

SOUTH AFRICA / JUDGMENT

Chanda v Ratlou Local Municipality (J4584/2018) [2018] ZALCJHB 428 (28 December 2018) [2018] ZALCJHB 428

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J4584/2018

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: J 4584/2018

In the matter between:

TEBOGO SHADRACK
CHANDA Applicant
and
RATLOU LOCAL
MUNICIPALITY Respondent
Heard: 21 December
2018
Delivered: 28
December 2018

JUDGMENT

TLHOTLHALEMAJE, J

- [1] The Applicant approached this Court on an urgent basis to seek orders to set aside the decision of the Council of the Respondent taken on 13 December 2018 to suspend or place him on forced special leave, and to uplift the said suspension or special leave with immediate effect.

[2] The Applicant is the current Municipal Manager of the Respondent, having been appointed on 31 August 2018. He assumed his duties from 1 October 2018. His suspension or forced special leave took place within six weeks of his employment. Upon his employment, he had concluded a contract of employment. The Respondent's Speaker and deponent to the answering affidavit

however denies the existence of a contract of employment between the parties.

[3] The Applicant's averments in support of the relief he seeks are as follows;

3.1. On 31 October 2018, the Respondent's Council took a resolution to terminate with effect from 1 November 2018 and upon one month's notice, the employment of 34 employees whose contracts of employment were converted from fixed term to permanent employment by the previous Municipal Manager. A dispute between these individual employees with the Respondent is currently pending before the North West High Court. In that application, the Respondent seeks an order reviewing and setting aside the 34 employees' contracts of employment.

3.2. The Applicant advised Respondent's Council on 1 November 2018 upon discussing the matter with the Respondent's Manager for Legal Services that the proposed termination as per the Council Resolution would not be fair. This was due to various factors, including that the conversions took place in September 2014; Council had instructed legal representatives to review and set aside the said decision, which matter was instituted in August 2018, and still pending before the North West High Court. A set-down had also been requested in that matter.

3.3. The Applicant had further proposed to Council that legal representatives should be invited to make representations as to how to proceed with the matter, in the light of the pending application.

3.4. In a response, the Speaker of the Council wrote back to the Applicant, expressing a different opinion, and further warning him not to attempt to contest the Council's resolution. According to the Applicant, it was expected of him to slavishly follow and implement the decision of Council despite the fact that it did not conform to the advice the Council obtained from legal representatives.

3.5. At an Executive Committee meeting (constituted by the Mayor, mayoral committee, Municipal Manager and other Senior Managers) held on 6 November 2018, it was then resolved that further legal opinion be obtained on the matter. Such legal opinion was obtained on 11 November 2018, which basically confirmed the view that should the affected any of the 34 employees approach a court on an urgent basis to interdict the termination of their contracts, the court would not be sympathetic to the Respondent in the light of the pending review application before the North West High Court.

3.6. A Special Meeting was convened by the Council on 21 November 2018, and nonetheless passed a resolution directing the Applicant to terminate the employment contracts of the 34 individual employees within 14 days.

3.7. On 13 December 2018, the Council convened another Special Meeting to discuss an update on the termination of the employment contracts in question. At that meeting, the Applicant advised that he had not carried out the instruction to terminate the employees' services, and that a legal opinion was obtained advising against taking decisions to effect the dismissals whilst a Court application was pending.

3.8. The Applicant upon making his submissions was then requested to leave the meeting. He was then called back, and was then informed orally that Council had resolved to place him on special leave for a period of three months. According to the Applicant, there was no explanation surrounding the resolution. He was then instructed to leave the Municipality with immediate effect, and another person, Sejake was immediately appointed as Acting Municipal Manager.

[4] The applicant's case is that the decision of the Respondent to place him on forced special leave is unlawful for the following

reasons;

4.1 There is no provision in law nor in his contract of employment upon which the Council may be entitled to place him on special leave. It is only where he was accused of misconduct that he could be suspended pending investigations into the allegations of misconduct, and the Council therefore had no grounds to suspend him, which was its real intention in the light of his failure to heed the unlawful instruction to terminate the contract of employment of the 34 individual employees.

