



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 2497-18

Not Reportable

In the matter between:

PAUL MPELE

Applicant

and

THE MUNICIPALITY COUNCIL OF THE LESEDI

1st Respondent

LOCAL MUNICIPALITY

THE LESEDI LOCAL MUNICIPALITY

2nd Respondent

THE SPEAKER OF THE LESEDI

LOCAL MUNICIPALITY

3rd Respondent

THE EXECUTIVE MAYOR OF THE

LESEDI MUNICIPALITY

4th Respondent

THE MEC OF CO-OPERATIVE GOVERNANCE,

TRADITIONAL AFFAIRS AND HUMAN SETTLEMENTS

5th Respondent

GUGULETHU THIMANE

6TH Respondent

Heard: 20 July 2018

Delivered: 13 August 2018

Summary: Urgent application to declare termination of employment unlawful and order reinstatement

Nature of dispute – termination of employment contract of employee by way of resolution of municipal council – constitutes a dismissal as contemplated by the LRA – dispute should be dealt with by bargaining council under normal dispute resolution processes under Chapter VIII of the LRA

No extraordinary circumstances shown to justify departure from normal dispute resolution processes – alternative remedy available.

JUDGMENT

WHITCHER J

Introduction

[1] The applicant was appointed on 13 October 2017 as the Municipal Manager of the second respondent. The appointment was on a five year fixed term contract. Seven months after the appointment, the MEC [the fifth respondent] took issue with the constitution of the selection panel which recommended the applicant's appointment having consisted of six members. He viewed this to be contrary to Regulation 12(3) of the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers.

[2] Regulation 12(3) provides that:

The selection panel for the appointment of a municipal manager must consist of at least three and not more than five members, constituted as follows:

- (a) the mayor, who will be the chairperson, or his or her delegate;
- (b) a councillor designated by the municipal council;

- (c) at least one other person, who is not a councillor or a staff member of the municipality; and who has expertise or experience in the area of the advertised post.¹

[3] Relying on section 54A(8) of the Municipal Systems Act 32 of 2000, as amended (“the Systems Act”), the MEC directed the first respondent to rescind its decision of 14 July 2017 concerning the constitution of the selection panel; and its decision of 12 October 2017 concerning the appointment of the applicant as Municipal Manager.

[4] Section 54A(8) provides as follows:

- (8) If a person is appointed as municipal manager in contravention of this section, the MEC for local government must within 14 days of receiving the information provided in subsection (7), take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to a court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council.

[5] On 29 June 2018 the first respondent, at a special Council meeting, rescinded its (aforementioned) decisions; ultimately rescinding the applicant’s appointment as Municipal Manager.

[6] The first respondent further resolved to reconvene “to constitute” a new selection panel for the appointment of a Municipal Manager.

[7] On 28 June 2018, prior to the special Council meeting, the applicant’s attorneys wrote to the Executive Mayor and Council. In the letter, they submitted that:

“First, it would offend the principles of fairness to deal with an issue adverse to the concerns and interests of the MM without having formally given the MM adequate notice that this is to be done and an opportunity to be heard;

...

¹ Emphasis added.

Thirdly,section 12(3) ... requires a proper consideration by a court of law before it can be found that that portion which provides for “not more than five members” is peremptory or not. In our respectful submission it is quite clear that there must be at least three members (this is compulsory) but the maximum number of five is directory having regard to the identity of the composition of the selection panel.

It is common cause that there was compliance with section 12(3) (a), (b) and (c). The only issue is whether the additional member had a say or not. Even if our view on the construction of the section is incorrect in law, it may be that the consequence is that the sixth member's vote is not taken into account. This too would leave the position that the MM was lawfully appointed.

....

