IN THE LABOUR COURT OF SOUTH AFRICA **REPORTABLE**

HELD IN CAPE TOWN

Case no: C159/2010

In the matter between:

RONNIE PETER LOTTERING	**1ST APPLICANT**
MICHAEL JOHN RHODE	**2ND APPLICANT**
MARX PUARWA	**3RD APPLICANT**
and	
STELLENBOSCH MUNICIPALITY	**RESPONDENT**

JUDGEMENT

CHEADLE AJ

Introduction

[1] The context for understanding the events described in this matter is one of a transfer of political power giving rise to shifting alliances between the political parties on the Council of the respondent and infighting among its senior managers. The applicants were executive directors appointed directly by the municipal council in terms of section 56 of the Local Government: Municipal Systems Act, 32 of 2000 (the Systems Act). Like the municipal manager, they are what are called 'political appointments' in the sense that they are chosen by Council, which normally means chosen by the majority party or coalition in the municipal council. During November and December 2009, the opposition party in coalition with other parties acquired the majority in the Council. The shifting alliances and changes in political authority have given rise to a number of conflicting and confounding decisions by the executive mayor and the municipal manager giving rise to some knotty legal problems.

[2] At a meeting on 6 November 2009 the applicants had their delegated powers withdrawn by the recently reinstated municipal manager. In response, the three applicants resigned that day. The municipal manager accepted their resignation that day but only communicated that to them on 9 November. On 16 November the applicants appealed to the executive mayor against the municipal manager's decision to accept the resignations. On 19 November, the executive mayor upheld the appeal. On 23 November the applicants withdrew their resignation, which withdrawal was accepted by the executive mayor on 24 November. Accordingly, as far as the applicants were concerned, their contracts continued to subsist.

[3] On 8 December, the applicants were advised that pursuant to a meeting of the mayoral committee confirming the executive mayor's decision to accept the withdrawal of their resignations, they were requested to continue reporting for duty. The next day the municipal manager retracted the contents of that letter stating that he had been misled into believing that a mayoral committee had been held. The municipal manager reverted to the respondent's previous position, namely that the applicants' employment had been terminated by the respondent's acceptance of their resignations on 9 November.

[4] On 14 December the Applicants were appointed to their positions in acting capacities pending the 'permanent filling of the positions'. On 13 and 14 February 2010, the applicant's posts were advertised. When the respondent failed to confirm that the applicant's original contracts were still in force and failed to withdraw the advertisements, the applicants launched this application on 24 February as a matter of urgency.

[5] The applicants sought a declarator that the contracts of employment 'that were in place on 30 November 2009 still subsist' and an order 'to cease the recruitment process it has commenced in order to fill the posts of the first second and third applicants'.

[6] At the hearing on 5 March, it was agreed that the matter be postponed to 21 April for hearing on the opposed roll and that the applicants remain in

the respondent's employment in acting positions until the date of judgement. The matter was heard on 21 and 23 April 2010 and judgment was reserved.

[7] Although various points were raised concerning jurisdiction, it was clear that the applicants' cause of action was contractual. The decisions of the executive mayor and the municipal manager concerning those contracts are not, after *Gcaba v Minister of Safety and Security & Others* 2010 (1) SA 238 administrative action.

[8] The central issue on which the application turned was whether the applicants had a clear right to the relief that they sought. It was and has proved unnecessary to consider the other requirements for declaratory and interdictory relief.

Outline of the law

[9] The Applicants have a main argument and several alternative arguments:

9.1 The main argument is that despite their letters of resignation, their contracts of employment did not terminate because the notices were in breach of contract and in contravention of section 37 and 38 of the BCEA;

9.2 Alternatively, the contracts did not terminate because the Municipal Manager's decision to accept the Applicants' resignations was overturned on appeal to the Executive Mayor;

9.3 Alternatively, if the contracts were terminated, the executive mayor agreed to the withdrawal of their resignations.

[10] These arguments are subject to an additional argument namely that the First Applicant contends that his letter of resignation is not unequivocal.

[11] Before dealing with each of these arguments it is necessary to outline the law implicated by the arguments.

The common law on resignation from employment

[12] Resignation is the term ordinarily used to refer to the termination of employment by the employee just as dismissal is used to refer to termination by the employer. Like dismissal, resignation can take many forms. It can take the form of the cancellation for breach, which has long been understood to include the acceptance of repudiation. If the contract permits, it can take the form of termination on notice.

