IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D1321-13

In the matter between:

Nongoma Local Municipality	**Applicant**
and	
S N Biyela	**First Respondent**
SALGBC	**Second Respondent**
Keshree Kemi N.O	**Third Respondent**

Heard: **17 August 2016**

Delivered: **25 January 2017**

Summary: Municipal Systems Act, 2000 – Manager directly accountable to the municipal manger – s 66 - the power to conclude a fixed term contract arises only once municipality exercises its discretion under s 57(7) - fixed term contract could only be effected in terms of s 57(6) so termination one year after elections also formed part of the terms of contract.

JUDGMENT

WHITCHER J

[1] First Respondent was employed as Applicant's Technical Services Director, a manager directly accountable to the municipal manger. He was employed on a fixed term five year contract, effective from 1 September 2009 to 31 December 2014. On 1 February 2013 Applicant gave Respondent notice that his contract of employment had terminated by operation of law. Thereafter, Respondent consented to and agreed to a three month' fixed term contract effective from 1 February 2013 to 30 April 2013.

[2] It was common cause that Respondent's appointment was made in terms of the Municipal Systems Act ('the Systems Act').[1] The issue before the arbitrator, and now on review in terms of section 145 of the LRA, is whether Respondent was dismissed by Applicant (whether his contract of employment was prematurely terminated) on 31 January 2013, or whether Respondent's employment contract terminated by operation of law in terms of section 57 of the Systems Act one year after the election of the new council following the municipal elections in May 2011. Stated differently, the issue is whether or not section 57(6) applied to Respondent's contract of employment, in particular the proviso that the employment contract must not exceed a period ending one year after the election of the next council of the municipality following municipal elections.

[3] The arbitrator concluded that Respondent was dismissed (that his fixed term contract was prematurely terminated by Applicant) on 31 January 2013 and awarded him compensation equivalent to the 20 months that had remained on the contract, which amounted to R958 428.00.

[4] In arriving at her decision, the arbitrator, in a nutshell, found that section 57(7) did not apply to Respondent's contract in the absence of the parties having provided for same, either through a council resolution or a specific term in the respondent's contract of employment. In other words, in the absence of Applicant, through a council resolution or specific contractual term, having extended the application of section 56(6) to Respondent's contract of

[1] Act 32 of 2000.

employment, Respondent's contract did not automatically terminate one year after the election of the new council following the municipal elections in May 2011.

Statutory Framework

[5] The relevant provisions of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) are as follows:

> "**55 Municipal managers**
>
> (1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for-
>
> (e) the appointment of staff other than those referred to in section 56 (a), subject to the Employment Equity Act, 1998 (Act 55 of 1998);
>
> **56 Appointment of managers directly accountable to municipal managers**
>
> (a) A municipal council, after consultation with the municipal manager, appoints a manager directly accountable to the municipal manager.
>
> **57 Employment contracts for municipal managers and managers directly accountable to municipal managers**
>
> (1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only-
>
> (a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).

(2) The performance agreement referred to in subsection (1) (b) must-

(a) be concluded within a reasonable time after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager, and thereafter, within one month after the beginning of the financial year of the municipality;

(b) in the case of the municipal manager, be entered into with the municipality as represented by the mayor or executive mayor, as the case may be; and

(c) in the case of a manager directly accountable to the municipal manager, be entered into with the municipal manager.

.....

(6) The employment contract for a municipal manager must-

(a) be for a fixed term of employment not exceeding a period ending two years after the election of the next council of the municipality; (b) include a provision for cancellation of the contract in the case of non-compliance with the employment contract or, where applicable, the performance agreement; …

(7) A municipality may extend the application of subsection (6) to any manager directly accountable to the municipal manager."

[6] According to Applicant, section 66 of the Systems Act is also relevant to the determination of the issues in this matter. It reads as follows:

"**66 Staff establishments**

(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must-

(a) approve a staff establishment for the municipality;

(b) provide a job description for each post on the staff establishment;

(c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and

(d) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.

(2) Subsection (1) (c) and (d) do not apply to remuneration and conditions of service regulated by employment contracts referred to in section 57."

[7] The Systems Act was amended with effect from 5 July 2011.[2] This amendment included amendments to sections 56 and 57. The case before me concerns the sections as they existed prior to the amendments.

