

SOUTH AFRICA / JUDGMENT

Naidoo and Another v City of Johannesburg Metropolitan Municipality (J639/20) [2020] ZALCJHB 264 (27 July 2020) [2020] ZALCJHB 264

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

J639/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case

no: J639/20

In the

matter between:

UGESHNI

NAIDOO

First Applicant

TAARIQ

KAGEE

Second Applicant

and

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

Respondent

Heard:

23 July 2020 over zoom application.

Delivered:

27 July 2020 through email to the
parties.

Summary:

Alleged breach of contract of employment – fixed term contract – where end date not agreed to or in dispute.
Formation of a contract – offer and acceptance – absent that no valid and enforceable contract in place. Specific performance is a discretionary remedy available to a breach of a valid contract. Where a valid contract is absent – no remedies would be afforded including specific performance. The applicants failed to establish that the agreed end date of the fixed term contracts was 30 June 2021 as opposed to 27 May 2020. Held: (1) The application is dismissed. Held: (2) The applicants to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Specific performance is one of the remedies available for breach of a valid and existent contract. For a valid contract to exist there must be an offer and acceptance[1]. The offer must be clear and unequivocal in all its terms. In a fixed term contract one of the important and essential elements of such a contract is the end date. If there is no end date, it is impossible to speak of a fixed term contract. The issue in this matter is whether the parties have agreed on an end date or not. The applicants allege that the agreed end date of their respective contracts is 30 June 2021. On the other hand, the respondent alleges that the agreed end date of the contracts was 27 May 2020. Since the end date was reached, there is no longer a valid and enforceable contract upon which this Court may order the discretionary remedy of specific performance. Thus the focal point of this judgment would be the agreed end date as an essential term of a fixed-term contract. If a conclusion is reached that the agreed date was 27 May 2020, that conclusion would mark the end of the applicants' case. However, if a conclusion is reached that the agreed end date is 30 June 2021, that conclusion would mean that the employment relationship was terminated prematurely and in breach of the agreed term of end date. Further this Court would consider whether a discretionary remedy of specific performance may be afforded to the applicants.

[2] The application before me is launched in terms of section 77 (3) of the Basic Conditions of Employment[2] (BCEA). Might I state upfront that the Court's powers therein is to determine a dispute concerning a contract of employment and not to create a contract for the parties.

Background facts

[3] Given the limited and narrow fulcrum upon which this matter oscillates, this Court shall not provide a detailed account of the factual matrix of this matter. The two applicants entered the employment of the respondent, City of Johannesburg Metropolitan Municipality (COJ) as

the so-called political appointees. Their appointment was linked to a term of office of a political figure that served in a mayoral position of the city, Mr Herman Mashaba (Mashaba). In terms of the local government legislations, the term of office of Mashaba was to end upon the conclusion of the local government elections which were anticipated to take place around June 2021. The letters appointing the applicants to positions in the office of Mashaba, indicated that their appointments would end upon a happening of an event – Mashaba leaving office or 30 June 2021, whichever happens first.

- [4] There is no dispute that in November 2019, Mashaba resigned as an executive mayor of the city. That happening marked the end of the contractual relationship between the city and the applicants. However in December of 2017, the city had adopted a directive to deal with this type of eventualities that befell the applicants. The critical terms of the directive were that the fixed term contracts do not come to an end but they extend automatically for a further period of six months. For the applicants, the dispensation herald by the directive meant that their original contracts were automatically extended from 28 November 2019 to 27 May 2020.
- [5] On or about 10 January 2020, the applicants were sent written notifications, which were received by them on 13 January 2020. For the purpose of this judgment it is utterly important to quote in detail the contents of the written notifications. The written notification read:

‘Subject : NOTICE OF RETENTION FOR SIX (6) MONTHS DUE THE END OF THE MAYORAL TERM OF OFFICE

Dear...

