



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 3099/ 11

In the matter between:

PAX LINDA RAMELA

Applicant

and

THE PREMIER: FREESTATE PROVINCE

Respondent

Date heard: 24 July 2013

Date of judgment: 25 September 2013

Summary: Exception to the statement of case.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] The respondent in this interlocutory application seeks an order upholding its exception to the applicant's statement of case. The respondent has in this regard raised several complaints against the applicant's statement of case. The application was brought subsequent to the respondent serving the notice on the applicant calling on him to remove the cause of the complaint in terms of Rule 11 of the rules of this Court¹ read with Rule 23(1) of the High Court Rules².

Background facts

- [2] It is common cause that the applicant who was initially appointed on a one year probationary period was subsequently appointed on a fixed term contract as Head of the Department of Health: Free State Province (HOD). The appointment was made in terms of the provisions of the Public Service Act of 1994 ("the Act"), the Public Service Regulations of 2001 (the "Regulations"), the Senior

¹ Rule 11 – of the rules of the Labour Court reads as follows:

1The following applications must be brought on notice, supported by affidavit:

(a) Interlocutory applications;
 (b) other applications incidental to, or pending, proceedings referred to in these rules that are not specifically provided for in the rules; and
 (c) any other applications for directions that may be sought from the court.

2The requirements in subrule (1) that affidavits must be filed does not apply to applications that deal only with procedural aspects.

3If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt any procedure that it deems appropriate in the circumstances.

4 In the exercise of its power and in the performance of its functions, or in any incidental matter, the Court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

² Rule 23 (1) of the Rules of the High Court reads as follows: Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception. [Subrule (1) amended by GN R2164 of 1987, by GN R2642 of 1987 and by GN In the exercise of its powers and in the performance of its functions, or in any incidental matter, the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act.

Management Service Hand Book ("SMS Hand book") and the written employment contract.

- [3] The applicant contends in the statement of case that consequent to the above legislative and regulatory frame work the following terms are applicable to his employment contract:

9.1.1 The respondent would be entitled to re-determine the term of the applicant's office in accordance with sections 12 (1) and (2) of the Act.

9.1.2 The redetermination would be subject to an agreement being reached between the respondent and the applicant pertaining to the redetermination.

9.1.3 Should this (ie the re-determination) occur, it will constitute a breach of contract, and this will entitle the applicant to be compensated for damages.

9.1.4 The compensation thus payable would be for the unexpired portion of the applicant's term of service.

9.1.5 The applicant would, should he have less than 10 years' of pensionable service, be entitled to a gratuity payment calculated at 15% of the average salary over the last 24 months that the applicant had received, multiplied by his period of pensionable service, plus an additional $\frac{1}{3}$ of this amount.

9.1.6 A leave payout was to be made to the applicant in respect of any unused leave credit of the previous and or current cycle which was applicable on the basis provided for in chapter 3.

9.1.7 The applicant would be entitled to a pro rata 13th cheque.

9.1.8 The applicant would be entitled to medical benefits, calculated as a cash benefit of 12x the applicant's contribution as at the last day of his service.

9.1.9 Special additional benefits were to be paid to the applicant, should his contract of service be re-determined before the expiry of his term, in accordance with section 37 (2) (d) of the Public Service Act. The applicant here pleads that although the aforementioned section has been repealed his entitlement to the additional benefit remains, because of *inter alia* the provision of the employer agreement, and the SMS Hand book.”

- [4] Clause 4 of the contract of employment deals with the various circumstances under which the contract may be terminated. In terms of clause 4.1.5 the employee’s term of office may be terminated through the re-determination of the original term of office. And clause 4.3 of the contract of employment reads as follows:

‘Subject to the provisions of section 16 (5) and 12 (1) or (2) of the Act, and the Labour Relations Act, 1995, either party may, after consultation and agreement, terminate the Contract before the expiry of an original term of office or an extended term of office, by giving the other party three months’ notice of termination, ...’

- [5] Section 16 (5) of the Act³ deals with termination of the contract at the instance of the employee and on the basis of early retirement. And section 12 (1) and (2) of the Act⁴ deals with appointments of head of department by either the President in the case of national departments or the Premier in the case of provinces.

