

SOUTH AFRICA / JUDGMENT

Dintwe v Ditsobotla Local Municipality and Another (J65/16)

[2016] ZALCJHB 24 (29 January 2016)

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COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajie

CASE / FILE NUMBER

J65/16

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J65/16

In the matter between:

LEETO JEREMIAH DINTWE Applicant and DITSOBOTLA LOCAL MUNICIPALITY SS NNETE
(ACTING MUNICIPAL MANAGER) First Respondent Second Respondent

Heard: 28 January 2016

Delivered: 1 February 2016

TLHOTLHALEMAJE, J

Introduction:

- [1] The Applicant was granted urgent relief under Case Number J2308/15 on 23 December 2015 by Nkutha-Nkontwana AJ in terms of which his suspension was set aside having been declared invalid and unlawful and of no force. The First Respondent (Municipality) was ordered to reinstate the Applicant with immediate effect and to comply with his contract of employment and conditions of service.

- [2] Subsequent to that order, the Municipality has since filed an application for leave to appeal. Nevertheless, the Applicant has again approached the Court on an urgent basis. He relies upon the provisions of Rule 49 (11) of the Uniform Rules of Court in seeking relief that the order granted by Nkutha-Nkontwana AJ be executable, and that its operation not be suspended pending the application for leave to appeal by the Respondents against that order, and any intended appeal, should leave to appeal be granted.
- [3] The Respondents have opposed the application on the grounds that firstly, they have good prospects of success in the leave to appeal, secondly that the Applicant has not satisfied the requirements of section 18 of the Superior Court Act[1], and the requirements of Uniform Rule 49 (11), and thirdly that the continued presence of the Applicant in the working place would be detrimental to the stability of the Municipality.
- [4] Whether the application was urgent was not seriously challenged by the Respondents. In the light of the factors considered by Nkutha-Nkontwana AJ in according the matter urgency in the first place, I will further in the light of the factors as shall be apparent from below, equally accord the matter urgency.

Background:

- [5] The salient facts pertinent to this application are common cause save for one issue that will be pointed out shortly. The Applicant is the Municipality's Chief Financial Officer. He was employed on a five years' term with effect from 1 November 2012. His appointment was made in terms of section 56 (1) (a) of the Municipal Systems Act, and his terms and conditions of service are regulated by the Local Government: Disciplinary Regulations for Senior Managers, 2010 (the Regulations)
- [6] The Second Respondent (Nnete), was the Municipality's erstwhile Acting Municipal Manager. He has since been replaced by Mr. Monde Juta (Juta), who was appointed as Municipal Manager with effect from 17 November 2015. Juta deposed to the answering affidavit in this application.
- [7] The Applicant was informed by Nnete via an internal memorandum dated 9 November 2015 that he was suspended from duty with immediate effect. The suspension was effected in terms of Regulation 6 of the Regulations. In the memorandum, the Applicant was also advised that he was initially afforded an opportunity on 29 July 2015 to submit written submissions to show cause why he should not be suspended[2]. He was informed that his response was not acceptable to management. Aggrieved at his suspension, the Applicant had approached the Court on an urgent basis, leading to the order that he seeks to execute.

