THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 685/2013
Reportable

In the matter between:

GREATER TZANEEN MUNICIPALITY **Appellant**

and

ANDRE JEAN JACQUES LE GRANGE **Respondent**

Neutral citation: *Greater Tzaneen Municipality v Le Grange* (685/2013) [2015] ZASCA 17 (18 March 2015)

Coram: Brand, Leach, Willis, Zondi JJA and Dambuza AJA

Heard: 23 February 2015

Delivered: 18 March 2015

Summary: Jurisdiction – an undertaking to employ in a contract is not a matter falling within the purview of s 157 of the Labour Relations Act. – the high court has jurisdiction – rectification – on the evidence the contract was not truly reflective of the intention of the parties and agreement properly rectified.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Hiemstra AJ sitting as court of first instance):

'The appeal is dismissed with costs, such costs to include the costs of the application for an interdict'.

JUDGMENT

Dambuza AJ (Brand, Leach, Willis and Zondi JJA concurring):

[1] This appeal is with the leave of this court, against the judgment of the North Gauteng High Court, Pretoria (Hiemstra AJ), dismissing an application by the appellant (municipality) to have the respondent (Mr Le Grange) interdicted from accessing the municipal premises as an employee of the municipality. The court a quo also rectified an agreement concluded between the municipality and Mr Le Grange. Before us counsel for the municipality informed us that the interdict originally sought by the municipality had become academic and that the municipality was abandoning its appeal and tendering costs in so far as it related to that issue. What remained for determination was the appeal against rectification of the agreement.

[2] The agreement at the centre of the dispute between the parties, was concluded on 9 April 2010. Prior to the conclusion of the agreement Mr Le Grange had been employed by the municipality as the 'Head: Section Finance Expenditure'. He had been employed by the municipality for the 17 years preceding the conclusion of the agreement. In terms of the agreement Mr Le Grange took up employment with the municipality as the chief financial officer (CFO) for a period of three years, starting from 1 December 2009 until 30 June 2012. Upon the expiry of the three year period, Mr Le Grange continued to present himself at the premises of the municipality, insisting that the municipality had an obligation to keep him in his employ.

[3] The municipality denied that it was obliged to employ Mr Le Grange. Instead, on 7 July 2012, the municipality approached the high court, on an urgent basis, seeking an order that Mr Le Grange be interdicted from accessing the municipal premises as an employee of the municipality and that he be ordered to return the access cards with which he had been provided as an employee. The municipality contended that Mr Le Grange's right to access the municipality premises as an employee of the municipality ceased when the term of his employment as CFO of the municipality expired.

[4] Mr Le Grange opposed the application brought by the municipality and asserted his right of continued presence at the municipal premises. He relied on a portion of clause 2.3 of the agreement which, he contended, entitled him to a further contract of employment with the municipality. He brought a counter-application in which he sought to enforce his right to a contract of that kind. He also sought rectification of the agreement in terms more fully set out in the paragraphs that follow.

[5] The high court dismissed the application for an interdict, holding that no authorisation for institution of the court proceedings by the municipality had been shown. It then granted an order for rectification of the agreement and found that on expiry of Mr Le Grange's term of employment as CFO, the municipality was obliged to employ him as provided in the rectified agreement.

[6] It was not in dispute, both before the high court and in this court, that in its original form, and as signed by Mr Le Grange, clause 2.3 of the agreement provided that:

'2.3 It is specifically recorded that there is no expectation that this Contract will be renewed or extended beyond the term referred to in clause 2.2 [the three year term]. The Employer's decision not to renew or extend the contract shall not constitute an unfair dismissal and the Employee shall not be entitled to any form of compensation.

2.3.1 However, during the discussions with the Mayor regarding the short period of the Contract, it was agreed that the Employer, in the case of non-renewal or extension of this contract will endeavour to suitably accommodate the Employee in a permanent position on the service register that fits his status, qualifications and experience.' (My emphasis.)