³ Section 16 (5) of the Public Service Act reads as follows: “Subject to the terms and conditions of a contract contemplated in section 12(2), an executive authority may, at the request of an employee occupying the office of head of department, allow him or her to retire from the public service before the expiry of the term contemplated in section 12(2) , or any extended term : contemplated therein, and notwithstanding the absence of any reason for dismissal in terms of section 17(2) or the contract concluded with the employee, as the case may be, if sufficient reason exists for the retirement.

⁴ Section 12 of the Public Service Act reads as follows: “ **Appointment of heads of department and career incidents**

- [6] The process that led to the termination of the applicant's employment commenced with the letter dated 26 November 2009 in which the respondent advised him that it wished to re-determine the employment contract and to have it terminated by 30 November 2009. The letter indicates that the re-determination was done subject to the agreement of the applicant. Furthermore the letter states that the applicant would be paid a lump sum in terms of section 3 (5) read with section 12 (4) of the Act.
- [7] Section 12(4) provides that if it is in the public interest and it is allowed by a determination made in terms of section 3 (5) of the Act⁵, an executive authority may, on the conditions provided for in such determination, grant a special service

(1) Notwithstanding anything to the contrary contained in this Act, but subject to this section and section 2(2B) and 32(2)(b)(i), the appointment and other career incidents of the heads of department and government component shall be dealt with, in the case of -

- (a) a head of a national department or national government component, by the President; and
 - (b) a head of the Office of a Premier, provincial department or provincial government component, by the relevant Premier.
- (2) (a) A person shall be appointed to the post of head of department in terms of section 9 for such term, not exceeding five years, as the relevant executive authority may approve.
- (b) The head of department shall conclude the prescribed contract within the prescribed period.
- (c) The relevant executive authority may at the expiry of the term of office of a head of department or at the expiry of an extended term of office extend the term for a period of not more than five years at a time.

⁵ Section 3 (5) of the Act reads as follows: (5)(a) Subject to the Labour Relations Act and any collective agreement, the Minister may make determinations regarding any conditions of service of employees generally or categories of employees, including determinations regarding a salary scale for all employees or salary scales for particular categories of employees and allowances for particular categories of employees.

(b) A determination involving expenditure from revenue shall be made in consultation with the Minister of Finance.

benefit to head of the relevant department before or at the expiry of his or her term of office or an extended term, or at the time of retirement or dismissal from the public service.

Section 3 (5)

[8] The amount referred to in the letter, would appear to be payment for the remaining period of the employment contract. In terms of the letter the amount is to be calculated on the basis of gross annual remuneration of the applicant as at 31 August 2012 and calculated as follows:

- 'first 3 months: 100% of your gross monthly remuneration, times the number of months;
- the next 9 months: 80% of your gross monthly remuneration, times the number of months;
- 12 months thereafter or part thereof :60% of the gross monthly remuneration, times the number of months; and
- the remaining months thereafter or part thereof: 30% of the gross monthly remuneration, times the number of months of part thereof.'

[9] As concerning payment for the re-determination of the office and the granting of benefits the letter states the following:

5.1 Relevant pension benefits in terms of the rules of the Government Employees Pension Fund with respect to a head of the Department who retires as provided for in section 16(3) of the Public Service Act, 1994, and referred to in paragraph 2.3 (6) of the Senior management Service Handbook (SMS) Handbook;

5.2 Medical assistance in accordance with paragraph 23. 6 (7) of Chapter 8 of the SMS Hand book;

- 5.3 The payment of leave benefits in respect of any unused annual leave credits of the current leave cycle; and
- 5.4 Resettlement benefits in accordance with the resettlement policy of the Department as contemplated in paragraph 5.6 of Chapter 3 of the SMS Hand book.'

[10] The respondent indicated that payment of the above amounts would be made within 30 days on condition the applicant submitted all the relevant documents.

