THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER: 254/97

In the matter between:

GIDEON LODEWIKUS EBERSOHN APPELLANT

and

LOCAL TRANSITIONAL COUNCIL
OF CULLINAN RESPONDENT

CORAM: HEFER, SMALBERGER, SCHUTZ, PLEWMAN JJA and NGOEPE AJA

DATE OF HEARING: 17 SEPTEMBER 1998 DATE OF

JUDGMENT: 28 SEPTEMBER 1998

JUDGMENT

PLEWMAN JA

Rayton is a rural town in the Province of Gauteng. In common with other towns, and indeed the country as a whole, it was involved in 1995 in the process of transformation initiated in terms of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution) and other Acts designed to achieve restructuring of the various organs of government. S 245 of the interim constitution provided that such restructuring in the case of local authorities should take place in accordance with the Local Government Transition Act No 209 of 1993 (Act). In the case of Rayton transformation gave rise to the unhappiness with which this appeal is concerned.

The appellant is a former employee of Rayton. He was, prior to the steps taken in terms of the Act which are later considered, the town clerk. Rayton was at that time administered by a town council constituted in terms of the Local Government Ordinance No 17 of 1939 (Transvaal) (I will use the word Rayton as describing the town

or the council as the context dictates). The respondent is the Local Transitional Council of Cullinan, a body constituted by Proclamation No 23 of 1 September 1995 (the Proclamation) issued by the Premier of Gauteng in terms of the provisions of s 8 and 10 of the Act. It comprises Rayton, the Town Committee of Refilwe and the areas of Cullinan and Zonderwater.

Two documents are central to this appeal. The one is Proclamation No 23. Rayton and its officials had anticipated changes of this nature and, prompted by fears that the process of transformation might unfavourably affect its officers and employees, on 12 December 1994 entered into a contract (the agreement) which is the other document. I will deal with its provisions presently and with steps taken by appellant in the belief that it had (as far as he was concerned) taken effect.

Appellant launched an application in the court a quo by notice of motion dated 24 January 1996 (the first application). It became,

unhappily, a protracted affair. The papers run to 694 pages which include 116 documentary annexures. (It will be necessary to apportion blame at a later stage.) Apart from quarrels about urgency and postponements to permit time for the filing of affidavits and applications to strike out evidence certain collateral disputes were stirred up. The most serious of these resulted in appellant launching a second application by a notice of motion dated 10 February 1996 (the second application). Here the parties were more moderate. Only 314 pages were generated. Judgment in both matters (there are separate judgments) was given on 20 November 1996 by McCreath J and leave to appeal was refused. Leave to appeal was granted by this Court. Both matters were argued together.

Despite the bulk of the combined records the real dispute falls within a very narrow compass and is not one of such complexity as to have justified all the energy with which the parties (particularly the appellant) approached the matter.

The first application

The relief sought in the notice of motion was, in the first place, an order declaring the agreement to be binding and enforceable. Secondly, an order was sought declaring that appellant's post as town clerk had been rendered redundant or abolished by the promulgation of the Proclamation and that appellant had, with effect from 1 November 1995,lost his work within the meaning of clause 2.5 of the agreement; or, in the alternative, that the Proclamation envisaged that appellant be accommodated in an alternative post within the meaning of clause 2.6 of the agreement; or, in the further alternative, that the Proclamation envisaged that he be transferred to another governing body within the meaning of clause 2.7. Finally, appellant sought an order that respondent be directed to comply with its obligation in relation to the Transvaal Municipal Pensions Fund. The significance of the last order will emerge presently. The purpose of the earlier orders was that if they were granted a payment made to appellant by

respondent in an amount of R579 448,11 in circumstances discussed hereafter, would be rendered unchallengeable.

