



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Of Interest to other judges

Case No: J 498/13

In the matter between:

MPHO SIMON MOFOKENG

Applicant

and ,

MAYOR: GREATER TAUNG LOCAL MUNICIPALITY

First Respondent

SPEAKER: GREATER TAUNG LOCAL MUNICIPALITY

Second Respondent

COUNCIL: GREATER TAUNG LOCAL MUNICIPALITY

Third Respondent

GREATER TAUNG LOCAL MUNICIPALITY

Fourth Respondent

Heard: 09 & 14 April 2013

Delivered: 24 May 2013

Summary: (return date – stay of local authority’s attempt to rescind renewal of appointment of municipal manager – interim order discharged – appointment ultra vires Municipal Systems Act – lis alibi pendens)

JUDGMENT

Lagrange J

Background

- [1] This matter was set down for hearing on 9 April 2013 by the respondents in anticipation of the return day.
- [2] The applicant, Mr M S Mofokeng, claims to be the appointed municipal manager of the Greater Taung Local Municipality, the fourth respondent. The first and second respondents are the Mayor and the Speaker of the fourth respondent respectively. The third respondent is the Council of the fourth respondent.
- [3] It is common cause that on 16 August 2010 the applicant and the municipality concluded a contract of employment appointing the applicant as the Municipal Manager. In terms of the contract his employment was deemed to have started on 1 April 2010 and was to last for a fixed period of two years. After the contract expired on 31 May 2012 he was appointed on a month-to-month basis as the acting municipal manager.
- [4] On 24 April 2012 the municipal Council decided to advertise the post of municipal manager. The relevant portion of the minute reads:

"11.5 End of Employment Contract of Acting Municipal Manager

That Council takes note of the contents of the report on the end of contract of the Acting Municipal Manager, Mr Mpho Mofokeng.

Resolution 5/2012-IiC

(a) That the position of municipal manager be advertised.

(b) That the current position be on a month-to-month for a period not exceeding three months to conclude the recruitment, selection processes and the appointment of a suitable candidate."

- [5] This prompted the applicant to demand of the Council that it refrained from advertising his position, that his current employment contract be extended, or alternatively that these questions should be referred to arbitration. The basis on which the applicant claimed that his contract should be extended related to clause 3.2, or more properly 3.3, of his original fixed term contract. Clause 3.2

concerning the fixed term of his contract was expressly made subject to clause 3.3 of the contract, which stated:

"3.3 it is specifically recorded that there is no expectation that this agreement will be renewed or extended beyond the term referred to in 3.2. The employer's decision not to renew or extend the contract shall not constitute an unfair dismissal and the employer shall not be entitled to any form of compensation. The Mayo and or municipal Council shall not unreasonably withhold such opportunity. To effect such renewal the municipal manager shall have to prove that he has performed his duties under this agreement to the satisfaction of the matter on behalf of the municipality, and the Mayo will have to be satisfied of the municipal managers work performance, in determining such work performance the man must be guided by the municipal manager performance in terms of the performance management system as well as his compatibility with the municipal Council and the matter and provided that:

3.3.1 The performance agreements concluded and required to be concluded between the Mayo in the municipal manager have been fulfilled.

3.3.2 Any other terms must be a basis for renewal e.g. that remuneration will not be less than it is at the date of expiry of the first term of the contract.

3.3.3 The failure to renew or extend the period referred to in 3.2 above, which renewal or extension will not be unreasonably withheld, could become a matter for arbitration on the request of any of the parties and then the provisions of clause 20 shall apply.

3.3.4 The parties specifically record that if a dispute regarding the renewal of the agreement is taken to arbitration and the ruling is made in favour of the municipality, this agreement comes to an end on expiry of the fixed period and then such ending shall not be construed as a termination based on the municipality is operational requirements, nor as an unfair dismissal...."

(sic)

[6] In the applicant's letter of demand, he set out what he considered to be features of his good performance record to date in support of his contention that he had met the requirement for extension of his contract.

