



**IN THE**

**INDUSTRIAL**

**COURT OF SWAZILAND**

**CASE NO.475/2015**

In the matter between:-

**WAYNE PARSONS**

Applicant

**And**

**PALFRIDGE LIMITED t/a THE FRIDGE FACTORY**

Respondent

**Neutral citation:** Wayne Parsons vs Palfridge limited t/a The Fridge  
Factory (475/2015) [2016] SZIC 09 (2016)

**Coram:** D. MAZIBUKO

(Sitting with A. Nkambule & M.T.E. Mtetwa)  
(Members of the Court)

**Last Heard:** 15<sup>th</sup> February 2016

**Delivered:** 2<sup>nd</sup> March 2016

*Summary: Labour Law; Contract of employment. Applicant concludes a fixed term written contract of employment for a two year period. Applicant claims to be permanently employed by Respondent.*

*Held: Parol – evidence rule prohibits extrinsic evidence that would contradict terms of a written contract.*

*Effect of Counter- offer. Respondent offers Applicant employment contract in writing for two year period. Applicant rejects offer by filing a counter – offer.*

*Held: A counter – offer destroys the offer entirely and consequently that offer is no longer open for acceptance.*

*Revival of offer. An offeror may revive his offer which had previously been rejected.*

*The terms of a revived offer must, inter alia, be consistent with the previous offer. A new offer consisting of new terms is not revival of a previous offer. The new terms destroy the element of revival, but constitute a fresh offer.*

1. The Respondent is Palfridge Limited, a company based at Matsapha, Swaziland whose business is to manufacture refrigerators.
  
2. By written contract marked annexure PAL1 the Respondent employed the Applicant as a Maintenance Manager at its factory. The contract was for a period of two (2) years beginning 1<sup>st</sup> October 2013 and ending 30<sup>th</sup> September 2015. When concluding the said contract (PAL 1) the Applicant represented himself while the Respondent was represented by Mr Peter Mc Cullough who then was the Chief Executive Officer and was referred to as CEO in the founding affidavit. The Court will continue to refer to him with that title. The Applicant executed his duties and was paid his dues accordingly in accordance with annexure PAL1.
  
3. About the 24<sup>th</sup> June 2015 the Applicant was offered another two (2) year contract of employment to commence 1<sup>st</sup> October, 2015 and terminate 30<sup>th</sup> September 2017. A draft contract marked annexure WP6 was presented to the Applicant for acceptance. On receipt of annexure WP6, the Applicant noticed that it contained terms that were less favourable than those contained in the existing contract- annexure PAL1.

3.1 In the employment contract (annexure PAL1) the Applicant enjoyed a payment package which had been structured as follows:

*“Remuneration and Benefits Package.*

*You will receive a total remuneration and benefits package of E78, 105.00 (Seventy Eight Thousand One Hundred and Five Emalangeneni) cost to company per month. Statutory deductions (and any other amount authorized by yourself and agreed to by the Company) will be made as required.*

*Made up as follows:*

<i>Basic Salary</i>	<i>E58, 775.00</i>
<i>Medical Aid Allowance</i>	<i>E2, 800.00</i>
<i>Pension allowance</i>	<i>E3, 530.00</i>
<i>Vehicle fuel Allowance</i>	<i>E5, 000.00</i>
<i>Housing Allowance</i>	<i>E7, 000.00</i>
<i>Cell Phone Allowance</i>	<i>E1, 000.00</i>

*The factory will assist in your relocation expenses to move your household contents from South Africa to Swaziland.*

*Annual Bonus*

*At the discretion of the directors you may receive a pro-rata bonus, payable each year.”*

(Record page 61)

3.2 In the proposed contract (annexure WP6) the Applicant was offered a pay package structured as follows:

*“Remuneration and Benefits Package*

*You will receive a total remuneration and benefits package of E57, 650.00 (Fifty Seven Thousand Six Hundred and Fifty Emalangen) cost to company per month. Statutory deductions (and any other amount authorized by yourself and agreed to by the Company) will be made as required.*

