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SOUTH AFRICA / JUDGMENT

## Dipone v Lekwa Local Municipality and Another (J1471/13) [2013] ZALCJHB 143 (19 July 2013) [2013] ZALCJHB 143

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COURT

Labour Court Johannesburg

BEFORE

Steenkamp

CASE / FILE NUMBER

J1471/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1471/13

In the matter between:

RTO DIPONE Applicant and LEKWA LOCAL MUNICIPALITY First Respondent L B TSHABALALA  
Second Respondent

Heard: 16 July 2013

Delivered: 19 July 2013

Summary: Urgent application for declarator and specific performance. Held that applicant not validly appointed in terms of s 56 of Municipal Systems Act and not an employee. Application dismissed with costs.

STEENKAMP J

## Introduction

- [1] This is the third time that these parties appear before this Court. Lagrange J has held that the applicant, Mr RTO Dipone, was not validly appointed as the Chief Financial Officer (CFO) of the first respondent (the Municipality). The applicant brought another urgent application asking this Court to declare that he remained an employee and that his suspension was unlawful. That application was struck from the roll for lack of urgency. The Municipality continued to pay the applicant's salary until June 2013. It has now stopped doing so. The applicant now asks the court to declare that he remains an employee and to order the Municipality to continue paying him.

## Background facts

- [2] The applicant claims that he was employed as the Municipality's CFO from 1 June 2010. In previous proceedings before this Court<sup>1</sup> he claimed that he was so appointed pursuant to ss 56 and 57 of the Local Government: Municipal Systems Act.<sup>2</sup> He now claims that, even if he was not validly appointed in terms of the Systems Act – as Lagrange J had held – he is still an employee and he is still entitled to be paid.
- [3] The applicant applied for the position of chief financial officer while the municipality was under administration as envisaged by section 193(1)(b) of the Constitution. The position was advertised for a fixed term of five years; however, after having interviewed the candidates to apply for the position, the municipality decided to appoint the successful candidate for a period of three years.
- [4] It is not disputed that the administrator, Mr JJ Sindane, sent the applicant a letter on or about 25 May 2010. However, neither

party is in possession of that letter. The applicant's recollection is that the administrator confirmed the following:

- 4.1. he was the successful applicant for the position of CFO;
- 4.2. he would be appointed with effect from 1 June 2010, subject to the municipal Council's approval;
- 4.3. he would be appointed for a term of five years; and
- 4.4. his remuneration package would be R 746 181, 00 per year.

- [5] On 3 June 2010 the Council resolved to appoint the applicant as CFO with effect from 1 June 2010 for a period of three years with the option of renewing the appointment for another period of two years, "if the candidate's performance is satisfactory in terms of the performance contract."

- [6] On 22 June 2010, the administrator sent the applicant a letter confirming the following:

*"The appointment to the said position is with effect from 01 June 2010 and includes:*

- (a) total remuneration package of R 747 181,00 at total cost to the organisation;
- (b) as per section 57 of the Local Government Municipal Systems Act, Act 32 of 2000 an employment contract and performance agreement to be entered into and signed between the administrator and yourself on or before, but not later than 2010-07-31.”

It is common cause that the parties did not sign an employment contract or performance agreement as contemplated. The applicant did sign a draft contract of employment sometime in September 2010; however, the municipality did not sign it, as it did not agree to its terms, in particular the contract period. At a special council meeting on 23 September 2010, the Council noted its earlier resolution that the appointment of the CFO would be for a period of three years, and not five years. The draft contract that the applicant signed, and the terms to which he had agreed, includes the following clauses:

*“The employer hereby employs the employee on a fixed term contract and the employee hereby accepts employment as Chief Financial Officer subject to the terms and conditions contained in this contract and subject to the Local Government Municipal Systems Act 2000, as well as those contained in the Municipal Finance Management Act, 2002, both of which the employer and employee will further refine during the signing of an annual performance agreement.*

The employment of the employee with the employer commences on 1 June 2010, regardless of the date of signing this contract and terminates on 1 June 2015. The employment period may be reduced to comply with section 57(6)(a) of the Municipal Systems Act, 2000, if this becomes necessary, and the employee shall under those circumstances not be entitled to a new contract to cover the period...”

The applicant was suspended in December 2012 pending a disciplinary enquiry. He launched an urgent application on 11 January

2013. That matter came before Lagrange J on 17 January 2013. The municipality argued in a counter application that the applicant was not an employee, alternatively, that he was not an employee as contemplated in sections 56 and 57 of the Systems Act. The applicant – represented by his current attorney – argued that he was appointed under the provisions of the Systems Act. In his founding affidavit he stated under oath: “I commenced my employment with the [municipality] on 1 June 2010 as its Chief Financial Officer, therefore a Manager as referred to in section 56 of the [Systems Act].” In a judgement handed down on 7 February 2013 Lagrange J found that the applicant had not been validly appointed to his position as it was subject to the conclusion of a performance agreement and that condition had not been fulfilled. He also found that there was no consensus on a material term of the contract of employment, i.e. its duration. He declared that the applicant had not been validly appointed as CFO in terms of the Systems Act. The applicant has applied for leave to appeal against that judgement.

