

IN THE EASTERN CAPE HIGH COURT, BHISHO

CASE NO: 550/10

In the matter between:

MALIBONGWE MTUZULA

Applicant

and

**THE SUPERINTENDENT-GENERAL FOR HEALTH,
EASTERN CAPE PROVINCE**

1st Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH,
EASTERN CAPE PROVINCE**

2nd Respondent

JUDGMENT

Y EBRAHIM J:

- 1] During June 2006 the Department of Health, Eastern Cape Province ('the Department'), placed an advertisement in the Sunday Times newspaper inviting applications for the '3 year contract post' of Chief Director: Infrastructure Development at its head office, Bhisho. In response to this advertisement the applicant submitted an application on a prescribed form.

2] The applicant, who was short-listed with another applicant, was interviewed by a panel constituted by the Department and emerged as the successful candidate. The Director-General of the Department conveyed this to the applicant in a letter dated 20 December 2006, which referred to 'APPOINTMENT IN POST OF CHIEF DIRECTOR : INFRASTRUCTURE DEVELOPMENT IN HEAD OFFICE (3 YEAR CONTRACT POST)' and informed him, *inter alia*, that 'this offer is subject to you assuming duties on 01 January 2007'. Attached to the letter was a document bearing the heading 'DEPARTMENT OF HEALTH FIXED EMPLOYMENT CONTRACT AGREEMENT' that set out the terms and duration of the applicant's employment and which he was required to sign and submit within fourteen days of assuming duty.

3] On 2 January 2007 the applicant commenced employment and signed an employment contract which Mr L M Boya, the Head of Department, in turn signed on 15 January 2007. The applicant has annexed the contract to his founding affidavit and it records that his employment with the Department was for a period of five years from 1 January 2007 to 31 December 2011. The respondents dispute that this is the contract that was forwarded to the applicant for signature. I shall discuss this more fully later.

4] It appears that the applicant's relationship with the Department proceeded without incident until he received a letter dated 26 April 2010 from Dr R M Wagner, the Department's Acting Executive Manager HR and Corporate Service. In the letter Dr Wagner notified the applicant that he had reason to

believe the applicant had committed serious misconduct and intended suspending or transferring him until an investigation into his alleged misconduct or disciplinary proceedings, if instituted, was finalised. Details of the misconduct were given in the letter and the applicant was informed that if he wished to object to his proposed suspension or transfer he had to submit written representations by not later than 09h00 on 29 April 2010.

- 5] The applicant's attorneys, in a letter dated 28 April 2010 which was delivered on 29 April 2010 at 09h00, replied that the applicant denied the allegations of misconduct and would urgently seek appropriate relief from the Court should the Department proceed with the suspension or transfer.
- 6] On the same day, 29 April 2010, the first respondent wrote to the applicant to notify him, *inter alia*, that he was being suspended, on full pay, with immediate effect for alleged serious misconduct. Further, the applicant had to vacate the premises as his presence might jeopardise an investigation and was to hand over certain items that were the property of the Department.
- 7] There were no further developments until 1 September 2010 when the applicant was served with a letter dated 10 August 2010 addressed to him by the first respondent, which read as follows:
- 'RE: TERMINATION OF YOUR EMPLOYMENT
1. It has come to my attention that your employment with the Department in fact terminated, through effluxion of time, on or about 31 December 2009. This on

account of the fact that you were appointed in terms of a three year contract to the post of Chief Director, Infrastructure Development with effect from 1 January 2007.

2. It appears that as a result of an error you were retained on the Department's PERSAL system and continued to render services to the Department, notwithstanding that your services had in fact terminated.
3. In the premises you are hereby notified that, with immediate effect, payment of your salary will be stopped on persal [sic] and your services will be taken as having terminated on 31 December 2009.
4. You are invited to make written representations to my office by no later than five (5) days from the date of receipt hereof, as to why the Department should not proceed as stated in paragraph 3 above.

Yours faithfully

Dr S M Pillay

Superintendent-General

Date: 10/08/2010'

8] The applicant's attorneys responded by furnishing a copy of the applicant's 'fixed employment contract' and stated that 'it is clearly evident that our client was employed for a period of five (5) years.' Moreover, 'that the premise upon which the decision to terminate his employment was taken, is incorrect and accordingly our client demands your retraction of this termination failing which legal action will be instituted against you.'

9] This was followed by further correspondence between the parties without the dispute being resolved. As a result, on 25 October 2010 the applicant instituted this application, on an urgent basis, for an order setting aside the termination of his contract of employment and to prevent the respondents from stopping payment of his salary.

10]The first and second respondents opposed the application and raised two points *in limine* in their answering affidavit. In view of the conclusion I have reached in regard to the merits I do not deem it necessary to deal with these.

11]The respondents dispute the applicant's claim that he was employed on a fixed term contract for the duration of five years. In substantiation of their claim that the applicant was employed for a period of three years the respondents assert the following: the post the applicant applied for was advertised as one for a fixed term of three years and not five years; during the applicant's interview by the Department's panel it had been raised specifically that the appointment would be for a fixed period of three years; the letter informing the applicant of his appointment to the post of Chief Director: Infrastructure Development in the Department's head office stipulated it was a '3 YEAR CONTRACT POST'; the contract attached to the letter of appointment addressed to the applicant specified he was being employed for three years (a copy thereof is annexed to the respondents' answering affidavit); attached to the report sent to the Member of the Executive Council for Health, Eastern Cape Province ('MEC for Health') recommending the applicant's appointment was the newspaper advertisement inviting applications for a three year post.

