



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D790/2013

In the matter between:

SHARMALAN PERUMAL

First Applicant

IAN GRISDALE

Second Applicant

JAMES BARTMAN MALTMAN

Third Applicant

and

ENDUMENI MUNICIPALITY

Respondent

Heard: 19 March 2014 (first application)

29 April 2016 (third application)

16 November 2016 (second application)

Delivered: 29 November 2016

Summary: First Application: by applicants for declarator that their contracts did not terminate by effluxion of time and that they are still employees of the respondent. Counter application by respondent to declare fixed period contract null and void. Both applications dismissed.

Second Application: Interlocutory application to declare that R Brijraj (deponent to the respondents opposing affidavit) did not have authority to oppose the applicants' application. Application dismissed.

Third Application: Interlocutory application to declare that judgment in the first application had not been delivered by 6 August 2014. Application granted

JUDGMENT

GUSH J

- [1] In 2013, the applicants launched the first application seeking a declarator that their contracts of employment with the respondent had not terminated by effluxion time. The details of this application appear below in this judgment.
- [2] This matter was heard on 19 March 2014 and the judgment was completed during the July 2014 recess to be handed down on 5 August 2014 in the Durban Labour Court at the beginning of the third term. I was not able to hand the judgment down as I was on long leave for that term.
- [3] Despite all indications to the contrary, it appears as if the judgment was not handed down in an open court on 5 August 2014 as is reflected on the file cover and the applicants launched the second application (co-incidentally on 6 August 2014). The uncertainty regarding the handing down of the judgment on 5 August led to the applicants' filing the third application.
- [4] Given the nature of and the relief sought by the applicants' in the second and third applications, it was necessary to consider them in reverse order.
- [5] The third application, for a declarator declaring that the judgment had not been handed down was heard on 29 April 2016 and I gave judgment in this application that day ordering that as there was no evidence to establish that the judgment was in fact handed down in open court on 5 August 2014 or at all, the parties

were given leave to argue the second application viz. the declarator regarding Brijraj's authority to oppose the first application.

- [6] By this time, the first applicant had passed away and his executor did not intend pursuing the matter.
- [7] This second application by the applicants was to declare that Brijraj did not have the necessary authority to oppose the applicants' application and for his affidavit to be struck out.
- [8] When the applicants' first application was argued and although Brijraj's authority was questioned in the applicants' replying and answering affidavits, this point was not argued.
- [9] Apart from the fact that Brijraj's averment that he was duly authorised is verified by the respondent's mayor and deputy mayor, subsequent to the issue of authority being raised, the respondent filed an affidavit in the second application by the acting senior manager legal and estates, Bezuidenhout, confirming Brijraj's authority. Needless to say that the applicants also challenge Bezuidenhout's authority.
- [10] The applicants' challenge to the verification of Brijraj's authority by the mayor and deputy mayor is based on the averment that in their affidavits they both include the qualification "in so far as they relate to me". What appears to have escaped the attention of the applicants is that in asserting his authority to oppose the application Brijraj bases it on his authority as "acting municipal manager...appointed as such by **the council of the respondent.**" My emphasis). It cannot be gainsaid that this averment clearly "relates" to them. There is nothing in the papers to suggest that the mayor and/or deputy mayor were not members of the respondent's council and the applicants take no issue with either verifying affidavit.
- [11] I am accordingly satisfied that Brijraj had the necessary authority to oppose the applicants' application. In any event, given my judgment in the first application,

the applicants did not succeed in proving that they were entitled to the relief they sought based on their own papers.

[12] Given the specific nature of the two interlocutory applications, the merits of the first application were not argued during the hearing of the second and third applications. For this reason, I can find no justification for changing the judgment I originally prepared in July 2014. Having decided that it was not handed down in open court, in the absence of any evidence to establish it was, of necessity it must now form part of this judgment.

