IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 1561/19

In the matter between:

EHLANZENI DISTRICT MUNICIPALITY **First Applicant**

MUNICIPAL MANAGER *N. O*: EHLANZENI DISTRICT MUNICIPALITY **Second Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

L.N NGOMANE & 95 OTHERS **Second Respondents**

Heard: **7 August 2019**

Delivered: **6 September 2019**

JUDGMENT

TLHOTLHALEMAJE, J

[1] The applicants, (Ehlanzeni District Municipality (the Municipality) and its Municipal Manager) approached this Court on an urgent basis for an order staying the enrolment of arbitration hearings in respect of disputes referred to the first respondent (SALGBC) by the third respondents (The Employees), pertaining to an unfair labour practice dispute and the interpretation and/or application of the collective agreement pending the finalization of the review application filed in this Court under case number JR 1221/19.

[2] The Municipality contends that the arbitration proceedings pending before the SALGBC, ought to be stayed pending review proceedings on the grounds that a preliminary ruling issued by Arbitrator (ZG Mpungose) on 27 May 2019 under the auspices of the SALGBC, in terms of which it was found that the SALGBC had jurisdiction to arbitrate the dispute was incorrect, particularly in circumstances where the unfair labour practice dispute referral was neither served on it nor filed with the SALGBC.

[3] The Employees opposed the application on two grounds *viz* that the application lacks the prerequisite urgency in order for it to be heard as such, and further that it is not just and equitable to review and set aside the jurisdictional ruling before the merits of the dispute were disposed of through an arbitration hearing.

[4] The background facts to this application, and to the extent that they are not controversial are summarised as follows:

4.1. The Employees are currently in the employ of the Municipality in various levels of lower management (levels 2 and 3). In 1998, the Municipality introduced a motor vehicle allowance scheme for employees at salary levels 3 and above (management positions) for the acquisition of motor vehicles. In terms of the 1998 scheme, the financial assistance was linked to the employee's annual remuneration and was premised on the *AA guiding tables*.

4.2. In 2007, the Municipality adopted the Motor Vehicle Allowance Scheme (2007), in terms of which *inter alia,* its employees on salary level 2 and 3 would receive a fixed monthly motor vehicle allowance calculated at their annual remuneration.

4.3. The Employees contend that the formula for calculating the allowance has not been updated since 2001, and the effect thereof is that other employees on a lower salary level have caught up with them, as they had reached the ceiling in respect of the formula used to calculate the allowance. They further alleged that they have not received an increase on the allowance over a prolonged period.

4.4. The Employees' case is further that a meeting was convened on 11 February 2013 which was attended by them, the Municipality, and SALGBC to discuss the effect of the non-adjustment of the allowances in respect of all the employees on salary level 2 and 3, in view of them having reached the ceiling. In that meeting the SALGBC had formed a view that all affected employees were entitled to an increase of the allowance when taking into account the provisions of clauses 3.1 and 3.2 of the Motor Vehicle Allowance Scheme, 2007[1][2] read with clause 6.6[3] of the Collective Agreement, 2012.

4.5. In the light of the views expressed by the SALGBC on the adjustments, a report was tabled in a Council meeting held on 29 May 2013. The report had recommended an increase to R16 071.96 and R13 999.20 for salary levels 2 and 3 respectively. The Council according to the Employees resolved to increase the allowance to only R12 000 and R11 000 for employees on salary level 2 and 3 respectively due to its financial constraints.

4.6. On 24 October 2014, the Council after the recommendations made on behalf of the mayoral committee resolved to amend clause 3.1 of the Motor Vehicle Allowance Scheme, 2007[4], the effect of which was that

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[1] **Clause 3** ...the following policy be adopted in respect of the participation in the motor vehicle and allowance scheme.

3.1 That with the exception of Section 57 Managers, Management positions from level 3 upwards received a fixed monthly allowance calculated on the annual basic salary of these respective positions and that the maximum amount of the allowance be equal to the figure indicated on the table in point 3.5 below.

3.5 That it be noted that the travelling allowance for qualifying staff members is determined and in line with SALGBC guidelines.