12]The respondents admit that the contract signed by the applicant and Mr Boya reflected that applicant's period of employment was five years. Mr Boya could not explain how this error occurred but assumed that the contract was handed to

him for signature without the report to the MEC and the letter of appointment and that he signed it on the assumption that it was correct. However, the true intention of the parties was that the applicant was to be employed for a period of three years and due to a patent error common to both parties the period was reflected as five years. In view of this, the respondents assert that they are entitled to rectification of the contract to reflect the correct period of three years.

13]The issues addressed by the respondent have not been dealt with by the applicant in his founding and replying affidavits. He has not disputed that the post he applied for was the one described in the advertisement. In reply to the respondents' assertion that it was specifically raised during the interview that it was a three year contract post the applicant stated he had no recollection of this. Then, in reply to the respondents' averments concerning the letter of appointment and the accompanying contract drawn up by Mr Masoka, the Department's Human Resources Manager, the applicant said he had 'no interest in the unsigned letter of appointment or the unsigned draft contract'. The applicant has not denied receiving this contract but contented himself with the explanation that '[t]he fact that such a document has not been signed by myself clearly suggests that I never received same.' The applicant has also not explained why the signed contract reflects his period of employment as five years instead of three years if he applied for the post that was advertised as a three year post. Moreover, except for insisting that the only binding document between him and the Department was the contract annexed to his founding affidavit, the applicant

has not contradicted the assertions of the respondents that the signed contract did not reflect the true intention of the parties regarding the duration of the applicant's employment.

14] Mr Zilwa's submissions, on behalf of the applicant, were directed primarily at the fact that the document annexed to the applicant's founding affidavit was the only signed contract and reflected the applicant's period of employment as five years, terminating on 31 December 2011. Whereas the respondents averred that the five year period was an error and that Mr Boya had not intended signing such a contract, Mr Boya never stated that he thought the period reflected therein was three years and had not noticed it was five years, when he signed. Mr Boya contended that he could only assume that the contract was handed to him for signature without the relevant accompanying documentation. Mr Zilwa submitted that in the absence of a substantive application, rectification of the contract could not be considered. The written contract stood unrectified and the integration rule (which forms part of the parol evidence rule) prevented the respondents from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely on the contract as altered.¹ The respondents had now abandoned the application for rectification and consequently the only contract the Court could take cognisance of was the one annexed to the applicant's founding affidavit.

15] Mr Euijen, who appeared for the respondents, confirmed the respondents were

¹ *Johnston v Leal* 1980 (3) SA 927 (A) at 943B

not proceeding with an application to rectify the contract. Notwithstanding this, the respondents were persisting with rectification as a defence. He submitted that if a contract was reduced to writing but did not correctly set forth the actual agreement between the parties, it could be corrected² as the underlying agreement was the contract and the written record merely evidence of its outward and visible sign.³ Formal rectification of the contract need not be sought⁴ and it was sufficient to raise this as a defence to a claim by the other party seeking to enforce the contract which the document appears to evidence.⁵ Mr Euijen disputed the relevance of the parol evidence rule as it only applied where a party had pleaded an inconsistent alternative agreement without relying on rectification. This was not the case here. In any event, in *Johnston v Leal*, which did not deal with rectification, the Court had permitted extrinsic evidence 'to fill in the blanks' in a written document.

16]The version of the respondents, unlike that of the applicant, is not inherently improbable and is accepted. The applicant has not clarified how it came about that the parties agreed to a period of five years when the advertisement specified a period of three years and this had been reiterated when the applicant was interviewed by the panel. The version of the respondents, on the other hand, establishes that there was an earlier agreement, arrived at antecedently by the

2 *Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W) at 273B-C

3 *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) at 310A-B

4 *Strydom v Coach Motors (Edms) Bpk* 1975 (4) SA 838 (T) at 841E-H

5 *Standard Bank of SA Ltd v Cohen* (2) 1993 (3) SA 854 (SECLD)

parties,⁶ that the period of the applicant's employment was three years. Their version confirms that it was the intention of the parties to enter into a contract of employment for not longer than three years and that the signed contract did not correctly record their actual agreement. I accept that due to a *bona fide* common error the period of employment was incorrectly reflected in the contract as five years and not three. I am satisfied furthermore that the defence of rectification renders the right which the applicant seeks to enforce open to dispute. Accordingly, the defence pleaded by the respondents in their answering affidavit is well founded and must be upheld.

17]The applicant has failed to establish that he is entitled to the relief prayed for⁷ and in the circumstances the application falls to be dismissed.

18]In regard to costs, it is trite that in the absence of cogent reasons not to order otherwise, costs should follow the result. I can find no reason to depart from this and consequently award costs in favour of the respondents.

19]In the result, the following order shall issue:

a) The applicant's application is dismissed; and

b) The applicant is ordered to pay the costs of the application.

⁶ *Benjamin v Gurewitz* 1973 (1) SA 418 (AD) at 425H to 426A

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 620 at 634E-F

Y EBRAHIM
JUDGE OF THE HIGH COURT

8 March 2011

Heard on:

9 November 2010

Judgment delivered on:

14 March 2011

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EAST LONDON