REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN

JUDGMENT

Reportable

Case No: D801/10

In the matter between:

NTAMBANANA MUNICIPALITY	**Applicant**
and	
XOLANI CAESAR MZOBE	**First Respondent**
HUMPHREY NDABA N.O.	**Second Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Third Respondent**

Date heard: 28 August 2012

Date delivered: 27 February 2013

Summary: Review application – renewal of contract of municipal manager – reasonable expectation – whether employee dismissed or contract ran its life time.

JUDGMENT

CELE J

Introduction

[1] In terms of s 158(1)(g) of the Act[1] the applicant seeks to review and set aside, or

[1] The Labour Relations Act No 66 of 1995.

correct, the arbitration award handed down by the second respondent, acting under the auspices of the third respondent, in this matter on 21 July 2010, in terms of which the second respondent found that there was a dismissal of the first respondent by the applicant and that such dismissal was substantively and procedurally unfair. The first respondent opposed the application.

Factual background

[2] The first respondent, Mr Mzobe, was employed by the applicant in terms of a fixed term contract commencing on or about 31 October 2005, terminating on 31 October 2008, in the position of Director: Corporate and Community Services. The Executive council of the applicant considered the extension of the fixed term contracts of its managers appointed in terms section 57 of the Local Government Municipal Systems Act 32 of 2000. During March 2008, it resolved to recommend the renewal of the managers' fixed term contracts, including that of Mr Mzobe. The matter came before Council for deliberation and decision. On or about 30 May 2008, the applicant Council took a resolution not to renew Mr Mzobe's contract while the other senior managers had theirs renewed. The decision of Council was not preceded by any discussion or voting. There was a proposal which was supported and a unanimous decision was taken not to renew his contract and to advertise the post when his contract expired. The Municipal Manager told him verbally what Council had decided. The decision was communicated to Mr Mzobe in writing only on or about 6 August 2008, wherein he was notified that his contract would be terminating by the effluxion of time with effect from 31 October 2008.

[3] In terms of the provisions of Government Municipal Systems Act, managers could only be appointed after consultation with the Municipal Manager. The managers' contracts and the legislative provisions of Government Municipal Systems Act and Regulations precluded a legitimate expectation except in limited circumstances. No such consultation took place with the Municipal Manager. Clause 3 of the contract of Mr Mzobe's employment provided that his contract

could be renewed at the discretion of the Council.

[4] In March 2008, a strategic meeting attended, *inter alia,* by the Municipal Manager and Mr Mzobe, became a recipe for mistrust between them, as a result of a plan to increase the salary of the Municipal Manager's secretary, which Mr Mzobe was supposed to take a lead in but did not.

[5] Both in March 2008, after the strategic meeting, and in August 2008, after notification of the expiry of his contract in October 2008, Mr Mzobe elected to negotiate the early termination of his contract of employment, which provisions were based on a consensual termination of the contract of employment. He in fact, left his employment early and was paid out in lieu of performing the remainder of his contract of employment. His letter dated 17 March 2008, proposing the shortening of his contract, had five paragraphs, the second and third of which read:

> '2. I cannot work at an environment where I receive such comments from my manager, especially since this is not the first message.
>
> 3. I have decided to make things easy for you. I propose that, by agreement, my employment be terminated with immediate effect and that I be paid my remuneration for the remaining three months. Surely if you get rid of me, your council will function properly in my absence as before. If you buy me out I will leave immediately. '

[6] Thereafter Mr Mzobe referred an alleged unfair dismissal dispute in terms of s 186(1)(b) of the Act to the third respondent for conciliation and arbitration. In terms of his letter dated 7 August 2008, addressed to the Municipal Manager, the conduct of his employer had created a legitimate expectation on him that his employment contract would be renewed, at least for a further 3 year period because:

a) According to him, EXCO of the applicant, without consultation with the Municipal Manager, resolved to renew his contract / resolved to recommend to the applicant's council that his contract should be renewed;
b) He heard nothing further from the applicant until he was informed that his contract would not be renewed.
c) He was not informed of the reasons for the non-renewal. He then contended that if no reasons were advanced in the general meeting, they could not be considered as reasons of the Council.

