

SOUTH AFRICA / JUDGMENT

Potgieter v George Municipality
(14/09) [2010] ZAWCHC 202; (2011) 32
ILJ 104 (WCC) (23 September 2010)
[2010] ZAWCHC 202

COURT

Western Cape High Court, Cape Town

BEFORE

Zondi

CASE / FILE NUMBER

14/09

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CIRCUIT LOCAL DIVISION)

CASE NO: 14/09

In the matter between:-

CHRISTIAAN WILHELMUS POTGIETERPlaintiff

and

GEORGE MUNICIPALITYDefendant

JUDGMENT DELIVERED ON 23 SEPTEMBER 2010

ZONDI, J

Introduction

- [1] The plaintiff sues the defendant for the payment of the sum of R1 398 225-50 for damages he allegedly suffered as a result of repudiation of the contract of employment by the defendant.
- [2] The defendant defends the plaintiffs claim contending that its termination of the plaintiffs employment contract did not constitute repudiation. It asserts that the plaintiff was employed on a fixed term contract whose life was linked to a particular event and the contract ended when the event occurred.

Pleadings

[3] The plaintiff alleges in the particulars of claim, firstly, that in terms of the employment contract he was employed by the defendant as a manager in the office of the defendant's executive mayor, secondly that his employment with the defendant was subject to the provisions of the Local Government: Municipal Systems Act, 2000 and the Municipal Finance Management Act, 2003, thirdly, that the plaintiff's appointment was for a fixed term linked to the term of the office of the executive mayor, who at that stage was Alderman B Petrus ("Petrus") and finally that the defendant repudiated the contract when it terminated his employment.

[4] In support of the case based on the premature termination of the contract of employment by the defendant, the plaintiff alleges:

"5. Dit was te alle relevante tye binne die kennis en vooruitskoning van die partye tot die ooreenkoms dat die ampstermyn van die Uitvoerende Burgemeester 'n periode van vyf jaar is vanaf die datum van sy verkiesing.

6. Dit was ook te alle relevante tye die bedoeling van die partye tot hierdie ooreenkoms dat Eiser se kontrak vir dieselfde vyf jaar

periode sou duur en dat Eiser die Bestuurder sou wees in die kantoor van die ampsbekleer naamlik die Uitvoerende Burgemeester."

[5] The plaintiff accordingly contends that the defendant repudiated the contract by terminating his employment before the expiry of the five year period.

[6] The defendant admits that it concluded the contract of employment with the plaintiff and that it terminated it on 07 April 2008.

[7] The defendant, however, denies that it unlawfully terminated the contract of employment. The defendant avers that the plaintiff was employed on a fixed term contract in terms of which the plaintiff's fixed term contract of employment was linked to a particular event, namely the term of office of Petrus as an executive mayor, and that when that event occurred, the plaintiff's contract came to an end. In the alternative, the defendant pleads that it terminated the contract of employment because of the plaintiff's fraudulent failure to disclose at the time of his employment that he had a criminal record relating to fraud.

Statement of the

issues

[8] At the commencement of the trial the parties agreed that the issue of quantum of the claim should be separated from the merits in terms of Rule 34(3) of the Uniform Rules of Court and such was made an order of Court.

- [9] In consequence of the agreement, only two issues remained for determination, namely the correct interpretation of the contract of employment and the question of cancellation based on the plaintiffs fraudulent non-disclosure.

The Evidence

- [10] Both the plaintiff and the defendant testified.
- [11] The essence of the plaintiff's evidence is that on or about 10 October 2007 he was employed by the defendant as a manager in the office of the executive mayor. The vacancy for which the plaintiff applied had been advertised in a local newspaper. The advertised position was a "five year contract appointment linked to the term of the office of the current executive mayor".
- [12] In response thereto the plaintiff completed and submitted to the defendant the necessary application forms for the vacant position.
- [13] It is common cause that the application forms inter alia required of the plaintiff to disclose if he was ever convicted of a criminal offence. The plaintiff answered the question in the negative. He stated:

"Geen rekord. Verwys definisie vervat in wetgewing afdeling: 47 subafdeling(s)(1) van Artike! 158 van die Grondwet Wet 108 van 1996."

