

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 167/18

Heard on: 07/06/18

Delivered on: 31/07/18

Not reportable

In the matter between:

ENOCK JEZILE

1st Applicant

MPHO STENGILE

2nd Applicant

BABALO NKUTU

3rd Applicant

ZANEKHAYA SIYEPU

4th Applicant

PHIWOKUHLE CIYO

5th Applicant

SIPHOKAZI LEVE

6th Applicant

MAWANDE NCEDE

7th Applicant

NOKULINDA ADONIS

8th Applicant

NANGAMSO LAMANA

9th Applicant

NOLUCEBISO HLUBI

10th Applicant

and

MNQUMA LOCAL MUNICIPALITY

Respondent

JUDGMENT

NHLANGULELA DJP

[1] Mr Enock Jezile together with his nine co-applicants seek an order that termination of employment contract that had been concluded between them and Mnquma Local Municipality be declared unlawful; and that they be re-instated to their employment on payment of salaries due to them in terms of the contract. In essence they seek an order of performance of that on which the contract agreed.

[2] The defence raised by Mnquma Local Municipality, the Municipality, is that the appointment of the applicants as its employer was unlawful; hence the counter application it launched for the setting aside of the employment contract. The applicants would have none of that as they contend that the employment contract is legally binding and is enforceable against the Municipality.

[3] On 23 November 2017 Mr Kulile Clock, the duly appointed Municipal Manager, addresses a letter to the applicants stating that they were not the employees of the Municipality by reason that the employment was irregular and unlawful. The letter was written against the following background.

[4] On 15 February 2017 the Municipality advertised ten vacancies for Traffic Wardens in the Daily Dispatch inviting suitable candidates to apply. The applicants were amongst 18 people who responded to the advert. On 24 April 2017 thirty candidates were shortlisted for interview by a Recruitment Panel of the Municipality, of which ten candidates were recommended to the sitting Acting Municipal Manager for approval. The sitting Acting Municipal Manager at the time happened to be one Mr Zonwabele Plata. On 08 May 2017 Mr Plata received the recommendation report, it having been signed by the Human Resource Practitioner, Human Resource Manager and the Director for Corporate Services. It would appear that the Chief Financial Officer had to sign the recommendation report as well. But his signature was not obtained by the Recruitment Panel. On 12 May 2017 Mr Plata signed off the recommendation report, thus signifying his approval that the applicants were the successful candidates for employment as Traffic Wardens. However, the appointment letters that were prepared by Mr Plata on 08 May 2017 for the applicants to

counter sign only reached the applicants on 01 November 2017, the date when they actually signed the letters.

[5] It is not disputed by the applicants that Mr Plata's services as the Acting Municipal Manager were terminated on or before 16 May 2017, just four days after he had approved the recommendation report. Mr Themba Hani took over as the Acting Municipal Manager. Upon entering his office Mr Hani found out that the approval of the recommendation report granted by Mr Plata was not supported by a budget for the 2016/2017 financial year as required by the job selection policy of the Municipality. On 30 May 2017 Mr Hani instructed one Ms Mrwetyana, the Director for Corporate Services, to withdraw the approval that had been erroneously granted. That step terminated the recruitment process. It is important to note that as at 30 May 2017 the applicants had not yet signed the letters of appointment as the Traffic Wardens.

[6] According to the applicants Ms Zine Ngidi of the Human Resources Section of the Municipality congratulated them on the approval granted by Mr Plata as it had paved the way for their ultimate appointment. They state further that on 17 July 2017 Ms Mrwetyana called them into the office to sign the letters of appointment. But that was not to be as they were ushered into the office of one Mr Mpithi, the Legal Advisor of the Municipality where they were told that the appointment letters would not be signed "due to internal complications" with regard to the recruitment process.

[7] It was only after a period of approximately five months since July 2017 (in November 2017) that the applicants managed to put their signatures on the letters of appointment duly assisted by Mr Fihla and Mr Mntukushe to do so. They state on affidavit that the cause for delay in signing the letters was the fact that Mr Plata had been interdicted by the Municipality by means of a Court Order to render services as the Acting Municipal Manager.

[8] The deponent to the opposing papers / counter application is not Mr Hani, but Mr Clock doing so in his capacity as the new Acting Municipal Manager. He is duly authorized to represent the Municipality in an appropriate manner. He states on affidavit that Mr Plata could not lawfully simply forge ahead with a recruitment process that had been terminated during May 2017 as he had no authority to do so and knowing fully well that the process had not been supported by a budget. He contends further that the recruitment process that had not been approved by the Chief Financial Officer because the Municipality would not have had funds to meet the new posts of Traffic Wardens.

