IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable/Not Reportable

Case no: D1198/13

MAPHUMULO LOCAL MUNICIPALITY **Applicant**

and

VUSUMUZI WELCOME MHLONGO **1ST Respondent**

Cm RICHARD LYSTER N.O. **2nd Respondent**

CCMA **3RD Respondent**

IMATU **4TH Respondent**

Heard: **6 August 2015**

Delivered: **20 January 2016**

Summary: renewal of municipal manager's contract of employment

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JUDGMENT

WHITCHER J

Introduction

[1] This is an opposed application in which the applicant, ('Maphumulo Municipality') seeks to review and set aside the award of the second

respondent, ('the arbitrator') issued under the auspices of the CCMA under case number D1198 / 2013. In this award, the arbitrator found the dismissal of the first respondent ('Mhlongo') unfair and ordered his reinstatement as relief.

Background

[2] Mhlongo was appointed as municipal manager at Maphumulo Municipality on 1 September 2001 in terms of a fixed term contract of employment. The contract was renewed in August 2006. The second contractual term would terminate two years after the "next local government election".

[3] Despite some confusion in the award about the date of the relevant local government election, this was 18 May 2011, making the date of Mhlongo's termination 18 May 2013.

[4] In 2012 Mhlongo was dismissed for misconduct. He successfully challenged the fairness thereof and was reinstated retrospectively in terms of a CCMA award dated 4 March 2013.

[5] On 25 April 2013, as the expected end date drew near, Mhlongo met with the mayor and deputy mayor at the Richard's Bay Protea hotel. He made out a case for the further renewal of his contract. According to Mhlongo, his presentation was well received. The mayor did inform him that the final decision did not lie with her, however. She would have to take instruction from the Regional Working Committee (RWC) of the ANC, the majority party in the municipality.

[6] On 13 May 2013, Mhlongo asked the mayor for feedback on the advice she received from the RWC. She told him that the RWC's advice was still pending and undertook to get back to him.

[7] On 20 May 2013, the mayor met with Mhlongo and advised him that his fixed term contract had expired two days earlier on 18 May 2013. She asked why he was still present at work. He advised her that he expected notice to the effect that his contract was not being renewed. He carried on performing his duties.

[8] On 23 May 2013, he attended an Exco Council meeting where he was informed that a decision was formally taken by this body not to renew his fixed term contract. He, however, remained at work until a full council meeting on 29 May 2013 convened, which he attended. The full council had the power to overrule the decision of the Exco but they did not do so. Instead, Mhlongo was placed on a notice period to expire at the end on June 2013.

[9] The CCMA award records a number of reasons why Mhlongo said he developed an expectation that his contract would be renewed past 18 May 2013. First, he had been permitted to work beyond the stipulated end date. The former mayor, Mr. Ngidi, had also informed him that as long as he continued to achieve unqualified audits, a welcome and apparently unusual occurrence for municipalities, his contract would be renewed. Mhlongo had indeed, performed well and took away the impression from the Richards Bay Protea Hotel meeting on 25 April 2013 that the mayor acknowledged this. Mhlongo also stated that it was practice that fixed term contracts were renewed.

[10] Mhlongo stated that he had used the 25 April 2013 meeting at the Protea Hotel explicitly to discuss and motivate for the renewal of his fixed term contract. Such an opportunity was provided for in terms of clause 3.2 and 3.3 of his contract with the municipality. Mhlongo testified that part of the reason he expected a renewal of his fixed term contract was that, at the Protea Hotel meeting, the Mayor expressed no dissatisfaction with his work. Mhlongo accepted that, in terms of section 56A(6)(a) of the Municipal Systems Act of 2000, a renewed contract would be for five years but not longer than one year beyond the next local government elections.

[11] In his evidence, the deputy-mayor, Mr Mbonambi stated that Mhlongo was not dismissed, his fixed term contract had come to an end. The additional time he had worked after 18 May 2013 was a notice period. Mbonambi denied that Mhlongo had motivated for the renewal of his contract at the 25 April 2013 meeting at the Protea hotel.

<u>The award</u>

[12] In his award the arbitrator pointed out that both parties' representatives had, in litigating the case, missed the fact that Mhlongo's contract itself defined under what circumstances a renewal could reasonably be expected. In terms of clause 3.3, this was that the municipal manager:

> "shall have to prove that he has performed his duties under this agreement to the satisfaction of the Mayor, and the Mayor will have to be satisfied of the Municipal Manager's work performance. In determining such work performance, the Mayor must be guided by the Municipal Manager's performance in terms of the Performance Management System, as well as his compatibility with the Mayor and the Executive Authority, and provided that:
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> 3.3.1 All performance agreements concluded and required to be concluded between the Mayor and the municipal manager have been fulfilled,
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> 3.3.2 Any other terms must be a basis for renewal (e.g. same remuneration),
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> 3.3.3 the failure to renew or extend the period referred to in 3.2, which renewal or extension shall not be unreasonably withheld, could be a matter for arbitration.