Transformations not very dissimilar to those envisaged in 1994 have occurred in this country in the past. This was the case at the time of Union. At later times Acts such as, for example, the Bantu Affairs Administration Act 45 of 1971, were also designed to effect the transformation of existing organs of government. What has to be considered is how in the case of the transition under discussion, such transformation was to be effected and what provision was made in relation to persons affected thereby. S 10(3)(f)(i) of the Act gives a not unimportant background to what was being attempted. It provides that in any proclamation issued thereunder the transfer of any person to any transitional council was to be made subject to:

> "(aa) conditions not less favourable than those under which they serve; and
>
> (bb) [the] applicable labour law".

Had that been appreciated by appellant (or perhaps those who advised

him) this judgment might have been unnecessary.

It was accepted in the court below (and therefore also in this Court) that the Proclamation was competent. The argument was directed only to its effect. The relevant provisions are s 8, 9 and 10. These read:

> "8. (1) A Single Local Administration is hereby established for the Transitional Local Council of Cullinan. (2) A permanent organisational structure for the Single Local Administration shall be constituted by the Transitional Local Council of Cullinan as soon as possible after the effective date. Town Clerk
>
> 9. The Eastern Services Council shall nominate a person to temporarily fulfill the functions of Town Clerk until the Transitional Local Council of Cullinan appoints a person in a permanent capacity.
>
> Employees and officers of Transitional Local Council of Cullinan
>
> 10. The employees and officers of the Town Council

> of Rayton and the Town Committee of Refilwe shall, for the purposes of this Proclamation, be deemed to be in the service of the Single Local Administration, pending the constitution of a permanent organisational structure as contemplated in section 8(2)."

It is also relevant to record that the Proclamation dissolved "the Town Council of Rayton and the Town Committee of Refilwe" and transferred to respondent all the assets, liabilities and obligations of those bodies.

The relevant clauses of the agreement must also be set out. These read:

> "2.5 Only in the event of staff reduction or so called affirmative action or as a result thereof will an employee be entitled to lay claim to benefits as stipulated in this agreement.
>
> 2.6 In spite of the possibility that the employee may be accommodated in an alternative post, albeit under the same or different service conditions, the employee will be entitled to a choice of accepting or not, the benefits as stipulated in this agreement and be retrenched.

> 2.7 Abovementioned as stated in paragraph 2.6 also applies in the case of transfer to another governing body."

It must be noted that the term "staff reduction" is defined as follows:

> "Staff Reduction refers to the term used when a person occupies a post which has become redundant for any reason whatsoever including what is known as affirmative action and the employee is dismissed as such and loses his work as a result of factors beyond his control."

On 25 October appellant submitted a report to the Rayton Management Committee. He asserted therein:

i) that the town council of Rayton had been disbanded; and

ii) that his post as town clerk had thereby been abolished and that he would lose his post as town clerk on 31 October 1995.

In the founding papers appellant alleged that his contentions had been accepted by Rayton in terms of a resolution taken. This was disputed in the answering affidavits. While it would presumably be the version in the answering affidavit which, in terms of the Plascon-

Evans rule, would have had to be considered, the court below found it unnecessary to resolve the question. That approach has not been questioned on appeal and for that reason I simply note the presentation of the report to the committee as an historical fact. What followed was that on 31 October 1995 appellant approached one Tosen the (then) town treasurer and induced him to issue a cheque on Rayton's bank account in his (appellant's) favour for the sum previously mentioned. (The cheque itself is dated 30 October 1995 but nothing turns on this.) This represented the amount Tosen had calculated as having accrued to appellant as the benefits to which he was entitled in terms of the agreement as a result of the termination of his employment. If correct and if appellant was indeed entitled thereto it would seem, according to respondent's averment, that it would also have become obliged to pay tax thereon in a further amount which would have inflated its overall liability to R851 282,00. It would also have become obliged (in terms of clause 34(l)(a) of the

Transvaal Municipal Pension Fund) to pay a yet further sum of R141 621,00 to appellant. It is this obligation which appellant sought to enforce in the final prayer to the notice of motion to which I have referred above.

