



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: J2314/18

In the matter between:

LUSANDA MADIKIZELA

Applicant

and

**CITY OF EKURHULENI
METROPOLITAN MUNICIPALITY**

First Respondent

DR IMOGENG MASHAKAZI N.O.

Second Respondent

BONGANI KHOZA N.O

Third Respondent

Heard: 10 July 2017

Delivered: 13 July 2017

Summary: (urgent interdict to stay disciplinary enquiry –urgency established – pursuit of internal remedy not dilatory – prima facie right to set aside enquiry for alleged non-compliance with regulations not established – prima facie right, though open to doubt to contractual relief established – better alternative remedy in terms of an urgent application for final order of specific performance exists – unnecessary to link interim contractual relief to outcome of review proceedings)

JUDGMENT

LAGRANGE J

Background

- [1] This is an urgent application brought by the applicant, a senior manager employed in terms of section 56 of the Local Government: Municipal Systems Act, 32 of 2000 ('the MSA') to halt disciplinary proceedings currently underway against her, pending the outcome of a review application filed on 27 June 2018 under case number JR 1275/18.
- [2] The review application is multipronged and seeks the following relief:
- 2.1 setting aside two resolutions of the City of Ekurhuleni Metropolitan Municipality on 22 February and 4 April 2018, which respectively authorised an investigation into her alleged misconduct and the institution of disciplinary proceedings against her;.
 - 2.2 declaring the disciplinary enquiry instituted against her to be unlawful, and
 - 2.3 declaring her suspension on 5 March 2018 to be unlawful.

Urgency

- [3] The urgent application for interim relief was launched on 29 June 2018 and set down for hearing on 10 July 2018. The reason the application was not brought earlier is that, the applicant first raised her objections about the invalidity of the enquiry before the chairperson of the enquiry. It is common cause that the enquiry took place on 15 May and 24 May 2018 and she raised voluminous objections *in limine* at the enquiry proceedings, which the chairperson considered and dismissed, reserving his reasons, on 25 June 2018. The applicant then sought a postponement in order to raise her *in limine* objections in review proceedings, but the postponement was refused and she then launched the urgent application.
- [4] The municipality contends that, she ought to have launched the urgent application when she became aware of the basis on which she claimed the

disciplinary proceedings instituted against her were unlawful, since those were issues which the chairperson did not have the power to determine himself. While it is true that, strictly speaking, the chairperson did not have the legal authority to determine his jurisdiction, I accept that he may have taken the view that it might be improper of him to proceed with the enquiry in the circumstances and request the municipality to relieve him of his appointment. It obviously also gave the municipality an opportunity to consider the merits of her objections without the parties having to go to court. Although, she might have brought the urgent application before the enquiry even commenced, and arguably might be criticised for not raising any preliminary objections before the enquiry commenced as she was advised to do in the notice of the enquiry, I do not think she can be faulted for attempting to have the issue addressed at the commencement of the enquiry itself.

- [5] Accordingly, I am satisfied that once it became clear that her objections had been rejected and the enquiry would proceed she acted with sufficient alacrity and also gave the municipality enough opportunity to file answering papers before the matter was heard.

Existence of a *prima facie* right

- [6] The applicant contends that the disciplinary proceedings against her were instituted in breach of various provisions of the Local Government: Disciplinary Regulations for Senior Managers, 2010 ('the regulations') and in breach of her contractual right to an enquiry by an arbitrator.
- [7] The applicant identified six alleged breaches of the regulations which she alleged rendered her disciplinary enquiry unlawful, namely:

7.1 A request on 21 December 2017 from the Chief Specialist: Contract Manager/Legal in the office of the City Manager requesting an internal audit to be conducted on a contract in terms of which a contractor was appointed to build a taxi rank at a location known as Bluegumview amounted to an allegation of misconduct against her which had to be tabled by the mayor or the municipal manager before a council meeting no later than seven days after the allegation was received in

terms of regulations 5 (1) and (2). There is in my view, no plausible basis for interpreting the request for an internal audit as being equivalent to an allegation of misconduct against the applicant even on a *prima facie* basis. Accordingly, the fact that the allegation was only tabled at a meeting of the Council in January did not entail any breach of the seven day provision.

7.2 The applicant further claims that the council breached the regulation 5(3)(a) which states that:

If the municipal council is satisfied that-

- (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days point an independent investigator to investigate the allegations of misconduct; ...