In the least, our client the MM would like to have a proper opportunity to make representations to the Mayor Committee before any decision is taken so that the Mayoral Committee can properly apply its mind and adopt a resolution or decision that is rational and reasonable. To do so the MM requires a reasonable opportunity to prepare and to appear at a properly constituted Mayor Committee meeting to deal with the matter. “

- [8] There was no response to this letter.
- [9] On 29 June 2018, the applicant's attorneys advised the MEC that the first respondent was not entitled to unilaterally rescind the applicant's appointment. It required a Court Order.
- [10] On 2 July 2018, the applicant was promised a meeting during the course of the week with the MEC. The meeting did not come to pass.
- [11] On 4 July 2018, the MEC directed the first respondent to pass a resolution appointing the applicant to his previous position of CFO with immediate effect.

The application before me

- [12] On 11 July 2018, the applicant filed an urgent application for an order in the following terms:

“Prayer 2 Declaring the first respondent’s decision of 28 June 2018 to rescind the appointment of the applicant as Municipal Manager, ultimately terminating his employment as Municipal Manager, to be unlawful.

Prayer 4 Reinstating the applicant into the position of Municipal Manager in the same terms and conditions enjoyed by him prior to the first respondent’s decision to terminate his employment as Municipal Manager.”

[13] In Prayer 3 the applicant had sought an order declaring the MEC’s decision of 27 June 2018 to be unlawful, but abandoned same on the basis that his application is directed against the first respondent’s actions, i.e. the action of his employer terminating his contract of employment.

[14] The first and second respondents do not oppose the application.

[15] In Prayer 5 of the Notice of Motion, the applicant had prayed for an order directing the first, second and/or fifth respondent, solely or jointly, to bring a review application within 14 days of the court’s order aforesaid, concerning the legality and/or validity of the first respondent’s decision of 14 July 2017 appointing the applicant as Municipal Manager.

[16] Clearly, in response to this prayer, the MEC filed, on 20 July 2018,² a counter-application together with an opposing affidavit to the main application.

[17] In the counter-application, the MEC seeks the following relief: staying the [main] application; the setting aside of the panel set up by the first respondent for the purpose of appointing its Municipal Manager; setting aside all decisions and actions taken by that panel, and in particular its recommendation that the applicant be appointed as Municipal Manager; and directing the first respondent to set up a panel that complies with the applicable statutory provisions, in particular Regulation 12 (3).

The parties’ submissions

² The day of the hearing of the applicant’s application

[18] The applicant submits that he was unlawfully dismissed by the first/second respondent. They acted unilaterally and failed to apply formally for a court to review the validity of his appointment. Their failure to do so further contravened his right to be heard because in the aforementioned court process, he would have been entitled to proper notice and a hearing on whether his appointment should be set aside.

[19] In support of his contention, the applicant referred to the following extracts from *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*³ and *MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd*.⁴

[20] *Oudekraal*:

“[26] ...The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

[21] In *Kirland*, Cameron J stated the following:

“[64] ... Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.

[65] The reasons spring from deep within the Constitution’s scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a

³ 2004 (6) SA 222 SCA

⁴ 2014 (3) SA 481

proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed.”

- [22] The MEC submitted that, in light of its counter-application, the only issue that remains to be decided in the main application is whether it is necessary to consider whether the applicant should be granted the relief he seeks in prayer 2 and 4 above.
- [23] This is because, the MEC submits, the only relief the applicant seeks in these two prayers is that he be granted declaratory orders – not consequential relief - and that the issuance of a declaratory order does not in itself lead to the grant of consequential relief.
- [24] In any event, the MEC submitted, the applicant is not entitled to an order that he be reinstated to the position of Municipal Manager because the validity of his appointment is subject to serious if not conclusive doubt in light of Regulation 12(3).⁵
- [25] The MEC contends that, in terms of section 172(1) of the Constitution, it would not be just and equitable to reinstate a person into the most senior position in a local municipality if his appointment appears “overwhelmingly to be unlawful”.

⁵As mentioned earlier on, the MEC took issue with the fact that the panel consisted of six members rather than five members, and on this basis contended the appointment was unlawful and directed the first and second respondent to rescind the appointment of the applicant. The MEC did not take issue with the applicant's contention that there was compliance with section 12(3) (a), (b) and (c).

