IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 1175/2021

In the matter between:

OWEN NGUBENDE HLAZO **Applicant**

and

OR TAMBO DISTRICT MUNICIPALITY **1st Respondent**

MUNICIPAL COUNCIL, OR TAMBO DISTRICT MUNICIPALITY **2nd Respondent**

EXECUTIVE MAYOR OF OR TAMBO DISTRICT MUNICIPALITY **3rd Respondent**

DEPUTY EXECUTIVE MAYOR, OR TAMBO DISTRICT MUNICIPALITY **4th Respondent**

JUDGMENT

JOLWANA J

[1] On 4 May 2021 this court delivered a judgment (the main judgment) in which Mr Hlazo was reinstated to his position as the municipal manager of the OR Tambo District Municipality. The respondents filed an application for leave to appeal against the said judgment and orders on 5 May 2021. This judgment concerns the said application for leave to appeal. I will refer to the parties as they were in the main judgment for ease of comprehension.

[2] In the notice of application for leave to appeal the respondents have advanced a number of grounds on which the leave to appeal is sought. I do not intend to traverse all of those grounds of appeal save for a few which I consider it necessary to deal with. Some of them are either submissions on a case that does not appear to have been not pleaded in the main application or re-arguments on issues that were dealt with in

some detail in the main judgment. In either case I have carefully considered them to see if and to what extent should those issues result in the application for leave to appeal being granted or refused.

[3] The first issue which deserve some further comment is the amendment to the notice of motion. I have dealt with the issue of the amendment of the notice of motion quite extensively in the main judgment. I do not think that it will serve any useful purpose to repeat my reasons for allowing the amendment save to point out that I am not at all convinced that another court may very well come to a different conclusion. This Court had a discretion on whether or not to allow the amendment which had to be exercised judiciously in ensuring the resolution of the actual *lis* between the parties. I do wish to point out that despite the main application having been filed on a truncated time table in terms of rule 6(12) of the Uniform Rules of Court the replying affidavit in which the applicant indicated that an amendment to the notice of motion would be sought during the hearing of the application was served at 08:33 on the 26 March 2021 on the respondents' attorneys.

[4] The applicant raised the issue of the amendment to the notice of motion in the replying affidavit very pointedly as follows:

"10. In paragraph 19 of the respondents' answering affidavit Mr Nogumla has deposed that the 21 October 2020 resolution has never been set aside by any Court. Below in this affidavit I deal with the fact that the said resolution was only made available to my attorneys and I only after I had filed the urgent application papers.

11. When my attorneys requested same on 19 February 2021, the respondents furnished an incorrect resolution of 19 February 2021 (without making available the said resolution).

12. I am advised that the resolution of 19 February 2021 is the subject matter of this urgent application proceedings in that it was taken after the 21 October 2020 resolution.

13. In any event, the respondents cannot rely on an earlier resolution of 21 October 2020 in circumstances where a subsequent resolution of 19 February 2021 was taken.

14. In the event the respondents' case at the hearing would be that the October 2020 resolution is still applicable, I am advised that it too must suffer the same fate as the 19 February 2021 resolution because it was motivated by the legal opinion that the employment agreement only subsisted for two (2) years.

15. To that end an amended notice of motion will be handed up in Court incorporating a prayer that the resolution by the municipal council of 21 October 2020 must also be declared as unconstitutional, invalid, unlawful, and in that it offends the doctrine of legality."

[5] The respondents had a number of options in dealing with these averments if they felt that they were not in compliance with any of the rules especially rule 28 of the Uniform Rules of Court. One of the options available to them on receipt of the replying affidavit containing what they considered to be irregular, was to proceed in terms of rule 30 of the Uniform Rules of Court. They did not do so. At the hearing of the main application on the 30 March 2021 they could have applied for leave to file a further affidavit, if so advised, they did not. In that further affidavit they would have pointed out any prejudice the amendment would visit upon them if leave to file same was granted. Instead, the respondents elected to proceed and argue from the bar and in their heads of argument that "*the attempt to amend the notice of motion is irregular and fatally defective and should be disallowed*."

[6] In opposing the application for leave to amend the notice of motion no reference was made to any prejudice the respondents might suffer if the amendment was allowed. In any event, as regards the termination of the employment contract the respondents' pleaded case was that the legal advice the respondents received was that the applicants' contract of employment was a two year contract and not a five year contract. Therefore, in my view, it mattered not which resolution implemented the said legal advice and absent a submission otherwise, the respondents' case remained the same as it related to the reasons for the termination of the contract. Such reasons were communicated to the applicant by the respondents in the letter of termination.

[7] The second ground of appeal which it is necessary to deal with is raised as follows in the application for leave to appeal:

"1.6 The substantive relief granted by His Lordship in relation to the duration of the contract is at variance with the relief sought by the applicant, both in the original notice of motion and the purported amended notice of motion, in this regard reference is made to paragraph 5 of the amended notice of motion and paragraph 4 of the original notice of motion.

1.7 The granting of paragraph 2 in the judgment is an overreach by His Lordship and an interference in a contract between the parties which was never sought by neither of the parties. His Lordship erred in doing so."