[13] A resignation in the form of a cancellation of the contract will mean, in the case of a fixed term contract, that the employee may terminate the contract before the expiry of the term; and, in the case of an indefinite contract, that the employee may terminate without giving notice. A resignation in the form of a cancellation is unilateral in the sense that one party can bring the contract to an end without the consent of the other. It however can only be exercised if the other party has committed a material breach. In other words, if no material breach is found to be committed then the party resiling from the contract is itself in breach. In other words if the reason for the cancellation is bad, the cancellation itself is bad.

[14] In an indefinite contract, either party may terminate the contract on notice. A resignation in this context is simply the termination by the employee on notice. There does not have to be a specific provision to that effect, it is an inherent feature of an indefinite contract and if there is no agreed notice, the notice must be reasonable[1] (provided that it is not less than the minimum notice prescribed in section 37 of the BCEA). If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation.[2]

[15] The common law rules relating to termination on notice by an employee can be summarised as follows:

---

[1] *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326.

[2] There is such a provision in the applicants' contracts of employment. Clause 15.1 permits the employee to terminate the contract on notice before the expiry of the fixed term stipulated in clause 2.2 of the contracts.

15.1 Notice of termination must be unequivocal – *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 4 SA 809 (SCA) at 830E.

15.2 Once communicated, a notice of termination cannot be withdrawn unless agreed – *Rustenberg Town Council v Minister of Labour* 1942 TPD 220 and *Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC).

15.3 Termination on notice is a unilateral act – it does not require acceptance by the employer – Wallis *Labour and Employment Law* para33 at 5-10. This rule is disputed by the applicants in so far as it applies to notice not in compliance with the contract. The rule is accordingly dealt with more fully below.

15.4 Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires – *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926 (AMSA) at para [6].

15.5 If the employee having given notice does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay;

15.6 If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the the contract or to cancel it summarily and sue for damages – *SA Music Rights Organisation v Mphatsoe* [2009] 7 BLLR 696; and *Nationwide Airlines (Pty) Ltd v Roediger & Another* (2006) 27 *ILJ* 1469 (W).

15.7 If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month if the employer – *Honono v Willowvale Bantu School*

Board & Another 1961(4) SA 408 (A) at 414H – 415A. Since this articulation of the rule is contentious and its application was placed in dispute by the applicants, it too is dealt with more fully below.

Termination on notice not in compliance with contractual notice

[16] Mr Kantor on behalf of the applicants contends that notice of termination not in compliance with the contract constitutes a repudiatory breach which does not bring the contract to an end unless the other party elects to accept the repudiation.

[17] I take the view that termination on notice involves two discrete elements: the notification of termination (the act of resignation) and the giving of notice. The notification of termination is a unilateral act permitted by the contract – either inherently or specifically. Unlike the notification of termination in the form of the cancellation of the contract for material breach, which requires a determination of whether or not the termination is permissible on those grounds, the notification of termination on notice does not require any justification. It is sufficient of itself.

[18] Once given, the contractual terms dealing with the period of notice take effect. The failure to give proper notice is a breach of contract entitling the employer under the ordinary principles of law relating to breach to either to accept the repudiatory breach and terminate the contract summarily or to hold the employee to the contract. But in these circumstances, holding the employee to the contract would mean no more than requiring the employee to work out her notice. Grogan states this distinction succinctly in his reasons for his award in *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926 (AMSSA):

> ‘A resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period stipulated in the contract or by law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without the consent of the employer, is in fact the act that terminates the

contract…The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequences of the resignation' (at para 6).

[19] It follows that the act of termination is unilateral act permitted by the contract. The fact that the notice period is not in compliance with the contract and accordingly a breach does not mean that that breach should reach backwards and contaminate the act of termination. In my view, the act of resignation (the communication of the decision to terminate) is not a breach or a repudiation of the contract but an exercise of a right conferred by the contract. It is a legal act and its consequences for the date of termination are determined by the contract, not what might be stated in the notice.

