



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable

Case no: PA 4/14

In the matter between:

MBASHE MUNICIPALITY

Appellant

And

SABELO DUMEZWENI AND OTHERS

Respondents

Heard: 24 February 2015

Delivered: 19 May 2015

Jurisdiction – Point *in limine* – employee’s appointment as municipal manager declared null and void by the municipality and appointment revoked - employee seeking declarator to enforce his contract of employment – municipality raising a point *in limine* that Labour Court lacking jurisdiction to entertain the legality of the employee’s appointment in terms of the Local Government Municipal Systems Act – employee seeking a declaratory order to be appointed as municipal manager – such relief falling outside the prescripts of section 191 but within the jurisdiction of the Labour Court in terms of sections 158 of the LRA and 77 of the BCEA - Labour Court having jurisdiction to decide on the validity of contracts of employment with reference to other statutes. Labour Court’s judgment upheld. Appeal dismissed with costs

Coram: Waglay JP, Ndlovu et Landman JJA

JUDGMENT

LANDMAN JA

Introduction

- [1] This appeal is against the dismissal of a point *in limine* that the Labour Court (Lallie J) did not have jurisdiction to hear an application brought by Mr Sabelo Dumezweni against the Mbashe Local Municipality (the Municipality) in which he sought an interdict and various other reliefs. The appeal is brought with leave of the Labour Court. I shall refer to the appellant as “the Municipality” and the first respondent as “Mr Dumezweni”.

The affidavits

- [2] Mr Dumezweni alleged in his founding affidavit that he was the duly appointed Municipal Manager of the Municipality. The Municipality concluded a five year contract with him. Shortly after his appointment, the Municipality stopped paying his remuneration and he was informed that an inquiry was being held into his appointment. He was also informed that the Municipality considered that his appointment was null and void. The Municipality was in the process of recruiting a Municipal Manager when the Mr Dumezweni sought interim and final relief against the Municipality. He cited the acting Municipal Manager, the Mayor, and the MEC for Local Government and Traditional Affairs in his application.

- [3] The Municipality’s case in its answering affidavit is that:

- (a) Mr Dumezweni’s appointment was in contravention of section 54A(3) of the Local Government Municipal Systems Act 32 of 2000 (the MSA) in that he did not have the prescribed skills, expertise, competencies or qualifications, rendering the appointment null and void;

- (b) the Municipality's resolution, which appointed Mr Dumezweni as Municipal Manager, was rescinded on 25 April 2013 by a further resolution of the Municipal Council;
- (c) the investigation into the legality of the Municipal Council meetings that resulted in Mr Dumezweni's appointment, established that the appointment was null and void as it was in contravention of the law, as evidenced by the Municipal Council resolution of 25 April 2013.

[4] In his replying affidavit, Mr Dumezweni averred:

- (a) that the resolution of the Municipal Council of 25 April 2013, which rescinded the resolution that appointed him, was not taken properly as there was no quorum; and
- (b) that he meets the minimum competencies for the position of a Municipal Manager.

Notice of points of argument

[5] Before the matter was heard, the Municipality advised Mr Dumezweni that the following points would be argued at the hearing, namely:

- (a) that because Mr Dumezweni was challenging the legality of the Municipal Council resolution of 25 April 2013, it would be argued that the Labour Court does not have jurisdiction;
- (b) the application turns almost exclusively on the interpretation and application of the relevant provisions of the MSA, and in particular section 54A and as the Labour Court does not have jurisdiction, the application ought to have been instituted in the High Court; and
- (c) in any event, and in the alternative, Mr Dumezweni's case was either that he had been unfairly dismissed or unfairly suspended. Accordingly, the Labour Court does not have jurisdiction to grant what is, in effect, final

relief in respect of a dispute which ought to have been referred to either the CCMA or bargaining council, but had not been so referred.

Judgment of the court a quo

[6] The Labour Court set out all the relevant facts and then went on to say:

'The question of legality regarding the validity of the applicant's contract of employment, whether it ever came into existence because it was void ab initio in terms of section 54A of the MSA fall within the ambit of section 77(3) of the BCEA as they concern the applicant's contract of employment. The question of legality does not exist in vacuo it refers to the applicant's contract of employment. So do the provisions of section 54A of the MSA. The respondent's point in limine that this court lacks jurisdiction for the above reason has no legal basis and is dismissed.

