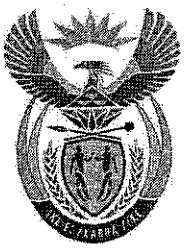

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: **12559/10**

In the matter between:

FATIMA SLEMMING Plaintiff

and

UNIVERSITY OF THE WESTERN CAPE Defendant

JUDGMENT DELIVERED: 13 DECEMBER 2012

FOURIE, J:

[1] This action concerns a claim instituted by plaintiff against her former employer, the defendant. Plaintiff's claim is founded on a written, alternatively oral, fixed term, alternatively impliedly indefinite, contract of employment. She alleges that her employment commenced on 1 January 2008 and would have terminated on 31 December 2012, alternatively would have continued

indefinitely. Plaintiff further alleges that defendant repudiated the contract on 17 March 2009, which repudiation she has accepted, thereby terminating the contract. She claims payment of the sum of R57 492-38 for the period that she had worked from 1 January 2009 to 17 March 2009, as well as R1 220 317-40, being damages in the form of loss of salary and benefits for the balance of the contract period, i.e. 18 March 2009 to 31 December 2012.

[2] Defendant, on the other hand, contends that the parties concluded a written fixed term contract of employment, for the period 1 January 2008 to 31 December 2008. Defendant alleges that this contract has terminated due to the effluxion of time and accordingly no payment at all is due to plaintiff.

[3] After hearing the evidence presented by both parties and having had the benefit of written and oral submissions, I have come to a firm conclusion as to the order which I should make. Due to time constraints by virtue of the fact that we are now in the last week of the final court term of the year, I do not intend furnishing detailed reasons for the conclusion that I have reached. I will rather provide my findings in summarised form. I do, however, accept that any person interested in this judgment is fully conversant with the respective allegations of

the parties in their pleadings and the evidence tendered on their behalf at the hearing of the matter.

[4] As will be apparent from what I have said above, the crucial issue between the parties relates to the duration of the contract, which, on all accounts, came into effect on 1 January 2008. The difference of opinion as to the duration of the contract, is brought about by conflicting terms in the documentation signed by the parties. The relevant documentation is attached to plaintiff's amended particulars of claim as Annexures A to D. In terms of the letter of appointment (Annexure B), dated 29 January 2008 and signed by both parties on 30 January 2008, the period of the contract is reflected as commencing on 1 January 2008 and terminating on 31 December 2008 (clause 2). However, on the ultimate page of the letter of appointment (clause 13), it is recorded that the "period of appointment" shall commence on 1 January 2008 and terminate on 31 December 2012. Furthermore, clause 1 (b) of the written contract of employment (Annexure D) provides that the period of appointment shall commence on 1 January 2008 and terminate on 31 December 2012.

[5] I should mention that there has been some debate whether the letter of appointment and the written acceptance thereof (Annexures B and C), form part of the contract documentation. In this regard plaintiff tentatively argued that the letter of appointment was not an offer in the true sense of the word. I do not agree. The letter of appointment(Annexure B) expressly states that defendant offers plaintiff a fixed term contract appointment on the conditions reflected in the letter of appointment. In the penultimate paragraph thereof, plaintiff is requested to sign Annexure C, thereby indicating her acceptance of the offer. Annexure C is entitled "Acceptance of the offer of employment", and was signed by plaintiff, thereby recording that her signature constitutes an acceptance of the offer of employment and that she abides by defendant's conditions of service, rules and regulations. In my view, the evidence clearly shows that the parties considered Annexures B and C to be part and parcel of the contract documentation. It is so that plaintiff was then presented with a formal contract (Annexure D), which was intended to record the terms of the letter of appointment as well as the rest of defendant's relevant conditions of service, rules and regulations. There is no doubt in my mind that all these documents, Annexures A-D to plaintiff's amended particulars of claim, constitute the contract documentation.

[6] There has also been some debate on the effect, if any, of the contract of employment (Annexure D) not being signed by a representative of defendant. I do not believe that it is necessary to prolong this debate, as both parties accepted that this document is valid and enforceable.

