REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 139/2013

In the matter between:

MZWANDIKLE DOUGLAS JACOBS **Applicant**

and

WITZENBERG MUNICIPALITY **First Respondent**

THE MUNICPAL MANAGER, **Second Respondent**

DAVID NASSON N.O.

THE EXECUTIVE MAYOR OF THE WITZENBERG MUNICIPALITY, **Third Respondent**
STEFAN LOUW N.O.

Heard: **5 March 2013**
Delivered: **12 March 2013**
Summary: Urgent application to set aside early termination of contract of employment on grounds of illegality.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant is the Director: Community Services of the Witzenberg Municipality (the first respondent). The Municipality notified him that his fixed term contract of employment will terminate on 17 May 2013, three months hence. The reason that it will not be renewed is because he is suspected of misconduct. The Municipality has paid him out for the duration of the contract and notified him not to tender his services for the remaining period.

[2] The applicant has brought an urgent application for an order declaring the early termination unlawful and invalid, and reinstating him in his post.

Background facts

[3] It is common cause that the applicant is employed on a fixed term contract. On 13 February 2013 the mayor (the third respondent) addressed a memorandum to the Municipal Council. He referred to the Disciplinary Regulations and noted that they set out "a lengthy disciplinary process that will in all likelihood not be concluded before the contract termination date" on 17 May 2013. He continued:

> "In light of the above, the instituting [*sic*] disciplinary procedure will not be practical as it in all likelihood, will not be concluded before 17 May 2013. In terms of the rules of natural justice, and particularly the *audi alteram partem* rule a person has a right to be heard, and a right to be presumed innocent until proven otherwise. The question arises therefore, what alternatives are available, that will not negate his rights and also not result in that allegations of such a serious nature is [sic] not left unchecked. The allegations will also certainly affect the continued employment relationship till termination of his contract. The continued presence of the Director in the workplace might be detrimental to stability in the Municipality, affect service delivery and create an intolerable situation for both parties...
>
> Council has a difficult task and responsibility to balance the best interest of the community and the right of the Director Community Services. To achieve this, the proposed solution is that:

a) Disciplinary proceedings not be instituted, based only on the fact that disciplinary proceedings will not be finalised on or before the termination date; and

b) That council pays the Director Community Services his full salary for the rest of his term of employment in compliance with his contract and that he immediately vacates office based on the fulfilment of council's obligation to compensate him in terms of his contract.

With the above, the employee is not dismissed, and counsel honour [*sic*] its obligation to compensate him in terms of his contract whilst ensuring that service delivery is not negatively affected."

[4] Council accepted the mayor's recommendation and sent the applicant a letter in these terms on 14 February 2013:

> "Please be advised that Council resolved on 13 February 2013 at a special Council meeting not to renew your employment contract as signed on 22 September 2008. Council has further resolved to release you, with immediate effect for the remainder of your contract period (which would have terminated on 17 may 2013) with full benefits."

[5] The municipality paid out the balance of his contractual remuneration to the applicant. (He belatedly tendered the return of that amount for the first time in a supplementary affidavit filed on the day of the hearing).

[6] The applicant served this application on the municipality at about 16:00 on Thursday, 28 February 2013 and filed it a court on Friday 1 March 2013 for hearing on Tuesday, 5 March 2013. It required of the municipality to file its answering affidavits before midday on Monday 4 March 2013. He thus gave the municipality one clear court day's notice to do so.

[7] The municipality delivered an answering affidavit. After 16:00 on Monday, 4 March 2013 – ie on the evening before the hearing – the applicant emailed and amended notice of motion and incomplete unsigned supplementary affidavit to the municipality's attorneys. He filed these documents at court on the day of the hearing.

Evaluation / Analysis

[8] The applicant argues that he is entitled to a final order declaring the termination of his employment contract to be unlawful and invalid, and reinstating him in his position with retrospective effect. He bases his argument on the fact that the Municipality has not complied with the disciplinary regulations. The applicant is a senior manager and those regulations are applicable to him.

