

SOUTH AFRICA / JUDGMENT

Mautitious and Others v Maquassi Hills Local Municipality and Others (J816/2014) [2014] ZALCJHB 171 (12 May 2014) [2014] ZALCJHB 171

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamaje

CASE / FILE NUMBER

J816/2014

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J816/2014

KHAUOE MALOISANE MAUTITIOUS.....First Applicant

MODISADIFE MOTSAMAI DAVID.....Second Applicant

HLONGWANE MPHO ANDREW..... Third Respondent

and

MAQUASSI HILLS LOCAL MUNICIPALITY.....First Respondent

JONAS ITUMELENG RONALD NO.....Second Respondent

MOTALA MOHAMMAD IQBAL NO.....Third Respondent

Heard: 25 April 2014

Delivered: 13 May 2014

TLHOTLHALEMAJE, AJ

INTRODUCTION:

[1] The applicants approached the court on an urgent basis in terms of section 158 (1) (c) of the Labour Relations Act, or alternatively, in terms of section 77 (3) 4 and 77A of the Basic Conditions of Employment Act and sought an order in the following terms:

1.1 “That the Settlement Agreement, dated 17 March 2014 attached to the Applicants’ founding affidavit as Annexure “B”, be made an order of this Honourable Court.

1.2 That the 1st and 2nd Respondent place the Applicants in appropriate positions, in accordance with the aforementioned Settlement Agreement, within 7 days of this order.

[2] The first and second respondents opposed the application, and simultaneously filed a counter application, seeking relief that the Settlement Agreement, dated 17 March 2014, as attached to the Applicants’ founding affidavit be declared to be of no force and effect against the first respondent.

[3] The matter was initially set-down for hearing on 15 April 2014. As per the order issued by the Honourable Lallie J, the matter was postponed by agreement in order to allow the parties to file further pleadings.

BACKGROUND:

The matter under J2009/2012:

[4] It is common cause that on 30 August 2012, the applicants launched an application under case number J2009/2012 in terms of which they sought a declaratory order to the effect that they remain employed by the first respondent with effect from 1 December 2011 in various positions. In the alternative, they sought an order that the purported termination or cancellation of their appointments by the first respondent to be declared invalid, unlawful and of no legal force and effect, and to be set aside. That matter was opposed by the first and second respondents.

[5] The circumstances that led to the matter under case number J2009/2012 are briefly as follows:

The applicants contend that they were appointed in terms of five year contracts in various capacities by the first respondent’s

erstwhile Municipal manager, Mr. M Mapholi with effect from 1 December 2011. They reported for duty on 1 December 2011 in terms of their letters of appointment. The said Mapholi however informed them on or about 6 or 7 December 2011 that they could not be employed in their respective positions as their letters of appointment were not signed, and they received assurances from the office of the Speaker, in which they were to be employed, that this matter was to be resolved soon. They nevertheless continued to present themselves for service until 20

December 2011 when the Speaker's offices closed for the festive season. On 20 January 2012 they reported for duty and approached the second respondent (Jonas), who was then the acting Municipality Manager. The latter informed them that they should stop reporting for duty as they were not properly appointed. He also escorted them off the first respondent's premises. The applicants further contended that they were prevented from rendering their services notwithstanding the fact that the first respondent had passed a Council resolution approving their appointments.

The Settlement Agreement:

- [6] The first respondent was placed under Administration effective from 1 April 2013 pursuant to a Provincial Executive Committee decision to invoke the provisions of section 139 (1) (b) of the Constitution of the Republic of South Africa. In terms of these provisions and with a view of rescuing dysfunctional local municipalities, the North West Provincial Government has assumed all executive powers of the first respondent's Council and administration. The third respondent, Mr Iqbal Motala (Motala) was appointed by the MEC for Local Government and Traditional Affairs as Administrator. The placing of the first respondent under the administration has placed Jonas and Motala on a collision course.
- [7] The applicants contend that during August 2013, Motala had approached their attorney of record with a view of resolving various labour disputes in which their attorneys acted. Various meetings were held between the applicants' attorneys and Motala or his associates from September 2013. Following such meetings, on 17 March 2014, the parties entered into a settlement agreement which recorded the following:

"Whereas the Applicants have brought an application under case number J2000/12 for an order declaring them to remain employed with the Respondent with effect from 1 December 2011, alternatively to have the termination of their services declared invalid, unlawful and of no legal force and effect and therefore set aside.

