

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 75/2024

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Applicant

And

LETSIMENG LOCAL MUNICIPALITY

First Respondent

TEBOHO ABEL MAINE

Second Respondent

Heard: 20 February 2024

Delivered: 5 March 2024

This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 5 March 2024.

JUDGMENT

PRINSLOO, J

Introduction

[1] The First Respondent (Municipality) is a municipality established in terms of the relevant provisions of the Local Government: Municipal Systems Act¹ and is situated in the southwestern Free State. The position of municipal manager has

¹ Act 32 of 2000.

been vacant for some time and on 24 February 2023, the Municipal Council (Council) appointed a selection panel, consisting of the Mayor, councillor Nthapo, Ms Khuzwayo from SALGA Free State and Mr Khiba from COGTA Free State. The position of municipal manager was subsequently advertised and whereafter shortlisting was done and interviews were held. The Second Respondent (Mr Maine) was appointed after the Council had resolved on 10 January 2024 to appoint him as the municipal manager.

- [2] On 18 January 2024, the Applicant became aware of the appointment of Mr Maine with effect from 1 February 2024. The Applicant approached this Court on 26 January 2024, on an urgent basis, seeking a rule *nisi* to *inter alia* interdict the Municipality from giving effect to the decision of 10 January 2024 to appoint Mr Maine, pending the finalisation of a review application to be instituted. The matter was enrolled for hearing on 2 February 2024, but on the said date, it was postponed until 20 February 2024.
- [3] The Respondents opposed the application and took issue with urgency. I have considered the question of urgency and I am inclined to deal with this matter on an urgent basis.

The urgent application

- [4] In its founding affidavit, the Applicant has set out the legal framework that applies to the appointment of a municipal manager. The Applicant's case is that the appointment of Mr Maine is unlawful for want of compliance with the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers² (Regulations). According to the Applicant, there were material deficiencies in the process followed leading up to the Council resolution of 10 January 2024 and the Regulations were flouted.
- [5] The Applicant seeks to interdict the Respondents from acting upon the Municipality's decision to appoint Mr Maine as the municipal manager, pending the finalisation of a review application to set aside the aforesaid decision.

² Published under GN 21 in Government Gazette 37245 of 17 January 2014.

The relief sought and the applicable legal principles

[6] The Applicant seeks to interdict the Municipality from giving effect to the decision of 10 January 2024 to appoint Mr Maine, pending the finalisation of a review application to be instituted. Furthermore, it seeks to interdict Mr Maine from performing any acts and duties, and attending to any function related to the position of municipal manager or from holding himself out to be the municipal manager.

[7] The requirements for interim relief were set out more than 100 years ago in *Setlogelo v Setlogelo*³. They are:

1. a *prima facie* right;
2. a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted;
3. the balance of convenience in favour of the granting of the interim relief; and
4. the absence of any other adequate ordinary remedy.

[8] The well-known authority in relation to the application of this test is *Webster v Mitchell*⁴. The headnote reads as follows:

‘In an application for a temporary interdict, applicant’s right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up ... in

³ 1914 AD 221 at 227.

⁴ 1948 (1) SA 1186 (W).

contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.

In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted, subject, if possible, to conditions which will protect the respondent.'

- [9] In order to establish a *prima facie* right, an applicant must provide *prima facie* proof of facts that establish the existence of a right in terms of the substantive law. An applicant must also establish a well-grounded apprehension of irreparable harm if interim relief is not granted and it ultimately succeeds in establishing its right. The balance-of-convenience requirement, as well as its interrelationship with the requirement of a *prima facie* right, was explained in *Olympic Passenger Service (Pty) Ltd v Ramlagan*⁵:

'The expression "prima facie established though open to some doubt" seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

⁵ 1957 (2) SA 382 (D) at 383D–F.

[10] As the Applicant seeks an interim interdict, it has to satisfy all the requirements for an interim interdict, which I will deal with *infra*. This Court has to decide whether the Applicant has made out a case, *prima facie*, which would entitle it to the relief it seeks.

