

SOUTH AFRICA / JUDGMENT

Nzimande and Another v Newcastle Municipality (DA1/2022) [2024] ZALAC 34; [2024] 11 BLLR 1120 (LAC) (10 July 2024)

[2024] ZALAC 34

COURT

Labour Appeal Court

BEFORE

Van Niekerk JA, Nkutha-Nkontwana JA, Govindjee AJA

CASE / FILE NUMBER

DA1/2022

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THE LABOUR APPEAL

COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case

No: DA1/2022

In

the matter between:

R S
NZIMANDE
First Appellant
M O
SHOZI
Second Appellant
and
NEWCASTLE
MUNICIPALITY
Respondent

Heard:

23 May 2024

Delivered:

10 July 2024

Coram:

Van Niekerk JA, Nkutha-Nkontwana JA, Govindjee AJA

JUDGMENT

Govindjee, AJA

Background

- [1] This appeal considers the legality of a municipal manager's decision to extend the fixed-term employment contracts of the appellants contrary to a municipal council resolution. The appellants were both employed by the respondent (Municipality) as managers. Both entered into five-year fixed-term contracts that were due to expire towards the end of 2018. [1] The agreed terms included that neither appellant would have any expectation of renewal of their contracts beyond the initial five-year period.
- [2] On 11 October 2017, the Newcastle Municipal Council (Council) resolved that all fixed-term contracts that were due to expire in 2018 and 2019 for managers and directors would indeed terminate at the end of the fixed term (the resolution). The resolution added that the affected positions were to be re-advertised on a permanent basis at least three months prior to the expiry of the contracts.
- [3] The appellants both received correspondence confirming the termination of their contracts in accordance with the resolution.[2] In respect of the first appellant (Mr Nzimande), a certificate of service was issued by the Municipality confirming his period of service, last position held and salary at the time of the termination of his contract. Mr Nzimande's last day of service was 31 October 2018. On that day, the municipal manager at the time (Mr Mswane) decided to extend Mr Nzimande's contract for a period of six months, ostensibly because there were two vacant positions in that particular unit, and to enable the department to prepare for the recruitment process. Mr Mswane withdrew that decision by way of a memorandum dated 30 November 2018 and informed Mr Nzimande that his previous fixed-term contract had been extended for a further period of five years. Mr Mswane and Mr Nzimande both signed an addendum giving effect to this arrangement.
- [4] The second appellant (Mr Shoji) was treated similarly and also entered into a written agreement with the Municipality, represented by Mr Mswane, purporting to extend his fixed-term contract of employment for a five-year period.
- [5] Mr Mswane was suspended on 13 December 2018 pending an investigation into his conduct. The acting municipal manager informed the appellants that their appointments were unauthorised and that they were to vacate their positions immediately. The appellants subsequently referred a dispute to the South African Local Government Bargaining Council for unfair dismissal. During May 2019, the Municipality instituted a legality review in terms of s 158(1)(h) of the Labour Relations Act[3] (LRA).

- [6] The Labour Court (per Cele J) reviewed and set aside Mr Mswane's decision to extend both fixed-term contracts. The contracts entered into with the appellants on 30 November 2018 were declared invalid and void ab initio and the appellants were held to be jointly and severally liable for the costs of the application. The present appeal is with the leave of the Labour Court.

Grounds of appeal

- [7] The appellants argue that the Labour Court ought not to have considered the review application given the unfair dismissal dispute that was pending at the time. They submit that the Labour Court erred in dealing with the application as a common law review and in finding that Mr Mswane lacked actual or ostensible authority to contract with them on 30 November 2018. The appellants claim that the Labour Court also erred in holding that they were aware of Mr Mswane's lack of authority to contract with them. Finally, it is argued that any finding of invalidity ought not to operate retrospectively and should not impact on pending unfair dismissal proceedings.