[8] After 5 July 2011, the relevant part of section 57 reads as follows:

'(3) The employment contract referred to in subsection 1(a) must –

(a) include the details of duties, remuneration, benefits and other terms and conditions as agreed to by the parties, subject to consistency with–

(i) this Act;

[2] This was done by way of the Municipal Systems Amendment Act 7 of 2011.

(ii) any regulations as may be prescribed that are applicable to municipal managers or managers directly accountable to municipal managers; and

(iii) any applicable labour legislation ….'

(6) The employment contract for a municipal manager must – (a) be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year after the election of the next council of the municipality; (b) include a provision for cancellation of the contract in case of non-compliance with the employment contract or, where applicable, the performance agreement; (c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; (d) reflect the values and principles referred to in terms of section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51.

[9] In addition, subsection (7) allowing for the application of subsection (6) to managers directly accountable to the Municipal Manager, was deleted by way of the amendment.

[10] Regarding retrospectivity of the new legislation, section 6(2) of the amending legislation reads:

"(2) the deletion of section 57(7) of the Principal Act does not affect the continuation of validity of a fixed term contract of a manager directly accountable to the municipal manager which is in force when this Act takes effect."

Respondent's submissions

[11] It is convenient to start with the submissions made on behalf of Respondent, which are that:

11.1 Respondent's contract of employment was unlawfully prematurely terminated on 31 January 2013 because the post-election termination provisions of section 57(6) apply to municipal managers only.

11.2 Section 57(7) does not automatically render the provisions of section 57(6) applicable to managers directly accountable to municipal managers such as him.

11.3 The provisions of section 57(7) extending the provisions of section 56(6) to managers directly accountable to the municipal manager must be done expressly and deliberately either by way of including same in the manager's employment contract or by passing a resolution to that effect.

11.4 No evidence was placed before the arbitrator to indicate the council extended section 57(6) to Respondent.

[12] In support of his submissions, Respondent relied on the following extract from the judgment in *Uthukela*[3] by Snyman AJ:

> "[50] The above being the case, what was then the mutually agreed terms of employment between the first respondent and the applicant? It starts with the resolution of 31 May 2010, which was adopted following discussion whether the five year fixed term contract period applicable to municipal managers was equally applicable to the appointment of the first respondent. It was resolved, pursuant to this deliberation, that the first respondent be appointed for seven years from 1 July 2010, as this five year limitation did not apply, and the municipal manager was authorized to conclude a contract with the first respondent in terms of section 57. Again, and contrary to what the applicant suggests, this is simply not a resolution by the council to apply or adopt section 57(6). Far from it, it is clear from the resolution that the council in fact considered section 57(6) and concluded that it did not apply, and the council then resolved to conclude a specific agreement for seven years with the first respondent. The reference to section 57 in the resolution clearly contemplates the employment contract in terms of

[3] *Uthukela District Municipality v Khoza and Others* (D735/13 [2015] ZALCD 19 (20/3/2015)

section 57(1)(a) as read with section 57(3). I agree with the submission of Ms Allen that if the council intended section 57(6) to apply, it would have specifically said so in the resolution, and this would have found room in the contract itself.

[51] I thus conclude sections 56 and 57 do not require, in the case of a section 56 manager, that section 57(6) must be applied by a municipality in order to validly effect a fixed term appointment of such a manager. Provided the council authorizes the appointment, the manager appointed is suitably skilled and qualified, and a written contract is concluded in the terms of what is required in section 57(3) for such a manager, there can be nothing unlawful or invalid in concluding such contract, and in particular, any agreed fixed term stipulated therein. In *Dihlabeng Local Municipality v Nthute and Others*[4], Musi JP, writing for the full Court on appeal, said the following:[5]

'The court *a quo* erred when it said that section 57 appointees needed to have fixed-term contracts and concluded that because the second to the fifth respondents did not have such fixed-term contracts, they could therefore not be managers directly accountable to the municipal manager. The requirement of a fixed-term contract is contained in section 57(6) and applies only to the appointment of a municipal manager. Of course a municipal council can act in terms of subsection (7) of section 57 and extend the requirement to managers directly accountable to the municipal manager. There has been no suggestion *in casu* that the appellant council had so extended the requirement.

Section 57 stipulates only two basic requirements for the appointment of a manager directly accountable to the municipal manager. They are a written contract of employment and a separate performance contract. …. In this regard it is noteworthy that whereas in terms of section 56(a), the municipal council must make the appointments, the fulfilment of the provisions of section 57 is left to the municipal manager. ….'