[11] It is trite that an applicant must make out its case in the founding affidavit. In *Bowman NO v De Souza Roldao*⁶, it was held that:

‘Generally speaking, an applicant must stand or fall by his founding affidavit; he is not allowed to make out his case or rely upon new grounds in the replying affidavit.’

[12] It is within this context that this application is to be decided.

Requirements for an interim interdict

Prima facie right

[13] The applicant for an interim interdict must show a right which is being infringed on or which he or she apprehends will be infringed. The right may arise out of contract, delict or it may be founded in the common law or on some statute; it may be a real or personal right. The right set out by an applicant for interim relief need not be shown by a balance of probabilities. Where the interim relief is sought *pendente lite*, the applicant is required to furnish proof which, if uncontradicted and believed at the trial, would establish his or her right.⁷

[14] The Applicant submitted that the appointment of Mr Maine was *prima facie* unlawful because there were material deficiencies in the process followed, leading up to the Council resolution, the Regulations were flouted and therefore his appointment is void and needs to be declared void, alternatively is reviewable and must be declared unlawful and set aside.

⁶ 1988 (4) SA 326 (T) at 327C – D.

⁷ CB Prest, ‘*The Law and Practice of Interdicts*’, Juta at pp 52 – 61.

- [15] The Applicant made specific reference to certain parts of the Regulations to support its case that there was no compliance with the Regulations, which renders Mr Maine's appointment unlawful.
- [16] According to the Applicant, the first irregularity is to be found in Regulation 10, which prescribes that once the Council has approved the filling of a vacant post, the post must be advertised within 14 days of receipt of the approval. The mayor must provide monthly reports to the executive committee regarding the progress on the filling of the vacant municipal manager post.
- [17] It is common cause that the Council approved the appointment of the selection panel for the vacant municipal manager position on 24 February 2023.
- [18] The Applicant's case is that the advertisement for the post of municipal manager was only published in the Sowetan newspaper on 14 March 2023, which was 21 days after the appointment of the selection panel, which constitutes an irregularity.
- [19] The aforesaid irregularity is disputed by the Respondents. Their version is that the vacant position of municipal manager was advertised in the City Press newspaper on 15 January 2023, with a closing date of 2 February 2023. Neither of the parties has informed this Court about the date when the filling of the vacant municipal manager post was approved, which is the relevant date for purposes of compliance with Regulation 10(1).
- [20] It is evident from the Council resolution of 24 February 2023 that the Council approved the appointment of the selection panel for the municipal manager position. The approved selection panel was authorised to conduct the entire recruitment process including shortlisting, selection, interviews and recommendation of the suitable candidate to the Council.
- [21] The Respondents referred to the 'extract of a special continuation council meeting held on 6 March 2023' wherein it was recorded that the purpose was for the Council to deliberate on the re-advertisement of the position of municipal

manager. It was recorded that the advertisement was placed in the City Press on 15 January 2023, but the purpose of advertising was not met and on 6 March 2023, the Council approved the re-advertisement of the said position and resolved that the selection panel, which was approved on 24 February 2023, remains the same. The position was advertised in the Sowetan on 14 March 2023 and it was done within the time period allowed.

[22] There is no evidence placed before this Court to show that the mayor complied with Regulation 10(5) by providing monthly reports to the executive committee regarding the progress on the filling of the vacant municipal manager post.

[23] Regulation 13 provides that the mayor, in consultation with the selection panel, must compile a list of all the applicants who applied for the advertised post, and must also compile a shortlist consisting of all applications received, evaluated against the relevant competency requirements. The shortlisting must be finalised within 30 days of the closing date of the advertisement.

[24] The Applicant's complaint is that interviews were conducted when there *"was no shortlisting of any candidate, and moreover, such a shortlisting process was not finalised within 30 days of the closing date of the advertisement. Indeed, the advertisement had no closing date"*.

[25] The Respondents disputed the aforesaid averments. A copy of the advertisement for municipal manager of 14 March 2023 was attached to Mr Maine's opposing affidavit. It is evident from the advertisement that the closing date was 3 April 2023, wherefore the Applicant's averment that the advertisement had no closing date is factually incorrect.

