**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: 1973/2013**

In the matter between:

**SOUTH AFRICAN MUNICIPAL WORKERS' UNION** **APPLICANT**

And

**ETHEKWINI MUNICIPALITY** **1ST RESPONDENT**

**THE MUNICIPAL MANAGER: ETHEKWINI MUNICIPALITY** **2ND RESPONDENT**

**INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION** **3RD RESPONDENT**

**NOMAKOSI IVY GXAGXISA** **4TH RESPONDENT**

**MINISTER OF LABOUR** **5TH RESPONDENT**

**MINISTER OF CO-OPERATIVE GOVERNMENT AND TRADITIONAL AFFAIRS** **6TH RESPONDENT**

**NCEBA GXAGXISA** **7TH RESPONDENT**

---

**JUDGMENT**

**Delivered on: 09 APRIL 2015**

---

**OLSEN J**

[1] I have reached the conclusion that this application brought by the South African Municipal Workers' Union has no merit. In furnishing my reasons for that conclusion, I will attempt to confine myself to what is essential, and to avoid becoming embroiled in peripheral issues and arguments which have emerged in the course of the applicant's attempt to make of this case something which it is not.

[2] There are seven respondents. The principal ones are the first respondent, Ethekwini Municipality, and the fourth respondent, Ms N I Gxagxisa, an employee of the first respondent. The application concerns two claims.

[3] The main claim challenges the first respondent's appointment of the fourth respondent to the post of Head : City Health in its municipal structure. The fourth respondent applied for the position in February 2009 and was appointed in May 2009. The applicant seeks an order reviewing and setting aside the appointment; an order directing the first respondent to re-advertise the post and to fill it in compliance with the provisions of a collective agreement entitled the "Employment Practice Policy Agreement", which I shall refer to as "the collective agreement"; an order directing the first respondent to investigate whether any of its officials committed acts of misconduct in connection with the appointment of the fourth respondent; and finally an order directing the first respondent to deliver a report to this court within three months reflecting the product of that investigation.

[4] The second claim arises as follows. In August 2010 the fourth respondent's son (who is cited as the seventh respondent) was appointed as a clerk in the fourth respondent's department. This was drawn to the attention of the appropriate officials within the municipality which resulted in the seventh respondent's dismissal on 1 October 2010. An investigation revealed that allegations of nepotism in connection with the employment of the seventh respondent had substance. An affidavit provided by the first respondent's

deputy city manager conveys that a perception of nepotism contributed to the decision to terminate the employment of the seventh respondent. In so far as the consequences of this for the fourth respondent were concerned, the deputy city manager and the then city manager decided that the correct approach for the employer in this case was to counsel the employee (i.e. the fourth respondent) and to strengthen her human resources support, all with a view to reduce labour issues and conflict in the health unit where relationships with trade unions were not good. From the first respondent's perspective that resolved the issue as between employer and employee.

[5] The applicant is not satisfied with that outcome. It accordingly also seeks an order declaring invalid the failure of the first respondent to institute disciplinary proceedings against the fourth respondent with regard to the issue of her son, an order reviewing and correcting the decision, and an order directing the first respondent to institute disciplinary proceedings against the fourth respondent within one month. The fact that these orders are inconsistent with the primary relief sought, namely the immediate termination of the fourth respondent's appointment to her post (which is the sole pedestal upon which her status as an employee of the first respondent rests) seems to have escaped the attention of the applicant. Perhaps the second claim should be regarded as an alternative to the first.

[6] There are accordingly two separate sets of events in respect of which the applicant seeks relief. I will deal first with those relating to the appointment of the seventh respondent to a post in the fourth respondent's department.

A FAILURE TO INSTITUTE DISCIPLINARY PROCEEDINGS

[7] The case which the respondents were called upon to meet is stated as follows in the founding affidavit.

(a) The fourth respondent was "caught red-handed in an act of nepotism".

(b) A failure to institute disciplinary proceedings in those circumstances "sends a very unpleasant message to others who may be contemplating similar acts of corruption or nepotism".

(c) It is a matter vital to the public interest that the first respondent disciplines its employees who violate its policies.

