



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no: P 173/11

In the matter between:

THE INDEPENDENT MUNICIPAL AND ALLIED

TRADE UNION obo P GONYA, P N STOFFELA

AND S L QWALELA

Applicant

~~and~~ And

INGQUZA HILL MUNICIPALITY

First Respondent

M FIHLANI

Second Respondent

Heard : 25 October 2013

Delivered : 12 December 2014

Summary: The Applicant seeks an order that the dismissal of the affected employees be declared unlawful and that it be set aside – Dismissal is disputed - the Second Respondent to pay the costs.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant approached this Court on an urgent basis on 11 April 2011. The Applicant seeks an order declaring the termination of the services of P Gonya, P N Stoffela and S L Qwalela (the affected employees) unlawful and that it be set aside. The matter was set down on the urgent roll of 20 April 2011, on which date the matter was removed from the roll.
- [2] Subsequently the First and Second Respondents (Respondents) filed an application to strike out the Applicant's claim. On 17 May 2012 the Court dismissed the application to strike out the Applicant's claim with costs and ordered the Respondents to file an answering affidavit within 10 days. The Respondents had to file an answering affidavit by no later than 31 May 2012. It appears that the Respondents filed an answering affidavit with a confirmatory affidavit which was not signed by the deponent.
- [3] The Registrar of the Court issued a directive on 22 August 2012 wherein the Respondents were directed to file the original answering affidavit. This was not done and on 13 November 2012 the Registrar issued a further directive stating that failing compliance with the directive of 22 August 2012, the matter is to be archived. The Court stamp on the answering affidavit shows that it was filed on 16 November 2012.
- [4] The Applicant filed a replying affidavit on 22 February 2013.
- [5] It is evident that this application has a long and unfortunate history.

Section 56 and 57 of the Municipal Systems Act

- [6] In this matter sections 56 and 57 of the Municipal Systems Act¹ ('the Systems Act') are relevant.
- [7] Section 56 provides for the appointment of managers directly accountable to the municipal manager and it reads as follows:

(a) A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.

(b) A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the post in

¹ Act 32 of 2000.

question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination.

[8] Section 57 provides for the employment contracts for municipal managers and managers directly accountable to municipal managers, the so called section 56 managers. The relevant portions are sections 57(1), (6) and (7) which read as follows:

- (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).
- (6) 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;
 - (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.
- (7) A municipality may extend the application of subsection (6) to any manager directly accountable to the municipal manager.

[9] In summary what is relevant is that a section 56 manager is to be appointed in terms of a written contract of employment. There is no provision in the Systems Act that specifies whether the contract should be permanent or fixed-term. Section 57(7) provides that a municipality may extend the application of section 57(6) to section 56 managers, whereby a municipality may appoint section 56 managers on fixed-term contracts. This is however not automatic

as it requires a municipality to extend the application of section 57(6) and this will be done by way of a council resolution.

Brief exposition of the facts

- [10] Ms Gonya was employed in December 2002 and she held the position of Chief Financial Officer. She reported directly to the municipal manager and it is common cause that she is a so-called section 56 manager. It is the Applicant's case that Ms Gonya was employed on a permanent basis.
- [11] The Respondents deny that Ms Gonya was permanently employed and it is the Respondent's case that since she was a section 56 manager, she was employed on a fixed-term contract for a period of five years.
- [12] Ms Stoffella was employed in January 2002 as Chief Administration Officer. It is the Applicant's case that Ms Stoffella was employed on a permanent basis and she was not a section 56 manager.
- [13] The Respondents deny that Ms Stoffella was permanently employed and it is the Respondent's case that she was a section 56 manager and was employed on a fixed-term contract for a period of five years.
- [14] Mr Qwalela was employed in January 2002 as Chief Community and Protection Officer. It is the Applicant's case that Mr Qwalela was employed on a permanent basis and that he was not a section 56 manager.
- [15] The Respondents deny that Mr Qwalela was permanently employed and it is the Respondent's case that he was a section 56 manager and was employed on a fixed-term contract for a period of five years.
- [16] On 19 October 2010 a meeting was held between the affected employees and the Respondents and on 25 October 2010 the Second Respondent (Fihlani) issued letters to them. The contents of the letters are similar, but addressed to each of the affected employees individually. The letters indicated that the affected employees did not sign employment contracts and performance agreements as required by section 57(1) (a) and (b) of the Systems Act, but since the First Respondent (the municipality) has extended the provisions of section 57(6) of the Systems Act to all managers reporting directly to the municipal manager, they should have been employed for a fixed-term period.