The Labour Court's jurisdiction to grant a declaratory order is provided for in section 158(1)(a)(iv). It is common cause that the applicant signed a contract appointing him as the applicant's Municipal Manager. There is a dispute over the validity of the contract which led the first respondent to take a decision that the applicant's contract was void ab initio. Some of the consequences of the decision are that the applicant is neither performing his duties nor receiving his remuneration in terms of the contract. He is for all intents and purposes not the first respondent's Municipal Manager. He seeks an order declaring him the first respondent's Municipal Manager. The Labour Court is the appropriate Court with the necessary jurisdiction to determine his dispute and grant the order he is seeking which falls outside the realm of section 191 of the LRA and the jurisdiction of both the CCMA and bargaining councils.'

Grounds of appeal

[7] The Municipality relies on the following grounds of appeal:

- (a) The Court a quo erred in finding that the issue of jurisdiction is determined on the basis of the pleadings and not on the substantive merits of the case.

- (b) The Court *a quo* erred in failing, in accordance with the unanimous judgment of the Constitutional Court in the matter of *Gcaba v Minister for Safety and Security and Others*,¹ to interpret the supporting affidavit “to establish what the legal basis of Mr Dumezweni’s claim is”.
- (c) The Court *a quo* erred by failing to properly interpret the issue before it with reference to the founding affidavit. Had this been done, it would have been apparent that the substance of the matter is the issue of legality, over which the Labour Court has no jurisdiction.
- (d) The Court *a quo* erred in finding that the issue before it was distinguishable from the matter of *De Beer v Minister of Safety and Security/Police*² on the basis that the respondent does not seek re-instatement. The Court *a quo* erred in failing to have any proper regard to the fact that it was Mr Dumezweni’s case that:
- (i) he had a valid and binding employment contract;
 - (ii) he had been advised by the Municipality that he was not an employee;
 - (iii) his remuneration had ceased; and
 - (iv) he was seeking an order to the effect that he be declared the Municipal Manager and be paid his remuneration.
- (e) Had the Court *a quo* had any or proper regard to the issue referred to in (d) above, it would have concluded that, in substance, Mr Dumezweni was seeking re-instatement – albeit temporary, as was the case in *De Beers* (supra). Accordingly, the Labour Court erred by failing to find that it was bound to follow the *De Beer*’s judgment.

¹ [2009] 12 BLLR 1145 (CC).

² [2013] 10 BLLR 953 (LAC).

- (f) The Court *a quo* erred in concluding that, in truth, the relief sought by Mr Dumezweni was re-instatement and reference to the order declaring him Municipal Manager was in truth, part and parcel of him seeking his order of re-instatement.
- (g) Alternatively to (f) above, and in the event of it being found that Mr Dumezweni was, in fact and law, seeking a declaratory, the court *a quo* erred in finding that “*both the CCMA and the bargaining council lack jurisdiction to determine a dispute where an applicant seeks a declaratory order*”. The Court failed to have regard to the provisions of section 138(9) of the Labour Relations Act 66 of 1995 which expressly gives a bargaining council and/or CCMA arbitrator the power to make an award which “*includes, or is in the form of, a declaratory order*”.
- (h) The court *a quo* erred by failing to uphold the *in limine* jurisdictional challenge and by not dismissing the application with costs (including costs of two counsel).

Evaluation

[8] The grounds of appeal raise three questions:

- (a) Did the court *a quo* apply the correct test for determining jurisdiction *in limine*?
- (b) Did the court *a quo* correctly establish the nature of Mr Dumezweni’s case?
- (c) Does the Labour Court have jurisdiction to decide whether a contract of employment or appointment complies with the MSA?

Did the court *a quo* apply the correct test to determine jurisdiction *in limine*?

[9] The Municipality’s first ground of appeal is that the court *a quo* “*erred in finding that the issue of jurisdiction is determined on the basis of the pleadings and not*

on the substantive merits of the case". It will be recalled that the court *a quo* was dealing with a challenge to jurisdiction as a point *in limine*. The merits of the Mr Dumezweni's case was not then in issue.

- [10] Van der Westhuizen J delivering the judgment in *Gcaba v Minister for Safety and Security*³ observed that:

'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in time), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleading – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the proceedings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would take jurisdiction.' [Footnote omitted]

- [11] The court *a quo* was correct in looking at the pleadings in order to establish jurisdiction at the outset of the proceedings. It follows that this ground of appeal is without merit.

Did the court *a quo* correctly establish the nature of Mr Dumezweni's case?

- [12] Mr Dumezweni's case is to be established by examining the notice of motion and the affidavits.