[9] I have not been able to find proof that, as a fact, the recruitment process had been funded by the Municipality at the time when the newspaper advert went up in February 2017. Counsel for the applicants urged me to make a finding that the budget was in place. I was referred to annexure “CSDHRD” it being contended that it serves as proof of existence of a budget for the recruitment process under question. This document is the recommendation report in which it is recorded that:

“The positions of Traffic Wardens became vacant after the adoption of 2016/2017 Organogram by Council on the 25 May 2016... The position was advertised externally in the Daily Dispatch on 15 February 2017 and the closing date was the 28th February 2017.”

That document cannot be accepted as evidence because the Municipality contradicts the fact that actual budget had been voted for the vacancies. In the absence of better evidence in the nature of a resolution of the Council for the Municipality the Court is prepared to accept the version of the Municipality that at budget never came into being. There is no evidence put forward to gainsay these assertions. Therefore, the case of *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A) finds application.

[10] Properly distilled the upshot of the proved facts of the matter is that there was a contract of employment that came into being, but on the face of a non-existent financial budget, the contract of employment was illegal as the Municipality could not perform an obligation to pay salaries and benefits attended thereto. In circumstances such as these the remedy of specific performance is available to the applicant. However, not only is the ordering of such a remedy often difficult to make, but in this case the enforcement of a contract that is tainted by an irregularity / illegality is the sticky point that cries out for resolution.

[11] As I understood the submission advanced on behalf of the applicants, since the issue of the validity of the contract of employment was not addressed by a court the counter-application brought by the Municipality should not be entertained. A similar point raised against a Municipality was defeated in the cases of: *Municipal Manager: Qaukeni Local Municipality And Another v F V General Trading CC* 2010 (1) SA 356 (SCA). There Leach AJA (as he was then) said the following in para 26:

“While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second respondent’s procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent’s attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In doing so it raised the question of

the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief."

[12] The statement of Leach AJA in *F V Trading CC, supra*, received a stamp of approval in the case of *Department of Transport And Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC), resulting in a finding that appears at 658-9 that:

"I therefore agree ... that the Supreme Court of Appeal was incorrect to find that the Department was barred from bringing a reactive challenge to the extension of the contract solely because it is a state functionary."

[13] The case of *Tasima* also confirms the legal principle that Municipality is entitled to challenge exercise of its own public power. See also: *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) in para 10-15.

[14] Much that has to do with this case lies in the legal position that municipalities must account fully for the work that it does as is envisaged in s 195 of the Constitution. In this connection the case of *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council And Others* 1999 (1) SA 374 (CC) is apposite. There the following was said at page 399:

"[55] There are a series of provisions in Chap 10 itself which make it plain that a local government's powers' to act are limited to the powers conferred by the Constitution or laws of a competent authority...

[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* 53 the Supreme Court of Canada held that:

“Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.”

[15] That said the steps taken by both Mr Hani and Mr Clock to correct the irregularity with regard to the flawed recruitment process were informed by legal obligations, rather than personal choices, that the Municipality owe to the public and the Constitution. For this reason I am of the opinion that even if the *functus officio* rule did apply in this case it would not stand on the way of the Municipality's efforts to correct its own illegal actions. The wrong action of Mr Plata in May 2017 when he approved the recommendation report without authority would not have changed in November 2017 because the necessary budget was still not available, even to this day. Therefore, the contract of employment concluded between the applicants is invalid and unenforceable in law. On these bases, the applicant's applications cannot be sustained.

[16] The general rule applicable when considering an award of costs is that they follow the event. Since the applicants have not been successful they are not entitled to the costs. They must pay the costs. The laudable conduct of the both Mr Hani and Mr Clock in protecting the Municipality from committing on illegal administrative action is yet another reason for the applicants to pay the costs. Added to that is the knowledge on the part of the applicants in July 2017 that the contract could not be implemented; as well as treating as non-existent a duly appointed Municipal Manager in Mr Clock who would have told them that the letters of appointment could not be signed.

[17] In the result the following order is made:

1. The applicants' main application be and is hereby dismissed with costs.
2. The counter application be and is hereby dismissed with costs.
3. The counter application be and is hereby granted with costs.

Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

MTHATHA

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