4.2 Paragraph 32 of his contract of employment, which the Respondent seeks to deny, provides that special leave is to be taken at his insistence and ought not be imposed by the Respondent.

4.3 Where the Respondent sought to suspend him, he was supposed to have been provided with a notice of intention to suspend, and be afforded an opportunity to make representations why he should not be placed on suspension.

4.4 The decision to suspend or discuss the Applicant's conduct was never placed on the agenda of any meeting of the Council, and the Council could not have discussed the suspension without following the requisite procedures. That decision, which was not explained at the time, lacked any rational basis.

[5] The respondent opposed the application on various grounds including that;

5.1 The urgency claimed by the applicant is self-created, and the application was an abuse of court process

5.2 The applicant was placed on special leave with full pay and benefits, and therefore suffered no prejudice during the period of suspension

5.3 This court lacked jurisdiction to review and set aside the resolution taken by the respondent, and lacked the powers to uplift the applicant's special leave

5.4 The applicant has not been placed under suspension and there was no labour dispute that justified the court's intervention with the respondent's resolution to place him on leave.

5.5 The applicant failed to exhaust SALGBC dispute resolution procedures, and therefore the matter was launched prematurely to this court.

5.6 The applicant had not yet signed a contract of employment with the respondent, and the latter had no knowledge of the purported contract concluded with the applicant.

Evaluation:

[6] Various defences raised in opposing this application clearly have no merit;

6.1 The first is that the Respondent's contentions that the application is not urgent is misplaced. The applicant having been suspended or placed on forced special leave on 13 December 2018, approached this Court on 18 December 2018, and it cannot be doubted that he had indeed acted with the necessary haste.

6.2 The facts of this case given the issues raised in the founding affidavit and the responses thereto, also give rise to the need for it to be treated with urgency. In particular, as shall be demonstrated in the course of this judgment, the 'forced special leave', which is essentially in a guise of a suspension, is so patently unlawful, and there is clearly no basis for any conclusion to be reached that the urgency claimed in this case is self-created, particularly since the Applicant had established a clear right to the relief that he seeks.

6.3 The second issue relates to the jurisdiction of this Court, a matter which is aligned to whether the Applicant has alternative remedies available to him. His case is grounded on the unlawfulness of the decision taken to place him on suspension, even if the Respondent contends that he was merely placed on special leave. The Applicant is not alleging unfairness, and it is trite that the SALGBC would not have the requisite jurisdiction to determine the unlawfulness of the suspension or special leave. A further contention therefore that the Applicant failed to exhaust internal remedies, or that this application is premature is misplaced, particularly since the alleged internal remedy referred to is the SALGBC. The SALGBC cannot serve as an 'internal remedy' as contended on behalf of the Respondent. Further as shall be discussed below, despite the Respondent having denied the existence of an employment contract, it nonetheless sought to rely on clause 35 of the very same contract of employment, which reliance was in any event misplaced.

6.4 A third consideration is that the Respondent seeks to deny the existence of the contract of employment relied upon by the Applicant, on the grounds that such a contract ought to have been signed within three months from the date that the applicant was served with a letter of appointment, and that it had not been signed on behalf of the Respondent.

6.5 The letter of appointment was signed by the Speaker of the Respondent, Tebogo Modise on its behalf on 31 August 2018. The contract of employment also appears to have been signed by Modise on the Respondent's behalf, albeit it is undated. Mr Makoti's submissions on behalf of the applicant that it only required a naked eye to see the similarities between Modise's signature on the letter of appointment and the contract of employment is not far-fetched.

6.6 Prima facie, I have no reason not to believe that a contract of employment was entered into between the Applicant and the Respondent, which by all account should determine his terms and conditions of employment in conjunction with other applicable prescripts.