- [8] Having obtained the order, the Applicant sought to report for duty on 11 January 2016 but was informed that the Municipal Manager was unavailable to facilitate his return. On 18 January 2016, the Respondents served an application for leave to appeal on the Applicant's attorneys of record. On 19 January 2016 the Applicant was called upon to attend to the Municipality's premises to meet with the Municipal Manager, Juta.
- [9] Flowing from the above meeting of 19 January 2016, Juta then sent correspondence to the Applicant confirming their earlier discussions. He had recorded that an agreement was reached in terms of which the Applicant would be placed on special leave. The Applicant was further informed that the investigative process pertaining to the allegations of misconduct against him was concluded, and that the Municipality would withdraw its intention to appeal against the order granted on 23 December 2015.
- [10] The Respondents contend that there is a material dispute of fact in regards to the discussions between the Applicant and Juta. It is contented that there was an oral agreement that the Applicant would be placed on special leave pending the outcome of a disciplinary enquiry, and that on that ground alone, this application should be dismissed.
- [11] The Applicant's contention on the other hand was that during the discussions with Juta, the latter had made a proposal that he should take special leave until the conclusion of the intended disciplinary enquiry. He had however requested that the proposal be reduced to writing, and also that he be served with a notice and charge sheet in respect of the forthcoming disciplinary enquiry upon which he would be in a position to obtain legal advice.
- [12] The Applicant's attorneys of record through correspondence to the Respondents on 20 January 2016 denied that any such agreement was reached, and insisted on compliance with the Court order. On the same date, the Applicant was formally charged for alleged acts of misconduct, and was furnished with a copy of a notice to attend a disciplinary enquiry and charge sheet. The Applicant acknowledged receipt of the notice and the charge sheet. The enquiry is scheduled to take place on 1 February 2016. Notwithstanding these factors, the Applicant approached the Court with this urgent application on 22 January 2016.

The

legal framework:

- [13] The Rules of the Labour Court are silent in regards to whether an application for leave to appeal should stay proceedings. This Court does not have a similar provision like Rule 49(11) [3] of the High Court Rules. However, in terms of Rule 11(3) of the Rules of the Court, if a situation for which the Rules do not provide

arises in proceedings or contemplated proceedings, the Court may adopt any procedure that it deems appropriate in the circumstances[4].

[14] This Court has over the years reasoned that it should adopt Rule 49(11) of the High Court Rules where circumstances require[5]. Thus the Court may on application, and in exercising its discretion order that a judgment be executed despite the fact that there is a pending appeal or even a petition to the Labour Appeal Court.

[15] The factors to be considered in such applications were identified in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[6] as follows:

“The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet, 49.7.3; Ruby’s Cash Store (Pty) Ltd v Estate Marks and Another [1961

(2) SA 118 (T)] at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf. *Fismer v Thornton* 1929 AD 17 at p.19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:

- (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or harass the other party; and
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.”[7]

The potentiality of irreparable harm or prejudice:

[16] The submissions made on behalf of the Applicant in this regard were as follows;

16.1 He was now in a worse position in relation to the prejudice which he would suffer and stood to suffer, as the Municipality was entitled as a consequence of the effect of the application for leave to appeal, to lawfully refuse his return to the workplace. He contends that this scenario may endure for months, considering the Respondents’ entitlement to file a Petition for Leave to appeal, should their application for leave to appeal be refused.

16.2 The Respondents’ application for leave to appeal would not be heard before March 2016, and his suspension would have already lapsed by 9 February 2016 as a consequence of Regulation 6 (6) of the Disciplinary Regulations for Senior Managers 2010. As such, and pending a possible petition for leave to appeal, he would be deprived of his right to be productively employed and to perform in terms of his performance contract;

16.3 His suspension was offensive to his dignity and reputation, sense of worth and self-esteem, and that the prejudice related thereto could not be repaired in any other way than to reinstate him. These circumstances and potential harm remained present and had in fact escalated given the Respondents' application for leave to appeal and the further lapse of time brought about as a result thereof.

16.4 The relief afforded to him in all probability stands to become moot as a consequence of any delays associated with the Respondent's intended appeal process, particularly in view of the fact that the application for leave to appeal was not brought on an urgent basis;

16.5 The Municipality would suffer no irreparable harm should he be granted leave to execute the order, and that instead, it would suffer harm if he is not allowed to work in the interim, as the failure to allow such, will be regarded as fruitless and wasteful expenditure in terms of the Municipal Finance Management Act 56 of 2003.

[17] The Respondents' main contentions on the other hand were as follows;

17.1 Although the Applicant contends that his continued suspension impacts on his dignity, there has to be a balance with the harm to the Municipality;

17.2 The Municipality cannot allow the Applicant into the workplace prior to the disciplinary hearing being completed and even though the investigation into his misconduct was complete;

17.3 The Respondents had complied with the time frames allowed for applying for leave and fully intent to prosecute the appeal;

17.4 The disciplinary enquiry is scheduled to take place on 1 February 2016, and thus the Applicant would not suffer any harm if the order is not prosecuted.

