

SOUTH AFRICA / JUDGMENT

Dyakala v Emfuleni Local Municipality and Others (2023-090199) [2023] ZAGPJHC 1337 (17 November 2023)

[2023] ZAGPJHC 1337

COURT

South Gauteng High Court, Johannesburg

BEFORE

Phahlamohlaka

CASE / FILE NUMBER

2023-090199

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG

Case number:

2023-090199
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
In the matter between
ANDILE
PHILLIP DYAKALA
APPLICANT
And
EMFULENI
LOCAL MUNICIPALITY
1ST
RESPONDENT
MUNICIPAL
MANAGER
2ND
RESPONDENT
MUNICIPAL
MAYORAL COMMITTEE
3RD
RESPONDENT
SPEAKER
OF MFULENI MUNICIPALITY

4TH
RESPONDENT
CHAIRPERSON
OF DISCIPLINARY HEARING
5TH
RESPONDENT
EMFULENI
MUNICIPAL COUNCIL
6TH
RESPONDENT
WENZILE
PHAPHAMA SECURITY
7TH
RESPONDENT
MEC
FOR COOPERATIVE & TRADITIONAL AFFAIRS,
GAUTENG
PROVINCE
8TH
RESPONDENT
Delivered: This
judgment was prepared and authored by the Judge whose name is
reflected herein and is handed down electronically
and by circulation
to the parties/their legal representatives by email and by uploading
it to the electronic file of this matter
on CaseLines. The date for
handing down is deemed to be 17 November 2023.

JUDGMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

1. The applicant has launched an urgent application seeking to declare the outcome of disciplinary proceedings instituted against him by the First Respondent on 29 August 2023 in terms of the Local Government Disciplinary set Regulations for Senior Managers 2010, unlawful and null and void ab initio and to be set aside.
2. According to the Applicant, the life of this matter began when the Sixth Respondent, Emfuleni Municipal Council, instituted disciplinary proceedings and terminated the employment contract of the Applicant while the Applicant and the Respondents were waiting for the judgment of Movshovic AJ. The Applicant avers that what had triggered him to institute the urgent court bid was the fact that the Sixth Respondent had blatantly disregarded judicial process and undermined the rule of law.

URGENCY

3. Rule 6(12)(b) prescribes two extremely important requirements for urgency, namely, that the applicant must, in the founding affidavit set out explicitly the circumstances which the applicant avers render the matter urgent and the reasons why the applicant claims that he or she will not be accorded substantial redress at a hearing in due course.
4. The guidelines regarding urgency were set out explicitly in the case of *Luna Meubelsvervaardigers*[1] as well as in *Die Republikeinse*[2], where it was emphasized that urgent applications must be brought in terms of Rule 6(12) in that the applicant must convince the court why the rules of the court must not be complied with.
5. It must not be difficult for the court to fathom the reasons advanced by the applicant why he/she is of the view that the matter is urgent. Secondly, the applicant must satisfy the court that he will not be afforded a substantial redress in due course. The Applicant contends that this matter is urgent because the effect and consequences of the relief sought now cannot be obtained later in a few months' time on the ordinary roll, more particularly the Applicant cannot approach the CCMA.
6. The Applicant's application is premised on the reserved judgment by my brother Molschovich AJ because he contends that he was dismissed whilst awaiting a judgment by Molschovich AJ where the Applicant had sought to interdict the disciplinary hearing.
7. The facts are succinctly that the Applicant was appointed as Chief Financial Officer by the First Respondent on 24 June 2019 on a fixed term contract. On 1 March 2022 the Applicant was served with a notice of intention to institute what the First Respondent referred to as a precautionary suspension pending the investigation in respect of possible acts of misconduct. The Applicant was indeed placed under suspension by the First Respondent. On 29 April 2022, the Applicant filed an urgent application in the Labour Court, Johannesburg, contending that his suspension was unlawful. That application was struck off the roll for lack of urgency. Subsequently, a disciplinary hearing chaired by Mr Zola Majavu was instituted by the First Respondent against the Applicant. Majavu found the Applicant guilty on two of the four charges preferred against him and recommended a sanction of a written warning. The implication was that the Applicant was permitted to go back to work as the suspension was no longer effective.
8. The First Respondent was not satisfied with the outcomes of the disciplinary hearing, particularly the sanction of a written warning. The First Respondent lamented that Majavu completely ignored the seriousness of the charges in relation to the extension of employment contract, which had a serious financial impact on the Municipality, and further ignored the seriousness of the charges in relation to the contravention of the Municipal Finance Management Act 56 of 2003, which resulted in fruitless and wasteful expenditure. As a result of their discontentment, on 13 September 2022 the Sixth Respondent resolved to review and set aside the findings and sanction made by the presiding officer of the disciplinary hearing, Mr Zola Majavu. That Review Application was launched in the Labour