[7] The order for rectification of the agreement provided for replacement of the word ‘endeavour’ in clause 2.3.1 with the words ‘be obliged’. It was common cause that, about a month into Mr Le Grange’s term of employment as CFO, Mr Mangena, the municipal manager at the time, deleted clause 2.3.1 from a copy of the agreement and signed that copy on behalf of the municipality (on 19 April 2010).

[8] Subsequent to the deletion of clause 2.3.1 there was an exchange of correspondence between Mr Le Grange (through his attorneys) and the municipality on the propriety of the deletion of the clause. Essentially, Mr Le Grange maintained that he had concluded an agreement with the municipality in the terms set out in the original agreement. He also lodged a grievance with the Mayor protesting the purported amendment to the agreement. The dispute remained unresolved until the expiry of Mr Le Grange’s term of employment as the chief financial officer (CFO).

[9] The appeal against rectification is premised, mainly, upon two grounds. The municipality contends, first, that Mr Le Grange had failed to establish that when the agreement was concluded both parties were labouring under a common mistake. Its second contention was that because the remedy sought by Mr Le Grange is founded in the provisions of the Labour Relations Act 66 of 1995 (LRA), the high court (and this court) had no jurisdiction to entertain the counter-application. This submission extended to an argument that employment to the position(s) contemplated by Mr Le Grange required approval of the municipal council which had not been obtained prior to the conclusion of the agreement and therefore the agreement was illegal and unenforceable. For that reason it could not be rectified. Although the high court did not pertinently consider the issue of jurisdiction, it is expedient that I deal with it before considering the other grounds on which the appeal is founded.

[10] **Jurisdiction**

The contention that the high court had no jurisdiction to hear Mr Le Grange’s complaint was foreshadowed, rather obliquely, in the municipality’s founding affidavit. The allegation was that, rather than repeatedly presenting himself at the

municipal offices and disturbing the peace, Mr Le Grange should have approached the labour court to assert his claim for 'reinstatement'. In the answering affidavit, Mr Le Grange denied that he sought re-instatement and explained that his claim was for specific performance of a term of an agreement. Counsel for the municipality persisted before us that in terms of s 77(3) of the Basic Conditions of Employment Act[1] (the BCEA), only the labour court had jurisdiction to hear the claim brought by Mr Le Grange as the claim was founded on s 186(2)(*c*) of the LRA.[2] The argument was that Mr Le Grange's case was essentially one of unfair labour practice by the municipality in refusing to reinstate him to employment. This is incorrect.

[11] First, the provisions of the LRA did not arise in this case. The remedy sought by Mr Le Grange was not 're-instatement' to a position previously held with the municipality; nor did he seek renewal of the expired agreement. What he sought was specific performance of clause 2.3.1 of the agreement as reflected in the declaratory order. In *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) the Constitutional Court explained the basis on which the nature of issues raised in proceedings must be determined. That court held that jurisdiction is determined on the basis of the pleadings and not on the substantive merits of the case. Mr Le Grange had pleaded, as the relief he sought, the common law remedy of specific performance, based on the fact that the municipality was obliged, in terms of the agreement, to employ him after 30 June 2012. The fact that the relief sought related to employment did not necessarily mean that it was rooted in the provisions of the LRA. And the fact that Mr Le Grange had been employed by the municipality prior to 30 June 2012 did not mean that he was seeking re-instatement. In *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) this court held that:

'When a claimant says that the claim arises from the infringement of the common-law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly. When a claimant says that the claim is to enforce a right that is created by the LRA, then that is the claim that the court has before it, as a fact. When he or she says that

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[1] Basic Conditions of Employment Act 75 of 1997.

[2] Section 186 of the LRA deals with the meaning of dismissal and unfair labour practice. Section 191 provides that if there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice the dismissed employee or the employee alleging an unfair labour practice may refer the dispute in writing for conciliation or arbitration.

the claim is to enforce a right derived from the Constitution, then, as a fact, that is the claim. That the claim might be a bad claim is beside the point.'[3]

[12] Further, even if Mr Le Grange was seeking reinstatement, s 77(3) of the BCEA on which the municipality relied (perhaps unwittingly), provides that:

'The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.'

