



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 314/09

In the matter between:

LUKHANJI MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL (SALGBC)

First Respondent

COMMISSIONER NCETezo N.O

Second Respondent

SOUTH AFRICAN MUNICIPALITY WORKERS

UNION obo SHEPERED MJOBO

Third Respondent

Heard: 15 November 2012

Delivered: 12 December 2013

Summary: When the authority of a municipal employee to institute and presecute a review application on behalf of a municipality is challenged, failure to provide the necessary proof will lead to the dismissal of the application for lack of the required authority.

Review in terms of section 145 of the LRA-Dissmissal for misconduct.

JUDGMENT

LALLIE, J

- [1] This is an application to review an arbitration award of the second respondent (the arbitrator) in which he found the individual third respondent's (Mjobo's) dismissal both substantively and procedurally unfair and ordered his reinstatement and payment of R20 000.00 which is equivalent to his five months' remuneration. The application is opposed by the third respondent.

Factual Background

- [2] Mjobo was employed by the applicant as a clerk at its traffic department from March 1986. Pursuant to an incident involving Mjobo and his supervisor Mfamana, a disciplinary inquiry into acts of misconduct was instituted against Mjobo. He faced charges of being at work while under the influence of alcohol and assaulting his supervisor. He was found guilty of both charges and dismissed on 20 December 2008. The third respondent challenged Mjobo's dismissal at the first respondent where the arbitrator issued the arbitration award which is the subject matter of the current application.

Locus standi

- [3] In the opposing papers, the third respondent denied that Micheal Thembile Ngxobongwana (Ngxobongwana) who attested to the founding and supplementary affidavit had the necessary *locus standi* to bring this application. Mjobo submitted that the applicant's council did not pass a resolution authorising the launching of the present review proceedings. Further, no decision or resolution of the applicant council was passed authorising Ngxobongwana to launch this review application and depose to any affidavit for purposes of prosecuting it. The applicant's response to the challenge on Ngxobongwana's *locus standi* was that the authority to institute legal proceedings rests with administration and not the council in

terms of the Municipal Systems Act 32 of 2000 (the MSA). It argued that the third respondent's submissions are therefore ill-founded.

- [4] Section 151 (2) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) confers the executive and legislative authority of a municipality on its Municipal Council. In terms of section 2(d) of the MSA, a municipality has a separate legal personality. It can, therefore sue and be sued. The Municipal Manager is the head of administration of a municipality and its accounting officer. Section 59 (1) (b) read with (2) (b) of the MSA grants the Municipal Council authority to delegate power in writing. Emphasising the necessity of the existence of proof that a municipal employee has the necessary authority to act on behalf of the municipal, the court in *Kouga Municipality v SA Local Government Bargaining Council and Others*¹ relied on the following dictum in *Pretoria City Council v Meerlust Investments (Pty) Ltd*:²

'[S]ince an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned. In order to discharge the above mentioned *onus*, the practitioner ought to have placed before this Court an appropriately worded resolution of the Council.'

- [5] In *Ganes and Another v Telecom Namibia Ltd*,³ it was held that the institution and prosecution of proceedings must be authorised. It is, therefore, necessary for the deponent to the founding affidavit to allege that he or she has the necessary authority to institute and prosecute motion proceedings.
- [6] In the answering affidavit the third respondent stated that the applicant's council passed no resolution authorizing the launching of the current application. He added that no resolution was passed by the applicant's

¹ (2010) 31 ILJ 1211 (LC) at para 19.

² 1962(1) SA 321 (A) at 325.

³ 2004 (3) SA 615 at 624 G-H at para 19.

council authorising Ngxobonwana to depose to any affidavit made and filed in support of this application. The applicant dealt with the issue in its heads of argument by submitting that the challenge to Ngxobongwana's *locus standi* is ill-founded as authority to institute legal proceedings rests with the administration and not the Council in terms of the MSA.

- [7] The applicant's argument that in terms of the MSA the authority to institute legal proceedings rests with the administration and not the council is not completely correct. The answer to the question whether Ngxobongwana had the necessary authority to move and prosecute the present application lies firstly in section 109 (2) of the MSA which provides as follows:

'A municipality may compromise or compound any action, claim or proceedings, and may submit to arbitration any matter other than a matter involving a decision on its status, powers or duties or the validity of its action or by-laws.'

In addition section 59 of the MSA makes it clear that the administration can exercise the authority to litigate when it has been delegated to it by the Municipal Council. The relevant parts of section 59 for purposes of this judgment are:

'59(1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system may-

- (a) Delegate appropriate powers, excluding a power mentioned in section 160 (2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76 (b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;
- (2) A delegation or instruction in terms of subsection (1)-
 - (b) Must be in writing;

- (4) any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation referred to in subsection (1).'

[8] As a staff member of the applicant Ngxobongwana should have had the power to institute and prosecute the present application delegated to him in writing. In both the founding and supplementary affidavits he does not disclose the basis for alleging to be authorised to launch this application. When the third respondent challenged Ngxongwana's authority there was a duty on the applicant to prove it. Absent proof that Ngxongwana was duly authorised by the applicant to institute and prosecute the present review application the point in *limine* raised by the third respondent must be upheld.

[9] I could find no reason for costs not to follow the result.

[10] In the premises, the following order is made:

10.1 The point in *limine* is upheld.

10.2 The application for review is dismissed with costs.

LALLIE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate Grobler

Instructed by: Micheal Randell Attorneys

For the first Respondent: Advocate Simoyi

Instructed by: Mlonyeni & Lesele Inc

LABOUR COURT