[7] The second respondent was appointed to arbitrate the dismissal dispute which had arisen. He made various findings which included:

a) The non-renewal of the contract by the Council was in line with clause 3 of the contract of employment of Mr Mzobe which stated that the contract may, at the discretion of the Council, be renewed at the termination thereof;
b) Despite the fact that Mr Mzobe was a section 57 Manager, he was an employee subject to the provisions of chapter 8 of the Labour Relations Act, and the concomitant constitutional right to fair labour practice;
c) Taking into consideration that the definition of Council in the definition section of the contract of employment of Mr Mzobe included an executive committee, even though the committee made a recommendation in line with the standing practice alluded to by Raymond, the fact that Council did not give reasons to Mr Mzobe why his contract was not renewed, the inconsistency in that the other section 57 managers' contracts were renewed and the continued availability of the particular job, he concluded that Mr Mzobe had a legitimate expectation that Council would renew his contract or provide reasons why it did not renew the contract;

d) Once Mr Mzobe successfully showed that he was dismissed in terms of s 186(1)(b) of the Act, the onus shifted to the employer to show that the reason for the non-renewal of the contract was a fair reason related to the employee's conduct or capacity or to the employer's operational requirements; and the decision not to renew the contract was taken following a fair procedure;

e) There was evidence that Mr Mzobe's conduct at the strategic organisational meeting resulted in a tense relationship with the Municipal Manager which led to their work relationship being incompatible;

f) Incompatibility was a species of incapacity and if the Municipality was of the view that the relationship between Mr Mzobe and his supervisor was incompatible, an incapacity route should have been followed to deal with the matter, which would have been in line with schedule 8 of the Act;

g) The dismissal of Mr Mzobe was therefore substantively and procedurally unfair;

h) The conduct by Mr Mzobe about the Municipality's secretary contributed to a deterioration of relations between him and his supervisor. Consequently, an order of reinstatement would be inappropriate in the circumstances. 5 months salary compensation was just and equitable.

[8] The applicant has outlined a number of grounds for review with supporting submissions, including that:

a) The second respondent failed to determine whether EXCO had the delegated powers which the first respondent alleged they had, despite the fact, and legal submissions advanced by the applicant to the effect that EXCO was devoid of such powers. While impliedly accepting that EXCO did not have such powers, the second respondent pursued the

alternative argument that EXCO's decision to recommend the renewal created a legitimate expectation of such renewal. The second respondent did not consider the issue whether the first respondent knew that EXCO would not have such authority to bind the applicant and accordingly that he could not place any reasonable reliance on that issue. The second respondent thus failed to apply his mind to a material aspect of the law in that regard and to the relevant material before him, namely the actual authority of EXCO, and the first respondent's knowledge of it.

b) The second respondent failed to resolve a material dispute of fact concerning EXCO's authority and the first respondent's knowledge, so as to adjudicate the actual case before him, and whether it was one of renewal and not just a legitimate expectation thereof.

c) The second respondent found that a failure by the applicant to give reasons to the first respondent for the non-renewal of his contract and the fact that the other section 57 managers' contracts had been renewed constituted sufficient grounds for an expectation of renewal on behalf of the first respondent. In doing so, the second respondent failed to take into account material aspects of the evidence which a reasonable decision maker would have and which would have precluded the second respondent (and a reasonable decision maker) from reaching the conclusion that he did;

d) He failed to apply his mind to the relevant statutory provisions in terms of which the contracts of the section 57 managers employed by a municipality can be renewed and when a legitimate expectation can be said to exist. He said nothing of why the three factors on which he relied, militated against the aforesaid contractual and statutory provisions, and notwithstanding them, created a legitimate expectation on behalf of the first respondent;

e) The second respondent failed to apply his mind to the issue of when the material time for determining a reasonable expectation for renewal

should have been investigated.