It was further stated that the municipality should have ended the affected employees employment in 2007. In this letter the affected employees were offered positions on level 6 and they were given 14 days to respond to the offer.

- [17] Section 57(7) of the Systems Act stipulates that a municipality may extend the application of section 57(6), which provides that the employment contract of a municipal manager must be for a fixed-term, to any section 56 manager. It is evident that the extension of section 57(6) to section 56 managers is not an automatic one.
- [18] On 17 November 2010 IMATU addressed a letter to the municipal manager wherein it was stated that the offer of posts at a lower post level constituted a demotion and that is an issue to be determined by the bargaining council. The municipal manager was also requested to provide a copy of the council resolution that extended the provisions of section 57(6) of the Systems Act to all section 57 managers and the date on which such resolution was taken.
- [19] Despite numerous requests from the Applicant and even when this matter was before Court, the Respondents did not provide a copy of the council resolution that extended the provisions of section 57(6) to all section 57 managers. I have no doubt that the Respondents are aware that it is a crucial and important document to be provided.
- [20] Fihlani explained that officials of the municipality searched in vain for a copy of the resolution. His predecessors confirmed that such resolution was taken. The confirmatory affidavit of one of the predecessors was not deposed to and the Applicant argued that the only inference is that the resolution does not exist.
- [21] I find it improbable that a municipality is unable to find a copy of a resolution taken by its council. Council resolutions are the backbone of decisions taken and executed in any municipality and I find it unacceptable that a document as important as a council resolution cannot be found. Either the council resolution was not properly searched for or it does not exist.
- [22] IMATU subsequently referred an unfair labour practice dispute in respect of demotion of the affected employees to the South African Local Government

Bargaining Council ('SALGBC') and the matter was set down for conciliation on 17 January 2011. The dispute remained unresolved and was set down for arbitration on 10 and 11 March 2011.

[23] On 25 February 2011 Fihlani addressed letters to the affected employees regarding the termination of their services. Fihlani stated that attempts to find an amicable solution have been unsuccessful and therefore continued engagement with the municipality would be practically impossible. The employees were advised that their services as employees of the municipality were terminated with effect from 1 March 2011.

[24] The Applicant subsequently approached this Court to declare the termination of the employees' services unlawful and that the termination be set aside.

The relief sought

[25] The Applicant approached this Court in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act² ('the BCEA').

[26] Section 77(3) of the BCEA should be read with section 77A (e).

[27] In *Tsika v Buffalo City Municipality*³ it was held that

"Under the LRA, disputes to be adjudicated or arbitrated by the Labour Court or statutory arbitration tribunals are clearly and specifically identified. The only matters specifically reserved in the BCEA for the Labour Court are those concerning contraventions of the BCEA if they are consolidated with dismissal disputes referred in terms of the LRA, disputes about the interpretation or application of part C of chapter 10 of the BCEA concerning victimization, and reviews of functions performed under the Act. For the rest, the BCEA sets out minimum conditions of employment applicable to all employees and employers and provides a specific procedure for their enforcement, beginning with compliance orders issued by the Department of Labour and ending with their enforcement by order of the Labour Court. These are matters clearly falling within the Labour Court's exclusive jurisdiction.

² Act 75 of 1997.

³ (2009) 30 ILJ 105 (E).

The only reference to that court's role in contractual disputes to be found in the BCEA is in s 77A(e). This provides that among the 'appropriate orders' the Labour Court may make, 'subject to the provisions of this Act', are determinations -

'that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation'."

[28] The Applicant's claim is that the Respondents unilaterally amended the nature of the affected employees' contracts from those of indefinite period permanent contracts to fixed-term contracts and terminated those contracts without good cause and without following proper procedures.

Analysis

[29] The following issues are common cause:

- a) The affected employees were employed on different dates in 2002;
- b) They did not sign fixed-term employment contracts or performance agreements;
- c) In October 2010 the affected employees were offered positions on level 6, which offer they rejected and subsequently referred an unfair labour practice to the SALGBC;
- d) On 25 February 2011 Fihlani issued a letter wherein he advised the affected employees that their services as employees of the municipality were terminated with effect from 1 March 2011.