*Made up as follows:*

<i>Basic Salary</i>	<i>E50, 000 .00</i>
<i>Medical Aid Allowance</i>	<i>E1, 650 .00</i>
<i>Pension Allowance</i>	<i>E3, 500.00</i>
<i>Vehicle Fuel Allowance</i>	<i>E1, 500.00</i>
<i>Cell Phone Allowance</i>	<i>E1, 000.00</i>

*Annual Bonus*

*At the discretion of the directors you may receive a pro-rata bonus, payable each year.”*

(Record page 27)

4. About the 26<sup>th</sup> June 2015 the Applicant wrote to the CEO a letter in which he addressed the terms of the proposed employment contract. The letter is marked annexure WP1. The same letter has been attached to the answering affidavit and marked annexure PAL12. The contents of this letter - WP1 is the subject of litigation before this Court.

5. In the opening paragraphs in annexure WP1 the Applicant explained in detail his loyalty to the Respondent and its directors and/or shareholders. He further explained the diligence and faithfulness with which he had served the Respondent. The Applicant added the following clauses:

*“The only way I can see myself going forward with the company and improving the quality and efficiencies are the following added into the contract. 35 years in the field has given me a distinct advantage in the field of Engineering and Process. (Yes, I started work at the age 16 and after my Military at 19, I was looking after myself.)*

1. *Housing added as per my original contract.*

2. *A profit share, we can all benefit when we are doing better. This is just around the corner.*
3. *I also need to have a voice in decisions made regarding the factory process and machinery and not finding out until the date or machines arrives[sic], this normally has us scrambling to implement the changes if there has been no fore sight, this can cause major problems in implementing, from electrical loads to training of the operators, most of the time small changes require large changes on our side.*
4. *I am sure with Colin and Tish going to Dubai there will be a vehicle that will not be used, farm van or whatever I can use. Maybe they can donate it for me to use. (tongue in cheek.)”*

*(Record page 77)*

According to the Applicant he wanted the four (4) demands which he had raised in his letter to be included in the proposed contract viz. housing, profit

sharing, a say in decision making and the use of a company motorvehicle.

6. The CEO replied the Applicant by writing a letter- annexure WP2. An extract of annexure WP2 reads thus:

*“Morning Wayne, Colin, Tish and I have met and discussed your response to our offer of a new contract from October onwards.*

*As explained to you in the meeting with Tish a few weeks ago, we really appreciate all your effort and input over past 2 years, you have definitely achieved what you were brought on board to do.*

*Unfortunately at the end of the day it all boils down to the fact that we are downsizing the production numbers and cannot afford to continue paying a man of your caliber the package you expect.*

*Going forward if you do not wish to accept the new contract on the conditions offered, we would like to revert back to the way things were previously where you consulted to us on an as and when required basis. We do*



*understand and we accept the risks with this type of arrangement.*

*If another opportunity arises before the end of your existing contract, and you wish to terminate your contract with us earlier than documented you are free to do so, we will hold no ill feelings.*

*Regards*

*Peter”*

(Record page 20)

Annexure WP 2 is dated 30 June 2015.

7. The Applicant stated that on the 14<sup>th</sup> September 2015 he had a meeting with the CEO wherein he was asked to make a counter-proposal regarding his continued employment with the Respondent.

7.1 Regarding that meeting the Applicant stated as follows:

*“On or about 14<sup>th</sup> September 2015, I had a meeting with Respondent’s CEO wherein I was asked to make a counter – proposal regarding my continued employment by the company.”*

(Record page 9)

7.2 According to the Applicant there was nothing new or further to add as the proposed terms he had wished to have incorporated in the draft employment contract (annexure WP6) had been turned down. Consequently, he decided to accept the Respondent's offer (annexure WP6) as is, by signing the draft contract in the space provided for acceptance. The Applicant added that the offer had not been revoked. It was still open for him to accept as at the 21<sup>st</sup> September 2015. The Applicant mentioned further that the offer (annexure WP6) did not incorporate a deadline within which it should be accepted.