- [26] Moreover, the applicant would not suffer prejudice in the interim if he were not reinstated to the position of Municipal Manager because he could resume being the Chief Financial Officer, the position he occupied prior to his appointment as Municipal Manager.
- [27] During the course of argument, counsel for the MEC raised a further submission.
- [28] I was referred to the Constitutional Court judgment in *Department of Transport and Others v Tasima (Pty) Limited*.⁶ On the strength of this judgment, counsel for the MEC contended that even if the first respondent ought to have approached the court to make an application to set aside the appointment of the applicant, the fact that the MEC does so in a counterapplication means that the counter-application is as much before this court as the main application, and it is clear in the counter-application that the appointment of the applicant was invalid.
- [29] Counsel, unfortunately, did not refer the court to specific paragraphs in the *Tasima* judgment. I read the full judgment, but, as will become apparent, I need not address the issues raised in this judgment.
- [30] Counsel for the applicant moreover submitted that *Tasima* has no application to the main case before me because the applicant is seeking to set aside the decision of his employer who unilaterally terminated his services. The applicant is not challenging the MEC's powers and his administrative decision. The applicant is challenging his employer's decision which decision falls outside the realm of administrative decisions and law. The court is thus being called upon to deal with the labour law rights of an employee. By failing to follow lawful process to terminate his employment contract, his employer denied him the right to be heard before a decision on the validity of his contract was determined. The applicant has a clear right not to be unlawfully dismissed and a right to expect his employer to comply with the law before making a decision as to the termination of his employment. The court is not doing anything magical by reinstating the applicant pending the determination

⁶ 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC).

of the MEC's application. The merits of the interpretation of Regulation 12(3) are thus an issue for another day.

Analysis

- [31] Since my ruling today extinguishes the main application in this forum, the counter-application in its present format falls away. Should the MEC nevertheless opt to have the original appointment of the applicant reviewed and set aside, it is free to approach the court afresh in the normal way. It would do so under whatever provisions of the LRA clothe the Labour Court with jurisdiction to hear such a matter *and* within circumstances which would make it appropriate for this court to hear such an application.
- [32] The action at the heart of the matter before me is an employer's termination of an employee's contract of employment with or without notice. This is the definition of dismissal in section 186 (1) of the Labour Relations Act, 1995 (LRA). Although the employer's initiative to bring the employment relationship to an end was an unusual [and I would venture to say an unfair one], there is to my mind no escaping the underlying nature of this dispute however it has been pleaded. The employer gave into the MEC's demand that the applicant's contract be terminated and he was dismissed.
- [33] Part of the challenge to the legality of this dismissal seems to rest on an understanding that the employer was only permitted to terminate the employee's services after a successful application to court by the MEC in terms of section 54A(8) of the Systems Act. But this statute only requires the MEC, upon receipt of information that an appointment contravened section 54, 'to take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to a court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council.' (emphasis added)
- [34] As is apparent from a purposive reading of section 54A(8), this provision is meant to regulate the enforcement of an MEC's views that an appointment

was irregular over the entity that must do something about it; the actual employer. I do not read this section of the Systems Act to state that there is a statutory obligation on an MEC to seek a declaratory order before a municipality complies with his view that an appointment was irregular by, for example, terminating a contract. Nor is there an obligation on a municipality to only terminate an irregularly appointed employee's contract on receipt of such advice from a court. Section 54A(8) of the MSA regulates what must happen when compliance needs to be enforced. Seeking a declarator is then one of the steps the fifth respondent *may* have taken to get his way. If a court had indeed been approached and a material irregularity established, then the applicant's contract would have been declared null and void. But this is not the only way that compliance with section 54A may be obtained. The municipality may agree that the contract needs to be terminated and it then assumes the duty to do so in compliance with another statute, the LRA.

[35] Reference to a declarator and other legal action in section 54A(8) seems to envisage circumstances in which there is resistance from a municipality to the MEC's views that an appointment was irregular by being in contravention of the rest of section 54. As it turns out, the MEC's instruction was obeyed without the need that the municipality's hand be forced at all. No mandatory adjudication is thus prescribed, nor would it make any sense that it be prescribed, where a MEC's instruction to a municipality to correct an irregular appointment is accepted by the latter.