[20] That means in an indefinite contract, short notice to bring that contract to an end does not constitute a repudiation – it is a unilateral legal act permitted by the nature or the specific terms of the contract for bringing the contract to an end at a future date – that date being determined by the contract. That is why an indefinite contract, often referred to as 'permanent employment' because it contemplates employment for long periods of time sometimes from the whole of an employee's working life, does not amount to servitude – as Mr Stelzner for the respondent pointed out, it is always open to being terminated unilaterally. In a fixed term contract, a notice to bring the contract to an early end is a repudiation because it does not in itself constitute a contractually permissible act of termination. Being a repudiation, the employer has an election to hold the employee to the contract or to accept the repudiation and cancel the contract.

[21] Mr Kantor contended otherwise and argued that notice of termination not in compliance with the contract constituted a repudiatory breach requiring the employer's acceptance before the contract could be terminated. The first authority relied on for this proposition is *Santos Professional Football Club (Pty) Ltd v Igesund and another* (2002) *ILJ* 2001 (C). In that matter the football coach had entered into a three year contract with the club. In

order to take up a more lucrative and more secure offer of employment, the coach gave two weeks notice of termination a year before the expiry of the fixed term. In that case the notice constituted a repudiation of the contract because no provision was made for the termination of the contract on notice. The giving of notice in such a circumstance is clearly a repudiation putting the employer to its election. Although the applicant's contracts are for a fixed term, specific provision is made in clause 15.1 of their contracts for the applicants to terminate the contract before the expiry of the fixed term. In *Santos* there was no contractual right to terminate on notice. That is the difference.

[22] The next authority for the proposition is *Datacolour International (Pty) Ltd v Intramarket (Pty) Ltd* 2001 (2) SA 284 (SCA). In that case a distributorship agreement provided for termination by either party on 'no less than twelve months written notice to terminate'. The plaintiff had written to the defendant indicating a clear intention of terminating the agreement. It did not purport to exercise its right to terminate on notice – important in this regard was the fact that the letters of termination did not refer to notice or the provisions for notice under the agreement nor to the notice period which was required to be fixed by the party exercising the right to terminate under the provisions. In these circumstances, the Court held that the letters constituted a repudiation. It is accordingly not authority for the proposition that when a contracting party exercises its right to terminate on notices that that exercise constitutes a repudiation.

[23] The next authority is a statement by the learned author, Martin Brassey, in his authorative *Employment and Labour Law* Vol 3 :

> 'Under the common law of contract a resignation takes effect immediately it is communicated if it constitutes *lawful* cancellation for material breach or is given in compliance with the notice or other requirements expressly or impliedly governing the termination of the contract. Such a resignation needs no acceptance to be valid and so operates unilaterally. *If the termination is in breach of contract, its acceptance is in principle necessary since repudiation terminates the*

contract if the innocent party (here the employer) elects not to act on it' (at A8-26 my emphasis).

A similar statement made by John Grogan in his *Dismissal, Discrimination and Unfair Labour Practices* Juta is made at 157.

[24] The statements of both authors are broad summaries of the law seeking to encapsulate both fixed term and indefinite contracts and termination by cancellation or by notice. I am not certain that either author intended their nutshell summaries to be interpreted in the manner relied on by the applicants. If however these summaries do represent their views in respect of a termination on notice, I must respectfully disagree with them because as a matter of principle a decision to terminate on notice can never be a repudiation or a breach although the failure to properly give notice may do so. The breach is not the decision to terminate but the failure to give proper notice - a breach that entitles the employer to hold the employee to the contract (i.e. what is left of it) which means holding them to work their notice in full or to cancel the contract summarily and sue for damages.

[25] In *Nationwide Airlines (Pty) Ltd v Roediger & Another* (2006) 27 *ILJ* 1469 (W) the contract of employment provided for 3 calendar months notice. The 1st Respondent, a pilot, gave notice on 3 October that he was terminating his employment and that his last day was 3 November. The applicant airline sought to hold the employee to his contract, which meant requiring him to work his notice i.e. until 31 January of the next year. The breach was the deficient notice not the invalid termination that entitled the employer airline to hold him to work his full notice.

