THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1310/2017

In the matter between:

ERNEST THERON **APPELLANT**

and

PREMIER OF THE WESTERN

CAPE PROVINCE **FIRST RESPONDENT**

DIRECTOR-GENERAL DEPARTMENT

OF THE PREMIER **SECOND RESPONDENT**

Neutral citation: *Theron v Premier, Western Cape* (1310/2017) [2019] ZASCA 6 (8 March 2019)

Coram: Lewis ADP and Cachalia, Saldulker, Mbha and Dambuza JJA

Heard: 27 February 2019

Delivered: 8 March 2019

Summary: Interpretation of an employment contract: contract for fixed duration, but with right to terminate for employer and employee on one month's notice; where employer ceased to exist, contract terminable by body that assumed liability, on one month's notice.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Lewis ADP (Cachalia, Saldulker, Mbha and Dambuza JJA concurring)

[1] The appellant, Mr Ernest Theron, was employed as the Chief Executive Officer by the Western Cape Provincial Development Council (the Council) on a fixed term employment contract, effective from 1 July 2009, and due to terminate three years later on 30 June 2012. The Council was established by a provincial statute, the Provincial Development Council Act 5 of 1996. That statute was repealed on 5 December 2011, and the Council ceased to exist on that date: it was disestablished. Theron's contract of employment accordingly terminated on the same date.

[2] The Provincial Development Council Repeal Act 5 of 2011 made provision for transitional arrangements after disestablishment. Section 4 read:

'For the purposes of disestablishment of the Provincial Development Council—

(a) all movable assets and monies held by the Provincial Development Council as at its disestablishment are deemed to be held by the Department of the Premier; and

(b) all outstanding liabilities of the Provincial Development Council as at date of disestablishment must, subject to the Public Finance Management Act, 1999 (Act 1 of 1999), be settled by the Department of the Premier.'

[3] Theron claimed payment of the salary that he would have earned had the Council not been disestablished, until 30 June 2012, as well as a performance bonus and leave pay, from the Premier of the Western Cape, and the Director-General of the

Premier's Department, the respondents. I shall refer to them for convenience as 'the Premier' and 'the Department'. The Premier accepted that the various amounts claimed were payable by her, save for the salary that Theron would have earned in 2012. She maintained that Theron was entitled to no more than one month's salary, as the contract could have been terminated by either party on one month's notice. The Department in fact paid one month's salary to Theron in December 2011.

[4] Theron applied for relief to the Commission for Conciliation Mediation and Arbitration (the CCMA) early in 2012. The CCMA found that it had no jurisdiction as the Premier was not the employer. Her department had simply been burdened with the Council's liabilities and Theron had not been dismissed. Theron then instituted action in November 2012 for payment of what he alleged was due to him in that year.

[5] Gamble J in the Western Cape Division of the High Court, Cape Town, found that Theron was not entitled to claim the additional salary over six months, and dismissed the claim but gave leave to appeal to this court.

[6] At a pretrial conference held on 20 June 2017, the parties' legal representatives agreed on a number of common cause facts, and framed the legal issues in dispute as follows: whether the termination of Theron's fixed term employment contract could be considered a 'premature' termination; and whether Theron 'was entitled to be compensated for damages in the amount of the full unexpired duration of his fixed term employment contract' or whether he was entitled 'to only one month's notice period' arising out of the termination of the contract.

[7] The agreed facts set out the terms of the contract, including Theron's gross annual remuneration; that he would be entitled to a service benefit in the form of a performance bonus; that his salary would be adjusted annually in accordance with a general adjustment for Council employees; that he was entitled to annual vacation leave of 24 days; and that the Council and Theron acknowledged that the contract would terminate automatically on 30 June 2012.

[8] Significantly, however, the contract made provision for its termination on one month's notice by either party (the Council could accept a shorter notice period), and

also provided that the Council could terminate the contract summarily in the event of Theron breaching it. The contract provided that 'the agreement may otherwise only be terminated for reasons relating to misconduct, operational requirements or incapacity'.

[9] It was common cause that Theron was in no way guilty of a breach of contract and that the Council did not summarily terminate the employment contract. But the Council itself ceased to exist on 5 December 2011 when the repealing Act, signed by the Premier, was gazetted.