[36] To the extent that this court is asked to find that the dismissal breached the principle of legality for want of compliance with provisions in the Systems Act that first require some legal action by the MEC, I do not read the relevant provision this way. I therefore dismiss this point.

[37] As mentioned above, where a municipality accepts the MEC's view that an appointment was irregular and the contract must be terminated as a result, it must comply with its own legal obligations to its employee. These are set out in the Labour Relations Act of 1995. This brings us to the second challenge to the termination of the employee's contract. This is that he was denied 'a

proper opportunity to make representations to the Mayor Committee before any decision is taken so that the Mayoral Committee can properly apply its mind and adopt a resolution or decision that is rational and reasonable.’ To my mind, the applicant has very clearly established that he was denied an opportunity to be heard in the forum that ultimately acted upon the MEC’s instruction; that is, the mayoral council meeting of 4 July 2018.

- [38] But on this score, the applicant essentially contends that his termination was for no good reason and that it was procedurally unfair in that he was given no hearing beforehand. He, moreover, seeks reinstatement as relief. This is all the nomenclature of dismissal law. The question that arises is whether a complaint about a faulty reason for dismissal and the denial of *audi altaram partem* belongs in the Labour Court as a court of first instance?
- [39] As I have already found, as a matter of law, there was no breach of s 54A(8) of the Systems Act. The remaining question is whether the applicant’s contentions about the substance (the additional person on the selection panel did not invalidate his appointment) and procedure (he was not heard on the matter) of his dismissal ought to be decided by the Labour Court.
- [40] The Labour Appeal Court in *Hendricks*⁷ found that public sector employees aggrieved by dismissal or unfair labour practices ‘should ordinarily pursue the remedies available in sections 191 and 193 of the LRA, as mandated and circumscribed by s 23 of the Constitution ...’ Surveying the broad ambit of case law from *Chirwa*⁸ through to *Gcaba*⁹, the LAC found that challenges to the legality of decisions taken by the state in its capacity as employer could be reviewed on any grounds permissible in law, *if no other remedy is available*. This is why, for instance, reviews of so-called ‘deemed dismissals’ under section s17(3)(a)(i) and s17(3)(b) of the Public Service Act are entertained by the Labour Court as there quite simply is no other remedy available in labour law for terminations that take place by operation of law.

⁷*Hendriks v Overstrand Municipality* [2014] 12 BLLR 1170 (LAC) at paras 21 and 32.

⁸ *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) .

⁹ *Gcaba v Minister of Safety and Security and Others* (2010) 31 ILJ 296 (CC).

[41] Although dealing with applications brought in terms of section 158(1)(h), the views of Myburgh AJ, in *Magoda v Director-General of Rural Development and Land Reform and Another*¹⁰ are apposite:

“... insofar as the LRA provides a remedy to address the applicant’s complaints ... I do not consider a review in terms of section 158(1)(h) to be permissible – otherwise a separate legal framework would apply to public and private sector employees. As held by the LAC in *De Bruyn*, the LRA may oust the section 158(1)(h) review jurisdiction of this court, where, for example, the dispute involves the interpretation or application of a collective agreement, which stands to be arbitrated by the CCMA. The LAC went on to find that a section 158(1)(h) review was not permissible on what appears to be a wider basis: “[i]t follows that the appellant is confined to its remedy in terms of section 24 of the LRA and it may not, instead, seek to review the respondent’s decision in the Labour Court in terms of section 158(1)(h).” Along similar lines, the LAC indicated in *Hendricks* that section 158(1)(h) reviews should be confined to legitimate challenges where there is no other remedy available under the LRA. As Murphy AJA went on to put it, “[i]f a cause of action meets the definitional requirements of an unfair labour practice or an unfair dismissal, the dictates of constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for [its] resolution”. This court has also held, on more than one occasion, that where another remedy exists under the LRA, a section 158(1)(h) review is not permissible. ...’