Evaluation

[9] Parties are in dispute as to whether the termination of the contract of employment of Mr Mzobe was a dismissal. In terms of s 192(1) of the Act, Mr Mzobe had the onus to prove the existence of such dismissal. Such onus entails him having to prove that the termination of employment falls within the purview of s 186(1)(b) of the Act, and also to prove that the subjective expectation was in relation to the renewal of the contract.[2] The expectation has to be reasonable and is therefore objectively determined.[3]

[10] One of the essential terms of the contract of employment in this case is that the contract was to have run its life time by 31 October 2008. For Mr Mzobe to place reliance on s 186(1)(b) of the Act, he had to prove the existence of certain facts on the basis of which a contract that was to end on 31 October 2008, was reasonably expected to be renewed or extended. The second respondent's finding in this regard in favour of Mr Mzobe that

> '. . . taking into consideration that the definition of Council in the definition section of the contract of employment of Mr Mzobe included an executive committee, even though the committee made a recommendation in line with the standing practice alluded to by Raymond, the fact that Council did not give reasons to Mr Mzobe why his contract was not renewed, the inconsistency in that the other section 57 managers contracts were renewed and the continued availability of the particular job. . . '

meant that Mr Mzobe had a legitimate expectation that Council would renew his contract or provide reasons why it did not renew the contract and that Mr Mzobe

[2] See in this respect *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) and (2001) 22 ILJ 2407 (SCA) and *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC).
[3] See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

had successfully proved that he had been dismissed by the applicant.

[10] By and large, the facts of this matter remained common cause between the parties. The circumstances prevailing at the time it was decided not to renew the employment contract, do not appear to support the finding made by the second respondent. Mr Mzobe's letter of 17 March 2008, proposing the shortening of his contract and the reasons he outlined, negate any prospects of him having to reasonably expect his contract to be renewed or extended. He admitted that he could no longer work with his immediate supervisor. He was a senior official who took part in the meetings of Council. He knew that the executive committee could never take final decisions on the employment of managers and that the powers of the committee were limited to making recommendations for consideration by the Council. At his level of a Manager, he could never have been confused about the powers of the executive committee. For him to suggest that he had an expectation that his contract would be extended, well knowing how council business was run, was rather self-serving and disingenuous. The applicant's contention that the second respondent failed to apply his mind appropriately to important facts of this matter is accordingly well grounded and is upheld.

[11] The second respondent further held that incompatibility was a species of incapacity and if the municipality was of the view that the relationship between Mr Mzobe and his supervisor was incompatible, an incapacity route should have been followed to deal with the matter, which would have been in line with schedule 8 of the Act. When the undisputed facts of this matter are considered, it becomes difficult to appreciate the reasonableness of this finding. It was not the evidence of the parties that Mr Mzobe was incapable of executing his tasks to the level required of the manager in his position. The issue turned on the human relationship having a negative effect on his job, as opposed to the ability to perform his tasks within required levels. It follows that an incapacity hearing could never have a bearing on the poor human relations between Mr Mzobe and his Municipal Manager. The second respondent went out of his way to consider

irrelevant issues and thus committed a gross irregularity.

[12] A proper conspectus of relevant evidential material shows that Mr Mzobe failed to prove the existence of facts on the basis of which he could reasonably expect his employment contract to be renewed.

[13] A proper order is accordingly issued in the following terms:

1. The review application is granted in this matter;
2. The arbitration award issued by the second respondent in this matter is reviewed and set aside;
3. The applicant did not dismiss Mr Mzobe, whose contract of employment was terminated by effluxion of time;
4. No costs order is made.

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Cele J

Judge of the Labour Court

Appearances:

For the Applicant:	Adv. C Nel.
	Instructed by Kloppers Incorporated
For the First Respondent:	Mr P Shangase.
	Instructed by Messrs A P Shangase & Associates, Durban.