



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D933/13

ETHEKWINI MUNICIPALITY

Applicant

and

IMATU obo VIJAY NAIDOO

Respondents

Heard: 12 August 2014

Delivered: 13 August 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] In this application, the applicant seeks an order to declare a settlement agreement entered into between it and Ms. Vijay Naidoo on 26 August 2013 to be invalid and be set aside. The respondents oppose the application.

Background:

- [2] Vijay Naidoo has been in the employ of the applicant for 29 years, and also a senior manager for over 15 years. For three years she acted as Deputy Head, Sub-District South. Two positions of Deputy Head which fell within the

Community and Emergency Services unit of the applicant were formally advertised and Naidoo had applied together with three other individuals.

- [3] The interview panel established to conduct the interviews included the Deputy City Manager: Community and Emergency Service, Mr. Musa Gumede. He is also the deponent to the founding affidavit and the convener of the panel: Dr Nomakhosi Gxagxisa, the Head of Health Unit; Mr. Bonginkosi Mshengu, the Deputy Head of HR Department within the Community and Emergency Services Department; and Mr. V Ngwenya, the Chief Legal Advisor to the Department.
- [4] Four candidates including Naidoo were interviewed. The majority of the panel had after the interview and evaluation process, found that another candidate, Van Heerden was the best to be appointed to one of the Deputy Head positions. Gxagxisa had however favoured Naidoo. The interview panel then took a decision to re-interview the three remaining candidates before making a recommendation as to who should be appointed in the remaining position. This decision was taken in view of the three candidates having scored close to each other. The panelist had then agreed and signed off on the scores determined in respect of the candidates.
- [5] Aggrieved at the panel's decision to re-interview them, Naidoo and another candidate had lodged a grievance, and requested an explanation for the need for the second interview. The interviews nevertheless took place, and Gumede explained to the candidates the reasons they were called to be re-interviewed.
- [6] Following this second round of interviews, another candidate, Buthelezi scored higher than Naidoo and the remaining candidates. The panel resolved to recommend Buthelezi. Again, Gxagxisa was in favour of Naidoo being appointed, but had submitted to the consensus of the panel.
- [7] Naidoo lodged an unfair labour practice dispute with the SALGBC, which was set down for conciliation on 19 July 2013. Mshengu attended the conciliation meeting which had failed to yield a resolution.

- [8] On 26 August 2013 Gumede received a text message from Gxagxisa in terms of which the latter had said that he wished to offer Naidoo a post that had become vacant. Gumede had informed her it was fine, as long as the paper work was done properly to indicate a promotion. Gumede's contention was that his understanding was that Gxagxisa would ensure that Naidoo was fit and proper for the post and satisfied its requirements and the job description.
- [9] Gumede further contended that the remuneration in regards to the position would be discussed with the relevant authorities, and he did not understand Gxagxisa to have already offered the position to Naidoo. At a meeting held on 29 August 2013, Naidoo was introduced by Gxagxisa as the new Deputy Head of Social Development, which came as a surprise to Gumede.
- [10] Gumede then made enquiries with Mshengu about how Naidoo was appointed, and he was informed that Gxagxisa had enquired from him whether it was possible to settle the Naidoo matter. Gxagxisa was informed that formal processes had to be followed including approval from Gumede. Mshengu had however informed Gxagxisa that he was not in favour of entering into a settlement with Naidoo.
- [11] Gumede further averred that at no stage did Gxagxisa contact him or Mshengu to discuss the terms of Naidoo's employment, the salary, her job description or the settlement agreement. He denied having agreed with Gxagxisa and Mshengu that a settlement agreement should be negotiated with Naidoo. He contended that as Mshengu had been dealing with the matter even at the level of conciliation, any settlement with Naidoo should have been driven by him, and if not, his input should have been sought on the terms of the settlement.
- [12] Gumede's further contention was both Gxagxisa and Naidoo were aware that Mshengu had declined to place Naidoo in any other vacant position in the absence of proper processes being followed. Naidoo's experience was in nursing and health sciences, and was not qualified in the social sciences sphere. Gxagxisa according to Gumede, was not authorized to bind the applicant to appoint Naidoo at her current salary when the position was at a

lower salary. Shabane and Mshengu's confirmatory affidavits accompanied Gumede's founding affidavit.