6.7 It is trite that the employment of Municipal Manager is in terms of section 54A of the Local Government: Municipal Systems Act[1] (The Systems Act), and that their terms and conditions of employment are subject to the Local Government: Disciplinary Regulations for Senior Managers (The Regulations). Regulation 5 and 6 of the Regulations make provision for the suspension of an employee such as the Applicant, where there is reason to believe that he might have been involved in acts of misconduct necessitating his removal

from his position either by means of a precautionary suspension or ultimately, a dismissal.

6.8 The facts of this case are curious in the extreme. First, the suspension or placing of the Applicant on forced special leave was never an item on the agenda of the Special Council Meeting held on 13 December 2018. He was verbally informed that he was to be placed on special leave. The respondent seeks to rely on Annexure 'QS' as some formal notification by the Council of its decision to place him on special leave. Be that as it may, there is no evidence to indicate how that notice was served on him, by whom, and when. In any event, the letter is dated 14 December 2018, and the decision to place the

Applicant on special leave was verbally communicated on 13 December 2018 and he was requested to leave the premises immediately.

6.9 Even if the letter served as formal notice of being placed on special leave, at its paragraph 2.1, it states that; "The council grant the Municipal Manager special leave to allow council through EXCO to investigate all alleged acts of misconduct committed by the Municipal Manager" (Sic)

6.10 To the extent that any allegations of misconduct were levelled against the Applicant, any procedure to be followed in that regard could only be in terms of Regulation 5 and 6 of the Regulations[2], something which the Council should be familiar with.

6.11 To the extent that the Respondent sought to place the Applicant on forced special leave, it should be known to it that since the Applicant is a senior manager, his conditions of employment are governed by the Local Government: Regulations: Appointment and Conditions of Employment of Senior Managers promulgated in terms of the Local Government: Municipality Systems Act of 2000 (the Regulations). The Regulations recognises three circumstances or conditions which would qualify an employee to take leave, amongst which is family responsibility leave and special leave. Such leave can only be granted upon the request of the senior manager.

6.12 There is no provisions for something called ‘forced special leave’ unless provided for in terms of Clause 32 (3) of the Regulations, which requires a municipality to adopt a special leave policy which defines the circumstances and conditions under which special leave may be granted. To the extent that the Respondent insisted that the Applicant is placed on special leave rather than suspension for alleged misconduct which still needed to be investigated, it is still not clear what is the source document or authority relied upon by the Respondent in doing so.

6.13 In *Heyneke v Umhlathuze Municipality*[3], this Court in dealing with not so dissimilar set of facts had the following to say;

“Special leave that is imposed on employees is effectively a suspension in the hope of subverting the residual unfair labour practice provisions of the Labour Relations Act No. 66 of 1995 (LRA) and all the time and other constraints that accompany suspensions.

To discharge its onus of proving the... lawfulness of the special leave the municipality has to show that the special leave was at all times at the instance of the employee and with his consent, that it was not imposed on him, that exceptional circumstances existed and that the special leave resolution was adopted in good faith, and that it was rational, reasonable, proportionate and in the public interest.”

6.14 In this case, given the haste and manner with which the ‘forced special leave’ was imposed on the Applicant, it is apparent that the Respondent sought to subvert the provisions of Local Government: Disciplinary Regulations for Senior Managers, and I am satisfied that the Applicant has established a clear right to the relief that he seeks, as no attempt was made to comply with the provisions of the Regulations in suspending him, and furthermore, there is no source document or authority relied upon by the Respondent in imposing the forced special leave.

6.15 In this case, it can also be safely stated that the Respondent failed to adhere to principles of natural justice enshrined in the Regulations, by affording the applicant an opportunity to make representations as to why he should not be placed on suspension or special leave, and there is further nothing placed before this Court that demonstrates that the decision of the Council can be classified as either sound or rational.

6.16 The fact that the Applicant is placed on special leave with full pay is equally a concern, as it appears that public entities are contend to incur such unnecessary costs at the expense of the public purse without consequences, and a simple retort that the employee would not suffer any prejudice. That practice of simply placing employees on paid suspension, even if limited to three months, is inimical to good governance, especially when there is no rational basis for such decisions.