[2] The South African Local Government Bargaining Council (SALGBC) salary and Wage Collective agreement 2012/2013

Linked Benefits and Conditions of Service

6.6 Any benefits or conditions of service that ordinarily increases by virtue of its links to the increase in the salary of an employee, shall increase by the same rate as the salary increase in each financial year, as set out above, subject to the special provisions relating to the increase of the maximum employer contribution to medical schemes as set out in clause 8 below.

[4] **AMENDMENT OF THE MOTOR VEHICLE ALLOWANCE SCHEME OF COUNCIL**

1. That section 3.1 of the Motor Vehicle Scheme be amended to read as follows:

1.1 That with the exception of section 57 managers' Management positions from post level 3 upwards received a fixed monthly allowance calculated on the annual basic salary of these respective position but must not be linked to the basic salary and that the maximum amounts of the allowance be equal to the figure indicated on the table 3.5.

the Employees, like section 57 employees, would be excluded from the scheme.

4.7. On 25 February 2019, the Independent Municipal Workers Union (IMATU) and the South African Municipal Workers Union (SAMWU) addressed correspondence to the Municipality, indicating their intention to refer the dispute to SALGBC for resolution.

4.8. In correspondence dated 9 April 2019, the Employees indicated their intention to refer an interpretation and/or application dispute in respect of the salary and wage collective agreement. A similar letter dated 15 April 2019 was also addressed to the Municipal Manager indicating the Employees' intention to refer a further unfair labour practice dispute to the SALGBC in respect of the Municipality's failure to implement the collective agreement. The letter was accompanied by a referral form in terms of which the nature of dispute was classified as 'unfair labour practice'.

4.9. The Employees' case is that both disputes were referred to the SALGBC on 9 April 2019 and 15 April 2019 respectively, and that the SALGBC had consolidated the disputes under case number HQ041903. The Employees had further in support of their case, produced documents signed by a Municipality official, which they contend was proof that both referrals were served on the Municipality. These documents were presented at the hearing of preliminary points as shall be dealt with later below.

4.10. On 3 May 2019, the SALGBC issued a notice of conciliation. The nature of the dispute set down for conciliation on 17 May 2019 related to interpretation/application of a collective agreement.

4.11. At conciliation proceedings, the applicants had raised preliminary points challenging the jurisdiction of the SALGBC. As can be gleaned from the submissions made to the Arbitrator in this regard[5], central to

[5] Annexure 'FA5" to the Founding Affidavit

the jurisdictional challenge was that the Employees were bound by the Main Collective Agreement and ought to have followed the Grievance Procedure set out therein by completing grievance forms. It was contended that to the extent that the Employees had not done so, the referral of the alleged unfair labour practice dispute was premature.

4.12. Following the hearing of arguments on the preliminary points raised, the Arbitrator had issued a ruling in terms of which it was concluded that the SALGBC had jurisdiction to determine the disputes. In the ruling, the Arbitrator had commented that the dispute before the SALGBC was enrolled for the conciliation of the interpretation and/or application dispute. It however became apparent at those proceedings that the Employees had further referred an unfair labour practice dispute on the same set of facts.

4.13. The Arbitrator accepted that the Employees did not refer any dispute in regards to interpretation/application of the Collective Agreement to the grievance procedure despite protracted discussions between the parties over the matter, and further that the referral in that regard was premature.

4.14. In regards to the unfair labour practice dispute, the Arbitrator accepted that there were various engagements between the parties over the same issues prior to the referral and accordingly, the SALGBC had jurisdiction to determine the dispute.

4.15. The Arbitrator did not issue a certificate of outcome at the time the ruling was issued. On 4 June 2019 the SALGBC issued notices of conciliation proceedings set down for 2 July 2019 in respect of a dispute pertaining to interpretation/application of a collective agreement.

4.16. On 10 June 2019, the applicant served and filed an application to review and set aside the Arbitrator' ruling.

4.17. Conciliation proceedings scheduled for 2 July 2019 were unsuccessful and a certificate of non-resolution was issued on the same date.