[13] The arbitrator accepted that the meeting on 25 April at the Protea Hotel constituted an opportunity for Mhlongo to motivate for the renewal of his contract before any advertisements were sent out, an opportunity provided for in Mhlongo's contract. The arbitrator rejected Mbonambi's evidence that this meeting did not discuss the possible renewal of Mhlongo's fixed term contract. In doing so, the arbitrator made an adverse finding on the deputy-mayor Mbonambi's credibility.

[14] On the arbitrator's analysis of clause 3.3 of Mhlongo's fixed term contract, his renewal was not to be unreasonably withheld. Having received no negative feedback from the Mayor, Mhlongo knew of no reason why a renewal would be withheld. Indeed, contractually, after Mhlongo made representations in favour of a renewal, it was incumbent on the municipality to advance reasons

against such an event. Not any reasons would do. If it wished to avoid a renewal, the municipality was confined by the terms of the contract to rely only on Mhlongo's poor performance or incompatibility as identified by the Mayor. The arbitrator found that once Mhlongo testified that his performance was of such a nature that a renewal was reasonably expected "it was incumbent on the Respondent to show, by evidence, that it was reasonable not to renew the contract".

[15] In this regard, the arbitrator found that since Mhlongo's fixed term contract repeatedly made reference to the Mayor being satisfied with Mhlongo's performance, it was essentially the Mayor had to disprove that her municipal manager had performed satisfactorily. The Mayor elected not to testify and thus there was no evidence before the CCMA to rebut Mhlongo's version that his performance was not only satisfactory, but exemplary. No evidence was led that he was incompatible with the Mayor either. There was no testimony from deputy-mayor Mbonambi to this effect, nor the acting municipal manager, neither was there any trace of performance or compatibility problems in any of the council minutes handed up as evidence.

[16] The arbitrator went on to find that the probable cause of the non-renewal of Mhlongo's fixed term contract was the decision of the ANC's RWC. However, this body's attitude towards Mhlongo had no statutory or contractual standing. It was the terms of Mhlongo's contract, paired with the absence of any criticism from the Mayor that properly and reasonably conditioned his expectation of a renewal. Clause 3.3 of this contract gave him an opportunity for renewal which, the arbitrator found, Mhlongo invoked in the 25 April 2013 Protea Hotel meeting. Absent any performance or compatibility problems from the Mayor's side, Mhlongo could thus have expected a renewal of his fixed term contract as a matter, more or less, of contractual compliance.

[17] As Mhlongo was unfairly denied a renewal of contract, which would have been for five years, or not later than one year after the next local government elections, the arbitrator coupled his finding that an unfair dismissal in terms of section 186 (1)(b) of the LRA had occurred with an order reinstating Mhlongo as Municipal Manager for the term mentioned above.

Grounds of review

[18] The municipality's main ground of review is that while the arbitrator relied on clauses 3.2 and 3.3 of the fixed term contract to find that Mhlongo's expectation of renewal of his fixed term contract was reasonable, he ignored the implications of clause 4.1 of the same contract which, on the facts of the case, pointed in the opposite direction. Clause 4.1 required the municipal manager to conclude a performance agreement with the Mayor within 60 days of signing the agreement and thereafter a separate performance agreement had to be concluded every year within 30 days of June of the year. If no performance agreement was concluded, none would come into effect, alternatively, the contract would automatically terminate upon the expiry of the 30 days period from June of the year.

[19] The municipality pointed out that, in terms of section 57(1), (2) and (4) of the Municipal Systems Act, the Municipal Manager may be appointed to that position only subject to a separate performance agreement concluded annually and to be concluded within a reasonable time after a person has been appointed as the municipal manger and thereafter within one month after the beginning of each financial year of the municipality.

[20] It was these statutory provisions that were expressly included in clause 4.1 of the written contract of employment concluded between the municipality and Mhlongo on 3 August 2006.

[21] The municipality led evidence that, during the period of Mhlongo's employment, Mhlongo had not concluded any performance agreement with the municipality despite the express provisions requiring same and despite the fact that the onus was on him to conclude such agreement.