- [7] There are further worrying features with this application and the Respondent's conduct in opposing this matter. The first is that despite the Respondent's contentions that annexure 'QS1' to the answering affidavit, which is the purported letter advising the Applicant of the forced special leave, was issued or sent to the Applicant, no attempt was made to indicate how, when and by whom was that document sent to him. The Court should take umbrage to such falsehoods.
- [8] Furthermore, it appears that the Council was displeased with the reluctance of the Applicant to implement its decision to dismiss the 34 employees employed by the previous Municipal manager. To the extent that the Respondent had a pending review application at the North West High Court in regards to the employment of the 34 employees, the haste and manner with which the Council, contrary to sound legal advice would want to nonetheless implement its decision to dismiss those employees, reflects self-help and complete disregard of the rule of law for whatever ends it seeks to achieve.
- [9] Furthermore, there is nothing in the answering papers to support any contention that the Applicant had gone on a frolic of his own and displayed open defiance of the Council for no reason. Out of concern of the legality and fairness of implementation of the Council's decision, and the foreseeable consequences thereof, the Applicant had consulted and conferred with the Manager, Legal Services, and obtained legal opinion which for reasons that are not clear, the Council seeks to ignore.
- [10] As head of administration, the Applicant as Municipal Manager is subject to the policy directions of the Council, but at the same time, as the accounting officer, and under the provisions of section 55 of the Municipal Systems Act[4], he has an obligation to guide Council where its decisions may be patently wrong, unlawful, irrational, unconstitutional and not in the best interests of the Respondent and the community it serves.
- [11] In this case, it appears that the Respondent's Council sought to be a law unto itself, which cannot bode well for our

constitutional democracy and the rule of law. It was therefore telling and disconcerting, for counsel on behalf of the Respondent to submit that it was not for the Applicant to challenge or question the decisions of Council irrespective of their lawfulness or legality, and that all that was required of him as an employee was to implement those decisions. It is seriously disconcerting therefore that counsel, an officer of this Court can with certitude, essentially make submissions to the effect that a Municipal Council is entitled to act as it pleases without due regard to its constitutional obligations and the rule of law, and to effectively subvert pending legal proceedings and the authority of Courts.

- [12] To conclude then in light of the above, I find that the Applicant has satisfied the essential requirements of urgency as contemplated in Rule 8 of the Rules of this Court; has established a clear right to the relief that he seeks, has no available alternative remedy, and would indeed suffer irreparable harm should urgent relief not be granted.

[13] Given the gung-ho manner with which the Respondent placed the Applicant on 'forced special leave', which in any event is euphemism for a suspension, the unlawful nature of its decision and its general approach in opposing this matter, it is my view that the requirements of law and fairness require that it be burdened with a punitive cost.

[14] The Applicant has not done this Court any favours by not citing the individuals that took the impugned decision in this case as respondents for an appropriate order to be made. To the extent however that such punitive costs are to be ultimately paid by the tax-payer, a copy of this judgment is to be sent to the Office of National Treasury, for an assessment to be made as to whether such costs should not be classified as wasteful and fruitless expenditure, for the purposes of taking any further action against the individuals in the Respondent's Council, who took the impugned decision.

[15] In the premises, the following order is made:

Order:

1. The Applicant's failure to comply with the Rules of this Court relating to form and manner of service is condoned.
2. The decision taken on 13 December 2018 by the Council of Respondent to suspend or place the Applicant of forced special leave is set aside on account of it being unlawful.
3. The Respondent is ordered to uplift the Applicant's special leave or suspension with immediate effect.
4. The Respondent is ordered pay to the Applicant, costs on attorney and own client scale, including the costs of counsel.
5. The Registrar of this Court is directed to forward a copy of this judgment to the Office of National Treasury, for its assessment as per paragraph [13] of this judgment, and to make any determination as to the liability of any individual (s) in respect of the costs as per 4 above, incurred by the Respondent in opposing this application.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: M.Z Makoti with l Boihang