[13] The applicants in the first application apply for an order declaring:

- a. that their fixed-term contracts of employment with the respondent have not terminated by effluxion of time;
- b. that the purported non-renewal of their contracts of employment by the respondent's council be declared to be a breach thereof and that such non-renewal be held to be of no force and effect and that the non-renewal be set aside;
- c. alternatively to (b) above, that the purported non-renewal of the contracts of employment be declared to be a breach of the contract of employment and that the applicants are therefore entitled to payment of the agreed notice period contained in the fixed term contract; and in the case of the first and third respondents; that they are therefore entitled to exercise an election within 15 days of the date of court so ordering to terminate the fixed term contract by taking voluntary retirement;
- d. in the event that the relief in (b) is granted that the applicants be declared still to be employees of the respondent, entitled to the benefits of such employment with effect from 30 June 2013; and that the respondent be accordingly directed to accept the applicants' tender of their services and to perform its reciprocal obligations in terms of the applicants' contracts of employment.

[14] The respondent opposed the application and filed a counter-application seeking the following relief:

- a. that the applicants' fixed-term contracts of employment be declared unlawful invalid and that they be set aside;
- b. that the continued employment of the applicants by the respondent after 17 May 2013 be declared to be unlawful;
- c. alternatively to (b) above that the applicants' employment with the respondent be declared to have terminated on 12 June 2013 alternatively 30 June 2013.

[15] The facts and circumstances concerning this matter are largely common cause. As is recorded by the respondent in its opposing affidavit: "the parties are in general agreement as to the sequence of material events which form the background to this application".

[16] The background facts regarding the applicants' contracts of employment are:

- a. Respondent is a duly established municipality.
- b. The first applicant entered into a written contract of employment with the respondent on 13 December 2001 in terms of which contract, the first applicant was appointed to the position of Manager: Corporate Services (with effect from one November 2001). The post to which the first applicant was appointed was a managerial position reporting directly to the Municipal Manager as envisaged by section 57 of the Local Government: Municipal Systems Act.¹
- c. As was required by section 57 (at the time), the contract of employment was for a fixed period not exceeding 24 months after the election of the next council of the respondent.

¹ 32 of 2000.

- d. The next election took place in March 2006 and the first applicant's contract was renewed for a further "fixed term", once again for a period "not exceeding 24 calendar months after the next general election for councillors in the Endumeni Municipality [respondent)]"² in accordance with section 57 as it provided at that time.
 - e. The next election took place on 18 May 2011 and taking into account the 24 month period, the fixed term of the contract came to an end on 17 May 2013.
 - f. The second and third applicants were likewise employed by the respondent in 2001 as Manager: Financial Services and Manager: Technical Services respectively. Both these posts are also "section 57 posts" and their contracts were renewed in 2006 for the same fixed-term as that of the first applicant. The fixed term of their contracts, as with the first applicant came to an end on 17 May 2013.
- [17] The renewed fixed-term contracts were all renewed on the same terms and conditions as "stipulated" in the original contract save to the extent that such terms and conditions were inconsistent with the recordal of the renewed contract.
- [18] The relevant clauses of the fixed-term contracts of employment of the applicants (pertaining to their duration, renewal and consequences if not renewed) are as follows:
- a. The applicants' initial and renewed contracts of employment both provided that the contract was to continue for a fixed-term not exceeding 24 calendar months after the next general election for councillors in the respondent municipality.³

² Contract of employment: Page 56 of the indexed pleadings.

³ Applicants' contracts of employment Pages 38, 56, 63, 97, 79 and 103 respectively of the indexed Pleadings.

b. The initial contracts stipulated that at the expiry of this period, the applicants would retire voluntarily "in terms of the applicable statutes" or conclude a new contract with the municipality. The second applicant's initial contract differed from the first and third applicants' initial contracts only in that this clause contained an additional provision namely "... or continue to work for the municipality or its successor in title".⁴

c. further to this, the applicants' initial contracts stated:

'The municipality shall not be bound to renew the contract but, if the contract is not renewed for any reason, Municipality ... shall continue to employ the manager [Corporate Services, Financial Services and Technical Services] in a position of a similar nature, involving similar duties at a similar level of seniority and remuneration subject to all applicable Labour Legislation.'⁵

d. The renewed contracts all repeat this clause but add the proviso that such continued employment shall be "outside the ambit of section 57 of the Municipal Systems Act".⁶

e. In each renewed contract, that clause providing for the continued employment of the applicants is immediately followed by a clause providing that:

'At the expiry of that fixed term the manager [Corporate Services, Financial Services and Technical Services] may either retire voluntarily or conclude a new contract of employment with the municipality, or continue to work for the municipality...'⁷

[19] In addition to the above, the renewed contracts contain a clause recording the applicants' entitlement to remain members of the medical aid scheme should the applicants qualify and that the respondent is in such circumstances obliged to

⁴ Page 79 of the indexed pleadings.

