



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J 1013/15

In the matter between:

TODANI NYAMBENI

Applicant

and

VHEMBE DISTRICT MUNICIPALITY

Respondent

Heard: 28 May 2015

Delivered: 29 May 2015

Summary: (Urgent application to enforce a settlement agreement made into an arbitration award – court lacking jurisdiction to grant relief sought)

JUDGMENT

LAGRANGE, J

Background

[1] This is an urgent application for final relief to enforce a settlement agreement in respect of the individual applicant. The applicant was employed on 28 April 2010 on a five year fixed year contract as a Senior Manager: Human Resources. This was pursuant to a resolution adopted by the respondent municipality on 3 April

2008 (Resolution 11 of 2008) to the effect that all posts on Level 2 should be filled by contract appointments.

- [2] The applicant claims that the resolution and her appointment on a fixed term basis contravene the provisions of a settlement agreement which was made an arbitration award on 22 February 2006. It is not necessary to describe the dispute which led to the settlement agreement in any detail, save to say that the dispute concerned a practice adopted by certain municipalities of appointing senior staff other than managers directly accountable to municipal managers on fixed term contracts as if they were subject to section 57 (3) and (6) of the Municipal Systems Act. The agreement did not find favour with a number of municipalities belonging to the employers association SALGA, which concluded the settlement agreement, but the agreement has remained in force and its conclusion into an arbitration award has not being set aside.
- [3] The provisions of the agreement relied on by the applicant in particular are the following:

“2.1 The respondent’s members will not:-

...

2.1.4 Extend the application of section 57 (3) and (6) of the systems act to employees other than managers directly accountable to the municipal managers, IT managers who are employed on the post level directly below that of the municipal manager, regardless of their post titles or responsibilities.

...

2.1.6 Offer employment to and/or appoint or place persons on fixed term contracts of employment without having agreed with the applicant’s what would happen to the relevant persons upon the expiry of the fixed term contracts; or...”

Urgency

- [4] The applicant contends it was only in mid-2014 that she became aware of her appointment on a fixed term contract and that the 2008 resolution appeared to be contrary to the terms of the settlement agreement. She did not take any legal action at that point to challenge the terms of her appointment because there were moves afoot initiated by the Corporate Services Department to bring the conditions of service of the applicant and other similarly placed senior managers in line with the her newly acquired understanding of her entitlement to permanent employment based on the settlement agreement. This initiative culminated in a recommendation to the Mayoral committee from the municipal manager on 23 February 2015 that, inter-alia, the previous resolution of 2008 should be rescinded and that all the persons appointed on fixed term contracts in Level 2 positions in terms of that resolution should be appointed permanently.
- [5] I accept that there was a reasonable prospect that the applicant's claim might have been resolved if these internal processes had led to the point they appeared to be moving towards. Even when the applicant was reminded on 11 March 2015 in a letter issued by the acting municipal manager that her contract was due to end on 31 May 2015, the same letter pointed out that the termination of her employment and a variation of her conditions of employment was still contingent on the outcome of a decision by the Council. It was only on 29 April 2015 that a memorandum of advice prepared for the Mayoral committee recommended that the fixed term contracts of the affected managers should be allowed to expire and a job evaluation of the posts at Level 2 should be conducted. The applicant was advised that the Council had in fact adopted the latest recommendation sometime after 6 May 2015 when she specifically enquired about the outcome of the Council meeting.
- [6] While there may be some cause for complaint that the applicant did not launch this application sooner than she did after hearing the somewhat unexpected outcome of the council meeting, in view of all the positive indications from the respondent that the matter would be resolved in her favour until she learnt of the outcome

earlier this month, I do not think she can be blamed for not acting in 2014, which seems to be the respondent's main complaint on urgency.

Application to compel the respondent to rescind Resolution 11 of 2008

- [7] The basis for this claim is not well articulated in the applicant's founding papers. It is unclear if it is based on the direct enforcement of the settlement agreement or on an alleged breach of s 71(3) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act'). If it is the former then the court lacks jurisdiction to deal with it for the same reasons cited below. If it is the latter then this was not properly pleaded as a breach of a statutory obligation or that the respondent had acted *ultra vires* the Systems Act.

Jurisdiction to enforce the award in respect of the applicant's employment status

- [8] The settlement agreement which was made an arbitration award is also a collective agreement, notwithstanding that the dispute originated in a dispute of right. The settlement agreement was not made an order of court in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995 ('the LRA'), but the applicant has asked the court to give effect to the terms of the agreement in so far as they might apply to herself, by ordering the respondent to appoint her on a permanent basis as a way of remedying the alleged breach of the provisions of the agreement. The applicant also seeks an order compelling the local authority to rescind resolution 11 of 2008 as she claims it was taken in contravention of the settlement agreement.
- [9] Ordinarily, a party wishing to enforce an arbitration award will have the award made an order of court. The court may then in the exercise of its power to enforce its own orders compel a party on pain of contempt to comply therewith, if the order is not one sounding in money, but is one *ad factum praestandum*,. In this instance, the court is being asked to enforce the award directly on the authority of the arbitration award itself. The applicant's representative could not point the court to any provision in the LRA in which such authority of the court could be sourced.

- [10] In the absence of the award being made an order of court, the applicant is not without a remedy. It is common cause that the settlement agreement is also a collective agreement. The parties are essentially at odds over the enforcement of that collective agreement which has also been confirmed as a binding arbitration award on the parties to it and their members in the unreported decision of this court in ***City of Johannesburg and Others v Independent Municipal and Allied Trade Union and Others*** (J 1232/06) [2013] ZALCJHB 51 (12 April 2013). In that matter employer parties to the agreement tried unsuccessfully to set aside the award on the basis that the settlement agreement itself was not binding on them.¹
- [11] The LAC has recently also identified the Labour Court's lack of jurisdiction when acting under s 77(3) of the Basic Conditions of Employment Act, 75 of 1997 to enforce individual contractual rights accruing to employees from a collective agreement.² This means that this court cannot entertain the applicant's claim as an enforcement of an individual contractual entitlement arising from the settlement agreement.
- [12] In the circumstances, I must agree with the respondent that the court has no jurisdiction to consider the claim.

Costs

- [13] The jurisdictional issues were only raised in argument and were not readily apparent in the answering affidavit. The applicant was reasonably led to believe the respondent was likely to amend her employment status in line with a legal opinion obtained by the respondent. I do not think that the applicant proceeded recklessly in launching this application or persisting with it. Consequently, it would be inappropriate in my view for the applicant to pay the respondent's costs.

¹ At para [1].

² ***Ekhurhuleni Metropolitan Municipality v SAMWU obo members*** [2015] 1 BLLR 34 (LAC) at 44, para [30].

Order

[14] In light of the reasons given above, the application is dismissed.

[15] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court

LABOUR COURT

Appearances:

For the Applicant: M Mthombeni

Instructed by: EM Phoko Attorneys

For the Respondent: M Marcus

Instructed by: Lebea and Associates

LABOUR COURT