In *Gcaba*[4] the Constitutional Court clarified the issue concerning the overlap in jurisdiction of the labour court and the high court in respect of employment matters by explaining that the labour court has exclusive jurisdiction over those matters which the LRA prescribes should be determined by it.[5] That court, however, endorsed the concurrency of jurisdiction between the two courts[6] but warned that s 157(2) should not be understood to extend the jurisdiction of the high court to determine issues which, in terms of s 157(1) of the LRA, fall exclusively under the jurisdiction of the Labour Court.[7]

[13] In this case the municipality brought its application for an interdict in the high court. In its founding affidavit it set out what it considered to be the relevant portion(s) of the agreement as the 'background facts to the application'. It pleaded that because the agreement had expired, Mr Le Grange's right to access the municipal premises as an employee had ceased. The defence tendered by Mr Le Grange was, in essence, that the agreement went beyond the terms set out in the founding affidavit; it also regulated certain rights and obligations of the parties after 30 June 2012. Therefore, even if Mr Le Grange's claim had been founded in the LRA it would not have been acceptable for the municipality to plead that Mr Le Grange be directed to approach the labour court. Such a course would result in an

[3]At 82G-I at 71G-I.

[4] Supra, paras 70 – 72.

[5] S157(1) of LRA. Such matters include review of arbitration awards in terms of s 145 of the LRA and those regulated by s 186 of the LRA.

[6] S157(2) of the LRA provides that: 'The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of Republic of South Africa, 1996, and arising from –
(*a*) Employment and from labour relations;
(*b*) any dispute over constitutionality of any executive or administrative act or conduct,. . . by the State in its capacity as an employer; and
(*c*) the application of any law for the administration of which the Minister is responsible'.

[7] At 261D-E

undesirable duplication of proceedings in which essentially the same disputes would arise. The contention that Mr Le Grange should have approached the labour court was therefore misplaced.

[14] **Rectification**

In granting the order for rectification, the high court found that Mr Le Grange had proved that both him and the municipality had intended that the municipality be obliged to offer employment to Mr Le Grange on expiry of his term of employment as chief financial officer. The challenge against the finding of the high court was based on two grounds: that Mr Le Grange had failed to prove a mistake common to both parties at the time of the conclusion of the agreement and that the agreement fell foul of certain statutory requirements and was therefore illegal and could not be rectified. I start with the last.

[15] The contention by the municipality was that the agreement could not be rectified as it was tainted by an underlying illegality in that it was concluded with the mayor who lacked the necessary power to do so. This argument on behalf of the municipality was based on an assumption that Mr Le Grange sought to be employed to a position regulated by s 57 of the Local Government: Municipal Systems Act 32 of 2000. This section regulates the terms of employment contracts for municipal managers and managers directly accountable to municipal managers. In terms of s 56 of the same Act, municipal managers and managers directly accountable to the municipal manager must be appointed by the municipal council in consultation with the municipal manager.

[16] This description of Mr Le Grange's case was wrong on three fronts. It was not Mr Le Grange's case that the agreement was that he would be employed to a s 57 position; he also did not seek employment to such a position. His case was that the municipality had undertaken to employ him in a 'permanent position on the service register that fits his status, qualification and experience'. All that he sought was to be employed as agreed. In fact, the evidence was that on expiry of his term as the CFO he had demanded to be employed in a position similar or the one he had occupied prior to the conclusion of the agreement. By all accounts such position was not a s 57 position.

[17] It was also not Mr Le Grange's case that he had concluded the agreement with the mayor. His case had always been that the agreement was concluded with the council. The agreement reflects that to have been the case. The fact that he had held discussions with the mayor relating to the agreement is irrelevant. Therefore the argument that the agreement was unenforceable did not assist the municipality.

