

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Reportable
Case No J1461-11

In the matter between:

OUPA LUCAS PHAKEDI

Applicant

and

DR KENNETH KAUNDA DISTRICT
MUNICIPALITY

First Respondent

S.K SEBOLA N.O (Acting Municipal Manager)

Second Respondent

Date of hearing: 8 September 2011

Date of judgment: 22 September 2011.

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application to confirm the interim order made by Van Niekerk J on 3 August 2011, which reads as follows:

“IT IS ORDERED THAT:

1. The Rules of the above Honourable Court relating to the forms and manner of service are hereby dispensed with and this matter is dealt with as one of urgency.

2. A rule *nisi* is hereby and is herewith issued calling upon the Respondents to show cause on **08 September 2011 at 10h00** why the following order should not be made:

2.1 Declaring that the notices of termination of the Applicant's employment, dated 28 April 2011 and 23 June 2011, are unlawful and of

- no force and effect;
- 2.2 Declaring that the Applicant remains employed by the 1st Respondent as the Secretary of the Office of the Speaker on the terms and conditions contained in the letter of appointment annexed as annexure “B” to the founding affidavit and the Respondents are ordered to comply with the arbitration award by Adv, R. G Lagrange, dated 22 February 2006, under case number HQ070502;
- 2.3 Directing the Respondent to give effect to the terms and conditions of the Applicant’s contract of employment until such time as the contract is not lawfully terminated and the Respondents are ordered to reinstate the Applicant retrospectively in the positions which he occupied immediately prior to the termination of these employment on the terms and conditions provided for in Clauses of the Settlement Agreement and Arbitration Award as referred to herein above;
- 2.4 Ordering the Respondents to comply with the provisions of the settlement agreement and the arbitration award referred to herein above;
- 2.5 Ordering the 1st Respondent to pay the costs of the application.
3. Pending the return date, the Respondents are interdicted and restrained from appointing any person in the Applicant’s position, to wit Secretary to the Office of the Speaker.”

2] The application that gave rise to the above order was unopposed. The matter is now, on the return day, opposed by the first respondent on a number of grounds including urgency.

Background facts

- 3] The applicant was prior to his dismissal employed by the first respondent as a secretary in the office of the Speaker, Councillor Koue (the Speaker), with effect from 1 December 2009. The applicant was appointed on a fixed term contract which was to last pending the Speaker's term of office.
- 4] On 18 January 2011, the applicant received a letter from the Municipal Manager informing him that the terms of his contract of employment were amended. The essence of the amendment was that the contract of employment was made permanent. The letter reads as follows:

“RE: ALIGNMENT OF EMPLOYMENT CONTRACT
WITH THE SETTLEMENT AGREEMENT IN CASE
NO. HQ 070502 AS CONCLUDED BETWEEN IMATU,
SAMWU AND THE SOUTH AFRICAN LOCAL
GOVERNMENT ASSOCIATION

The above-mentioned matter refers:

Clause 2.4 of the settlement agreement referred above
states:

‘2.4 In respect of current fixed term contracts
concluded with non-Section 57 employees, these
contracts will run for their fixed terms, where, after the
employees concerned will remain employed on
SALGBC grades and salary scales, unless otherwise
agreed in a division of the SALGBC, or unless
extension is granted in terms of clause 7 hereof.”

- 5] The provisions of the settlement agreement referred to above had been made, pursuant an arbitration award by the panelist of the South African local

Government Bargaining Council (the bargaining Council).

- 6] During May 2011, the applicant received a letter dated 28 April 2011, in which he was informed that his contract of employment would come to an end on 31st May 2011. He received another letter from the first respondent informing him that his contract of employment was extended to 30th June 2011. The extension was apparently due to the operational needs of the first respondent.
- 7] On 23rd of June 2011, the applicant received another letter from the Municipal Manager, reminding him that his contract of employment would end on 30 June 2011. And thereafter the applicant received a letter on 28th June 2011, confirming the termination of her employment.

Submission and contention by the parties

- 8] Mr Scholtz, for the applicant, contended that the applicant's employment contract had been lawful, and properly amended by the Municipal Manager, and therefore its termination on the basis of the alleged unlawful extension was unlawful. In this respect, Mr Scholtz relied on the provisions of section 55 and 66 of the Local Government: Municipal Systems Act (the Systems Act).¹

¹ 32 of 2000. Section 55(1) of the Systems Act reads as follows: " As head of administration municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for-

- a) . . .
- b) The management of the municipality's administration in accordance with this Act and other legislation applicable to the municipality.
- c) . . .
- d) . . .
- e) The appointment of staff other than those in section 56(a), subject to the Employment Equity Act (Act No 55 of 1998).
- f) . . .
- g) The maintenance of discipline of staff;
- h) The promotion of sound labour relations and compliance by the municipality with the applicable labour legislation.