[8] In argument counsel for the applicant stressed throughout that the applicant has not approached this court relying on the provisions of the Promotion of Administrative Justice Act, 2000. Counsel stressed that the challenges made by the applicant are legality challenges. I fail to see how the allegations made in the founding affidavit can sustain a conclusion that the first respondent's failure to institute disciplinary proceedings (in the narrow sense of the term "disciplinary proceedings") was unlawful.

[9] Seeking to overcome the first respondent's contention that counselling and assisting an errant employee is a legitimate mode of addressing default on the part of the employee, and that the manner in which such default is dealt with is a matter between employer and employee, counsel for the applicant called in aid of his argument Item 14A of Schedule 2 to the Local Government : Municipal Systems Act, 2000, which is the code of conduct for municipal staff members. Item 14A is to the effect that a breach of the code is a ground for dismissal "or other disciplinary steps". The difficulties with the argument are

(a) that Item 14A does not render disciplinary steps compulsory in all cases;
(b) there is in any event no evidence before me that the steps taken by the first respondent were in conflict with its employment policies relating to discipline, and indeed no such case was sought to be made in the founding affidavit.

[10] The application for relief under this heading must accordingly fail. There is no reason to go into other questions which the claim raises, including whether this court is the right place to make the claim.

THE APPOINTMENT OF THE FOURTH RESPONDENT

[11] This is the main issue in this case. It turns on the contention that the fourth respondent did not meet two of the essential requirements for the post to which she was appointed. These were the following, under the heading "Qualifications".

(a) "MB.CH.B or NQF Level 7 in Public Health"; and
(b) "Registered with the Health Professions Council of South Africa …".

[12] The collective agreement referred to earlier deals with the first respondent's employment practices policy. In its founding affidavit the applicant makes the undisputed points that the provisions of the collective agreement are peremptory and form part of the first respondent's constitutional duty to engage in collective bargaining and to recognise and respect collective bargaining in terms of s 23 of the Constitution; and that the collective agreement is given further statutory force by the provisions of s 23 of the Labour Relations Act, 1995. Clause 11 of the collective agreement is to the effect that any dispute arising as to the application of the agreement shall be determined in accordance with the dispute resolution procedures of the Bargaining Council. This is what is required by s 24 of the Labour Relations Act.

[13] When it discovered that at the time of her employment the fourth respondent was not in fact registered with the Health Professions Council the applicant referred the matter to the South African Local Government Bargaining Council. Conciliation failed and an arbitration followed. The award was made on 12 July 2011. The arbitrator found that the first respondent had indeed acted in breach of the collective agreement. Under the impression (which counsel before me appeared to accept was wrong) that

she did not have the power to set aside the appointment, the arbitrator made an order (consequent upon her finding as to breach of the collective agreement) that the first respondent must remedy its failure in the application of the collective agreement within a period of three months.

[14] It turned out that the fourth respondent had previously been registered as a medical practitioner, but that at the time of her appointment her registration had lapsed. It was reinstated retrospectively during the course of the three month period allowed by the arbitrator, and the fourth respondent continued to hold the office to which she had been appointed.

[15] Far from challenging the decision of the arbitrator, the applicant embraced it by applying to the Labour Court to have the award made an order of court in terms of s 158 (1) (c) of the Labour Relations Act. The award had already been certified as binding in terms of s 143 (3) of that Act. The reason this relief was sought from the Labour Court lay in the applicant's intention to pursue contempt proceedings against the first respondent on the basis that, despite the restoration of the fourth respondent's registration as a medical practitioner, there had not been compliance with the arbitrator's award. The Labour Court dismissed the application because it was unnecessary given s 143 (4) of the Labour Relations Act, which is to the effect that a failure to comply with an arbitration award that requires the performance of an act may be enforced by way of contempt proceedings instituted in the Labour Court.

[16] The significance of the applicant's failure in any way to challenge the arbitrator's award is apparent from s 143 (1) of the Labour Relations Act. It reads as follows.

> "An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award."

[17] The applicant did not bring contempt or any other proceedings against the first respondent based upon its view that the retrospective registration of

the fourth respondent as a practitioner did not remedy the failure to comply with the collective agreement, as required by the arbitrator. This was despite the fact that the judgment of the Labour Court pointed out that the remedy of contempt proceedings was already available to the applicant.