⁵ Pages 38, 63 and 97 respectively of the indexed Pleadings.

⁶ Pages 56, 97 and 102 of the indexed pleadings.

⁷ Pages 56, 97 and 103 of the indexed Pleadings.

continue payment of its contributions to the medical aid scheme of the applicants' "choice".(sic)

- [20] The first and third applicants' contracts contain a provision under the heading "Termination" requiring the respondent to give the applicants "12 months' notice of termination in writing" should the respondent, at its instance, terminate the contract for any reason relating to conduct capacity performance or any reason "recognised by the law as sufficient". In such event, the contract provides that the applicant in question would be entitled to "go on voluntary pension in terms of the applicable statutes or as otherwise determined by the Labour Relations Act".⁸ The second applicant's contract contains a similar provision save that the notice period is for one months' notice should his contract be terminated by the respondent in the same circumstances.⁹
- [21] The 24-month period provided for in the applicants' contracts of employment expired on 17 May 2013.
- [22] The applicants record in their founding affidavit that they requested the respondent's speaker to convene a special executive committee and council meeting for 16 May 2013 in order to discuss their contracts of employment. In response to this request, the applicants were advised that the matter would be considered at the respondent's council meeting of 31 May 2013. At this meeting, the question of the renewal of their contracts was referred to a special council meeting to be held on 5 June 2013 and that "the contracts of the managers directly accountable to the municipal manager be renewed on a month-to-month basis on the same terms and conditions of employment contract entered into in September 2006".
- [23] On 5 June 2013, the special council did not take place but a meeting of the executive committee of the respondent was convened. This meeting, despite apparently not quorate, purported to resolve that the contracts of employment for

⁸ Pages 48 and 89 of the indexed pleadings.

⁹ Page 70 of the indexed pleadings.

the applicants would not be renewed. Pursuant to this meeting, the chairperson of the respondent's executive committee addressed a letter to each of the applicants advising them that the executive committee had resolved to terminate their services pending the resolution of the respondent's council and reminding them that their contracts have expired on 18 May 2013.

- [24] On 10 May 2013, the applicants were, on the instructions of the respondent's Mayor, escorted from the respondent's premises. The Mayor in addition issued an internal memorandum to senior officials of the respondent informing them that the applicants were no longer employed by the respondent.
- [25] The respondent's council met on 12 June 2013 and the recommendation by the executive committee of 5 June 2013 was approved and adopted as a resolution of the council. On 25 June 2013, the respondent's Municipal Manager addressed a letter to the applicants advising them that the respondent's council had, on 12 June 2013, resolved not to renew their employment contracts. On 19 July 2013, the Municipal Manager again wrote to the applicants this time informing them that the respondent would no longer make any contribution to their medical aid scheme after 30 July 2013.
- [26] It is common cause that the respondent did not address the expiry of the applicants' contract of employment prior to 17 May 2013, and specifically the respondent did not address the renewal of the contracts prior to this date. It is common cause that the applicants' fixed period contracts were not renewed before 17 May 2013.
- [27] Based on the above the applicants aver:
- a. That their contracts of employment had not terminated by effluxion of time;
 - b. That the purported non-renewal of the contracts by the respondent's council on 12 June 2013 constitutes a breach of the contract of employment and the notice provision contained in the contracts; and the termination is therefore of no force or effect. Accordingly, the applicants

argue that they remained employees of the respondent and therefore are entitled essentially to retrospective reinstatement;

- c. alternatively to the prayer that the non-renewal be deemed to be of no force and effect: that insofar as the purported non-renewal is in breach of the contracts of employment and the notice provision that the applicants accordingly are entitled to payment for the notice period provided for in the fixed period contract and that they should be entitled to exercise their election to take voluntary retirement from the employ of the respondent.