1. You are hereby reminded that the City of Johannesburg has a newly elected Executive Mayor, Cllr Geoffrey Makhubo, who replaced the former Executive Mayor, Mr Herman Mashaba, flowing from his resignation on 27 Novemeber 2019.
2. In terms of City policy and acceptable practice, this therefore, primarily or secondarily, affects all fixed-term contracts linked to the Mayoral Term of Office...Your fixed-term contract with the City has therefore come to an end on 27 November 2019. Your contract has therefore been extended from 28 November 2019, until 27 May 2020.
3. In terms of the directive dated 7 December 2017, by the City Managerr, which deals with the event where the political term of office of the political principal being served comes to an end, prior to the next local government elections, the affected employee’s contract will automatically be extended for a period of six (6) months on same or new terms and conditions, or be given an option of being paid out for the remainder of six (6) months term.
4. You will be released from your substantive position and will be deployed within the City group, where your skills and services are required. Kindly report to the HOD of your department to facilitate deployment. In terms of clause 3 above, you have the option of not accepting the deployment and may request to be paid out.

5. Should you wish to be paid out for the remainder of the six (6) months, you must submit a request to do so to my office within three (3) working days from the date of receipt of this letter.

MBULELO RUDA

CHIEF OF STAFF

CITY OF JOHANNESBURG.'

- [6] The two applicants before me signed only as acknowledgement of receipt of their respective notices on 13 January 2020. The one signed by Naidoo was erroneously dated 2019 as opposed to 2020.
- [7] On the applicants' version, as foreshadowed in the founding papers, COJ (no official named) presented them, on an unspecified date, two options when Mashaba resigned. Those options were; (a) accept payment equivalent to six months' remuneration and termination of employment; or
- (b) they could continue employment and during the six months that followed, identify vacant funded positions that matched their respective skill sets within COJ to transfer to until 30 June 2021.
- [8] On their version they chose to continue for six months and they found positions during January 2020. They both transferred to the Public Safety Department as Director: Compliance Services and Stakeholder Management and Deputy Director: Compliance Services respectively.
- [9] On the respondent's version the alleged second and chosen option was never made. On 13 January 2020, a memorandum signed by one Mr William Mazibuko, the Acting Head of Department: Public Safety came into being. There is no dispute that the memorandum was prepared by the second applicant, Mr Kagee. The bone of contention on it is that the end date recorded in it as prepared by Mr Kagee is not supposed to be 30 June 2021. To that end Mr Kagee allegedly misled Mr Mazibuko who ultimately signed the memorandum. Again a detailed quote of the memorandum is critical. The memorandum reads:

'RE: TRANSFER OF STAFF FROM MMC OFFICE TO HOD OFFICE

Per discussion at the Executive Management Team (EMT) meeting today, Monday 13th January 2020 on the transfer of personnel in the Office of the MMCs appointed by the previous administration into the respective

departments. With respect to the Department of Public Safety I request that the process be initiated immediately per the table below, from the MMC Office into vacant positions within the Office of the Head of Department: Public Safety

THE TABLE OMITTED.

The affected persons have been engaged on the transfer and have agreed accordingly, to complete their term of employment to 30 June 2021 within the Department of Public Safety. I hope that the process can be expedited as to ensure stability and continuity within the Department, through optimizing available personnel.

Signed

William Mazibuko

Acting Head of Department: Public Safety.

[10] This memorandum was directed to the Acting Group Executive Director: GCSS, Mr Anthony Ngcezula (Ngcezula). There is no indication on the papers that Ngcezula acceded to the request of Mr Mazibuko. The minutes of the EMT referred to were not exhibited to this Court. It is uncertain whether it was resolved that Ngcezula was authorised to accede to certain requests. Despite that the transfer forms were prepared and signed off to be captured on the SAP system. I interpose to state that what the memorandum suggests is that the applicants were engaged by somebody, presumably Mr Mazibuko, on a transfer and they agreed to a transfer in order to complete the term of employment to 30 June 2021. I shall return to this aspect later in this judgment.

[11] On 28 January 2020, the City Manager, Dr N Lukhwareni, penned a memorandum to various officials of the city. The memorandum read:

‘SUBJECT : PLACEMENT OF DISPLACED EMPLOYEES FROM POLITICAL OFFICES

I wish to bring to your attention that flowing from the political changes within the structures of the City, a need has manifested itself to momentarily place the displaced employees from political offices, within various departments, for a limited period ending on 27 May 2020.

You are therefore requested to host these employees who will be presented to you by the City’s Human Capital management representatives for a limited period ending on 27 May 2020.