Court, Johannesburg, on 16 September 2022, and it was unsuccessful.

9. On 19 June 2023, the Applicant was served with a notice to attend a disciplinary hearing. The Respondents contend that the charges emanate from the Applicant's misconduct whilst on suspension, and therefore according to the Respondents there was no need to comply with the Local Government: Disciplinary Regulations for Senior Managers, because the Applicant was already on suspension. The disciplinary hearing was scheduled to take place on 13 June 2023 but was postponed to 29 June 2023. On 28 June 2023, the Applicant's attorneys of record dispatched a letter to the First Respondent requesting a postponement. In part the letter reads as follows:

"2. Our client has instructed us that he was notified to attend a disciplinary enquiry on 29 June 2023, however, earlier today, we have issued an urgent High Court under case number 2023-062857 in order to declare the continued suspension preventing our client to resume his duties and functions to be declared illegal and to be set aside.

3. The urgent application will be heard on 4 July 2023, we therefore kindly request that tomorrow's disciplinary enquiry be postponed pending the outcome of the urgent application."
10. The letter was sent to the First Respondent despite the fact that the Applicant was informed that the Respondents are represented by a firm of attorneys. Secondly, according to the contents of this letter, the Applicant was interdicting the continued suspension at the High Court and not the disciplinary hearing. The first Respondent did not respond to the letter.
11. It is common cause that the Applicant did not attend the disciplinary hearing on the 29 June 2023 and the hearing proceeded in his absence. The chairperson found the Applicant guilty in absentia and recommended a sanction of a dismissal, which was accepted and executed by the First Respondent.
12. For the Applicant to succeed on urgency, Rule 6(12)(b) requires the Applicant, first to set forth explicitly in the founding affidavit the circumstances which he avers render the matter urgent. This is not a simple exercise because the subrule provides that the circumstances that render the matter urgent must be set forth in the founding affidavit and not in the replying affidavit or during argument. When considering the founding affidavit, if the court does not find those circumstances that the Applicant avers render that matter urgent, the court cannot hear the matter as urgent.
13. But there is a second leg of this inquiry, namely that the applicant must set forth reasons why he avers he will not be afforded substantial redress in due course. Urgency must, therefore, not be self-created.
14. In *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (ta Makin Furniture Manufacturers)[3]*, the Court held as follows:

“ Mere lip service to the requirements of Rule 6(12)(b) will not do, and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down”. See also Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk[4].

15. In my view, the Applicant has not succeeded in explaining explicitly why he contends that the matter is urgent, and he further failed to make averments in the founding affidavit why he will not be accorded a substantial redress at a hearing in due course. For that reason alone, the application stands to fail.

INJURY REASONABLY APPREHENDED

16. The applicant avers that the injury that is reasonably apprehended is because if the suspension is not declared unlawful, invalid and set aside and the sixth respondent's unlawful suspension continues with another unlawful suspension linked to the first suspension which lapsed when the chairperson made a ruling that he reports for duty, he will suffer.
17. I now turn to the requirements that the applicant ought to fulfil in order to succeed in the application for the relief sought.

