

SOUTH AFRICA / JUDGMENT

Phokwane Local Municipality v Mabusela N.O. and Others (JR1044/20) [2022] ZALCJHB 117 (7 March 2022)

[2022] ZALCJHB 117

COURT

Labour Court Johannesburg

BEFORE

G N Moshwana

CASE / FILE NUMBER

JR1044/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

no: JR

1044/20

In

the matter between:

PHOKWANE LOCAL

MUNICIPALITY

Applicant

and

MABUSELA,

TL N.O.

First Respondent

THE

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING

COUNCIL

Second Respondent

IMATU

OBO MARIMA, BB

Third Respondent

Heard:

03 March 2022

Delivered:

07 March 2022

Summary: Opposed review – award falls outside the bounds of reasonableness. A benefit is not due if it arises from an unenforceable agreement. A Municipal Manager lacks powers to establish staff compliment without the approval of a municipal council. Failure to establish an enforceable agreement means that an employee fails to discharge the onus of proving that an employer has committed an unfair labour practice in relation to the provision of benefits.

Held: (1) The arbitration award is reviewed and set aside. It is replaced with an order of this Court. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] There is sufficient evidence that many local municipalities in South Africa are unfortunately managed badly. This unfortunate state of affairs impact negatively on the public purse. The application before me epitomise or rather typifies the situation of a badly managed municipality. This is an opposed review application, in terms of which the Phokwane Local Municipality (Phokwane) seeks to review and set aside an arbitration award issued by Panellist T L Mabusela (Mabusela) on 17 July 2020 in terms of which Mabusela found that Phokwane had committed an unfair labour practice in relation to the provision of benefits – car allowance – against Mr B Marima (Marima) – the Human Resources Manager of Phokwane. He ordered the financially beleaguered Phokwane to pay Marimba an amount of R150 672.00, which constituted unpaid car allowance benefit for the period July 2019 up to and including June 2020.
- [2] Aggrieved by the arbitration award, Phokwane launched the present application. Marima assisted by the Independent Municipal Allied Trade Union (IMATU) opposes the application.

Background facts

- [3] Marima commenced employment with Phokwane in 2011 in the capacity of a Labour Relations Officer. In 2013, he was appointed as a Manager Human Resources. On 28 January 2015, Marima tendered his resignation from the position. As required by his contract of employment, he offered to serve his notice period from 1 February 2015 until 28 February 2015. He had received an offer of employment at the South African Local Government Association (SALGA), which was to take effect on 1 March 2015.

- [4] Whilst serving his notice period, Marima was approached by the Acting Municipal Manager, one Mr Lenkoe (Lenkoe), who sought to retain him in his position. He asked him to make a proposal for his retention. Indeed, on 20 February 2015, Marima made a written proposal. In it, he suggested a salary increment of R350 000.00 per annum and a transport allowance of R12 556.00 per month to take effect on 1 March 2015.
- [5] On 23 February 2015, Lenkoe accepted the offer made by Marima for his retention/reappointment. On 3 March 2015, Marima prepared a memorandum for the approval by the Acting Director: Corporate Services, one Mr Pule (Pule) seeking the annual salary notch to be adjusted in line with the acceptance of his offer by Lenkoe. On 13 March 2015, Pule approved the memorandum. The payroll section of Phokwane was duly instructed to action the adjustments. In due course, on 27 March 2019, Phokwane was placed under administration in terms of the provisions of the Constitution of the Republic of South Africa, 1996. Mr B K Ndwandwe (Ndwandwe) was appointed an Administrator of Phokwane on 5 April 2019.
- [6] On 23 July 2019, Ndwandwe issued an instruction to the payroll section to place on hold payment of the car allowance. This instruction of course upset the arrangements between Marima and Lenkoe. On 23 August 2019, IMATU on behalf of Marima referred a dispute to the South African Local Government Bargaining Council (SALGBC) and alleged an unfair labour practice relating to the provision of the transport allowance. Conciliation failed to resolve the dispute. A request was made to resolve the dispute through arbitration. Prior to the commencement of the arbitration proceedings, the parties entered into an agreement setting out the issues for decision. Squarely raised by the parties was the issue of the authority of Lenkoe to contract on the car allowance. Mabusela heard testimony from Marima and Ndwandwe. Thereafter, as stated above, on 17 July 2020, Mabusela published the impugned arbitration award.

