

SOUTH AFRICA / JUDGMENT

IMATU v City of Tshwane Metropolitan Municipality (J2561/01) [2001] ZALC 128; [2001] 12 BLLR 1332 (LC) (17 August 2001) [2001] ZALC 128

COURT
Labour Court

BEFORE
Landman

CASE / FILE NUMBER
J2561/01

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JUDGMENT

J2561/09-mc

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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J2561/01

2001-08-17

In the matter between

IMATU Applicant

and

CITY OF TSHWANE Respondent

METROPOLITAN MUNICIPALITY

J U D G M E N T

LANDMAN J: A number of municipalities surrounding the City of Pretoria were disestablished present to the Local Government Municipal Structure Act 117 of 1998. These disestablished municipalities were incorporated into the City of Tshwane Metropolitan Municipality. Similar disestablishments of other municipalities and incorporations took place across the country. This matter, however, is only concerned with the City of Tshwane Metropolitan Municipality.

In terms of section 14(3) of the Act, read with a notice issued in terms of section 12, an employee of the disestablished municipalities becomes an employee of the Metropolitan Council. However, these employees form part of what is termed an administrative unit. An administrative unit functions until the Metropolitan Council has established a staff structure and has appointed staff to positions on that staff structure. IMATU, representing inter alia employees of the Tshwane Council and which is also a party to the South African Local Government Bargaining Council, together with other trade unions, intended to enter into an agreement at the Bargaining Council with the employer parties, in particular the South African Local Government Association, SALGA. These negotiations were entered into to establish a staff structure and appoint staff to positions on that staff structure. These proposals to set in place a placement policy were tabled in March 2000. These policy structures had been tabled in terms of clause 10 of the Bargaining Council's constitution. The executive council of the Bargaining Council met and resolved on 22 November 2000 that: "The parties submit their respect proposals on placement policy to the general secretary by no later than 31 December 2000. That the general secretary place this issue on the agenda of the next executive committee meeting, scheduled to take place on 25 January 2001. That the general secretary issue a circular to all municipalities indicating that no placement should take place before the issue has gone through the process of first being negotiated and agreement reached between the parties of the SALGBC and that the final negotiated and agreed document be used in the placement process by all municipalities." In its founding affidavit IMATU submits that this resolution places a moratorium on all placements and appointment of staff by the Tshwane Council until the finalisation of a placement policy. SALGA which represents inter alia the Tshwane Council, later alleged that its delegates to the meeting, which took place on 22 November 2000 where the moratorium resolution was passed, were not mandated to bind their principals to such an undertaking. IMATU declared a dispute as a result of SALGA's repudiation of the resolution. This dispute was submitted to arbitration. I was told from the bar that the arbitration has not been concluded, or rather SALGA has withdrawn from the arbitration and the arbitrator has ruled that he could not continue with the arbitration as his instructions had been withdrawn. Review proceedings are contemplated. Returning to the placement policy issue. IMATU tabled its proposals but negotiations have not got under way and IMATU and SAMWU have declared a dispute with SALGA over its failure to conclude a placement policy. This notwithstanding, the Tshwane Council went ahead and passed a resolution approving the development and implementation of an organisational structure for the city of Tshwane. The Tshwane Council caused advertisements to appear in the Sunday press on 10 June 2001. Several posts were advertised. Some of IMATU's members, presumably those who are languishing in the administrative unit would be eligible for appointment and it is alleged that they would be suitable for appointment. A rule nisi was sought and granted in this court on 27 June 2001. The rule nisi

calls upon the respondents to show cause why a final order should not be granted in the following terms: 1.1 Respondent is interdicted from making any permanent appointments to its staff prior to the finalisation of a negotiated placement policy setting out an organisational structure in the manner in which appointments should be made. 1.2 The respondent is ordered to pay the costs of this application. Paragraph 1.1 was made an interim interdict pending the return date. This is the extended return date of the rule nisi to which I referred earlier. In its answering affidavit the Tshwane Council raised five points in limine. Two points have been abandoned. The remaining points relate to:

- (a) The non-joinder of SALGA.
- (c) That there is a material dispute of fact and therefore the matter cannot be decided. And lastly the Labour Court lacks jurisdiction to entertain this matter. These points can be disposed of briefly. As regards the complaint that SALGA has not been joined, it has been submitted by the Tshwane Council that SALGA has a direct interest in this application and should therefore have been joining the proceedings. SALGA is an employer's organisation which inter alia represents the City of Tshwane and that does not make SALGA an interesting party. SALGA is merely the agent of the Tshwane Council and has no interest of its own. If it does have any interest that has not been disclosed in the papers. That point therefore cannot be upheld. Secondly the Tshwane Council alleges that there is a dispute of fact on the papers regarding the issue whether SALGA had a mandate to agree to the moratorium and whether a resolution itself constitutes a moratorium. For reasons which appear later, it is unnecessary for me to resolve these issues on the papers or by referring the matter to oral evidence. The principal complaint of IMATU is that the moratorium resolution has been breached. At least this appears to be its complaint on the founding affidavit and a complaint which was debated in this court. The application for an interdict is founded on this and it is therefore clear that IMATU does not seek relief regarding a matter of mutual interest. At least not on this basis. IMATU seeks a final interdict albeit it one of a limited, but indefinite, duration and the onus of proving that it is entitled to such relief rests on IMATU. On behalf of IMATU it was submitted that it had a clear right to relief. I have already referred to the submission contained in its founding affidavit that the resolution places a moratorium on the hiring of staff by the Tshwane Council. See paragraph 10 of the founding affidavit. In motivating its grounds for arguing this issue, the deponent in the founding affidavit says in paragraph 4 ...(inaudible) placed by the Tshwane Council are in contravention of its statutory obligations and a collective agreement concluded at the Bargaining Council. IMATU's counsel submitted in support of the application that the collective agreement upon which IMATU relies, is the resolution passed at the meeting of the executive committee of the Bargaining Council on 22 November 2000. It was submitted that this resolution constitutes a collective agreement as defined in section 213 of the Labour Relations Act 66 of 1995. It is submitted that it is common cause that the agreement was concluded between registered trade unions on the one hand and registered employer's organisations on the other hand, that it is in writing and though it is not signed, that is not a requirement laid down by the LRA. It is also submitted that even if the resolution is not a

collective agreement it is nevertheless an agreement which is binding on the parties and is enforceable in terms of the Law of Contract. It is further submitted that if there is no collective agreement or other agreement, there is an implied agreement that no appointments will be made prior to the conclusion of a placement policy. The moratorium resolution does not in my opinion constitute a collective agreement as defined in section 2 and 3 of the LRA. The constitution of the Bargaining Council, which is attached to the Tshwane Council's papers, speaks of decisions and resolutions in one breath in clause 5, and collective agreements in clause 10. Clause 10 sets out in considerable detail the process which the parties to the Council must follow in order to arrive at a collective agreement and although there is some uncertainty about the legal nature of collective agreements, it is clear that whatever the true legal position may be, the constitution of the South African Local Government Bargaining Council makes it clear that unlike a consensual contract, a collective agreement comes into being if at least two thirds of the employer representatives have voted in favour of it. Clearly a collective agreement, at least as regards this Bargaining Council, can be validly concluded without the consent of all the parties to the Council. See clause 10.3.8 of the constitution. In *South African Association of Municipal Employees (Pretoria Branch) & Another v Pretoria City Council* 1948 (1) SA 11 (T) at 17 it was said by DOWLING J: "In my opinion, there is no substance in this contention. The representatives of the City Council on the industrial council are in no sense agents with power at common law to bind the City Council by their votes on the industrial council. They are persons with purely statutory functions, and it is only by virtue of the discharge of such functions in manner prescribed by the statute that their votes can affect the City Council." The judgment then goes on to deal with the nature of an Industrial Council agreement, but that is not relevant to this matter. This passage still seems to hold good as regards the constitution of the Bargaining Council. The resolution is therefore, in my opinion not a collective agreement as envisaged by section 213 of the LRA. It is also not a common law agreement with the express or implied. This brings me to the question whether the moratorium resolution is otherwise binding on the parties. The difficulty which I have is that the resolution is patently not that of the Council but that of its executive committee. Clause 7 of the constitution provides for the delegation of powers by the central council or a divisional council to committees as they deem fit. I do not know whether the resolutions of the executive council binds all members of the Council. I am unable to determine its status. The Tshwane Council denies that its representatives had a mandate to bind it at the executive committee meeting. Whether they had or did not have a mandate, is something which I need not decide and indeed I cannot decide on these papers. It does, however, seem to me the Tshwane Council is challenging the right of its representatives to have taken part in the binding resolution on the basis that they are not really mandated. It therefore seems to be common cause between the parties that resolutions of the executive committee are otherwise binding on parties to the Council and their constituents. There remains thus two issues. The first is was there a mandate, regardless of this what does a resolution mean? Is it advisory or is it peremptory? I have mentioned that I need not decide these issues and this is because the parties have agreed to refer their dispute regarding the moratorium resolution

