IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO: **D811/19**
Reportable

In the matter between:

NEWCASTLE MUNICIPALITY **Applicant**

and

REVERANCE SIBONELE NZIMANDE **First Respondent**

MUZI OBED SHOZI **Second Respondent**

BHEKANI ERROL MSWANE **Third Respondent**

Heard: 10 July 2020
Delivered: 26 July 2020
Summary: Review – legality based – record to be filed different to that of arbitrator – filing time thereof determined by facts of each matter - arbitrator not empowered to determine legality – municipality, hence municipal manager, required to develop and adopt appropriate systems and procedures consistent with section 72 (1) (c) of the Municipal Systems Act – legality review well founded – fixed term contracts illegally extended.

JUDGMENT

CELE J

Introduction

[1] This application is brought as a legality challenge, it seeks to review and set aside the decision, which the Third Respondent made when he purported to employ the Two Respondents by way of fixed term contracts for periods beyond the initial dates set out in the respective contracts of the Two Respondents. Costs are sought against the Two Respondents who are opposing this application. The Third Respondent did not oppose the application. While the applicant called it a section 158 (1) (h) of the Labour Relations Act[1], I formulate a view that it is a common law review application. The LRA was never formulated to deal with any legality challenges, hence the absence of reference in it thereto[2].

Factual Overview

[2] To a large extent, the facts of this matter are common, with some differences on each of the two respondents. The Two Respondents[3] were employed by the municipality respectively as Manager: Tourism Development and Marketing, and Manager: Housing and Land. The First Respondent commenced employment with the applicant in 2010. The Second Respondent commenced his services in 2003. In 2013, managerial employees were offered an option of converting their employment contracts to five-year fixed term contracts, which would enable them to structure their packages. Pursuant to this, the First Respondent entered into a fixed term contract that was effective from 1 November 2013 to 31 October 2018. That of the Second Respondent was from around January 2014 to December 2018. It was a term of the Respondents contracts that there would be no expectation of renewal and their contracts would not be prolonged beyond the five-year term.

---

[1] Act Number 66 of 1995, the LRA.
[2] Steenkamp and others v Edcon Ltd 2016 (3) SA 251 (CC).
[3] Also hereafter, referred to as the two respondents or the respondents.

[3] On 11 October 2017, the Applicant's Council took a resolution that all Directors and Managers' contracts that were ending had to be advertised in the media to permit other citizens to apply for the post. During the period 19 July 2018 and 30 July 2018, the Applicant advised the Respondents that their services were ending on 31 October 2018. The notices referred to the Council resolution, which required that all such contracts be terminate to ensure that the posts could be filled on a permanent basis after an open selection, which required the Respondents to apply for and to be shortlisted and interviewed for appointment.

[4] The Applicant's Human Resource Department also complied with the fixed term contract by advising its budget and treasury office of the termination of the contract and that the Respondents last working day was the 31 October 2018.

[5] The Third Respondent extended the contract of the two Respondents for a period of six months, saying that this was done to enable the SED Corporate Services to prepare for recruitment processes. The Third Respondent re-appointed the two Respondents by extending their contracts on similar terms and conditions effective from 1 November 2018. He also notified them that their contracts would be signed in due course. The decision of the council to have the posts advertised was never carried through by the HR Department.

[6] On 26 November 2018, the Applicant's Council received reports of serious misconduct on the part of the Third Respondent. It resolved to convene a special meeting in accordance with the disciplinary regulations for Senior Managers to enquire into the Third Respondent's misconduct. This was set down for discussion on 28 November 2018. However, the meeting was disrupted. It was then adjourned to 30 November 2018. At that, meeting the Council resolved to suspend the Third Respondent and to require him to make representations before it gave effect to the decision to suspend.

[7] The Third Respondent was suspended with effect from 13 December 2018. Thereafter the Applicant preferred charges against him. The Third Respondent elected to resign as an employee rather than co-operate with his employer, as he was obliged to do, by placing material before it, to enable it to determine the

merits of the disciplinary charges. He refused to advise or inform the Applicant of the decisions taken and the reasons for them. The Third Respondent was in law, the Accounting Officer responsible for the appointment of staff below section 56[4] Managers in accordance with the Applicant's recruitment policy. That power was subject to the Applicant's Council resolution, which determined how employees were employed.

[8] The First Respondent rendered services for a few months, until he was told to leave and was not paid his remuneration. This was around the time when the Third Respondent was suspended. The Second Respondent rendered his services for some part of December 2018 as he was told to leave the applicant on 20 December 2018. He was only reimbursed for his travelling expenses and accommodation. Both respondents then referred an unfair dismissal dispute to the Bargaining Council at different times. Their disputes were amalgamated into one.