[11] The applicant responded to the above letter in the letter dated 1 December 2009, and in essence rejected the offer which had been made by the respondent. He indicated that he was willing to accept the offer on the following conditions:

1. 'The Department must make a final after-tax lump sum payment equal to the after-tax benefits that I would have received over the remaining term of my contract in full and final settlement of all potential claims against the department.
2. The pension pay-out must be equal to that which would have been calculated at the end of my term (31.08.2012) including employer contributions to a retirement fund of my choice.
3. No restrictions must be placed on future economic activities including gainful employment at senior management level within any government department or entities related to government. Should such trade restrictions be imposed, fair compensation equal to potential loss of earnings and potential damage to my career should be paid.'

[12] The applicant was advised in the letter dated 18 December 2009 that his employment contract was terminated.

Submissions

[13] It was contended during the hearing of this matter on behalf of the respondent that the proposition put forward by the applicant seeks to have the Minister of Public Service to make a new determination specifically to address his case. It

was further contended on behalf of the respondent that the proposition that the re-determination can only be made when there is an agreement to do so by the parties, was unsustainable as it did not disclose a cause of action.

- [14] The respondent contends that the applicant's statement of case does not disclose a cause of action, it is vague and embarrassing because the applicant does not indicate his reaction to what was tendered and also does not say what was not paid to him and why he is entitled to that payment. In other words he does not say by how much he was underpaid.
- [15] As concerning the issue of special benefits the respondent contends that the case of the applicant lacks the cause of action firstly because the applicant in that regard relies on section 37(2) of the Act which has been repealed. Section 37 (2) of the Act has been replaced by section 12 (4)⁶ which firstly requires that it must

⁶ Section 12(4) of the Act reads as follows: (4) If it is in the public interest and it is allowed by a determination made in terms of subsection 3; and subsection 3 reads as follows: (3) (a) The President may transfer the head of a national department or national government component before or at the expiry of his or her term, or extended term, to perform functions in a similar or any other capacity in a national department or national government component in a post of equal, higher or lower grading, or additional to the establishment, as the President considers appropriate.

(b) The Premier of a province may transfer the head of the Office of the Premier, a provincial department or a provincial government component before or at the expiry of his or her term, or extended term, to perform functions in a similar or any other capacity in the Office of the Premier, a provincial department or a provincial government component of the relevant province in a post of equal, higher or lower grading or additional to the establishment, as the Premier considers appropriate.

(c) The President may, in consultation with the Premier or Premiers concerned, transfer before or at the expiry of his or her term, or extended term-

(i) the head of a national department to perform functions in a similar or any other capacity in the Office of a Premier, a provincial department or a provincial government component; or

(i) the head of a national department to perform functions in a similar or any other capacity in the Office of a Premier, a provincial department or a provincial government component; or

(ii) the head of the Office of a Premier, a provincial department or a provincial government component, to perform functions in a similar or any other capacity in the Office of a Premier, a provincial department or provincial government component of another province or in a national department or national government component, in a post of equal, higher or lower grading or additional to the establishment, as the President, in consultation with the Premier or Premiers, considers appropriate.

(i) (d) A transfer in terms of this subsection may only occur if- the relevant head of department consents to the transfer; or

(ii) after due consideration of any representations by the head, the transfer is in the public interest.

(e) Any person appointed as head of department or government component who is transferred in terms of this subsection-

(i) during his or her term of office or extended term

in the public interest and also that it is discretionary benefit. It is on this basis that the respondent contends that it is difficult to see how the applicant could claim the benefit without indicating on what basis he is entitled to the discretionary benefit.

- [16] In relation to severance pay the respondent contends it is not a self-standing claim to an additional severance.

Evaluation

- [17] In my view the issues raised by the applicant in the statement of case and challenged by the respondent in the exception are issue which can best be determined by the trial Court.
- [18] It is common cause that the respondent has the power in terms of the legislative frame work, which has been incorporated into the employment contract, to re-determine the period of the fixed term employment contract of senior managers employed in the public service. In essence this means that the respondent has the power to terminate a fixed term contract prior to its expiry date. The Act treats the cancellation of the contract prior to its expiry date (re- determination) as breach of contract. The legislature addresses the breach of the contract through a ministerial determination. It is through the Ministerial determination that the formula for damages arising for the breach due to re-determination worked out. The determination by the Minister is made in broad terms and is intended to apply in general to cases involving re-determination of a senior management contracts. In other words the re-determination is not made on a case by case basis.