[5] Central to the applicants' case in seeking the Court's urgent intervention is that it was anticipated that the dispute in respect of the unfair labour practice would be enrolled for arbitration within 21 days [from the date of the jurisdictional ruling] which would result in irreparable harm should urgent relief not be granted. It was further submitted that the yet to be set down arbitration proceedings would confer jurisdiction on the disputes referred to the SALGBC in circumstances were there are pending review proceedings which seek to demonstrate that it lacked such jurisdiction. The applicants argue that approaching the Court on an urgent basis is the only remedy available to them.

[6] The principles applicable to urgent proceedings are trite. Emanating from the provisions of Rule 8 of the Rules of this Court, and as further supplemented by paragraph 12. 11 of the Court's Practice Manual, the Court will decline to grant an order for the enrolment of the application as an urgent application and/or for the dispensing of the forms and services provided for in the Rules if the facts and circumstances set out in the applicant's affidavits do not constitute sufficient urgency for the application to be brought on an urgent basis and/or justify the abrogation or curtailment of the time periods referred to in the Rule 6(5).

[7] It has also been repeatedly stated in this Court that it is only once an applicant has persuaded the Court that sufficient grounds exist which necessitate a relaxation of the rules and ordinary practice, that the Court would proceed to consider a matter as one of urgency. The extent to which the court will allow parties to dispense with the rules relating to time periods will depend on the degree of urgency in the matter.[6]

[8] In this case, the impugned ruling sought to be reviewed was issued on 27 May 2019. At that stage, it can safely be said that the Applicants were

[6] *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd* (2007) 28 ILJ 2796 (LC) at paragraph 12

aware of the consequences of that ruling. On its own version, it had anticipated that the arbitration proceedings would proceed within 21 days from the ruling conferring jurisdiction.

[9] The Notice of Motion and Founding Affidavit in respect of the review application under case number JR1221/19 were served and delivered on or about 10 June 2019. The applicant however approached this Court for its urgent intervention on 10 July 2019, some six weeks since the ruling was issued. As at the hearing of this application, the SALGBC had not set down the dispute before it for arbitration, nor was there any indication as to when the matters would be set down. Be that as it may, the averments made in regards to the urgency of the matter only relate to concerns about the financial implications should the matters be set down for arbitration before the SALGBC. It is not clear as to what fruitless and wasteful expenditure is referred to should the matters be set down. Be that as it may, no attempt was made whatsoever as to the reason it took the applicant about six weeks from the date of the ruling to approach the Court on an urgent basis.

[10] A concern surrounding fruitless and wasteful expenditure, with no particulars in that regard pointed out, cannot by all accounts trump the Employees' rights to have their disputes properly and expeditiously determined before the SALGBC. Furthermore, as was correctly pointed out on behalf of the Employees, it is indeed ironic for the applicants to raise issues surrounding fruitless and wasteful expenditure in regards to defending these matters at the SALGBC, in circumstances where counsel and two attorneys were engaged by the applicants for the purposes of the hearing of preliminary points at the SALGBC, and where in subsequent conciliation proceedings, the applicants were yet again represented by an attorney.

[11] In the end, no case had been made out to justify why this matter should be on this Court's urgent roll. On the contrary, given the timeline set out above in this judgment since the ruling was issued, at most it should be concluded that the urgency claimed in this case is self-created and consequently, the matter ought to be struck off the roll.

[12] Removing the matter from the roll however only implies that it will find its way back onto the ordinary motion roll. In my view and based on the facts of this case and what is pleaded, the matter ought to be disposed of on its merits.

[13] To the extent that the applicants seek interim relief, the requirements to obtain such relief are well-known. Thus, the applicants must establish a *prima facie* right (although open to some doubt) to the final relief that will be sought in due course; an apprehension of irreparable harm, if the application is not granted and an applicant ultimately establishes a valid claim; that the balance of convenience favours the applicants; and that there is no other satisfactory remedy.