- [13] Mr Dumezweni sought a rule *nisi* in the following terms:

'2.1 That the Respondents be and are hereby interdicted and/or restrained from continuing with the recruitment process and any conduct in

³ 2010 (1) SA 238 (CC) at para 75.

furtherance of the filling of the post of Municipal Manager, Mbashe Local Municipality as advertised in the issue of Daily Dispatch dated 3rd June 2013, pending the finalization of the investigation, conducted by the Respondents in respect of the appointment of [Mr Dumezweni] as Municipal Manager of the First Respondent and any subsequent process challenging the ultimate decision of the Applicant;

- 2.2 That the decision of the Respondents to terminate [Mr Dumezweni's] remuneration as Municipal Manager of the First Respondent be declared wrongful, unlawful and unconstitutional, reviewed and set aside pending the finalization of the processes mentioned in paragraph 2.1 above;
- 2.3. That [Mr Dumezweni] be declared to be the Municipal Manager of the First Respondent and entitled to receive remuneration and privileges attached to such employment, pending the finalization of the processes mentioned in paragraph 2.1 above;
- 2.4 That the Respondents be and are hereby ordered to conclude the investigation in respect of [Mr Dumezweni's] appointment as Municipal Manager of the First Respondent within 60 (sixty) days of this order.
3. Prayers in terms of sub-paragraphs 2.1, 2.2 and 2.3 above shall operate as an interim interdict or mandamus until the finalisation of this application.
4. The Respondents be and are hereby ordered to pay the costs of this application, jointly and severally, the one paying, others to be absolved.'

[14] Mr Dumezweni's case as set out in his founding affidavit can be summarised as follows:

- (a) He was employed as the Municipality's Manager: Land and Housing Department as from December 2007.
- (b) His contract was extended and he acted as Municipal Manager as from 9 January 2013.

- (c) He applied for the post of Municipal Manager and was interviewed.
- (d) He was appointed (or his appointment was authorised) as the Municipal Manager by a resolution of a special council meeting of the Municipality of 12 March 2013.
- (e) The Mayor appointed him as the Municipal Manager on 15 March 2013. A contract of employment for a period of five years was concluded and Mr Dumezweni assumed his duties.
- (f) On 26 March 2013, he met Mr Oxley Sibongile Ngqele who gave him a copy of a letter indicating that Mr Ngqele had been seconded to act as Municipal Manager for three months.
- (g) On 11 April 2013, he established that the Municipality had stopped payment of his remuneration.
- (h) On 15 April 2013, he was informed by Mr Ngqele that his contract of employment was null and void as it was in contravention of the law and that an investigation was pending into his appointment.
- (i) On 4 June 2013, he came to learn that the post of Municipal Manager of the Municipality had been advertised in "The Daily Dispatch" of 3 June 2013.
- (j) It may be inferred that Mr Ngqele acted on behalf of the Municipality.

[15] The Municipality submits that the substance of Mr Dumezweni's case and therefore the true basis of his claim is his alleged unfair dismissal or alleged unfair suspension which falls within the province of the CCMA or a bargaining council and, as this is the case, the Labour Court does not have jurisdiction in this matter.

- [16] The Municipality relies on *De Beer v The Minister of Safety & Security Services/Police and Another*⁴ that is to the effect that the Labour Court does not have jurisdiction to adjudicate a dispute about an unfair dismissal or unfair labour practice, unless the dispute has been referred to conciliation and the reason for the dismissal is one of those listed in s 191(5)(b) of the LRA. See para 29.
- [17] In the *De Beer's* case, it was found that the crucial and central issue concerned the termination of the appellant's employment and the fairness thereof, despite his averments to the contrary. See para 38. The ratio in the *De Beer's* judgment will be applicable only if the Labour Court erred in finding that Mr Dumezweni did not complain of unfair dismissal or unfair suspension.
- [18] Mr Dumezweni alleges that the Municipality has breached his contract. He alleges in addition that the Municipality intends recruiting another person to occupy his post. He seeks a declaratory order, an interdict, a mandamus and specific performance of his contract. Mr Dumezweni does not complain of an unfair dismissal or unfair suspension. He bases his case squarely on a contract of employment.
- [19] As the court *a quo* was at pains to point out Mr Dumezweni does not make any allegation of unfairness. He could perhaps have done so. But it is his prerogative to formulate his case and he has opted to rely on his contractual remedies. He does not seek equity based relief. He complains of the wrongfulness or unlawfulness of the Municipality's actions. Nugent JA in *Manama v King Sabata Dalindyebo Municipality*,⁵ emphasised that the existence of other remedies does not have any bearing on a case based on one remedy upon which an applicant relies. Nugent JA said:

'The evidence in this case establishes the existence of a contract of employment between the municipality and [the applicant]. And he wishes to enforce the contract.... That he might have been entitled to other relief under the remedies

⁴ (2013) 34 ILJ 3083 (LAC).