Section 66 (1) reads as follows: A municipal manager, within a policy framework determine the

- 9] It was further argued on behalf of the applicant that even the letter of appointment reflects that the Municipal Manager had the power to appoint the applicant permanently, which is also in line with the provisions of the Systems Act. It was further submitted on behalf of the applicant that even the unsigned copy of the contract which was submitted by the first respondent supports the proposition that the Municipal Manager had the power to appoint the applicant.
- 10] As concerning the legality of the decision to terminate the applicant's employment contract, it was argued that the Court was in a position to intervene because the applicant as an employee was faced with consequences of an invalid and unlawful decision. In this respect, reliance was placed on the cases of *Mafihla v Goven Mbeki*² and *Morule v Minister of transport and Another*.³ Given the conclusion reached at the end of this judgment, I do not deem it necessary to deal with the findings and the relevance or otherwise of these judgments.
- 11] Adv Rautenbach SC, for the respondents, in his submission and heads of argument raised a number of points in challenging the applicant's application. The first point concerns the issue of urgency. He argued in this regard that despite the ruling on urgency in the interim order, the issue still remains

municipal council and subject to any applicable legislation, must-

- a) ...
- b) ...

Attach to those the remuneration and other conditions of service as may be determined in accordance with any applicable legislation."

2 (2000) ZANWHC 3

3 unreported case number J304/11.

relevant and pertinent on the return day.

- 12] It was further argue on behalf of the respondents that the applicant had failed to proof that he had a clear right, compliant with the requirements of a final interdictory order. This argument is based on the contention that the Municipal Manager did not have the authority to change the terms and conditions of the employment of the applicant as those had been created by the Municipal Council, in particular those dealing with the appointment of political appointees.
- 13] As concerning the settlement agreement, the respondents argued that its terms were not applicable to the applicant as it applied to the people who were in the employment of the first respondent at the time it was concluded. In this regard, the agreement did not envisage its provisions covering prospective employees such as the applicant. The agreement was concluded during 2006, whereas the applicant commenced employment during 2009.
- 14] A further point raised by the respondents is that the matter as raised by the applicant has given rise to the issue of interpretation and application of a collective agreement which would fall under the jurisdiction of the either the CCMA or the bargaining council in terms of section 24 of the Labour Relations Act.⁴ Whilst I do not intend dealing with this issue, it does seem to me that

4 66 of 1995. Section 24 of the LRA reads as follows: (1) Every collective agreement, excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)(c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.

(2) If there is a dispute about the interpretation or application of a collective agreement, any

the respondents do have a case in that regard which would then mean the applicant would have failed to establish a clear right.

- 15] The other point raised on behalf of the respondents is that the applicant was not entitled to the relieve he sought because he had other remedies such as those provided for in terms of section 77 of the Basic Conditions of Employment act.⁵

Analysis and evaluation

- 16] It is trite that on the return day of the rule *nisi*, the applicant would ordinarily seek to have the interim order confirmed or made absolute. In general, when the interim order is not opposed, the court will readily confirm such an order. However, if there is opposition to the rule *nisi*, the matter will be argued and the court will consider all the aspects raised by the parties including the issue of urgency.

- 17] In the present instance, the urgent application by the applicant was not opposed as stated earlier; it would appear that the court readily issued the interim order on the basis of the papers as were presented by the applicant.

- 18] As stated above, the matter was opposed on the return day. The first issue to

party to the dispute may refer the dispute in writing to the Commission if-

- (a) the collective agreement does not provide for a procedure as required by subsection (1);
- (b) the procedure provided for in the collective agreement is not operative; or
- (c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.

⁵ 75 of 1997.

consider now is whether the issue of urgency is relevant for consideration in the present instance –it, previously being held that the matter had to be treated as one of urgency. There was no argument between the parties about the fact that the Court on the return day has to consider all aspects of the interim order. There was however an argument as to whether the Court was entitled to entertain the issue of urgency which had already been determined in the rule *nisi*.

- 19] The general principle of our law, as I understand it, is that on the return day of a rule *nisi*, the court has the power and authority to consider all aspects of the rule. In other words, the court considering the matter on the return day has an independent discretion to exercise and is not bound by the finding of fact or law made by the court that granted the interim order.
- 20] The issue of urgency was considered on the return day in the case of *Van Wyk Von Ludwig and Hanekom Inc v Ferguson*.⁶ In that case, the court in dealing with the issue of urgency, on the return day, held that:

“9. The court which granted the provisional order also granted condonation and permitted the applicant to proceed with the application as a matter of urgency on the basis of the allegations contained in paragraph 10 of the founding affidavit and which are set out above. There is no reason for this Court to interfere with the discretion exercised by that court in respect of condonation and urgency.”

6 [2001] JOL 7967 (C) at para 9.

