



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P182/2012

In the matter between:

AJ LAMONT

Applicant

And

EDEN DISTRICT MUNICIPALITY

Respondent

Heard: 18-19 March 2015

Delivered: 25 March 2015

Summary: Termination of fixed term contract. Offer to reinstate fixed term contract unconditionally, four months after it was unlawfully or unfairly terminated by the respondent, limits the applicant's claim, whether as contractual damages or statutory compensation, to four months' salary.

JUDGMENT

EUIJEN, AJ

Introduction

- [1] This is an application founded both in contract and on an alleged breach of section 189 of the Labour Relations Act, no 66 of 1995 (the LRA), which seeks the applicant's reinstatement, alternatively payment of all amounts due to him for the remainder of a fixed term contract, including two performance bonuses and, in addition, compensation for the unfair termination of his employment in terms of section 195 of the LRA in an unspecified amount. At the hearing, Mr Lamont abandoned his claim for reinstatement and limited the relief he sought to the damages and compensation set out in the alternative prayer. The fixed term contract upon which his claim is based had, in any event, expired by the date of this hearing.
- [2] The respondent for its part, denies that it dismissed the applicant Mr Lamont; it contends that he deserted. In the alternative and, if it be found that Mr Lamont was dismissed, i.e. that his contract was unlawfully or unfairly terminated, then the respondent pleads that it tendered to reinstate him unconditionally in writing on 25 September 2012, which tender was repeated as a formal tender in terms of Rule 22A of the Rules of this Court on 8 October 2012, which has not been accepted by the applicant. This consequently limits the amount of the applicant's claim to four month's salary whether viewed as contractual damages or compensation for an unfair dismissal.
- [3] Mr Engela, who appeared on behalf of the respondent advised me at the commencement of his case that although the respondent viewed the fixed term contract entered into with Mr Lamont as unlawful, he would not rely on such unlawfulness in these proceedings, since this was not pleaded as a defence. It is only referred to insofar as it informs the respondent's offer to reinstate Mr Lamont from 1 October 2012.

Evidence

- [4] Mr Lamont testified in support of his case. He has extensive experience in local government, and was previously the mayor of the respondent

municipality between 2000 and 2005, as well as the previous Pacaltsdorp Municipality.

- [5] Approximately 18 months prior to the start the World Cup held in this country during 2010, Mr Lamont entered into a fixed term contract of employment with the respondent to promote George as a venue to host participating national teams. The period of that agreement ran from 1 November 2008 until 31 December 2010. No provision was made for the termination of that agreement prior to its expiry. In terms of that agreement, Mr Lamont was entitled to an annual salary of R460 000,00, "(all inclusive)", part of which (14%) was payable as a performance bonus.
- [6] Prior to the expiry of the agreement and with effect from 1 November 2009, Mr Lamont entered into another fixed term contract of employment with the respondent municipality, to endure until 31 December 2013. The second contract expanded his duties from that of co-ordinator for the 2010 soccer World Cup to include 'various other projects'. The annual salary payable to Mr Lamont was increased to R598 620,56, this time exclusive of a performance bonus of 14%. The performance bonus is dependent on a performance assessment. The second contract also contained a provision (clause 11) entitling the employee to terminate the agreement on notice. There is no similar provision entitling the respondent employer prematurely to terminate the agreement on notice.
- [7] On 2 May 2012, Mr Lamont was called to a meeting with the municipal manager Mr GW Louw and the human resources manager Ms A de Beer. He was advised that the council had restructured the municipality's staff complement which had rendered his position redundant. He was also told that he had reached retirement age, although his 65th birthday was only on 6 May that year. He was offered payment of three times his monthly salary as an "exit package". He was told to consider accepting the exit package and communicate his response later.
- [8] This advice was subsequently confirmed to Mr Lamont in a letter from the municipal manager dated 7 May 2012. The letter also confirmed the offer of

payment of the three-month salary as an “exit package”. The letter concluded on the following terms:

“In terms of paragraph 11 (1), of the employment contract you are hereby given notice, of my council’s attention, to terminate the said employment contract on 31 May 2012. Should you fail to accept this offer within 7 days of this letter, such offer will become obsolete and your contract of employment will terminate on 31 May 2012 due to you reaching retirement age, but without any exit package.”