[4] [2009] JOL 23108 (O).
[5] Id at paras 21 – 22.

[52] *In casu*, there is, as said, a written contract and an appointment by the council. … Thus, all the requirements for a valid employment contract of the first respondent as section 56 manager exists. …

[54] Therefore, considering the above, and applying the *ratio* in *Dihlabeng Local Municipality*, I accept that the employment contract concluded between the applicant and the first respondent on 1 July 2010 is valid and lawful. There is no indication *in casu* that section 57(6) was extended to the appointment of the first respondent, and in fact, as I have said, the contrary is true. The employment contract in all respects complies with what is stipulated in sections 57(1) and (3) …

[55] I therefore conclude that the seven year term as contained in the employment contract concluded between the applicant and the first respondent on 1 July 2010 is binding on both parties. This means that the employment contract expires on 30 June 2017, and I thus reject the applicant's contention that the employment contract in fact expired on 18 May 2012 by virtue of the application of the section 57(6) time period."

Applicant's submissions

[13] Applicant weaves a number of provisions of the Systems Act together to construct an argument that, even in the absence of such an express term in Respondent's contract, his employment was still subject to termination one year after the May 2011 local government election. Applicant contends first that Respondent's employment was regulated by section 57(6) because he was employed as a manager directly accountable to the municipal manager and was given a five year fixed term contract. The specific contractual form of a five year fixed term contract could not have been validly concluded with Respondent but under section 57(6).

[14] Following the municipal elections in May 2011, his contract, on interpretation of section 57(6)(a), terminated one year later in May 2012. There was thus no dismissal.

[15] The amending Act removed the empowerment or discretion afforded under section 57(7) of the Systems Act to make section 57(6) applicable to the employment of managers directly responsible to the municipal manager. In other words, the old section 57(7) allowed managers directly accountable to municipal managers to be appointed for fixed terms, but that discretion is no longer available. The amendment appears to foster the building of a stable local public administration through the retention of managerial personnel. It fosters employment on indefinite contracts. The fact that section 57(7) was removed in order to achieve the above policy objectives lends credence to the notion that fixed term contracts under the old Systems Act where only authorised in terms of section 57(6).

[16] Section 66(2), furthermore, creates an exception to the general staff establishment norms in respect of municipal managers *and section 56 managers.* A fixed term five year contract is thus to be understood as an exception to the rule.

[17] Section 57 provided for written agreements in respect of these exceptions and provided, in subsection 57(6), that the contract of a municipal manager must be for a fixed term up to a maximum of 5 years not exceeding one year after the election of a new municipal council.

[18] The old section 57(7) provided that a municipality may extend the application of sub-section (6) to any manager directly accountable to the municipal manager. It is common cause that Respondent was such a manager. By so providing, section 57(7) empowered a municipal council to apply a fixed term contract to section 56 managers. In the absence of section 57(7), which permitted the exception of fixed-term contract, all managers accountable to the municipal manager would, by operation of the staff establishment, be hired on indefinite contracts. There was no power to conclude fixed-term contracts to second-tier managers other than under section 57(6). Indeed that discretion has now been removed *in toto.* Other than with municipal managers, a municipality is now constrained to conclude indefinite contracts of employment with manages directly accountable to municipal managers.

[19] As a principle of interpretation of contracts, if a sub-section is invoked then all the parts of that sub-section apply. Indeed, the Labour Court held that, where certain of the sub-provisions of section 57(6) of the Systems Act are made applicable, then all the provisions have been made applicable.

[20] In *Sondlo,*[6] the Labour Court held as follows:

> "That being so, I find it implausible for the respondent to extend almost all the provisions of sub-section (6) and leave out 1 (fixed term). If it were so, such will be inconsistent with the law (the enabling statute). The only discretion left for the municipality is whether to extend the application of sub-section (6) or not. Once that discretion has been exercised, which I find has been in this matter, the entire sub-section's applications has to be extended."

[21] In other words, once the municipality exercises the discretion to make applicable section 57(6), the entire ambit of that sub-section becomes applicable to Respondent's contract of employment.

