THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1814/19

In the matter between:

MTHOBELI SOLAM KOLISA **First Applicant**

44 OTHER EMPLOYEES OF THE CITY OF

TSHWANE METROPOLITAN MUNICIPALITY **Second to forty fourth Applicant**

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **First Respondent**

MUNICIPAL MANAGER OF THE CITY OF

TSHWANE METROPOLITAN MUNICIPALITY **Second Respondent**

Heard: 3 September 2019

Delivered: 12 September 2019

JUDGMENT

PRINSLOO, J

Background

[1] The First Respondent's (the Municipality) employees can be divided into three tiers, to wit: the first tier being the City Manager and the managers directly accountable to the City Manager (the section 56 managers), the second tier

being the group and divisional heads (the non-section 56 managers) and the third tier being all other employees up to the level of director (the other employees). The total cost to company packages and increases of the section 56 and non-section 56 managers are determined by the Minister for Cooperative Governance and Traditional Affairs (COGTA) whilst the remuneration and service conditions of the other employees are determined by way of negotiations in the South African Local Government Bargaining Council (SALGBC).

[2] The Municipal Systems Amendment Act[1] brought about a change in the categorisation of employees and limited the operation of section 56 of the Municipal Systems Act[2] (MSA) to managers directly accountable to the City Manager. In 2017 a report was submitted to the council with the purpose of proposing a way forward in relation to the positions that were classified as non-section 56 manager positions. The council took certain pertinent resolutions in respect of the aforesaid positions.

[3] On 19 January 2018, the Municipality was re-classified from a category 9 to a category 10 municipality.

[4] On 29 March 2018, a report was submitted to council to seek approval for the implementation of an annual remuneration increase for section 56 managers and for non-section 56 managers. The report differentiated between the two categories. The re-categorisation of the Municipality was also considered and in that regard the differentiation was relevant as the section 56 managers received a higher remuneration, whilst the non-section 56 managers did not as they technically fell within the SALGBC provisions.

[5] The cost to company packages for the section 56 managers were subsequently adjusted in accordance with the packages of a category 10 municipality as promulgated annually by the Minister of COGTA. The section 56 managers received an increase of 18%.

[6] The remuneration packages of the non-section 56 employees were increased by 5% with effect from 1 July 2017.

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[1] Act 7 of 2011.
[2] Act 32 of 2000.

[7] A disparity arose between the section 56 and non-section 56 managers who were all remunerated on a total cost to company salary package and a grievance was lodged as the non-section 56 managers expected their packages to be adjusted in accordance with those of the section 56 managers. As a result, the Municipality recommended that the non-section 56 managers' salary packages be adjusted in line with those of the section 56 managers in a grade 10 municipality. The non-section 56 managers' salary packages had been adjusted accordingly for May, June and July 2019.

[8] On 17 July 2019, SAMWU, on behalf of all its members in the Municipality filed a grievance with the employer. The nature of the grievance was an unfair labour practice in relation to the inconsistent application of remuneration policy in the re-grading of the Municipality from grade 9 to grade 10 in that the Municipality decided to implement salary increases of 18% for non-section 56 managers, excluding all other permanent employees. SAMWU demanded that all permanent employees be treated consistently with the implementation of a salary increase of 18% in line with the re-grading of the Municipality. SAMWU demanded that all salaries be graded and evaluated in line with a grade 10 municipality and that a proper job evaluation be conducted.

[9] When the aforesaid demand was not met, the dispute escalated into a full-scale strike by the third-tier employees who brought the Municipality to a standstill from 29 July 2019. On 29 July 2019 the Municipality obtained an urgent interim interdict from this Court, interdicting and restraining the employees *inter alia,* from blocking or interfering with the traffic flow in the Pretoria CBD.

[10] Notwithstanding the fact that an interdict was obtained, the unprotected strike action continued unabated until the Municipality had signed a settlement agreement during the night of 1 August 2019.

The settlement agreement

[11] It is evident from the settlement agreement that it was signed on 1 August 2019 and that it was entered into between the Municipality, and IMATU and SAMWU acting on behalf of their members.