[8] What the respondents now seem to be contending for is that if I found against them as I did I could only make an order that the applicant prayed for which is reinstatement up to April 2023. On this contention which was never made in the main application in any event, if I could not find in their favour the only option would be to dismiss the application. I do not think so. In fact such a contention amounts to saying that a court and on the facts before it cannot grant an appropriate relief, one that is capable of being enforced. Were that contention to prevail it would lead to such an absurdity that courts would be hamstrung in their constitutional duty of resolving the actual disputes between the parties within the prism of the pleadings. It would lead to results that are not informed by the entire constitutional edifice and legal framework.

[9] In any event, the respondents themselves made a submission in their answering affidavit whose import is contrary to what is now being submitted. In the answering affidavit they averred that:

"36. The applicant has overlooked the fact that the next council elections are due to be held on the 4th of August 2021. In terms of the law, the employment contract of a municipal manager commences on assumption of duty and ends 1 year after the expiry of the term of the current council."

[10] The order that I granted which is now said to be an overreach is in fact what the respondents contended for as being the best scenario for the applicant, in the event that I found against them as I understood the pleadings. This ground of appeal is consequently also unsustainable.

[11] The third issue is the interpretation of clause 5.1 of the employment contract. I do not intend to repeat the same points that I made in the main judgment which, I remain unpersuaded that my reasoning and conclusions thereon are incorrect or that I erred in arriving at such conclusions. During the hearing of the application for leave to appeal it was submitted on behalf of the respondents that the main case was never about the interpretation of the contract of employment, if I understood those submissions correctly. However, the respondents' entire pleaded case on the termination of the employment contract, understood in context of all the pleadings as a whole, was about the interpretation of the employment contract, in particular clause 5.1 thereof.

[12] Even if there might have been any doubt about what the crux of the issue was in this case, the respondents themselves in their heads of argument made it clear that

their own understanding was that the main case was about the interpretation of the employment contract. They said:

"6. For the applicant to succeed he will have to establish a clear right. In order to do so he will have to convince this Honourable Court that his interpretation of the contract is the only acceptable one[1].

7. It is respectfully submitted that it is far from clear what the parties agreed upon. Subclause 5.1 is patently contradictory. Is the reference to two years an error or is it the year 2023?"

[13] In light of this submission it lies ill in the mouth of the respondents to now contend otherwise. It clearly was the interpretation of the contract in light of the legal advice that the respondents received and on the basis of which council took a resolution on 21 October 2020 to terminate the employment contract that was the issue before court. Whatever deliberations took place in council on 21 October 2020, once it was resolved to accept the legal advice to the effect that based on clause 5.1 the contract of employment terminated in April 2020 as it was a two year contract; and once the council decided to act on that resolution and effected the termination in line with that resolution no fruitful purpose would be served by seeking to establish what deliberations took place before the resolution was taken. Therefore, the ground of appeal that because the applicant had not sought reasons by way of a rule 53 or any other form, that stood in the way of the applicant challenging the resolutions terminating his contract of employment is, with respect, a red herring and is misplaced on the facts of this matter. Throughout the respondents' various voluminous papers filed in opposition to the main application the non-compliance with rule 53 now raised in the application for leave to appeal was never raised. Furthermore and in any event, no other reason for the termination of the employment contract was pleaded other than the legal advice which was sought and obtained to the effect that the employment contract was for two years and not five years.

[14] One of the grounds of appeal that I consider it necessary to deal with is articulated as follows in the notice of application for leave to appeal:

"1.3.1.2 The appointment letter upon which the court relied, is dated 29 March 2018, which is a date of more than a month preceding the date of the actual contract that was signed on 2 May 2018.

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[1] My underlining.

1.3.1.3 The contract contains a variation clause which reads – “No addition to or variation or mutually agreed cancellation of this contract and no waiver of any right arising from this contract or its breach or termination shall be of any force or effect unless it has been reduced to writing and signed by or on behalf of both parties”.
1.3.1.4 On the basis of the above, the appointment letter was irrelevant in determining the duration of the contract.
1.4 It is submitted that His Lordship erred and misdirected himself in relying upon the appointment letter, which was on its own, invalid for contravention of section 57(6).”
[15] The posture of the respondents in the application for leave to appeal appears to be contrary, in many respects, to its own posture in the main case. In their heads of argument in the main application the respondents made the following submissions:
“8. To further complicate matters there is the appointment letter of 29 March 2018 (which was handed up by agreement). It states that the appointment was to terminate one year after the expiry of the current Council’s term of office, the date being given as 31 August 2022.
9. Whilst the letter reflects the legal position as provided for in section 57(6) of the Systems Act what it doesn’t say is that the appointment is for five years, subject to the proviso that it would terminate one year after the municipal elections.”
[16] Nowhere in the respondents’ heads of argument or during submissions in the main application was the validity or relevance of the letter of appointment questioned. In fact its validity was affirmed with the respondents arguing their case also based on it for this Court to find in their favour. This is far from saying that it was irrelevant and should not be taken into account. It seems to me that the respondents are, through the application for leave to appeal, attempting to make out a new case which was neither pleaded nor argued in the main application.
[17] In arguing that reliance on the letter of appointment in the main judgment was a misdirection reference is also made to the non-variation clause contained in the contract. The non-variation clause reads:
“No addition to or variation or mutually agreed cancellation of this contract and no waiver of any right arising from this contract or its breach or termination shall be of any force or effect unless it has been reduced to writing and signed by or on behalf of both parties.”

