REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1667/13

In the matter between:

SAMWU obo **Applicant**

MW MOKWALAKWALA

and

POLOKWANE **First Respondent**

LOCAL MUNICIPALITY

PETER LAWRENCE **Second Respondent**

Heard: **31 July 2013**

Delivered: **1 August 2013**

Summary: Urgent application to interdict appointment of municipal official pending unfair labour practice and review proceedings.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an urgent application to interdict the Polokwane Local Municipality (the first respondent) from permanently appointing the second respondent, Peter Lawrence, in the position of Manager: Office of the Speaker pending the finalisation of an unfair labour practice dispute instituted by the applicant; alternatively, pending the finalisation of review and breach of contract disputes lodged by the applicant in this court.

Background facts

[2] The applicant, the South African Municipal Workers Union (SAMWU) acts in this dispute on behalf of its member, Mr M W Mokwalakwala. For ease of reference I shall refer to Mr Mokwalakwala as "the applicant".

[3] The applicant is employed by the first respondent, the Polokwane Local Municipality ("the municipality"). He applied for a promotional position as Manager: Office of the Speaker in the municipality in April 2012. He was shortlisted and interviewed. He was one of three candidates who were recommended to the municipal manager for appointment. A rival trade union, IMATU, objected to the fact that he had been shortlisted because he did not meet the minimum qualifications for the position. The municipality re-advertised the position in October 2012. The requirements for the position were, *inter alia*:

> "National diploma / Degree in Public Administration.
>
> Five years experience in the relevant field with three years at a managerial level."

[4] Interviews for the re-advertised position took place in May 2013. On 5 June 2013, the applicant filed an urgent application in this court requesting it to interdict the shortlisting and interview process of candidates for the position. The parties reached an agreement on 9 June 2013. It reads as follows:

> "1. The [municipality] shall not shortlist, interview or appoint any candidate for the position of Manager: Office of the Speaker (aka Manager: Council Support, Traditional Affairs and Public Participation) on the basis of an advertisement for the said position which was done in November 2012.

2. The [municipality] shall:

2.1 Consider the candidates recommended by the interview panel for appointment to the said position on 15 June 2012 and make an appointment from the said candidates as shortlisted and interviewed, in line with the [municipality]'s recruitment policy.

2.2 In the event the said recommended candidates, in their order of recommendation, do not accept appointment, the position shall be re-advertised."

[5] On 19 and June 2013 the municipality's Manager: Human Resources gave the applicant a letter that reads as follows:

"Re: Application for Position of Manager: Office of the Speaker

The above matter has reference.

The municipal manager has considered your application, recommendation of the interview panel for the above position which was advertised during April 2012 as well as the municipality's recruitment policy and noted the following:

1.1 The minimum academic requirements for the position as per the advertisement were a National Diploma/Degree in Public Administration.

1.2 The curriculum vitae which you submitted indicates that your qualifications are Matric and a six months course in Labour Relations Management from UNISA. This is further confirmed by the copies of academic qualifications which you had attached.

Since you do not possess the minimum academic qualifications required for the position as per the advertisement, the municipal manager did not approve the recommendation of the interview committee for your appointment and your application is unsuccessful."

[6] On 29 July 2013 the applicant launched review and breach of contract proceedings in this court, asking it to review the decision to appoint the second respondent, Mr Peter Lawrence, into the position. The municipality informed Lawrence on 9 July 2013 that he had been appointed to the position with effect from 1 August 2013. This application was heard on 31 July 2013 and judgement handed down the next day, 1 August 2013.

Evaluation / Analysis

[7] Mr *Mthombeni*, for the Municpality, raised three points *in limine.*

[8] Firstly, he pointed out that there is extensive reference in the applicant's founding papers to an unfair labour practice dispute to be referred to the Bargaining Council; yet there is no proof that such a dispute has indeed been referred. In reply, Mr Venter pointed out that the applicant had to refer such a dispute within 90 days and that those 90 days had not yet elapsed. That may be so; but the applicant can hardly be heard to motivate that this matter should be heard urgently when he has not shown any urgency in referring a dispute to the Bargaining Council. I shall return to this aspect when I deal with the question of alternative relief.

[9] Secondly, the applicant seeks interim relief pending the finalisation of "the review and breach of contract disputes" lodged in this court under case number J1674/13. Those disputes were referred to this court simultaneously. The applicant did so by way of a referral and statement of case in terms of rule 6. It is perhaps understandable that the applicant did so in order to avoid an unnecessary duplication of pleadings by way of referral in the breach of contract dispute and by way of application in the review proceedings. Yet it is so that rule 7 prescribes an application procedure for review proceedings. For the purposes of this application, I need not consider whether the applicant has followed a correct procedure in those proceedings.

[10] Thirdly, the muncipality raise the issue of urgency. I now turn to that aspect.

Urgency

[11] The applicant says in his founding affidavit that he was only informed on 26 July 2013 that Lawrence would start tendering his services in the disputed position today, 1 August 2013. He consulted with his attorneys on 27 and 28 July and delivered this application on 29 July to be heard on 31 July 2013. The respondents were given one day to file an answering affidavit.

[12] The applicant further says that he was given the letter pointing out to him that he did not have the required qualifications for the job "during July 2013". He then went to the SAMWU offices "around the 4th July 2013". After that, he contacted the municipality's personnel section and he "was then advised" that Lawrence had already been appointed from 1 July 2013.

[13] The municipality has included a copy of the letter of 19 June 2013 to the applicant in its papers. On that letter is a handwritten annotation that reads:

> "Received by M.W. Mokwalakwana 19/06/2013 16h00".

[14] The municipality states in its answering affidavit that the applicant received the letter on 19 June 2013. On a balance of probabilities, given the handwritten annotation and having regard to the answering affidavit and the rule in *Plascon-Evans*, I have to accept that that is indeed so. Yet the applicant waited for more than a month before launching this application, and he then did so on one day's notice. The urgency is entirely self-created. And even though Lawrence is only due to start tendering his services today, it is correct that he was already appointed on 9 July 2013 with effect from today's date. He accepted that appointment on 10 July 2013 and noted that he would report for duty as from today, 1 August 2013.

[15] The application should be struck from the roll for this reason alone. However, the merits have been fully argued and I will also deal with the question whether the applicant has established the requirements for an interim interdict.

Prima facie right?

[16] It is so that, at first blush, the municipality appears to have breached its settlement agreement of 9 June 2013. The applicant was one of the candidates recommended by the interview panel on 15 June 2012. Lawrence was not. Yet the appointment had to be made "in line with [the municipality's] recruitment policy".

[17] The recruitment policy provides, unsurprisingly, that the process appointment must be “fair, transparent and reasonable”. It further provides that job applications must be evaluated “against the actual job requirements of the position as reflected in the post specification, such as qualifications, experience and skills”. It is common cause that the applicant does not have the required qualifications for the job. Even though that remains to be finally decided in the pending substantive applications before this court and the Bargaining Council, I am not persuaded that the applicant has established a *prima facie* right on the papers before me.

Alternative remedies

[18] More importantly, the applicant has a number of alternative remedies open to him. He is already pursuing those remedies. He has instituted proceedings in this court relating to an alleged breach of the settlement agreement as well as the review of the appointment. He has also referred a dispute to the Bargaining Council.

Apprehension of irreparable harm?

[19] Any harm that the applicant may suffer because of his non-appointment to the position, is not irreparable. Should he be successful in the substantive proceedings before this court and the Bargaining Council, he may still be appointed. In the interim, he remains employed by the municipality at his full salary and with all his benefits. He is not suffering any actual harm.

Balance of convenience

[20] The balance of convenience favours the respondents. Lawrence has accepted his appointment and is due to start working today. He cannot return to his previous employment. He would suffer great prejudice if he were not able to take up the position he has already accepted. The municipality and the residents of Polokwane will also be prejudiced. Service delivery may be affected by the uncertainty created by the failure to fill the position on a permanent basis.

[21] The applicant, on the other hand, would suffer very little prejudice. He continues in his present position at his same salary. If he is ultimately successful, he will be able to enforce the further rights that he lays claim to.

Conclusion

[22] The applicant has not satisfied the requirements for an urgent interdict pending the processes he has initiated. He is not entitled to the relief he seeks.

Costs

[23] The municipality has asked that the applicant pay its costs on a punitive scale. I do not agree. The municipality did not play open cards with the applicant when it signed the settlement agreement on 9 June 2013. That agreement has led to the present litigation. The parties also have an ongoing employment relationship and the dispute between them still has to be finally decided. In all these circumstances, a costs order is not warranted.

Order

[24] The application is dismissed, with no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	R Venter Instructed by Maenetja attorneys.
FIRST RESPONDENT:	M Mthombeni Instructed by Lebea & associates.