- [9] Mr Lamont testified that he was shocked at the content of the municipal manager’s letter. He decided not to accept the three-month exit package as there was no need to declare his position redundant. After the conclusion of the World Cup at the end of 2010, he had busied himself with agricultural projects in the district on the instructions of the mayor. Not having accepted the three-month exit package, he regarded himself as dismissed with effect from 31 May 2012.
- [10] He accordingly instructed his attorneys of record to address a letter of demand to the respondent, demanding payment of the full amount for the remainder of the duration of his fixed term contract, until the end of December 2013. Such a letter was addressed to the municipality on 9 May 2012. From the outset, Mr Lamont has been adamant that he did not wish to continue working at the municipality after the 2 May 2012 meeting, because he felt that he could not trust the municipal manager, Mr Louw or the mayor and the council anymore.
- [11] Further correspondence was addressed to Mr Lamont by the municipal manager, denying that he had been dismissed and instructing him to return to work, which Mr Lamont ignored, despite being accused of desertion. The matter was then handed over to the respondent’s attorney of record who addressed two letters to the applicant’s attorneys. The first dated 15 June 2012, contained a repetition of the three month “exit package” offer, which was again rejected. The second dated 25 June 2012, contained the following offer:

“As far as the last-mentioned referral to the Labour Court is concerned, or (sic) instructions are to make the following tender of reinstatement to your client, which we hereby do:

- 1 Your client may return to work and resume his duties on 1 October 2012.
- 2 Your client's salary for the four months from 1 June 2012 until the end of September 2012 will be paid to him and that all benefits in terms of the contract will be restored.

The tender is open and unconditional, and it will also be formally filed in the court file with the Labour Court.”

[12] The second offer quoted above was subsequently repeated in terms of Rule 22A of the Rules of the Labour Court, on 8 October 2012. Both were not accepted by Mr Lamont. Again, the reason that he gave, was that given the manner of his dismissal, he felt that he could not trust the municipal officials and councillors with whom he had to work, ever again in the future. It was put to him that the real reason why he had refused to accept the respondent's unconditional offer to reinstate him was that it had come at an awkward time when he was involved in co-ordinating the bicentennial celebrations at Pacaltsdorp. Mr Lamont admitted that he was the coordinator of the Pacaltsdorp bicentennial celebrations, but said this was a voluntary position for which he was not paid. It did not prevent him from accepting the respondent's offer of reinstatement.

[13] Mr Lamont also testified that he had been assessed on his performance in coordinating the soccer World Cup during 2010 and paid a performance bonus thereafter. He had not been assessed for the duration of his second fixed term contract with the municipality. On this basis, Mr Lamont claimed that he was entitled to be paid two performance bonuses for the remainder of the duration of this contract of employment, as if he had been assessed.

[14] Mr Louw, the current municipal manager of the respondent municipality gave evidence on its behalf. He was also the municipal manager at the time of Mr

Lamont's appointment in terms of his first fixed term contract of employment, as the coordinator of the 2010 soccer World Cup. He had thereafter been suspended by the municipality on 12 October 2009 and subsequently dismissed. He referred the matter to the SA Local Government Bargaining Council and was reinstated with effect from 1 July 2011.

- [15] After his return to the municipality, Mr Louw was surprised to find Mr Lamont still there, as the soccer world cup had ended the previous year. It was then that he discovered Mr Lamont's second fixed term contract of employment, which had been entered into while he was dismissed by the municipality. He discovered a number of other irregular appointments made during the same period. This led the mayoral committee to instruct him to conduct an audit of all employment contracts entered into during this period. This was done by a firm of attorneys who produced a report which, *inter alia* identified Mr Lamont's contract as an irregular appointment. It was this report which led the mayoral committee to the consideration of a restructuring of the municipality's staff complement.
- [16] Mr Louw testified that at the time he met Mr Lamont, together with the human resources manager on 2 May 2012, the mayoral committee was merely considering restructuring the staff complement; consequently he did not tell Mr Lamont that his position was redundant as no decision had yet been made about it. He also denied mentioning Mr Lamont's age. He did confirm offering Mr Lamont payment of three month's salary as an exit package. The same offer was made to all other identified irregular appointments as a pragmatic solution to the problem.
- [17] Mr Louw testified that the reason he had stated in his letter dated 7 May 2012 both that Mr Lamont's position was redundant and that, in any event, he would be retired because he had reached 65 years of age, was that he had received this advice from the human resources manager after the meeting. He had subsequently discovered this advice to be wrong on both counts when the matter was handed over to the respondent's attorneys. That is why the offers to reinstate Mr Lamont had been made, which were *bona fide* attempts to rectify this mistake.