[26] There are two authorities for this approach. *Pemberton NO v Kessell* 1905 TS 174 and *Honono v Willowvale Bantu School Board & Another* 1961(4) SA 408 (A) at 414H – 415A. In *Honono* a teacher was required by regulation to give a school quarter's notice of termination, which notice had to be served in the first week of the quarter. The respondent school board gave a school term's notice to terminate the services of the appellant teacher on 31 March 1959 but only served the notice in the second week of the quarter. The Court rejected the argument that the

notice of termination was invalid because it was not served in time. It found that the notice was 'insufficient to terminate' the contract at the date stated in the notice, namely the end of the quarter. The Court went on to say:

> 'It does not follow, however, that it [the notice] had no force and effect whatever. As a result of the conditions of service imposed upon the appellant by the regulations, his position, as far as notice of termination or dismissal is concerned was equated with that of any common law servant. That being so, it follows from the judgement of Innes CJ in the case of `*Pemberton NO v Kessell* 1905 TS 174 that the notice served on the appellant on the 27th January was sufficient and valid to terminate his appointment on the 30th June, 1958 at the end of the second school quarter' (at 414H -415A).

[27] Kerr takes a different view. In his chapter on 'Lease' in *LAWSA* Vol 14 at para 212 he argues:

> 'if notice expires on a date which is not the terminal date of one of the periods of the lease, it is ineffective even if the whole of a period elapses between the date on which the notice is given and the date on which the notice purports to bring the lease to an end. In other words, when notice covering a full period is given, it is the terminal date which matters, not the date of which the notice is given'

Kerr cites several cases in support of this proposition, the most important of which are *Fulton v Nunn* 1904 TS 124, *Tiopaizi v Bulawayo Municipality* 1923 AD 317 and *Moyce v Estate Taylor* 1948 (3) SA 822 (A). He significantly does not cite *Honono*, the later Apellate Division authority which clearly does not accord with his views.

[28] *Fulton v Nunn* and *Tiopaizi* are authority as to *when* the notice period comes to an end if no notice is stipulated in the contract and that that date is dependent on the periodicity of the lease. Neither are authority for the proposition that if the notice is deficient that the act of termination is invalid. They simply assert the notice period *should* run concurrently with

the periodicity of the lease and accordingly should end at the end of the period.

[29] In *Moyce* a monthly lease was terminated on 4 October with effect on 24 December. Relying on *Fulton v Nunn* and *Tiopaizi* and the fact that there was no evidence that the tenancy ran from the 25th of the month to the next, the Court found that the 'notice to quit…was not intended as a termination of the appellant's tenancy, it was not pleaded nor – if that tenancy ran from the first of the month – was it relied upon before us, and rightly so' (at 830). *Moyce* was decided on its facts. Whether the intention was correctly drawn from the fact that it was improbable that the tenancy was one that ran from the 25th of the month to the next or not, it cannot be a decision that one can rely on for establishing a a principle. And it certainly cannot on this basis seriously stand against the same but later court's decision in *Honono* in which it is explicitly stated that the fact that notice was deficient did not mean that it had 'no force and effect'.

[30] To sum up, there is a distinction between notification to terminate and the date of termination, which is determined by the notice period stipulated in or inferred from the contract of employment. Put another way termination on notice turns an indefinite contract into a fixed term, the final date of which is determined by contract if the notice is deficient. A deficient notice does not vitiate the act of termination although it may constitute a breach, which may entitle an employer or employee to either cancel the agreement summarily or hold the employer to the contract, which in its terminal state amounts to no more than requiring the employee to work notice or paying the employee in lieu of notice if the empoyer does not want the employee to work out the notice.

The application of sections 37 and 38 of the BCEA

[31] It is now necessary to outline the application of sections 37 and 38 of the BCEA. to resignations.

[32] Section 37(1) (c) states that a contract cannot be terminated at the instance of a party to the contract on notice less than four weeks if the

employee has been employed for a year or more. It is common cause that the applicants have been employed for more than a year.

[33] Section 38(2) read with subsection (1) states that if an employee gives notice of termination and the employer waives any part of the notice, the employer must pay the remuneration the employee would have received if the employee worked the full notice.

[34] It follows that although section 37(1)(c) requires an employee to give a minimum period of notice, section 38(2) permits an employer to waive any part of that notice provided that it pays the employee an amount equal to what the employee would have earned for the unworked part of the notice.

[35] If notice is given and not waived, the contract terminates on the expiry of the notice. If the employer waives any part of notice, the contract terminates when the employee leaves work (i.e. at the commencement of the waived period).

[36] If an employee having given notice to terminate, fails to work the notice, that failure constitutes a breach of contract entitling the employer to hold the employee to the contract (i.e. work out the notice) or cancel the contract. Nothing in section 37 or 38 affects the application of common law principles to the failure to comply with the contract until its expiry at the end of the notice period.