[18] In the end, whether the agreement was eligible for rectification fell to be determined on whether the evidence tendered proved that the agreement, in particular, clause 2.3.1, was not a correct recordal of the true agreement between Mr Le Grange and the municipality. In essence the enquiry was whether use of the word 'endeavour' in clause 2.3.1 was due to a mistaken understanding of the meaning thereof by both parties, as Mr Le Grange contended.

[19] The municipality insisted that the determination of the intention of the parties had to be limited to the word 'endeavour' as used in the agreement without recourse to the background against which the agreement was concluded. On the wording of the agreement, the municipality was only obliged to endeavour to employ Mr Le Grange, so it was argued. This interpretation of the agreement impermissibly isolates the word 'endeavour' from the rest of clause 2.3.1. The clause sets out the background and motivation for the agreement to employ Mr Le Grange in a permanent position after 30 June 2012. In addition Mr Le Grange tendered further evidence in respect of the background to the conclusion of the agreement. The evidence was to the effect that it was Mr Le Grange and Mr Visser, the municipality's human resource manager at the time, who prepared the agreement. In his affidavit, filed in support of Mr Le Grange, Mr Visser explained that when Mr Le Grange was recommended for the position of CFO, he (Mr Le Grange) advised the municipal council that he would accept the position on condition he was 'provided with security that he would not be without an appointment/work after 30 June 2012'. It was on this basis that Mr Visser was instructed to draft the agreement. He explained that the word 'endeavour' was used as a translation for the Afrikaans word 'onderneem', which both he and Mr Le Grange, being Afrikaans speaking, had intended to use in the agreement.

[20] Both Mr Le Grange and Mr Visser highlighted in their evidence that, at the discussions relating to the three year CFO position, Mr Le Grange had insisted on protecting the security of his long term employment with the municipality. This evidence is consistent with the inclusion of clause 2.3.1 in the agreement.[8] As against this evidence, the municipality tendered the evidence of Mr Thulani Twala, the municipal manager who took office at some stage subsequent to Mr Mangena. Mr Twala denied that the use of the word 'endeavour' was a mistake. However, Mr Twala did not set out the basis on which he could attest to the facts relating to the conclusion of the agreement. There was no evidence indicating that he was present at any stage during the negotiations relating to the conclusion of the agreement.

[21] On the evidence before the high court, Mr Twala could only have hearsay knowledge about the terms on which the agreement was concluded. There was no evidence tendered on behalf of the municipality, by a person who was privy to the negotiations. The high court could only determine the true intention of the parties on credible evidence before it. Only the evidence of Mr Le Grange and Mr Visser was properly before the high court and the finding of that court, that the use of the word 'endeavour' was attributable to an erroneous translation of the Afrikaans word 'onderneem' by Mr Le Grange and Mr Visser, was properly made. A proper case for rectification had been made and the declarator was correctly granted. Consequently the appeal must fail.

[23] In the result, the following order is made:
'The appeal is dismissed with costs'.

N Dambuza
Acting Judge of Appeal

[8]The evidence was that it was only after an (unspecified) inquiry was made by 'National Treasury regarding the clause that Mr Mangena deleted it. Although in the correspondence following from the deletion of clause 2.3.1, the municipal (through Mr Mangena) disputed that the clause had been properly included in the agreement, in its replying papers to the counter-application it disavowed Mr Mangena's attempts at altering the agreement, by deletion of the clause. It only contended that Mr Le Grange's interpretation of the clause as entitling him to 'remain' in the employment of the municipality was incorrect as the clause only compelled the municipality to 'endeavour' to employ Mr Le Grange. The argument was that Mr Le Grange had not proved that the municipality had failed to meet its obligation to 'endeavour' to employ him.'

APPEARANCES

For Appellant:	GN Moshoana Instructed by: Mushoana Inc, Pretoria Lovius Block Attorneys, Bloemfontein
For Respondent:	JS Stone Instructed by: Kruger Nagel & De Jager Attorneys, Tzaneen Bezuidenhouts Attorneys, Bloemfontein