[9] As Ms *Harvey* pointed out, this court has confirmed that employing municipalities are bound by the regulations and that non-compliance is unlawful.[1] But before I can deal with the merits, I need to decide whether the matter should be heard on an urgent basis.

Urgency

[10] The Municipality hand delivered the letter informing the applicant of the early termination of his contract at his house on 14 February 2013. He launched this application two weeks later and required of the Municipality to respond within less than two days. And then he delivered a supplementary affidavit and amended notice of motion on the day of the hearing without giving the Municipality an opportunity to respond thereto.

[11] When I queried the urgency of the application in oral argument, Ms *Harvey* referred me to a section in Erasmus, *Superior Court Practice*[2] in support of an argument that mere delay is no bar to relief in applications for final relief. But that passage and the authorities there cited does not deal with urgency. It refers to the discretion of the court to refuse a final interdict and the question whether the rights of the party complaining can be protected by any other ordinary remedy. It then states that "mere delay in applying for an interdict in defence of a right is no ground for refusing the interdict"; but that deals with the enforceability of the right, and not the question whether the court should deal with an urgent application for final relief on

[1] *Biyase v Sisonke District Municipality* (2012) 33 *ILJ* 598 (LC); *Lebu v Maquassi Hills Local Municipality* (2012) 33 *ILJ* 653 (LC); *Nothnagel v Karoo Hoogland Municipality* (C 341 your

[2] Van Loggerenberg & Farlam, *Superior Court Practice* (originally by HJ Erasmus & DE van Loggerenberg) at E8-13 para 9 (Service 38, 2012).

an urgent basis, i.e. by condoning the non-compliance with the normal time periods set out in the court rules.

[12] The authority cited in support of the contention advanced by the applicant (and cited in Erasmus) is *Zuurbekom Ltd v Union Corporation Ltd.*[3] IN that case, the court held that the doctrine of laches is not part of our law. In considering whether the holder of mineral rights could enforce that right after considerable delay, Tindall JA noted that mere delay should not deprive a plaintiff of his right to an injunction; "the circumstances must be such that the enforcement of the right by the plaintiff would really be an act of bad faith in his part."

[13] But that is not the objection raised by the Municipality that has to be considered by the Court in the matter before me. The objection is, quite simply, that the application is not urgent. Rule 8 requires that:

> "(1) A party that applies for urgent relief must file an application that complies with the requirements of rules 7(1), 7(2), 7(3) and, if applicable, (7).
>
> (2) The affidavit in support of the application must also contain –
>
> (a) the reasons for urgency and why urgent relief is necessary."

[14] In the founding affidavit, under the heading of "urgency", the applicant merely alleges that the early termination of his contract is "arbitrary, unfair and unlawful". He then states that, if the status quo is permitted to endure, he will be permanently deprived of the opportunity to refute the allegations against him; that this will cause irreparable harm to his reputation, prospects and career; and that the effects of the unlawful conduct can only be cured if remedied urgently.

[15] That is not enough to establish urgency. The applicant does not explain why he waited for two weeks before launching the application, and then imposed a time limit of less than two days on the municipality to oppose an application for final relief.

[16] It is so that this court has, in the past, come to the assistance of (for example) senior municipal employees who have been unlawfully

[3] 1947 (1) SA 514 (A) at 537.

suspended. In those cases, if they could show urgency, the court ordered the parties to revert to the status quo. In this case, the matter is not sufficiently urgent to lead to the conclusion that the applicant will suffer irreparable harm. His contract expires on 17 May 2013. Any damages have been cured by the payment of the balance of the contractual period. Even though he founds his claim on the contention that the early termination is unlawful (and not on a claim for unfair dismissal or damages for breach of contract) any harm suffered will not be irreparable. He can pursue his remedies in due course.

[17] The applicant has not shown sufficient reasons for urgency as required by rule 8. The matter must therefore be struck from the roll. Both parties asked for costs. I see no reason to disagree.

Order

The application is struck from the roll for lack of urgency. The applicant is ordered to pay the respondent's costs.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Suzanna Harvey Instructed by Brits Dreyer Inc.
RESPONDENTS:	Alma de Wet Instructed by Marieke van Rooyen.