8. The Applicant's position was that his conduct of accepting the offer resulted in a binding contract of employment on the terms embodied in the offer (annexure WP6). The Applicant regarded himself an employee of the Respondent for a period of two years from 1<sup>st</sup> October 2015 to 30<sup>th</sup> September 2017 in accordance with the contents of annexure WP6.

9. The Applicant referred to a particular clause in annexure WP2. The Applicant argued that, that letter gave him assurance that the offer (annexure WP6) was still open for acceptance. That clause is again reproduced as follows:

*“Going forward if you do not wish to accept the new contract on the conditions offered, we would like to revert back to the way things were previously where you consulted to us on an as and when required basis. We do understand and we accept the risks with this type of arrangement.”*

According to the Applicant this clause meant that he had an option to either accept the proposed contract (annexure WP6) or work with the Respondent on a consultancy basis as he had done in the past. The Applicant stated that he opted to accept the offer, hence he signed the draft contract on the 21<sup>st</sup> September 2015.

10. The Applicant argued further that he was permanently employed by the Respondent. He referred to a letter dated 19<sup>th</sup> June 2014 written by the CEO on the Respondent’s letterhead addressed to ‘Whom It May Concern’. The letter reads thus:

*“19<sup>th</sup> June 2014*

*To Whom It May Concern*

*RE CONFIRMATION OF EMPLOYMENT*

*This letter serves to confirm that Mr Wayne Parsons is permanently employed at Palfridge Limited as Maintenance Manager.*

*Please feel free to contact me should you require any further information.*

*Yours faithfully*

*Peter McCullough*

*Director”.*

(Record page 22)

This letter is annexure WP3 to the founding affidavit.

- 10.1 According to the Applicant he used the letter extensively including securing his residence permit and obtaining credit. He stated that, that letter was never revoked and therefore he remains permanently employed by the Respondent to date.
- 10.2 The Applicant concluded that the discussion and argument he had with the Respondent on the issue:

whether or not the Applicant was employed, was a fruitless exercise in light of the fact that the Respondent had committed itself by writing annexure WP3 that it had permanently employed the Applicant. According to the Applicant, his status had been upgraded from being a fixed term employee to a permanent employee.

11. The Applicant has applied to Court for relief as follows:

*“1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the matter be heard as one of urgency.*

*2. That a Rule nisi do hereby issue, calling upon the Respondents to show cause of [on] a date to be determined by the above Honourable [Court], why the following Orders should not be made final.*

*2.1 Setting aside Respondents letter of 28<sup>th</sup> September 2015, pending determination of*

*whether Applicant is a permanent or contract employee.*

*2.2 Compelling the Respondent to furnish Applicant with his employment contract signed in 2013.*

*2.3 Directing Respondent to comply with the determination made by the above Honourable Court in 2.1 above.*

*2.4 Granting applicant leave to supplement his founding affidavit in light of new evidence (contract) should it be necessary.*

- 3. That the rule nisi operate with immediate and interim effect.*
- 4. Costs of suit in the event of opposition.*
- 5. Such further and or alternative relief.”*

12. The application is opposed. The Respondent’s affidavit is deposed to by the CEO (Mr Peter Mc Cullough). According to Mr Mc Cullough he vacated the position of CEO in the year 2015 and occupied that of Financial Director. It appears the Applicant was not aware of those

changes and has accordingly referred to Mr Peter Mc Cullough as CEO in his founding affidavit. The Court will follow that designation.

13. The parties began by arguing the question of urgency. The Court decided the issue of urgency in favour of the Applicant. The Court was persuaded that the matter was sufficiently urgent to qualify it to be heard as such. There was uncertainty whether the Applicant was the Respondent's employee or not. That question was in the interest of both parties. The Respondent needed to know whether or not it was liable to pay the Applicant a salary as an employee after the 30<sup>th</sup> September 2015. The Applicant also needed to know whether or not he had a duty to render his services as an employee of the Respondent. That question had to be decided urgently so that each party would know both its right and legal obligation.

