

SOUTH AFRICA / JUDGMENT

Madumo v MEC for Agricultural and Rural Development, North West Province (76/2011) [2012] ZANWHC 53 (31 May 2012) [2012] ZANWHC 53

COURT
North West High Court, Mafikeng

BEFORE
N Gutta

CASE / FILE NUMBER
76/2011

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NORTH
WEST HIGH COURT, MAFIKENG
CASE NO. 76/2011
In

the matter between:

MICHAEL
MAKWATSE MADUMO
.....APPLICANT
and
BOITUMELO
TSHWENE
.....RESPONDENT
THE
MEC FOR AGRICULTURAL & RURAL DEVELOPMENT (NWP)

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The applicant applied for the following order:

“1.1. That he be appointed permanently as a Director in the Department of Agriculture and Rural Development in line with the decision to appoint his former colleagues who were on the same kind of contracts with him prior to their permanent appointments;

1.2. That the said appointment be made retrospective to 01 May 2009 and that all attendant benefits that would have accrued to him since then be payable to him with interest;

.3. That the Respondent be ordered to pay the costs of the application in the event of opposition by him.”

[2] At the commencement of the proceedings, the Court heard submissions from counsel for both the applicant and the respondent on a point in limine of res judicata, a striking out of the new issues and new cause of action raised in the applicant’s replying argument.

[3] This Court provided an ex tempore ruling and dismissed both the point in limine and the application to strike out.

[4] A further point raised by the respondent, namely, that the applicant ought to have proceeded by way of a review in terms of the Promotion of Administrative Justice Act of 2000, was correctly so, in view of the Supreme Court of Appeal decision of *Gcaba v Safety & Security* 2010 (1) SA 238 CC at paragraph 53, abandoned by the respondent.

B.

FACTS

[5] The facts briefly are that:

5.1. the applicant was employed by the respondent as a Director in the office of the Member of the Executive Committee (“MEC”)

for Agriculture, Conservation & Environment in the North West Province from 01 September 2006;

5.2. the applicant’s appointment was linked to the tenure of the then MEC, Mr E.M. Mayisela (“MEC Mayisela”), whose political term of office would come to an end in April 2009. If MEC Mayisela was removed at any stage prior to the end of the political term, the applicant’s contract would be terminated simultaneously;

5.3. the contracts of other staff members in the office of the MEC had the same clause that linked their appointment to the political term or the tenure of MEC Mayisela;

5.4. the African National Congress (“ANC”) in the North West Province recalled MEC Mayisela in July 2007 and the Premier appointed Mr Jan Serfontein (“MEC Serfontein”) as the MEC in October 2007;

5.5. the applicant's contract as Director in the office of the MEC was terminated through a letter by the Head of Department ("HOD"), Mr Paul Mogotlhe, who cited the recall of the MEC in July 2007 as reason for terminating the applicant's contract. At the same time, the applicant was advised that he would be appointed as a Deputy Director: Communications for a period of three months;

5.6. the applicant referred an unfair labour dispute to the General Public Service Sector Bargaining Council ("GPSSBC") on 22 September 2008;

5.7. on 17 September, the arbitrator ruled that the applicant's dismissal was both substantively and procedurally unfair and ordered the respondent to pay him compensation equal to three month's salary;

5.8. the respondent paid the appellant the amount as ordered by the arbitrator;

5.9. the applicant applied to the GPSSBC for a rescission of the arbitration award, which application was dismissed by the commissioner.

C. MERITS

Applicant's Case

[6] Counsel for the applicant, Mr Venter, submitted that the applicant, in essence, seeks the fulfillment of a promise which constitutes a contractual action.

[7] He submitted that MEC Serfontein, in October 2007 when addressing all the staff promised that he will retain all the staff in permanent positions. His promise was not fulfilled as the applicant was a week later informed that his contract as director was terminated and the reason given was the recalling of the MEC in July 2007.

[8] Mr Venter contended that there was a practice in the department that all supporting staff are redeployed permanently. He submitted that, save for the applicant, all the other staff whose contracts were linked to the political term or tenure of MEC Mayisela, were redeployed in permanent positions.