[9] The unfair dismissal arbitration proceedings were set down for hearing in the bargaining council on 28 and 29 May 2019. On the day of the arbitration the municipality advised the arbitrator that a legality review had been launched and applied to have the hearing postponed pending the finalisation of the review application. The municipality brought the present legality review. The unfair dismissal dispute remains in limbo while this application to review and set aside the contracts of employment that were concluded with the two Respondents plays itself out here.

Brief submissions of the applicant

[10] The two Respondents were or must have been aware of the disciplinary action that was being undertaken against the Third Respondent. They were also aware of the decision of the Applicant's Council to invoke the disciplinary regulations for Senior Managers. The Third Respondent was aware of the Applicant's resolution. He sought to subvert it by initially extending the First

[4] Of the Municipal Systems Act Number 32 of 2000.

Respondent's contract for six months and thereafter by surreptitiously, and in the midst of his proposed suspension, by seeking to give to the two Respondents an additional five year term.

[11] The Applicant was unaware of the Third Respondent's conduct until the period December 2018 and January 2019. Consequently, it undertook an investigation. It determined on the advices of its legal representatives that the appointment of the two Respondents was unlawful and immediately apprised them that they were not entitled to tender their services. The Third Respondent would have been undeniably subject to the policy directions of the Applicant's Municipal Council. He was required, in terms of section 55 of the Municipal Systems Act, to ensure that the appointment of staff, such as the Two Respondents, are appointed in accordance with the policy directions of the Applicant's Municipal Council. An appointment contrary to the policy directions and resolution of the Applicant's Council is therefore ultra vires, unlawful and of no force and effect. Otherwise, Municipal Managers will appoint whomsoever they want. This is not consistent with the Municipal Systems Act[5], the Constitution and the Local Government: Municipal Finance Management Act.

[12] The Respondents, who delivered an identical Affidavit to each other, argue their alleged unfair dismissal claim before this Court. This Court cannot make factual or legal findings on the subject matter of the unfair dismissal dispute, which is extant before the Bargaining Council. It is therefore deemed unnecessary in these submissions to deal with the merits or demerits thereof.

Brief submissions of the respondents

[13] The applicant has known about the fact that it has refused to comply with the employment contract the respondents concluded with it certainly from December 2018. It was in a position to launch this application at that time but it chose not to do so. The review application, launched after a referral of a dismissal dispute to the Bargaining Council, appears to be designed to

[5] Act Number 32 of 2000.

undermine the remedies available to the respondents in terms of the LRA. The submission is that it was not brought *bona fide*. It remains open to the applicant to contend, at the Bargaining Council, that the Third Respondent lacked the necessary authority to conclude the contract with the respondents. That would be one of the factors that have to be considered by the Council in deciding whether the dismissal was fair or unfair. A legality review simply has no place in determining the breach of the constitutionally entrenched right to fair labour practice. The question whether the contract is lawful is a factor in determining the fairness of the dismissal but is not, in itself decisive of the issue. An attempt to bypass the remedies provided in the LRA should not be countenanced.

[14] The person who signed the contracts is not some arbitrary employee of the municipality who under no circumstances would have any authority to represent it in entering into a contract of employment. It is the very person who, in terms of the Systems Act, is the appropriate person to conclude such a contract. He would therefore have ostensible authority to do what he did. If the ostensible authority in this case does not translate into actual authority, the municipality would be bound in contract nonetheless unless it could demonstrate that the other parties to the contracts knew that the municipal manager lacked actual authority when he entered into the contracts with them. On the facts, the respondents did not have such knowledge and genuinely believed that the municipal manager had authority under the Municipal Systems Act.

[15] The review application did not provide the record initially, and did not follow the requirements of the Labour Court Rules or the Practice Manual in this respect. The documents that should form part of the record and on which in some instances the application itself depends have not been provided even though specific attention was drawn to this in the answering affidavits. Two of such examples are firstly, the resolution before court upon which the review is premised as is referred to in the letter annexure MM1. That has been challenged and the letter is not the best evidence and is not therefore admissible to prove the resolution. Secondly, the documentation that relates to what happened at the meeting of the council on 31 May 2017, which is

important to understanding the resolution upon which reliance is placed is not provided, and not even the minute of that council meeting has been put up.