14. The Respondent's position is that the Applicant's contract of employment (annexure PAL 1) terminated by effluxion of time on the 30<sup>th</sup> September 2015. The Applicant is no longer its employee since that date. The Respondent stated that in June 2015 it offered the Applicant a two (2) year employment contract which was meant to begin 1<sup>st</sup> October 2015 and terminate 30<sup>th</sup> September 2017. That offer

is annexure WP6. The Applicant rejected that offer by letter dated 26<sup>th</sup> June 2015 (annexure WP1).

15. According to the Respondent, the Applicant had an option to accept the offer (annexure WP6) by signing on the space provided for acceptance in the same document. Instead of accepting the offer the Applicant rejected the offer and made a counter –offer which is contained in annexure WP1 especially the quotation that appears in paragraph 5 above. That counter-offer was not acceptable to the Respondent. Consequently there is no current employment contract concluded between the parties.

16. The Respondent admits that the offer of employment as contained in annexure WP6 contained less favourable terms as compared to the employment contract that terminated 30<sup>th</sup> September 2015. The Respondent explained that it had experienced an economic down turn and had to reduce its wage bill and other expenses in order to stay economically afloat. The Applicant had been made aware of the Respondent’s economic situation in various meetings that he held with senior management. The Applicant, as head of department, had



submitted names (to management) of junior employees in his department who had opted for a voluntary Exit Package as a means to reduce the wage bill. While the Applicant's skill and loyalty was appreciated, the Respondent could not afford to pay him the emolument he had demanded in annexure WP1, hence his counter-offer was not acceptable.

17. The CEO admitted the meeting of the 14<sup>th</sup> September 2015 between himself, the Applicant and a certain Mr Colin Foster who was or is a director of the Respondent. The CEO however denied that in his presence there was ever a discussion regarding the Applicant's counter-proposal relating to his continued employment with the Respondent. The evidence of the CEO reads thus:

*“14.2 The Applicant was not requested to make a counter proposal regarding his continued employment this is clearly untrue and misleading. The Applicant was informed that the terms of the fixed term contract were not negotiable and he was wished well on his future endeavors.”*

(Record page 41)

In his replying affidavit the Applicant did not deal with the CEO's contention regarding the meeting of the 14<sup>th</sup> September 2015 as stated in the quotation. The Applicant simply moved on to discuss other issues and did not deal with the meeting of the 14<sup>th</sup> September 2015 in his replying affidavit. The conclusion that this Court has reached is that the Applicant could not deny the Respondent's version of the events in the meeting of the 14<sup>th</sup> September 2015. The Court is not persuaded that in the meeting of the 14<sup>th</sup> September 2015 the Applicant was informed that the offer (annexure WP6) was still open for acceptance. At any rate the question; whether or not the Applicant was entitled to accept the offer, at the time of the purported acceptance, is a legal issue which has been dealt with later in this judgment.

18. The CEO admits writing annexure WP2 but denies that it gave the Applicant an option to accept the offer (annexure WP6). According to the Respondent, this letter confirmed to the Applicant that the employment relationship terminates 30<sup>th</sup> September, 2015. Thereafter the Applicant was welcome to work with the Respondent on a consultancy basis and not as an employee.

19. The Respondent has denied the allegation that it gave the Applicant permanent employment. The allegation of permanent employment is based on the contents of annexure WP3 which has been fully quoted in paragraph 10 above. The authenticity of this letter (annexure WP 3) has been challenged and the Respondent demanded that the Applicant should produce the original letter, for examination. The CEO stated that the Applicant's file (at work) does not have a copy of the said letter. He could not confirm that he wrote that letter hence he demanded to see the original letter.