[30] The Applicant seeks for the dismissal of the affected employees to be declared unlawful.

[31] In my view there are two issues for this Court to decide. The first is whether the affected employees were dismissed and if so, whether their dismissal was unlawful.

[32] The Applicant's case is that the affected employees were permanent employees and that they were dismissed on 1 March 2011.

[33] The Respondents in opposing the application stated that despite the absence of a written contract of employment, a tacit contract came into effect, employing the affected employees in terms of section 56 of the Systems Act. The Respondents' case is further that the affected employees were offered alternative positions, which they rejected and as a result thereof their term of employment came to an end. It is denied that the Respondents dismissed the affected employees and it was stated that their term of employment came to an end in terms of the contract of employment.

Were the affected employees dismissed?

[34] In terms of section 186(1) (a) of the Labour Relations Act (hereinafter referred to as 'the Act')⁴:

“ (1) 'Dismissal' means that-

(a) an employer has terminated a contract of employment with or without notice;

[35] In *National Union of Leather Workers v Barnard NO and another* ⁵ the Labour Appeal considered the interpretation of section 186(1)(a) of the Act and held that:

“The key issue in the interpretation of the phrase 'an employer has terminated the contract of employment with or without notice' is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognized as valid by the law.”

[36] In *Ouwehand v Hout Bay Fishing Industries*⁶ this Court also considered a dismissal in terms of section 186(1)(a) of the Act and held that:

“It is accordingly incumbent upon an employee to establish on a balance of probabilities, where that employee claims to have been dismissed in terms of s 186(a), some overt act by the employer that is the proximate cause of the termination of employment”.

[37] The affected employees were employed by the First Respondent since 2002 and on the Respondents' own version, their employment contracts should

⁴ Act 66 of 1995.

⁵ (2001) 22 ILJ 2290 (LAC).

⁶(2004) 25 ILJ 731 (LC).

have terminated in 2007. The employment contracts were not terminated in 2007 or any time thereafter. It was only on 25 February 2011 that the affected employees receive a letter from Fihlani wherein he stated that their continued engagement became impossible and their services as employees were terminated with effect from 1 March 2011.

[38] Section 186(1)(a) of the Act contemplates that the employer must undertake some action that leads to the termination of the contract of employment. The employer must take some initiative, which has the consequence of terminating the contract of employment, or must perform some act that is the proximate cause of the termination of employment. The employer must bring the contract to an end.

[39] On the Respondents' own version there is no signed fixed-term contract and if there were, the affected employees' services were to be terminated in 2007. It is common cause that the affected employees remained employed after 2007. I cannot accept that the affected employees' employment came to an end in terms of the provisions of a fixed-term contract. There is simply no fixed-term contract that stipulates any end date and the letter of 25 February 2011 signed by Fihlani and advising the affected employees that their services were terminated with effect from 1 March 2011 constituted a dismissal.

[40] The Respondents dismissed the affected employees with effect from 1 March 2011.

Was the dismissal of the affected employees lawful?

[41] The affected employees approached this Court to challenge the lawfulness and not the fairness of their dismissals. The Applicant's case is that the affected employees were employed permanently. No council resolution was produced confirming that the First Respondent had in fact extended the provisions of section 57(6) to section 56 employees. There is no provision in the Systems Act stipulating that all managers reporting to the municipal manager must be appointed on fixed-term contracts. The Systems Act provides that the council may extend the provisions of section 57(6) to managers reporting to the municipal manager. The Respondents were unable to provide the resolution wherein the provisions of section 57(6) of the

Systems Act were extended and there is no basis for the Respondents to terminate the affected employees' contracts.