[37] If an employer fails to pay an employee who works the full notice period, the employee can sue the employer for the remuneration earned for that work. Section 37 and 38 do not affect the common law principles in respect of the failure of an employer to pay an employee for working out the notice period. The same would apply to an employee who tenders to work the full period but is not permitted by the employer to do so.

[38] Accordingly, what sections 37 and 38 do, for the purpose of this case, is to guarantee a minimum period of notice which may be waived by an employer. If waived, it must pay the employee an amount equivalent to what the employee would have earned had she worked out her full notice.

[39] Mr Kantor argued that section 37 required four weeks notice in order for a contract terminable at the instance of a party to the contract to be lawfully terminated. If less than four weeks notice was given, the contract could not be terminated. In other words, the contract would subsist until four weeks notice was formally and properly given. The employer's right to waive any part of the notice under section 38(2) only has application if the notice of termination complies with section 37(1).

[40] Such a reading requires an interpretation that makes the termination at the instance of a party to the contract unlawful if the full notice is not given. There are several answers as to why this cannot be a correct reading of the provision. *Firstly*, the mischief that the legislation was seeking to remedy was the abuse that a contractual regime for giving notice was prone to such as the giving of no notice or very short notice by the employer (such as an hour or a day), the disparity in notice permitting the employer to give short notice while requiring the employee to give long notice, and allowing an employer to waive notice without paying in lieu of notice. That is clear from the provisions of the two sections.

[41] *Secondly*, what mischief would the legislature be seeking to remedy by upholding the contract until formally terminated and thereby keeping the employee working for an employer she no longer wants to work for or, if she leaves employment, allowing the employer to cancel the contract for material breach and thereby avoid the obligations under sections 37 and 38 in their entirety by virtue of section 37(6) (a). Rather than ensure compliance with the provisions of the section by preventing termination, an interpretation that gives the employee the right to claim the amounts owing for non-compliance under the enforcement mechanisms of the BCEA or by way of a civil claim is the more preferable one.

[42] *Thirdly*, the interpretation advanced here is one that is in accord with the common law as I have analysed it. It is not the act of termination that is rendered unlawful but the failure to give the statutory notice. That unlawfulness is easily remedied by a claim for outstanding money and a compliance order under the enforcement machinery of the BCEA.

Applying the law to the main argument

[43] The Applicants' main argument runs as follows:

43.1 The Applicants gave short notice namely notice 6 days short of the 30 days required by their contracts of employment and 2 days short of four weeks required by section 38(1)(b) of the BCEA;

43.2 There was no agreement to waive the full period of notice and pay remuneration in lieu thereof under either the contract or section 38 of the BCEA;

43.3 Those notices were accordingly in breach of contract and in contravention of statute;

43.4 A breach of contract or repudiation does not bring the contract to an end, an employer has an election to hold the employee to the contract or to cancel it in accordance with its terms;

43.5 The Applicants' contracts provide if there is a material breach of contract, the innocent party may cancel the contract after giving the other party 14 days' notice to rectify the breach. No such notice was given.

43.6 Accordingly until the contract is cancelled by the employer, it subsists.

[44] It is necessary to break the main argument up into its constituent parts in order to deal with each proposition. The first issue is what the legal consequences are of a failure to comply with the notice of termination requirements in clause 15.1 of the applicants' contracts of employment. Those provisions read:

> 'The employee may terminate this contract by giving 30 days written notice of termination and the employer may, in his sole discretion, waive any part of the notice period'.

[45] On 6 November the applicants gave written notice of their intention to terminate their contracts with effect from 30 November. The notice of

termination was accordingly 6 days short of the contractual requirement and 2 days short of the statutory requirement. Mr Kantor, for the applicants, argued that the notice of termination was accordingly wrongful (a breach of contract) and unlawful (a contravention of statute).

[46] Despite the failure to give the required notice, the respondent's municipal manager wrote to the applicants on 6 November accepting their notices of resignation and confirming that their 'last working day would be 30 November 2009'.

[47] The thrust of the applicants' contractual argument is that a notice of termination not in compliance with the terms of the contract. Is not a lawful termination but a breach of contract. Being a breach of contract, the employer is put to an election: either to hold the employee to the contract or to cancel it on grounds of the breach. Since the respondent did not cancel on grounds of the breach, the applicants' contracts remained in force.