[22] The municipality argued further that Clause 3.2 and 3.3 of the written contract of employment expressly provided that the appointment of Mhlongo shall commence on 1 July 2006 and shall endure for a period which terminated automatically two years after the next ordinary Local Government Elections but at the end of such period Mhlongo shall be offered an opportunity to renew the agreement before any advertisements for applications are done

provided, inter alia, that all performance agreements concluded and required to be concluded have been fulfilled.

[23] Accordingly, the non-existence of any performance agreement between the municipality and Mhlongo was a bar for the renewal of the contract of employment to which the arbitrator did not have proper regard in coming to his finding.

[24] Thus, Mhlongo ought to have harboured no expectation of renewal.

[25] In its heads, the municipality further argued that Mhlongo is an IFP member whereas the mayor is an ANC member, thus creating policy incompatibility, which entitled it not to renew Mhlongo's contract and militating against reinstatement as relief.

[26] Mhlongo, in opposing the review application, noted that the municipality elected not to launch any serious attack upon the conclusions reached by the arbitrator on the objective basis for his expectation of renewal outlined in the award and the absence of any evidence led by the municipality in the arbitration contradicting such conclusions.

[27] Mhlongo argued that the municipality chose to rather focus on the contention that because no separate performance agreement was entered into between the municipality and Mhlongo (which agreement is typically concluded after the conclusion of the primary contract of employment in any event), the fixed term contract was not renewed.

[28] The basis for the review of the award was thus that the arbitrator had regard to the provisions of clause 3.2 of the fixed term contract (which set out the obligations of the municipality and, in particular, the obligations of the Mayor in respect of the renewal of the fixed term contract), whereas the arbitrator should have considered the provisions of clause 4 of the fixed term contract, relating to the obligations of the parties to conclude a Performance Agreement which is ancillary to the fixed term contract.

[29] Mhlongo argued that this criticism of the award was unsustainable, as neither the provisions of the fixed term contract upon which this criticism was

premised (i.e. clause 4.1), nor the relevant provisions of the Municipal Systems Act of 2000 support the idea that the arbitrator committed any error at all.

[30] Mhlongo pointed out that the obligation to conclude a separate performance agreement was contained in clause 4.1 of the FCT and read as follows:

> "Notwithstanding anything to the contrary contained in this agreement, the Municipal Manager shall be required to conclude a performance agreement with the Mayor within 60 days of signing this agreement, *and thereafter a separate performance agreement must be concluded every year within 30 days of June of such year,* 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 the expiry of such reasonable extension of the period as may be agreed to.by the Mayor, for such purposes." (Emphasis added).

[31] From this clause, Mhlongo argues, the following points emerge:

1. The renewal of the fixed term contract precedes the conclusion of the separate performance agreement, so the absence of such agreement at the time of renewal cannot be said to prevent the fixed term contract from being renewed;

2. Such performance agreement need only be concluded within 30 days of June (i.e. the end of July) of the year in which the fixed term contract expires; and

3. In the event of such performance agreement not being concluded within such time frame, the Mayor may extend the time period for the conclusion of such performance agreement.

[32] For Mhlongo, the due date for the conclusion of the performance agreement had not yet arrived at the time that his services were terminated on 23 June 2013.

[33] Mholongo similarly points out that section 57(2) of the Municipal Systems Act provides that the performance agreement must be concluded within 60 days after a person has been appointed as the municipal manager, failing which the appointment lapses: provided that, upon good cause shown by such person to the satisfaction of the municipality, the appointment shall not lapse; and be concluded annually, thereafter, within one month after the beginning of each financial year of the municipality. The section further provides that the performance agreement shall be entered into with the municipality as represented by the mayor.

[34] Mhlongo's argument was that the 60 day period must be calculated from the date of renewal (i.e. 18 May 2013) or, in terms of the fixed term contract, the 30 day period after June (the end of July) referred to in clause 4.1 of the contract. It could not mean any period shorter than that. On this basis, the due date for the conclusion of the performance agreement had again not yet arrived at the time a decision was taken not to renew.

<u>Analysis</u>

[35] The review test is trite. The applicant must first show that a material irregularity exists in the arbitration award. Second, the applicant must show that such an irregularity could reasonably lead to a different outcome. For reasons that follow below, I am satisfied that the conclusions the arbitrator reached on both the law and facts are not those that no reasonable decision-maker would have made.

[36] I agree with Mhlongo's submissions that the arbitrator committed no reviewable irregularity in concluding that a performance contract is not a prerequisite for the renewal of the fixed term contract, on the facts outlined above. The time for the conclusion of the last, required performance contract had not yet lapsed at the time the municipality decided not to renew Mhlongo's contract.