[9] Mr Venter submitted that corroboration of MEC Serfontein's promise could be found in the following:

9.1. In the arbitration award, reference is made to the HOD, Mr Mogotlhe's evidence, namely, that after the termination of the applicant's contract, the applicant addressed a letter to the former Premier of the North West Province, Ms Molewa ("the Premier"), for intervention. The Premier then met with the HOD, Mr Mogotlhe, and they agreed to appoint the applicant permanently as a Director in the department.

9.2. The applicant addressed a further letter to the Premier, to which the Premier responded in writing on 27 February 2008, wherein she stated the following:

“I have previously discussed the matter with the Head of Department, Mr Paul Mogotlhe who confirmed that you were still discussing the details of your redeployment from the MEC’s office to an appropriate division without losing your employment. You will however note that your redeployment/transfer will not alter your conditions of service, that is your salary but will exclude your role playing allowance, since this is only applicable to members serving in the offices of the Executing Authorities.”

9.3. At the expiry of the applicant’s second short term contract in May 2008, the HOD submitted a memo requesting MEC Serfontein to approve the extension of the applicant’s contract for a further period of three months, commencing 01 June 2008 to 31 August 2008. The MEC approved the recommendation for the extension of the contract and he wrote the following in the section for remarks: “Devise means to appoint the incumbent on a permanent basis in line with our discussion and agreement with the Head of Department”. Mr Venter submitted that the word ‘devise’ means to appoint and constitutes a promise and the words ‘without losing employment’ denote transfer in a permanent capacity, hence the applicant’s conditions of service will not be altered. Mr Venter submitted that this constitutes an instruction in the execution of a promise to appoint permanently.

[10] Mr Venter further submitted that this Court should take all the pieces of the puzzle together, which gives substance to the promise to employ the applicant permanently.

[11] He contended that it was not necessary for the respondent to advertise, interview, etc, as this process was already completed when he was appointed. He relied on Clause 7(2)(a) of the Senior Management Service Handbook (“SMS Handbook”), which reads:

“(2) Despite the above-mentioned, a department may fill a vacant post without advertising the post if the -

- (a) department can fill the post from the ranks of supernumerary members of equal grading;
- (b) department can absorb into the post an employee/member who was appointed under an affirmative action programme, if he or she meets the requirements of the post;
- (c) department plans to fill the post as part of a programme of laterally rotating or transferring members to enhance organizational

effectiveness and skills;

- (c) post is filled in terms of section 3B of the Act (deployment of HoDs); and
- d) post is upgraded and the incumbent employee/member complies with the stipulations in relation V C.6 of chapter 1 of the PSR.”

[12] Mr Venter submitted that the applicant was a supernumerary, that he was in the rank of director and is seeking the permanent post of director.

- [13] He submitted further that this Court must deal with the issue of whether a promise constitutes a contractual obligation and if the answer is in the affirmative, which he submitted it is, then the Court must grant the applicant the relief sought that he be appointed permanently as a director.

Respondent's Case

- [14] Counsel for the respondent, Mr Masilo, submitted that the applicant is asking this Court to order the respondent to fulfill a promise. The promise that the applicant relies upon is to be found on paragraph 13 of the founding affidavit and paragraph 3.1 of the arbitration award. He submitted that an analysis of these paragraphs is required.

- [15] In paragraph 13 of the applicant's founding affidavit, the applicant avers that:

"The new MEC addressed the staff when he was introduced and assured us that he will not terminate anyone's contract and that he will continue working with the staff of the former MEC. . ."

- [16] In paragraph 3.1 of the arbitrator's analysis of the evidence of the applicant, the arbitrator states:

"After the previous MEC had been recalled in June 2007, although the Department would have been within his right to terminate his contract of employment by then, the acting MEC had elected to keep him in office. Mr J Serfontein was then appointed in October 2007 and with the very first meeting he held with all staff he assured them that he will not terminate any person's contract and that he will continue to work with everyone in the office. The MEC however decided to terminate his contract a week later and he was offered the position as Deputy Director. . . ."