Whereas the Applicants seek to be reinstated as follows;

1st Applicant in the position as Administrator: Office of the Speaker;

2nd Applicant in the position as CLO: Office of the Speaker; and

3rd Applicant in the position of CLO: Office of the Speaker.

And Whereas (Sic) the Parties wish to settle this matter, the parties therefore agree to the following:

1.

The Respondent will undertake a matching and placing exercise to determine the appropriate placement of the Applicants, which exercise

will be finalised by 28th February 2014.

2.

The Respondent will appoint the Applicants in appropriate vacant positions, which appointment(s) would be subject to the same terms

and conditions as the Applicants' original appointments.

3.

The Applicants will be appointed with effect from 1 April 2014. In the event of the Respondent not being able to place the applicant in appropriate vacant positions by 1st March 2014, the Applicants agree to be placed temporarily in other positions.

4.

Each party shall pay its own costs in respect of the application under case number J209/12.

5.

The Applicants will withdraw this application upon being issued with their appointment letters.

6.

This agreement will be in full and final settlement of the Applicants' application under the above-mentioned case number.

7.

The parties further agree:

7.1 That this agreement may be made an order of the Labour Court;

7.1 That the party in default with reference to the terms of this agreement obliging the aggrieved party to proceed with an application as per paragraph 7.1 herein above, will be liable for the costs of such an application on a scale as between attorney and own client"

[8] The applicants' contention was that the Director of Corporate Services, who was present when the agreement was entered into has since prepared their letters of appointment, but that Jonas has refused to sign those letters[1]. They reported for duty on 1 April 2014, and Jonas informed them that he could not comply with the Settlement Agreement as it might be regarded as fruitless and wasteful expenditure. He further informed the applicants that they should approach their attorneys of record and instruct them to immediately bring an urgent application to make the settlement an order of Court as it would allow him to comply with the agreement, and that they would receive their remuneration retrospectively as soon as the agreement was made an order of court.

[9] In his answering affidavit to this application, Jonas raised a number of issues as to the reason he had refused to implement the settlement agreement, some of which were wholly irrelevant for the purposes of this application. Pertinent to the application were the following:

9.1 Having opposed the application under J2009/12, nothing further occurred, and the applicants had not filed a replying affidavit nor proceeded to set the matter down for adjudication. In essence, the applicants had abandoned pursuing relief in that application.

9.2 He had disputed the legitimacy of the appointment of Motala in numerous respects. In this regard, he had contended that the appointment of Motala by the MEC for Local Government and Traditional Affairs, North west Province as Administrator in terms of section 139 (1) (b) of the Constitution in April 2013 was the product of an improper procedure which contravened the provisions of section 139 of the Constitution. This appointment was therefore irregular.

9.3 Motala had usurped all responsibilities, duties and powers of Council and the Municipal Manager which are provided for in legislation, and had issued a number of notices and letters which do not resort within his authority and powers in terms of his appointment under section 139 of the Constitution.

9.4 Motala had informed him that he was executing his mandate, and that his appointment rendered his (Jonas') insignificant in the management of the first respondent. In this regard, Motala inter alia adopted the view that the first respondent was involved in unnecessary litigation, and that all pending matters and application

should be settled in favour of the applicants and plaintiffs and that settlement agreements should be concluded in that regard.

9.5 Motala's conduct in usurping all his duties and responsibilities was unlawful, and violated the delegation of powers of the Council without following proper procedures. Since Motala's terms of reference were ultra vires, he (Jonas) had approached the North Gauteng High Court under case number: 59078/13 and sought an order inter alia, interdicting him from appointing 56 managers pending an application to review and set aside his appointment.

9.6 Motala did not have authority to conclude the settlement agreement on behalf of the first respondent, and Jonas sought an order that the agreement be declared to be of no force and effect against the first respondent.

THE ARGUMENTS AND DISCUSSION:

(i) The appointment of the third respondent:

[10] Following the postponement of the matter on 15 April 2014, and with the leave of this court, the applicants filed a replying affidavit in which they had pointed out that the tenure of Motala as Administrator has since been extended by the Executive Council of the North West Provincial Government for a further six months until the end of September 2014. Motala had filed a confirmatory affidavit in this regard. To this end, any dispute surrounding whether Motala still remains an Administrator is laid to rest.