- [18] He stated that he and the rest of the management team were perfectly prepared to continue working with Mr Lamont. He pointed out that no allegations of impropriety had been levelled against Mr Lamont and his dismissal was a “no fault” termination. He contrasted Mr Lamont’s position with his own where he faced multiple allegations of unfounded misconduct and was still able to resume his employment with the municipality after his reinstatement, which endures to this day.
- [19] Mr Louw attempted to suggest that his letter of 7 May 2012, was not a dismissal letter, when read together with his subsequent letters, particularly those instructing Mr Lamont to return to work, which were ignored. He confirmed however, that the respondent’s attorneys were subsequently given instructions to convey an unconditional offer of reinstatement to Mr Lamont, precisely because the respondent had been advised that its termination of the employment contract was unlawful.

Was there a Dismissal?

- [20] The applicant bears the onus of proving that he has been dismissed, since this has been placed in issue in these proceedings. (*Ouwehand v Hout Bay Fishing Industries* [2004] 8 BLLR 815 (LC) at 818 paras [14-15]) This issue largely depends on the interpretation to be given to the municipal manager’s letter of 7 May 2012. That letter is unquestionably a termination letter. In the first instance, it is headed “termination of employment contract due to reaching pensionable age\operation requirements”. Secondly, it states in terms that “should you fail to accept this offer within 7 days of this letter, such offer will become obsolete and your contract of employment will terminate on 31 May 2012...” There is nothing uncertain or ambiguous about this letter. It states unequivocally that in the event that Mr Lamont did not accept the exit package within 7 days, which he did not, his employment terminated on 31 May 2012.
- [21] None of the subsequent letters addressed to Mr Lamont by the municipal manager, alters this position. At no stage did the municipal manager unconditionally withdraw the termination letter, until such time as the

respondent's attorneys made such an offer, which is dealt with later in this judgement. His first letter just says that the applicant's letter of demand is premature. The instructions to return to work are confusing and certainly do not convey in any clear terms that the applicant's dismissal has been revoked.

- [22] In the light of these proved circumstances, I find that Mr Lamont has proved that he was dismissed with effect from 31 May 2012.

Lawfulness and Fairness of the Dismissal

- [23] As I have already observed, the clause in the employment contract on which the municipal manager relied in his letter of 7 May 2012, terminating the employment contract, (clause 11(1)), only gives the employee the right to terminate the agreement, not the employer. The respondent did not rely on any breach of the employment contract by the applicant to justify its termination. I accordingly conclude that the employment contract was unlawfully terminated by the respondent. (*SA Football Association v Mangope (2013) 34 ILJ 311 (LAC)*)

- [24] Insofar as it remains competent to consider also the fairness of the applicant's dismissal, since it arises from the same factual matrix supporting the contractual claim, which question I consider more fully below, I conclude that Mr Lamont's dismissal for alleged operational requirements is also unfair. The Labour Appeal Court has held that it is impermissible to terminate a fixed term contract of employment prematurely for operational requirements (*Buthelezi v Municipal Demarcation Board (2004) 25 ILJ 2317 (LAC)*)

Damages and/or Compensation

- [25] As stated at the outset of this judgment, the applicant claims payment of his salary for the remainder of his fixed term contract, together with two performance bonuses and compensation for his unfair dismissal. The entitlement to both is said to arise from the wording of section 195 of the LRA, which permits the award of compensation in addition to contractual damages. In support of this submission, Mr van Rensburg for the applicant, also relied on the matter of *Abdullah v Kouga Municipality [2013] 5 BALR 437*

(SALGBC), read with an application under the same name in the Labour Court where the applicant was awarded payment of the remainder of the duration of his fixed term contract of employment as contractual damages ([2012] 5 BLLR 425 (LC)).