Preliminary

issues

- [8] The appellants applied for condonation for the late filing of the appeal record and supplementary record. Various reasons were furnished for the failure to serve a copy of the record of the proceedings on the municipality within the prescribed period of time, including financial constraints. There is no reason not to accept the explanation offered. The appellants also rely on the judgment of the Labour Court granting leave to appeal, and the finding of that Court that there are reasonable prospects of success on appeal. In the circumstances, there is sufficient cause shown to excuse non-compliance with the prescribed procedure on appeal.
- [9] The municipality applied for condonation for the late filing of its power of attorney authorising its legal representatives to oppose the appeal. Rule 6 of this court's Rules[4] provides that, in cases where there is no cross-appeal, a power of attorney to oppose an appeal must be filed with the registrar by the respondent's representative when copies of the respondent's main heads of argument are filed under Rule 9.[5] The special power of attorney was filed together with the municipality's heads of argument in the appeal. Condonation was

therefore unnecessary and the appeal was duly opposed.

Analysis

[10] The constitutional right to fair labour practices is not restricted to the protection of workers' rights. The LRA provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.[6] This includes the municipality's right to review the conduct of its own employees on the ground of illegality.[7] As the Constitutional Court held in *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal*: [8]

'Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of s 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights". As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.'

[11] The principle of legality is an intrinsic part of the constitutional order. In part, it serves to ensure that public functionaries

exercise their power within necessary confines. Adherence to the rule of law requires the decisions of municipal managers to be lawful, not arbitrary, and rationally related to the purpose for which they have been empowered.[9] Considering the circumstances, the Municipality was duty-bound to review the extension of the appellants' contracts of employment.[10]

[12] While it may be so that courts will typically not entertain an application for review where this will interfere with uncompleted proceedings in a lower court, the present context is different.[11] The appellants have not presented any serious argument to justify overturning the judgment of the Labour Court on this basis. In

addition, to insist on the approach favoured by the appellants may serve to delay proceedings and incur unnecessary costs, thereby

prejudicing the parties. Instead, postponing the arbitration proceedings until the completion of the review process, as occurred

in the present instance, is the sensible approach. A party to a contract that has been declared invalid due to illegality cannot rely on the constitutional right to fair labour practices in order to insist that an appeal should succeed purely because the review

interrupted arbitration proceedings. The suggestion that the Labour Court ought not to have considered the review application pending

finalisation of the unfair dismissal dispute is, therefore, without merit and the Labour Court's decision to grant leave to appeal partly on this basis was erroneous.

[13] The Labour Court also erred in framing the matter as a “common law review application” when the Municipality expressly relied on s 158(1)(h) of the LRA and illegality.[12] As between the parties this was common cause and the reliance on Steenkamp and Others v Edcon Ltd,[13] a case dealing with unlawful dismissal, was inapposite. Classification aside, however, the Labour Court considered the issue of the legality of the extension of the contracts and rightly concluded that Mr Mswane had acted contrary to the resolution. The order issued was premised on a permissible legal basis, within the power of the Labour Court as contemplated in s 158(1)(h) of the LRA and, for reasons that follow, justified on the facts, so that the mere error in classification is insufficient reason to uphold the appeal.

[14] The principle of legality requires all exercises of power to be, at a minimum, lawful and rational.[14] The conduct of a public official must not be mala fide or based on ulterior or improper motives. A court is obliged to intervene on review if an official did not apply their mind or

exercise their discretion at all, or if they disregarded an express provision of a statute.[15]

[15] In proceeding as he did, Mr Mswane ignored the resolution.[16] By doing so, he contravened the Local Government: Municipal Systems Act[17] (Act). Section 55 of the Act provides that municipal managers are the head of the municipality’s administration. They are responsible and accountable for the appointment of certain staff, but this is subject to the policy directions of the council.[18] The Supreme Court of Appeal (per Nugent JA) has explained the relationship between municipal councils and municipal managers as

follows:[19]

‘[14] ... As is to be expected, the Act is replete with provisions recognising that executive authority vests in the council and in nobody else. Indeed, ordinary legislation is not constitutionally capable of divesting a municipal council of its executive authority – or any part of it – and the construction of a statute that would produce that result must be avoided if it is possible to do so.

...

[16] A municipal council is not capable in practice of exercising its executive authority by running the day-to-day affairs of the municipality and it employs staff to do that on its behalf. In the past it was common for municipal councils to confer the appropriate authority upon their staff by delegation of all or some of its executive powers. Such a delegation of power does not ordinarily divest the delegator of the power to perform the particular function itself ...