CLEAR RIGHT, ALTERNATIVE REMEDY AND PREJUDICE

18. On the requirement of a clear right, the Applicant does not explain in detail what the clear right is. In fact, in the founding affidavit, the Applicant deals scantily with this topic together with alternative remedy and prejudice in one paragraph. In the paragraph, the Applicant says the following:

“The applicant has a clear right to the relief he seeks, has no alternative remedy available to him, and considerations of prejudice favour him, and it therefore follows that the senior manager(CFO) concerned must at least be placed in a position where he can effectively make such representations and must receive proper notice of intention to suspend, this notice has requirement attached to it.”

19. The Applicant fails to address the requirements that he must meet for the relief he is seeking. It is not sufficient to just state what the requirements are, but the Applicant must explain in detail how he met those requirements so the court could have sufficient information when considering the issues.

EVALUATION

20. In my view, the Applicant's application lacks particularity on pertinent issues, and the court can in no way second guess the Applicant. It is trite that in motion proceedings, the Applicant must make out its case in the papers.

21. It is not even clear from the papers what relief is the Applicant is seeking, whether he seeking to interdict the suspension or to review the dismissal. In the founding affidavit[5] he seeks to review and set aside the disciplinary hearing and declare it to be in contravention of Regulation 6(1) of the Local Government Disciplinary Regulations for Senior Managers, 2010. Regulation 6(1) provides as follows:

“The Municipal Council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act or misconduct, where the municipal council has reason to believe that-

- (a) The presence of the senior manager at the workplace may –
 - (i) Jeopardise any investigations into the alleged conduct;
 - (ii) Endanger the wellbeing 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 witnesses;
 - (ii) Commit further acts of misconduct.”
22. Clearly, the regulation deals specifically with suspension and nothing else. The Applicant has challenged his suspension on an urgent basis before my brother Movshovich AJ and therefore it is only proper for the Applicant to await the outcome of that application. Should I entertain the issue of suspension, which is served before another judge in the circumstances where judgment has not yet been handed down, I run the risk of making an order that might contradict the order of my brother Movshovich AJ.

CONCLUSION

23. The proven facts that are common cause are that in the application that is served before Movshovich AJ, the Applicant did not seek to interdict the chairperson of the disciplinary hearing that was set down for the 13 July 2023. In that application, the Applicant was complaining about his suspension. It is therefore not correct that the Applicant is awaiting judgment on another matter in respect of the disciplinary hearing.
24. In my view, the Applicant has not made a proper case in the papers for the relief sought in the notice of motion, and therefore the application stands to fail.

COSTS

25. I am aware of the developed approach that costs are within the discretion of the court. However, the second leg of this approach is that the successful party should as a general rule have his or her costs[6]. The party who loses must, therefore, pay costs, and in this case the Applicant must pay the costs. However, I see no reason why costs should be on a punitive scale.

ORDER

25. In the circumstances I make the following order:

(a) The application is dismissed with costs.

KGANKI PHAHLAMOHHLAKA

ACTING JUDGE OF THE HIGH COURT

DELIVERED ON: 17 NOVEMBER 2023

COUNSEL FOR APPLICANTS: ADV V NYAMBANE

INSTRUCTED BY: MUKWEVHO-MAKGOLA ATTORNEYS

COUNSEL FOR RESPONDENTS: MR F BALOYI

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[1] Luna Meubelsvervaardigers (Edms) Bpk v Makin & Another 1972(1) SA 773 (A)

[2] Die Rebuplikeinse Publikasie (Edms) Bpk v Afrikaanse Pers Publikasie (Edms) Bpk 1977(4) SA 135 (W)

[3] 1977(4) SA 135(W) at 137F

[4] 1972(1) SA 773 (AD) at 782B

[5] Paragraph 12.4 FA

[6] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others(CT5/95) [1996] ZACC 27

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