[18] The illegality complained of by the applicant before the arbitrator was that, in breach of the collective agreement, the first respondent had appointed someone who did not meet the minimum essential requirements for the post. The challenge was successful. The decision of the arbitrator was, in terms of s 143 (1) of the Labour Relations Act, final and binding. One would have thought that was the end of the matter. The applicant thought otherwise.

[19] In late 2011 or early 2012 the applicant again referred the matter of the breach of the collective agreement to the Bargaining Council, which resulted in a second arbitration. On this occasion the complaint was that the fourth respondent's foreign medical degree did not meet the first of the essential requirements to which I referred earlier. But the crux of the claim in the second arbitration was the same as the first, namely an attempt to void the appointment of the fourth respondent on the basis of an unlawful breach of the collective agreement.

[20] The second arbitrator decided that the dispute raised in the second arbitration was not in fact a different or fresh one, and that she lacked jurisdiction to determine the dispute "which has already been arbitrated". At that time the application to the Labour Court referred to earlier, and relating to the first arbitration award, was still pending. It has been suggested on the papers that the second arbitrator declined jurisdiction on a so-called technicality, because the matter was then serving before the Labour Court. That in my view is a misinterpretation of her award. The second arbitrator held that the issue had already been disposed of in the first arbitration. She merely mentioned the fact that the first award was still the subject of an application in the Labour Court. The second arbitrator could not have overlooked that what was sought in the Labour Court was in fact enforcement of the first award.

[21] The second arbitrator proceeded to deal with the allegation that the fourth respondent did not hold the requisite qualification, to cover the contingency that she was wrong in saying that the second arbitration was incompetent. She found that the fourth respondent held the requisite qualification and recorded that in her award.

[22] It is against this background that in the present proceedings the applicant seeks the same relief as has already been sought twice in the forum which was appropriate, given the provisions of the collective bargaining agreement and of the Labour Relations Act. The fact that on this occasion the principal relief is accompanied by subsidiary orders designed to have this court in effect supervise some of the first respondent's employment practices (for which no authority has been cited) does not in my view distinguish these proceedings from what went before.

[23] Justification for this must be sought in the founding papers. The relevant allegations may be summarised as follows.

(a) The primary and essential allegation remains that the appointment was unlawful as it was made in contravention of the collective agreement.

(b) The appointment was ultra vires, unlawful and unconstitutional. The first respondent breached the legality principle : executive organs of State can only exercise the powers conferred on them by law : their actions shall not be arbitrary and must be rational : the rule of law is a foundational value.

(c) The failure of the first respondent's municipal manager to take what the applicant calls "proper action" once the unlawfulness of the fourth respondent's appointment was discovered is in itself unlawful and violates Item 2 of the Code of Practice for Municipal Staff Members which is Schedule 2 to the Municipal Systems Act, and indeed constitutes a violation of s 50 of that Act.

(d) Section 50 of the Municipal Systems Act and s 195 (1) of the Constitution set out the basic values and principles governing local public administration which have been breached.

[24] Section 50 of the Municipal Systems Act is to the effect that local public administration is governed by the democratic values and principles embodied in s 195 (1) of the Constitution. The section goes on to provide that a municipality must strive to achieve the objects of local government set out in s 152 (1) of the Constitution and comply with the duties set out in sections 4 (2) and 6 of the Municipal Systems Act (both of which, like s 195 (1) of the Constitution, set out general and important principles which, within the sphere of public administration, reflect the democratic values and principles enshrined in the Constitution). The following was said on the subject of s 195 of the Constitution in *Khumalo v MEC for Education* 2014 (5) SA 579 (CC), para 35.

> ”Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, s 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in s 195 (1) (f) and (g) and the requirement of a high standard of professional ethics in s 195 (1) (a). Read in the light of the founding value of the rule of law in s 1 (c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.”

[25] The difficulty for the applicant is that in these proceedings it exceeds the boundaries of the law and disregards the interests of justice. It sought the corrective measures which it says the applicant ought to have sought itself

(and illegally failed to seek itself) in the correct forum, and received its (the applicant's) relief. It embraced its relief, seeking to have it made an order of court (albeit unnecessarily). It believes that the only way in which the first respondent could comply with the order of the first arbitrator would be by removing the fourth respondent from office and re-advertising the position. If it is right then its remedy is the contempt proceedings provided by s 143 (4) of the Labour Relations Act.