[16] Should the court finds that, the legality review does lie, that it was brought without undue delay and that the factual features that are raised in the papers are no bar to setting aside the employment contracts of the respondents, then having regard to the factual picture and the pending unfair dismissal disputes in the bargaining council, it is contended that the court should exercise the powers conferred upon it[6], by making an order limiting the retrospective effect of the declaration of invalidity. Court can then direct that the declaration will not operate retrospectively. This will enable the question of fairness in relation to the dismissals of the respondents to be dealt with in the bargaining council. The arbitrator would then be able to take the *de facto* existence of the employment contracts into account. These will include how they came to be entered into and then repudiated in the full factual matrix that prevailed at the time to determine whether there was an unfair dismissal. The arbitrator can then fix an appropriate amount for compensation, if there is a finding that there were dismissals that were unfair.

Analysis

[17] Various interlocutory issues have been raised by the respondents and it is appropriate to determine them as they have the potential to dispose off this matter. The respondents say that this application could have been lodged as early as December 2018. The contention is that in the absence of a condonation application, this matter is not properly before court. If the two respondents had accepted the termination of their employment and did nothing about it, there would be no reason or basis to bring the review application. Once the arbitration process was set in place, it became clear that the applicant had to decide to confront the challenge or recapitulate. It decided on the former. In my view, the review application was lodged and brought without undue delay.

---

[6] by s172(1)(b)(i) of the Constitution to make an order that is just and equitable which in this case would be to make the declaration of invalidity prospective only

[18] It is contended that the record of the review application is defective, denying the respondents of access to some important documents they could have relied on. Admittedly, this is not a review of a commissioner's award or ruling which must conform to the precepts of rule 7A.That observation notwithstanding, and as a matter of comparison, sub rules 7A (5) and 7A (6) read:

> "(5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant ***must make copies of such potion of the record*** (my emphasis) as may be necessary for the purpose of the review.....
>
> (6) The applicant must furnish the registrar and each of the other parties with ***a copy of the record or potion of the record*** (my emphasis) as the case may be, and a copy of the reasons filed by the person or body."

[19] With reviews under the LRA therefore, a copy of the portion of such record as may be necessary for the review application needs to be made available by the applicant. The applicant must then furnish the registrar and each of the other parties with a copy of the record or potion thereof. The rule does not prescribe the furnishing of the total record but leave it to the applicant to deliver such potion of the record as may be necessary for the review. The applicant knows what grounds of review are to be rely on. Where the record filed is deficient to resolve the issues raised, the discrepancy on the record should be held against that applicant. The answering affidavit is replete with much more details on the changes the posts of the respondents were subjected to at various times. Most of the developments pertaining to these posts are not in dispute and appear to be sufficient to determine this application.

[20] The next probe turns on the powers of the acting municipal manager. To my understanding of the pleaded facts, once the municipal manager is no longer available to execute his or her duties, the council had to find a replacement who, once appointed assumes all duties of a municipal manager. A confirmation

of the resolution taken by the council on 27 February 2019, authorizing the acting municipal manager to institute the present application was attached to the founding affidavit. The attack of the respondents on this authority is rather flippant, for lack of details. I hold that the acting municipal manager was properly authorized to institute these proceedings.

[21] The email service of the application to the respondents is raised as an irregular step on the basis of which the review application is to be dismissed. The current rules of this court do not permit the service of court papers by email. With the advancement of technology and numerous problems encountered through the post office use, it is a matter of time before the email service is accommodated by the rules of this court. It has not been suggested that the email service failed to achieve the desired goal. Equity drives me into accepting that the mode of service used was successful and effective, with no prejudice caused to the party sought to be served.

[22] Lack of consent to service to respondents' attorneys is the next consideration. It remains common cause that the parties in this matter first met at the bargaining council. The same firms of attorneys in this application legally represented both parties at arbitration. The dispute emanated from the same facts as are traversed in this application. If the service of this application was rendered to the respondents directly, the applicant could easily be accused of shunning the legal representatives, well knowing that the respondents had appointed attorneys for parallel mater. There was timeous, effective and adequate service of the papers of this application to attorneys of the respondents. In my view, the attack on service is devoid of any merits. It is to be borne in mind that the rules are for the court and not the court for the rules.

[23] Then, clauses 11.2.2 and 11.2.3 are relied upon by the respondents in saying that the review application delayed to the point of lapsing. The applicant correctly submitted that the matter at hand is not a review of the decision of an arbitrator. The record referred to is completely different to that of an arbitrator, which is constituted by definitive documents used at arbitration and audio recording of proceedings in which the parties participated. The identity of

documents needed in a matter such as the current application is often not easy to determine in advance and might well be part of the bone of contention. Again, this ground has no merits.