[12] The parties to the agreement recorded that they had agreed that the implementation of the increase for non-section 56 managers would be suspended until completion of the benchmarking exercise, which the parties agreed that a task team, consisting of representatives of the Municipality, SAMWU and IMATU, would conduct within 60 days of the date of the agreement in order to develop pay scales.

[13] The Municipality further offered to pay a once off *ex gratia* equalization payment to employees, based on their current basic monthly salaries. The unprotected strike action was to be discontinued and the parties committed to restore order and stability within the City of Tshwane.

[14] The Municipality has effected the *ex gratia* payments as per the agreement and the strike action had been called off.

This application

[15] The Applicants approached this Court on an urgent basis for *inter alia,* the following relief:

> ‘ 1. To set aside Clause 1 of the settlement agreement concluded by the Respondents and SAMWU and IMATU on 1 August 2019, suspending the implementation of the salary increase for non-section 56 group heads and divisional heads until completion of the bench marking exercise, pending the institution and finalisation of review proceedings of the Respondents’ decision to suspend the implementation of the salary increases of the Applicants;
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> 2. Directing the Respondents to effect the salary increases of 18% retrospectively from the 26th August 2019 to the Applicants;
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> 3. Directing the Applicants to institute review proceedings within (30) thirty days of this court order against the Respondents’ decision to suspend the implementation of the salary increase in favour of the Applicants;’

[16] The Respondents took issue with urgency. I have considered the submissions made in support and in opposition of urgency and I do not intend to deal with the submissions in any detail as I am inclined to deal with the matter notwithstanding the objections regarding urgency.

Non-joinder

[17] The Respondents raised a point *in limine* regarding the non-joinder of SAMWU, IMATU and the affected employees.

[18] Rule 22 of the Rules of this Court provides for joinder as follows:

> '(1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.
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> (2)(a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.
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> (b) When making an order in terms of paragraph (a), the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs.'

[19] It is trite and in accordance with the provisions of Rule 22 that in order for parties to be joined to particular proceedings, they must have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. The Court may join parties where the right to relief depends on the determination of substantially the same question of law or facts.

[20] *In casu*, the Applicants seek an order to set aside clause 1 of the settlement agreement, pending the institution and finalisation of review proceedings. The Respondents' case is that if the Court were to grant the order, it would effectively suspend the operation of the settlement agreement. The settlement agreement was concluded between the Municipality, and SAMWU and IMATU representing their members, therefore they all have a direct and substantial interest in the outcome of this litigation and should be joined as parties.

[21] In answer to the point taken regarding non-joinder of necessary parties, the Applicant submitted that the setting aside of clause 1 to the settlement agreement would in no way suspend the operation of the settlement agreement due to the fact that clauses 3 – 8 have already been fulfilled and

clause 2 has taken effect in that the task team has met twice already. The setting aside of clause 1 will not affect the continuation of the task team.

[22] The Applicants indicated that upon the institution of the review proceedings, the parties to the settlement agreement would be cited.

[23] There are two critical factors to be considered here, namely; whether the other parties to the settlement agreement have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings and whether the determination of relief depends on substantially the same question of law or facts.

[24] The Applicants approached this Court for an order to set aside clause 1 of the settlement agreement concluded on 1 August 2019, pending the institution and finalisation of review proceedings to be instituted at a future date. The approach adopted by the Applicants in this urgent application is concerning for a number of reasons.

[25] Firstly, the approach is nothing but a piecemeal approach. Litigation in this Court should not be approached or conducted in a piecemeal fashion as it undermines the purpose of the Labour Relations Act[3] (LRA) namely the expeditious and effective resolution of labour disputes. It further not only burdens this Court, with already limited resources, unnecessarily in that the same matter calls for judicial attention on more than one occasion, but it also burdens the respondent parties unnecessarily in opposing an application based on virtually the same set of facts more than once. Piecemeal litigation in this Court is not encouraged and should be avoided where possible.