[7] A special meeting of the municipal Council took place on 13 June 2012. At that meeting, there was extensive discussion under an item headed 'End of Employment Contract of Acting Municipal Manager'. Under that item a report was tabled which dealt with the legislative framework created by the amendments to the Local Government: Municipal Systems Act, 32 of 2000 ('the Systems Act') in July 2011, the audit reports of the Council under the applicant's tenure, long term planning, performance management and ultimately, the applicant's contract. The report noted the following in relation to changes to the Systems Act affecting the appointment conditions of a municipal manager:

- *Any person, who has been appointed as acting municipal manager before the commencement of the Amendment Act must be regarded as having the relevant appointment requirements. However, all acting appointments must be brought in line with the requirements of the section relating to the limitations on acting periods which cannot exceed three months.*
- *Before the appointment of a section 57 manager, the municipality must furnish the MEC of Local Government with a full appointment processes report as set out in regulation 19.*
- *The municipal manager must have signed a performance agreement signed 60 days after the commencement of employment.*
- *That in terms of the Municipal Systems Act section 54 (A) (11) a person who is appointed as an acting municipal manager before the section took effect in July 2011, must be regarded as having been appointed in accordance with this section for the period of the acting appointment.*

- *It is also specifically stated in section 57 (6c) of the MSA that the employment contract of section 57 manager must have terms for renewal of the employment contract."*

[8] There followed a discussion of the report in which it was noted that conflicting legal opinion on the issue had been received. It was further noted the Council's executive committee meeting of 20 April 2012 had recommended that the acting municipal manager's contract should be renewed for reasons of continuity, positive performance progress, stability and similar considerations. At the conclusion of the discussion, the meeting took the following decision, from which it appears seven councillors abstained from endorsing:

"Resolution 34/2012

(a) that Council takes note of the content of the report as tabled.

(b) That Council approves rescinding of Council resolution number 5/2012 liC which resolved to "advertise the position of the municipal manager and appoint Mr Mofokeng on a month-to-month fixed term contract" as it was misled and ill informed of the contractual obligations of Mr Mofokeng's employment contract.

(c) That Council approves the renewal of employment contract of Mr Mofokeng which must be linked to the term of office of Council and must not exceed one year of the next election.

(d) That the Mayor be delegated to enter, finalise an employment and performance contract and report to Council for ratification.

(e) That on good cause shown, concurrence be sought from the MEC for Local Government and Traditional Affairs as per legislative requirements.

(f) That upon realisation of (d) above, the position be filled with immediate effect..."

(emphasis added)

[9] Notwithstanding the resolution, the Mayor did not conclude an employment and performance contract with the applicant. The thrust of this application is to hold the Council to resolution 34/2012 and, in particular, to compel the Mayor to

finalise an employment and performance contract with the applicant. In fact, towards the end of February 2013 the applicant's learnt that the Mayor had prepared a document for discussion at a Council meeting scheduled for 28 February 2013. The document contained a recommendation that Exco should recommend to Council to review the resolution 34/2012 and recommend the advertisement of the position of municipal manager and the declaration of a moratorium on all pending interviews and appointments until the matter was resolved. The applicant advised councillors that the proposal would contravene the Council's Rules of Order because the item was not on the agenda of the meeting and seven days notice of it had not been provided as the rules required. It appears that the applicant succeeded in persuading the councillors not to discuss the item on that occasion, possibly induced by the applicant's threat of seeking a costs order against councillors personally if the item was discussed.

[10] However, a notice was issued on 8 March 2013 calling a special meeting of the Council to be held on 12 March 2013. On the agenda of the meeting was a notice of motion to rescind resolution 34/2012. It was this notice on which prompted the applicant to launch his initial application on 10 April 2013.