- [42] The Applicant further submitted that the affected employees were employed on a permanent basis and their contracts were valid and binding and that the Respondents had no right to unilaterally amend the employment contracts to fixed-term contracts and to terminate the contracts without good cause and without following proper procedures. The affected employees have the right not to be subjected to unlawful conduct such as the repudiation of their contracts and abuse of power.
- [43] The Respondents averred that the affected employees have referred a dispute to the SALGBC and that the matter is still pending at the bargaining council therefore the employees are barred from instituting proceedings in this Court. There is no merit in this averment. The dispute which the affected employees referred to the SALGBC was an unfair labour practice dispute in relation to their demotion. The affected employees were dismissed prior to the commencement of the arbitration. The matter before Court seeks to declare the affected employees' dismissal unlawful and has no bearing on the unfair labour practice dispute.
- [44] The Respondent's case is that the affected employees' contracts were tacitly converted to fixed-term contracts in that they were appointed in terms of section 56 of the Systems Act and that the contracts were for a period of five years and came to an end. What the Respondents dismally failed to explain is how a contract that was supposed to be terminated after five years and in 2007 continued for another four years and was only terminated in March 2011.
- [45] In my view the contention that the affected employees' contracts were 'tacitly' employing them as managers in terms of section 56 of the Systems Act does not assist the Respondents as section 56 of the Systems Act does not stipulate that any person employed as a section 56 manager is employed on a fixed-term contract. Being appointed as a section 56 manager does not automatically result in employment on a fixed-term contract.
- [46] The Respondents' case is that the application of section 57(6) was extended to the affected employees, employed in terms of section 56 of the Systems

Act. The Respondents dismally failed to provide any proof to satisfy this Court that it was indeed the case.

- [47] In the absence of a written fixed-term contract and a council resolution extending the provisions of section 57(6) to the affected employees I cannot find that they were employed on fixed term contracts. This is more so for the following reasons: Fihlani alleges that the affected employees' contracts should have terminated in 2007 yet he fails to tender any explanation as to why the affected employees remained employed until 2011. Secondly the content of the letters of termination issued by Fihlani on 25 February 2011 and thirdly his opposing affidavit, Fihlani introduced the new 2007 structure and organogram as the reason for the termination of the employees' services. It is evident that throughout the termination of the employees' services, the expiry of a fixed-term contract was not the sole reason proffered for the termination of their services and I do not accept that to be the reason.
- [48] The contents of the letters of 25 February 2011 wherein Fihlani terminated the services of the affected employees are disturbing. In the letter of termination no mention whatsoever is made of the fact that the employees were employed on fixed-term contracts and that the contracts came to an end. The reason proffered in the letters of 25 February 2011 was that attempts to find an amicable solution were unsuccessful and continued engagement was impossible.
- [49] In argument before Court Mr Msiwa for the Respondents submitted that there are material disputes of fact and that the matter should be referred to oral evidence. Mr Minaar for the Applicant disputed this and submitted that the issues are clear from the papers before Court and there is no basis to refer the matter for oral evidence.
- [50] In my view the disputes as evident from the papers are not so much on the facts as on the law. For example the Respondents' case is that the affected employees' contracts were tacitly converted to section 56 contracts and by implication to fixed-term contracts. The Systems Act clearly requires contracts to be in writing and this issue, based on the Respondents' concession that there were no signed fixed-term contracts, will not change by leading oral

evidence. I am of the view that there is no need to refer the matter to oral evidence.

[51] Fihlani acted unlawfully when he issued the letters of termination on 25 February 2011.

[52] Fihlani terminated the contracts of employment unlawfully and as a result of such breach the affected employees were entitled to elect whether to accept the repudiation and cancel the contract or reject the repudiation and claim enforcement thereof. By their conduct the affected employees clearly rejected the repudiation and they are seeking specific performance.

Costs

[53] The Applicant is seeking a punitive cost order against the Second Respondent and submitted that had it not been that Fihlani was litigating with public money, he would not have resorted to such a blatant abuse of power and would not have acted in such an unlawful manner. Fihlani provided no satisfactory answer to this in his opposing affidavit.

[54] In my view Fihlani acted not only unlawfully and without any regard for the rights of the affected employees, he acted in an arrogant, high handed and abusive manner. He dealt with the affected employees as if he employed them in his personal capacity and could dismiss them as he pleased, without having regard to the fact that he occupied a public position where he was expected to act with due diligence and due compliance with applicable legislation.

[55] I can see no reason why tax-payers should be burdened with the costs where it was clearly Fihlani who acted in an unlawful manner. He should have acted as a reasonable municipal manager with caution, which he dismally failed to do.

Order

[56] In the premises I make the following order:

56.1 The termination of the services of P Gonya, P N Stoffela and S L Qwalela is unlawful and it is set aside;

56.2 The Second Respondent in his personal capacity is to pay the costs.

Connie Prinsloo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Attorney Mr Minnaar Niehaus of Minnaar Niehaus Attorneys

For the Respondents: Advocate Msiwa

Instructed by: Ximbi Ncolo & Associates Attorneys

LABOUR COURT