[28] The respondent in turn opposes the relief sought by the applicants and argued that:

- a. the fixed period contracts that were renewed in 2006, annexed to the applicants' application were unlawful and invalid and that they should be set aside;
- b. that the applicants continued employment after 17 of May 2013 was unlawful;
- c. alternatively to (b) above that the applicants' employment was terminated on 12 June 2013 alternatively 30 June 2013.

[29] It is unclear why the respondent finds it necessary to seek an order declaring the applicants' fixed term contracts of employment entered into in 2006 to be unlawful, invalid and that they be set aside. The respondent's argument appears to be based essentially on an averment that it was not competent for the respondent to have renewed the applicants' fixed period contracts in 2006 by virtue of the provisions of sections 56 and 66 of the Municipal Systems Act and amendments thereto prior to the date on which they terminated by effluxion of time. I am not persuaded that the amendments to the Act had retrospective effect and accordingly I am satisfied that the continued employment of the applicants up to 17 May 2013 by virtue of the renewed contract was lawful.

[30] The question to be decided in this matter is whether the applicants were and could be lawfully employed after their fixed period contracts terminated on 17 May 2013 and if so to what relief the applicants are entitled.

[31] Having regard to both the arguments of the applicants and the respondent, it appears that the issue is this:

- a. The applicants' contracts of employment expressly record that the duration of the contract was for a fixed-term and it is common cause that the fixed term expired on 17 May 2013.
- b. The respondent did not renew the fixed term contract prior to 17 May 2013 and that it expired on 17 May 2013.
- c. It is trite that where a fixed term contract expires and the employer continues to employ the employee, in the absence of any provisions to the contrary, the employee is deemed to be employed on an indefinite contract of employment.
- d. In this matter, however, the applicants' fixed period contracts specifically provided for what would happen in the event that the respondent elected not to renew the contracts. The continued employment of the applicants' was also subject to the provisions of the Municipal Systems Act.
- e. The applicants' contracts specifically stipulated that, in the event that the fixed period contract of employment was not renewed, the applicants would continue in the employ of the respondent but "outside the ambit of section 57 of the Municipal Systems Act". The applicants' fixed period contract specifically records that it is a contract entered into in compliance with Municipal Systems Act.
- f. The circumstances governing the applicants' continued employment is further qualified in the contract by the provision that at the expiry of a fixed term contract, the applicants' had the option to "retire voluntarily or

conclude a new contract of employment with the municipality or continued to work for the municipality".(sic)

- g. Given that the contract specifically records the consequences should the contract not be renewed and in addition provides for an election to be exercised by the applicants to either retire or continue in employment, there is nothing in the papers to support a suggestion that the applicants could have entertained any reasonable expectation of the contract being renewed. To the contrary, the applicants must have specifically contemplated that the contracts may in all likelihood not be renewed and for this reason addressed this possibility by including in the fixed term contract a provision for their continued employment "outside the ambit of section 57 of the Municipal Systems Act".
- h. It is clear from the papers that the applicants neither elected to retire voluntarily nor conclude a new contract of employment with the respondent.
- i. The only conclusion therefore that can be drawn therefor is that the applicants relied upon the clause providing for their continued employment by the respondent "outside the ambit of section 57 of the Municipal Systems Act..."
- j. Apart from stating that this continued employment would be at a "similar level of remuneration", it is not spelt out what duties and functions the applicants would perform or what post they would occupy. In the original contract however, it is suggested that the continued employment would be in "a position of similar nature involving similar duties at a similar level of seniority in remuneration..."

[32] Taking the above into account and that the stated intention of the parties was to specifically circumvent the provisions of section 57 of the Municipal Systems Act, the applicants continued employment was clearly intended not to be in the

capacity of section 57 employees despite it being envisaged that the applicants would to all intents and purposes be section 57 employees.

[33] That being so, it is necessary to consider whether the applicants' continued employment satisfied the requirements of the Municipal Systems Act and in particular section 66 thereof and whether such continued employment was lawful.

