REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: J 511/2013

In the matter between:

MATHABATHE PAULINE KOKETSO **Applicant**

and

EMFULENI LOCAL MUNICIPALITY **First Respondent**

MASITE JANE SEDIE **Second Respondent**

SHABALALA SAM **Third Respondent**

Heard: **12 and 14 March 2013**

Delivered: **15 March 2013**

Summary: Urgent application wherein a manager sought an interdict against the Municipality for having withdrawn her from a course. The requirements of a final interdict restated.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an urgent application brought by the applicant seeking an interdict against her withdrawal from a training course offered by the University of Pretoria. On 12 March 2013, the applicant approached this court seeking a declaratory relief to the effect that the decision of the second and third respondent to arbitrarily terminate her attendance of the Municipal Finance Management Programme ("the MFMP") as set out in terms of Municipal Finance Management Act, circular 60 is unlawful. Further, to interdict the respondents from interfering with her attendance pending referral of the unfair labour practice claim to the bargaining council.

[2] Having listened to the applicant's representative, I was not persuaded that a clear right was shown. Applying the principle of a *prima facie* right even though open to doubt, I was inclined to issue a *rule nisi* with a right to anticipate. On 14 March 2013, the respondents anticipated the order. Full set of papers was filed. Before I could listen to argument, the applicant's representative placed on record that the applicant would have wished to have the matter argued the following day. I must mention at this stage that on anticipation, it is the respondent that determines the urgency of the matter. The respondents impressed on me that the matter required urgent attention, as they needed to replace the applicant with another employee. It seems logical that a party armed with an interim order ordinarily sees no urgency in a matter anymore. The very reason that parties are granted the right to anticipate is that being affected by an interim order issued in their absence on an urgent basis they are afforded the right to be heard on the same basis. Under the circumstances, it is improper to allow an applicant armed with an interim order to still dictate terms on anticipated day.

Background facts

[3] The applicant is currently employed by the first respondent as a manager in the Internal Audit Department. On or about 15 June 2007, the Minister of Finance acting with the concurrence of the Minister for Provincial and Local Government issued regulations under GG No 29967 within the contemplation of section 168 of the Municipal Finance Management Act. The aim of the regulation is to regulate competence levels of certain officials within the Local Municipalities.

[4] During April 2012, the National Treasury issued a Circular known as MFMA Circular No. 60. On 22 March 2012, the applicant addressed an email to one Abram Mokhoantle to the following effect:

> 'I would like to find out whether you managed to secure the dates for CMPD for planning purposes. Do we need to complete any forms? In her founding papers, the applicant alleges that on that day what she did was to remind Abram about her attendance of the Programme. On 23 March 2012, Abram respondent to her by saying: 'not as yet, we will communicate the date to you shortly. However the Supervisor must approve your training.' (My underlining).

[5] On 24 March 2012, the applicant responded by saying: 'true, she had already agreed to it, but we will have to do it in writing. I will do it on Monday.' The applicant alleges that on 28 May 2012, she had a discussion with the second respondent and one Lulamile regarding her attendance of the MFMP course. In that discussion, the second respondent suggested that she be included in the list and be removed from another list as the Institute of the Municipal Finance Officers is paying for her tuition fees. The second respondent vehemently denied these allegations. The applicant alleges that she emailed Abram on 29 May 2012, to advise him of the discussions with the second respondent and Lulamile. The respondents denied this allegation. She was criticised for not annexing the alleged email to Abram. In reply, she referred to annexure PJM 2, which was not attached nor did her representative hand it up in court.

[6] On 5 November 2012, the applicant addressed an email to Abram asking: 'How far is the process, any new dates so far. I need to register other courses for next year. Please advise.' On the same day, Abram escalated the issue to one Sol and said: 'Please assist Jacque with the registration dates.' On the same day the applicant requested the contact details of Sol

[7] On 12 December 2012, the applicant held a telephonic discussion with Sol. Later in the day, she confirmed the discussion in an email, wherein she recorded that she will like to be included in the next list for January 2013 for CPMD. She is currently a manager in the Internal Audit Department. She has been previously informed that she shall be included in the next list. Amazingly, on 10 January 2013, she wrote to Sol and stated that Sol mentioned to her that she will be included in the list and she wanted to know what happened, whether she will be attending or not. In her founding affidavit, she testified that in January 2013, she emphasised to Sol that she needed to make a decision regarding her Masters degree. Sol informed her that he has been in contact with the University of Pretoria and dates will be set soon in January 2013. The respondents deny this allegation and state that Sol was misled into believing that she had an approval. In rejecting this, the applicant refers to an email on 29 March 2012 written by her referring to the discussion with the second respondent where allegedly there was an agreement for her to attend.

[8] On 1 February 2013, against the background of the allegation that the second respondent agreed that she should be in the list, she wrote a letter and mentioned the following: 'Previously, you agreed that I should participate in the municipal finance management project in the interest of the municipality. It is proposed that I be authorised for enrolment this year respectively with the aim of promoting the delivery of quality professional service, share information and collaborate on municipal financial management issues. I therefore request your approval for enrolment of this course during the current year.' In her founding papers she did not disclose the full contents of this letter. In a rather cavalier

manner she testified that she wrote a memo in respect of attending the course and made follow-ups with the secretary of the second respondent.

[9] On 20 February 2013, the second respondent refused to recommend her to attend the course. On 21 February 2013, Sol emailed a group that was suggested, which will be sent to Pretoria University. The applicant's name appeared on the suggested group, with her date of attendance as 26 February 2012. On 22 February 2013, the applicant took ill.

[10] On 25 February 2013, the applicant alleges that she formally confirmed by email her attendance to Sol and DMM: Corporate Services. Later she learnt that she had been removed from the list. She went to the second respondent's office and could not find her. She then approached Sol, who after discussing with DMM: Corporate Services said she must attend on 26 February 2013. The respondents deny this allegation. On their version, the applicant misled Sol and DMM: Corporate Services to believe that the second respondent gave approval. As instructed by Sol, she attended the course from 26 February 2013 to 1 March 2013. On 5 to 7 March, she received confirmation letter from the University for the attendance for 13 to 15 March 2013.

[11] On 5 March 2013, she received a letter from the second respondent, who learnt that she was attending the course without her consent, to provide written response why she ignored protocol and willfully disregarded authority. On 6 March 2013, the applicant wrote a condescending email and failed to give a written response as directed. However, in her founding papers she states that she told the second respondent that she attended as per the instructions of the DMM and Sol. This statement does not appear in her email annexed to her founding papers. On 11 March 2013, Sol confirmed to her that she had been removed following a decision taken in the meeting of 4 March 2013, a record of which was made available to her. An amount of R64000 has already been paid for her tuition and R4000 for her accommodation. The respondents state that the Chief Financial Officer is to absorb those costs.

[12] Aggrieved by the removal, the applicant on 12 March 2013 launched this application and gave the respondent effectively 30 minutes to be in court. As pointed out earlier an interim order was issued.

Evaluation

[13] The determination of this matter turns largely on the question whether the applicant had a right to attend the course. Both representatives agreed to this proposition from the court. Shongwe appearing for the respondents agreed to the proposition that where there is an obligation there is a corresponding right. According to Makonoto appearing for the applicant, the right is located in circular 60, section 83, 107, 119 and 165 of the MFMA. This contention was only made in the submissions to court. In her founding papers, the applicant located her clear right in circular 60 only. The principle that a party stands and falls by his or her founding papers holds true even in urgent applications. In my mind failure to fully set out one's case in the founding papers is equally fatal irrespective of the urgent approach. The applicant failed to set out facts critical to her case when such facts were clearly within her knowledge. A party cannot formulate its case in reply. It is clear in my mind that the applicant concealed the true facts as set out in her letter of 1 February 2013 because such disclosure is detrimental to her punted right to attend. It is also clear in my mind that when she wrote the letter she was fully aware that the policy so require. Besides Abram had reminded her of this requirement, to which she replied true.

[14] In my view, circular 60 does not create rights. It seeks to clarify the regulations and the Act with regard to competency levels. Section 83 is, in my view, the section where a right should be located. The respondents contend that the course is reserved for the so-called section 56 and 57 employees. Regarding other employees, it with the discretion of the municipality. In countering this submission, Makotoko referred to circular 60 where it sought to deal with officials appointed from the date of the circular. Reliance was placed on the statement that training opportunities are available to all persons whether they are current or future. The

submission being that the course is not limited to section 56 and 57 employees. When the applicant's counsel argued the matter on 12 March 2013, he advised the court that the right is located in section 83 and the applicant is a senior manager contemplated therein. This contention was jettisoned later. The court was advised that the applicant was not a senior manager. The criticism that nowhere in the circular or the Act is it expressed that the course is reserved for section 56 and 57 employees is misplaced. Proper reading of section 83 suggest that such employees are contemplated.

[15] Section 83 (1) applies to an accounting officer, senior managers, the chief financial officer and other financial officials. It is not by accident that section 83 is located in chapter 9 that deals with budget and treasury office. In terms of section 81 (1) (e), financial management resides with the chief financial officer. The term financial official as employed in section 83 (1) is defined in the regulations to mean an official exercising financial management responsibilities, which includes the accounting officer, the chief financial officer, senior manager and other financial official. For one to be regarded as a financial official, one must exercise financial management responsibilities. In her founding papers, all the applicant told the court was that she was a manager in the Internal Audit Department. She did not allege that she exercises financial management responsibilities. She admitted that her functions include handling special audits, risk management and IT. In reply, she sought to make out a case that her direct duties are those listed in section 165 (2) (b) of the MFMA. The difficulty with this allegation is that it is made only in reply. Further section 165 (2) (b) sets out the functions of the unit and not of an individual. It was incumbent on the applicant to make an averment that places her within the contemplation of section 83. She failed to do so in her founding papers.

[16] Section 107 is couched in the same terms as section 83. If anything, the obligation to meet the competency levels falls on those mentioned officials. Section 119 applies only to supply chain management officials. Declaratory relief is akin to interdictory relief. A party seeking that must

demonstrate a clear right. The applicant dismally failed to show a clear right. The fact that her case shifted from a senior manager within the contemplation of section 83 to something else is evident enough of the lack of clear right. Absent of a clear right, a declaratory and an interdict cannot issue.

[17] Since I hold a view that the applicant failed to demonstrate a clear right from the Act or any other instrument, I must consider whether the applicant was approved to attend the course and the second respondent arbitrarily withdrew her. The facts of this case clearly reveal that the applicant sought permission and the competent person did not grant it. In a rather disingenuous manner, the applicant having firstly failed to disclose full facts seeks to relegate the request for permission to extending courtesy. She testifies that her request was an orderly way of leaving her place of work. This is absurd. The contents of the letter of 1 February 2012 speaks for themselves. Her allegations that she was given permission in a discussion on 28 May 2012 are denied. Applying the *Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd,*[1] rule I find that no such permission was given to her on 28 May 2012. If permission was given, why propose and request one again? Her version on this point is improbable and inconsistent with the admitted facts. There is no merit in a submission that the policy provided by the respondents does not provide for permission by the supervisor. The applicant, by her own conduct on 1 February 2013, suggests that she was acting in tandem with the policy. I, therefore, conclude that the application or request for a permission to attend training was not approved. In fact, the emails quoted earlier lend credence to the allegation that she misled Sol. On the one email, she records that she informed Sol of the permission that she allegedly obtained. On the other, she suggests that Sol promised to include her in the list.

[18] I now turn to the question of costs. In her notice of motion, the applicant sought an order that the second and third respondent pay the cost *de*

[1] 1984 (3) SA 623 (A) at 634D-635D.

bonis propriis on attorney and own client scale. Equally, the respondents urged me to discharge the rule with punitive costs on attorney and own client scale. In this matter, it is clear in my mind that costs should follow the results. The issue is whether I should order punitive costs against the loosing party or only normal scale? In my mind, the applicant was indeed less than candid. She approached the court with besmirched hands. She was not open and frank at all. Put it differently, the applicant was frivolous and vexatious in this application. It was clearly an ill-conceived application, which ought not have been brought in the manner in which it was brought.[2]

[19] In the result, I am not persuaded that the applicant had a clear right worthy of protection by way of a declaratory or interdictory relief. The applicant has referred a dispute to the Bargaining Council. She clearly has an alternative remedy if she can demonstrate that the conduct of the respondents is unfair. The fact that the respondents have already paid for the course does not suggest that she must obtain a relief in order to avoid fruitless expenditure. Besides that, should be the problem of the municipality and not hers. The rule ought to be discharged.

Order

[20] In the results, I make the following order:

1. The rule issued on 12 March 2013 is hereby discharged. The applicant is to pay the respondents' costs on attorney and own client scale.

[2] See *Van Dyk v Conradie* 1962 SA 413 (C) at 418.

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Moshoana, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Advocate Makotoko with him Mabena on 12 March 2013 only.
Instructed by:	Motanya Madiba Attorneys, Roodepoort
For the Respondents:	Attorney Shongwe of Shongwe Attorneys, Johannesburg.