[26] If the applicant's interpretation of the relief it obtained in the first arbitration is incorrect, it is nevertheless bound by that outcome having failed to take the award on review to the Labour Court.

[27] In either event the issue as to whether the first respondent was obliged to terminate the appointment of the fourth respondent has been adjudicated upon. It is unsurprising, then, that the first respondent raises a plea of *res judicata*. To the extent that there might be some debate about nice distinctions between the first arbitration, the second arbitration and these proceedings, the position is that in appropriate cases the strict requirements for a plea of *res judicata*, especially those of "same relief" and "same cause of action", may be relaxed. (See *Pratt v Firstrand Bank Limited* (696/13) [2014] ZASCA 110 (11 September 2014), para 11.) In my view the plea in this case is good. I do not believe that there is any real difference between the cause of action pursued in arbitration, and the one sought to be established here. If I am wrong in that, then this is a case where the strict requirement must be relaxed in the interests of justice.

[28] Furthermore what was said in paragraph 57 of the judgment in *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) applies in this case.

> "Following from the previous points, forum-shopping by litigants is not desirable. Once a litigant has chosen a particular cause of action and system of remedies (for example, the structures provided for by the LRA) she or he should not be allowed to abandon that cause as soon as a negative decision or event is encountered."

That is precisely the course which the applicant asks this court to sanction. It cannot be permitted. If the allegation made by the applicant that the appointment of the fourth respondent was unlawful because it breached the collective bargaining agreement is removed from the mix of facts and circumstances relied upon in the present proceedings, nothing would be left of the cause of action. The issue as to whether that breach occurred has already been decided. In reality it is the applicant's dissatisfaction with the remedy it was given which brings it to this court. The power to correct the remedy (assuming it can and should be done) resides in the Labour Court.

[29] In the circumstances I conclude that the relief relating to the appointment of the fourth respondent must also be denied.

CONCLUDING REMARKS

[30] In the light of the aforegoing I have found it unnecessary to deal with the issue of the inordinate delay in the institution of the present proceedings. If the relief sought by the applicant were to be granted it would have the effect of setting aside the fourth respondent's appointment to a post which she has occupied now for some six years.

[31] It has also been unnecessary to consider the question as to whether the applicant's claim to standing under s 38 of the Constitution is properly made in this case. Counsel for the applicant argued that the applicant could bring this application in much the same way (he argued) as a ratepayer could, to protect his or her interests in proper and lawful municipal government. Given the peculiar interests and *raison d' etre* of the applicant, that would raise the question as to whether "the right remedy is sought by the right person in the right proceedings". (See *Giant Concerts CC v Rinaldo Investments (Pty) Limited* 2013 (3) BCLR 251 (CC) para 34, and the reference to the judgment of the Supreme Court of Appeal in the same matter given in note 39.)

I make the following order.

> **The application is dismissed with costs, including the costs of two counsel**.

OLSEN J

| | |
|---|---|
| Date of Hearing: | TUESDAY, 24 FEBRUARY 2015 |
| Date of Judgment: | THURSDAY, 09 APRIL 2015 |
| For the Applicants: | MR J NXUSANI |
| Instructed by: | TOMLINSON MNGUNI JAMES<br>2 NCONDO DRIVE<br>LEVEL 2, NEDBANK BUILDING<br>UMHLANGA<br>DURBAN<br>(Ref.: E Geldenhuys/23/S0052/14)<br>(Tel.: 031 – 566 2207) |
| For the 1ST Respondent: | MR M PILLEMER SC and Ms L R NAIDOO |
| Instructed by: | HUGHES-MADONDO INC.<br>UNIT 7, LEVEL 2<br>THE CENTENARY BUILDING<br>QUADRANT 1<br>30 MERIDIAN DRIVE<br>UMHLANGA NEW TOWN<br>UMHLANGA ROCKS<br>DURBAN<br>(Ref.: Ms Olivia Swardling/ud/EM69)<br>(Tel.: 031 – 584 6969) |