[18] The non-variation clause was used to bolster the argument that the letter of appointment should not have been relied upon by this Court in establishing what the common understanding between the parties was.

[19] Besides the fact that this is contrary to the respondents' own position in the main application, at least as determined through submissions made during the hearing of the main application and in their heads of argument, the respondents have misconstrued what for and how the letter of appointment was used. It was not used by the applicant to seek to vary the contract or to do anything referred to in the non-variation clause or elsewhere in the entire contract. Instead it was used by the court, as clearly pointed out at the hearing of the main application, as one of the things to take into account in understanding what was in the minds of the parties at the time or round about the time the contract was concluded. As pointed out in the main judgment this is perfectly permissible in our jurisprudence.

[20] For this reason even reliance on *TDH Tsolo Junction*[2] is, with respect, unsustainable in my view as it will become clear below. In that case the Supreme Court of Appeal said:

"[6] In its terms, the letter of appointment was a preliminary document. It expressly provided that the development of the property would be governed by a written contract which would "outline the conditions of the contract". The undisputed evidence was that during the negotiations between the parties that preceded the conclusion of the agreement, the representatives of the respondent had explained why the documents in question were not applicable to the project and that this was accepted by the appellant's representatives.

[7] Thus, the parties in fact agreed to exclude the requirement that these documents be submitted, from the agreement. The agreement contained no reference to the letter of appointment and, importantly clause 15 thereof provided that it constituted the sole memorial of their agreement."

[21] *TDH Tsolo Junction* is distinguishable and thus inapplicable to this matter for a number of reasons. First, in *casu* there was no evidence of any preliminary negotiations in which it was agreed that the contract of employment would no longer subsits for up to one year after the expiry of the term of the current council or for five years. Second, there was no evidence of any negotiations which took place between

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[2] *Municipality of Mhlontlo v TDH Tsolo Junction* (1086/2019) [2021] ZASCA 3 (7 January 2021).

the date of the letter of appointment and the conclusion of the contract. It would be very strange if the parties had negotiated and agreed on a two year contract, if it was not pleaded at all by the respondents. Third, the contract itself reflects a termination date which is at the end of the five year period as does the letter of appointment subject to the provisions of section 57(6) of the Municipal Systems Act. Finally, it was never the respondents' case in *casu* that the termination of the contract was based on the council having at any stage agreed on a two year contract and not a five year contract. In fact in their answering affidavit they make it clear that they were not aware that it was a two year contract until they received legal advice. Even the termination letter makes no reference to any such negotiations and agreement which would have informed the reference to the employment contract being for a duration of two and not five years. All that the respondents pleaded was a bare denial that the employment contract was for five years.

[22] In any event the applicant never placed reliance on the letter of appointment in advancing his case for a five year contract. The letter of appointment was thus not used to vary or add anything to the contract and thus the non-variation clause was not breached by the applicant in his contentions for a five year contract. The letter of appointment was used by the court to make sense of what prevailed and was intended by the parties at the time of the conclusion of the contract so as to determine whether the parties had intended a two year or five year contract.

[23] The treshhold for the granting of an application for leave to appeal is codified in section 17 of the Superior Courts Act[3] as follows:

"(1) Leave to appeal may only be given where to judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

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[3] Superior Courts Act 10 of 2013

[24] The Supreme Court of Appeal has given an authoritative interpretation of section 17(1)(a) of the Superior Courts Act. In *Mkhitha*[4] the court stated the legal position as follows:

"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be granted.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[25] I have carefully considered all the grounds of appeal including the parties' very useful heads of argument and the submissions made for which I am grateful. However, I am unconvinced that on the facts of this matter, there are reasonable prospects of success on appeal. I can also find no compelling reason why the appeal should be heard. Therefore, and for all the above reasons the application for leave to appeal stands to be dismissed.

[26] The applicant has, in his heads of argument, asked that the costs should include costs occasioned by the employment of two counsel in the event of the application for leave to appeal being dismissed. I do not think that the matter at this stage, warranted the employment of two counsel.

[27] In the result the following order shall issue:

1. The application for leave to appeal is dismissed with costs.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant: E. MOKUTU SC with X. STEMELA

Instructed by: MALEMBE MOTAUNG MTEMBU INC.

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[4] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] Jol 36940 (SCA) at paras 16-17.

c/o T.L. LUZIPHO ATTORNEYS

MTHATHA

Counsel for the Respondent: M. NOTYESI

Instructed by: MVUZO NOTYESI INC.

MTHATHA

Head on: 18 June 2021

Delivered on: 29 June 2021