- [17] Mr Masilo submitted that neither the two extracts constitute nor prove a promise to appoint the applicant permanently.

- [18] Mr Masilo challenged the documents corroborating the promise. He contended that the MEC's remarks to "devise means to appoint the applicant permanently", does not mean to appoint the applicant permanently as a director, but rather to follow a process whereby the applicant can be permanently appointed.

- [19] Mr Masilo submitted further that the letter from the Premier dated 27 February 2008, to the applicant also does not state that the applicant will be appointed permanently as a director.

- [20] Mr Masilo referred the Court to the arbitration award, where the HOD, Mr Mogotlhe, testified, which reads:

"[3.4] Next Mr. MP Mogotlhe, the Head of Department, testified as the only witness for the Respondent. He stated that, as a result of the fact that the previous MEC had been recalled in June 2007, they decided to keep all staff in place until a new MEC had been appointed. He had then had a meeting with the newly appointed MEC J Serfontein some time after his appointment in October 2007, where he was informed that the MEC would take over all staff in his office with the exception of Mr. MM Madumo. He was then also instructed to offer Mr. Madumo a different contract position within the department. Furthermore, he stated that the Applicant's salary could not remain unaffected when he was offered the

new position, as he was not a permanent employee. As such, the Premier's view of the matter was incorrect and also, there was no resolution taken by EXCO in 2002 on matters such as these as she had stated. Lastly, he stated that, as he had by then agreed with the Premier that the Applicant should be permanently employed, this entailed the availability of a post, an interview process and a recommendation for the Applicant's appointment. The Applicant however declined, as he was of the view that he was being unfairly treated and in stead[sic] the Applicant decided to refer the matter to the GPSSBC."

[21] Mr Masilo further directed the Court's attention to the above extract, to the fact that the MEC informed the HOD that he would keep all the staff in his office with the exception of the applicant and the MEC further directed HOD to offer the applicant a different contract position in the department, which contract position was offered and accepted by the applicant.

[22] He submitted that the applicant could only be permanently employed if there was a post available and the applicant was interviewed and recommended for the post.

[23] The above, Mr Masilo submitted, was consistent with the Public Service Act and regulations, and the SMS handbook, which requires

that appointments be done openly and transparently in line with the Constitution of the Republic of South Africa, 1996. He submitted that the SMS handbook regulates the appointment of senior management in the public service, which requires good practice in the recruitment and selection of members of senior management and includes the advertising of vacant post for senior managers. The only exception to filling a vacant post without advertising is Clause 7(2)(a) of the SMS handbook.

[24] Mr Masilo submitted that the applicant cannot rely on Clause 7(2)(a), namely, "the department can fill the post from the ranks of supernumerary members of equal grading", because the applicant is not a supernumerary, that is, an additional person to the structure of government. Further that reference to grading is to the content of the post and content of the qualification of the candidate.

[25] He submitted that in terms of Clause 7(2), there must be a vacant post available and the applicant in casu does not seek to fill a vacant post.

[26] Mr Masilo further posed the question to the applicant why he did not seek to enforce the promise in October 2007 when the matter was referred to the bargaining council.

[27] Mr Masilo contended that the promise that the MEC made was to continue to work with everybody, not to redeploy or appoint them

permanently and that the applicant is not entitled to the relief he is seeking.

Analysis

[28] In analyzing the facts and evidence in relation to the law, I have adopted the following two-fold enquiry:

28.1. Did the MEC make a promise to the applicant to appoint him permanently as a director?

28.2. If the answer is in the affirmative, did the promise result in a binding contract which the respondent can enforce. If the answer is in the negative, then the applicant is not entitled to the relief he is seeking.

[29] The applicant is relying on the promise creating contractual obligations and a resultant breach of the contract.

[30] Although a promise may give rise to a legitimate expectation in the context of procedural fairness, the applicant only raised the issue of a legitimate expectation in his replying affidavit and did not rely on a legitimate expectation either in his written heads of argument or in Court. Accordingly, the Court did not attach any weight to the doctrine of legitimate expectation.