[34] Section 66 of the Act provides:

'Staff establishments

(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must-

(a) develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval;

(b) provide a job description for each post on the staff establishment;

(c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and

(d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.

(2) Subsection (1) (c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57.

(3) No person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality.

(4) A decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment was made in contravention of subsection (3).'

- [35] There is nothing in the applicants' papers to suggest that their continued employment as provided for in the fixed period contract formed part of the approved staff establishment or was subject to a specific job description specifically as the parties had agreed that the applicants continued employment was not as section 57 employees..
- [36] In response to the averment by the respondent that their employment was contrary to the provisions of section 66, the applicants simply averred that the posts that they occupied at the expiry of their fixed term contract did in fact form part of the staff establishment approved by the respondent. There is nothing in the applicants' papers over to justify this conclusion other than the averment that by "approving [their] continued employment respondent approved their "post-section 57 appointments on the staff establishment". This however does not take into account the requirements of the Act regarding section 57 employees. I am not persuaded that this averment by the applicants is justified given the facts. Their continued employment was therefore neither compliant with section 57 nor section 66 of the Act.
- [37] That being so, I am satisfied that the applicants at the termination of their fixed term contracts became employees of the respondent as provided for in the contract, but subject to such employment being lawful. The circumstances of the applicants prospective continued employment was specifically regulated by their fixed period contract. The applicants had the option of retiring voluntarily, concluding a new contract of employment or continuing to work for the respondent but "outside the ambit of section 57 of the Municipal Systems Act".
- [38] The applicants did not elect to retire nor did they conclude a new contract of employment. Their continued employment is therefore subject to the provisions of section 66 of the Municipal Systems Act. Consequently their continued employment was to a post that was not a section 57 post, not identified in the staff establishment nor the subject of a job description and their employment was

in contravention of section 66 (3) and as a consequence null and void as provided for in section 66(4).

- [39] In the alternative to the applicants' main prayer that the fixed period contracts had not terminated by effluxion of time and that the non-renewal was a breach of the contract, the applicants sought an order that they be found to be entitled to be paid the agreed notice pay recorded in their contracts and/or to exercise their election to take voluntary retirement.
- [40] In this regard, the applicants relied on a clause in their fixed period contract relating to a notice period. It is clear however that this clause applied only to the termination of the fixed period contract prior to its termination by effluxion of time. It is untenable to suggest that where their fixed period contract terminated by effluxion of time that the applicants would be entitled to the notice period stipulated therein.
- [41] As far as the entitlement to take voluntary retirement is concerned although the fixed period contract did not stipulate by when this election should be exercised, it was as an alternative to continued employment. It is clear from the papers that the applicants all chose and now rely on their continued employment.
- [42] Turning then to the relief sought by the applicants. The applicants have not established:
- a. that their contracts of employment did not terminate by effluxion of time;
 - b. that the purported non-renewal of the contracts constituted a breach of the fixed period contracts of employment; or
 - c. that they are entitled to an order declaring that they remain employees of the respondent and that they be reinstated.
- [43] Regarding the respondent's counter-application, it is abundantly clear that the respondent has not established that the applicants fixed period contracts were unlawful invalid or that they should be set aside. As far as the additional relief is

concerned, namely that their continued employment be declared unlawful alternatively that it be declared that the applicants' employment was terminated during June 2013, this relief does not take into account the provisions of section 66(4) of the Municipal Systems Act. In terms of this section, the employment of the applicants immediately following the termination of a fixed period contract is simply null and void and the issue of the termination of their services is irrelevant.

[44] In the particular circumstances of this matter, I am not satisfied that that a costs order against either party is justified in any of the applications.

[45] For the reasons set out above ,I make the following order:

First Application

- a. Both the applicants' application and the respondent's counter-application are dismissed;
- b. There is no order as to costs.

Second Application.

- c. The applicants' application is dismissed.

D H Gush

Judge of the labour Court of South Africa

APPEARANCES:

FOR THE APPLICANTS:

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Instructed by Livingston Leandy Inc (First Application)

McGregor Erasmus Attorneys (Second and Third Applications)

FOR THE RESPONDENT:

Adv. P Wallis (First Application)

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