REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J2764/2013

In the matter between:

CAPRICORN DISTRICT MUNICIPALITY **Applicant**

and

MOATLHODI ISAAC MOTSUKI **Respondent**

Heard: 24 April 2014

Delivered: 05 May 2014

Summary: (Application for rectification – fixed term contract – sufficient that the applicant pleads that the document to be rectified is incorrect because of an error.)

JUDGMENT

LAGRANGE, J

[1] This is an application to rectify a contract concluded between the Capricorn District Municipality (the applicant) and Mr M I Motsuki (the respondent) employed as an Executive Manager: Community Services in Polokwane. The essential dispute between the parties is whether a document signed in April 2012 annexed as Annexure "NDM1" to the founding affidavit correctly reflects that the respondent's fixed term contract is only due to terminate on 1 May 2015, rather than 15 May 2014, or 15 June 2014. Ancillary to this dispute is a dispute over the respondent's current annual performance contract and when it expires. It is common cause that the respondent only commenced work in his new post on 15 June 2009.

[2] It must be said at the outset that the notice of motion and founding affidavit set out different purported start and end dates from each other, which did not make the application a model of clarity. However, I am satisfied that the essential dispute between the parties concerns whether or not they entered into a five year fixed term contract commencing on 15 June 2009, or a term just short of six years.

[3] The respondent insists that there is no error in the document, which correctly reflects his contract termination date as 1 May 2015. Effectively, the applicant is contending that the contract was for a five year period whereas the respondent contends for a fixed term contract of nearly six years. It is common cause that the contract signed in April 2012 was intended to replicate the original contract concluded between the parties in 2009 which the applicant said had been mislaid. The applicant contends however that the stipulated end date of 1 May 2015 was inserted in error.

[4] The respondent tendered another document identical in all respects to the document signed in April 2012 which he claims is the original contract sent to him by the applicant under cover of an e-mail in November 2009, which he states he was instructed to print, sign and return to the applicant. The

signed copy attached to his answering affidavit only reflects his signature and is undated.

[5] Both documents contain two conflicting clauses. The first clause which is identical in both documents reads:

> *"2.1 The Employer hereby employs the Employee on a five year fixed term contract and Employee hereby accepts employment as the manager community services, subject to the terms and conditions contained in this contract and subject to the Local Government: Municipal Systems Act, 2000 and the Municipal Finance Act, 2003. The main duties that the Employee will be expected to perform are: ..."*

(Emphasis added)

The second clause which is also identical in both contracts save for the last portion (which is underlined in the version stated below) reads:

> *"2.2 The employment of the Employee with the Employer commences on **01 June 2009** regardless of the date of signing this contract and terminates on **01 May 2015**. It is specifically recorded that this agreement is the replacement of an earlier agreement that has been mislaid and could not be found after a diligent search."*

The underlined portion of the clause only appeared in the document signed by both parties in April 2012. The emphasised dates were highlighted in bold in both documents.

[6] The respondent claims that when he signed the version of the contract that was e-mailed to him in November 2009 he focused on the dates emphasised in clause 2.2 and did not notice clause 2.1. He further stated:

> *"As I was already working and receiving a salary from the applicant, I quickly glanced at my remuneration package and the performance aspects and then signed the last page thereof in November 2009, the exact date which I cannot recall." (sic)*

[7] The applicant had also sought declaratory relief in respect of the annual performance agreement concluded between the parties for the financial

year 1 July 2013 to 30 June 2014. Originally, it sought to have the termination of that agreement determined as 15 May 2014, which in itself made little sense. Subsequently, in an amended notice of motion, it asked that the termination date to be determined as 15 June 2014. The annual performance agreements are also relevant to the dispute about the length of the respondent's contract. Two copies of performance agreements for the financial year as 1 July 2011 to 30 June 2012 and 1 July 2013 to 30 June 2014 were attached to the applicant's founding affidavit. The applicant's Municipal Manager who deposed to the affidavit claimed he was unable to locate copies of previous performance agreements. The respondent does not dispute the validity of these documents nor does he deny the conclusion of prior performance agreements. The first provision of both performance agreements is identical and reads:

> *"1.1 The Municipality has, in terms of section 57 (1) (a) of the Local Government Municipal Systems act, No. 32 of 2000 (' the Systems Act') entered into a contract of employment with the Manager for a period of five years, commencing on 15 June 2009."*

[8] In the 2011/2012 performance agreement, the date 15 June 2009 appears in handwritten script. Once again, the respondent disclaims any specific knowledge of this provision saying that he never read the performance agreements properly in spite of completing certain sections thereof. In particular he did not note the date in clause 1.1, as it was clause 2.2 of the contract of employment which, in his words, was "stuck in my memory".

