in clause 4.1 would indeed be the end of the appointment. The sequence envisaged in the provisions if the Minister proposed to retain the applicant would be that this intention would be conveyed to the applicant and the applicant would be obliged to inform the Minister within a month

¹ See **Lombaard v Dropprop CC and Others 2009 (6) SA (N)** at [24] The Shorter Oxford English Dictionary describes ‘confer’ as an intransitive verb meaning: “converse, hold conference, take counsel”.

² **Coopers & Lybrand and others v Bryant 1995 (3) SA 761 (A)** at 767

whether she accepted the proposal. If agreement is reached by the parties, then a new agreement would be drawn up in terms of clause 5.2 and the employee's service would be deemed continuous. Clause 5.3 spells out the benefits accruing to the employee if the employer does not renew the agreement.

- 28] There is no great difficulty in understanding the intentions of clauses 5.2 and 5.3 which clearly deal with the consequences of following the two alternative choices. Clearly an agreement to extend the contract must be concluded, whereas no agreement is necessary if the contract is not extended, since the parties have already agreed on the termination date in the original contract. The respondents' lead counsel, Mr Motau, contended that the reference to conferring in writing in clause 5.1 could only have been intended to address the situation where a renewal was contemplated by the Minister. It had no application to the situation where the Minister had no intention of extending the contract. This argument is consistent with the statement by the Minister in the answering affidavit that clause 5.1 of the contract of employment "*...is intended to avoid applicant being prejudiced by way of being given a period of notice, which is less than two (2) months*".
- 29] In essence, what the respondents are arguing is that if the Minister does not intend to renew the contract or extend it after the agreed termination date, he merely needed to give the applicant notice that there would be no renewal of the contract. Indeed this is the manifest purpose of his letter of 3 February 2012. The Minister clearly believed this was all he needed to do, and that he was giving the applicant more generous notice that the contract would not be renewed, than she was entitled to in terms of clause 5.1.
- 30] Was this sufficient? The letter was not cast in the form of a proposal but was a notification of a decision, albeit with some reasoning for the decision being provided. It was not cast in the form of advising the applicant of the Minister's proposed non-renewal of the contract. I do not think that the language of clause 5.1 is commensurate with an interpretation that the communication from the Minister was intended to describe communication

of a decision. The use of words like 'intention' and 'proposal' in the clause are more compatible with a communication about what the Minister was minded to do, not what he had already decided to do. That is the context in which the obligation to confer in writing should be understood. Whatever else the word 'confer' might mean it does not refer to a unilateral act but some form of communication and engagement between two or more parties. The Minister's notice did not invite engagement or a two way communication.

- 31] In the light of the above, I am of the view that the Minister correctly conceded in the answering affidavit that the applicant might be entitled to the relief to address the consultation process and the reasons for non-appointment. The respondents contended however that this was not part of the relief sought. I agree it was not expressly pleaded, but I think it is reasonably incidental to the prayer that the Minister's decision not to renew the contract, as communicated in his letter should be deemed invalid, because that prayer is intrinsically linked with the applicant's complaint that the letter was in breach of clause 5.1 of her contract. In any event, I believe such relief is well within the ambit of alternative appropriate relief the court might order in such a case.
- 32] Having said this, a word of caution is necessary. It is clear in terms of the existing contract that the Minister is not bound to renew or extend the applicant's contract. What he must do however, by 3 July 2012, is to convey a proposal to the applicant in writing, indicating his reasons for the proposal. The applicant should have a reasonable opportunity to digest and consider the Minister's communication and to respond to his proposal and reasons. The obligation to confer does not imply any obligation to reach an agreement, nor does it appear to impose any requirement that the parties should try and reach agreement. In this regard it should be mentioned that, for example, the legislature felt it necessary to spell out expressly in section 189(2) of the LRA that consultation in the context of contemplated retrenchments entailed an obligation to do so in a consensus seeking process with a view to reaching agreement. Even an obligation to consult was felt to be insufficient to bear the meaning that it

entailed a consensus seeking process, on the strength of the word 'consult' alone.

Conclusion

33] in the circumstances, I am satisfied that the applicant has failed to demonstrate that her appointment as National Commissioner was a five-year appointment, but that before the Minister decided that she was not going to extend her contract beyond 3 September 2012, he should have notified her of his intentions and reasons, and given her an opportunity to respond thereto. Consequently he ought not to have embarked on the further step of advertising her position until this process had taken place.

34] On the question of costs, since both parties have been partially successful, it would seem fair in the circumstances that they should each bear their own costs.

Order

35] Accordingly, I find that:

35.1 The second respondent's decision communicated to the applicant on 3 February 2012 that he was not going to renew or extend her contract was in breach of his obligation to confer with her in writing in terms of clause 5.1 of her contract.

35.2 The applicant's appointment as a commissioner in terms of the Consumer Protection Act 88 of 2008 is for a term which ends on 3 September 2012 and does not extend beyond that.

36] Consequently it is ordered that:

36.1 the second respondent must comply with the provisions of clause 5.1 of the applicants contract of employment by notifying her of his proposed intentions regarding the renewal, extension or nonrenewal of her contract and giving his reasons for his proposal and permitting the applicant to respond thereto in writing within 10 days of receipt of

his communication, after which he may make his decision on the renewal or nonrenewal of her appointment.

36.2 Pending the decision of the second respondent at the conclusion of the process described above, the respondents must suspend the recruitment process currently under way.

36.3 each party must pay its own costs



R LAGRANGE, J

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant: G Moshwana of Mohlaba & Moshwana Attorneys

For the Respondents: T Motau, SC assisted by Ms K. Pillay and Mr M. Manala
and instructed by the State Attorney