Kindly ensure that these employees are adequately resourced and productively utilised

Kind Regards

[12] On 14 May 2020, both applicants received letters from the Chief of Staff informing them that their employment would terminate because their fixed-term contracts end on 27 May 2020. This on the applicants’ version induced a sense of shock on them. Instantaneously they engaged the relevant officials to register their grouse. That culminated in a meeting of 25 May 2020. Both parties give a different account of this meeting. The meeting was recorded but the transcription is poor. Ms Naidoo also presented her own contemporaneous notes of this meeting. Both representatives agreed that whatever was discussed in this meeting is not relevant to the case that the applicants seek to make. I pause to mention that what the applicants are seeking to demonstrate is that the officials present concluded the meeting on the basis that on 27 May 2020, the fixed-term contract would not end, which conclusion

lends credence to their averment that the contract was to end on 30 June 2021. I shall return to this aspect later in this judgment.

- [13] Resultantly, the applicants were not paid their dues for the month of June 2020. On 26 June 2020, the applicants referred a dispute to the Bargaining Council alleging unfair dismissal. The referred dispute is still pending. As advised, the applicants launched the present application on an urgent basis.

Evaluation

- [14] The limited and narrow point of dispute – end date – requires this Court to consider whether an agreement on the alleged end date – 30 June 2021 was reached or not. Although this Court was not completely satisfied that the relief sought was urgent, I nonetheless entertained the matter on an urgent basis. During argument, Mr Itzkin appearing for the respondents did not press on lack of urgency.

The origins of the date 30 June 2021

- [15] On the facts of this case, the date of 30 June 2021, is one that emanates from the contract entered into with Mashaba. It must be pointed out that once the earlier event happens the other event is overtaken and ceases to exist in terms of the duration of the fixed-term agreement. Put differently, when Mashaba resigned – the event that happened first – there was no other event that would present itself regarding the lifespan of the fixed term contract. Only the new dispensation ushered by the directive presents itself. Therefore, the period to end on 30 June 2021, becomes history. In terms of the directive, which has not been placed in dispute, a new dispensation is herald, which is (a) continue employment for 6 months or (b) terminate employment and be paid for 6 months.
- [16] The trite principles of the formation of a valid contract are that there must first be an offer and thereafter an acceptance. What initiates the formation is the making of an offer. In an employment context, ordinarily, an employer is the one to make an offer. There are three elements of a valid offer. Those are (a) communication; (b) commitment; and (c) definite terms. In other words, a definite offer must be communicated on acceptance of which a contract forms.
- [17] During argument, I persistently asked Mr Hafagee, appearing for the applicants as to who made the offer and when. In other words, who proposed the date of 30 June 2021 as the end date? It ought to have been proposed by COJ. In their founding papers a vague allegation is made that COJ presented two options. One of the options so presented carried this date.
- [18] COJ is a legal entity and is incapable of speaking for itself. In Makate[3], Jafta J stated the law as follows:

“If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal.”

- [19] No clear case was made as to who in COJ proposed this date as the end date. However, proper analysis of the memorandum prepared by Mr Kagee and signed by Mazibuko, reveals that the date was “proposed” by Mazibuko as the author of the memorandum. The memorandum suggests that the date was agreed to by the applicants. On those simple basis one may jump into an improper conclusion that an offer and acceptance was achieved. However, the memorandum was addressed to a certain official who had to accede to the request.
- [20] As pointed out above there is no evidence that the said official acceded to the request. Mr Mazibuko is the Head of the Department. According to the memorandum of 10 January 2020, the mandate of Mazibuko was to facilitate a deployment in line with the directive, which is for the period of six months. Section 55 of the Municipal Systems Act[4] (MSA) empowers the City Manager to appoint staff. Such power is capable of being delegated in writing in terms of section 59 of the MSA. The City Manager is in terms of section 66 (1)(d) of the MSA authorised to establish a process or mechanism to regularly evaluate staff establishment and if necessary review the staff establishment. Vested with those statutory powers, on 28 January 2020, the City Manager specifically directed a momentary placement until 27 May
2020. Therefore, Mazibuko was not empowered to make and accept an offer to end the fixed term on 30 June 2021. No suggestion was made by the applicants that Mazibuko had ostensible authority to bind the COJ. Ostensible authority ought to be pleaded[5]. None was pleaded by the applicants. In the vague allegations made in the founding papers no official was named.
- [21] Assuming for a moment that the offer of 30 June 2021 was made by Mazibuko on 13 January 2020, the repository of statutory powers changed the offer. With that assumption the question that immediately arises is who is by law

empowered to make the offer. Undoubtedly, the City Manager is legally empowered. On application of the principle of legality functionaries

of state organs cannot exercise powers that they do not have in law.[6]

