



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 247/2012
Not Reportable

In the matter between:

PIERRE ANDRÉ NEL

APPELLANT

and

OUDTSHOORN MUNICIPALITY

RESPONDENT

Neutral citation: *Nel v Oudtshoorn Municipality* (247/2012) [2013]
ZASCA 37 (28 March 2013)

Coram: Mpati P, Nugent, Pillay JJA, Schoeman and Mbha AJJA.

Heard: 28 February 2013

Delivered: 28 March 2013

Summary: Review – Local Government: Municipal Systems Act 32 of 2000 – reinstatement of municipal manager after dismissal – whether constitutes fresh appointment requiring compliance with provisions of the Act.

ORDER

On appeal from: Western Cape High Court (Erasmus J)

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

SCHOEMAN AJA (MPATI P, NUGENT and PILLAY JJA and MBHA AJA CONCURRING)

[1] The respondent is the Oudtshoorn Municipality, established in terms of the Local Government: Municipal Structures Act, 117 of 1998 (Municipal Structures Act). The appellant – Mr Nel – is a member of the respondent’s municipal council (the council). The second respondent – Mr Pietersen – is the municipal manager of the first respondent.

[2] Mr Pietersen was appointed municipal manager in August 2007. Towards the end of 2008 the council instituted disciplinary proceedings against Mr Pietersen on two charges of misconduct. The disciplinary body found him guilty of the charges and recommended that he be summarily dismissed. The recommendation was accepted by the council and in March 2009 he was dismissed. Mr Pietersen challenged the lawfulness of his dismissal before the South African Local Government Bargaining Council and the dispute was referred to arbitration according to the procedures of the Bargaining Council. Shortly before the arbitration commenced the council resolved – on 4 August 2010 – to settle the dispute on terms that were later

embodied in an award made by the arbitrator by consent. The terms upon which the dispute was resolved were, amongst others, that

‘1. The employee will be reinstated in his position as Municipal Manager of the employer with effect from Tuesday 10 August 2010;

2. The reinstatement of the employee and the employment relationship between the parties will be subject to and regulated by the terms and conditions of the employment agreement concluded between the parties dated 1 August 2007, as amended by the Addendum thereto dated 5 February 2008’.

[3] Mr Nel applied to the Western Cape High Court for an order reviewing and setting aside the resolution taken on 4 August 2010 – under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – together with certain interim relief that need not now concern us. The application was dismissed by Erasmus J and this appeal against his order is before us with the leave of this court.

[4] The court below singled out for decision the question whether the adoption by the council of the resolution of 4 August 2010 constituted ‘administrative action’ subject to review under PAJA. Holding that it did not he dismissed the application on that ground.

[5] I do not think it is necessary to pronounce upon that issue. It is trite that an appeal lies against the order of a court and not its reasons for the order. In my view the appeal must fail even if the adoption of the resolution falls within the purview of PAJA.

[6] The case made by Mr Nel against the council was that its resolution constituted the appointment of Mr Pietersen to the position of Municipal Manager, which was said to be in conflict with various provisions of the Local Government: Municipal Systems Act 32 of 2000. He relied in particular on s 51 (which requires a municipality to establish and organize its administration in accordance with various principles), s 55 (which imposes various duties upon a municipal manager) and s 57 (which requires the contract of employment of a municipal manager to comply with various

specified requirements). His employment was also said to conflict with Items 2(b) and 9 of the Schedule to the Act.¹

[7] I do not find it necessary to detail the various provisions I have referred to. Suffice it to say that those provisions must be taken account of when appointing a municipal manager. Counsel for Mr Nel properly accepted that if the resolution did not constitute the appointment of Mr Pietersen to that position then the appeal must fail.

[8] The resolution, in terms, was to ‘reinstate’ Mr Pietersen to his former position. In *Jackson v Fisher's Foils Ltd* [1944] 1 All ER 421 Humpreys J quoted with approval the following dictum in *Dixon (William) Ltd v Patterson* 1943 SC (J) 78² as to the meaning of ‘reinstatement’:

‘The natural and primary meaning of “to reinstate” as applied to a man who has been dismissed (*ex hypothesi* without justification) is to replace him in the position from which he was dismissed, and so to restore the *status quo ante* the dismissal.’

[9] In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*³ Nkabinde J, with reference to the provisions of s 193 of the Labour Relations Act 66 of 1995 (LRA) said the following on the meaning of ‘reinstatement’:

‘The ordinary meaning of the word “reinstate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.’⁴

[10] From the provisions of the LRA and the cases I have cited it is clear that by reinstating a dismissed employee the employer does not purport to conclude a fresh contract of employment. The employer merely restores the

¹The Code of Conduct for Municipal Staff Members.

² At 85.

³*Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 (CC).

⁴ Para 36.

position to what it was before the dismissal. That that was the intention and effect of the resolution is also made clear by paragraph 2, so far as it provides that the relationship between the parties would be ‘subject to and regulated by the terms and conditions of the employment agreement concluded between the parties dated 1 August 2007...’.

[11] Indeed, it would be absurd to construe the settlement of a labour dispute on the terms on which this dispute was settled to constitute a fresh appointment. That construction would necessarily require the council to advertise the position, interview numerous hopeful applicants, and then decide who to appoint, which would make it impossible to settle a labour dispute on these terms, contrary to the concept of reinstatement which is the ‘primary statutory remedy in unfair dismissal disputes’.⁵

[12] In my view the resolution taken by the council did not constitute the appointment of a municipal manager as contemplated by the Act. His appointment occurred in 2007 and the resolution did no more than to restore that relationship. In those circumstances the resolution is not susceptible to review on the grounds now advanced and the appeal must fail, albeit for reasons different to those of the court below.

[13] The appeal is dismissed with costs including the costs of two counsel.

I SCHOEMAN

ACTING JUDGE OF APPEAL

⁵*Equity Aviation* para 36.

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