

REPUBLIC OF SOUTH AFRICA**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable

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Case no: D430/15

In the matter between:

SOUTH AFRICAN MUNICIPAL**WORKERS UNION****Obo NOMASONGO LINA MTHEMBU Applicant**

10 and

NDWEDWE LOCAL MUNICIPALITY First Respondent**THEMBEKA CIBANE N O Second Respondent****SOUTH AFRICAN LOCAL****GOVERNMENT BARGAINING**15 **COUNCIL Third Respondent****S'THEMBILE MNGADI Fourth Respondent**

Heard: 22 May 2015

Delivered: 22 May 2015

Summary: Urgent application. Application granted

JUDGMENT

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1. GUSH J

2. In this matter the applicant applies as a matter of urgency for an order inter alia, that the applicant be reinstated to the position to which she had been appointed following an interview process conducted by the first respondent.

3. The applicant had applied to the first respondent for an advertised position and was shortlisted interviewed. During the interview process there had been a disruption but despite this at the conclusion of the interview process the applicant was formally appointed to the position of communications and special projects manager by the first respondent.

4. The applicant duly took up the position and proceeded to render services in accordance therewith.

5. Unbeknown to the applicant the first respondent

received a complaint or grievance from one of the unsuccessful and disgruntled applicants. This dispute was referred to the third respondent.

6. At no stage was the referral of the dispute referred to the applicant nor was she cited in the referral. The matter proceeded to the Bargaining Council where somewhat surprisingly the respondent and the complainant reached a settlement agreement which was to the effect that the recruitment process was declared null and void and was to start afresh. The 1st respondent in addition agreed that it would complete the recruitment process within 2 months and finalise the appointment by 11 June 2015.

7. Pursuant to this agreement reached on 10 March 2015 the 2nd respondent advised the applicant on 30 March 2015 that her appointment was nullified and that she was to revert to her former position. The applicant requested the 2nd respondent to give others decision in writing and to provide with a copy of the so-called settlement agreement.

8. The 2nd respondent wrote to the applicant on the same day advising the applicant :

Kindly be advised that there was a grievance hearing of the South African local government bargaining Council on 10 March 2015. The outcome was as follows:

- 5 • that your point is null and void in that proper recruitment policy was not followed
- the Ndwedwe municipality was therefore ordered to start the recruitment process from scratch within 30 days of the settlement of the dispute for purposes of fully adhering to the recruitment process as per the Ndwedwe
10 municipality policy
- the process of filling a post be finalised within 2 months from the 10th day of April 2015. Therefore shall be finalised on about 10 June 2015

15 We therefore inform you to revert back to your old position as a public participation officer, all benefits and salary thereof would be that of the public participation officer.

 You are further informed that 31 March 2015 is your last day as a manager communication. You are required to resume your duties as a public participation officer as of 1 April
20 2015.

 Kindly take further notice that such post be readvertised and you are at liberty to apply for the said post.

9. Apart from anything else the 2nd respondent did not

attach a copy of the settlement agreement nor advise the applicant of the fact that the matter was settled between the 1st 2nd and 4th respondents.

10. The applicant responded to the 2nd respondent's letter again requesting a copy of the "order or settlement" and pointing out that she was neither party to the matter nor given an opportunity to respond to the grievance. The applicant in addition pointed out that she was entitled to be advised of the grievance, entitled to respond to the grievance and requested clarity as to whether her employment was being terminated or whether she was being demoted.

11. The 2nd respondent replied simply recording that she was unable to explain why the applicant had not been party to the proceedings and blamed the 4th respondent for not notifying her.

12. It is difficult to comprehend quite what the applicant was thinking when they entered into a settlement agreement knowing that the consequence of the agreement would be to effectively remove the applicant from position to which had been appointed and at the same time being acutely aware of the fact that she was

not party to the proceedings.

13. The applicant referred a dispute to the 3rd respondent and endeavored to resolve the impasse with the 1st respondent.

5 14. The dispute referred to the 3rd respondent was enrolled for conciliation on 7 May 2015. Despite this being an opportunity for the 1st respondent resolve the matter the 1st respondents response to the notice of set down was to advise the 3rd respondent that it would not be
10 represented at the conciliation “due to its complexity which confirms that it will not be resolved on the conciliation level”.