[31] In the context of the law of contract, a promise may be interpreted to be an offer. A person is said to make an offer when he puts forward a proposal with the intention, either express or implied, that by its mere acceptance, without more, a contract should be formed.

[32] What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance. The intention to be bound is known as *animus contrahendi*. See *Saambou-Nasionale Bouvereniging v Friedman* 1979

(3) SA 978 (A) at 991G.

[33] It is the intention that distinguishes between what Grotius called 'toezegging', a promise requiring acceptance in order to create a contract, as opposed to a 'belofte', a promise which was not intended to be accepted by anyone. See *The Law of Contract*, RH Christie, 4th Edition, pages 32–33.

[34] In *Robinson v Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 it was stated that:

"Robinson, a director of the company, had acquired certain mining property and re-sold it to the company at a profit. As a defence to the company's claim for the amount of the profit he relied on a right of pre-emption or voorkeurrecht allegedly given to him by the owner before the company was formed. The owner and his wife had said, in gratitude for assistance in establishing the beacons of their farm: "If ever we sell the farm, you shall have the voorkeurrecht as far as the purchase is concerned." The Appellate Division held that this assurance was given without animus contrahendi, from motives of gratitude, and amounted to a general promise binding on honour and conscience rather than a definite contractual

undertaking enforceable at law."

[35] Each case needs to be considered on its own facts. The Court, when determining whether the offer was made with or without animus contrahendi, examines the nature of the offer which entails the words used by the offeror, the relationship between the parties and the circumstances surrounding the making of the offer.

[36] In *Wasmuth v Jacobs* 1987

(3) SA 629 (SWA) 633D, Levy J said:

“It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror.”

See also *Homton v Bletchly* 1926 EDL 305 at 311–312.

[37] The words used by the offeror are of primary importance and if the words are “sufficiently clear a conclusion can and should be reached by ‘linguistic treatment’ alone, without resorting to the surrounding circumstances”. See *Blaike-Johnstone v Holliman* 1971

(4) SA 108 (D) 112H–117F.

[38] As Innes J, in *Pieters & Co v Salomon* 1911 AD 121 at 137, said:

“... when a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract.”

[39] When looking at the words used by MEC Serfontein on paragraph 13 of the applicant’s founding affidavit and paragraph 3.1 of the arbitration award, which words are repeated in paragraphs 15 and 16 supra, I am of the view that the words do not constitute a promise to appoint the applicant permanently. MEC Serfontein merely assured the staff that he will continue working with the staff. Subsequent thereto, the applicant was appointed in the position as deputy director for a period of three months.

[40] Furthermore, the applicant’s evidence at the arbitration hearing and the arbitrator’s analysis of evidence does not prove a promise by MEC Serfontein to appoint the applicant permanently as director.

[41] Turning to the evidence of corroboration of the promise relied upon by the applicant, firstly, in the letter from the Premier dated 27 February 2008 to the applicant, as quoted in paragraph 9.2 supra. There is no reference to the applicant being appointed permanently as a director. Furthermore, the applicant cannot rely on the Premier’s comments to prove a promise made by MEC Serfontein.

[42] The written remarks by MEC Serfontein to “devise means to appoint the applicant permanently in line with their discussion and agreement with the HOD”, cannot be interpreted to mean the appointment of the applicant permanently as a director. I agree with Mr Masilo that ‘to devise means to appoint the applicant permanently’ entails a process that has to be followed. If it was MEC Serfontein’s intention to appoint the applicant

permanently as a director, he would have directed the HOD to appoint him as a director instead of, in the same letter, approving the recommendation to extend the applicant's three months contract as deputy director. In any event, MEC Serfontein probably did not have the authority to approve or to devise appointment except for employment in the MEC's office.

[43] The director: corporate communications, C Mncwango, in a letter dated 23 June 2008 addressed a submission to the Chief Directorate

Corporate Services to appoint the applicant permanently in the post of deputy director. In his covering letter he stated:

"Please be informed that this is in line with the remarks by MEC Jan Serfontein on the submission dated 29 May 2008 on same matter."