On 1 March 2013 the applicant – still represented by its current attorney – argued a second urgent application before

me. That application was struck from the roll for lack of urgency.

Despite the judgement of Lagrange J, the municipality continued paying the applicant until June 2013. It stopped doing so on 26 June

2013. The applicant then brought the current application.

[11] The relief sought by the employee in this application is the following:

11.1. declaring the applicant to remain an employee of the municipality pending the termination of the employment relationship

for a reason recognised in law;

11.2. ordering the municipality to comply with and perform in terms of the applicant's conditions of service and, therefore, to effect payment of the applicant's remuneration for the month of June 2013; and

11.3. ordering the municipality to reinstate the applicant's benefits retrospectively.

[12] The main issue to be decided is, therefore, whether the applicant remains an employee of the municipality despite the

## judgement

of Lagrange J.

### Evaluation / Analysis

Mr Scholtz now argues, contrary to his earlier arguments in the previous appearances of these parties before this court, that the applicant was not appointed in terms of section 56 of the Systems Act; but that he was nevertheless employed as CFO and remains so employed. He now attempts to draw a distinction between the applicant's employment as CFO and an appointment in terms of the Systems Act.

[14] The relevant sections of the Systems Act are the following:

*"56 Appointment of managers directly accountable to municipal managers*

1. (a) A municipal council, after consultation with the municipal manager, must appoint –
  - (i) a manager directly accountable to the municipal manager; or
  - (ii) an acting manager directly accountable to the municipal manager in the circumstances and for a period as prescribed.
- (b) A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications, as prescribed.
- (c) ...

- (2) A decision to appoint a person referred to in subsection (1)(a)(ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if –
  - (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
  - (b) the appointment was otherwise made in contravention of this Act, unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1)(b).

57 Employment contract 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.”

[15] As I have set out above, it is common cause that the parties did not conclude a written employment contract, nor did they conclude a performance agreement. The question remains whether the applicant nevertheless remains employed as the municipality's CFO and is still entitled to that salary.

[16] It is common cause that the only position for which the applicant applied and to which he could have been appointed, is that

of CFO. It is also common cause that the CFO is a manager reporting directly to the municipal manager. It is disingenuous to suggest, as the applicant now does – contrary to his earlier argument before Lagrange J and in his application for leave to appeal against that judgement – that his employment as CFO can be divorced from his appointment in terms of section 56 of the Systems Act.

[17] It also appears clearly from the surrounding circumstances that the applicant's employment as CFO was dependent upon his appointment in terms of section 56 of the Systems Act. The Council resolution of 3 June 2010 makes his employment subject to his performance in terms of a performance agreement. That could only refer to the obligatory performance agreement contemplated by section

57. And in any event, his letter of appointment of 22 June 2010 makes it clear that his employment is subject to an employment contract and performance agreement to be entered into and signed by both parties in terms of section 57 of the Systems Act.

[18] In this application, the applicant seeks an order that the municipality must comply with the terms of his conditions of service.

But the only conditions of service upon which he relies are those contained in the contract of employment on which the parties could not reach consensus. And that contract – to which he considered himself bound – makes it clear that his employment as CFO is subject to sections 56 and 57 of the Systems Act. This court has held that he was not validly appointed in terms of that Act. It must follow that he is, therefore, not validly employed by the municipality as CFO.

[19] The applicant has not established that he has been employed in any position other than that of CFO. That position is an appointment

in terms of section 56 of the Systems Act as a manager directly accountable to the municipal manager. If that appointment is not

valid, as this court has held, he does not remain employed in any other capacity.

[20] Mr Scholtz further relied on the principle of estoppel to argue that the applicant remains employed by the municipality, as the municipality has continued to pay him a salary as an employee until June 2013. But, as the Supreme Court of Appeal held in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*:<sup>3</sup>

*“[F]ailure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires.”*

[21] In this case, the applicant was not validly appointed as CFO. That cannot be remedied by estoppel. And in any event, in terms of section 56(2)(b) of the Systems Act his appointment is null and void, as it was made in contravention of that Act.

#### Costs

[22] The applicant has been unsuccessful before this court on three occasions. He has sought leave to appeal against the judgement of Lagrange J; yet he has come before this court again to argue a proposition contrary to that contained in its application for leave to appeal. He has also not pursued the same question – ie whether he remains an employee – that was argued before this court under case number J 268/13. That matter was struck off the roll in

March 2013 and was not finally decided; yet he did not pursue it. Instead, he brought a third urgent application before this court. The municipality is already under administration. Its ratepayers should not be required to spend further money defending unnecessary litigation.

Order

The application is dismissed with costs.

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Steenkamp J

APPEARANCES APPLICANT: C Scholtz attorney, Potchefstroom. RESPONDENTS: K Tsatsawane  
Instructed by Gildenhuys Malatji Inc, Pretoria.

1Before Lagrange J under case no J20/2013; and before this Court under case no J 268/13.

2Act 32 of 2000 (“the Systems Act”).

3 2008

(3) SA 1 (SCA) para [13].

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