20. The CEO recalled that he had prepared a similarly worded letter for the benefit of the Applicant which was intended to assist the Applicant to purchase a motorvehicle. A copy of the letter referred to by the Respondent is marked annexure PAL6. The letter (PAL6) reads as follows:

*"4<sup>th</sup> February 2014*

*Wave Motors  
Plot #583  
Police College Road  
Matsapha*

*Dear Sir,*

*RE: CONFIRMATION OF EMPLOYMENT*

*This letter serves to confirm that Mr Wayne Parsons is permanently employed at Palfridge Limited as our Maintenance Manager.*

*Please feel free to contact me should you require any further information.*

*Yours Faithfully*

*Peter McCullough  
Director”*

21. According to the CEO the words:-

“... *Mr Wayne Parsons is permanently employed ...*” were used by him to mean that Mr Wayne Parsons is not a casual employee at Palfridge Limited (Respondent) but is employed on a contract. The CEO denied that the letter (annexure WP3) altered the Applicant’s employment contract from fixed term to permanent employment. The employment relationship had all along been governed by the employment contract namely annexure PAL 1. In the event the original of annexure WP3 is produced and its contents are verified, the CEO

attaches the same explanation to the words in annexure WP3 as he did in annexure PAL6.

22. The CEO further denied that the Applicant had used annexure WP3 to inter alia, secure a work permit. This allegation appears in paragraph 15 of the founding affidavit and reads thus:

*“The letter is on the official letterheads of the Respondent and I have used it extensively including securing my residence permit, obtaining credit, etc. For the Respondent to then at a drop of a dime, declare the letter of no force and effect is not keeping with its responsibilities as a credible entity.”*

(Record page 11)

- 23 According to the CEO it is the Respondent, as employer, that took the responsibility to apply for a work permit for the Applicant, as its expatriate employee. That work permit was issued on the 8<sup>th</sup> November 2013. A copy of the Applicant’s work permit is annexed to the answering affidavit and marked PAL7. The CEO added that the letter

(annexure WP3) is dated 19<sup>th</sup> June 2014. He concluded that the letter (annexure WP3) could not have been used by the Applicant to secure a work permit because by the 19<sup>th</sup> June 2014 the Applicant's work permit was already in existence.

24. It is common cause that the parties concluded a written contract of employment which commenced 1<sup>st</sup> October 2013 and terminated 30<sup>th</sup> September 2015 namely annexure PAL1. On the 25<sup>th</sup> June 2015 the Respondent offered the Applicant another contract of employment which was intended to run for two(2) years beginning 1<sup>st</sup> October 2015 and terminating 30 September 2017 viz annexure WP6.

25. Annexure WP6 was an offer made by the Respondent to the Applicant in order to conclude a legally binding contract- on acceptance. The learned author Gibson has succinctly explained an offer as follows:

*“An offer is a proposal which expresses a person’s willingness to become a party to a contract, according to the terms expressed, and the acceptance of which by another person binds both of them contractually.”*

GIBSON JTR: SOUTH AFRICA MERCANTILE AND COMPANY LAW, 7<sup>th</sup> edition, Juta & Co., 1997 ISBN (not available) at page 32.

Annexure WP6 satisfies the legal requirements of an offer.

26. In annexure WP6 the Respondent prescribed the method by which its offer should be accepted. In clause 10 of annexure WP6 the Respondent stated the following requirement:

*“Would you please let me have your formal acceptance of this offer by signing the copy of this letter [WP6] in the place indicated and returning it to me at your earliest convenience! Your signed copy of this letter is for record purposes and will be placed in your personal file.*

*Yours Sincerely*

*[Signature]*

*Director*

*Confirmation of acceptance of offer of employment*

*I have received a copy of this letter and confirm that, in addition, the contents hereof have been explained and accept the terms and conditions of employment contained therein.*

*Signed:\_\_\_\_\_Date:\_\_\_\_\_”*

27. When the Applicant received the offer (annexure WP6) he did not accept the terms stated therein. Instead he wrote the Respondent a letter (WP1) in which he conveyed his decision to reject the offer and gave reasons therefor. The Applicant demanded that certain perks should be included in the offer in order for him to accept it. Particularly the following perks were mentioned; housing, profit sharing, a voice in decision making and a company motorvehicle.

28. The Respondent’s argument is that the Applicant’s letter- annexure WP1 contained a rejection of the offer in that it contained a counter-offer which is a species of rejection. The Respondent focused on this clause:

*“The only way I can see myself going forward with the company [Respondent] and improving the*



*quality and efficiencies are with the following added into the contract.*

...