[26] The Respondents attached the minutes of the selection panel's shortlisting meeting held on 25 April 2023 to Mr Maine's opposing affidavit. It is evident from the minutes that a total of 15 applications were received and a list was compiled of those and that seven candidates were shortlisted.

- [27] It appears from the minutes of the selection panel that a shortlisting process indeed took place and that the shortlisting was done within 30 days of the closing date of the advertisement. There is no merit in the Applicant's complaint that no shortlisting was done or that it was not done within 30 days of the closing date of the advertisement. The Applicant's complaint is factually incorrect and not supported by the evidence placed before this Court.
- [28] The selection panel recorded that in terms of the Regulations, all the shortlisted candidates had to undergo a screening process and they requested COGTA's assistance to conduct the screening process. On 28 April 2023, the acting municipal manager requested the Free State COGTA to assist with the screening of the shortlisted candidates as the Municipality does not have the capacity and the means to conduct the screening on its own.
- [29] Regulation 14 requires that the screening be done within 21 days after the finalisation of the shortlisting. It is evident from the facts before this Court that the shortlisting was done on 25 April 2023.
- [30] On the Applicant's version, COGTA submitted a report from its security and management and anti-corruption directorate on 16 May 2023, in terms of which only Mr Maine was evaluated. The Applicant accepts that this had happened before the interviews took place, but alleged that there was no compilation of shortlisted candidates and the screening did not take place within 21 days of finalising the shortlisting.
- [31] The Respondent's version is that screening was requested for and conducted on all the shortlisted candidates and that there was substantial compliance with the Regulations. There was no prejudice and it was not for the Council to compel COGTA to conduct the screening in a more expedited manner.
- [32] The Applicant insisted that Regulation 14 was disobeyed as screening did not take place within the prescribed timeframe and the mayor did not report on the outcome of the screening process before the interviews took place. It is evident from the Respondents' version that COGTA's response to the screening

pertaining to candidates who were dismissed for misconduct or who had resigned prior to the commencement or finalisation of proceedings, was received on 22 June 2023. It is common cause that the candidates were interviewed on 1 June 2023. It seems that the Applicant has merit in its complaint that there was not compliance with Regulation 14.

[33] Regulation 15 provides that the selection panel must conduct the interviews of candidates within 21 days of screening and that the selection panel for a specific post must remain the same throughout the screening and interviewing process.

[34] The Applicant insists that there is no compliance with Regulation 15 as it requires that the selection panel must conduct the interviews of candidates within 21 days of screening and the interviews were held before the screening was done. In my view, there is merit in the Applicant's complaint regarding the non-compliance with Regulation 15 in this regard.

[35] Regulation 15 also provides that the selection panel for a specific post must remain the same throughout the screening and interviewing process.

[36] The Applicant's complaint is also that not all the selection panel members attended the interview for the vacant municipal manager post. The Respondents admitted that Mr Nthlapo, a DA councillor did not attend the interviews, but submitted that there was substantial compliance with the Regulations in that the remainder of the selection panel still constituted a quorum in terms of the Regulations.

[37] The Applicant disputed that there was substantial compliance or that the Municipality was entitled to rely upon the doctrine of substantial compliance for purposes of showing compliance with the requirements of the Regulations.

[38] Regulation 12(3) provides that the selection panel for the appointment of a municipal manager must consist of at least three and not more than five members, constituted as follows:

- a) The mayor;
- b) A councillor designated by the Council;
- c) At least one other person, who is not a councillor or a staff member of the municipality and who has expertise or experience in the area of the post.

[39] It will be for the review Court to decide if there was compliance with the Regulations if the councillor, designated by the Council, did not attend the interview. In my view, the absence of the councillor constitutes non-compliance, at least at a *prima facie* level.

[40] Regulation 16 provides that the candidates recommended for appointment must undergo a competency assessment. The Respondents' version is that after the interviews were conducted, the top four candidates were indeed assessed by COGTA's accredited service provider, Gijima Technology People and Mr Maine was found to be competent.

[41] The Applicant's case is that there is no evidence that all the candidates recommended for appointment had undergone a competency assessment. The fact that Mr Maine says it was done, without any supporting document or confirmatory affidavit, is not sufficient to accept that it was indeed done.