Instructed by: Moetsi Maredi Inc

For the Respondent: M.J Mashavha

Instructed by: H.R Munyai Attorneys

[1] Act 32 of 2000

[2] Regulations 5 and 6 read:

5. Disciplinary procedures.

- (1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.
- (2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven [7] days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven [7] days to consider the said report.
- (3) If the municipal council is satisfied that –
 - (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days appoint an independent investigator to investigate the allegation[s] of misconduct; and
 - (b) there is no evidence to support the allegation[s] of misconduct against the senior manager, the municipal council must within seven [7] days dismiss the allegation[s] of misconduct.
- (4) The investigator appointed in terms of sub-regulation (3)(a) must, within a period of thirty [30] days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.
- (5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).
- (6) After having considered the report referred to in sub regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.
- (7) The resolution in sub-regulation (6) must-
 - (a) include a determination as to whether the alleged misconduct is of a serious or a less serious nature;
 - (b) authorise the mayor, in the case of municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to -
 - (i) appoint - (aa) an independent and external presiding officer; and (bb) an officer to lead evidence; and (ii) sign the letters of appointment.
6. Precautionary suspension
 - (1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that-

- (a) the presence of the senior manager at the workplace may -
 - (i) jeopardise any investigation into the alleged misconduct; (ii) endanger the well-being or safety of any person or municipal property; or (iii) be detrimental to stability in the municipality; or
- (b) the senior manager may-
 - (i) interfere with potential witnesses; or (ii) commit further acts of misconduct.
- (2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven [7] days of being notified of the council's decision to suspend him or her.
- (3) The municipal council must consider any representation submitted to it by the senior manager within seven [7] days.
- (4) After having considered the matters set out in sub regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.
- (5) The municipal council must inform -
 - (a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and
 - (b) the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven [7] days after such suspension.
- (6) (a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.
 - (b) The period of three months referred to in paragraph (a) may not be extended by council.”
- [2] Regulations 5 and 6 read:
- 5. Disciplinary procedures.
 - (1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.
 - (2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven [7] days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven [7] days to consider the said report.
 - (3) If the municipal council is satisfied that –

- (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days appoint an independent investigator to investigate the allegation[s] of misconduct; and
- (b) there is no evidence to support the allegation[s] of misconduct against the senior manager, the municipal council must within seven [7] days dismiss the allegation[s] of misconduct.
- (4) The investigator appointed in terms of sub-regulation (3)(a) must, within a period of thirty [30] days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.
- (5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).
- (6) After having considered the report referred to in sub regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.
- (7) The resolution in sub-regulation (6) must-
 - (a) include a determination as to whether the alleged misconduct is of a serious or a less serious nature;
 - (b) authorise the mayor, in the case of municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to -
 - (i) appoint -
 - (aa) an independent and external presiding officer; and
 - (bb) an officer to lead evidence; and
 - (ii) sign the letters of appointment.
- 6. Precautionary suspension
 - (1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that-
 - (a) the presence of the senior manager at the workplace may -
 - (i) jeopardise any investigation into the alleged misconduct;
 - (ii) endanger the well-being or safety of any person or municipal property; or
 - (iii) be detrimental to stability in the municipality; or
 - (b) the senior manager may-
 - (i) interfere with potential witnesses; or

(ii) commit further acts of misconduct.

- (2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven [7] days of being notified of the council's decision to suspend him or her.
- (3) The municipal council must consider any representation submitted to it by the senior manager within seven [7] days.
- (4) After having considered the matters set out in sub regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.
- (5) The municipal council must inform -
 - (a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and
 - (b) the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven [7] days after such suspension.
- (6) (a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.
(b) The period of three months referred to in paragraph (a) may not be extended by council."

[3]

(2010) 31 ILJ 2608 (LC) at para [33] – [34]

[4] Act 32 of 2000

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