⁵ [2011] 3 BLLR 215 (SCA). 1

provided for under the Labour Relations Act does not somehow extinguish his contractual rights.’⁶

- [20] The jurisdiction of the Labour Court includes, in terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) “...concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.” The Labour Court has the power and jurisdiction to grant the relief claimed by Mr Dumezweni.

Does the Labour Court have jurisdiction to decide whether a contract of employment or appointment complies with the MSA?

- [21] The Municipality submitted in its heads of argument that Mr Dumezweni is challenging the validity or the legality of the municipal resolution taken on 25 April 2013 which apparently revokes the March resolution that authorised his appointment as Municipal Manager. This is regulated by the MSA and the Labour Court does not have jurisdiction as regards this Act.
- [21] Mr Buchanan SC, with him Mr Grobler, who appeared for the Municipality, contended during oral argument that Mr Dumezweni relied on the MSA because he was obliged to show that his contract of employment was a valid one in terms of this Act. This is undoubtedly correct.
- [22] Section 54A(1) of the MSA requires a Municipal Council to appoint a Municipal Manager as head of the administration of the Municipal Council (or an Acting Municipal Manager). The qualifications of a Municipal Manager are provided for in subsection (2) that reads:

‘A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.’

And subsection (3) provides that:

⁶ At para 23.

'A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-

(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or

(b) the appointment was otherwise made in contravention of this Act.'

- [23] I do not understand subsection (3) to mean that the appointment of a Municipal Manager may be treated conclusively by a municipality, or anybody else, as null and void without the intervention of a court. The principle of legality does not permit this. Contracts are binding but may be void or voidable.
- [24] Mr Buchanan SC submitted that as Mr Dumezweni relied on the MSA to show the validity of his contract, and as the Labour Court did not have jurisdiction in respect of this Act, therefore, it could not consider the validity of the contract with reference to the MSA.
- [25] The Labour Court may indeed need to consider the validity of a Municipal Council resolution or section 54A(2) of the MSA. This raises the issue whether the Labour Court has incidental jurisdiction to consider the validity of a contract of employment, in this case, with reference to the MSA. When the legislature conferred jurisdiction on the Labour Court to enforce a contract of employment it can only have meant a valid contract of employment and that the Labour Court would decide whether the contract of employment in issue was a valid contract according to whatever law was applicable. The Labour Court has consistently, and correctly, decided on the validity of contracts of employment with reference to other statutes such as the Companies Act 71 of 2008, Immigration Act 13 of 2002 and as regards enforceability the Prescription Act 68 of 1969 (to name a few) over which it does not have direct jurisdiction. There is no reason why the same rule should not apply in the case of the MSA.

Concession

- [26] Before concluding, I must mention a concession made by Mr Simoyi, who appeared on behalf of Mr Dumezweni, that the municipality had not complied with section 54A(7)(a) of the MSA which requires a Municipal Council, within 14 days, to inform the MEC for Local Government of the appointment process and outcome, as may be prescribed. The MEC for Local Government, in turn, must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister. See section 54A(7)(b) of the MSA.
- [27] At first blush, Mr Simoyi seemed to concede that Mr Dumezweni's appointment was not in accordance with the MSA. However, the obligation to inform the MEC is an obligation that arises after the appointment of a Municipal Manager. It is not part and parcel of an appointment. Its purpose is to enable the MEC to monitor appointments and take appropriate steps to enforce compliance by the Municipal Council with section 54A of the MSA. Appropriate action may include an application to a court for a declaratory order on the validity of the appointment, or any other legal action against the Municipal Council. See section 54A(8) of the MSA. Where the MEC for Local Government fails to take appropriate steps, the Minister may take the necessary steps. See section 54A(9) of the MSA.
- [28] Therefore the concession does not detract from Mr Dumezweni's averments that his contract as Municipal Manager meets the requirements of the MSA.
- [29] In the result, I am of the view that the appeal should be dismissed. Costs should follow the result.

Order

- [30] I make the following order:

The appeal is dismissed with costs.

Landman JA

I agree

Waglay JP

I agree

Ndlovu JA

APPEARANCES

FOR THE APPELLANT:

Mr Buchanan SC, with Mr Grobler,

Instructed by Kirchmanns Inc.

FOR THE RESPONDENT:

Mr Simoyi

Instructed by Mlonzi and Co Inc.