



REPUBLIC OF SOUTH AFRICA

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Reportable

Case no: J 1516/12

In the matter between:

SA MUNICIPAL WORKERS UNION

Applicant

and

MOPANI DISTRICT MUNICIPALITY

Respondent

Heard: 11 June 2012

Delivered: 15 June 2012

Summary: (urgent-staying recruitment process - locus standi of union - joinder of short-listed candidates).

JUDGMENT

LAGRANGE, J

Introduction

- 1] This is an urgent application in which the applicant seeks effectively to interdict the recruitment process for the appointment of a new Municipal Manager of the respondent municipality, which has reached the stage where short-listing has been done and interviews of the short-listed candidates are due to take place on 15 June 2011. On account of this, I agreed that judgment would be given at 08h00 that day before any interviews are due to commence.
- 2] The relief sought by the applicant is an interim order pending the return date:
 - 2.1 That the intended interviews for the position of municipal manager scheduled for 15 June 2012 at 09H00 or any other date thereafter be interdicted;
 - 2.2 alternatively to 2.1, in the event that interviews already took place at the time of hearing this application, appointment of a recommended candidate be and is hereby interdicted; and
 - 2.3 that the short listing process of candidates for the position of municipal manager be set aside;
 - 2.4 that the respondent be ordered to be advertised de novo the position of municipal manager;
 - 2.5 that the respondent be ordered to pay the costs of the application on attorney and own client scale
- 3] An answering affidavit was received shortly before the hearing of the application which had been stood down from 10h00 to 14h00 today (14-06-2012). In the circumstances there is no replying affidavit.
- 4] The relief sought by the applicant is in the form of a rule nisi, leaving the final determination of the matter to the return date. The effect of granting

the interim relief would require the respondent to abandon the present recruitment process and restart it anyway, so the consequences are final in nature. I agree with respondent's counsel that the relief sought is in fact final in nature. Consequently, the applicant must demonstrate a clear right, which has been infringed, and an absence of a suitable alternative remedy in due course.¹

Brief summary of the facts

- 5] The employment contract of the previous Municipal Manager, Mr Maake, ended on 30 April 2012. It was initially extended for a further five years by the respondent. This was contrary to the provisions of section 54 (2A) of the Local Government: Municipal Systems Act 32 of 2000, which requires any extension to be sanctioned by the MEC, which in any event cannot exceed three months. The applicant claims that as a result of its "blowing the whistle" this invalid appointment was withdrawn by the respondent.
- 6] The respondent then advertised the post of municipal manager in May 2012 setting a closing date for submitting applications by 31 May 2012. Eight people applied for the post by the closing date. The applicant alleges that in terms of the respondent's personnel procurement procedures, applications received are captured by the registry section of the municipality on the closing date to record the stock of applications received and verify the documentation. After verifying the applications and documents attached to them the applicant claims that corporate services department would retain the applications until the short listing process.
- 7] The applicant claims that the former municipal manager's secretary requested four of the applicants CBS CV's, which claims had not yet been captured by the registry department. These CVs were only returned to the registry section after the closing date, but the director of corporate services nonetheless instructed that all the applications should be captured.

¹ Setlogelo v Setlogelo 1914 AD 221 at 227

- 8] The applicant believed that only one of the applicants whose CVs were removed, was shortlisted. Believed that this might have been a result of the CVs being tampered with. However, according to the respondent two of the applicants in question were in fact shortlisted. On the papers I must accept the respondent's version. As a result of the applicant's suspicions that is the four candidates applications might have been tampered with, it believed the whole process of recruitment had been tainted and it demanded the process be started afresh.
- 9] Demands were conveyed in various letters to the respondent to which the latter replied. In essence, the respondent denied that the former municipal manager's secretary had handled any of the applications as alleged and was satisfied that the process of short listing could continue. This was communicated to the union in two separate and similar letters from the acting municipal manager and the mayor respectively, both signed on 7 June 2012.
- 10] The shortlisting process took place on 8 June 2012 and the applicant's representative, who was entitled to observe the process, again voiced the union's objections to the recruitment process continuing, but the short listing proceeded nonetheless. At this point it is useful to set out the limited role assigned to the applicant's representative in the recruitment process.
- 11] The relevant clauses of the respondents Personnel Provisioning Policy read as follows:

"5.4 job levels zero, 1 and 2 positions:

Shortlisting will be done by the speaker, Executive Mayor, or any two of full-time counsellors, municipal manager and the head of directorate where possible. Unions are allowed to attend process as observers."