1. *Housing ...*

2. *A profit share ...*

3. *I also need to have a voice in decisions made regarding the factory process ...*

4. *... a vehicle ...”*

(Record page 19)

29. When the Applicant expressed himself in those words:

*“The only way I can see myself going forward with the company...”,*

he meant that he was rejecting the offer (annexure WP6) and that he would consider working for the Respondent, if the latter were to accept the Applicant’s counter-offer. The Respondent did not accept the counter-offer. The Applicant’s letter (annexure WP1), satisfied the requirements of a rejection.

30. The learned author, Gibson explains the principle of rejection as follows:

*“The offer comes to an end if it is rejected by the offeree. Rejection can occur in two ways; either by an express rejection communicated to the offeror or by the making of a counter-offer. In either case the rejection brings the offer to an end and it is no longer open for acceptance.”*

(Underlining added).

Gibson (supra) page 35.

The offer came to an end when the Respondent received the Applicant’s counter offer. The submission by Gibson is trite law as seen in judgments of the Courts and submissions made by various authors.

30.1 The learned author Christie also dealt with this subject and expressed the legal position as follows:

*“The principle that rejection by the offeree terminates the offer is well established.*

...

*It is usually regarded a axiomatic that a counter-offer incorporates a rejection and therefore destroys the original offer”*

CHRISTIE RH: THE LAW OF CONTRACT, 4<sup>th</sup> edition, Butterworths, 2001 ISBN 0 409 01836 8 at page 55.

30.2 In the matter of COLLEN V RIETFONTAIN ENGINEERING WORKS 1948(1) SA 411, the Court affirmed the legal position as follows:

*“It must also be remembered that a counter-offer is in general equivalent to a refusal of an offer and that thereafter the original offer is dead and cannot be accepted unless revived.”*

(at page 420)

30.3 A classical case on the subject is that of: WATERMEYER VS MURRAY 1911 AD 61.

W offered to sell his farm to M. W demanded a down payment on signing of the written agreement of sale. M

counter- offered to make a down payment on a future date.

Held- per Solomon J:

*“If, then, the defendant’s offer to sell on certain terms was rejected by the plaintiff making a counter- offer to buy on different terms, it follows that the defendant’s offer was no longer open for acceptance ...”*

(At page 70)

31. In his founding affidavit the Applicant conceded the legal effect of his counter- offer when he stated that:

*“Although am advised that failure to accept an offer on its own terms by making counter-offers, such amounts to a rejection of the offer.”*

(Record page 14 paragraph 27.2)

32. The Applicant argued in the alternative that the Respondent’s offer (annexure WP6) which he (Applicant) rejected by making a counter- offer was revived by the Respondent when the latter invited the

Applicant to make alternative suggestions if the offer (annexure WP6) is not accepted. The said revival of the offer is allegedly contained in annexure WP2. Annexure WP2 is quoted in full in paragraph 6 above. The Applicant focused on a particular clause in annexure WP 2 which reads thus:

*“Going forward if you do not wish to accept the new contract on the conditions offered, we would like to revert back to the way things were previously where you consulted to us on an as and when required basis. We do understand and we accept the risks with this type of arrangement.”*

33. It is possible for an offeror to revive an offer that had previously been rejected

33.1 Christie explains this principle as follows:

*“A counter-offer that destroys an offer destroys it entirely, so it may be ignored by the parties and by the Courts in considering the effect of subsequent negotiations. There is, of course, nothing to prevent the offeror repeating his offer*

*that has thus been destroyed and so resuscitating it.”*

Christie (supra) at page 56.

33.2 Another learned author A.J. Kerr confirms the legal position when he says:

*“An important effect of making a counter- offer is that the original offer is deemed to be refused when the counter-offer is made even though the offeree was not aware of this legal consequence. Hence the original offer, deemed to have been refused, has fallen away and cannot subsequently be accepted unless of course on receipt of the counter – offer the original offeror says: ‘No, I repeat my original offer.’ Such statement constitutes a new offer on the same terms as the first one. This renewed offer can then be accepted by the counter – offeror, now again the offeree.”*

KERR AJ: THE PRINCIPLES OF THE LAW  
OF CONTRACT, 6<sup>th</sup> edition, 2002  
Butterworths. ISBN 0 409 037532 at page 77.