[11] On 11 March 2013, the Honourable Justice Moshoana, AJ made an interim order, with a return date 9 May 2013, in the following terms:

11.1 The matter is urgent and forms for service dispensed with.

11.2 The first, second, third and fourth respondent is interdicted from:

11.2.1 Rescinding the decision of the third respondent taken on 12 July 2012 being the Council resolution 34/2012.

11.2.2 That the prayer in paragraph 10.2.1 shall operate as an interim order pending:

11.2.2.1 The implementation and finalisation by the first respondent of the provisions of subparagraph (d) of the second respondent's resolution 31/2012 alternatively

11.2.2.2 The conclusion of the application under case number J445/2013.

[12] The last mentioned matter is another application launched in March 2013 prior to this one, in which the applicant is claiming specific performance of his contract of employment or alternatively damages. In relation to this earlier matter another controversy was raised by the applicant in an attempt to dispute the authority of the Mayor to depose to the answering affidavit on behalf of the respondents. The applicant claims that the Mayor was only authorised by a Council resolution to oppose his application for specific performance and not this urgent application. A resolution was taken at a Council meeting which took place the day after the interim order in this matter was handed down. At the meeting, it was specifically noted that the Council had been interdicted from rescinding resolution 34/2012 and that the applicant had launched his application for specific performance, or alternatively damages based on a claim that he was entitled to be employed for a five year period.

[13] The last item on the agenda of the meeting of 12 of March 2013 concerned the earlier resolutions. At the conclusion of discussions, a ruling was made by the Speaker followed by the adoption of resolution 3/2013 liC. The relevant portion of the minute reads:

"Ruling by the Speaker

(i) That in order to avoid discussion of the court interdict directly or indirectly, the Speaker ruled that the house be divided by way of voting to indicate whether members for or against the defence of the interim order brought by the municipal manager against the municipality.

Resolution 3/2013 liC

(a) That the following councillors vote for the defence of the order, case number will J445/2013 against the municipality..."

(Emphasis added)

[14] The applicant argued that the reference to 'J445/2013' in the resolution meant that the Council had only authorised opposition to his application for specific

performance under that case number and had not authorised opposition in this matter. He also argued and that in any event since the question of the validity and enforcement of his employment contract was at issue in that application also, this court could not pronounce on the effect of section 54A of the Systems Act, which was central to the issues in that application and therefore this court is precluded from determining the issue in these proceedings on the principle of *lis alibi pendens*.

[15] Section 54A of the Systems Act is central to the respondents' defence in both claims. In essence, the respondents say that the purported 'extension' of the applicant's contract of employment was in contravention of section 54A. On their version, when the applicant's initial two year fixed term contract ended the position of the municipal manager became vacant and when that occurred the Council should have followed the requirements of section 54A (4). What happened was that, the applicant was appointed on a month-to-month basis from 31 May 2012 and in terms of section 54A(2A)(a) of the Systems Act a municipal manager could not be appointed to act for a period exceeding three months. In terms of section 54A (3)(b) any appointment of a person in contravention of the provisions of the Systems Act is null and void. Consequently, the respondents argued the extension of his contract which had already terminated was null and void *ab initio*.

[16] By contrast, the applicant argues that the resolution did not extend his existing contract but renewed it. He was appointed as the permanent municipal manager (at least for a five year term) and not in an acting capacity. That renewal was not affected by the provision of s 54A because it was inapplicable to a renewal of his contract.

Evaluation

Lack of Authority to oppose the application

[17] Considering resolution 3/2013 liC and the wording of the Speaker's ruling, it is clear that the meeting which took the resolution, intended to defend the interim ruling which was made the previous day. That was the only order which had been made in the matter at that stage. The erroneous reference to the case

number of the applicant's contractual claim was clearly an error. It follows in my view that having taken this decision, a natural consequence would be that legal practitioners would have to be engaged to give effect to it. Consequently, I am satisfied that the Mayor was not acting without authorisation in deposing to answering affidavit in this matter.