[10] The Director General: Provincial Strategic Management for the Western Cape, Mr B Gerber, wrote to Theron on 8 December 2011, advising that all staff contracts had been terminated as a result of the disestablishment of the Council. Gerber advised that Mr C Stuurman had been appointed to represent the administration, and that he would, with the assistance of Theron, calculate salaries to be paid, as well as leave and severance payments.

[11] The Department paid Theron the sum of R90 724 on 20 December 2011, and then the sum of R235 236 on 15 March 2012. (These sums have been rounded off.) These amounts covered a bonus, leave pay, severance and one month's notice. There is no dispute as to the amounts paid, save in respect of the notice period. Theron maintains that he was entitled to salary until 30 June 2012, and calculated that as R352 728. Again the quantum is not in issue. The only question is whether Theron is entitled to be paid anything further by the Department. That depends on an interpretation of the employment contract.

[12] Clause 5 of the contract, headed 'Duration', read (the formatting is not reproduced here):

'5.1 Irrespective of the date or dates of signing of this Agreement by the parties, it is agreed and recorded that the Agreement shall be deemed to be of force and effect from 1 July 2009. A probationary period of twelve months from the commencement date applies, with performance evaluation taking place after 4 and 8 months respectively in the first year of probation.

5.1 The Employee hereby expressly acknowledges and accepts that the Agreement will terminate automatically upon 30 June 2012.'

[13] Clause 9, on which this appeal turns, headed 'Termination' read (again the formatting is not reproduced):

'9.1 Notwithstanding anything to the contrary in clause 5.1 herein contained, *either party* to this Agreement *may terminate* it at any time during the currency thereof *on giving one month's notice* in writing to the other party. The Employer may, however, in its discretion accept a shorter period of notice.

9.2 The Employer may terminate this Agreement *summarily* or after notice of less than one month, as it may deem expedient, *in the event of a breach* of the terms of this Agreement by the Employee. The Agreement may *otherwise only* be terminated for reasons relating to misconduct, operational requirements or incapacity.' (My emphasis.)

[14] Theron argues that clause 9.2 qualifies clause 9.1: the employer need not give notice of termination in the event of breach by the employee. It may give the one month's notice to the employee only for reasons relating to misconduct, operational requirements or incapacity. The employer, on this argument, is bound by the agreed duration in clause 5. The employee, on the other hand, may give a month's notice and terminate the contract at any time before it terminates by the effluxion of time. This construction is argued to be necessary to give meaning to the second sentence of clause 9.2 – 'the agreement *may otherwise only* be terminated for reasons' not amounting to breach.

[15] On this contention, the Department was bound to perform the obligations of the former Council under the agreement until 30 June 2012, and owed Theron salary for the 2012 period. This interpretation, he argued, was consonant with the common law on damages suffered by an employee. In *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) this court confirmed that the common law continued to apply to employment contracts, and had not been abolished by the provisions of the Labour Relations Act 66 of 1995. The common law was supplemented by that Act. Nugent AJA said (para 16):

'The continued existence of the common-law right of employees to be fully compensated for the damages they can prove they have suffered by reason of an unlawful premature termination by their employers of fixed term contracts of employment is not in conflict with the spirit, purport and object of the Bill of Rights'.

[16] The right of an employee to damages has been recognized in several cases in the Labour Court and the Labour Appeal Court, referred to in the judgment of Gamble J in the trial court in this matter. And usually the quantum of damages would be the salary that the employee would have earned had there been no unlawful termination: *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC) para 9. There the Labour Appeal Court said:

'There is no doubt that at common law a party to a fixed-term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party. In other words, there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in the light of their agreement, their lives [on that basis].'

[17] Theron argues that the termination of his contract of employment was unlawful in the sense that it was contrary to the terms of the contract and he is accordingly entitled to damages. The Department was not entitled to give him notice of termination and in any event did not do so.

[18] The Premier argues, on the other hand, that this interpretation negates the first subclause in clause 9. This gives both parties, employer and employee, the right to terminate on one month's notice. Subclause 2 does not qualify subclause 1. If anything, the second sentence reading 'The Agreement may otherwise only be terminated for reasons relating to misconduct . . .' demonstrates that there are three instances where the contract may be terminated: on the giving of notice under subclause 1; summarily on breach by the employee under subclause 2; and thirdly, where there is some misconduct that must, presumably, be investigated, or there are operational reasons that must likewise be followed up, or incapacity which must also be considered. In the third instance, it is not contemplated that notice is required. In effect, the Premier submits that this sentence is the third point of clause 9.

[19] It is as well at this stage to refer to the principles dealing with the interpretation of contracts. It is now clear that interpretation is a unitary exercise, which starts with the text to be interpreted, and considers it within the contract as a whole, and in

context. As put most pithily by Unterhalter AJ in *Betterbridge (Pty) Ltd v Masilo & others NNO* 2015 (2) SA 396 (GNP) para 8 (referring to the decision of this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)) 'the interpretation of language, including statutory language, is a unitary endeavor requiring the consideration of text, context and purpose'.

[20] Most recently, this court in *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176 (*Tshwane*) para 59, referred to the English approach set out by Lord Hodge in *Wood v Capita Insurance Ltd* [2017] UKSC 24 para 10:

'The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations.'

[21] Navsa ADP continued, in *Tshwane*, (para 61):

'It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* . . . stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors have to be considered holistically, akin to the unitary approach.' (Footnotes omitted.)

[22] The contract between Theron and the Council must thus be considered as a whole, and clauses 5 and 9 read together. The contract was of limited duration (three years) but was terminable in terms of clause 9. Subclauses 1 and 2 of clause 9 cannot be examined without reference to one another. We have to ask what purpose they

were designed to achieve and look for a sensible meaning to be attributed to all the parts.

[23] If Theron's construction were to be accepted, that subclause 2 qualifies subclause 1, then little purpose would have been served by the latter. Only the employee would have had the right to terminate on one month's notice. The employer would not have had the right to terminate on notice. It could terminate only on breach by the employee, with or without notice. And in the event that there was misconduct or another incident mentioned in the second sentence. But not otherwise.

[24] Could that have been intended by either Theron or the Council? Why would the Council have intended that Theron would have a right to terminate on notice but that it would not? It is highly unlikely that that would have been the case. And the words indicating that 'either party . . . may terminate . . . on giving one month's notice' would be entirely superfluous on this construction. So too would the provision in clause 9.2, that in the event of breach by the employee, no notice, or less than a month's notice, could be given to the employee, be superfluous.

[25] On the other hand, if we do not accept the Theron construction, what could the second sentence of clause 9.2 possibly mean? It is hardly a model of clarity. It does not state which party can terminate in the event of misconduct (one assumes it was the employer) and whether it would be on notice, or pending an investigation of circumstances. However, I consider the Premier's submission to be more coherent and plausible: termination for reasons relating to misconduct and other circumstances was included to ensure that where further investigations needed to be done immediate notice did not have to be given.

[26] Accordingly, the Premier was entitled to terminate on notice to Theron. It is true that he was not given formal notification in his personal capacity. But he was advised, as CEO of the Council, by the Premier as early as September 2010, that the Provincial Cabinet proposed to disestablish the Council, and that members had been informed of this earlier in the year. The Premier stated that the contracts of employment of all employees of the Council would terminate in March 2011, after due process had been followed. In the end, it was only disestablished in December 2011, but Theron and

other employees had had ample notice before then that their contracts would terminate.

[27] Gamble J in the trial court held that where there is no breach of the employment contract, but a lawful termination, the measure of an employee's claim is limited to the loss of salary for the notice period. Theron was paid that amount. Accordingly he dismissed the action. I consider that the finding was correct.

[28] The appeal is dismissed with costs.

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C H Lewis

Acting Deputy President

APPEARANCES

For Appellant:	A C Oosthuizen SC (with him S Mahomed) Instructed by: M Z Solomon Attorneys, Grassy Park Honey Attorneys, Bloemfontein
For Respondents:	E A de Villiers-Jansen Instructed by: State Attorney, Cape Town State Attorney, Bloemfontein