(ii) Locus standi: Jonas' mandate and that of Phambane Mokone INC to represent the first respondent:

[11] The mandate of Jonas to oppose this application and his appointment of attorneys Phambane Mokone Inc to act on behalf of the first respondent was placed in dispute. In this regard, the applicants filed a Notice in terms of Rule 11 of the Rules of this Court read with Rule 7 of the Uniform Rules of the High Court, in terms of which; (a) the attorneys of the first respondent were requested to file and serve a power of attorney, which power is to indicate their authority to act on behalf of the first respondent in this application and in which capacity, the first or Jonas. (b) In the event that the first respondent and Jonas were represented on the instruction of the latter in this application, a copy of the resolution by the first respondent in terms of which Jonas was authorised to oppose this application and whereby the attorneys are mandated to execute the opposition to this application.

(c) In the absence of a resolution as required, a copy of a power of attorney signed by any party by virtue of delegated power.

[12] The concerns surrounding mandate of Jonas emanate from two previous judgments issued by this court. In this regard, it was contended that in a matter heard under case number J1362/12 before this court, the Honourable Acting Justice Gaibie made an ex tempore ruling to the effect that Jonas de facto acting as the first respondent's Municipal Manager was unlawful and that he lacked authority to depose to an affidavit on behalf of the first respondent. That matter dealt with the period when Jonas was the acting Municipal Manager, and is not relevant for the purpose of this application.

[13] The applicants further relied on the judgment of the Honourable Acting Justice Kumalo issued under case number J2931/12 who had found that Jonas' subsequent appointment as Municipal Manager was null and void ab initio. In making this finding, the Honourable Kumalo AJ held the following in regards to the purported appointment of the second respondent as Municipality Manager;

'Section 54A(3) determines the following:

"(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipality 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.” [2]

And

The purpose of advertising the post is to attract a pool of candidates from far and wide so as to select a suitable person who complies with the prescribed requirements as set out in section 54A(4)(a)(b), *supra*. [3]

Even the agenda of the disputed council meeting of 14 August 2012 does not contain a curriculum vitae of R.I. Jonas or of any other candidates for that matter nor do the minutes of that meeting reflect any discussion about his ‘...his prescribed skills, expertise, competencies or qualifications; as required under section 54A(3)(a) of the Act.

Accordingly, in terms of sub-sections (3)(a) of the Act the decision to appoint him is null and void, *ab initio* [4].

[14] In a different matter involving the first respondents and Jonas under Case no J1472/13, the Honourable Steenkamp J had in considering a cost order, referred to the ruling of the Gaibie AJ and the judgment of Kumalo AJ. Steenkamp J had ordered that Jonas, and the current attorneys purportedly acting on his and the first respondent’s behalf, to pay the applicant’s costs in that matter, *de bonis propriis* on an attorney and client scale, jointly and severally, the one paying, the other to be absolved.

[15] In this case, Jonas contended that he had the necessary authority to oppose this application, having relied on the disputed fact that the appointment had expired. This argument lost steam when it became clear that the appointment of Motala was extended. Jonas then relied on what he deemed to be common cause fact that he was indeed the Municipal Manager. This was notwithstanding the finding of Kumalo AJ under case number J2931/12 .

[16] On the date of the hearing of this application Jonas had filed a special powers of attorneys. This was notwithstanding the fact that on 27 May 2013, Motala had sent correspondence to Phambane Mokone INC that henceforth, further instructions in pending matters and instructions in new matters shall be given by him to the exclusion of all officials in the employ of the first respondent including Jonas. It is clear that such instructions and the purported powers of attorney are in direct conflict with Motala’s instructions of 27 May 2013. In the light of this specific instruction from the Motala, who had executive authority, and further in the light of the conclusions reached by Kumalo AJ in the matter under Case no: J2931/12, I fail to appreciate how the Jonas can still insist that he has authority to oppose this application.

[17] Jonas’ contentions in paragraph 2.7.3 of his supplementary affidavit to the effect that he and the first respondent have

intended to file an appeal against the judgment of Kumalo AJ is hardly small comfort. Whilst it is correct that the judgment did not make an order to the effect that his appointment was reviewed or set aside, that issue was not one, which Kumalo AJ had to decide. However, in determining a

different issue, Kumalo AJ had made that finding in respect of Jonas' purported appointment. In my view, the fact that Jonas remains a Municipal Manager despite his appointment being declared null and void, implies that whatever authority he has and any action he has taken purportedly on behalf of the first respondent remains a nullity. The fact that the first respondent has not invoked the provisions of section 56 (6) of the Municipal Systems Act to invalidate his appointment is neither here nor there.