[7] Plaintiff maintains that the latter document (Annexure D), supports her version of having concluded a five year contract, while defendant has pleaded that clause 1 (b) of Annexure D and clause 13 of the letter of appointment (Annexure B), do not correctly reflect the common intention of the parties and stand to be rectified on the basis that the termination date should be reflected as 31 December 2008. It is trite law that a defendant may rely on rectification as a defence without having to claim rectification. Upon proof of the facts necessary to establish rectification, the court should then adjudicate the matter on the contract as it stands to be rectified. See **Gralio (Pty) Ltd v D E Claassens (Pty) Ltd** 1980 (1) SA 816 (A) at 824.

[8] A party seeking the rectification of a written contract has the onus of showing that the parties had reached consensus and reduced their agreement to writing, but, due to a common error of the parties, the writing does not

accurately reflect the actual agreement. The court then has an equitable jurisdiction to rectify the written instrument.

See in general, Christie's, **The Law of Contract in South Africa**, 6th Edition, P.343, *et seq.*

The issue of rectification has to be decided on the evidence presented by the parties, seen against the background and surrounding circumstances prevailing at the time of the conclusion of the contract.

[9] It is convenient to first have regard to the evidence tendered on behalf of defendant. Professor Bharuthram was the first witness called by defendant. His evidence was not really put in issue by plaintiff. According to Prof. Bharuthram, he carefully read through an initial offer of employment made to plaintiff, for a one year period commencing on 1 January 2008 and terminating on 31 December 2008, before signing it on 23 January 2008. (See Exhibit B7-10).

[10] Thereafter, on 30 January 2008, Prof. Bharuthram signed a revised offer of employment (Annexure B) without noticing that it contained contradictory terms as to the period of employment, i.e. in clauses 2 and 13 thereof. He described this as being an oversight, but as far as he was concerned, plaintiff was offered a one year contract, which offer she accepted. It should be noted

that during her cross-examination, plaintiff readily conceded that it was reasonable for Prof. Bharuthram to have formed the view that the parties had entered into a contract of one year duration.

[11] Prof. Bharuthram testified that there were no discussions between him and plaintiff regarding the conclusion of a five year contract of employment. He emphasised that, at all material times, the parties were guided by the contents of plaintiff's letter dated 17 January 2008, to which I will in due course refer, wherein plaintiff placed on record that she had agreed with Prof. Bharuthram's predecessor, Prof. Stanley Ridge, that she would be employed for a further year until the end of 2008. Prof. Bharuthram confirmed that he did not sign the final document in which the contractual terms were recorded (Annexure D). This appears from the final page of the document which shows that there is no signature on behalf of defendant.

[12] Mr. Kevin Gardner also testified on behalf of defendant. He was employed as a junior HR Consultant in defendant's HR department at the relevant time. When the contradictory terms in the contract documentation were pointed out to him, he described it as an oversight on his part by inserting December 2012 instead of December 2008, as the date upon which the contract

of employment terminated. According to him it was an extremely busy time of year, which he described as "frenetic", when there was a lot of pressure on him. His explanation for the typographical error is that he inadvertently used the template of a contract for a duration of five years.

[13] Plaintiff testified that she had read through all the contractual documents that were given for her to sign on 30 January 2008 (Annexures A-D). She says that, upon reading the documentation, she noticed the conflicting termination dates of the contract, i.e. 31 December 2008 and 31 December 2012. However, she elected not to raise this issue with any of the relevant personnel at defendant, as she had just been through a process of negotiation with them and did not want to endure another process of this nature. She insisted, however, that the termination date of her contract of employment, agreed upon by the parties, was 31 December 2012. For this she relies exclusively on the contract documentation and conceded that there is no documentary evidence supporting her version, apart from the two typographical errors in the contract documentation.

[14] As pointed out by counsel for defendant, a perusal of the relevant objective documentation, not only underscores the lack of support for plaintiff's

version, but rather shows that plaintiff herself had considered the contract to be of one year duration only.