[9] The provisions of the current performance agreement which are relevant to the duration of the agreement on the following:

> *"2.1 The Parties agree that the purposes of this Agreement are to:*
>
> *2.1.1 comply with the provisions of section 57(1)(b), (4 A), (4 B) and (5) of the Systems Act as well as the contract of employment entered into between the parties;...*
>
> *...*

3.1 Notwithstanding the date of signature this agreement will commence on the 1 July 2013 and will remain in force until a new performance agreement including a Performance Plan and Personal Development Plan is concluded between the parties as contemplated in clause 3.2.

3.2 The Parties will review the provisions of this Agreement during June each year. The parties will conclude a new performance agreement including a Performance Plan and Personal Development Plan that replaces this agreement at least once a year by not later than 31st July each year."

[10] The provisions of the Systems Act referred to in clause 2.1.1 of the performance agreement read:

"57 Employment contracts for municipal managers and managers directly accountable to municipal managers

(1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only-

(a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).

...

(4A) The provisions of the Municipal Finance Management Act conferring responsibilities on the accounting officer of a municipality must be regarded as forming part of the performance agreement of a municipal manager.

(4B) Bonuses based on performance may be awarded to a municipal manager or a manager directly accountable to the municipal manager after the end of the financial year and only after an evaluation of performance and approval of such evaluation by the municipal council concerned.

(5) The performance objectives and targets referred to in subsection (4) (a) must be practical, measurable and based on the key performance indicators set out from time to time in the municipality's integrated development plan."

[11] The applicant claims it became aware of what it claims was the error in the employment contract when it concluded the current performance agreement and realised that its term extended beyond the five year fixed term of the respondent's employment which should end in mid-June 2014. When it turned to look at the contract itself it was realised that the employment contract also reflected the wrong date. In July 2013 the applicant tried to obtain the respondent's agreement to rectify the dates and, when this was unsuccessful, it wrote to the respondent giving him an ultimatum to sign an amending addendum, failing which it would approach a court to rectify matters. The rectification sought, rather ineptly, to have the start and end dates in clause 2.2 of the employment contract amended to read 15 June 2009 and 14 May 2014, respectively. The respondent never replied to the ultimatum claiming that the applicant's confusion about starting and ending dates coupled with its apparent ignorance of what was intended in the original contract justified his lack of response. It ought to have been patently obvious to the applicant that there was a problem with the termination date it had identified because it was a month short of a five year term of employment that would end on 14 June 2014. These calculation errors are replicated in the careless drafting of the notice of motion. Even the amended version of the notice motion still contained errors in that it incorrectly identified the 'correct' termination date as 15 June instead of 14 June 2014. Nonetheless, as mentioned already, the nub of the dispute is that the applicant seeks to rectify the contract to reflect a five year fixed term of employment whereas the applicant seeks to rely on the dates in the clause 2.2 of the contract.

[12] In relation to the approximate six year term he seeks to rely on, the respondent does not advance any reason why it should have been six years, rather than five as the applicant alleges. All he says is that he

noticed the period in the contract which was sent to him and that it accorded with his retirement planning. It is common cause that the advertisement of the post and limited discussions which took place as well as the correspondence exchanged prior to the confirmation of the applicant's appointment did not deal with the period of the fixed term contract.

[13] The main material facts which emerge from the affidavits and attachments are that:

13.1 The applicant commenced work in his post on 15 June 2009.

13.2 The existing replacement contract signed by both parties in April 2012, which supposedly reproduced the original contract concluded in 2009, contains irreconcilable provisions about the intended duration of the contract: clause 2.2 containing specific dates indicating a contract commencing on 1 June 2009 and ending five years and eleven months later, and clause 2.1 confirming the employment of the respondent for a fixed term contract of five years.

13.3 The 2011/12 and 2013/14 annual performance agreements concluded by the parties in the latter half of 2001 and in July 2013 respectively, both confirm the existence of a five year fixed term contract of employment commencing on 15 June 2009 consistent with clause 2.1 of the employment contract but inconsistent with clause 2.2.

13.4 No reason is advanced why the applicant would have entered into a contract just short of six years duration.

13.5 The respondent himself simply says he agreed because it suited his retirement planning without elaborating thereon. He does not contend there was a specific reason why the parties agreed on this period.

13.6 The applicant contends the dates in clause 2.2 of the replacement contract were an error and do not conform with the intention to conclude a fixed term contract of only five years, which is expressed in clause 2.1 and in the performance agreements. The respondent denies this was an error, and claims simply not to have noticed these

conflicting provisions in the agreements he signed, fixated as he was on the dates in bold typeface in clause 2.2.