[18] Even if it were to be accepted that Jonas occupies the position of Municipal Manager legitimately, there is still the matter of the specific instructions issued by Motala on 27 May 2013 to Phambane Mokone Inc. Jonas in his supplementary replying affidavit made no attempts to address this instruction. It follows from this instruction that no other person other than Motala, acting within his mandate, could instruct attorneys in any pending or future matters involving the first respondent.

[19] It is apparent that Jonas refuses or fails to appreciate or accept Motala's executive authority in regards to many matters,

including the instruction of attorneys to handle litigation on behalf of the first respondent. In the light of the above conclusions, it follows that any purported powers Jonas had exercised on behalf of the first respondent, including the appointment of attorneys Phambane Mokone Inc as per his "Special Power of Attorney" equally becomes invalid. To this end, it is concluded that in opposing this application, Jonas, duly assisted by Phambane Mokone Inc, was on a frolic of his own.

Other applications/affidavits:

[20] A further application to strike out parts of Jonas' answering affidavit was made by the applicants. However, in the light of the pertinent issues to be determined by the court, this application was not pursued with any vigour, and in any event, in the light of the above conclusions, that application became moot.

[21] Also on the date of the hearing, Motala filed a 'confirmatory/supplementary/opposing affidavit'. There was vehement opposition to the admission of this affidavit by Adv. Ncongwana on behalf of Jonas and for obvious reasons. A ruling was then issued to exclude that affidavit. As that ruling was made on record, it stands.

URGENCY:

[22] Having disposed of the above issues, the only issue for determination is whether this application should be treated as urgent. In considering this issue, it is accepted that Motala had the necessary authority to conclude the settlement agreement which the applicants seek to make an order of court. This authority stems from the terms of reference for the section 139 of the Constitution interventions in the first respondent[5]. In terms of the letter confirming the appointment of the Administrator addressed to the Speaker of the first respondent[6], the first respondent was inter alia, requested and advised to cooperate with the Administrator to be appointed to execute all executive obligations and functions of the

council. The Administrator was to be supported by a team of experts to ensure the successful implementation of the intervention.

Pertinent to this application are the following provisions in the terms of reference:

Maquassi Hills LM (Entire Administration)

Manage the overall administration.

Attend to labour matters in the municipality [outstanding disciplinary cases, labour disputes, functionality of LLF, instill culture of work and discipline of workers.]

(c) LEGAL EXPERT:

To provide legal advice on:

All legal related matters of the municipality [litigations, court orders, disciplinary cases etc].

Status of disciplinary processes [number of cases, status of suspensions etc].

[23] It is further accepted that the court has the requisite jurisdiction in terms of section 158 (1) (c) of the Labour Relations Act to determine the application before it. In this regard, the court is empowered to make any settlement agreement an order of this court. In the alternative, the nature of dispute brought before the court is determinable under the provisions of section 77 (3) and (4) of the Basic Conditions of Employment Act.

[24] The well-known legal requirements to be satisfied in order to succeed in an urgent application are as follows: (a) the applicant has to either show a clear right or a prima facie right in the case of interim relief; (b) a well-grounded apprehension of irreparable harm if the relief is not granted on an urgent basis,

(c) that the balance of convenience favours the granting of the relief on an urgent basis; and (d) that the applicant has no other satisfactory relief[7].

[25] An applicant instituting an urgent application must justify the necessity to circumvent the ordinary time periods set out in the rules of this Court. This much can be gleaned from Rule 8 of the Rules of this Court which provides that:-

“(2) The affidavit in support of the application must also contain-

(a) the reasons for urgency and why urgent relief is necessary;

(b) the reasons why the requirements of the rules were not complied with, if that is the case ...”

[26] Whether a matter is urgent involves two considerations. The first is whether the reasons that makes the matter urgent, have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. Thus, the applicant must satisfy the court that if the matter is not treated as one of urgency, something drastic is likely to happen[8]. Amongst the fundamental principles relating to urgency is that when an application is brought on that basis, the institution of the proceedings should take place as

soon as reasonably possible after the cause thereof has arisen.