[15] First, plaintiff addressed a letter to Prof. Bharuthram on 17 January 2008, (Exhibit B.6a), in which she recorded that, on 27 November 2007, in a meeting with Prof. Stanley Ridge, agreement was reached that both the existing contracts of plaintiff and her co-employee, Mr. Dominic Wolf, would be extended for 2008. She requested Prof. Bharuthram to recognise and honour the agreement reached in November 2007, so that salaries for January 2008 could be paid to them on time.

[16] Subsequent to the receipt of this letter, Prof. Bharuthram made the following note, dated 18 January 2008, on the letter:

"Approved that the contracts be extended until 31/12/2008 for Ms. Slemming and Mr. Wolf."

I should add that, under cross-examination, plaintiff conceded that, at the time, she did see Prof. Bharuthram's handwritten note on the letter recording that the extension of her contract until 31 December 2008, had been approved by him.

[17] A noteworthy aspect of plaintiff's evidence, is that she did not dispute Prof. Bharuthram's evidence that there was no discussion of a contract of five year duration between him and plaintiff, and that, in their dealings with each other, the parties were guided by the contents of plaintiff's letter of 17 January 2008. As I have indicated earlier, this letter refers to a contract of one year duration, i.e. until the end of 2008.

[18] As mentioned earlier, although she noticed the discrepancies in the contract documentation, plaintiff elected not to raise this issue with anybody at defendant. She had ample opportunity to draw the attention of defendant's representatives to the fact that she was on a five year contract that terminated on 31 December 2012, but she failed to mention it all. A glaring example is to be found in her failure to respond to a letter addressed to her by the Executive Director: Human Resources, on 17 March 2009, in which it was recorded that *"your last contract of employment with the University expired on 31 December 2008..."*. Plaintiff made no effort at all to dispute this statement. If she had been employed on a five year contract, only terminating on 31 December 2012, I would have expected her to respond immediately by stating this fact, particularly as the letter effectively required her to vacate her office and return defendant's property which she still had in her possession.

[19] It is common cause that during the period January – March 2009, there were moves afoot to have plaintiff appointed on a permanent basis. She accordingly remained on defendant's campus. However, defendant did not receive an acceptance by plaintiff of defendant's written offer of permanent employment, with the result that the letter of 17 March 2009 was addressed to her, requesting her to hand over defendant's property in her possession and to, effectively, vacate her office.

[20] Plaintiff did not receive any salary after 31 December 2008. She was unable to give a coherent answer as to why she did not receive her salary for January 2009, if she had in fact been employed by defendant on a five year contract. Furthermore, in her e-mail to the HR department dated 17 March 2009 (Exhibit B.106), she said that she had received no salary to date for 2009, but she curiously failed to take the opportunity to stress that she should have received payment for 2009 as she was on a five year contract.

[21] In view of the aforesaid, I have no hesitation in rejecting plaintiff's evidence where it is at variance with that of defendant's witnesses. In particular, I accept the evidence of Prof. Bharuthram, which was effectively unchallenged, that, at all times, the parties were guided by plaintiff's letter to him dated 17

January 2008, requesting his approval that plaintiff's contract of employment be extended for another year to the end of 2008. I therefore find that the common continuing intention of the parties, as represented by plaintiff personally and Prof. Bharuthram on behalf of defendant, was that plaintiff's contract of employment was for a one year period terminating on 31 December 2008. Therefore, the matter falls to be adjudicated on the contract as it stands to be corrected, i.e. a written fixed term contract of employment for the period 1 January 2008 to 31 December 2008.

[22] In view of my finding that the parties concluded a fixed term contract of employment for the period 1 January 2008 to 31 December 2008, there is no room for the implication of plaintiff's alternative cause of action, namely that the parties concluded an impliedly indefinite contract of employment. Such a construction is gainsaid by the evidence and the relevant documentation. It is clear to me that, at all relevant times, the parties envisaged the conclusion of a fixed term contract of employment and not a contract for an indefinite period of time.