The applicant claims that because the resolution of the Council of 26 February 2018 decided that the city manager should appoint 'an independent investigator' that this was a breach of the regulation because the council itself had to make such an appointment and could not delegate that function to the city manager. Secondly, she maintains that because the person, an attorney, who was appointed had previously represented the council in a dispute with a contractor involving the same contract, in relation to which she was alleged to have committed misconduct. The various charges against her revolve principally around her alleged authorisation of a payment of approximately R 540,000 to the contractor in circumstances where she knew or ought to have known that the contractor had not completed the work for which it was being paid. There may be some merit in the claim that the Council could not delegate the appointment of the investigator to the city manager, not least because the council does not deny this allegation. I am more doubtful that the investigator's independence is impugned merely because he had previously represented the council in respect of the same contract. That would not necessarily predispose him to find fault with the applicant. In fact his knowledge of the contract might well have made him an ideal choice to conduct the investigation, which after all could not make any

binding pronouncement on the applicant's guilt as such. In any event, as the investigation is merely a preliminary stage to launching disciplinary enquiries, unless there is manifest bad faith, or capriciousness on the part of the Council in initiating such an investigation, it is difficult to see why such deviations from the procedure would necessarily invalidate the entire disciplinary proceedings, if it does not involve a material deviation from the principles governing the disciplinary code set out in regulation 5(3). In this regard see ***Steenkamp & Others v Edcon Ltd***.¹ The dangers of a rigid literal approach to interpreting regulations must also be borne in mind, as the SCA cautioned in ***Weenen Transitional Local Council v Van Dyk***:²

“ [13] It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434A - B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van

¹ 2016(3) SA 251 (CC) , paras [183] – [184].

² 2002 (4) SA 653 (SCA)

Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138D - E, seems to be the correct one and does away with debates of secondary importance only.”³

- 7.3 The Applicant also claims that the alleged failure to validly appoint the investigator meant that anything done by the investigator or by the council pursuant to the investigation report tabled by the investigator were also invalid. Accordingly, she argues that the disciplinary enquiry was unlawful because the report tabled before the council on the basis of which it took the decision to institute disciplinary proceedings was not produced by an independent investigator appointed by the council itself and therefore breached the requirements of regulations 5(5) and (6). This cascading effect argued for by the applicant in essence is that, on a proper construction of the regulations, they should be read to mean that each successive step in the institution of disciplinary proceedings rests on the legal validity of the previous step and not merely on the fact that the previous step had been taken. If, one takes the view, as I do, that the appointment of the investigator substantially complied with regulations 5(3) and (4), then the subsequent steps taken by the Council to have the report tabled and considered before deciding to institute disciplinary proceedings are not rendered invalid.
- 7.4 The applicant further contends that the resolutions of the Council appointing the investigator and authorising disciplinary proceedings were not voted upon as required by section 160 (3)(c) of the Constitution of the Republic of South Africa and section 30 (3) of the Local Government: Municipal Structures Act 117 of 1998. The applicant further argues that she asked the council for proof that the resolution was voted upon, which was not forthcoming. In the answering affidavit, the council attaches the resolutions both of which reflect that the resolutions were unanimously adopted and asserts that they were voted upon. In the context of application proceedings for

³ At 659.

temporary relief on the test in **Webster v Mitchell**⁴ the councils answer on this question must be accepted in my view.

- 7.5 Lastly, the applicant contends that, there is another distinct contractual basis that makes the current disciplinary proceedings unlawful. She contends that she signed a contract of employment which included the following provision:

Any dispute arising out of misconduct or incapacity or operational requirements or application or interpretation of this agreement, while this agreement is in force , will be dealt with as follows : -

15.1

15.2 should the employee commit an act of misconduct of a serious nature that warrants a disciplinary hearing, the Parties agree to use the PRE-DISMISSAL ARBITRATION in terms of the Labour Relations Act 66 of 1996 as amended.

(original capitalisation)

The difficulty the applicant faces is that, she only has an unsigned version of a contract containing this provision. Notwithstanding this, she did allege in her founding affidavit and provided further evidence thereof in reply in the form of an alleged email from an erstwhile Human Resources Manager apparently confirming that her contract was sent to the City Manager, but that she still had to sign an addendum relating to Municipal Finance Management Act training before the city manager could sign the contract. A copy of the addendum signed only by the applicant is attached to the applicant's founding affidavit. She also gives a plausible account of the circumstances under which she claimed she signed the contract at a police station, but did not provide a confirmatory affidavit of the council official who supposedly accompanied her to the police station. The council submits that the only contract that exists between the parties is a letter of appointment, which the applicant denies can be considered a contract of employment under s 57(1)(a) of the MSA