- [27] In this case, the settlement agreement was entered into on 17 March 2014, in terms of which they were to report for duty on 1 April 2014. They were prevented by the second respondent from rendering their services contrary to the provisions of the settlement agreement on that day. The following day on 2 April 2014 they approached their attorneys of record in order to launch this application. I am satisfied that the applicants acted in due haste in approaching the court.
- [28] From the terms of the settlement agreement as stated elsewhere in this judgment, it can be concluded that the parties always intended to resolve the dispute under J2009/12, and in the absence of a contrary view held by Motala, I am satisfied that the intention was always to ensure that the terms of that agreement were complied with. To the extent that the applicants were supposed to commence their duties on 1 April 2014, and only to be so prevented by Jonas who had no authority to do so, it is accepted that the application is indeed urgent, taking into account that the applicants, by virtue of the provisions of that agreement, are entitled to be gainfully employed.
- [29] It is further accepted that applications of this nature ordinarily join the litigation queue. However, Motala as part of his mandate, had intended to deal expeditiously with pending matters involving the first respondent, and it is not for this court to frustrate his efforts in that regard. To have placed this application on the ordinary roll when it was the intention of the parties to expeditiously resolve the dispute under J2009/12 would not make any sense.
- [30] It is also accepted that the applicants may suffer irreparable harm if they are not immediately placed in the first respondent in terms of the provisions of the settlement agreement, as these positions may be filled. Furthermore, the applicants' clear right to the remedy they seek arise from the provisions of the agreement itself. The provisions of this agreement being valid and sanctioned by a person with executive powers, should thus be implemented with immediate effect.

Costs:

- [31] Clause 7.2 of the settlement agreement provided;

'That the party in default with reference to the terms of this agreement obliging the aggrieved party to proceed with an application as per paragraph 7.1 herein above, will be liable for the costs of such an application on a scale as between attorney and own client'

It cannot be doubted that the first respondent, being duly represented by Motala had always intended to comply with the provisions of the settlement agreement. Those endeavours were frustrated by Jonas, who had no right or powers to do so, and who as already indicated, was acting on a frolic of his own.

[32] This case represents a sorry saga that is not nearing an end, and which involves the first respondent. This is apparent from the matters dealt with previously by the Honourable Acting Justices Gaibie and Kumalo, and also by Steenkamp J. The latter had even commented that the litigation that the first respondent was involved in, which involved Jonas was mostly at the expense of the ratepayers of Maquassi Hills. One would have hoped that the cost orders made by Kumalo AJ and Steenkamp J would have made Jonas take stock and relent, but this was not to be. The settlement agreement being valid, the long-suffering ratepayers of Maquassi Hills cannot be expected to pay legal costs that were in the first place, incurred purportedly on their behalf by an individual who is on a crusade of his own.

[33] Steenkamp J in a matter before him, commented that:

‘This is a case where the municipal manager’s conduct warrants a costs order against him in his personal capacity on a punitive scale.’

I have no hesitation in coming to the same conclusion in this matter in that there is clearly no justification for Jonas’ conduct of frustrating the implementation of the provisions of the settlement agreement validly entered into and sanctioned by Motala. As that agreement provided for liability for costs on a scale as between attorney and own client, considerations of law and fairness dictate that such costs should be borne by Jonas.

ORDER:

- a) The settlement agreement dated 17 March 2014 is herein made an order of this Court.
- b) The second respondent, Jonas Itumeleng Ronald is ordered in his personal capacity, to pay the costs of this application, on a scale as between attorney and own client.

Tlhotlhlalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: Mr. WP Scholtz of Scholtz Attorneys

For the First and Second Respondents: Adv. T Ncgwongane SC with

Adv. M Makgato

Instructed by: Phambane Mokone Inc

[1] Annexures ‘B1’, ‘B2’ and ‘B3’ to the founding affidavit.

[2] [at para 55]

[3] [at para 55.1]

[4] [at para 55.2]

[5] Pages 125 – 131 of the common bundle.

[6] Page 123 of common bundle

[7] See inter alia, *Jonker v Wireless Payment Systems CC*

(2010) 31 ILJ 381 and *LF Boshoff Investment (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F. ; *CB Prest, Law and Practice of Interdicts*, Juta 1996, page 57

[8] *Vermaak v Taung Local Municipality* (JR315/13) [2013] ZALCJHB 43 (12 March 2013) at para 12.

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