[26] Secondly, the obvious approach to take was to file an urgent review application, seeking the review of the decision that the Applicants seek to attack as well as the setting aside of clause 1 of the settlement agreement. Mr Ramarumo appearing for the Applicants submitted that this approach was not taken as the Applicants were of the view that a review application would take too long and they were unaware of the possibility that a review application could be brought on an urgent basis. I find this explanation surprising in view of the fact that the Applicants are legally represented and they should have

[3] Act 66 of 1995, as amended.

been advised that a review application of this nature could be brought on an urgent basis, provided that there are grounds to approach the Court on urgent basis.

[27] The piecemeal approach adopted by the Applicants is the main reason behind the non-joinder point *in limine.* In my view there is merit in the Respondents' point *in limine*. On the Applicants' own version, the parties to the settlement agreement, IMATU and SAMWU on behalf of their members, will be cited as parties in the review application. Thus, on the Applicants' own version they are necessary parties in the review.

[28] In my view the parties to the settlement agreement have a direct and substantial legal interest in the matter such as to make them necessary parties to the proceedings. Not only are they parties to the settlement agreement of which the Applicants seek to set aside a clause, but the right to relief that the Applicants claim, will ultimately depend on the determination of substantially the same question of law or facts.

[29] The Applicants' submission that the setting aside of clause 1 of the settlement agreement will not affect or suspend the operation of the entire agreement as the remainder of the settlement agreement had been fulfilled or had taken effect, is without merit. Mr Basson for the Respondents, submitted that clause 1 of the settlement agreement forms the basis of the remainder of the settlement agreement and is not severable therefrom and if clause 1 is set aside, it will affect the entire settlement agreement. The 18% increase paid to the non-section 56 managers was the reason or the trigger for the strike in the first place and the suspension of the implementation thereof, is the main basis of the settlement agreement. The object of entering into the settlement agreement was to discontinue the strike and to restore order and stability within the Municipality. If clause 1 is set aside, it will affect the remainder of the settlement agreement.

[30] Considering the context within which the settlement agreement was concluded as well as considering its terms holistically, I am not convinced that the setting aside of clause 1 will not affect the operation of the entire settlement agreement. That being so, the signatories of the settlement agreement will be affected by the outcome of this application and they have a substantial interest

in the subject matter of this application, therefore they should have been joined as parties to this application.

Costs

[31] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[32] In *Zungu v Premier of Kwa Zulu-Natal and Others*[4] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[33] Mr Ramarumo submitted that the Applicants are entitled to a cost order. Mr Basson, on the other hand submitted that the Respondents are entitled to a cost order as there is no merit in this application and notwithstanding the fact that the Applicants were warned about the points *in limine,* they persisted with this application without joining the necessary parties. In short, both parties seek an order for costs.

[34] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[5]

> .it was emphasized that:'…unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as applicant in launching proceedings or as respondent opposing proceedings.'

[4] (2018) 39 ILJ 523 (CC) at para 24.
[5] (2012) 33 ILJ 2117 (LC) at para p 2119 I-J.

[35] *In casu,* the Applicants failed to join the necessary parties, notwithstanding the indication that they had to do so. The Respondents had to defend an urgent application where the point *in limine* raised is upheld. Fairness dictates that the Respondents cannot be expected to endure enormous costs defending litigation in circumstances where, despite a warning given to the Applicants raising non-joinder and such warning being ignored, caused them to incur costs. This is more so where the costs incurred by the Respondents are paid from taxpayers' money and I can see no reason why the taxpayers should be burdened with the costs in this application.

[36] In my view this is a case where a cost order would be appropriate.

[37] In the premises, I make the following order:

Order:

1. The point *in limine* on non-joinder is upheld;
2. The matter is postponed *sine die;*
3. The Applicants are to pay the Respondents' costs, jointly and severally, the one paying the other to be absolved.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate K Ramarumo

Instructed by: Seabela Attorneys

For the Respondents: Advocate J L Basson

Instructed by: Diale Mogashoa Attorneys