It seems that respondent required time to prepare its answering affidavits. Its request for time was refused and allegations and counter allegations began to be freely made. In the founding affidavit appellant's fundamental contention was that the effect of the Proclamation was to dismiss him from his post. A good deal of what is said is argumentative and reasoning is also advanced on alternative possibilities, such as that the proclamation envisaged that he would be given an alternative post. The notice of motion makes provision for such contentions. It is, however, clear that whatever the formulation, the basic contention was that appellant was dismissed and lost his work. The use of the phrase "uit my diens getree" is one example which establishes this proposition. So too do the assertions

that the respondent "om 'n onverklaarbare rede die standpunt handhaaf dat ek nie my werk op 31 Oktober verloor het nie". It is accordingly this proposition and the consequence flowing from appellant having adopted that stance, that have to be examined. Indeed this was counsel's basic premise. I would add only in passing that the founding affidavit trespassed into other areas - a matter to which I will return. In the answering affidavits appellant's main contentions were challenged. It was also said that appellant was told both on 25 October and later "that he was not dismissed but that he still remained in the service of [Rayton] and as from 1 November he would be in the service of [respondent]". The contention was also advanced that appellant was told that he would only become redundant if and when respondent appointed a town clerk other than him.

Respondent stated that it investigated matters and concluded not only that the payment had not been regularly made (which caused

it unsuccessfully to attempt to stop payment of the cheque) but also that other irregular steps had been taken by appellant to ensure that there would be sufficient funds in respondent's bank account to meet the cheque. It accordingly commenced disciplinary proceedings against appellant and instructed that steps be taken against appellant in order to recover not only the amount of the cheque but also to hold him responsible for the irregularities which its investigations seemed to it to reveal. It was the steps so taken and the resolutions passed for that purpose as also the steps taken pursuant to such resolutions that gave rise to the second application.

All that need be further noted is that appellant made an attempt (or several attempts) to turn the events to his advantage and to obtain for himself an appointment as town clerk for the to be enlarged final entity but eventually abandoned this approach and absented himself from work on the basis that he had been dismissed.

In so far as it may be relevant it was established that on 8

November a Mr du Plooy (who was an employee of Refilwe) was appointed as the temporary functionary in terms of s 9 of the Proclamation to fulfill "the functions of Town Clerk until the (respondent) appoints a person in a permanent capacity". Only on 15 November did respondent hold its first meeting as a new organ of local government and it was only on 30 January 1996 that respondent decided to appoint a town clerk in a permanent capacity. It seems that it was on 30 January 1996 that respondent as a token of its recognition of a factual situation formally dismissed appellant. The post of town clerk was filled on 5 February 1996.

The first question to be dealt with is the effect of s 9 and s 10 of the Proclamation. S 9, properly construed, merely provides for the nomination and appointment of a temporary functionary for the single transitional administration pending the establishment of a permanent structure. The suggestion by appellant's counsel that the effect of s 9 (upon promulgation) was to dismiss appellant cannot be

upheld. The section simply does not so provide. Nor can the contention that s 10 did not apply to appellant be accepted. A town clerk is both an officer and an employee of a council. It is then immediately apparent that the "deeming" process was both designed and effective to ensure that (in this case) the appellant did not lose "his work".

These conclusions must then be applied to the clauses of the agreement. One may take the subclauses upon which reliance is placed seriatim. I start by saying that the agreement as a whole is not a happily worded document. But this does not, in my view, cause a problem in construing clause 2.5 for present purposes. Since it has not been suggested that there is any need for this Court to concern itself with the concept of "affirmative action" the clause may be more simply read. The governing phrase is "only in the event of... staff reduction". Before an employee can be entitled to lay claim to the stipulated benefits there must therefore have been a staff reduction.

One is therefore driven to determine that question in accordance with the definition of that phrase. The definition has been quoted above. It stipulates three conditions. These are listed conjunctively and must accordingly all be present. The clause will then take effect if a post has become redundant and if the employee is dismissed and if he loses his work as a result of factors beyond his control.