[17] In my view, section 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive authority – which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power. To

the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result.’ [Footnotes omitted]

- [16] The council had expressed itself clearly on the issue of fixed-term contracts for managers and directors due to expire during 2018 and 2019. It was resolved that these contracts were to be terminated at the end of the term and re-advertised on a permanent basis at least three months prior to the date of expiry. Mr Mswane acted arbitrarily and violated the principle of legality by extending the appellants’ contracts in contravention of the resolution.[20]
- [17] This finding is also dispositive of the argument that Mr Mswane had actual or ostensible authority to contract with the appellants. Mr Mswane’s actual authority was constrained by the applicable legislation and there is simply no case on the papers to support the suggestion that the Municipality, presumably through its Council, created the appearance that Mr Mswane could proceed as he did.[21]
- [18] As there is no prescribed time limit for launching a review under s 158(1)(h) of the LRA, there was no need for the Municipality to apply for condonation before the Labour Court. [22] The Constitutional Court has confirmed that a court should be slow to allow procedural obstacles to prevent it from considering a challenge to the lawfulness of an exercise of public power. Review proceedings must nevertheless be instituted within a reasonable time. [23] Considering the circumstances, the review was brought within a reasonable time after the Municipality came to learn of Mr Mswane’s

conduct.[24] The Labour Court cannot be faulted for its finding in this respect and there was no need to exercise a discretion to overlook the delay.[25] The appellants’ arguments in this respect must be rejected.

- [19] Finally, the suggestion that it would be just and equitable to limit the retrospective effect of the declaration of invalidity, to enable the appellants to pursue the arbitration proceedings, is misplaced. Doing so would negate the efficacy of the review proceedings and would enable the appellants to benefit from unlawful conduct that has rightly been declared to be invalid. This would be an affront to the constitutional values and principles governing public administration and the rule of law.[26] On the facts, there is no basis to conclude that it would be just and equitable to permit the appellants to benefit from the conduct of Mr Mswane.[27] In all the circumstances, the appeal must be dismissed.

Costs

- [20] It is settled that the rule of practice that costs follow the result is inapplicable in this Court. [28] This Court may make an order for the payment of costs, according to the requirements of the law and fairness.[29] When deciding whether or not to order the payment of costs, the conduct of the parties in proceeding with or defending the matter, and during the proceedings before the Court, is relevant.[30] Zondo JP formulated the position as follows:[31]

‘In making decisions on cost orders this court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes.’

[21] The appellants were held jointly and severally liable to pay the costs of the Labour Court proceedings. There is no basis for interfering with the presiding judge's exercise of discretion in granting that order. This is particularly true when considering that the appellants were aware of the contents of the resolution and admit being part of a group of employees who pressed for contract renewal, or permanent employment, without the need for any advertisement.

[22] The Municipality argued that it should also be awarded the costs of the appeal. This was mainly on the basis that the appellants had pursued the appeal in circumstances where it was futile to do so. That argument overlooks the contents of the judgment granting the application for leave to appeal and the fact that there had been no process of advertisement for the positions in question. It is so that the appellants have, in effect, attempted to benefit from Mr Mswane's decision to contract with them in the face of the resolution. In doing so, they have skirted the margins of defending the indefensible. On balance, however, the appeal cannot be described as frivolous and fairness dictates that there should be no order as to costs in respect of these proceedings.

Order

1. The appeal is dismissed, with no order as to costs.

Govindjee AJA

Van Niekerk JA et Nkutha-Nkontwana JA concur.

Appearances

For the Appellant: Mr P.O. Jafta

Instructed by: Jafta Incorporated

For the Respondent: Adv S. Tshangana

Instructed by: TJ Mphela Attorneys Incorporated

[1] The first appellant (Mr Nzimande) was appointed as Manager: Tourism Development and Marketing between 1 November 2013 and 31 October

2018. The second appellant (Mr Shoji) was contracted as Director: Housing and Land between 1 September 2013 and 31 August 2018.