[42] The Applicant further took issue with the fact that the Council had resolved on 6 March 2023 that the vacant municipal manager post be filled within three months from the closing date of the advert, which did not happen.

[43] On 23 November 2023, the mayor addressed a letter to COGTA's MEC, regarding the appointment of the municipal manager. In the letter, it was recorded that the appointment of the municipal manager was not concluded within a period of 90 days and that the report was not presented to the Council, due to a number of instabilities within the Municipality. The MEC was approached to advise the Municipality on the appointment of a municipal

manager. The MEC responded to the mayor and the speaker on 4 January 2024.

[44] The Municipality was advised that the appointment of a municipal manager vests in the Council and that it is only after the Council has resolved “*on the suitable candidate and submitted the report to the MEC, can the MEC pronounce of (sic) the validity of the appointment. However, since the Council has not pronounced itself on the suitable candidate for the position of municipal manager, I advise that the selection panel report on the suitability and recommendation of the municipal manager be tabled before Council as a matter of urgency*”. The MEC advised that the speaker should call an urgent special council meeting as soon as it was practically possible and that the selection panel report on the suitability and recommendation of the municipal manager be tabled by the mayor and for Council to resolve accordingly.

[45] It is common cause that the Council resolved on 10 January 2024 to appoint Mr Maine as municipal manager.

[46] The Applicant does not seek an order from this Court to pronounce on the lawfulness of the Council's decision to appoint Mr Maine as the municipal manager. The Applicant only seeks interim relief to interdict the decision to take effect, pending the finalisation of a review application.

[47] An applicant for interim relief has merely to show that it has a right, although the right might be open to doubt, and has to make only the averment that, if proved at a subsequent hearing, will prove its right.

[48] In my view, the Applicant has made out a *prima facie* case that there was not full compliance with the Regulations that govern the appointment of municipal managers and that the deviation is not minor, as the Regulations are peremptory.

Harm

[49] Once a *prima facie* right is established, the applicant must show irreparable harm or damage and a well-grounded apprehension of a prejudicial act on the part of the respondent.

[50] In respect of harm, the Applicant's case is that the "*injury this unlawful process brings about not only befalls SAMWU and the workforce, but also the Municipality itself*". This is so because Mr Maine will be performing the functions of a municipal manager, under circumstances where his appointment is unlawful. The position of municipal manager carries with it significant power and duty and Mr Maine will deal with the citizenry and service providers, outside of the municipal structure and he cannot be allowed to do so, pending the finalisation of the review application.

[51] The Applicant further submitted that the resolution of 10 January 2024 undermines and derails the implementation of the Municipality's statutory authority, it implicates the Municipality's capacity to carry out its Constitutional mandate of service delivery.

[52] Mr Maine will take important decisions having a bearing on the finances of the Municipality and service delivery, he will make a myriad of administrative and executive decisions daily, which may result in litigation against the Municipality, owing to the legally defective appointment of Mr Maine as municipal manager.

[53] The Respondents did not put up any convincing answer to the Applicant's averments of harm.

[54] In my view, the Applicant has shown that harm is likely to be suffered if the interim interdict is not granted. The harm would extend to the general public and could have serious financial and operational repercussions for the Municipality.

Balance of convenience

[55] The Court has to consider the balance of convenience and in exercising its discretion, weighs the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. It is the balancing of respective harms and an assessment of which of the parties will be least seriously affected or prejudiced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the end of the trial.⁸

[56] The Applicant's case is that the balance of convenience favours them. The Applicant submitted that the Municipality will suffer no harm as it may appoint an acting municipal manager and the review application can be prosecuted urgently. More so, the Municipality failed to fill the position for more than a year. The harm to be suffered by the Applicant, the citizenry and the rule of law has been addressed *supra*.

[57] Mr Maine submitted that he would be severely prejudiced if he was to be removed from a position he was lawfully appointed to, due to a meritless challenge which is politically motivated. He has relocated to Petrusburg and as such, incurred great expenses to be available to tender his services to the Municipality. He would not be receiving a salary if the interdict is granted, which would be blatantly unfair.