[37] It is not accurate that the arbitrator failed to properly take into account the historical non-existence of performance agreements between the municipality and Mhlongo and failed to appreciate that this constituted a bar to the renewal

of Mhlongo's contract since the Mayor had no way of assessing his performance in terms of the Performance Management System. Albeit in general terms, in his award, the arbitrator finds that there is no basis for the argument that Mhlongo should be held responsible for omissions or failings in terms of his own contract. Mhlongo and the municipality were equal contracting parties and both were expected to be aware of what was required of them.

[38] While the failure to agree to the terms of a performance agreement may, contractually and proactively, be invoked as grounds for termination of a contract in terms of the contract itself, I am loathe to have this count against the employee in circumstances where his employer has tolerated the absence of a performance agreement, it seems, for many years. I note that clause 15 of Mhlongo's contract specifically provides for the municipality to call upon him to remedy any breach of the contract that they are moved to enforce. I do not find any mention that Mhlongo was placed on terms to conclude a performance agreement in the record. It strikes me, as it apparently did the arbitrator too, to be an *ex post facto* rationalisation for an otherwise unfair action that labour tribunals should, for policy reasons, not countenance.[1]

[39] Indeed, the arbitrator specifically found that the absence of a performance agreement was not the true cause for the non-renewal of Mhlongo's contract. The true cause instead appeared to be the decision of a non-statutory body, the RWC of the ANC, to replace him. This was not a proper legal basis for a non-renewal, especially in light of the terms of the contract the municipality had signed with him.

[40] I mention in passing that clause 3.3 strikes me as considerably limiting an employer's options should it not wish to renew a fixed term employee's contract. Be that as it may, there was no suggestion this contract was not valid.

[41] It is not necessary to assess whether Mhlongo's expectation of a renewal fell within the ambit of the factors in existing case law which have been held to

[1] *National Lotteries Board v South African Education and Environment* 2012 (4) 504 (SCA) at para 27.

sustain a reasonable expectation of renewal of a fixed term contract. The arbitrator did not base his decision on whether Mhlongo was permitted to work beyond the end date, that he received repeated prior renewals, or that there was on-going work for him to do. The reason given by the arbitrator was that Mhlongo had formed a reasonable expectation of continued employment because of a term in his contract of employment which specifically regulated renewal. This was clause 3.3. It provided that, absent poor performance or incompatibility as determined by the Mayor, a municipal manager at the Maphumulo Municipality could expect a renewal of his fixed term contract. I do not find the arbitrator's factual or legal conclusions on this score to be beyond the pale of what a reasonable decision-maker would have found.

[42] Indeed, in my view, the arbitrator correctly determined that Mhlongo's expectation that his contract would be renewed flowed quite naturally from the provisions of the contract itself. Indeed, this is a rare case where a non-renewal of a fixed term contract could just as well have been litigated as the enforcement of a contract.

[43] The same applies to the municipality's argument set out in supplementary heads of argument, (served a day before the matter was heard), that the fact that Mhlongo motivated for a renewal on 25 April at the Protea Hotel showed he had no positive expectation of renewal. The arbitrator convincingly dealt with this in his award by finding that the absence of any criticism from the Mayor at the Protea Hotel meeting reasonably informed Mhlongo's expectation of renewal. I point out that this finding was made in the context of clause 3.3 of Mhlongo's fixed term contract. Given what Mhlongo's contract said about his achieving renewal, the arbitrator found his expectation of renewal perfectly reasonable. I, in turn, make the same finding with regards to the arbitrator's decision.

[44] The municipality's attempt to introduce new evidence relating to Mhlongo's political party membership is both unfortunate and impermissible. Having said that, I do note that it was, notionally, possible for the municipality to have relied on a difference of political party between mayor and municipal manager as a reason against renewal. This is quite possibly the ground of

incompatibility invoked in clause 3.3 itself. However, for this reason to be invoked, would require evidence to this effect. In the manner they litigated the case at the CCMA, the municipality put all their eggs in the basket of termination by effluxion of time, instead of termination for incompatibility. To introduce new material into their basket at this stage is impermissible.

[45] The suggestion that Mhlongo's successful overturning of his earlier unfair dismissal at the CCMA somehow constitutes incompatibility with the Mayor comes dangerously close to an admission of an automatically unfair dismissal for exercising his rights in terms of the Labour Relations Act.

Order

[46] In the circumstances, the following order is made:

46.1. The application is dismissed with costs.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: Adv T Kadungure (instructed by Ngidi & Company Inc.)

On behalf of the first respondent: R Meneses from Garlicke & Bousfield Inc.