- [13] In her answering affidavit, Naidoo contended that it was not the function of this Court to make a finding whether or not the decision to settle a matter was a good one or not, and further to enquire into the merits of a case that has been settled between the parties.
- [14] In regards to the circumstances leading to the settlement agreement, Naidoo submitted that in August 2013, Gxagxisa had mentioned to her that they should settle the dispute between the parties. A meeting was held on 26 August 2013 attended by her, her union representative and Gxagxisa. The latter had again at that meeting reiterated that she wished the matter to be resolved, and that the vacant position of Deputy Head (Social Development) was a suitable alternative.
- [15] During discussions held with Gxagxisa and also where Shabane of the Human Resources was present, Naidoo's union representative had prepared a draft settlement agreement using the standard SALGBC agreement. Having done so she had then read the contents of the draft agreement and presented it to Gxagxisa. Gxagxisa then informed Naidoo and her representative that she would need to bring in Mshengu and Gumede on board prior to signing the agreement and left the meeting.
- [16] When Gxagxisa came back, she told Naidoo and her representative that having communicated with Mshengu and Gumede, she was ready to sign the agreement offering her a promotion. They had all signed the agreement and Shabane was advised to send a copy to SALGBC to confirm that the dispute had been resolved. The union had also sent a copy to SALGBC to confirm that the dispute was resolved.
- [17] According to Naidoo, the settlement agreement was negotiated and concluded in good faith, with someone who either had the authority to settle the dispute, or purported to have authority. She denied having acted in common purpose with anyone in securing the settlement. She further denied that settling the dispute in circumstances where an unfair labour practice

dispute had been referred was irregular, as this was common practice within the applicant to resolve disputes once referred to SALGBC.

Legal framework and evaluation:

- [18] Central to this application is whether Gxagxisa had the necessary authority to conclude the settlement agreement. The applicant contends that she did not, whilst Naidoo holds the view that she did. Naidoo further contends that the agreement was made into an award by SALGBC on 13 October 2013.
- [19] It however needs to be stated that the settlement agreement despite a dispute having been referred was not facilitated by SALGBC as it was concluded internally. Only the SALGBC *pro forma* settlement agreement was utilized to conclude and formalize the agreement. As Naidoo however correctly pointed out, the agreement makes provision under its clause 5 that the parties consented to the agreement being made an arbitration award in terms of the provisions of section 142A (1) of the Labour Relations Act.
- [20] Naidoo's further contention was that the parties were *ad idem* when the agreement was concluded in good faith, and further that the agreement constituted a contract for the purposes of contract law. She further submitted that at no stage during the meeting leading to the agreement did Gxagxisa, who was the head of the unit, indicate that she did not have the authority to conclude the agreement.
- [21] It is trite that actual authority may be express or implied. In *Hely-Hutchinson v Brayhead Ltd & another*¹, the Court expressed the distinction as follows:

'[Actual authority] is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly

¹ [1968] 1 QB 549 (CA); ([1967] 3 All Eng ER 98]) at 553 A-G). See also *NBS Bank Ltd v Cape Produce Co. Ltd* (2002 (1) SA 396 (SCA); *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd* 2012 (5) SA 323 (SCA) at para [24] at 332H-333A

authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.'

[22] To the extent that Naidoo may have argued that Gxagxisa had ostensible authority, her argument as I understand it is that the applicant is bound by the agreement on the basis that she was a *bona fide* third party, and Gxagxisa had represented the applicant even without actual authority, but that the applicant had allowed her to represent it as if she did have authority. It was however common cause that Naidoo had not pleaded estoppel.

[23] In *Northern Metropolitan Local Council v Company Unique Finance*², the Court stated that in order to hold the applicant liable on the basis of ostensible authority the respondents had to prove the following:

- (a) A representation by words or conduct;
- (b) Made by the appellant and not merely by the agents that they had authority to act as they did;
- (c) A representation in a form such that the appellant should reasonably have expected that outsiders would act on the strength of it;
- (d) Reliance by the respondents on the representation;
- (e) The reasonableness of such reliance;
- (f) Consequent prejudice to the respondents.