- [26] In the *Kouga Municipality* case, the Bargaining Council Commissioner found that payment of contractual damages amounting to the remainder of the fixed term contract of employment was insufficient to compensate the applicant fully for the unfairness of the dismissal, since the respondent's conduct had destroyed the trust relationship, thereby rendering reinstatement impossible. It was this loss that the applicant was compensated for at the bargaining council. Nevertheless, even though the circumstances in that matter were far more egregious than the present, the Commissioner awarded only one month's salary as compensation.
- [27] As far as the applicant's entitlement to contractual damages is concerned, it is of course trite that he is not merely entitled to payment of the balance of his fixed term contract of employment; he is under a duty to mitigate his damages. Put differently, the amount claimed stands to be reduced by an amount the applicant could reasonably have been expected to earn during the period of his claim. (*SA Football Association v Mangope* (2013) 34 ILJ 311 (LAC) at 332A-333E)
- [28] In the present matter, Mr Lamont testified that he had applied for two positions at municipalities he did not name, but both of his applications were unsuccessful because of his age. As far as the offer of reinstatement from the respondent municipality was concerned, it was argued on his behalf that the offer was conditional and ought not to be considered as a genuine offer that would have effectively mitigated Mr Lamont's loss. Mr Lamont himself did not rely on this in his evidence in chief; he, as already noted, conceded that he viewed the offer as unconditional, unlike his attorney. Mr Lamont's reasons for refusing the tender, as I understood his evidence, was that he could not return to the respondent after the 2 May 2012 meeting, because the respondent had shattered his trust in it. I will accordingly consider both reasons.

- [29] As far as the respondent's attorney's letter dated 25 May 2012 is concerned, it is clear from the terms of that offer quoted above, that it is expressly unconditional. The fact that the letter goes on to express the view that the contract remains unlawful and that an application will be made to the High Court in due course to set it aside, does not change this. It is merely an expression of intent for the future. There is no link between the threatened review application and the offer of reinstatement. The applicant is not asked to waive or compromise any of his rights in connection with the threatened review application or indeed do anything at all in return for his reinstatement. This ought to be more than clear in terms of the formal offer filed in terms of Rule 22A. I accordingly conclude that the offer of reinstatement made to the applicant by the respondent's attorneys was not conditional at all.
- [30] Mr van Rensburg submitted that the formal tender made in terms of Rule 22A does not comply with the requirements of the Rule in that it is not said whether it includes costs or not. The offer obviously does not include costs, since these are not mentioned in the terms of the offer. The part of the Rule which has not been complied with by the applicant is Rule 22A(1)(d), which states that if a party disclaims liability for costs, the reasons must be given. The reason(s) why there is no tender of costs, is not stated in the applicant's notice filed in terms of Rule 22A.
- [31] While it is correct that the formal tender does not comply with the Rule in the respect which I have indicated, I do not consider that this in any way renders it invalid, or ineffective, or prevented the applicant from accepting the tender. Indeed, his remedy is provided in Rule 22A(5) which provides that on acceptance of a tender without costs, costs may be applied for upon acceptance. The fact that the respondent has not given a reason for the withholding of costs, at least until the making of the tender, is thus more likely to count against it in such a situation. Moreover, it was not the withholding of costs, but the fact that the applicant wishes to claim more than the four months' salary tendered, that is the reason for this trial proceeding. For these reasons, I find that the fact that the tender was not strictly in accordance with

the Rules of this Court, is not a good reason why it was not accepted, or capable of acceptance by the applicant.