- [14] The plaintiff believed that his record of a previous conviction had expired as it was more than 20 years old. When the plaintiff completed the application forms he knew that it was important for him to answer all the questions honestly and that furnishing false information could constitute a basis for his dismissal.
- [15] It was for this reason that during the interview which he subsequently held with the defendant's officials, he mentioned that he had a criminal record for cheque fraud which occurred in 1988 and for which he was sentenced to 5 years imprisonment.
- [16] After the interview the plaintiff was informed by the defendant that he had been a successful candidate. The defendant offered him the position. The plaintiff accepted the defendant's offer and thereafter concluded a contract of employment with the defendant. He commenced his duties on or about 15 October 2007. In terms of accountability the plaintiff reported to the Assistant Municipal Manager for administrative purposes and politically to the executive mayor.
- [17] In terms of clause 2 of the contract the plaintiff's employment was for a fixed term and linked to the term of office of the executive mayor, Alderman B Petrus, and would terminate a month after the end of [Petrus'] term of office. The plaintiff testified that Petrus was appointed as an executive mayor on 14 March

2006 and that at the time of his employment Petrus had been in office for about one and a half years.

- [18] The plaintiff further testified that everything went well in his work until 1 April 2008 when the defendant informed him of its intention to terminate his contract of employment in terms of clause 2.3 of the contract 'in the light of the fact that Alderman Basil Petrus' term of office was terminated on 07 March 2008" and a new mayor had been elected on 31 March 2008.
- [19] Following upon his representation to the defendant the plaintiffs date of termination was extended from 30 April 2008 to 31 July 2008.
- [20] In the meantime, on 8 May 2008 the plaintiffs attorney on his instruction wrote to the defendant expressing dissatisfaction at the defendants decision to terminate his services and threatened the defendant with legal action unless it changed its decision.
- [21] In response thereto the defendant wrote to the plaintiffs attorneys inter alia stating:
- "Dit was dan juis die bedoeling van die Raad om 'n dienskontrak met 'n kliënt te sluit was saamval met die normale termyn van die Uitvoerende Burgemeester synde vir vyf (5) jaar, maar sou die vermelde ampstermyn voortydig beeindig word, u klient se dienskontrak outomaties tot 'n einde kom aangesien 'n onhoudbare situasie sal ontstaan as die nuwe verkose Uitvoerende Burgemeester sy/haar eie Bestuurder in sy/haar kantoor wit aanstel".
- [22] During cross examination by Mr Coetsee on behalf of the defendant, the plaintiff testified that it was his understanding that his term of office as a manager was commensurate with the normal municipal general elections which take place in five year cycles and that he had expected to be employed in that position until the next general elections in 2011. He, however, conceded that his contract makes no mention of the 5 year period. It merely states that he was employed on a fixed term contract linked to the term of office of the executive mayor B Petrus. However, he did not expect that Petrus would be removed from office before the end of the five year term.
- [23] The plaintiff had expected to remain in his position even if the executive mayor vacated his office before the end of his term of office as he was appointed to manage the office of the executive mayor and not the person.
- [24] Mr Cecil Africa (Africa) testified for the defendant. At the time of the plaintiff's employment Africa was employed by the defendant as a municipal manger. He concluded the contract of employment with the plaintiff on behalf of the defendant during October 2007.
- [25] Africa was also present at the plaintiffs interview He noted down the questions which were put by the panelists to the plaintiff and the latter's answers thereto. Although at the time of the interview Africa knew the plaintiff as a person, he was not aware that the plaintiff had a criminal record.
- [26] With reference to the notes he took down during the plaintiffs interview (exh A78-83), Africa testified that the following question was put to the plaintiff:

"Het u enige geraamtes in die kas of het u in u toopbaan enige eitiese of morele oordeelsfout begaan?"

[27] The plaintiffs answer was that he had a criminal conviction for fraud which was overturned on appeal. In this regard Africa referred to a copy of the transcript of the plaintiffs interview (exh.B16) in which the plaintiff stated:

"Eventueel is ek wet skuldig gevind. Ek het geappeileer en my appeal het geslaag..."

[28] Africa testified that based on the plaintiffs answer he took a decision to recommend the plaintiff for employment which he would not have taken had he known of the true nature and extent of the plaintiffs criminal convictions.