(aa) shall for the unexpired portion of that term not suffer any reduction in salary and change of other conditions of service, unless he or she consents thereto; and

(bb) to a higher post shall not by reason only of that transfer be entitled to the higher salary applicable to the higher post; and

(ii) at the expiry of his or her term of office, or extended term, shall receive the salary and

(i) conditions of service attached to the capacity in which he or she is so transferred

- [19] There seems to be no dispute as concerning the formula provided for in the Ministerial determination to address the issue of damages that arises as a result of the breach of the contract. The issue raised by the applicant has to do mainly with the question of consultation and agreement to re-determine the contract as provided for in clause 23.6.3 of the SMS hand book.
- [20] The Premier seems to also understand the legal position to be that an agreement was to be concluded between the parties before the term of office of the applicant could be re-determined. The Premier's letter states very clearly that the applicant was required to agree. The issue of whether the making of the determination without the agreement of the employee is a material breach that would entitle the applicant to claim damages in addition to those stipulated in the formula stated in the Ministerial determination is a matter for the trial Court.
- [21] The issue of the severance pay is also a matter for consideration by the trial Court. Although the severance pay was previously provided for in the repealed section 39 of the Act, it was not abrogated as it remained in the SMS hand book. The use of the section in the pleadings may well be found to be more of form than substance when the trial Court considers the matter.
- [22] The mandamus claim arises from the contention that the Minister of Public Service "must be consulted" (my emphasis) as concerning the fairness of the severance payment. Although clause 23.6 says that the severance payment is subject to the treasury approval that does not detract from the fact that the Minister must be consulted. The treasury comes into play once the Minister has determined whether the severance pay is fair or otherwise. It would appear on the face of the clause that the party responsible for initiating the consultation in the context of the present case is the Premier. This in my view seems to create a right to have the Minister determine the fairness or otherwise of the severance pay. That right is not absolute as the amount that would have to be paid arising from the Minister's determination is subject to the approval by treasury.

- [23] Turning to the issue of jurisdiction, I am of the view that the reading of the papers reveal very clearly that this is a contractual claim which the Court has the power to determine in terms of the provisions of section 77 of the Basic Conditions of Employment Act. The argument that says that the Court lacks jurisdiction simply because the pleadings do not specifically mention that section is placing form over substance and adopting approach that is highly technical.
- [24] The final issue to deal with concerns the non-joinder of the Minister. The test to apply in determining joinder or non-joinder is whether the party to be joined has material interest in the subject matter. The interest of the Minister in the present matter is indirect and not substantial. The complaint of the applicant in this respect is not that the Minister has already been consulted and that he or she has made a decision which the applicant is unhappy with. The issue concerns the duty of the Premier to submit the payment of severance to the Minister to determine whether or not the severance is fair. The situation would be different had the Minister already made a determination as to the fairness of the severance pay and the applicant was complaining about such a determination.

Conclusion

- [25] In summary, the essence of the applicant's case is that he did not consent to the redetermination of his employment contract. In other words the respondent re-determined the contract without the consent of the applicant. It is on this basis that the applicant says that the respondent was in breach of the contract. The damages which the applicant is seeking seem to go beyond those determined in terms of the Minister's determination.
- [26] It is clear from the arguments presented by the parties that the word "severance pay" used in the context of this matter is something that requires interpretation, a task best suited for the trial Court.
- [27] It would seem to me that there is a case to answer where an employee complains that the redetermination is unlawful in that the process as envisaged in

terms of the employment contract, the Act, and the SMS hand book had not been followed.

[28] In light of the above reasons, I find that the respondent's exception stands to fail. Accordingly, I see no reason in law and fairness why the costs should not follow the results.

[29] In the premises, the applicant's exception is dismissed with costs.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate S. Grobler.

Instructed by: Honey Attorneys.

For the Respondent: DI Berger SC and V September.

Instructed by: State Attorney.

LABOUR COURT