[18] In assessing the question of irreparable harm, central to the main judgment is the primary finding that the suspension of the Applicant was declared to be invalid and unlawful on account of its non-compliance with Regulation 6 of the Regulations. This was so in that he was not given an opportunity to be heard before he was suspended and/or given full details for the rationale for his suspension. This finding was premised on the fact that having sought to place the Applicant on suspension on 29 July 2015, the Municipality nevertheless did not do so having received the Applicant's terse response on 26 August 2015 as already alluded to elsewhere in this judgment. The Applicant was however suspended on 9 November 2015 without being afforded an opportunity to be heard before he was suspended.

[19] During the hearing of this application, I had raised with both Mr. Scholtz and counsel, Adv Saloojee for the Respondents whether this application was not moot in the light of the fact that the investigations into the allegations of misconduct against the Applicant had been completed, and the fact that the disciplinary enquiry was scheduled to commence on 1 February 2016. In my view, and to the extent that the disciplinary enquiry may proceed as intended, the Applicant would in effect be reinstated in his position on 1 February 2016,

albeit for a different reason other than to render his services.

[20] The Applicant's response however was that the scheduling of the disciplinary enquiry did not render his suspension lawful. It was further pointed out on his behalf that the disciplinary process instituted against him was in any event unlawful, in that it had not been instituted in accordance with inter alia, the Financial Misconduct Procedure and Criminal Proceedings Regulations (since the charges include allegations of financial misconduct).

[21] I am in agreement with the contentions made on behalf of the Applicant that the scheduling of the disciplinary enquiry does not make his suspension lawful. Whether that disciplinary enquiry would be lawful or not is however not a matter before the Court to determine. I am equally in agreement with the submissions made on behalf of the Respondents that there is a need for a balance between the impact of the suspension on the Applicant's dignity, reputation, sense of worth and self-esteem, and the harm to the Municipality should he report for duty. This balance needs to be assessed further in the light of the allegations of misconduct made against the Applicant. It is however important to bear in mind that these allegations, despite the conclusion of the investigations

remain mere allegations, and that as matters stand, the suspension remains unlawful. Other than issues surrounding the impact of the suspension on his dignity, reputation and self-worth, it was further common cause that the Applicant is currently suspended with pay.

[22] Taking the above factors into account, it is my view that inasmuch as there might be a compelling case made by the Respondents as to why the Applicant should not be allowed back to work, it is the Applicant who would continue to suffer irreparable harm as a consequence of the unlawful nature of his suspension. As can be gleaned from the judgment of Nkutha-Nkontwana AJ, the Respondents made no effort to dispute that the suspension was not preceded by an opportunity afforded to the Applicant to be heard. In the light of the unlawful nature of the suspension, the Applicant would ordinarily be entitled to execute the order.

Balance of convenience:

[23] I accept that the allegations of misconduct made against the Applicant are prima facie serious. However as already indicated, the investigations into these allegations have been completed, and the presence of the Applicant at the workplace would not in any meaningful way impact on any intended disciplinary process or investigations against him. It is further my view that in the light of the unlawful nature of the suspension as already alluded to, it would be convenient for the Applicant to be reinstated as ordered by Nkutha-Nkontwana AJ, and for the Respondent, as correctly pointed out by Mr. Scholtz, to rectify the procedural defects pointed out.

[24] It is therefore my view that to not order the execution of the order in circumstances where there are clear legal and procedural issues to dispense with pending the application for leave to appeal would clearly not be in the interests of either the Applicant or the Municipality.

Whilst the leave to appeal is pending, and in the absence of any indication that the Municipality has attempted to correct the flaws in its intended disciplinary process against the Applicant, and in particular his suspension, it would imply that the Applicant would remain suspended with pay until the leave to appeal is finally dispensed with. This can definitely not be an ideal situation for both parties, let alone members of the public the Municipality is meant to serve. To this end then, the and for reasons other than those advanced by the Applicant, the balance of convenience favours that the order be executed.