[58] Mr Maine further submitted that it is important for the Municipality to have continuity and to have another acting municipal manager, would not serve the interests of the Municipality. He also stated that all actions and powers of a municipal manager are strictly regulated in terms of applicable legislation and there is reporting to the Council and the Auditor General, wherefore he does not have a free reign where he can do as he pleases.

[59] The Applicant responded that the issue is not whether the municipal manager has a free reign, but rather whether he was lawfully appointed in the first place.

⁸ Prest, "*The Law and Practice of Interdicts*" at pp 72 – 73.

[60] It cannot be disputed that Mr Maine will be prejudiced if the interim interdict is granted. This Court has to balance the respective harms and make an assessment of which of the parties will be least seriously affected or prejudiced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found when the review application is adjudicated upon.

[61] In my view, the balance of convenience favours the Applicant – more is at stake than just the prejudice to an individual, the proper functioning of the Municipality and the lawfulness of decisions taken on a daily basis are relevant considerations in favour of the Applicant. The harm to Mr Maine can be limited by expediting the subsequent litigation to be instituted by the Applicant. Furthermore, the Municipality has been dragging its feet to appoint a permanent municipal manager for a material period of time and a further delay in the process does not outweigh the prejudice alleged by the Applicant, more so where it is allowed to appoint an acting municipal manager in the interim.

Alternative remedy

[62] The final requirement for the grant of an interim interdict is the absence of another adequate remedy.

[63] Mr Grobler on behalf of the Applicant submitted that the Applicant has no alternative remedy, except approaching this Court for interim relief. The appointment of a municipal manager constitutes administrative action, which must be overturned by judicial decree. A review application must be launched and to avoid the interim harm, an interim interdict is sought.

[64] The remedy that will be adequate at this point, is a temporary injunction in the form of an interim interdict, protecting the *status quo* prior to the Council resolution of 10 January 2024, pending the finalisation of the Applicant's review application.

Conclusion

[65] In *National Gambling Board v Premier, Kwazulu-Natal and others*,⁹ the Constitutional Court considered interdict proceedings and held that:

‘An interim interdict is by definition

“a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.”

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the *status quo* should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the *status quo*. It does not depend on whether it has the jurisdiction to decide the main dispute.

[66] The relief sought by the Applicant is interim in nature, pending the final determination of a review application. The Applicant has satisfied the requirements for an interdict and is entitled to interim relief *pendente lite*.

Costs

[67] The last issue to be decided is the issue of costs. This Court has a wide discretion in respect of costs, considering the requirements of law and fairness.

[68] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*,¹⁰ the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

⁹ [2001] ZACC 8; 2002 (2) SA 715 (CC) at para 49.

¹⁰ (2018) 39 ILJ 523 (CC) at para 24.

[69] Counsel for both parties argued that a cost order should be awarded in favour of their respective clients.

[70] This is a case where the Court has to strike a balance. The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. Considering the facts placed before me, this is a matter where the interest of justice will be best served by making no order as to costs.

[71] In the premises, I make the following order:

Order

1. Pending the finalisation of the review proceedings contemplated in paragraph 3 of this order, the Respondents are interdicted and restrained from implementing the Council Resolution of 10 January 2024 and giving effect to the decision to appoint the Second Respondent as municipal manager of the First Respondent;
2. Pending the finalisation of the review proceedings contemplated in paragraph 3 of this order, the Second Respondent is interdicted and restrained from:
 - 2.1. Performing any acts, duties and attending to any function related to the position of municipal manager of the First Respondent;
 - 2.2. Holding himself out to be the municipal manager of the First Respondent;
3. The Applicant has to institute proceedings in this Court seeking the review and setting aside of the Council Resolution of 10 January 2024, alternatively claiming such declaratory relief as may be necessary, within

5 Court days from the date of this order, failing which this order will automatically lapse;

4. The parties are directed to jointly approach the Judge President of the Labour Court with a request and motivation to expedite the adjudication of the application to be filed by the Applicant.
5. There is no order as to costs.

Connie Prinsloo
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate S Grobler SC

Instructed by:

Kramer Weihmann Inc Attorneys

For the Respondents:

Advocate L A Roux

Instructed by:

Michael du Plessis Attorneys