15 15. The applicant, following the 1st respondent’s non-participation in the conciliation wrote to the respondent, setting quite clearly what the basis of her complaint was that without her being party to any of the
20 proceedings she had been improperly removed from her position by virtue of a so-called settlement agreement to which she was not a party in respect of a dispute or grievance to which she had not been joined despite interest in the matter and pointing out that she was to be demoted and prejudiced as a result thereof.

16. It is so that the applicant dealt with this matter in the first or second week of May and this matter now appears before this Court on 22 May. Whilst the respondent complains of a lack of urgency the applicant pursuant available remedy to the point where she was left with no remedy other than to approach the court. I am satisfied in the circumstances that this matter is urgent.
17. Insofar as the applicant is applying for an interdict, the applicant needs to establish a right. There could be no clearer right than the applicant's right to remain in the position to which she had been appointed in circumstances where the employer seeks to remove her as a consequence of a settlement to which she was not a party nor in respect of a grievance or dispute which had serious implications for her rights but to which she was not joined.
18. The basic and fundamental principle in this matter is that the applicant as an affected party should have been cited or joined in the dispute.
19. The failure by the 4th respondent to join the applicant in the grievance or dispute should immediately have rung

alarm bells in the mind of the first respondent who should have immediately addressed the issue and at least have remedied this.

20. That the appointment may at some stage in the future
5 be set aside is not the concern of the Court at this stage.

21. As far as the absence of another remedy is concerned the applicant had no choice but to proceed with this matter particularly given the attitude of the 1st
10 respondent.

22. The issue facing the Court is one not only regarding lawfulness of the 1st respondent's attempt to remove the applicant from the position to which she was properly appointed appointment, but also one of
15 fairness.

23. Having given the 1st respondent an opportunity to resolve the matter by availing herself of the remedy via the referral to the 3rd respondent the 1st respondents spurning of this opportunity is sufficient justification for
20 concluding that this Court is the appropriate forum in which to deal with the lawfulness of the actions of the first respondent.

24. The respondent has prejudiced the applicant by removing her from the position to which she was properly appointed and have ceased to pay the applicant her the salary to which she is entitled in that position.

25. I have no doubt, given the respondents attitude towards the applicant's predicament, having removed her from her position, that there is a reasonable apprehension of irreparable harm on her part.

26. As an example, I refer to the affidavit put up in response to the applicant's application by the first respondent. Amazingly at paragraph 22 thereof, the respondent says the following:

27. "We dispute that there is anything wrong done by the first respondent in relation to how it has been handling the movement of Ms Mthembu. It was necessary for it to do what it did".

28. In addition the respondent in its answering affidavit avers that the applicant must prove that she was not wrongly appointed, that she knows that she was wrongly appointed. And that the reason she has launched this application is that she has now realised

that the selection process was not conducted fairly, that she may not be successful and she is trying to escape the procedurally selection process by approaching this Court.

5 29. What is absolutely crystal clear from the first respondent answering affidavit that it has no comprehension whatsoever of the necessity of ensuring the applicant was party to the proceedings leading up to the settlement agreement. This is clearly evidenced
10 by the suggestion the 1st respondent did nothing wrong in having appointed the applicant to the position and then removing her in a settlement agreement with a third party, without reference to the applicant herself. It is difficult to comprehend the basis upon which the 1st
15 respondent avers that the applicant is simply seeking some sort of advantage in the knowledge she was improperly appointed.

30. As far as a balance of convenience is concerned it is clear that the interview panel was satisfied that the
20 applicant could perform the functions required by the position and in the interim while this matter is finally unraveled and resolved, there is no detriment to the

respondent should the applicant be reinstated in the position.

31. In the circumstances I make the following order as set out in paragraphs 1, 3, 4 and 8 of the Notice of Motion (as amended) Viz:

- a. the application is declared to be one of urgency and dispensing with the provisions of the rules of this court relating to the time limits and manner of service;
- 10 b. the first respondent is ordered to place the applicant in the position to which she was appointed, namely communications and special projects manager pending the outcome of an arbitration under case number KPD 121401;
- 15 c. the first respondent is ordered to pay the applicant the commensurate remuneration for the position of communications and special projects manager, together with all the benefits and allowances, pending the outcome of the arbitration under case
20 number KPD 121401;
- d. That the 1st respondent is ordered to pay the costs of this application.

D H Gush

Judge of the

Labour Court of South Africa

DURBAN

APPEARANCES:

FOR THE APPLICANT:

R Kissun

Shepstone & Wylie

FOR THE RESPONDENT:

Z Luthuli

A P Shangase Attorneys