The legality issue

[24] I am in agreement with applicant's submissions that in terms of Section 67 of the Local Government: Municipal Systems Act, a Municipality is required to develop and adopt appropriate systems and procedures consistent with section 72 (1) (c) of the Municipal Systems Act. This is to ensure fair, efficient, effective and transparent personnel administration including the recruitment, selection and appointment of persons as staff members. All of these must be consistent with the Constitution. Section 195 of the Constitution is the *grundnorm* for the basic values and principles government public administration. It requires a high standard of professional ethics. It requires that services must be provided impartially, fairly, equitably and without bias. It also demands an accountable public administration.

[25] Indeed, the Third Respondent would therefore have been undeniably subject to the policy directions of the Applicant's Municipal Council. He was required in terms of section 55 of the Municipal Systems Act to ensure that the appointment of staff, other than those referred to in section 56 (a) of the Municipal Systems Act, such as the Two Respondents, were appointed in accordance with the policy directions of the Applicant's Municipal Council. An appointment contrary to the policy directions and resolution of the Applicant's Council stands to be found to be *ultra vires*, unlawful and of no force and effect. Otherwise, Municipal Managers will appoint whomsoever they want. That would not be consistent with the Municipal Systems Act, the Constitution and the Local Government: Municipal Finance Management Act.

[26] The Third Respondent was faced with a situation where a council resolution had been adopted requiring the H R Department to advertise posts within three months of the fixed terms of some employees coming to the end. For a number of employees, including the two respondents, the advertisement was not

released for publication. In the case of the First Respondent, his fixed term contract was ending when his senior, a Director, had recently retired. There was a risk that there would be no succession planning. According to the Second Respondent, the employees concerned formed a group of affected employees and. They collectively made a proposition to the applicant that they be given an option of either having their fixed term contracts extended for a further fixed term. In the alternative, they said they could become permanent employees without the need for advertising of the posts. He said that the group effort was frustrated by fear of victimization brought by political interference. The Second Respondent believes that the H R Department was manipulated into failing to advertise his post so that he could not apply.

[27] Both respondents give some details of the situation the Third Respondent was confronted with, leading to him signing their final five-year fixed term employment contract. Both admit that they knew very well at the time that the council had taken a resolution against any fixed term contracts being further used. Clearly therefore, they cannot reasonably contend that they thought the Third Respondent was authorized to appoint them into the final fixed term of five years as he did. Neither can they reasonably rely on ostensible authority. According to their evidence, they knew that the Third Respondent, in appointing them, was acting contrary to the council resolution, whatever his motive was. In fact, if anything, their evidence supports the version of the applicant that their final appointment by the Third Respondent was unlawful. All that the Third Respondent was supposed to do when facing an impasse, was to take the matter back to the council, so that it would decide on the way forward, instead of taking the law into his own hands.

[28] The finding on legality I have just made is not the kind of finding an arbitrator, acting within the purview of the LRA would be legally entitled to make. It is a finding that only this court or the high court could make, as a court of first instance. This court, per Gush J, in Case No:-D1114/19 dated 3 June 2020 found itself in a similar position. The present applicant and its erstwhile Legal Manager, one Mr Qiniso Zwane, and the Third Respondent purported to extend Mr Zwane's fixed term contract, contrary to the applicants' council resolution.

The applicant brought an identical legality challenge. This Court, in an unopposed review application, granted an order setting the decision of the Third Respondent aside.

[29] The respondents have asked that, having regard to the factual picture and the pending unfair dismissal disputes in the bargaining council, the court should exercise the powers conferred upon it, by making an order limiting the retrospective effect of the declaration of invalidity. Court can then direct that the declaration will not operate retrospectively. I have already found that the two respondents admitted knowing that the Third Respondent acted contrary to the resolution of the council, in appointing them. They are accordingly, not entitled to the delayed finality they are asking for, in this matter.

[30] I accordingly proceed to issue the following order:

1. The decision of the Third Respondent taken on 30 November 2018 to extend the fixed term employment contracts of the two Respondents and to further appoint them as employees of the applicant is reviewed and set aside;
2. The appointment of the two Respondents on 30 November 2018 as employees of the applicant is accordingly, declared to be invalid and void ab initio:
3. The two Respondents are ordered to pay the costs of this application. They are held to be jointly and severally liable therefor, the one paying, the other to be absolved.

Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the Applicant: Adv. J Nxusani SC
   Instructed by Brett Purdon Attorneys.
2. For the two respondents: Adv. M Pillemer SC.
   Instructed by Jafta Inc.