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- [2] Mr Nzimande received notification of termination on 19 July 2018. Mr Shoji received similar notification on 20 September 2018.
- [3] Act 66 of 1995, as amended.
- [4] GN 1666 of 1996: Rules Regulating the Conduct of Proceedings in the Labour Appeal Court.
- [5] Rule 9(2) provides that the respondent must deliver a copy of its heads of argument not later than 10 days before the hearing, unless an earlier date has been determined by the Judge President.
- [6] S 158(1)(h) of the LRA.
- [7] The municipality is an 'organ of state' as defined in s 239 of the Constitution and its powers and duties are of a public nature. The extensions of the appellants' contracts of employment constitute a decision, or decisions, or conduct, by the State in its capacity as employer: *Merafong City Local Municipality v South African Municipal Workers Union and another* [2016] ZALAC 12; [2016] 8 BLLR 758 (LAC) (*Merafong*) at para 38.
- [8] [2013] ZACC 49; (2014) 35 ILJ 613 (CC) at para 36.
- [9] *Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of SA and others* [2000] ZACC 1; 2000 (2) SA 674 (CC) (*Pharmaceutical Manufacturers*) at para 85.
- [10] *Ntshangase v MEC for Finance KwaZulu-Natal and Another* 2010
- (3) SA 201 (SCA); [2009] ZASCA 123 at para 18. For a survey of various decisions pertaining to s 158(1)(h) of the LRA, see *Ramonetha v Department of Roads & Transport, Limpopo and Another*
- [2017] ZALAC 68; (2018) 39 ILJ 384 (LAC).
- [11] *Cf Zondi & others v President, Industrial Court & others*
- (1991) 12 ILJ 1295 (LAC).
- [12] See: *Makhonjwa v Director General of the Department of Justice and Constitutional Development and Others*
- [2023] ZALCJHB 90; (2023) 44 ILJ 1530 (LC) at para 9.
- [13] 2016
- (3) SA 251 (CC).
- [14] *Khumalo and Another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) (*Khumalo*) at para 28. See also *Merafong supra* at paras 35 - 39.
- [15] *Pharmaceutical Manufacturers above n 9* at para 82, citing *Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651.

[16] Cf SA Municipal Workers Union & others v Kannaland Municipality

[2010] ZALAC 2; (2010) 31 ILJ 1819 (LAC) (Kannaland Municipality) at para 58.

[17] Act 32 of 2000.

[18] Section 55(1)(e) of the Act. Similarly, section 66(1)(a) of the Act provides that a municipal manager must approve a staff establishment for the municipality within a policy framework determined by the municipal council and subject to any applicable legislation. Section 67(1)(a) of the Act adds that a municipality must develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including the recruitment, selection and appointment of persons as staff members.

[19] Manana v King Sabata Dalindyebo Municipality [2010] ZASCA 144; [2011] 3 BLLR 215 (SCA) at paras 14 - 17.

[20] Pharmaceutical Manufacturers above n 9 at para 85. Enoch Mgijima Local Municipality and another v Dingani and another and related matters

[2020] 3 All SA 135 (ECG) at para 113. The position may have been different had it been shown that the Municipal Council was informed of the reasons for Mr Mswane's conduct, and had the Council permitted Mr Mswane to proceed as he did: Kannaland Municipality supra at para 57.

[21] NBS Bank Ltd v Cape Produce Co (Pty) Ltd 2002

(1) SA 396 at 411H – 415D.

[22] Khumalo above n 14 at para 44.

[23] Khumalo above n 14 at paras 42 and 45. Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

[24] Gqwetha v Transkei Development Corporations Ltd [2005] ZASCA 51; [2006] 3 All SA 245 (SCA) at para 24.

[25] Khumalo above n 14 at para 49.

[26] S 195(1) and s 1(c) of the Constitution.

[27] Cf State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd

[2017] ZACC 40; 2018 (2) SA 23 (CC) at para 54.

[28] Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) (Dorkin) at para 19.

[29] S 179(1) of the LRA.

[30] S 179(2) of the LRA.

[31] Dorkin above n 28 at para 19. This approach has been endorsed by the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal & others*

(2018) 39 ILJ 523 (CC) at para 24.

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Prepared on 11 October 2026 · Esheria