Grounds of review

- [7] Phokwane contends that Mabusela misconceived the nature of the enquiry before him; he excluded relevant and/or included irrelevant material or consideration of facts; he committed misconduct in relation to his duties as an arbitrator. In support of these contentions, Ndwandwe referred to the testimony delivered at arbitration. Phokwane supplemented its contentions by stating that Lenkoe acted ultra vires and there was no approval for the car allowance offered to Marima. Above all, Phokwane contended that the arbitration award of Mabusela is not one that a reasonable decision maker may reach. Marima contends that there is no merit in the grounds put forward by Phokwane and that the award meets the constitutional standard.

Evaluation

[8] A claim for an unfair labour practice in relation to the provision of benefits is akin to a breach of contract claim, in the event an employee alleges that the benefit arise ex contractu. Like a contractual claim, an employee must establish the existence of a contract. That contract must be one that is enforceable in law. An employee bears the onus of proof in matters of this nature. Owing to the challenge that Lenkoe did not have authority to contract, Marima was obliged to

allege and prove an enforceable contract.

[9] Lack of authority to contract vitiates a contract. In the local government sphere, the authority to contract is circumscribed by legislation. In terms of section 55 (1) (e) of the Local Government: Municipal Systems Act (Systems Act)[1], a municipal manager, subject to the policy directions of the municipal council is responsible and accountable for the appointment of staff. In terms of section 55 (2) (c), a municipal manager in his capacity as an accounting officer is responsible and accountable for proper and diligent compliance with the Municipal Finance Management Act (MFMA).[2] In terms of section 15 of the MFMA, a municipality may incur an expenditure only in terms of an approved budget and within the limits. In terms of section 16, the municipal council approves budgets. This function is non-delegable in terms of section 160

(2) (b) of the Constitution. In terms of section 66 (1) of the Systems Act, a municipal manager is obligated to develop a staff establishment acting within the policy framework determined by the municipal council and submit it to the municipal council for approval.

[10] Regard being had to the provisions of the Systems Act read with the MFMA, it is apparent that the Municipal Manager of a Municipality does not have unfettered powers to have a changed staff establishment[3] and to incur and attract expenses on behalf of the Municipality. Phokwane, specifically challenged Marima to show that Lenkoe had the power to contract with him over the car allowance. The testimony of Marima was that he is not sure if Lenkoe obtained any authority from the municipal council to conclude the car allowance with him. Ordinarily, decisions of the municipal council are proved by way of a formal council resolution. Absent a formal council resolution, it must follow that there is no evidence approval of the car allowance in particular by Phokwane.

[11] On the facts of this case, it is apparent that Lenkoe re-appointed Marima. Marima had already terminated his employment with Phokwane. A resignation is a unilateral act[4]. Inasmuch as it can be argued that Lenkoe did not accept the resignation and as such, it did not take effect in law, then in that

regard, Marima should have remained on the same terms and conditions of his employment as it obtained prior to his resignation. However, Marima negotiated new terms and he was appointed on those enhanced terms. Phokwane places the legality of those improved terms in dispute. As pointed out earlier, the onus remained on Marima to establish and prove the terms of the contract he wished to rely on for the provisions of the benefits. Mabusela reached the following startling conclusion:

“49. There was no evidence tendered by the respondent to show that the Municipal Manager only had the authority to counter offer on a position which was not in existence during that period and not on the car allowance. The onus rests on the respondent to show that indeed the issue of the Municipal Council did not know anything about the package offered to the applicant but only that the new position be created to suit him.

50. According to my analyses, the then Municipal Manager made an offer of employment coupling it with the car allowance because he knew very well that the Municipal Council would not have a problem with the exercise of such powers hence the new position was later ratified by Council.”

[12] What is startling about the above finding is that Mabusela seems to be applying reverse onus and make speculations to support his conclusions. The principle of s/he who alleges must prove remain valid to this day. The establishing of the contractual obligation to pay the benefit is a matter that lies squarely on the shoulders of Marima. As to what Lenkoe knew or did not know very well is of no benefit to Mabusela as Lenkoe did not testify before him. It remains a speculative finding.

[13] In dealing with the issue of the vires - power, Mabusela reached the following

conclusion:

“According to my understanding, the Municipal Manager is the accounting officer and has been delegated powers in terms of section 55 (1) (e) of the Municipal Systems Act to appoint staff including to dismiss. He contracts on behalf of the Municipality and all decisions taken bind the municipality and are enforceable.”