to arbitration. Presumably this arbitration is the sort of arbitration which is contemplated in terms of the Bargaining Council's constitution. It is therefore for the arbitrator to decide the matter and I have already indicated that counsel for IMATU has informed me that SALGA has withdrawn from the arbitration proceedings. This appears to be common cause. The arbitrator has ruled that he is *functus officio* and review proceedings appear to be envisaged and I assume that they have not yet been instituted. I, of course, have no way of assessing the situation. I have no evidence before me which would indicate that this court should grant an interim interdict pending the decision of the review court and finally the arbitration award, if there is to be a continuation of the arbitration. It is competent for a court of law to grant an interdict, pending the outcome of proceedings instituted in another body, such as I would assume, an arbitration tribunal. See *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others*

[1986] ZASCA 6; 1986 (2) SA 663 (A). But this is not the right on which IMATU relies in its application. Indeed it does not seek an interdict preventing the implementation of the staff policy and the recruitment of staff pending the outcome of the arbitration and review proceedings I turn now to the last and most important aspect of this case, one which received less attention than the other matters with which I have dealt. IMATU seeks an interdict prohibiting the Tshwane Council from making permanent appointments, pending the finalisation of a negotiated placement policy. It is submitted in the papers, and was submitted by counsel on behalf of IMATU that the law is on their side. Counsel for IMATU referred to section 14(3) of the Local Government Municipal Structures Act 117 of 1998, section 66 of the Local Government Municipal Systems Act 32 of 2000 and also section 67 and 71 of the former Act and the section 12 notice issued in terms of the Local Government Municipal Structures Act. It seems to me that the deciding statute is indeed the delegated legislation which the section 12 notice constitutes. Clause 15 of that notice does not deal with, and therefore does not preclude a metropolitan municipality from hiring staff or transferring staff in the administrative unit to posts in the metropolitan municipality. Clause 16(4) of the notice provides that: "The Council of the Metropolitan Municipality must transfer a person who became an employer of the municipality in terms of sub-clause (1) to a post on the establishment of the municipality, but such person remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before becoming such an employee." The reference to a person in sub-clause (1) is to a person who is an employee of the disestablished municipality on the effective date, who becomes an employee of the metropolitan municipality. These transfers are not made subject to the conclusion of a collective agreement. It appears to me merely that the terms and conditions of employment, particularly while they are awaiting employment in the administrative unit, would govern their terms and conditions of employment. It is furthermore no provision that I can find that precludes the Tshwane Council from recruiting external staff until such time as a collective agreement has been reached with IMATU. It follows that IMATU has not established a clear right to the relief which it is seeking. On the other hand the Tshwane Council has shown cause why the rule

nisi should be discharged. In the circumstances the rule nisi is discharged with costs. ---
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The executive council of the Bargaining Council met and resolved on 22 November 2000 that:

"The parties submit their respect proposals on placement policy to the general secretary by no later than 31 December 2000. That the general secretary place this issue on the agenda of the next executive committee meeting, scheduled to take place on 25 January 2001.

