

Legal Brief

CAN AN EMPLOYMENT CONTRACT BE VALID IF A PERFORMANCE AGREEMENT HAS NOT BEEN CONCLUDED?

Regulation 4(4) of the *Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006* makes the employment contract “subject ... to the signing of a performance agreement”. A literal interpretation of this would mean that if a performance agreement is not signed, the employment contract is invalid. There are, however, a number of examples in the law, and even in these regulations, that suggest that this is not the case.

- The regulations provide that the purpose of the performance agreement is to “comply with ... the employment contract” (regulation 23). This contradicts the argument that the performance agreement is a precondition to a valid employment contract. It suggests rather that an employment agreement stands even if a performance agreement has not been concluded. There is no doubt that failing to conclude a performance agreement constitutes a violation of the regulations and requirements of the Municipal Systems Act, but this does not invalidate an employment agreement. It simply means

that the employment agreement has a defect which must be corrected.

- The performance agreement must be entered into with the mayor. The expectations in the agreement relate to the integrated development plan, the service delivery and budget implementation plan and the budget of the municipality. In evaluating these broad instruments which guide the activities of the municipality, it is clear that the performance agreement is intended to be a management tool. It does not regulate the employee's legal position. Any alteration of the employee's legal position is done in terms of the employment contract. The fact that the law separates the performance agreement and the employment contract is an indication of the different purposes which these instruments serve.
- The performance agreement must be entered into annually. If the validity of an employment contract is dependent on the conclusion of a performance agreement, then the employment contract stands to lose its validity after a year if the parties fail to conclude a fresh performance agreement. This interpretation would introduce a great measure of uncertainty into the employee's legal position, which is not the intention of the performance agreement.

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