[14] This conclusion suggest that Lenkoe had a carte blanche given to him by section 55 (1) (e) of the Systems Act. This is a wrong interpretation of the section. Subsection (1) is lucid and

clear. The responsibility and the accountability is subject to the policy directions of the municipal council. This section must be read in conjunction with section 66 (1) of the Systems Act. It must follow that any appointment must be subject to the policy considerations of the municipal council and the approval of the municipal council. There was no credible evidence to show that the contractual arrangements that Marima sought to rely on to establish his right to the payment of the car allowance were enforceable in law. In other words, Marima needed to show that his appointment on those conditions comply with the policy considerations and met the approval of the municipal council of Phokwane. It is not a simple matter of offer and acceptance, it involves

statutory constraints. It being a statutory mandate, non-compliance with such a mandate leads to a nullity[5]. More recently, the Constitutional Court under the hand of Madondo AJ in *Nehawu and others v Minister of PSA and others*[6] confirmed that:

“[73] It is also a fundamental principle of our law that an actor must be legally empowered to perform any act in question and that public power can only be exercised by a lawfully constituted authority.

- [89] The end result is that the State’s failure...to comply with the requirements of regulations... renders the resultant collective agreement entered into between the parties under the LRA invalid and unlawful...
- [108] ...The general rule is that if an invalid agreement is void, it gives rise to no legal obligations, which means that the State cannot be ordered to comply nor can it be ordered to perform, as there is nothing in the eyes of the law to be complied with nor enforced...”
- [15] As indicated above, Marima failed to establish that there was an enforceable contract in place. A car allowance that does not arise *ex contractu* does not qualify to be a benefit within the contemplation of section 186 (2) of the Labour Relations Act[7] (LRA). Having failed to establish a contractual benefit, Marima was not entitled to an award that Phokwane has committed an unfair labour practice. Therefore, the arbitration award issued by Mabusela is not one that a reasonable decision maker may reach and is incapable of any justification. The nett effect of this award is that Mabusela enforced a nullity and or an unlawful act. It is so that an unlawful act exist as a fact until set aside by a competent Court of law, however, the unlawful act is bereft of legal consequences.
- [16] Before I conclude, it is befitting to say that municipalities in South Africa have been plagued by unending allegations of systemic corruption and have been haemorrhaging financially for a while now. Therefore, Municipal Managers should not and cannot act without impunity. What happened in this matter between Marima and Lenkoe smacks of frivolity and vexatiousness. Municipal Managers cannot run the administration of the Municipalities as if it is their fiefdom. No disrespect is intended to the HRMs, but one wonders why a HRM can be in charge in such a manner as if he possessed rare skill. It took one memorandum for Marima to persuade an accounting officer to calmly accept an offer to increase a salary and top it up with a travel benefit that never existed. This does not add up.
- [17] In summary, the conclusion this Court reaches is that Marima failed to establish a valid and enforceable contract containing a right to the benefit. On the facts of this case, the car allowance was offered contrary to the prescripts of the legislations governing Municipalities. An enforceable contract did not come into existence. Absence thereof, a claim for unfair labour practice in relation to the provision of benefits did not occur. This Court is in as good a position as Mabusela to make a determination that an unfair labour practice did not happen.
- [18] In the result the following order is made:

Order

1. The Arbitration award issued by Commissioner Mabusela under case number NCD 081913 dated 17 July 2019 is hereby reviewed and set aside.
2. It is replaced with an order that Phokwane did not commit an unfair labour practice within the contemplation of section 186 (2)
 - (a) of the LRA.
3. The claim of Marima is dismissed.
4. There is no order as to costs.

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr F Venter

Instructed by:

Van De Wall Inc, Kimberly

For the 3rd Respondent: M S Windvogel IMATU Official.

[1] Act 32 of 2000 as amended.

[2] Act 56 of 2003 as amended.

[3] See Charity Nthembi Pule & 8 Others v Phokwane Local Municipality (C133/2020) dated 17 August 2021.

[4] Sihlali v SABC

[2010] 31 ILJ 1477 (LC).

[5] See Wilken v Kohler 1913 AD 135; Magwaza v Heenan 1979 (2) SA 1019 (A); and Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 2001 (4) SA 1315 (SCA).

[6] (CCT21/21, 28/21, 29/21 and 44/21) [2022] ZACC 6 (28 February 2022).

[7] No. 66 of 1995, as amended.

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