

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: J2740/14

DATE: 2015-02-04

In the matter between

O Z MKHOMBO

Applicant

and

SAMWU

Respondent

In re:

SAMWU

Applicant

and

MEC for COGHSTA

First respondent

GREATER TZANEEN MUNICIPALITY

Second respondent

OZ MKHOMBO

Third respondent

JUDGMENT

STEENKAMP J:

The applicant in this matter, Mr O Z Mkhombo, seeks to rescind an order granted by my brother, Mr Acting Justice Thlothalemaje, on the 18th of November 2014.

In that order he interdicted the third respondent (in the main dispute), Mr Mkhombo, from continuing to act in the position of

municipal manager of the Greater Tzaneen Municipality (the second respondent in the main application). He also declared that the municipality's decision to appoint Mkhombo as an acting municipal manager, or allowing him to act as municipal manager for a period longer than that which is prescribed by section 54A of the Local Government: Municipal Systems Act¹, is null and void and is set aside. The MEC for COGHSTA was cited as the first respondent in that application.

10 The employee, Mr Mkhombo, seeks to have that order rescinded. In the application for rescission he cited only SAMWU as respondent. He did not cite either the MEC or the municipality. As a result, the union raises a first point *in limine*, and that is one of non-joinder or misjoinder. It points out that the order contains specific relief against the municipality. It is the municipality that appoints the acting municipal manager and it is the decision of the municipality to extend Mkhombo's acting appointment that has been declared null and void by this Court. Clearly the municipality has a direct and substantial interest in these proceedings and should have been joined.

20 Furthermore, the municipality appointed another person, Ms Norah Lion, as acting municipal manager for a period of three months, starting on the 1st of December 2014. She is therefore the current incumbent and also has a direct and substantial interest in this application. The applicant's failure to join either the municipality or Ms Lion as parties is in itself fatal to the application.

¹ Act 32 of 2000.

There is a second point *in limine*, and that is Mr Mkhombo's lack of authority. He says in his founding affidavit that he purports to bring the application both in his personal capacity and in his capacity as acting municipal manager, following both the court order and the decision of the municipality to declare his appointment null and void. He is of course no longer the acting municipal manager. For that reason also the application should be dismissed as he does not have *locus standi* to bring the application in that capacity.

10 Thirdly, as Mr *Venter* pointed out, the relief sought at this stage is academic and impractical. It is trite that the court will not grant orders that have no direct effect. In this regard, the facts before me are that the municipality adopted the following resolutions on 1 December 2014: Firstly, to appoint Ms Lion as acting municipal manager for a period of three months, i.e. until the end of February 2015; secondly, to rescind the appointment of Mr Mkhombo as acting municipal manager; and thirdly, and in any event, Mr Mkhombo has already acted as municipal manager for a period of more than six months. I agree with Mr *Venter* that on a clear reading of section
20 54A(2)(a) and (b) of the Systems Act, that is not admissible.

In any event, Mr Mkhombo's last appointment as acting municipal manager, commencing in October 2014, would already have expired at the end of December 2014. For that reason also, the relief sought cannot be granted.

Even if I were not inclined to uphold these points in *limine* I am not satisfied that the applicant has made out a case to show good cause in terms of rule 16A(1)(b) to have the order rescinded.²

I will accept, even though I have some misgivings, that it may be that the person who accepted service of the application that was heard by Molahlehi J, that is Christelle van der Merwe, may not have given it to Mr Mkhombo directly. Instead, she reported it to the labour relations officer, Mr Malale, who simply told her that the document is lost. Malale does not explain to the court how he even knew what that
10 document was and what the circumstances are leading to its loss, nor what efforts anyone at the municipality took to make sure that it did come to the attention of Mr Mkhombo.

However, there is a second leg to the requirement for good cause, and that is a *bona fide* defence. I do not agree with Ms Williams that the applicant, Mr Mkhombo, has set out a *bona fide* defence. On my reading of section 54A(2)(b) of the Systems Act it is clear that the legislator contemplated an initial acting appointment of three months, and as the subsection clearly states that:

“A municipal council may, in special circumstances
20 and on good cause shown, apply in writing to the MEC for local government to extend...”

and I stress:

“...the period of appointment contemplated, for a

² *Lumka & associates v Maqubela* (2004) 25 ILJ 2326 (LAC) par 21-23;
Superb Meat Supplies cc v Maritz (2004) 25 ILJ 96 (LAC) par 19-22.

further period that does not exceed three months.”

The period of appointment contemplated is clearly the initial period of three months. The Act then envisages that that period of appointment may be extended for a further period that does not exceed three months. It does not provide for further periods. For that reason also the application would have failed even had I not upheld the points *in limine*.

With regard to costs, I take into account that the applicant brought the union to court on an urgent basis on the 5th of December
10 in circumstances where it did not have prospects of success. In any event, both parties asked for costs to follow the result. I therefore make the following order:

ORDER

1. The application for rescission is dismissed.
2. The applicant (Mr Mkhombo) is ordered to pay the costs of the respondent (that is SAMWU), including the costs of 5 December
20 2014.

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ON BEHALF OF APPLICANT: ADV WILLIAMS

ON BEHALF OF RESPONDENT: ADV VENTER



CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, *in as far as it is audible*, the foregoing is a **VERBATIM** transcription of the proceedings as was ordered to be transcribed by iAfrica Transcriptions and which had been recorded by Digital Court Recording Services by means of a digital recorder in the matter of:

SAMWU on behalf of MEMBERS

V
GREATER TZANEEN MUNICIPALITY

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- None



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