



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D1097/14

In the matter between:

ENDUMENI MUNICIPALITY

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

VEESLA SONI N.O.

Second Respondent

ERIC JABULANI MBEJE

Third Respondent

Heard: 16 November 2016

Delivered: 26 May 2017

Summary: Review.

JUDGMENT

GUSH J

- [1] The applicant in this matter applies to review and set aside the arbitration award handed down by the second respondent in which award the second respondent found that the third respondent had been unfairly dismissed by the applicant. In

the alternative, should the court find that the dismissal was unfair; the applicant prays that the third respondent be awarded compensation.

- [2] To all intents and purposes, the background to the matter is common cause.
- [3] The applicant is a municipality as defined in section 2 of the Local Government: Municipal Systems Act 32 of 2000 and it is required to conduct its business in accordance with the provisions of that Act. In particular, the Act specifically governs the procedures to be followed when employing staff.
- [4] During April 2013, the applicant's municipal Council resolved to institute disciplinary proceedings against the then municipal manager Mr. Biyela. As a consequence, the Council suspended Biyela with effect from 18 April 2013.
- [5] With the apparent unlawful connivance of the number of Councillors and the applicant's Executive Council, the Council purported to resolve to withdraw the charges against Biyela and uplift his suspension.
- [6] This decision or resolution was subsequently found to be a nullity and of no force and effect meaning that Biyela having been suspended was not entitled to lawfully represent the applicant.¹ The applicant had appointed an acting municipal manager in the place of Biyela.
- [7] Acting on the authority of the unlawful resolution, Biyela insisted on resuming his position of municipal manager or as described by the second respondent "took siege of the municipality in September 2013, whilst on suspension, and was only legally removed during April 2014".²
- [8] During his "siege", Biyela made a number of appointments to the staff of the applicant. The third respondent was one of these appointments. Biyela purported to conclude a contract of employment with the third respondent appointing him as "Senior Manager Legal and Estates in the Corporate Services

¹ *T B Biyela v Endumeni Municipality and another Kwazulu-Natal High Court Case Number 7494/14.*

² Arbitration award paragraph 20 page 30 of the pleadings.

Department” on 17 January 2014 with effect from 1 March 2014. It is common cause that Biyela was not entitled to lawfully make the appointment or enter into any contracts for or on behalf of the municipality and that the appointment of the third respondent did not comply with the provisions of the Local Government: Municipal Systems Act.

- [9] As a result, at a meeting of the applicant’s Council on 16 April 2014, it resolved correctly that the appointments made by Biyela were “illegal and invalid *ab initio*”.
- [10] The Council further resolved that the persons unlawfully appointed by Biyela were to be advised of the invalidity of their contracts. On 17 April 2014, the then acting municipal manager, who had been appointed effective 13 June 2013, addressed a letter to the third respondent advising him of the “nullification of [his] irregular and un-procedural employment” and setting out in detail the reasons behind the Council’s resolution.³
- [11] As a consequence, the third respondent referred a dispute to the first respondent who in turn appointed the second respondent to arbitrate the dispute.
- [12] At the arbitration, the applicant submitted that as the third respondent had been irregularly appointed without the consent of the applicant’s Council, the appointment was null and void and that accordingly the third respondent had not been employed and accordingly had not been dismissed.
- [13] Despite this argument, the second respondent concluded that the applicant was estopped from raising the invalidity of the contract and that termination of the third respondent’s employment was both substantively and procedurally unfair. The second respondent concluded:

‘[24] I also believe that summary termination the [third respondent’s] employment on a declaration of illegality and noncompliance with a recruitment policy was harsh and unfair, thus entitling him to the relief sought herein. I accept there will

³ Page 44-55 of the pleadings.

be financial repercussions on the [applicant] but the [third respondent's] situation far outweighs the [applicant]. The harm to the [third respondent] overshadows any harm the [applicant] may or will suffer. The balance of convenience certainly favours the applicant herein.

[25] The applicant challenged the procedural fairness. [the applicant's witness] maintained there was no dismissal on the appointment was withdrawn, hence there was no need to for the applicant an opportunity to present his case. I find this stance illogical and absurd and does not nullify a person's right to a fair hearing. He should have been afforded a formal inquiry and such failure deprived him of a right to be heard. [the third respondent] was entitled to an explanation for his dismissal and the failure by the municipality to afford him that opportunity amounted to procedural unfairness.⁴

[14] I am not persuaded that the doctrine of estoppel in the circumstances of this matter can be applied in order to establish that a lawful contract of employment existed. The facts are:

- a. Biyela was lawfully suspended;
- b. The uplifting of his suspension was found to be null and void; and
- c. His resumption of his duties as municipal manger was accordingly unlawful as were his actions in entering into contracts of employment with *inter alia* the third respondent during the period September 2013 to April 2014.
- d. As the contracts of employment did not comply with the Local Government: Municipal Systems Act 32 of 2000, the contracts were unlawful and void *ab initio*.

[15] In a previous judgment, I concluded that in such circumstances as no contract came into being there could no dismissal.⁵ In this matter, I am persuaded by Mr Pitman's that despite the fact that the purported contract between the applicant

⁴ Award paragraphs 24 and 25 pleadings page 32.