34 A revived offer must satisfy the legal requirements of an offer which include the following:

34.1 The offer must be communicated to the offeree with sufficient certainty.

34.2 The offer must define all the terms on which an agreement is sought.

35. In annexure WP2, the Respondent did not write words that conveyed to the Applicant a revival of its initial offer (annexure WP6). Instead, the Respondent introduced a new proposal in its letter (annexure WP2) which was not contained in the offer that was rejected. The Respondent's new proposal was particularly that it would consult with the Applicant for work as and when required. Annexure WP2 proposed a new offer which would have resulted in a consultancy arrangement with the Applicant, if it were accepted. The initial offer (annexure WP6) would have resulted in an employment relationship

between the parties if it had been accepted. The terms that the Respondent communicated to the Applicant in annexure WP2 were clearly different from those it had communicated in the initial offer that was rejected. Annexure WP2 does not therefore convey a revival of the initial offer. The Applicant's alternative argument fails.

36. The Applicant introduced another alternative argument and this time he argued that he was permanently employed by the Respondent. As proof of permanent employment the Applicant introduced a letter-annexure WP3. This letter has been reproduced in paragraph 10 above. The CEO has demanded (in his affidavit) that the original of annexure WP3 be produced in order to prove authenticity. The original was not produced before Court. There is still doubt whether or not annexure WP3 was written by the CEO.

37. Assuming the original of annexure WP3 had been furnished and the Respondent was satisfied that it was genuine, this letter would require further investigation.

37.1 If indeed the letter (annexure WP3) was tendered as confirmation that the Applicant was permanently



employed by the Respondent, that confirmation would be deficient in that it did not state when exactly the Applicant was so employed. The date it is alleged the Applicant was permanently employed by Respondent is material in light of the fixed term contract which the parties signed viz annexure PAL1.

37.2 The Applicant did not say that he was permanently employed by the Respondent on 19<sup>th</sup> June 2014; that is the date annexure WP3 was written. Annexure WP3 has been tendered as evidence to confirm an existing fact, namely the Applicant's alleged permanent employment by the Respondent. The Applicant does not seem to know the date he alleges he was permanently employed by the Respondent. Furthermore, the Applicant does not seem to know the person who allegedly represented the Respondent in that employment contract. Other than annexure WP3 the Applicant has failed to tender evidence to support his allegation that he was permanently employed by the Respondent.

37.3 What appears strange in the Applicant's argument is that the letter he referred to, namely annexure WP3, was addressed 'To *Whom It May Concern.*' There is no letter addressed to the Applicant which confirms his allegation that he was permanently employed.

38. In addition, the Applicant does not say that he was permanently employed by the Respondent by written contract, and indeed no written contract was furnished to prove that allegation. If the Applicant was permanently employed by oral contract then he had a legal duty to plead in his founding affidavit, the date as well as the terms and conditions of that oral contract of employment. This requirement is mandatory in terms of the rules of Court and compliance is required of every litigant who approaches the Court with a claim based on a contract.

38.1 The High Court rule 18(6) states that:

*"A party who in his pleading relies upon a contract shall state whether the contract is written or oral and*

*when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.”*

The High Court rules are mutatis mutandis applicable at the Industrial Court in terms of the Industrial Court rule 28(a).

38.2 The learned authors Herbstein and Van Winsen have explained the principle in rule 18 (6) as follows:

*“The supporting affidavits must set out a cause of action. If they do not, the respondent is entitled to ask the court to dismiss the application on the ground that it discloses no basis on which the relief can be granted.*

*In application proceedings the affidavits constitute not only the evidence but also the pleadings and, therefore, while it is not necessary that affidavits ‘should set out a formal declaration or [an answering] affidavit set out a formal plea, these*

*documents should contain, in the evidence they set out, all that would have been necessary in a trial.*

*It is clear, therefore, that an application not only takes the place of a declaration in an action but also of essential evidence to be led at trial. An application must include facts necessary for determination of the issue in the applicant's favour."*

HERBSTEIN AND VAN WINSEN: THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA, 5<sup>th</sup> edition, vol.1, Juta, 2009, ISBN 978 0 7021 7933 4 at page 439.