[48] I have held that as a matter of authority and principle, an employee has the right to unilaterally terminate the contract of employment on notice. That means that even if the employee does not give the proper notice, the unilateral termination of the contract is not a breach or repudiation of the contract. The failure to give proper notice is a breach of contract in response to which the employer may elect to hold the employee to the contract, which having been terminated amounts to no more than holding the employee to work out the contractual period. Alternatively it may elect to cancel the contract on grounds of breach. In any case even if the employer did neither, the employer would not be obliged to pay the employee for that part of the contractual notice period not worked.

[49] It accordingly follows that the applicant's acts of terminating the contracts of employment do not constitute a breach or a repudiation of the contract. They were doing no more than giving effect to a right accorded to them by their contracts, namely the power to bring the contracts unilaterally to an end. It is quite clear that the notice given in their letters of termination is 6 days short of the 30 days notice required under clause 15.1. Although the

applicants considered that their notice period to terminate on 30 November this does not mean that as a matter of law it 'has no effect' once notice is given the contract ends when the notice period contemplated in the contract expires.

[50] But even if I am incorrect on the legal consequences of short notice, section 15.1 of the applicants' contracts specifically provides that the respondent can 'waive any part of the notice period'. The Mr Stelzner argued that the letters dated 6 November 2009 and handed to the applicants on 9 November constitute such a waiver. Those letters confirm that the applicants' last working day will be 30 November 2009. I agree with him that the inference is inescapable that a confirmation of an employee's last working day before the expiry of the notice period constitutes a waiver of the balance of the contractual period of notice. By waiving that part of the notice period, the respondent has agreed to the short notice. The waiver cures the breach. It has the effect of releasing the respondent from the horns of electing either cancellation for a repudiatory breach or holding the employee to the contract until validly terminated. It follows that the contract accordingly terminated on 1 December

[51] Mr Kantor raised two arguments against accepting such a waiver. The first was that clause 16.1 of the applicants' contracts provides that 'no waiver of any right arising from this contract or its breach or termination shall be of any force and effect unless reduced to writing and signed by or on behalf of both parties'. Since the waiver of the period of notice was not signed by both parties it was not valid. But as Mr Stelzner pointed out when the employer exercises its right to waive a part of the notice period in terms of clause 15.1 it is not waiving any right – it is exercising one.

[52] The second argument was that the waiver contravened section 37 read with section 38. Section 38(2) states that if the 'employer waives any part of the notice'; it must pay the remuneration that the employee would have earned had the employee worked the full notice. The waiver contemplated in clause 15.1 of the applicant's contracts of employment gives the employer the contractual entitlement to do what section 38(2) permits. The

only contravention that can arise from the section is the failure to pay the remuneration due for the waived part of the notice period.

[53] It follows then that the resignation letters of 6 November constituted unilateral exercises of the power to terminate requiring no acceptance and permitting no withdrawal without consent. Accordingly the municipal manager's purported acceptance of the resignation had no legal effect – the contracts had been terminated to take effect at the end of the contractual notice period. *T*

The alternative arguments

[54] The alternative arguments are premised on decisions made by the executive mayor and the failure of the respondent to review them. The first decision is the upholding of the appeal against the municipal manager's acceptance of the applicant's resignations. The second decision is the executive mayor's decision to accept the applicant's withdrawal of their resignations. The argument centred on the validity of the decisions and if invalid whether it was required of the respondent to review them and have them set aside before it could rely on that invalidity.

[55] Section 62 of the Local Government: Municipal Systems Act, 32 of 2000 gives an executive mayor the power to hear appeals from decisions affecting a person's rights taken by the municipal manager (other than decisions in respect of which the municipal manager is the appeal authority).

[56] In his letters to the applicants on 6 November 2009 the municipal manager states that his letter 'serves as acceptance of your notice of resignation and confirmation that your last working day will be 30 November 2009'. It is this decision to accept their resignations that forms the basis for their appeal to the municipal manager.