Lis alibi pendens

[18] I agree that the question of whether the attempt to renew the applicant's appointment as municipal manager raises the issue of the effect of s 54 of the Systems Act in this matter and in the applicant's pending contractual claim. The requirements of *lis alibi pendens* are met. But that is not dispositive of which matter should determine the issue. In ***Van As v Appollus en Andere* [1993] 3 ALL SA 402 (C)**, Conradie J found that when the special plea of *lis alibi pendens* arose, it was not an inflexible rule that whichever of two matters was launched first determined which matter would have to yield to a decision in the other. The court held that it has a discretion to determine in which matter the pending question should be determined, and that considerations of convenience and fairness might justify that the common issue could be determined in the matter that was not launched first.¹

[19] In this case, the dispute has been drawn out since February this year and no date had been set for the hearing of the applicant's contractual claim. The Council has been paying the applicant his salary and claims that he is appointing staff, which the applicant does not deny. He also occupies a key position as the accounting officer of the Council. Moreover, he is performing the functions of Municipal Manager without a performance agreement in place, contrary to the provisions of section 57, which states *inter alia* that:

¹ At 404-405 of the judgment, viz: "Die Hof het 'n diskresie om te besluit watter van die verrigtinge voortgaan. Hoewel dit seker dikwels sal gebeur dat 'n Hof sal besluit dat die lis wat eerste aanhangig gemaak is die een is wat behoort voort te gaan, is dit nie 'n onwrikbare reël nie. In *Geldenhuis v Kotzé* 1964 (2) SA 167 (O) , byvoorbeeld, het die Hof op grond van oorwegings van gerief en billikheid toegelaat dat mosieverrigtinge wat ná 'n aksie ingestel is, eerder as die aksie self voortgesit word. Insgelyks is daar in *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) beslis dat die Hof 'n diskresie besit om die een of die ander van die verrigtinge te laat voortgaan. Die later ingestelde verrigtinge vir voorlopige vonnis is op grond van billikheidsoorwegings toegelaat om voort te gaan. Oorwegings van gerief en billikheid oorheers by hierdie vraagstuk."

“(1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only-

(a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).

(2) The performance agreement referred to in subsection (1) (b) must-

(a) (i) be concluded within 60 days after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager, failing which the appointment lapses: Provided that, upon good cause shown by such person to the satisfaction of the municipality, the appointment shall not lapse;...”

[20] Since his original appointment as the Municipal Manager expired with the expiry of his fixed term contract, he was employed in an acting capacity only. The applicant contends his contract was not extended but renewed by the contentious resolution of June 2012. I agree that the Council was intending to appoint the applicant as Municipal Manager subject to a longer fixed term contract and to end his acting status. Such an appointment necessarily meant it was purporting to make a new appointment of a full time municipal manager and was filling a vacant full-time post that had only been filled on a temporary basis since the applicant's first full-time appointment expired. In such circumstances, s 54(4) comes into play, viz:

(4) If the post of municipal manager becomes vacant, the municipal Council must-

(a) advertise the post nationally to attract a pool of candidates nationwide; and

(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.”

[21] A purported appointment without following this process would be contrary to the provisions of the Systems Act and therefore null and void in terms of s 54(3) of that Act. In the circumstances, I am satisfied that the Council acted *ultra vires* in purporting to resolve to renew the applicant's appointment as municipal manager and that resolution was null and void *ab initio*. It follows therefore that the applicant has no right to enforce claims against the respondents based on the existence of such a contract.

Order

[22] In light of the findings above, resolution 11 March 2013 of the Council of the Greater Taung Local Authority dated 13 June 2013 which purported to authorise the renewal of the appointment of the applicant as Municipal Manager is declared null and void.

[23] The interim order issued by Moshwana AJ on 34/2012 is discharged.

[24] The applicant must pay the respondents' costs



LAGRANGE, J

Judge of the Labour Court

Appearances:

For the applicant: K Lengane instructed by DMS Attorneys

For the respondents: D K Kela instructed by N P Voyi