38.3 The Applicant has failed to plead the necessary facts as well as provide evidence to establish and prove that he is permanently employed by the Respondent. That failure is fatal to the Applicant's claim.

39. There is another angle from which to consider the Applicant's claim that he was permanently employed by the Respondent. If the Applicant's claim is that he was permanently employed before the 18<sup>th</sup> November 2013, then he should have explained the reason he signed the written contract of employment (annexure PAL1) that day. The Applicant would be contradicting himself in signing a two (2) year employment contract with the Respondent (annexure PAL1) and yet insist that he is simultaneously-permanently employed by the Respondent. These two (2) claims cannot co-exist, one would prevail and the other should fail. The argument in favour of a two (2) year employment contract would prevail because it is supported by evidence (annexure PAL1).

40. On the other hand, if the Applicant claims that he was permanently employed by the Respondent after the 18<sup>th</sup> November 2013, in the duration of the two (2) year employment contract (annexure PAL1), then the Applicant should have explained (in his founding affidavit) the reason he failed to terminate annexure PAL1. If the Applicant's allegation is correct it would have made sense for the Applicant to

cancel annexure PAL1 in order to give effect to the alleged permanent employment contract. Annexure PAL1 provides room for its termination by giving one (1) month's written notice of termination to the other party. An extract of annexure PAL 1 provides as follows:

*“8. Termination of Employment*

*The duration of your employment with the company is from the start date to the end date as specified on page one of this contract, but may be terminated at any stage with a 3 month probation period and 1 calendar months' notice, in writing, from either party.”*

There is no mention in the Applicant's affidavit that annexure PAL1 was terminated. Annexure PAL1 remained valid until terminated by effluxion of time. The Applicant's alternative argument fails again.

41. The Applicant's latter alternative argument would have failed in any event for another reason, for breach of the parol – evidence rule.

*“The parol – evidence rule prohibits evidence to add to, detract from, vary, contradict or*

*qualify the terms of a contract once that contract has been reduced to writing.”*

CORNELIUS SJ: PRINCIPLES OF THE INTERPRETATION OF CONTRACTS IN SOUTH AFRICA, 2002 Butterworths. ISBN 0 409 00343 3 at page 99.

42. The effect of annexure WP3 (as explained by the Applicant) would be to vary or contradict the terms of a written contract of employment (annexure PAL1). Annexure WP3 would certainly have contradicted the parol – evidence rule. Annexure WP3 would have been set aside for this reason as well.
  
43. For reasons stated above the Court finds that the Applicant was employed by the Respondent on a two (2) year contract being annexure PAL1. That contract terminated by effluxion of time on the 30<sup>th</sup> September 2015. The proposed contract of employment (annexure WP6) was rejected on the 26<sup>th</sup> June 2015 when the Applicant filed a counter – offer (annexure WP1). The Respondent’s offer was not revived. Annexure WP6 was no longer open for acceptance on the 21<sup>st</sup> September 2015, this being the date the Applicant purported to accept

the offer. The Court further finds that there is no evidence that the Applicant was permanently employed by the Respondent. The application accordingly fails. The Applicant appears to have been labouring under a genuine mistake of law. The Court will exercise its discretion in his favour by directing each party to pay its costs.

44. Wherefore the Court orders as follows:

44.1 The application is dismissed.

44.2 Each party to pay its costs.

Members agreed

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D.MAZIBUKO  
INDUSTRIAL COURT JUDGE

Applicant's Attorney

MP Simelane  
MP Simelane Attorneys



Respondent's Attorney

Ms Boxshall-Smith  
Boxshall-Smith Attorneys