That the general secretary issue a circular to all municipalities indicating that no placement should take place before the issue has gone through the process of first being negotiated and agreement reached between the parties of the SALGBC and that the final negotiated and agreed document be used in the placement process by all municipalities."

In its founding affidavit IMATU submits that this resolution places a moratorium on all placements and appointment of staff by the Tshwane Council until the finalisation of a placement policy.

SALGA which represents inter alia the Tshwane Council, later alleged that its delegates to the meeting, which took place on 22 November 2000 where the moratorium resolution was passed, were not mandated to bind their principals to such an undertaking. IMATU declared a dispute as a result of SALGA's repudiation of the resolution. This dispute was submitted to arbitration. I was told from the bar that the arbitration has not been concluded, or rather SALGA has withdrawn from the arbitration and the arbitrator has ruled that he could not continue with the arbitration as his instructions had been withdrawn. Review proceedings are contemplated.

Returning to the placement policy issue. IMATU tabled its proposals but negotiations have not got under way and IMATU and SAMWU have declared a dispute with SALGA over its failure to conclude a placement policy. This notwithstanding, the Tshwane Council went ahead and passed a resolution approving the development and implementation of an organisational structure for the city of Tshwane.

The Tshwane Council caused advertisements to appear in the Sunday press on 10 June 2001. Several posts were advertised. Some of IMATU's members, presumably those who are languishing in the administrative unit would be eligible for appointment and it is alleged that they would be suitable for appointment.

A rule nisi was sought and granted in this court on 27 June 2001. The rule nisi calls upon the respondents to show cause why a final order should not be granted in the following terms:

1.1 Respondent is interdicted from making any permanent appointments to its staff prior to the finalisation of a negotiated placement policy setting out an organisational structure in the manner in which appointments should be made.

1.2 The respondent is ordered to pay the costs of this application.

Paragraph 1.1 was made an interim interdict pending the return date. This is the extended return date of the rule nisi to which I referred earlier.

In its answering affidavit the Tshwane Council raised five points in limine. Two points have been abandoned. The remaining points relate to:

- (a) The non-joinder of SALGA.
- (c) That there is a material dispute of fact and therefore the matter cannot be decided.

And lastly the Labour Court lacks jurisdiction to entertain this matter.

These points can be disposed of briefly.

As regards the complaint that SALGA has not been joined, it has been submitted by the Tshwane Council that SALGA has a direct interest in this application and should therefore have been joining the proceedings. SALGA is an employer's organisation which inter alia represents the City of Tshwane and that does not make SALGA an interested party. SALGA is merely the agent of the Tshwane Council and has no interest of its own. If it does have any interest that has not been disclosed in the papers. That point therefore cannot be upheld.

Secondly the Tshwane Council alleges that there is a dispute of fact on the papers regarding the issue whether SALGA had a mandate to agree to the moratorium and whether a resolution itself constitutes a moratorium. For reasons which appear later, it is unnecessary for me to resolve these issues on the papers or by referring the matter to oral evidence.

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It is submitted that it is common cause that the agreement was concluded between registered trade unions on the one hand and registered employer's organisations on the other hand, that it is in writing and though it is not signed, that is not a requirement laid down by the LRA.

It is also submitted that even if the resolution is not a collective agreement it is nevertheless an agreement which is binding on the parties and is enforceable in terms of the Law of Contract.

It is further submitted that if there is no collective agreement or other agreement, there is an implied agreement that no appointments will be made prior to the conclusion of a placement policy.

The moratorium resolution does not in my opinion constitute a collective agreement as defined in section 2 and 3 of the LRA. The constitution of the Bargaining Council, which is attached to the Tshwane Council's papers, speaks of decisions and resolutions in one breath in clause 5, and collective agreements in clause 10. Clause 10 sets out in considerable detail the process which the parties to the Council must follow in order to arrive at a collective agreement and although there is some uncertainty about the legal nature of collective agreements, it is clear that whatever the true legal position may be, the constitution of the South African Local Government Bargaining Council makes it clear that unlike a consensual contract, a collective agreement comes into being if at least two thirds of the employer representatives have voted in favour of it. Clearly a collective agreement, at least as regards this Bargaining Council, can be validly concluded without the consent of all the parties to the Council. See clause 10.3.8 of the constitution.