Prospects of success on appeal:

- [25] The Municipality contended that it has good prospects of success in the leave to appeal in that inter alia, Nkutha-Nkontwana AJ failed to take into account a material provision of the Municipal Systems Act with regard to condoning the Applicant's suspension and the requirement to provide reasons for not being suspended was satisfied
- [26] In response, it was contended on behalf of the Applicant that the application for leave to appeal was solely directed against the cost orders granted in terms of the order by Nkutha-Nkontwana AJ. In this regard, it was pointed out that in the Application for Leave to Appeal, the Respondents stated that;

"The grounds on which leave to appeal against the cost orders are sought are the following:"

- [27] It was further submitted on behalf of the Applicant that there was a real possibility that the subject matter will become moot by the time that any intended appeal in relation to the suspension of the Applicant is heard.
- [28] Other than the factors raised on behalf of the Applicant, which in my view have merit, I am not convinced that based on the findings made by Nkutha-Nkontwana AJ and the grounds upon which leave to appeal is sought, that the Respondent have prospects of success. The Respondents' failure to afford the Applicant a hearing before the suspension was imposed does not appear to be in contention, and it is doubted that any justification in this regard as pleaded in the application for leave to appeal would find favour at the appeal stage. To this end, I am not convinced that the Respondents' prospects of success on appeal might be particularly good.

Conclusions:

- [29] I have further had regard to the Respondents' contentions that the application ought to be dismissed in the light of the verbal agreement reached between the Applicant and Juta on 19 January 2016 that the Applicant would be placed on special leave pending the disciplinary hearing. I have no reason to doubt Juta's bona fides that such an agreement was reached, and there is no basis for any conclusion to be reached that these contentions were made to mislead the Court. This verbal agreement however does not address the underlying cause of Nkutha-Nkontwana AJ's findings and order. Thus nothing turns on this agreement.

[30] To conclude then, having had regard to the irreparable harm the Applicant stands to suffer as a consequence of the unlawfulness of his suspension, and further having concluded that the Respondents' prospects on appeal appear to be remote, I accordingly find that, the balance of convenience favours the granting of leave to execute the order of Nkutha-Nkontwana AJ's order, despite the application for leave appeal launched by the Respondents. Further having had regard to considerations of law and fairness, and in particular the circumstances and background of this matter, I do not believe that a cost order is called for in this matter. Accordingly, the following order is made;

Order:

- i. The Applicant's non-compliance with the Rules relating to form, service and times, is condoned and he is permitted to bring this application on an urgent basis in terms of Rules 8(1) and (2);
- ii. The Applicant is granted leave to execute the judgment of Nkutha-Nkontwana AJ under Case Number J2308/15 dated 23 December 2015, pending the Respondents' application for leave to appeal.
- iii. There is no order as to costs.

Tlhotlhlalemaje, J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr WP Scholtz of Scholtz Attorneys

On behalf of the Respondents: Adv. YF Saloojee

Instructed by:

Phambani Mokone Inc

[1] No 10 of 2013

[2] His response on 26 August 2015 was to submit a terse reply to the effect that; "Your letter of intention to suspend bears reference. The allegations reflected are incorrect and unfortunate. Hope you find the above in order"

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- [3] Rule 49 (11) of the High Court Rules provides that: “Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.”
- [3] Rule 49 (11) of the High Court Rules provides that:
- “Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.”*
- [4] See *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another* (J1990/2014) [2014] ZALCJHB 365 (25 September 2014) and instances referred to in paragraphs [23] to [26]
- [5] See *Christo Bothma Finansiële Dienste v Havenga and Another* (2010) 31 ILJ 93 (LC) and authorities referred to in *National Entitled Workers Union (NEWU) and Another v Director Commission for Conciliation Mediation and Arbitration and Others* (2011) 32 ILJ 2095 (LAC) at para [10] to [13]
- [6] 1977
- (3) SA 534 (A) at 545C-G
- [7] At para [15]. Also referred with approval in *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) [2002] ZACC 16; 2002 (5) SA 703 (CC) at para [10]

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Prepared on 13 October 2026 · Esheria