



IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Not Reportable

CASE NO: D 1164/12

In the matter between:

ADVOCATE MEYER THABO PUTINI

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING
COUNCIL**

1st Respondent

PROFESSOR KARTHY GOVENDER N.O.

2nd Respondent

EDUMBE MUNICIPALITY

3rd Respondent

Heard: 23 July 2014

Delivered: 15 October 2015

Summary judgment:

JUDGMENT

FARRELL AJ

BACKGROUND

1. This matter was set down as an opposed review application in the Labour Court, Durban on 3 July 2014. Having read the arbitration award, the record and transcript of the arbitration proceedings in the South African Local Government Bargaining Council before Commissioner Professor Karthy Govender and heard argument by the Applicant and Third Respondent's legal representatives, the review application was dismissed with costs.
2. The reasons for dismissing the review application and making an award with costs on the party and party scale, are simply provided.

REASONS

3. The Applicant had been employed as a Municipal Manager of the Third Respondent in terms of a fixed term contract of employment for a three (3) year period ending 31 December 2011.
4. From the record of the proceedings before the Bargaining Council and the award of the Second Respondent at that arbitration, that there were

allegations of serious misconduct against the Applicant in respect of which the Applicant was never found guilty but that the Third Respondent, Edumbe Municipality, the Applicant's employer alleged that the Applicant's contract of employment terminated prior to 31 December 2011 by mutual agreement. The pre-arbitration minute for the arbitration before the Bargaining Council required that the Commissioner decide the following issues: -

- “1. Was the termination of the employment contract by agreement?*
- 2. If not, was the termination for a fair reason and in accordance with a fair procedure?*
- 3. If not, is the Applicant entitled to relief (compensation and legal costs) he is seeking?*
- 4. If so, what is the quantum of his compensation?”*
5. It follows that as the Commissioner found, the contract of employment terminated by agreement and that it was therefore not necessary to determine the other three (3) issues recorded in the pre-arbitration minute.
6. The arbitrator found that the termination of the contract of employment was by agreement and it is that finding which the Applicant seeks to review and set aside. The question before the arbitrator was simply if there was no dismissal the Bargaining Council would not have jurisdiction to arbitrate the dispute. The arbitrator of the Bargaining Council made a particularly detailed and thorough award and it is this award which the Applicant seeks to review and

set aside. The Applicant's review application hinged on the following specific arguments: -

- 6.1 that there was no verbal agreement terminating the contract of employment;
- 6.2 the non-variation clause in his contract of employment is applicable; and
- 6.3 the "improper expansion of the dispute".

WAS THERE AN AGREEMENT TERMINATING THE CONTRACT OF EMPLOYMENT?

- 7. The arbitrator after a thorough consideration of the evidence before him in making a number of adverse findings in regard to the Applicant's evidence finds that in fact there was an agreement terminating the Applicant's fixed term contract of employment prematurely. In fact, the finding of the arbitrator is that the agreement finalised on 24 August 2011 was complied with by the Edumbe Municipality and that the Applicant was paid out for the "full remainder of his contract from the public purse and has enjoyed other privileges such as access to the premises that he occupied". The Applicant was not required to provide any services to the Edumbe Municipality.
- 8. As the duration of the fixed term contract had come to an end and the Applicant had been paid for the full duration of the contract, he could not seek reinstatement but was in fact seeking "maximum compensation plus legal

costs". The Applicant is in fact seeking something beyond what his contract of employment entitled him to. Irrespective of whether there was an agreement or not to terminate the contract of employment prematurely the Applicant was in fact remunerated for the entire contractual period.

9. In the circumstances whether or not there was an agreement to terminate the contract prematurely the Applicant was paid for the full duration of the contract and the current contract had come to an end simply by an inflection of the entire three (3) year period of the original agreement. On that basis alone there can be no dismissal.

THE APPLICABILITY OF THE NON-VARIATION CLAUSE

10. Again, the Commissioner at the Bargaining Council hearing the arbitration dealt with this aspect of the Applicant's case in detail considering the legal arguments and the cases referred to by both parties.
11. In coming to his decision on the issue of the non-variation clause the Commissioner placed reliance on the Judgment in Nyandeni Local Municipality v Hlazo¹. In applying the Judgment in the Nyandeni Local Municipality case, the arbitrator cannot be said to have acted unreasonably.

IMPROPER EXPANSION OF THE DISPUTE/ARBITRATOR HAS NO JUDICIAL POWER

¹ 2012 (4) SA 261 (ECM).

12. There is no basis on which the Applicant can place reliance on such allegations. Mr Crampton was correct when he states: -

"It is common cause that the Second Respondent was required to determine: "the validity or effect of the verbal agreement in view of the non-variation clause in the contract of employment".

13. As Mr Crampton states in his Heads of Argument at paragraph 12.3: -

"12.3 It must, therefore, follow that Second Respondent was required to determine whether, in the circumstances, the non-variation clause could, as a matter of public policy, be enforced."

14. In the circumstances, there is no basis on which to review and set aside the award of the Second Respondent.

15. Having read the transcript of the proceedings before the Bargaining Council and the award of the arbitrator there is certainly a case to be made out that this review application is vexatious and frivolous. There were serious allegations of misconduct against the Applicant, which were never proved and his conduct through the arbitration proceedings was certainly not beyond reproach. The Applicant was also paid a considerable sum of money by Edumbe Municipality, a municipality under severe financial strain at the time.

16. Application for Review dismissed.

17. The Applicant is to pay the Third Respondent's costs on an party and party scale.

D M FARRELL
Acting Judge

Appearances :

For the Applicant : S B Mgaga from Garlicke and Bousfield Inc

For the Respondent : Adv D P Crampton instructed by PKX Attorneys