In *South African Association of Municipal Employees (Pretoria Branch) & Another v Pretoria City Council* 1948 (1) SA 11 (T) at 17 it was said by DOWLING J:

"In my opinion, there is no substance in this contention. The representatives of the City Council on the industrial council are in no sense agents with power at common law to bind the City Council by their votes on the industrial council. They are persons with purely statutory functions, and it is only by virtue of the discharge of such functions in manner prescribed by the statute that their votes can affect the City Council."

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This brings me to the question whether the moratorium resolution is otherwise binding on the parties. The difficulty which I have is that the resolution is patently not that of the Council but that of its executive committee. Clause 7 of the constitution provides for the delegation of powers by the central council or a divisional council to committees as they deem fit. I do not know whether the resolutions of the executive council binds all members of the Council. I am unable to determine its status.

The Tshwane Council denies that its representatives had a mandate to bind it at the executive committee meeting. Whether they had or did not have a mandate, is something which I need not decide and indeed I cannot decide on these papers. It does, however, seem to me the Tshwane Council is challenging the right of its representatives to have taken part in the binding resolution on the basis that they are not really mandated. It therefore seems to be common cause between the parties that resolutions of the executive committee are otherwise binding on parties to the Council and their constituents.

There remains thus two issues. The first is was there a mandate, regardless of this what does a resolution mean? Is it advisory or is it peremptory?

I have mentioned that I need not decide these issues and this is because the parties have agreed to refer their dispute regarding the moratorium resolution to arbitration. Presumably this arbitration is the sort of arbitration which is contemplated in terms of the Bargaining Council's constitution. It is therefore for the arbitrator to decide the matter and I have already indicated that counsel for IMATU has informed me that SALGA has withdrawn from the arbitration proceedings. This appears to be common cause. The arbitrator has ruled that he is functus officio and review proceedings appear to be envisaged and I assume that they have not yet been instituted.

I, of course, have no way of assessing the situation. I have no evidence before me which would indicate that this court should grant an interim interdict pending the decision of the review court and finally the arbitration award, if there is to be a continuation of the arbitration.

It is competent for a court of law to grant an interdict, pending the outcome of proceedings instituted in another body, such as I would assume, an arbitration tribunal. See *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others*

[1986] ZASCA 6; 1986 (2) SA 663 (A). But this is not the right on which IMATU relies in its application. Indeed it does not seek an interdict preventing the implementation of the staff policy and the recruitment of staff pending the outcome of the arbitration and review proceedings

I turn now to the last and most important aspect of this case, one which received less attention than the other matters with which I have dealt. IMATU seeks an interdict prohibiting the Tshwane Council from making permanent appointments, pending the finalisation of a negotiated placement policy. It is submitted in the papers, and was submitted by counsel on behalf of IMATU that the law is on their side. Counsel for IMATU referred to section 14(3) of the Local Government Municipal Structures Act 117 of 1998, section 66 of the Local Government Municipal Systems Act 32 of 2000 and also section 67 and 71 of the former Act and the section 12 notice issued in terms of the Local Government Municipal Structures Act.

"The Council of the Metropolitan Municipality must transfer a person who became an employer of the municipality in terms of sub-clause (1) to a post on the establishment of the municipality, but such person remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before becoming such an employee."

The reference to a person in sub-clause (1) is to a person who is an employee of the disestablished municipality on the effective date, who becomes an employee of the metropolitan municipality. These transfers are not made subject to the conclusion of a collective agreement. It appears to me merely that the terms and conditions of employment, particularly while they are awaiting employment in the administrative unit, would govern their terms and conditions of employment.

It is furthermore no provision that I can find that precludes the Tshwane Council from recruiting external staff until such time as a collective agreement has been reached with IMATU. It follows that IMATU has not established a clear right to the relief which it is seeking. On the other hand the Tshwane Council has shown cause why the rule nisi should be discharged.

In the circumstances the rule nisi is discharged with costs.

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