Evaluation of the merits

[14] The respondent initially raised a challenge to the Municipal Manager's authority to initiate the application, but withdrew this after receiving the replying affidavit. He further attacked the Municipal Manager's authority to bring the application as it amounted to an attempt to determine or alter the applicant's conditions of employment, and that power could only be delegated to an executive committee or executive mayor in terms of s 60(1)(b) of the Systems Act, but *Mr Van Graan SC*, appearing for the respondent conceded, rightly, that an application for rectification of the existing terms of an employment contract was not the same as the determination of conditions of employment which is envisaged in that provision.

[15] The respondent also claimed that the application was fatally defective, because the nature of the error on which the applicant sought rectification was not clearly pleaded.In the case of ***Offit Enterprises & others v Knysna Development Company and others*** **1987(4) SA (CPD)** cited by *Mr Manchu*, for the applicant, the court had to consider an application by the defendant for further particulars relating *inter alia* to the manner in which the applicants had come to hold a mistaken belief about the correctness of an agreement they sought to rectify and how the defendant arrived at that mistaken belief as well. The court held:

> *"When the plaintiff seeks rectification of the agreement, one can hardly expect him to prove how the defendant came to make the mistake. In fact the mechanics of the mistake are irrelevant, so also whether it is a reasonable error or not. Whatever happened, once the Court is satisfied that the agreement recorded is not the same as the actual agreement arrived at the Court will grant the rectification."*[1]

The court further stated by way of an example reminiscent of features of this case:

[1] At 27D-E, cited with approval in ***Tesven CC and another v South African Bank Of Athens*** **2000 (1) SA 268 (SCA)** at 274, [15].

> *"The conclusion that the plaintiff need allege no more than that the document to be rectified is incorrect because of an error, is also arrived at along a different route. Take for example the case where a defendant, when signing the agreement that is sought to be rectified, is not interested in the part to be rectified and in fact does not even read that part. Or on reading it prior to signing he may have a doubt whether this reflects the actual agreement between the parties, yet he signs because his attitude is that if plaintiff is satisfied why should he concern himself-?"*

[16] To the extent that it does matter, I think it is readily apparent that, of the two classes of error relied on in rectification cases namely mutual error or intentional error of the other party[2], the only type of error that could have been contemplated on the basis of the allegations made by the applicant was a mutual one, because the applicant does not attribute the error to the intentional action of the respondent. It is also clear from the respondent's answering affidavit, that he understood it to be such and denied the dates in clause 2.2 were an error.

[17] Has the applicant established that the dates appearing in clause 2.2 of the employment contract were an error not reflecting the common intention of the parties? When considering the absence of any evidence of prior discussions about the term of the contract, but the clear intention in clause 2.1 of the contract that it should be for five years, and the performance agreements signed before and after the replacement contract, it seems most likely the parties intended the applicant would work on a fixed term contract of five years from the date he commenced working. The alternative version is that notwithstanding a five year term being expressly stated at the introduction of the contract and ancillary agreements referring to a five year term with a starting date conforming with the date the parties agree he started working in his new post, the parties nonetheless concluded a contract of an odd duration, namely five years eleven months for no reason seems far less likely. The fact that it suited the respondent from 'a retirement planning' perspective, even if I accept that as true, does not provide a plausible explanation why the parties would have agreed on

[2] See Harms TC , Amler's Precedents of Pleadings, (7ed), 2009 at 337

such period and he himself does not contend that is why such an unusual period was agreed on.

[18] The periods of the performance contracts do not in themselves assist as they clearly are intended to fit in with the financial years of the applicant. It was contended by the respondent that the current performance contract clearly envisaged it would be renewed, which in turn lent support to its argument that the employment contract would endure until next year. However, the performance contract was clearly a standard one designed both for years in which it would be renegotiated, but also containing other specific provisions dealing with the final year of the respondent's employment.

[19] I am satisfied, on the probabilities that the applicant has established a case for rectification of the employment contract to reflect a five year fixed term of employment commencing on 15 June 2009 and ending on 14 June 2014, despite the manifest errors in identifying the termination and commencement dates, which were not material in the light of the substance of the dispute between the parties.

[20] It follows too that the current performance agreement will not extend beyond the applicant's contract of employment and he will be entitled to the payment of the bonus in terms of the provisions of clause 3.4 of the said agreement.

Order

[21] Accordingly,

21.1 Clause 2.2 of the contract of employment recorded in Annexure "NDM1" of the applicant's founding affidavit is rectified by the substitution of the dates "01 June 2009" and "01 May 2015" by the dates "15 June 2009" and "14 June 2014" respectively;

21.2 The current performance agreement concluded between the applicant and the respondent for the financial year 01 July 2013 to 30 June 2014 will terminate on 14 June 2014.

21.3 The respondent must pay the applicant's costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	T Manchu instructed by SC Mdhluli Attorneys
FIRST RESPONDENT:	E S J van Graan SC, instructed by Jan Stemmet Attorneys