[24] Thus in order to render the applicant liable, it is apparent that more is required than mere reliance on the representation of the claimed agent alone. Assurances by an agent as to the existence or extent of his authority are therefore of no consequence when it comes to the representation of the principal inducing a third party to act to his detriment³. Furthermore, no representation is made if the representee is aware that the transaction he is engaging in is not of the kind a particular official will ordinarily transact with an outsider⁴. It is further trite that extra-judicial statements, conduct and

² 2012 (5) SA 323 (SCA). See also *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* [2002] 2 All SA 262 (A) at para [26] at 412C - E

³ *Glofinco v Absa Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) at para [13]

⁴ *Glofinco* at para [20]

admissions of the 'agent' himself cannot be relied upon to establish authority when that is the very fact in issue⁵.

[25] Depending on the legislation involved and the nature and functions of the body concerned, a public body may not only be entitled but also duty bound to approach a court to set aside its own irregular administrative act⁶. Thus Naidoo's contentions that it is not the function of this court to make a finding whether or not the decision to settle was a good one or not, and further that it was not the function of this court to enquire into the merits of a case that has been settled between the parties is misplaced.

[26] Further applying the above legal principles to the facts of this case, the starting point in determining whether the agreement should be set aside is the acknowledgement that the applicant is a local municipality governed by the Local Government: Municipal Systems Act⁷ (The MSA). Section 55 of this Act makes provision in regards to the responsibilities of a Municipal Manager. Pertinent in this regard is that as head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for *inter alia*, the management of the municipality's administration in accordance with this Act and other legislation applicable to the municipality⁸; the appointment of staff other than those referred to in section 56 (a), subject to the Employment Equity Act, 1998 (Act 55 of 1998)⁹; the management, effective utilisation and training of staff¹⁰; the maintenance and discipline of staff¹¹; the promotion of sound labour relations and compliance by the municipality with applicable labour legislation¹².

[27] The Municipal Manager is also empowered within a policy framework approved by the Municipal Council and subject to any applicable law, to approve a staff establishment for the municipality and provide a job

⁵ See *Venter v Credit Guarantee Ins Corp of Africa Ltd* 1996 (3) SA 966 (A) at page 978 D-E

⁶ See *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 10

⁷ 32 of 2000

⁸ Section 55 (1) (b)

⁹ Section 55 (1) (e)

¹⁰ Section 55 (1) (f)

¹¹ Section 55 (1) (g)

¹² Section 55 (1) (h)

description for each post on the staff establishment¹³. The MSA therefore envisages that the municipal manager will manage day-to-day staff matters.

- [28] Naidoo therefore needs to demonstrate that the act of Gxagxisa as an agent was authorized by the applicant¹⁴. In this case, and by nature of the legislative framework within which municipalities and municipal managers operate insofar as matters of appointment of staff are concerned, it has to be demonstrated by Naidoo, that indeed Gxagxisa was accordingly delegated to enter into the impugned settlement agreement as contemplated in section 59(1)¹⁵ of the MSA.
- [29] It is accepted that a *bona fide* third party such as Naidoo may in certain circumstances reasonably assume that Gxagxisa was able to bind the applicant. This however would not apply where it can be shown that Gxagxisa acted on her own without the necessary authority as sub-delegated to her, and accordingly, Naidoo bears the onus of proving that Gxagxisa like any other agent of the applicant, had the necessary authority, either actual or implied, to bind it¹⁶.
- [30] Gxagxisa despite her vehement support for Naidoo throughout the latter's quest to be appointed and/or to resolve the dispute has not in any manner or form confirmed Naidoo's averments that she indeed had the necessary authority or mandate as conferred in terms of the provisions of section 59 of the MSA, and the question that remains in the absence of express authority is whether a case has been made out on the basis of ostensible authority.

¹³ Section 66(1)

¹⁴ See *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) 155 (A) 164G-165G:

¹⁵ s59 (1) (a) provides that:

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;

s59 (2) A delegation or instruction in terms of subsection (1)-

(b) Must be in writing;

s59 (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).'