[23] It was submitted on behalf of plaintiff that, in the event of the court finding that the parties concluded a contract of employment for a period of one

year, terminating on 31 December 2008, the plaintiff is entitled to claim a salary and benefits for the period 1 January 2009 to 17 March 2009, while she remained on the premises and defendant accepted her services. Plaintiff's counsel submitted that such a claim can be founded on a tacit renewal of the contract of employment, when defendant allowed her to carry on working after 31 December 2008. Alternatively, it was argued that plaintiff has a claim based on unjust enrichment for this period that she had worked without receiving any salary or benefits.

[24] The obvious and glaring difficulty with a claim based on a tacit renewal of the contract or on unjust enrichment, is that it is not covered by the pleadings. Whichever way one interprets the pleadings of plaintiff, there is no room for the inclusion of these causes of action which plaintiff now seeks to put forward. The additional difficulty is that the evidence, and in particular that presented by defendant, was not at all directed at a cause of action based on the tacit renewal of the contract, or a claim based on unjust enrichment. Therefore, this is not a case where it can be said that the evidence has sufficiently covered causes of action of this nature and that the court can therefore adjudicate the matter as if such causes of action had been pleaded. See **Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd**, 2009 (2) SA 150 (SCA) at para.14.

[25] It was submitted on behalf of defendant, correctly in my view, that the adjudication of the matter on the new causes of action now suggested by plaintiff, will cause defendant irreparable prejudice. Had these causes of action been properly pleaded, defendant would certainly have conducted its case in a materially different way to meet a claim founded on a tacit renewal of the contract or on unjust enrichment.

[26] Further, it should be borne in mind that plaintiff's particulars of claim, as amended, are totally at variance with a claim founded on a tacit renewal of the contract or on unjust enrichment. The particulars of claim are based on the existence of a valid contract for a period of 5 years, alternatively for an indefinite period, while the causes of action upon which she now tries to rely, have as their foundation the absence of a consensual contract between the parties for the period subsequent to 31 December 2008. As stated earlier, there is just no room for the introduction of causes of action of this nature in plaintiff's particulars of claim.

[27] I should also briefly deal with another alternative submission made on behalf of plaintiff, namely, that the court should find that there was no true consensus between the parties due to their mutual (and not common) mistake.

On this basis it was submitted that the court could either employ the doctrine of quasi mutual assent or, at least, find that, subsequent to 31 December 2008, there came into being a tacit employment contract which arose by virtue of the conduct of the parties.

[28] Once again, the immediate difficulty that I have with this submission, is that it is not covered by the pleadings. It presupposes that there was no true consensus, by virtue of a mutual mistake which resulted in the contract being *void ab initio,* thereby allowing plaintiff to base her claim on the doctrine of quasi mutual assent or, alternatively, on the existence of a tacit employment contract which arose by conduct. As I have already explained, plaintiff's cause of action in the particulars of claim is based on the existence of a valid and enforceable contract. There is certainly no room in the pleadings for the introduction of any cause of action based on the absence of consensus by virtue of a mutual mistake. In any event, no evidence was tendered, in particular by defendant, to deal with a possible claim of this nature, simply because there is no such claim before the court.

[29] In sum, I find that the employment contract concluded between the parties was for a limited duration, i.e for the period of 1 January 2008 to 31

December 2008. In the light thereof I conclude that the plaintiff has failed to prove the existence of an enforceable contract after 31 December 2008, with the result that her claims, as framed in the amended particulars of claim, cannot succeed and ought to be dismissed.

[30] This brings me to the issue of costs. The general rule is that the successful party is entitled to its costs. There is no reason why this rule should not apply in the instant case. However, defendant has asked that plaintiff be ordered to pay costs on the attorney and client scale. In this regard it was submitted that plaintiff could not have held a genuine belief in her case, and that it is significant that she only raised the contention that she had a five year contract, after she had consulted her former attorneys. On reflection, I do not believe that it necessarily follows that plaintiff acted vexatiously or *mala fide* in pursuing her claims. Her evidence shows that she believed, at least in respect of the period 1 January 2009 to 17 March 2009, that she was entitled to some form of remuneration. As mentioned above, her claim may not have been properly formulated, but this does not mean that she is guilty of conduct which justifies a punitive costs order.

[31] In the result the application is dismissed with costs.

P B Fourie, J