[22] In respect of the above principle, Applicant concluded a five year fixed term contract with Respondent in terms of section 57. The municipality at the onset exercised the discretion previously retained under section 57(7) to extend the application of section 57(6) to Respondent. When doing so, it had no discretion to extend only the 5 year time period portion of the sub-section but not the termination after elections portion. In other words, when the municipality exercised a discretion to conclude a five year fixed term contract, as is the case, it did so on the full extent of the provisos contained in sub-section 6, namely the conditions contained in 57(6)(a)(b)(c) and (d). Respondent's contract of employment makes it clear that each of the sub-sections in section 57(6) were made applicable to his contract. In this regard his contract states that Respondent is employed on a five year fixed term contract and he accepts employment as Technical Services Manager, subject to the terms and conditions contained in this contract *and* subject to the Local Government Municipal Systems Act, 2000…"

[6] *Sondlo v Chris Hani Municipality* (2008) ILJ 2010 (LC).

Analysis

[23] Respondent conceded that the onus was on him to prove he was dismissed. This means that the onus rested on him to demonstrate why section 57(6)(a) was expressly excluded from his contract.

[24] Having regard to section 66 of the Systems Act, I am persuaded that the power to conclude a fixed term contract arises only once Applicant exercises its discretion under section 57(7).

[25] The *Uthukela* judgment is distinguishable on the facts and the issues. The court in that matter does not appear to have been referred to, nor did it consider the import of section 66 of the Municipal Systems Act. Indeed, the court's decision in *Uthukela* appears to have been based on the view that parties could validly effect a fixed term contract (in that case it was for seven years) entirely outside of the ambit of section 57(6).

[26] The Labour Court authority on which the court in *Uthukela* relied also does not have a bearing on this case. The LAC in *Dihlabeng Local Municipality v Nthute and Others* was asked whether the fact that municipal employees were not on fixed term contracts precluded them from being considered as managers reporting to the municipal manager. The LAC, with respect, correctly simply pointed out that the municipality had a discretion whether to submit such employees to fixed term contracts or not. The LAC did not opine on the central issue in this case which is, whether, once a fixed term contract is effected, only the subsection setting a five year time-frame applies or term providing for termination one year after elections too.

[27] In *Sondlo* the court found with authority that once any of the sub-sections of section 57(6) are incorporated, they must all apply. This means that the express term of a five year fixed term contract carries with it, *ex lege*, the additional term permitting termination one year after municipal elections.

[28] The simple point is that in the matter before *Uthukela*, there was no evidence before the court to demonstrate that, in fact, the staff establishment did not

allow for fixed term contracts, except under the legislative exception created by section 57(6).

[29] This matter is a review. Bearing in mind that Respondent bore the onus to prove dismissal, I can see no evidence before the commissioner to suggest that the staff establishment allowed Respondent's appointment on a fixed-term contract under anything other than section 56(6). That being the case, a reasonable commissioner would have considered what the contractual terms were in light not only of the contract but also sections 56(6) read as a whole.

[30] Respondent was a high ranking official, a politically-appointed manager directly accountable to the municipal manager. In terms of the surrounding employment context, it was well-known that managers at this rank were subject to replacement not only after five years but a year after a change in the administration of a municipality. The absence of a contractual clause specifically providing same does not mean that this term did not implicitly apply.

[31] In any event, I agree with Applicant that there was no need to reduce such a term to writing or make a special council resolution. It was the law and thus formed part of the *naturalia* of the contract.

[32] In sum, there was no authority for the municipality to have concluded a fixed term contract other than under sub-section 57(6). Once this subsection was invoked to provide for Respondent's employment, part of the same sub-section that provided for termination after elections also applied.

Review Test

[33] It is trite that misapplication of the law or omitting a critical piece of evidence or argument constitutes a ground for review under section 145 of the Labour Relations Act. In my view, if the commissioner had proper regard to the fact that Respondent's fixed term contract could only be effected in terms of section 57(6), the commissioner would also have found that termination one year after elections also formed part of the terms of that contract. There is nothing on the record that suggests that, even in the face of this error, the

outcome would likely have been the same. The misdirection has thus had a distorting effect on the outcome of the matter. Consequently, the review must succeed.

[34] Given the legal – not evidentiary - basis on which this matter was argued and decided, I cannot see how remitting it back to the Bargaining Council will serve any purpose or disadvantage any party. I am able to provide finality to the parties.

Order

[35] In the premises, the following order is made:

(a) The review is upheld.
(b) The arbitration award issued by the commissioner is set aside and the finding and order replaced with the following: The case is dismissed.
(c) There is no order as to costs.

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Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For Applicant: Adv I Pillay, instructed by Magigaba Inc
For First Respondent: Adv S P Andertan, instructed by Gielink Attorneys