[57] I have held that even though the notice period was not in compliance with the applicants' contracts, their termination of those contracts was a unilateral act not requiring acceptance. Although the municipal manager may have purported to 'accept' the resignations, no acceptance was

necessary – the contracts terminated as a matter of law following their notification to terminate not as a result of his acceptance. Even if the 'acceptance' by the municipal manager constituted a decision – it was not a decision that affected the applicant's rights. The resignations took effect irrespective of the municipal manager's purported acceptance and the executive mayor's reversal of that acceptance.

[58] The next argument is premised on the executive mayor's decision to accept the applicants' withdrawal of their resignations. The central issue here is whether the executive mayor has the power to withdraw the resignations. Mr Kantor contended that the executive mayor had the delegated power to do so under EM93 of the respondent's System of Delegations, July 2009. That delegation confers on the Executive Mayor the power 'to exercise the rights and obligations of Council in terms of the service contracts of the Municipal Manager and Managers directly accountable to the Municipal Manager'. In order to understand the scope of this delegation, it is necessary to determine the extent of the Council's powers in respect of the service contracts of managers that are directly accountable to the municipal manager ('section 56(a) managers'). That requires an analysis of the Systems Act and the Local Government: Municipal Structures Act, 117 of 1998 ('the Structures Act')

[59] Section 56(3) (f) of the Structures Act requires an executive to 'perform such duties and exercise such powers as the council may delegate to the executive mayor in terms of section 59 of the Local Government: Systems Act, 2000'. Section 59 of the Systems Act authorises a council to develop a system of delegation and delegate appropriate powers, subject to certain exclusions, to any of the municipality's other political structures, political office bearers, councillors or staff members. It is specifically stated in subsection (2) (a) that such delegation 'must not conflict with the Constitution, this Act or the Municipal Structures Act'.

[60] Section 60 of the Systems Act confines a council's power to delegate. The power to determine or alter 'the remuneration, benefits or other conditions of service of the municipal manager or managers directly responsible to

the municipal manager' may be delegated to only an executive committee or an executive mayor. Accordingly, the power delegated under EM 93 of the System of Delegations at least includes the power to determine and alter the conditions of service of the section 56(a) managers. Mr Kantor contends that this includes the power to accept a withdrawal of a resignation.

[61] The difficulty with this argument is that the Systems Act makes the municipal manager 'responsible and accountable for -… the management of the municipality's administration,… the management of staff, … the maintenance of discipline of staff, … [and] the promotion of sound labour relations and compliance by the Council with applicable labour legislation'. This effectively means that the municipal manager has the statutory responsibility for all labour matters subject to a few exceptions. It is an all embracing responsibility applicable to staff including section 56(1) (a) employees. There is no definition of staff but its ordinary meaning embraces the managers that are directly accountable to the municipal manager. The very existence of limited exceptions in respect of section 56(1) (a) employees only serves to reinforce that the legislature contemplated that a municipal manager must exercise the general power to manage the staff of the municipality.

[62] The exceptions to the general power to manage section 56(1)(a) employees are the power to appoint them (section 56(1)(a)), the contractual requirements (section 57) requirement that they have a contract of employment performance agreements (section 57), the determination or alteration of their conditions of employment (section 60(b)) and appeals from decisions of the municipal manager that affect their rights (section 62(4)(b)) and the exclusions from the municipal manager's powers in regard to the staff establishment (section 66). Four important provisions arising from these exceptions highlight the municipal manager's general power to manage section 56(1) (a) employees.

[63] The first is that the performance agreements under section 57(1) (b) must be concluded between the sections 56(1) (a) employees and the municipal

manager (section 57(2) (c)). The second is that the Act contemplates that the municipal manager will make decisions that affect the rights of section 56(1) (a) employees – that is the plain inference to be drawn from the rights of appeal under section 62(4) (b). The third is that the municipal manager has the power to approve the staff establishment and the job description of each post in that establishment which includes the posts of section 56(1) (a) employees. The determination of the job description also determines the employee's duties. Finally, it is important to note in this regard that the duties flowing from the job description determined by the municipal manager under 66(1) (b) are not listed in section 60(b) whereas they are in section 57(3).

[64] Section 60(b) deals with the determination of some of the content of the contract not with decisions that may arise from the rights, powers and duties flowing from the contract itself.

[65] It follows that the wide interpretation of the delegation under EM93 advanced by Mr Kantor would conflict with the powers conferred on the municipal manager under the Systems Act. That would render the delegation invalid under section 59(2) (a). Given that the delegation refers back to the powers of the Council, those powers should be interpreted narrowly and in accordance with the Systems Act.