5.5 Invitation to attend the interview

The directorate of corporate services is to invite in all instances union representatives to be observers during the interviewing

process. The purpose of union observer is to monitor and evaluate the process of recruitment on a continuous basis.

Unions do not form part of the selection panel, Unions do however attend the interviewing process, but may not ask questions on substantive issue. They however challenge unprocedural issues."

- 12] These are the provisions specifically relied on by the applicant, though there is also a specific objection procedure provided in the policy which enables the union or any shortlisted member to obtain reasons why a specific candidate was successful or another was not. The municipality is also obliged to provide objective reasons for an appointment. Although there is some ambiguity as to whether the union can obtain information on final choices made, the procedure makes it clear that any party including a union or another employee may object if it is not satisfied with the procedures.
- 13] The essential concern of the applicant is that because it believed that the documentation of the four candidates whose CVs were removed, might have been tampered with by the former municipal manager or by his staff, it is concerned that the recruitment process has been tainted and argued that it must start again from scratch to ensure that it is fair and transparent. It has taken up the matter based on its interpretation of its entitlement to ensure that the recruitment process is procedurally fair based on the respondent's policy. It also claims to have brought the application to "protect the interest of third parties who are not privy to the selection and interviewing processes as they are not involved."

Analysis

- 14] A number of *in limine* objections were raised by the respondent apart from disputing the applicant's entitlement to substantive relief. For the purposes of this decision I will only deal with the issue of joinder and the union's *locus standi* to bring this application.

Locus standi

- 15] The union brings this application in its own name and says that its *locus standi* is also "entrenched" by the respondent's Personnel Provisioning Policy. In terms of the provisions of that policy, the union is clearly entitled to attend the short-listing process and the interviews of short-listed candidates. In terms of the provisions of the policy not relied on by the union, it is also entitled to object to any procedural unfairness and to be given written reasons for not considering or appointing a specific candidate.
- 16] Union representatives did in fact attend the short listing process, and did raise objections to the recruitment process proceeding on the basis that it was unfair. Mr Venter, who appeared for the applicant, argued that the rights in the policy were meaningless, if the union also did not have a right to pursue a procedural objection grievance of procedural unfairness by obtaining relief in the form of an order compelling the respondent to conduct a procedurally fair recruitment process. In terms of the policy the union would certainly be entitled to enforce its right to participate in the capacity of an observer and to raise objections, but that does not mean that the policy also implies it has a right to stop the process if its objections are overruled. Such a right must be founded on some other ground.
- 17] Thus, it might for instance be possible that the union could have tried to base its right to sue on the broader principle of *locus standi* introduced by section 38 of the Constitution which permits a party to sue to protect a fundamental right in the bill of rights, even if the party does not have a direct and substantial interest in the subject matter of the litigation itself. However, the union did not lay a basis for this in its founding affidavit and did not identify a fundamental right in the constitution it was trying to enforce in the interests of others. The closest it came to articulating such a ground was to say it was 'acting in the public interest', but this was not related to a fundamental right in the bill of rights.

Non-joinder

- 18] Another objection raised by the respondent was the failure of the applicant to join any of the candidates due to be interviewed on 15 June 2012. In argument it was suggested that such candidates would suffer no prejudice if the process was restarted as there was no reason to believe they would not be shortlisted. All candidates who met the basic requirements for the post were shortlisted. When applicant's counsel was asked whether there might not be other prejudice flowing from a delay in the recruitment process to shortlisted candidates he argued that the need for ensuring the fairness of the process would outweigh such interests.
- 19] That might be so, but I do not think that is a basis for not joining the short-listed candidates. It is the fact that they have a material interest in the interview process proceeding now and not at some indefinite later date which gives them a right to be heard. Whether that interest will be outweighed by other considerations is a matter to be decided on the merits of the case.
- 20] For this reason, I think that the application ought also be dismissed for the non-joinder of the shortlisted candidates.

Conclusion

- 21] As there are at least two preliminary reasons why the application should be dismissed, it is not necessary for me to consider the others or the merits of the claim.

Order

- 22] The application is dismissed with costs for the reasons stated above.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R Venter instructed by Maenetja Attorneys

FIRST RESPONDENT: N Cassim, SC instructed by Lebea Attorneys