¹⁶ See *Zelpy 1780 (Proprietary) Limited v Mudaly and Another* (10995/2009) [2014] ZAKZPHC 63 (19 December 2014)) at para [37]

Contrary to the submissions made on behalf of Naidoo, it was not for the applicant to prove by way of a confirmatory affidavit from Gxagxisa that she lacked the necessary authority.

- [31] Naidoo's main contention was that the applicant by conduct had conferred ostensible authority on Gxagxisa to enter settlement agreements on its behalf. She relied on a motivation sent by Gxagxisa to Gumede¹⁷, in which the latter indicated that the matter was discussed with Gumede and Mshengu, where after the settlement was then negotiated and agreed upon with her. As already indicated however, mere reliance on extra-judicial statements, conduct and admissions of the 'agent' himself is not sufficient, and to this end, little value is attached to the motivation addressed by Gxagxisa to Gumede.
- [32] Furthermore, Naidoo's reliance on the motivation however is belied by Gumede's e-mail of 11 September 2013 to Mshengu¹⁸ wherein the former had clearly instructed the latter to withhold the agreement until everyone was on board and all processes were followed as led by HR. Needless to say however, it has already been stated that reliance of a representation by words or conduct in reference to Gxagxisa's memorandum is not sufficient. Furthermore, Gumede's contentions were that Shabane had also signed the settlement agreement after being informed by Gxagxisa that he (Gumede) had agreed to the settlement when this was not the case.
- [33] As conceded by Naidoo, Gxagxisa had always been supportive of her appointment to the advertised posts, and had openly showed her displeasure at her non appointment following the two interviews. In these circumstances, it cannot be said that any representation made by Gxagxisa was in a form such that the applicant should reasonably have expected that Naidoo in particular would act on the strength of it.
- [34] Naidoo by virtue of her position and service with the applicant, could not reasonably have formed the view that Gxagxisa had any authority to conclude the settlement agreement, more specifically since she should have been

¹⁷ Annexure "FA3" to the founding affidavit

¹⁸ Annexure "FA2"

aware of powers of delegation, the processes to be followed, and most importantly, the requirements of the post in question. Furthermore, it cannot be said that a representation was made by the applicant when Naidoo was or should have been aware that the negotiations or conclusion of the agreement were not of the kind Gxagxisa would ordinarily engage with her. At most, she would have been aware that Mshengu and Gumede had to have a say in that regard, and her reliance on Gxagxisa's motivation has been dealt with. Furthermore, Naidoo would have known that any such promotion should have been in terms of established processes and procedure, and not merely at the behest of Gxagxisa, who incidentally had been seeking and supporting her promotion for whatever reason known to her.

[35] Naidoo by virtue of Gxagxisa's support of her appointment had merely relied on Gxagxisa's representation as it was suitable and convenient for her. As the applicant has correctly pointed out, any prejudice and inconvenience to be suffered by Naidoo with the setting aside of the agreement is solely as a consequence of her unreasonable reliance on Gxagxisa's representation, which found no support in law as per the prescripts of the MSA, or on any other basis. Furthermore, any prejudice suffered by Naidoo as a consequence of the agreement being set aside can be ameliorated by pursuing the unfair labour practice dispute lodged with SALGBC.

[36] In the light of the above, it follows that it has not been established as a fact that Gxagxisa had actual or implied authority to make a representation, by entering into and signing the agreement, that she had authority to bind the appellant. From the facts, it is apparent that Gxagxisa went on a frolic of her own and without due regard to established processes and procedures, entered into the settlement agreement. She further did so with a misplaced view that Naidoo was entitled to a promotion. In these circumstances, the settlement agreement stands to be set aside. I have further had regard to considerations of law and fairness, and even though there was no basis for opposing the application, I am of the view that no order should be made as to costs.

Order:

- i. The settlement agreement dated 26 August 2013 concluded between Dr Gxagxisa and Vijay Naidoo is invalid and is accordingly set aside.
- ii. There is no order as to costs.



Tlhotlhamaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv. J Nxusani
Instructed by: Kathy James Attorneys

On behalf of the Respondent: Ms C Soni of IMATU

LABOUR COURT