⁵ *Endumeni Municipality and SALGBC and Others* Case Number D758/14 (unreported).

and the third respondent, concluded by Biyela, was null and void an employment relationship as contemplated by the Labour Relations Act did in fact come into existence.

- [16] The chronology of events leading up to the so-called “nullification” (sic) of the contract further reinforce the conclusion that despite the invalid unlawful contract, an employment relationship was established.
- [17] In the award, the second respondent records that the chairperson of the applicant’s Council had formally objected to the appointment of the third respondent on 28 February 2014. The applicant only commenced his employment in march 2014. The objection was addressed to the applicant’s acting municipal manager. It is also apparent that the speaker of the applicant’s Council also reported the matter to the Member of the Executive Council (MEC), prior to the “nullification” and indicated that the Council was not prepared to condone the appointment.
- [18] What is clear from this is that the applicant became aware that the employment contract entered into with the third respondent by Biyela was invalid before Biyela commenced his employment. Despite this it took the applicant a further two months before the contract was cancelled.
- [19] As a result, when the third respondent commenced work with the applicant despite the invalid contract of employment, an employment relationship was created between the applicant and the third respondent. When the applicant resolved to cancel and nullify the Biyela’s contract, it was necessary for the applicant to terminate the employment relationship.
- [20] That being so, the applicant in terminating that employment relationship was required to act fairly.
- [21] The Biyela’s contract was null and void and the terms and conditions of the employment relationship did not comply with the Local Government: Municipal Systems Act 32 of 2000.

- [22] In the award, the second respondent having concluded that the termination of the third respondent's employment was "harsh and unfair" found the dismissal to be substantively unfair and ordered retrospective reinstatement. What the second respondent ignored were the requirements of the Local Government: Municipal Systems Act 32 of 2000.
- [23] It is not disputed that the applicant, in employing personnel, in order for the employment to be lawful must comply with the Local Government: Municipal Systems Act 32 of 2000: The employment relationship with the third respondent that came into existence alongside the unlawful contract did not comply with that Act. I am satisfied that in the circumstances, the applicant had a fair reason for terminating the employment relationship and that accordingly the termination was substantively fair.
- [24] The question that remains is whether the applicant followed a fair procedure in terminating the applicant's employment.
- [25] The termination of the third respondents employment is clearly a no-fault termination. Using as an analogy the procedure required in a dismissal for operational reasons, also a no-fault termination, the Labour Relations Act 66 of 1995 specifies a detailed and comprehensive consultation process. There is no reason why an employee in the position of the third respondent should not be entitled to be engaged by the municipality in a similar process.
- [26] In this matter, all the applicant did was to address a letter to the third respondent advising him of the "nullification of [his] irregular and un-procedural employment". I am not persuaded that this constituted procedural fairness.
- [27] As for the appropriate relief for the procedural unfairness, it is so that the third respondent sought an order of reinstatement. It is therefore necessary to

consider whether in the circumstances it would be “reasonably practical for the applicant to reinstate the third respondent”.⁶

- [28] As the effect of an order reinstating the third respondent would be to oblige the applicant to restore an unlawful contract that did not satisfy the statutory requirements of the Municipal Systems Act, that is not reasonably practical.
- [29] I am satisfied though that the third respondent is entitled to compensation.
- [30] I am for the reasons above persuaded that it is necessary to review and set aside only that portion of the second respondent’s award that declares the dismissal unfair and the order reinstatement.
- [31] The third respondent is however entitled to compensation for the unfair procedure adopted by the applicant.
- [32] In its Notice of Motion, in the alternative, the application prayed for an order that the third respondent be awarded “compensation of an amount which is deemed fitting by the Court.”⁷ I understood the third respondent’s Counsel’s argument also to be that in the alternative should reinstatement not be appropriate that compensation should be awarded but in an amount equivalent to 12 months’ salary.
- [33] In order to determine what compensation would be “fitting”, I have taken into account that the third respondent was not the author of his misfortune; that the contract had just commenced; that the applicant did not acted timeously and that the arbitration was concluded six months after his employment was terminated.
- [34] Having regard to all these factors, I find that the appropriate compensation to which the third respondent is entitled is an amount equal to 12 months’ salary.
- [35] As far as costs are concerned I have taken into account that the applicant has been partially successful in its application. I am however satisfied that in the

⁶ Labour Relations Act 66 of 1995 s 193(2)(c).

⁷ Notice of Motion Pleadings page 2.

interests of law and fairness that the applicant should pay the third respondent's costs.

[36] In the circumstances, I make the following order:

- a. The second respondent's award is reviewed and set aside and substituted with the following:
 - i. The dismissal of the third respondent was procedurally unfair;
 - ii. The applicant is to pay the third respondent an amount equivalent to 12 months' salary
- b. The applicant is ordered to pay the third respondent's costs.

D H Gush

Judge Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Adv P Blomkamp

Instructed by Acutt and Worthington

FOR THE THIRD RESPONDENT:

Adv M Pitman

Instructed by Shepstone and Wylie