- 21] It is apparent from the reading of the judgment in the above case that the court did entertain the issue of urgency but, however, declined to interfere with the finding of urgency because the respondent failed to deal with the substantive issues of urgency but simply proffered a bare denial of the existence of urgency. In this respect, the court found that the respondent had skirted the issue dealing with the important issues related to urgency.
- 22] In *Fourie v Uys*⁷, the court held that the rule *nisi* would be discharged if there were insufficient ground for granting the interim order and this in my view, includes also insufficient grounds for urgency.
- 23] In *SAFCOR Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*,⁸ the Court held that:

“ Nor am I impressed by the argument that the Judge issuing the rule might be called upon to give a ruling on a matter of law which would be binding on the Judge who finally heard the matter, unless clearly wrong. Very often legal rulings are inextricably bound up with the facts placed before the Court. Obviously in such a case a ruling at the rule nisi stage could not bind the Court finally hearing the matter on a more broadly-based factual foundation. In some instances the ruling of law might transcend the particular facts and be applicable both at the rule *nisi* and the final stages. (My underlining)

- 24] The basis for the principle that on the return day, the court has the discretion to consider all aspects of the interim order as well as urgency was well and

⁷ 1957 (2) SA 125 (C) at 129 A-F.

⁸ 1982 (3) SA 654 (A) at 676 C-E.

correctly summarised in the case of *Polyoak (Pty) Ltd v Chemical Workers Industrial Union and Others*.⁹ In that case, Brassey AJ summarised the position in the following terms:

“Many, but by no means all of these shortcomings are excusable when an application is brought as a matter of urgency. In the press of circumstances, the court may be quick to grant interim relief when it does so, when it does no more than oblige the respondents to refrain from doing what, in any event, they should not do. By the time the return day arrives, however, the dust is settled, and then it becomes necessary for a court to consider whether a case has been made out for the relief sought. That an interim order has been granted in no way prevents this process, for, being interlocutory, it serves to dispose of none of the issues that arise in the case. The absence of opposition moreover, cannot cure deficiencies in the papers. Being uncontroverted, the allegations in the founding affidavit can be accepted unless they are baseless or fanciful and they must still embody evidence on which the court can act. Failure to oppose an application, in no way, constitutes an act of submission to the relief sought. On the contrary, respondents in an application that makes out no case have a right to assume that the court will arrive at this conclusion without the aid of argument from them. On the return day, in short, the court must be satisfied that a proper case has been made out for each facet of relief sought.”¹⁰

25] It is on the basis of the above principle that I have decided to scrutinize the case of the applicant with regard to urgency. In this respect, I do not agree with Mr Scholtz that the issue of urgency cannot be entertained at this level,

9 (1999) 20 ILJ 392 (LC) at 394H–395B.

10 This approach was followed by Moshwana AJ in *Southernwind Shipyard (Pty) Ltd v NUMSA and Others* [2009] 4 BLLR 390 (LC).

because it was dealt with separately from the other aspects of the interim order by Van Niekerk J.

26] In my view, for the reasons set out below the applicant's claim stands to fail, essentially on the basis of lack of urgency.

27] It is common cause that the initial engagement of the applicant was based on a fixed term contract linked to the term of office of the Speaker. The contract was extended by the Municipal Manager on 20th January 2011.

28] On 15th May 2011, the applicant received a letter dated 28th April 2011, informing him that his contract of employment would come to an end on 21st May 2011. Thereafter, about a month later he received a letter informing him that his contract of employment was extended for another month. On 28 June 2011, the applicant received another letter reminding him that his contract of employment would expire on 31st June 2011. It is also stated in the interim order (paragraph 2.1) that the applicant was notified of the termination on 28 April 2011 and 23 June 2011.

29] The applicant waited from 15 May 2011 to 28 July 2011 before approaching the court regarding his complaint. This means that the applicant waited for about two months before approaching the court for a relief.

Adequacy of other remedies

30] In order to succeed in making an interim order final or definite the applicant has to show the following: a clear right, an act of interference and that there is

no other adequate relief.

31] It is apparent from the reading of the papers that in seeking to protect the alleged interference with his rights, the applicant relies on the alleged breach of the provisions of his employment contract by the respondent. That being the case, it seems to me that the applicant essentially relies on the provisions of section 77 of the Basic Conditions of Employment Act (BCEA).¹¹ There is no evidence on the papers before me that the applicant would be deprived of his rights if this matter was to be considered in the ordinary course and in terms of section 77 of the BCEA.

32] The applicant has in my view failed to show that he has no other adequate remedy, if this matter was to be heard in the ordinary course or that if that was to happen he would suffer irreparable harm. In other words the applicant has failed to show that it would be difficult and costly to place him in a position he was in prior to termination of his contract of employment.¹²

33] For the above reasons, I am not disposed to granting in a final interdict and accordingly the rule *nisi* stands to be discharged.

34] As concerning costs, I am of the view that in the circumstances of this case it would not be both law and fairness that costs should follow the results.

35] In the premises, the matter is struck of the roll with no order as to costs.

¹¹ 77 of 1997.

¹² See *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C).

MOLAHLEHI J

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Mr Scholtz from Scholtz Attorneys

For the Respondent: Adv Rautenbach SC

Instructed by: Cheadle Thompson & Haysom