[29] With regard to the nature of the plaintiffs appointment, Africa testified that the plaintiffs appointment as a manager was for a fixed period, which was linked to a term of office of a politician (the executive mayor) the plaintiff was employed to serve under. He stated that it was an appointment under section 57 of the Local Government: Municipal Systems Act, 2000. Africa testified that the politician for whom the plaintiff was appointed was an executive mayor, Mr Basil Petrus, whose term of office was 5 years from the date of his appointment after the municipal general elections. In this case the executive mayor was from the Democratic Alliance (DA) and at the time of his appointment the plaintiff was a Democratic Alliance ward councillor.

[30] In contextualising the employment of the plaintiff Africa testified that it is the practice to link the term of employment of the manager to the term of office of the executive mayor for whom the manager is employed. Africa explained the reason for doing so. He said the executive mayor is a political appointee who gets replaced if a different political party wins the municipal general elections or the control of the council of the relevant municipality. When a new executive mayor gets appointed he employs his own manager to manage his office. Africa stated that it was on the basis of these considerations that the defendant concluded a fixed term contract of employment with the plaintiff.

Legal Principles

[31] The question is whether the defendant was entitled to terminate the plaintiffs contract employment when it did in April 2008 and on the basis of the two grounds advanced by it.

[32] I wish to point out from the outset that the plaintiff sues for damages arising out of an alleged repudiation of the contract by the defendant. The plaintiff does not allege that the termination of his contract of employment by the defendant constituted an unfair dismissal. The plaintiffs claim is not founded on the Labour Relations Act. It is grounded on the common law contract.

- [33] In fact, Counsel for the plaintiff in argument disavowed any reliance on the provisions of the Labour Relations Act for the relief the plaintiff seeks. The plaintiff does not seek reinstatement and/or compensation as a remedy. He seeks damages. This distinction must be borne in mind in determining the issues which are presented in this matter.
- [34] The first issue to be decided involves the interpretation of the contract of employment, in particular the meaning of the phrase "fixed term contract linked to the term of office of the executive mayor, Alderman B Petrus" appearing in clause 2.1 of the contract of employment. The question is whether clause 2.1 allows the defendant to terminate the plaintiffs contract of employment in the event of vacation of the position by the executive mayor for whom the plaintiff was employed.
- [35] The golden rule of interpretation is to seek the intention of the parties at the time the contract was entered into (*Joubert v Enslin* 1910 AD 6), and the language in the document is to be given its grammatical and ordinary meaning, unless this would lead to some absurdity, or some repugnancy or inconsistency with the rest of the document (*Coopers & Lybrand and Others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 767 E).
- [36] Recently the SCA held in *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* [2010] 2 ALL SA 195 (SCA) at paragraph 13 that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also in a manner which will give it a commercially sensible meaning, and this requires a Court to construe a contract in context
- within the factual matrix in which the parties operate.
- [37] Mr Sonnekus submitted for the plaintiff that the phrase in clause 2.1 of the contract, means that the fixed period for which the plaintiff was employed was 5 years. He argued that the plaintiffs interpretation was in line with the factual matrix in which the parties operated. He pointed out that the executive mayor is appointed for a term of 5 years after the municipal general elections. He submitted that this is the period which the parties had in mind when they concluded the contract
- [38] In accordance with this approach, Mr Sonnekus submitted that the defendant repudiated the contract when it terminated the plaintiffs employment in April 2008.
- [39] In response. Mr Coetsee submitted on the defendant's behalf that the plaintiffs period of service was linked to the term of office of the executive mayor and that the plaintiffs employment would automatically terminate when the executive mayor, to whose term of office the plaintiffs contract was linked, vacated his office.
- [40] Mr Coetsee pointed out that it was important to observe that the contract of employment, upon which the plaintiff sues, does not state that the plaintiff was employed for a period of 5 years, nor does it stipulate that the plaintiff would be employed until the next municipal elections.

[41] In the alternative, Mr Coetsee argued that the defendant was entitled to terminate the plaintiffs contract of employment when it discovered that the plaintiff had fraudulently failed to disclose at the time of his employment that he had a criminal conviction for fraud.