Hence, MEC Serfontein's remarks were interpreted by Mr Mncwango to mean the appointment of the applicant permanently as deputy director and not as director.

[44] Any doubt in MEC Serfontein's intention is removed when the evidence of the HOD, Mr Mogotlhe, in the arbitration award, is considered, which is quoted in paragraph 20 supra, namely, that the applicant would be offered a different position in the department and that his salary would not remain unaffected as he was not a permanent employee. Further that the permanent appointment of the applicant will entail the availability of a post, an interview and recommendation of the post.

[45] The letter of termination addressed to the applicant dated 31 October 2007 reads:

".....

2. Clause 6.1 of your employment contract provides that your employment term is linked to the term of office of the Executing Authority. As you may be aware, the term of office for that MEC has been terminated. You[sic] contract is accordingly terminated with effect from the 31st October 2007.
3. You are however, on the directives of the MEC, appointed on contract to the post of Deputy Director; Events and Stakeholder Management in the Directorate Communications as from the 1st November 2007 up until the 31st January 2008."

[46] The content of the above letter is, in my view, consistent with the HOD's evidence at the arbitration hearing in that the applicant, as stated supra, was appointed as a deputy director for three months and after the first three months lapsed, the applicant's contract was

extended for a further period of three months, and again for a further period of three months from 01 June 2008 to 31 August 2008).

[47] Just as it may be hazardous to contract with public bodies, it is dangerous to rely on promises or assurances as to their future

action. The orthodox view is that administrators are not entitled to stipulate in advance that they will act in a certain way, as this is tantamount to fettering their future freedom of action. See *Southern Metropolitan Substructure v Thompson* [1997] 1 All SA 571 (W) at 575–6; *Rapholo v State President* 1993

(1) SA 680 (T) at 693–4.

[48] As with a legitimate expectation, a promise cannot arise if it is contrary to express statutory provisions. See *Swart v Department of Justice* 2003 ILJ 1049 (BCA).

[49] In the *Swart v Department of Justice* case *supra*, it was held that a reasonable expectation of reward cannot arise where a post has to be filled permanently and there is a requirement that the permanent post must first be advertised.

[50] Section 12A of the Public Service Act of 1994 provides for the appointment of persons under a contract by the executing authority on grounds of policy considerations. Section 12A.3 states that the contract shall include the terms and conditions agreed upon,

including the contract period, the duties, the remuneration and other conditions of service.

[51] Hence, from the HOD, Mr Mogotlhe's evidence, it was MEC Serfontein who in terms of Section 12A of the Public Service Act did not want to take the applicant into his staff but stated that the applicant should be offered a contract position.

[52] Furthermore, I agree with Mr Masilo that the applicant could only rely on Clause 7(2) of the SMS handbook if there is a vacant post. There is no proof of a vacant position. There is also no evidence before this Court to make a finding that the applicant is from the ranks of supernumerary members of equal grading.

D.

CONCLUSION

[53] When considering the relationship between the parties, the circumstances surrounding the making of the “promise” and the body of evidence relied upon by the applicant, I am unable to conclude that MEC Serfontein promised to appoint the applicant

permanently as a director.

[54] The applicant failed to satisfy the Court on a balance of probabilities that the MEC promised to appoint the applicant permanently as a director. Accordingly, there is no contract concluded between the parties, which the applicant can enforce.

E. ORDER

[55] In the circumstances, I make the following order:

a) The application is dismissed with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 03 MAY 2012

DATE OF JUDGMENT : 31 MAY 2012

COUNSEL FOR APPLICANT : ADV R. VENTER

COUNSEL FOR RESPONDENT : ADV M.H. MASILO

ATTORNEYS FOR APPLICANT : JERRY SITHOLE ATTORNEYS

ATTORNEYS FOR RESPONDENT : THE STATE ATTORNEY

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Prepared on 12 October 2026 · Esheria