[14] In the founding affidavit, none of these requirements are addressed with any particularity, other than the issue of urgency and 'prejudice'. Only in the written heads of argument were these requirements addressed. The heads of argument are not pleadings, and it is trite that a case ought to be made out in the founding affidavit. It cannot be made out in the replying affidavit nor in the heads of argument.[7]

[15] The grounds upon which the stay of arbitration proceedings is sought by the applicants are essentially based on the provisions of Clause 13 of the SALGBC Constitution, which requires any party to refer a dispute to arbitration. To this end, it was submitted that since the jurisdictional ruling was issued, the Arbitrator nonetheless failed to direct the next process, resulting in the dispute surrounding interpretation/application of a collective agreement being set down for conciliation for the second time and the issuance of a certificate of outcome.

[16] It is not clear from the above grounds as to what *prima facie* right the applicants rely on. To the extent that reliance is placed on the SALGBC Constitution, these provisions insofar as they provide a process for referring disputes, are indeed secondary to the statutory requirements prescribed in

[7] See Herbstein & Van Winsen - The Practice of the High Courts of South Africa - Fifth Edition Volume 1 at pages 439 - 440

section 191 of the Labour Relations Act (LRA)[8] insofar as a referral of disputes is concerned.

[17] The jurisdictional ruling having been issued, there was clearly nothing wrong with the SALGBC having re-scheduled the matter for conciliation as the certificate of outcome had not been issued nor the dispute conciliated. It did not require of the Arbitrator who issued the jurisdictional ruling to indicate therein what the next process was, as the Employees were *dominus litis* in the matter.

[18] The applicants in the heads of argument made reference to the provisions of section 158 (1B) of the LRA which states that;

> "The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined."

[19] There are clearly cogent reasons behind the above provisions. Central to their purpose is to ensure the expeditious resolution of disputes at the CCMA or Bargaining Councils as the LRA requires, and to further ensure that those processes are not a stop/start affair as a consequence of each and every ruling made by Commissioners being taken on review, especially on contrived grounds. These provisions were further enacted upon a realisation that review proceedings in this Court take longer than necessary to be finalised.

[20] In interpreting these provisions, it was submitted on behalf of the applicants that should the Court refuse to grant relief, the results would be that the issue in respect of the dispute to be referred to SALGBC for arbitration will be the dispute not served on them and referred to SALGBC without using the prescribed forms in accordance with the parties' collective agreement.

[8] Act 66 of 1995 (as amended)

[21] Certain difficulties arise from the above contentions. From the submissions made before the Arbitrator when hearing the preliminary points at the SALGBC, it has already been pointed out that the basis upon which they challenged the jurisdiction of the SALGBC was that the Employees had not followed the internal grievance procedure as prescribed by the Collective Agreement. The issue of whether the one dispute was referred or not was not even central to the determination of the preliminary point. To this end, I fail to appreciate the persistence with the argument that the Collective agreement was not followed prior to referring the dispute, when discussions surrounding the issues in dispute were the subject of sustained discussions between the applicants, the unions and the Employees.

[22] To the extent that the applicants had not address the requirements of the relief that they seek in the founding papers, it needs to be said that it cannot be argued that any harm apprehended as a consequence of such relief not being granted is reasonable. On the contrary, the Employees' rights to an expedited dispute resolution of their dispute is paramount. Furthermore, it cannot be said that at the end of the arbitration proceedings (whenever they do take place), the applicants would be without a remedy. Depending on the outcome of such proceedings before the SALGBC, the applicants would still have a right to approach the Court for relief in the ordinary course if the need arises. In the end, the balance of convenience clearly does not favour the applicants, and it is more the Employees who stand to be prejudiced if the relief sought is granted, rather than the applicants should such relief be refused. In the end, to grant the relief sought by the applicants would not assist in the expeditious resolution of disputes before the SALGBC.

[23] In the light of the above conclusions, it follows that the applicants have not made out a case for the relief that they seek. Further having had regard to the requirements of law and fairness, I see no reason why the applicants should not be burdened with the costs of this application.

[24] In the premises, the following order is made;

Order:

1. The Applicants' application is dismissed with costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the First and Second Applicant: J. Molapo, instructed by Mohulatsi Attorneys Inc.

For the Second Respondents: T Cooper, Instructed by Döman Weitsz Attorneys