[42] I have to construe the meaning of clause 2.1 read with clauses 2.3 and 15 of the contract, Clause 2 of the contract provides as follows;

"2.1 the Employer hereby employs the Employee on fixed term contract linked to the term of office of the Executive Mayor, Alderman B Petrus.

2.2 The Employee hereby accepts employment as Manager in the Office of the Executive Mayor, subject to the terms and conditions in this contract and subject to the Local Government: Municipal Systems Act 2000 and the Municipal Finance Management Act, 2003

2.3 The employment of the Employee with the Employer commences on 15 October 2007, regardless of the date of signing this contract and terminates one month after the current Executive Mayor's term of office ends".

[43] Clause 2.1 renders the plaintiffs fixed term contract of employment linked to the term of office of the executive mayor, Alderman B Petrus. Clause 2.3 determines the date of commencement of the plaintiffs employment as well as the date on which his employment will terminate. The date of commencement is 15 October 2007 and the date of its termination is a month after the current executive mayor's [Alderman B Petrus] term of office ends.

[44] Clause 15.2 also specifies the date of termination of the plaintiffs employment It states that it terminates at the end of the period referred to in clause 2.3 namely a month after the end of current executive mayor's term of office.

[45] Clause 15.4, which allows the defendant to terminate the contract on account of the plaintiffs misconduct or a breach of trust between the plaintiff and the executive mayor, unacceptable performance or incapacity, is irrelevant to this enquiry. It specifically requires a termination made under it to be effected in words, the continued employment of the plaintiff as a manager depended on the duration of Petrus' term of office as an executive mayor. Thus if Petrus vacated his position as the executive mayor, the plaintiffs contract of employment would come to an end a month after the date on which Petrus ceased to be an executive mayor.

[49] The use of the word "linked" in clause 2.1 is significant- In my view, it was intended to emphasise the connection or relationship between the period of employment of the plaintiff and the term of office of Petrus. The Concise Oxford English Dictionary 10,h ed, Revised, defines the word "link' as a "relationship or connection between people or things..."

- [50] Secondly, the construction contended for by Mr Sonnekus is not supported by the plaintiffs own evidence. The plaintiff testified that the life of his contract was 5 years because the term of office of the executive mayor for whom he was employed, is 5 years. This assertion cannot be correct because at the time of the plaintiffs employment in October 2007 the executive mayor had been in office for about one and a half years.
- [51] In the result I reject the construction contended for by Mr Sonnekus and hold that the plaintiffs employment was for a fixed term linked to a term of office of Petrus as an executive mayor and that the plaintiffs employment could be terminated on a month's notice after Petrus vacated his position as an executive mayor. Accordance with Labour Relations Act. The provisions of clause 15.4 do not therefore apply as the plaintiffs case is not founded on the Labour Relations Act.
- [46] I disagree with Mr Sonnekus' contention for two reasons. Firstly, the construction contended for by the plaintiff is violative of the integration rule, which provides that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction, and in the event of a contractual dispute between the parties, no evidence to prove its terms may be given to contradict, alter, add to or modify the contract (KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA) at paragraph 39).
- [47] The plaintiffs interpretation of the contract has the effect of altering or modifying the contract. In the first place there is no reference to a "five year" term in clause 2 of the contract. Secondly, the construction contended for by the plaintiff contradicts clause 2.1 of the contract, which provides that the plaintiffs fixed term contract is linked to the term of office of the executive mayor, Mr B Petrus. On a proper construction of the contract, the plaintiffs term of employment does not exist independent of the term of office of Petrus.
- [48] The period for which the plaintiff was employed is intrinsically linked to the term of office of the person in the office of the executive mayor as opposed to the office of the executive mayor. In the instant case the term of office of Mr B Petrus as the executive mayor determines the fate of the plaintiffs employment. In other
- [52] It therefore follows that the defendant did not repudiate the contract when it terminated the plaintiffs employment in April 2008.
- [53] In light of the conclusion I have reached it becomes unnecessary to consider the defendant's alternative defence based on the plaintiffs fraudulent non-disclosure. The Order
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The Order

- [54] In the result the plaintiffs claim is dismissed with costs.

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Prepared on 10 October 2026 · Esheria