⁴ 1948 (1) SA 1186 (W.L.D.) at 1189

because it does not set out her duties which is a pre-requisite of such contracts under s 57(3) of that Act.⁵ She further points out that the letter of appointment itself describes her Conditions of Service “As per the employment contract”. She further submits that it is improbable she would have been employed since 1 February without a contract. On the evidence, it would appear that it is reasonably probable that the applicant did sign a contract containing the arbitration provision in question. A pre-dismissal arbitration provision in a contract of

⁵ The pertinent provisions of s 57 of the MSA state:

57 Employment contracts for municipal managers and managers directly accountable to municipal managers

(1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only-

(a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).

(2) The performance agreement referred to in subsection (1) (b) must-

(a) (i) be concluded within 60 days after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager, failing which the appointment lapses: Provided that, upon good cause shown by such person to the satisfaction of the municipality, the appointment shall not lapse; and

(ii) be concluded annually, thereafter, within one month after the beginning of each financial year of the municipality;

(b) in the case of the municipal manager, be entered into with the municipality as represented by the mayor or executive mayor, as the case may be; and

(c) in the case of a manager directly accountable to the municipal manager, be entered into with the municipal manager.

(3) The employment contract referred to in subsection (1) (a) must-

(a) include details of duties, remuneration, benefits and other terms and conditions of employment as agreed to by the parties, subject to consistency with-

(i) this Act;

(ii) any regulations as may be prescribed that are applicable to municipal managers or managers directly accountable to municipal managers; and

(iii) any applicable labour legislation; and

(b) be signed by both parties before the commencement of service.

employment is now permissible in terms of s 188A (4)(b) of the LRA, which states that:

Despite any other provision in this Act, an employee earning more than the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act at the time, may agree in a contract of employment to the holding of an inquiry in terms of this section.

There is no dispute the applicant earns above the threshold. On the face of the conflicting evidence, I am satisfied that she has a *prima facie* right to a pre-dismissal arbitration hearing in terms of her contract of employment, though her reliance on such an entitlement is irrelevant to a review based on non-compliance with the regulations . It is also unclear why that right should be asserted indirectly by way of a review of the chairperson's ruling on that issue, when the applicant is effectively asserting a self standing right to specific performance of her contract of her employment which is enforceable irrespective of the chairperson's ruling on that issue.

- [8] In conclusion, I am not satisfied that the applicant has established a *prima facie* right, though open to doubt, to set aside the enquiry for want of compliance with the regulations. She does have a *prima facie* right to a pre-dismissal hearing. The question remains whether it is appropriate to address this on an interim basis.

Existence of alternative remedies

- [9] As I have decided that the applicant has not established a *prima facie* right to review and set aside the disciplinary proceedings on account of non-compliance with the regulations, it is not necessary to consider the existence of a suitable alternative remedy.
- [10] What is unclear is how the applicant can justify a claim for interim relief in respect of her contractual remedy which she can pursue quite independently of any review proceedings and for which she could seek a final order for specific performance. In my view, such an application for final relief is more than an adequate alternative remedy to this application for

interim relief under the rubric of pursuing a review of a chairperson's ruling on an issue he could not even decide in the first place.

Prejudice and balance of convenience

[11] The main prejudice the applicant complains of is having to be subject to a disciplinary enquiry which is either unlawful in terms of the regulations or it is an unlawful breach of her contract of employment. If she had simply pursued a final claim for specific performance on an urgent basis there is no reason she needed to suffer such prejudice if her contractual claim is sound. It is inappropriate in my view to weigh up the applicant's prejudice if she is not granted interim relief staying the proceedings, when it is quite unnecessary for her to link her contractual relief to the pending review proceedings. Further, granting interim relief in relation to the applicant's contractual claim would have a somewhat absurd result, because it would pointlessly stay the disciplinary enquiry when the contractual right she seeks to enforce is to replace the current enquiry with a pre-dismissal enquiry. I cannot see how it could be in either party's interest to delay the final determination of that relief, by linking it to the outcome of the review proceedings.

[12] In the circumstances, I am satisfied that this is not a case in which interim relief should be granted in relation to the applicant's prima facie right to a pre-dismissal hearing.

Order

- [1] The application is dealt with as one of urgency and non-compliance with the rules of the Labour Court relating to service and time periods is condoned.
- [2] The application is dismissed.
- [3] No order is made as to costs.

R Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

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RESPONDENT:

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