



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable
Of interest to other judges
Case no: J3219/12

In the matter between:

SAMWU OBO MONYAMA AND OTHERS Applicant

And

GREATER TZANEEN MUNICIPALITY Respondent

Heard: 06 December 2012

Delivered 11 December 2012

Summary: Urgent application. Jurisdiction to interdict acting appointment- Section 56(a) of the Local Government Systems Act.

JUDGMENT

Molahlehi J

Introduction

- [1] This is an urgent application in terms of which the applicants, inter alia, seek an order declaring the appointment of the third respondent as acting Director: Corporate Service to be null and void and to interdict the

continued acting appointment of the third respondent. Furthermore the applicants seek an order directing the first respondent to advertise the position in question.

[2] Before dealing with the merits of this matter I need to indicate that in my view there can be no doubt that this court has jurisdiction to entertain the applicants' claim because the acting appointment as envisaged in section 56 of the Systems Act falls within the purview of the "employment and labour relations" as envisaged under section 157 (1) of the Labour Relations Act.¹

[3] The relief sought by the applicant is based on the provisions of section 56 (c) of the Municipal Systems Act (the Systems Act) which provides that a person:

"May not be appointed to act for a period that exceeds 3 (three) months: provided that a Municipal Council may, in special circumstance and on good shown apply in writing to the MEC for Local Government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed 3 (three) months."

[4] The applicants are seeking a final order on an urgent basis and therefore their case has to satisfy the following legal requirements; a clear right,

¹ The relevant part of Section 157 of the Labour relations Act, for the purpose of this judgement reads:

"Jurisdiction of Labour Court

- (1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court.
- (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the *Republic* of South Africa, 1996, and arising from -
 - (a) employment and from labour relations;
 - (b) any *dispute* over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

well-grounded apprehension of irreparable harm and absence of other adequate relief.²

- [5] The essence of the applicants complaint is that by allowing the third respondent to act in the position of Director: Cooperate Services for a period of more than three months contrary to the provisions of section 56 (3) of the Systems Act, the second respondent has denied the applicant's members the right to apply for that position.
- [6] The third respondent is according to the applicant a member of the National Executive Council of the African Youth League (ANCYL), and was appointed as the Acting Director: Cooperate Services with effect from 10 October 2011, "until the position is filled." The third respondent has been in the acting position for over a year.
- [7] The applicants contend that the position, to which the third respondent has been appointed to act in, is one where he reports directly to the municipal manager and accordingly that appointment has to comply with the provisions of section 56 of the Systems Act.
- [8] The position in question was advertised at the beginning of 2012, but could not be filled because the applicant objected to the third respondent being considered for appointment. The applicant objected to the appointment of the third respondent because according to them he did not qualify for the position. It would seem that the acting appointment of the third respondent was extended subsequent to failure to make an appointment after the interview.
- [9] The applicant further testified in the founding affidavit that they recently discovered a resolution extending the acting appointment of the third respondent, until the end of January 2013.
- [10] The right which the applicant seeks to assert arises from the provisions of section 156 (c) of the Systems Act. Section 56 of the Systems Act deals with the appointment of a person to act in a vacant position of director who reports directly to the municipal manager.

² The requirements for an urgent applications are set out in a number of case over the years dating back to *Setlogelo v Setlogelo* 1914 AD 221.

- [11] The powers to appoint an acting manager who is directly accountable to the municipal manager rests with the Municipal Council in terms of section 56 (1) (a) of the Systems Act.³ The appointment is of course done in consultation with the municipal manager.
- [12] The Municipality Council can appoint an acting manager for a period not exceeding three months. The acting appointment can only be extended for a period also not exceeding three months and that in terms of section 56 (1) (c) can be done with the approval of the Member of the Executive Council for Local Government (MEC). The MEC can extend the acting of a person on "special circumstances and on municipality showing good cause for the extension."⁴
- [13] The acting appointment has to be made on the basis of skills, expertise, competency, or qualification. The acting appointment would be null and void if the acting person does not satisfy these requirements.⁵
- [14] In terms of section 56 (3) of the Systems Act, the municipality is obliged to advertise a director's post nationally in order to attract candidates as widely as is possible. And section 56 (5) ⁶ of the Systems Act obliges the

³ Section 56 (1) (a) of the Systems Act reads as follows:

"A Municipal Council, after consultation with the Municipal Manager, must appoint-

- (i) A Manager directly accountable to the Municipal Manager; or
- (ii) An acting Manager directly accountable to the Municipal Manager under circumstances and for a period prescribe

⁴ Section 56 (1) (c) of the Systems Act reads: "A person appointed in terms of paragraph (a) (ii) may not act for a period that exceeds three months: Provided that a Municipal Council may, in special circumstances and on good cause shown, apply in writing to the MEC for Local Government to extend the period of appointment contemplated in paragraph (a) , for a further period of appointment contemplated in paragraph (a) for a further period that does not exceed three months.

⁵ Section 56 (2) of the Systems Act reads: "A decision to appoint a person referred to in subsection (1) (a) (ii), and any contract concluded between the Municipality and that person in consequence of the decision, is null and void if-

- (a) that person appointed does not have the prescribed skills, expertise, or
- (b) the appointment was otherwise made in contravention of this Act, unless the Minister has, in terms of subsection (6) has waived any of the requirements listed in subsection (1)(b).

⁶ Section 56 (5) of the Systems Act reads: "If a person appointed to a post in subsection (1) (a) in contravention of tis Act, the MEC for Local Government must, within 14 days of becoming aware of such appointment, take steps to enforce compliance by the Municipality with tis Act, which steps may include an application to a Court for a declaratory order on the validity of the appointment or any other legal action against the Municipality."

MEC for Local Government to take steps within 14 days of becoming aware of an improper appointment of the acting director.

- [15] Section 56A (1) of the Systems Act ⁷ prohibits the appointment of a person to act in the director's position if that person holds an office in a political party be it temporary or permanent.
- [16] In light of the above I am of the view that the applicant has made out a case warranting an urgent interdict. The applicants have also made out a case warranting the intervention which the court would ordinarily not do. This relates to having to order the municipality to advertise the position. The intervention is warranted because of both the continued unlawful conduct of the second respondent resulting in the denial of the first applicant's members of the right to contest the position in a fair and proper manner.
- [17] As indicated earlier this matter was unopposed in the interest of relationship building between the parties, I do not believe that costs should be allowed to follow the results.

Order

- [18] In the premises the following order is made:

18.1 The non-compliance with the Rules of the Court in relation to time for service of documents is condoned and the matter is treated as one of urgency.

18.2 It is declared that the Second Respondent's decision to appoint the Third Respondent to act as Director: Corporate Service for a period longer than the period prescribed in Section 56 of the Local Government: Municipal Systems Act as amended, is null and void;

18.3 The Third Respondent is interdicted from continuing to act in the position of Corporate Services;

18.4 The Second Respondent is ordered to advertise the position of Director: Corporate Services in accordance with the provisions of

⁷ Section 56 A (1) of the Systems Act reads as follows: "A municipal manager or a manager directly accountable to a municipal manager may not hold political office in a political party, whether in a permanent, temporary or acting capacity."

section 56 (3) of the Local Government: Municipal Systems Act,
within 1 (one) month of date of this order.

Molahlehi J
Judge of the Labour Court of
South Africa

APPEARANCES

For the Applicant: Maenetja Attorneys

For the Respondent: