



IN THE LABOUR COURT OF SOUTH AFRICA: HELD AT DURBAN

Reportable

Case no: D1282/13

In the matter between:

PIUS JABULANI MOSEYA

Applicant

And

MSUNDUZI MUNICIPALITY

Respondent

Heard: **18 March 2016**

Delivered: **3 February 2017**

Summary: **BCEA Section 77 application. Granted**

JUDGMENT

GUSH J

1. The applicant, an employee of the respondent, applies in terms of section 77 (3) of the Basic Conditions of Employment Act to be paid the remuneration due to him pursuant to his appointment to the position of Operations Manager: Waste Management by the

respondent on 6 January 2010. The applicant's claim is limited to the remuneration due to him in accordance with the appointment for the period from his appointment on 6 January 2010 to November 2013 only. (hereinafter "the period")

2. At the heart of the issue is the averment by the respondent that the appointment by the respondent of the applicant to the position Operations Manager: Waste Management was invalid and null and void.
3. The respondents bases its averment on the provisions of section 66(3) of the Municipal Systems Act¹, which prevents a municipality from appointing a person to a post unless that post is provided for in the staff establishment. The respondent avers that as the post was already filled by a Mr. Masikane at the time of the applicant's appointment the appointment was invalid as the post was not vacant.
4. The respondent argued that it was at all times implicit that the appointment of the applicant was in an acting capacity. It is obvious from this averment that it is not in dispute that Mr Masekane was not "occupying" or performing the duties commensurate with the post at the time of the applicant's appointment and for "the period".
5. When the matter was heard the parties placed before the court's an amended statement of case by the applicants, the respondent's response to the applicant statement of case and the document setting out the preliminary issues and agreed facts.
6. The Applicant was employed by the Respondent in 1998 as the Foreman reporting to the Operations Manager: Waste Management. On 6 January 2010 the Applicant was appointed as

¹ No 32 of 2000

the Operations Manager: Waste Management by the then Municipality Manager, Mr R.F. Haswell with immediate effect.

7. With effect from the date of his purported appointment the applicant has performed the functions of the Operations Manager: Waste Management. It appears that the respondents Human Resources Department did not formally record the Applicant's promotion/appointment as the prior incumbent a Mr Masikane was still being paid and officially occupied the post. Despite this it is clear that the respondent at all material times regarded the applicant as having been appointed to the post and that he was occupying the post.
8. The applicant attached to his papers documentation relating to the respondent's Appointment Process; a letter from the municipal manager confirming the applicant's appointment to the post of Operations Manager: Waste Management and the applicant's acceptance which letter is endorsed "please process appointment". On the basis that the respondent was not entitled to make the appointment to a post that was already filled respondent avers that the applicant is not entitled to be paid at the rate applicable to that post with "the period" in question.
9. During the period up to the time point when the respondent disputed the validity of the applicant's appointment to the post the respondent acknowledged on various occasions that it regarded the appointment as having been valid.
10. On a number of occasions the applicant addressed his concerns regarding the matter with the respondent. Firstly with the then Respondent's duly appointed administrator. (The respondent at the time had been placed under administration and the administrator was performing the functions of the "municipal manager"). He

advised that the Applicant had been properly appointed and that his task team would address the administrative problem relating to the remuneration. Secondly and subsequently members of the task team involved in the administration of the respondent after interviewing the Applicant confirmed that the Applicant should continue to work as Operations Manager: Waste Management and that they would sort the administrative problem.

11. The respondent thereafter also informed the Applicant that he had no need to be concerned about his appointment as there was a valid letter of appointment.
12. It is common course that the alleged invalidity of the applicant's appointment only came to the attention of the respondent during 2013. When the matter came to the attention of respondent the respondents apparently took legal advice and wrote to the respondent on 20 March 2013 advising him inter alia that his appointment was unlawful and irregular.²
13. Importantly though respondent sets out quite clearly its attitude towards the effect of the alleged irregular appointment and the procedure it intended taking in order to regularize the position. The letter, having explained in some detail the basis upon which it avers the appointment was irregular and unlawful, continues to outline the steps it intends taking. The respondent says:
 10. In light of the above you are invited to agree and or consent to in writing to the setting aside of your Appointment: Operations Manager: Waste Manager dated 6 January 2010 signed by Mr. R F Haswell.
 11. This written agreement and/or consent must be delivered to the Office of the Municipal Manager within 14 days of the date hereof.
 12. Should you by the guidance of your union representatives refuse, fail and/or neglect to agree to the setting aside of his