[42] *In casu*, the applicant was dismissed on the initiative of his employer. He thus has a remedy under the LRA other than seeking relief from the Labour Court in motion proceedings. This is to take the well-trodden path of many employees before him, no matter their rank, who have had their dismissals conciliated by the CCMA or Bargaining Council and, if the dispute remains unresolved, arbitrated on the evidence.

¹⁰ [2017] JOL 38772 (LC) at para 10.

[43] As the Labour Court in *Mohlomi v Ventersdorp/Tlokwe Municipality and Others*¹¹ recently pointed out:

‘... the LRA has a very unique scheme where it comes to resolving disputes that arise in the scope of the employment relationship. This includes such disputes involving the state as employer. The LRA creates a right to a fair dismissal and the right to a fair labour practice, and then provides for a prescribed dispute resolution process to give effect to such rights. At the heart of this dispute resolution process lies the notion of fairness as between both employer and employee. This notion of fairness is not compatible with concepts such as unlawfulness or illegality or invalidity. At a level of policy, this Court should always strive to give primacy to this prescribed dispute resolution processes of the LRA and the notions underlying it...’¹² (footnotes omitted)

[44] The Court goes on:

‘[40] Therefore, and when this Court is confronted with an application seeking to challenge decisions in the context of the employment relationship in the public service, this Court is duty bound to ascertain whether the decision taken is one that would normally be susceptible to challenge under the auspices of what is defined as a dismissal or unfair labour practice in Chapter VIII of the LRA, irrespective of the fact that the review applicant may label it as a legality challenge. Thus, the classification of the dispute as one of an infringement of a Constitutional principle of legality and a challenge being launched on that basis, must be carefully scrutinized, so as to ascertain if it is a dispute capable of resolution under the proper prescribed processes under Chapter VIII of the LRA in the forum properly and specifically designated to deal with such a dispute. As said by Ngcobo J in *Chirwa*:

“... It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute

¹¹ [2018] 4 BLLR 355 (LC); (2018) 39 ILJ 1096 (LC).

¹² At para 39.

under the LRA as a constitutional issue under the provisions of s 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute-resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case 'for practical considerations'. What is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.'

- [45] While it is trite that the jurisdiction of the Labour Court is determined by the pleaded case and that this court has jurisdiction to entertain an attack on the legality of an action of an employer, this does not mean that it must do so. As stated in *Aucamp v SA Revenue Service*¹³:

"... it is the duty of the Labour Court to determine the true nature of the issue in dispute between the parties before court, no matter how an applicant may choose to label or describe the dispute. The court is not bound by the description of the dispute as may be articulated by an applicant. ...'

- [46] Aside from the alleged violation of s 54A(8) of the Systems Act, discussed above, I was pointed to no specific contractual provisions that the applicant alleges were breached and which he asks this court to enforce. Everything about his challenge sits foursquare within ordinary dismissal law. The character of his challenge to his employer's actions is about its soundness of reason and fairness of procedure. The cause of action is a termination of a contract without notice and the relief sought is also proper to dismissal disputes. I am thus of the view that this matter is truly a dismissal matter.

- [47] Having found that this dispute is in truth a dismissal matter which, as case law suggests, should ordinarily be processed as set out in section 191 of the LRA,

¹³ (2014) 35 ILJ 1217 (LC) at para 18.

the remaining question to ask is whether exceptional circumstances exist nevertheless justifying the court exercising its discretion to hear it, especially as a matter of urgency. Since no such circumstances were substantively pleaded, none are taken into account.

[48] For the reasons set out above, I therefore dismiss the application.

[49] In the premises I make the following order:

Order:

1. The application is dismissed.
2. Each party to pay their own costs.

B Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv N.A. Cassim SC with T. Govender

Instructed by: Tshiqi Zebediela Attorneys

For the Fifth Respondent: Adv V. Soni SC

Instructed by: State Attorney, Johannesburg

LABOUR COURT