- [22] That notwithstanding, there is no credible evidence that an unequivocal offer was communicated. If Mazibuko, on the assumption that he is duly authorised, communicated this offer, then the applicants would not have been vague in their founding papers. The events happened a mere seven months ago and not years ago. On the probabilities, this date was introduced by Mr Kagee and unfortunately, Mr Mazibuko did not pay attention to it. The respondent disputed the validity of the alleged agreement to end on 30 June 2021 on the basis that Mazibuko was misled by Mr Kagee. That simply implies that the authority of Mazibuko to bind the COJ was challenged. As pointed out in Makate, if the principal were to deny that it conferred authority, the other party who concluded the juristic act with the agent may plead estoppel in replication. Other than challenging the asserted misleading, the applicants did not plead estoppel in this matter. In the absence of a valid offer an agreement

enforceable in law is incapable of being reached.

[23] Therefore I conclude that the origins of this date is from the applicants and not COJ as it should be. The date is at odds with three other evidentiary materials, namely the directive; the memorandum of 10 January 2020 and the memorandum of 28 January 2020. I agree with both representatives that the incidents of 25 May 2020 is a red herring. Already on 14 May 2020, COJ had pinned its colours to the mast and made its intentions clear. The officials present on that day would not have been empowered to create another end date for COJ. The narrative by the applicants that one official mentioned that come 27 May 2020, they shall not terminate does not advance their punted case of an agreed end date by one bit.

Can specific performance be ordered?

[24] Specific performance is a remedy for a breach of a contract. In this instance the applicants failed to make out a case for the contract they are punting for. The probabilities do not establish such a contract. The fixed term contract ended on 27 May 2020. To that extent the applicants are not entitled to any contractual remedies. The applicants have referred a dispute alleging an unfair dismissal. Perhaps their case is that somebody in the city created a legitimate expectation for them that their fixed term contracts will be renewed on those punted terms. Therefore, the applicants must make that case at the relevant forum.

Conclusions

[25] Returning to the relevant factual question in this matter, on the conspectus of the evidence and an application of the Plascon-Evans rule the conclusion I reach is that the agreed end date is 27 May 2020 as opposed to 30 June

2021. As a result, the applicants must fail entirely. They are not entitled to any contractual remedies, be it specific performance or damages. The applicants must have foreseen a dispute of fact on the end date yet they chose motion proceedings in circumstances where it is trite that no final relief may be granted in motion proceedings where a genuine dispute of fact arises. Motion proceedings is no place for dispute of facts. What then remains is the issue of costs.

Costs

[26] Mr Hafagee implored this Court not to make an order as to costs because COJ is to blame for the alleged confusion, and it would thus be harsh to apply the principle of costs following the results. However, this is a civil matter and the applicable principle is that of costs following the results[7]. Mr Itzkin submitted that the principle must apply. I do not see any reason why such should not be the case. Accordingly, costs must follow the results.

[27] In the results, the following order is made:

Order

1. The matter is heard as one of urgency.

2. The application is dismissed.
3. The applicants to pay the costs on a party and party scale jointly and severally the one paying, the other to be absolved.

G. N. Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr I Haffegge of Haffegge Roskam Savage Attorneys, Johannesburg.

For the Respondents: Advocate R Itzkin

Instructed by:

Saljee Govender Van Der Merwe Inc, Parktown.

[1] See *Da Silva v Janowski* 1982 (3) SA 205 (A)

[2] No. 75 of 1997.

[3] See fn4 below.

[4] No. 32 of 2000.

[5] See *Makate v Vodacom*

[2016] ZACC 13 (26 April 2016)

[6] See: *Imatu obo Espach v Polokwane Local Municipality* (J1171/17) [2020] ZALCJHB 30 (6 February 2020) at Para 28.

[7] See *Ekurhuleni Metropolitan Municipality v SAMWU*

[2015] 1 BLLR 34 (LAC) and *Legal Aid SA v Theunissen* [2020] 4 BLLR 370 (LAC). Compare *Crosnier v Easigas (Pty) Ltd* (J2808/2014) [2016] ZALCJHB 284 (23 March 2016).

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