² Bundle of documents page 44

appointment. The employer will have no alternative to make an application to the Labour Court in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 to review the administrative act of Mr. Haswell who had promoted you, in which a cost order will also be sought against the respondents. (sic)³

14. Two important factors arise from this letter.
 - a. The first is that the respondent clearly acknowledges that the applicant is the incumbent in the post to which he was appointed.
 - b. The second is that the respondent is of the view that the appointment in order to be set aside requires a review of the “administrative act of Mr. Haswell”.
15. It is common course that no application was by the respondent prior to November 2013. The consequence of the issues raised in paragraph 14 are that while the respondent acknowledges that the applicant occupies the first is that the applicant is entitled to be paid in accordance with the position to which he was appointed. First above Implicit in the respondents offer
16. It is clear that the Respondent at all material times from his appointment in 2010 and during “the period” regarded the Applicant as having been appointed to the post of Operations Manager: Waste Management.
17. Despite this the Applicant was not paid the amount commensurate with the post.
18. The issue in this matter is simply given the circumstances is whether the applicant is entitled to be paid for “the period” at the rate applicable to the post to which he was appointed. It is apparent from the papers that the appointment did not comply with

³ Bundle of documents pages 45-46

the provisions of section 66 (3) of the Local Government: Municipal Systems Act⁴ (The Systems Act), because at the time of the appointment Mr Masekane was the designated Operations Manager: Waste Management.

19. There can be no doubt that the respondent intended to appoint the applicants to this position and in its subsequent actions confirmed that this was so. The issue to be decided is whether in the circumstances, given that the appointment contravened The Systems Act the applicant is entitled to be remunerated as if his appointment was regular.
20. In the matter of *Oudekraal v City of Cape Town and Others*⁵ the Supreme Court of Appeals established the principle that administrative acts even if “unlawful and invalid at the outset” may not simply be ignored. This principle was restated in *Kwa Sani Municipality v Underberg/Himeville Community Watch Association*⁶ as “even invalid administrative acts are treated as valid until they are set aside”⁷ the rationale behind the principle set out in *Oudekraal Estates* is based on “the legal consequences of the administrative act”.
21. In this matter the consequences of the respondent having contracted with the applicant to perform the duties of the Operations Manager: Waste Management and having accepted the services required the respondent to comply with the contract for “the period”.
22. Given the limited nature of the applicant’s claim and the respondents decision to invite the applicant to consent to the

⁴ No 32 of 2000

⁵ 2004 (1) SA 222 (SCA)

⁶ [2015] ZASCA 24

⁷ Para 34

setting aside of his appointment failing which to apply for it to set aside there can be no doubt that the applicant is entitled to the salary commensurate with the position. It is accordingly not necessary to deal with what is required of an employer in such circumstances to bring such contract to an end.

23. Likewise it is not necessary to decide on the point raised by the applicant concerning the constitutionality or otherwise of The Systems Act or to consider the averment by the applicant that his appointment was regular and lawful.
24. The respondent suggested that at least part of the applicant's claim had prescribed. There was no evidence produced to gainsay the applicant's averment that subsequent to his appointment the respondent through certain of its officials confirmed and acknowledged the applicant's entitlement to the salary applicable to the post of Operations Manager: Waste Management. In addition the acknowledgment in march 2013 by the respondent of the factual position the applicant held suggests that the claim has not prescribed.
25. The position is this: the applicant was appointed to the post of Operations Manager: Waste Management. At all material times, prior to 2013, the respondent and the applicant believed that this appointment was regular. Applying the principle set out in the Oudekraal judgment, the appointment falls to be treated as valid until set aside particularly in the light of the respondent's attitude towards the consequences of the appointment as set out in its letter of 20 March 2013. The applicant however has limited his claim to a specific period. This is from the date of his appointment to November 2013. Accordingly the applicant is entitled to be

remunerated as if he had been lost be appointed to the post of Operations Manager: Waste Management.

26. The applicant has claimed an amount of R240,379.86. There was no evidence to suggest that the amount claimed by the applicant had been incorrectly calculated. In so far as this amount might be incorrect parties may enroll the matter again for the amount due to the applicant to be determined.
27. As far as costs are concerned I am not persuaded that I should exercise my discretion in awarding costs.
28. The circumstances and for the reasons above I make the following order:

The respondent is ordered to pay the applicant the amount of R240,379.86 together with interest thereon from the date on which the applicant filed this application.

There is no order as to costs

D H GUSH

Judge of the Labour Court South Africa

APPEARANCES

FOR THE APPLICANT:

Adv. D Crampton

Instructed by TMJ Attorneys

FOR THE RESPONDENT:

Adv. P Dutton

Instructed by Mdlele Inc