[66] It follows from this that the executive mayor did not have the power to withdraw the applicants' resignations.

[67] Mr Kantor then argued that even if the executive mayor's decisions were invalid, they remained de facto decisions on which the applicants continue to rely. Relying on the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA), he argued that until the respondent reviews those decisions they should stand. The difficulty with this argument is that it is the applicants themselves that are relying on the validity of the decisions to support their claim that their original contracts of employment continue to subsist.

Was the 1st applicant's letter of resignation unequivocal?

[68] On 6 November the applicants handed in their letters of resignation to the municipal manager. The first applicant stated the following:

> ‘1 Hereby my formal notice of my proposed resignation from my post as director: public safety: Stellenbosch municipality.
>
> 2 This serves as one month notice.
>
> 3 My last working day would be on 30 November 2009.
>
> 4 Please ensure that my leave and the other benefits are calculated for payments as a part of my employment conditions according to the collective agreements and performance contract.
>
> 5 In anticipation of your corporation.’

[69] Mr Kantor argued that the use of the term ‘proposed’ meant that the letter of resignation was equivocal and under the common law principles enunciated above ought not to have constituted a unilateral termination of the contract. It is abundantly clear that the letter was unequivocal and the term ‘proposed’ means intended rather than put forward for discussion. The letter states that the last working day. It calls on the municipal manager to ensure that various payments due on termination such as leave pay, benefits under his contract and performance agreement are calculated.

[70] In any event, the municipal manager raised the ambiguity introduced by the use of the word ‘proposed’ in his letter dated 6 November and stated that ‘if your letter is indicative that your last working day will be 30 November 2009, I accept your notice of resignation’. The 1st applicant never disabused the municipal manager of his assumption. Moreover, he appealed against the acceptance and sought to withdraw his resignation – neither of which would have been necessary if he had not intended to resign and given an equivocal notice of termination.

Conclusion

[71] It follows from the above that the applicants have failed to demonstrate a clear right to the relief sought. They unilaterally terminated their contracts. If the failure to give notice in accordance with their contracts constituted a breach, it was not a breach that rendered their decision to terminate contractually invalid. In any event the respondent waived the balance of the notice and accordingly there was no breach – the notice contemplated by clause 15.1 was given effect to, namely 30 days notice subject to the employer waiving any part of that notice.

[72] There was no legal requirement on the part of the respondent to accept the resignation. The purported statement to that effect in the municipal manager's letter of 6 November 2009 has no legal effect. If it is a decision, that decision does not affect the applicants' rights and accordingly cannot be appealed under section 62(4) of the Systems Act. But even if it can be appealed, the reversal of the municipal manager's acceptance had no legal effect on the status of the applicants' contracts of employment.

[73] The executive mayor did not have the delegated power to accept the applicant's withdrawal of their resignations.

[74] Accordingly, the applicants' contracts expired on 30 November 2009 as a result of the respondent waiving the balance of the notice period which would have terminated on 6 December 2009. Those contracts no longer subsist.

[75] The applicants accordingly failed to establish a clear right to the relief. It is unnecessary for me to consider the other factors to take into account in deciding an application of this nature.

Costs

[76] The applicants have themselves to blame for their predicament. They had secure fixed term contracts and channels of communication and appeal open to them. Despite this, they terminated their contracts on 6 November 2009 because they said that they could not work with the municipal manager and his 'cabal' and yet 10 days later they sought to have the 'acceptance' of their resignations revoked and 7 days after that sought to

withdraw their resignations and be re-instated. They justified their application to the executive mayor for his consent to their withdrawal on the basis that they never intended to resign so much as to bring their plight to the attention of the Council. But there were other ways of bringing their plight to the attention of the Council. Instead they decided to collectively resign to make a point knowing full well what the effect would be to the operations of the respondent by a collective resignation of its senior management.

[77] In these circumstances, the normal rule that costs follow the result should prevail.

Order

[78] The application is dismissed with costs, including the costs of senior counsel.

_____

CHEADLE AJ

Date of Hearing : 21/04/2010

Date of Judgment : 07/05/2010

Appearances

For the Applicant : Adv P Kantor

Instructed by : Craig Schneider Associates

For the Respondent : Adv R Stelzner

Instructed by : Fairbridges Attorneys