As a consequence of the deeming provision in s 10 of the Proclamation, on the facts outlined, the conclusion must be that even if redundancy were conceded, appellant had as a result of the Proclamation neither been dismissed nor lost his work; nor had he done so at any stage before he, in effect, discharged himself on 15 November. But even if the conclusion on these requirements were otherwise he would have been dismissed and lost his work not as a result of factors beyond his control but, precisely because of matters entirely under his control. For these reasons no claim under clause 2.5 could or did arise and the payment made to appellant was

improperly made.

The proper construction of clauses 2.6 and 2.7 poses greater difficulty. If they are to be read as providing independent grounds for a claim to the benefits under the agreement the words "only in the event of staff reduction" in clause 2.5 would have to be ignored. It may be, as suggested by respondent's counsel, that clauses 2.6 and 2.7 were intended to exclude the possibility of a person in the position of respondent endeavouring to counter a claim made under clause 2.5 by offering the claimant an "alternative post" or by "transferring" the claimant to another body. It could then be contended that the claimant was not entitled to the benefits because he had not been dismissed or that he had not lost his work. However, to return to appellant's situation. If it be assumed that clauses 2.6 and 2.7 are to enjoy an independent status appellant could only rely on them if he had been offered an alternative post or had been transferred and had thereafter exercised an election to take his retrenchment benefits. The

facts are that no such events occurred. Appellant was not offered an alternative post nor was he transferred in circumstances allowing him to exercise an election. Either or both such possibilities may indeed have occurred in the future, but at the time when appellant took the precipitate steps previously mentioned no permanent new structure had yet been created and both he and respondent were simply in the interim phase of the contemplated transition.

I tend to favour the construction suggested by respondent's counsel but it seems to me to be unnecessary to arrive at a final view as to how these two clauses are to be construed. In the light of the facts it matters little whether counsel's approach is followed or whether the clause be read as providing further mechanisms which, in appropriate circumstances, render the benefits payable. Merely to render a post redundant does not bring about a dismissal with loss of work. Nor had there been an offer of an alternative post or a transfer. This in any event was clearly not the position on 31 October when

appellant took the cheque as his retrenchment package, nor on 15 November when he discharged himself.

The learned judge in the court below held that appellant had not "lost his work" and that conclusion cannot in my view be faulted. The additional reasons given by the learned judge need therefore not be considered.

In this Court appellant also argued that it was open to the court to deal with the application on the basis that (as emerges from the record) another person was appointed town clerk on 6 February 1996. Even if this were possible it seems to me that by that stage appellant by his own acts had disqualified himself from entitlement to relief.

The appeal in the first application must therefore fail. The second application

Here it is necessary to note what the relief claimed in the notice of motion was and the nature of respondent's response. In the notice of motion appellant sought the setting aside of resolutions of

respondent. The first (taken in the order followed) was taken on 18 November 1995. (This prayer is qualified in the notice of motion by the words "vir sover dit heet om die [appellant] uit die diens van die respondent te geskors het".) The resolution in fact had no such effect but for the reason given below this is of no significance. The second was a resolution appointing a disciplinary committee. In this case the resolution appears to have been incorrectly identified but this again, as will be seen, is of no consequence. The third was a resolution of 30 January 1996, the fourth one of 29 January and finally one taken on 3 January 1996. Prayer 2 sought an order prohibiting respondent from acting on the above resolutions in any manner or (so the prayer concludes) of making the resolutions "rugbaar" - that is becoming known - or publishing them in any way.

I should mention that there seems to have been an attempt to amend the notice of motion in the first application to incorporate what was sought in second. The record is not clear but it seems obvious

from the fact that the second application was separately answered by respondent that nothing could have come of it. The matters proceeded and were dealt with in separate judgments. In the founding affidavit in the second application there is a great deal of repetition of matters already canvassed in the first application, leaving it unclear whether the second application was necessary.