- [32] That leaves Mr Lamont's reason advanced in evidence why he did not accept the respondent's formal tender of reinstatement for consideration. That, it will be recalled, is that his trust in key municipal officials and office bearers was shattered after the 2 May 2012 meeting. In my judgment, if that is indeed the reason, then Mr Lamont's sensibilities are far more precious than reasonable. No allegations of misconduct or indeed any impropriety were levelled against Mr Lamont in that meeting and, if anything, the person whose reputation took a knock as a result of it, is the municipal manager, who accepted responsibility for the ensuing letter of 7 May 2012, despite being poorly advised by the human resources manager. The municipal manager's shoulders are, however, broader than those of Mr Lamont and I find the former's evidence regarding the contrasting situations faced by himself after his reinstatement and Mr Lamont, telling on this issue. The observations of Nugent JA in *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA) decision, to which I was referred by Mr Engela, are also instructive in this regard:

"No doubt Dr Rawlins genuinely felt that there had been a breach of trust. But these are two professional people who might be expected to resolve any acrimony that might earlier have existed. No objective grounds were advanced why any perceived breach of trust between them was not capable of being restored. Dr Rawlins chose not even to explore that possibility but rejected it out of hand. That is not how labour relations should be conducted and I agree that the rejection of the repeated offers of reinstatement was unreasonable and she has only herself to blame for her financial loss." (at 2330, para [18])

- [33] In the present matter too, I find that Mr Lamont's conduct in rejecting the offer of reinstatement to be unreasonable and unwarranted. Had he accepted that offer, his damages would have been limited to payment of four month's salary and he would have been in gainful employment thereafter. Whether the respondent thereafter sought to set that contract aside on grounds of alleged

unlawfulness is neither here nor there; the respondent would always have had that right and the applicant still had all the defences he always had to defend that application, notwithstanding an acceptance of an offer of reinstatement.

- [34] Finally, I do not consider that reliance on the unfair dismissal portion of Mr Lamont's claim takes this issue any further. It is equally well established in the realm of unfair dismissal law, as it is in contract, that an offer of unconditional reinstatement, limits the claimant, at best, to the relief he could have secured at the stage the tender was made. In *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC), the Labour Appeal Court held that:

"The nature of an employee's right to compensation under section 194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of section 194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee." (at 1220, para [41])

- [35] Mr Engela referred me to a number of cases in this Court where this approach has been followed. (See: *Burger v Alert Engine Parts (Pty) Ltd* [1999] 1 BLLR 18 (LC) at 25C-H; *Fletcher v Elna Sewing Machines Centre (Pty) Ltd* [2000] 3 BLLR 280 (LC) at 290 B-I; *Mkhonto v Ford NO & Others* [2000] 7 BLLR 768 (LAC) at 771F- 772B; *Maloba v Minaco Stone Germiston (Pty) Ltd & Another* [2000] 10 BLLR 1191 (LC) at 1201 C-I; *Scribante v Avgold Ltd (Hartebeesfontein Division)* (2000) 21 ILJ 1864 (LC) at 1874 I-J)

- [36] For all of the above reasons, I hold that whether viewed as damages for breach of contract, or as compensation for unfair dismissal, Mr Lamont is entitled to the same measure of damages. In this case I hold those to be equal to payment of four months' salary, since Mr Lamont could have resumed his employment on the same terms and with the same job security as prevailed previously. I find that no further damages have been proved and in particular, that Mr Lamont has not demonstrated that he is entitled to any additional *solatium* for injury to his dignity as a result of his unfair dismissal.

Costs

[37] Both parties were agreed that costs should follow the result in this matter. It follows from the conclusions which I have reached in this judgment that Mr Lamont is entitled to his costs up and until 1 October 2012 and the respondent is entitled to its costs thereafter.

[38] There is also the issue of the reserved costs relating to the condonation of the later filing of the respondent's answering statement of defence. That application was granted and it appears that the respondent has achieved a fair degree of success in advancing that defence in these proceedings. Nevertheless, it still sought an indulgence from this Court in doing so. In my judgment, it seems to me that the interests of justice and fairness require that I make no order as to costs on that application.

Order

[39] I make the following order:

- a. The dismissal of the applicant by the respondent with effect from 31 May 2012, is declared to be unlawful and unfair.
- b. The respondent is ordered to pay the applicant four months' salary in the amount of R199 540,19, within ten (10) days of the date of this order.
- c. Interest on the aforesaid amount is payable at 9% per annum from the date of this order to date of payment.
- d. The respondent is to pay the applicant's costs up to and including 1 October 2012 and the applicant is to pay the respondent's costs thereafter, including the costs of the hearing in this Court.
- e. As far as the reserved costs of the condonation application for the late filing of the respondent's statement of defence are concerned, there is no order as to costs.

Euijen AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

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