What effectively put an end to the second application was the following concession by respondent:

> "I have been advised about the procedures prescribed in the Industrial Agreement as published by the Minister of Labour in Government Notice R1807 of 21 October 1995. The Respondent has therefore decided not to oppose prayers (a) to (e) of the notice of motion……"

The result was an order in terms of prayer 1 of the notice of motion. As far as prayer 2 is concerned, respondent stated that it did not intend to act in accordance with the resolutions (as it clearly could not do if they were set aside). That part of the relief sought also fell away. All that remained and all that was contended for on appeal was

the last portion of the prayer namely an order prohibiting respondent

from making the resolutions known or publishing them.

The court below held that there was no evidence suggesting that respondent would, in making any disclosure of the contents of the resolutions, fail to reveal the whole course of events. It therefore held that no order was called for. In this connection it should be observed that appellant did not seek an interdict against the publication of future defamations or injurious falsehoods. I cannot fault the judgment of the court below, but it would seem to me to be not unreasonable to suggest to respondent that (if this has not been done) it make an annotation on the resolutions to indicate that they have been set aside. This I merely make as a suggestion. I can, however, see no grounds for going further and I conclude that the appeal on this application must also fail.

Costs

There remains the question of the order for costs. The costs of

appeal were not in issue, but appellant's counsel, in an attempt, in the

event of the failure of his greater hopes, to salvage something, repeated an argument advanced in the court below that a special order for costs was warranted on the grounds that the answering affidavits contained matter which was "hearsay", "irrelevant" and "scandalous". The court below rejected this submission. What was urged on this Court was that the counter application was unnecessary. This was argued on the basis firstly that (so it was said) had appellant simply been asked to do so he would have agreed to refund the payment, that is if his application failed. There is nothing before the court to suggest that he was so amenable. The answering affidavit and the counter application was answered by a reply of just short of 150 pages and the grant of the counter application was opposed.

The final submission related to the prayer in the counter claim in which it was sought to hold appellant liable for repayment of a loan of Rl million which he allegedly obtained male fide and without

authorization. This was based on a contention that appellant had caused the loan to be taken up by Rayton in order to ensure that Rayton would be possessed of sufficient funds to meet the cheque in his favour. It is an ill-conceived claim. It also does not reflect well on those who took over the administration of Rayton's assests and liabilities. But there is this to be said on the other side. The counter claim is a mere three pages. Respondent's averments in regard to the loan of Rl million are contained in the answering affidavit. With hindsight one may question the relevance of the conclusions drawn but the first steps into this territory were taken by appellant in the founding affidavit where he endeavoured to justify the procedure taken and the absence of council approval for the payment, in anticipation it seems, of criticism of his and Tosen's actions. What was suggested was that this was a contractual payment and therefore did not require a reference to the council. The correctness or otherwise of this is in all the circumstances of no moment. But I do

not think respondent can be faulted for responding to the founding affidavit by entering this field. It entertained suspicions concerning all aspects of the payment. Tosen had thrown in his lot with appellant. It is in any event even now not finally cleared up because the resolutions taken (also first raised by appellant in the founding affidavit) were set aside for a quite different reason.

The matter of a special order was argued in the court below and was refused. Costs being a discretionary matter the court will not lightly intervene. Though the judgment does not discuss the question at length counsel's submissions in this Court were in effect no more than a complaint that the prayer in the counterclaim was a reflection on appellant. The fact that respondent's action in appellant's view reflected adversely upon him was also something first raised (and in my view unnecessarily raised) in the founding papers. In the end it all seems to be a case of a pot calling a kettle black. I am unpersuaded that the decision of the court a quo has been shown to be incorrect.

In the result the appeals in respect of both applications fail.

The order is:

The appeals are dismissed with coats.

PLEWMAN JA

CONCUR:

HEFER JA

SMALBERGER

JA SCHUTZ JA

NGOEPE AJA