

SOUTH AFRICA / JUDGMENT

Govan Mbeki Municipality v Mndebele and Others (775/2021) [2021] ZAMPMHC 16 (16 May 2021) [2021] ZAMPMHC 16

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

775/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

HF

BRAUCKMANN AJ

16 MAY 2021

CASE NO: 775/2021

In

the matter between:

GOVAN
MBEKI
MUNICIPALITY
Applicant
and
SIMON
FELANI MNDEBELE
First Respondent
MPHOKE
MAGANE
Second Respondent
JOY
LEBOGANG RAPHIRI N.O.
Third Respondent

JUDGMENT

(LEAVE TO APPEAL)

BRAUCKMANN AJ

[1] The applicant applies for leave to appeal this court’s judgment dated 22 March 2021^[1] (“the judgment”) in terms whereof it was ordered that:

[1.1] the disciplinary proceedings instituted against the first respondent on 16 October 2020 in terms of the Local Government: Disciplinary Regulations for Senior Managers 2010 is declared unlawful, null and void;

[1.2] the applicant is interdicted and restrained from continuing with the disciplinary proceedings instituted against the first respondent on 16 October 2020 until the applicant complies with Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2014;

[1.3] the Appointment of the Second Respondent as the presiding officer of the disciplinary hearing is declared be invalid, unlawful and null and void;

[1.4] the applicant is in breach of the contract of employment entered into between the Applicant and the First Respondent on 5 October 2018;

[1.5] applicant and second respondents are ordered to pay the applicant’s costs, jointly and severally, the one to pay, the other to be absolved, including the cost consequent on employing senior counsel. The costs includes the reserved costs of 16 March 2021. (“The relief”)

[2] The matter started as an urgent application by the first respondent for the relief against his employer, the Govan Mbeki Municipality (“applicant”). Applicant is the Municipal Manager of applicant. He was appointed in terms of a fixed term contract for a period of four years on 01 October 2018. He was suspended on 04 September 2020, and served with a notice to appear at a disciplinary hearing on 16th October 2020. It is common cause that no enquiry

by applicant's Disciplinary Board was held as provided for in the with Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2014 ("the 2014 regulations").

- [3] The grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. First respondent, with reference to various judgments as well as the well-known work of Erasmus – Superior Court Practice – argues that the applicant fails to delineate sufficient grounds of appeal to enable first respondent to respond thereto in argument. He states further that the purported grounds of leave to appeal in the application constitute vague and random statements lacking judgment and levelled against a well-reasoned judgment of this Court. It is then submitted that the Applicant's application for leave to appeal is thus fatally and substantively defective and must be dismissed by the Court for non-compliance with Rule 49(1) (b) of this Court's Uniform rules.
- [4] I agree to a certain extent with the well-constructed argument by Adv Dlamini SC, but will not go into the argument for the reason that will become apparent later on in the judgment. Whether I entertained the argument or not would not have had an effect on the outcome of the application for leave to appeal. I may mention, in passing, that the grounds of appeal contained in the application is nothing but an indication that applicant disagrees with all the findings the court made that led to the order appealed against. One may justifiably call it "having a second bite at the cherry".

LAW ON APPLICATIONS FOR LEAVE TO APPEAL

- [4] Section 16 and 17 of the Superior Court's Act³⁸ regulates appeals in the High Court. Section 17(1)³⁹ stipulates the requirements for an application for leave to appeal. Leave to appeal will only be granted if there is a sound and rational basis for the conclusion that there are prospects of success on appeal^[2].
- [5] The criteria, which had been adopted over many years in applications for leave to appeal now has statutory force^[3]. The wording of section 17(1) (a) raised the bar, and leave to appeal will only be granted if the court is of the view that the appeal would have reasonable success^[4].
- [6] Leave to appeal may only be given where the judge (or judges) concerned are of the opinion that –
- “(a)
- (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard”

- [7] In *Mont Chevaux Trust v Tina Goosen*[5], the Land Claims Court held (obiter dictum) that the wording of this subsection raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted. That view, which has also now been endorsed by the SCA in an unreported judgment in *Notshokovu v S*[6]. I am in agreement with the court's finding in the *Mont Chevaux* – case. In the *Notshokovu* - matter the SCA remarked that an appellant now faces a higher and a more stringent threshold, in terms of the Superior Court Act 10 of 2013 compared to that under the provisions of the repealed Supreme Court Act 59 of 1959. The principle as enunciated in *Mont Chevaux* has also been endorsed by a Full Court of the Gauteng Division of the High Court in Pretoria.[7] The use of the word “would” in the statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed.
- [8] Generally leave to appeal will only be granted against costs orders if an applicant could satisfy the court from which leave is sought, that an appeal court may reasonably find that exceptional circumstances existed, justifying the interference with its court order. If the court of first instance does not find accordingly it must refuse leave. The award of costs is a matter in respect of which courts exercise a true discretion. Compelling reasons must exist why the appeal should be heard[8].
- [9] If leave to appeal is granted, the appellate court may only interfere with the court a quo's judgment when it appears that the court had not exercised its discretion, where costs are involved, judicially, or that it had been influenced by the wrong principles, or misdirection of facts, or that it had reached a decision within the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles[9].
- [10] The well-known principles in the matter of *R v Dhlumayo*[10] still guides a court in an appeal purely on fact. These principles will also guide the court in an application for leave to appeal in determining whether an applicant has prospects of success. The trial judge is steeped in the atmosphere of the trial. Consequently an appeal court will be very reluctant to upset findings of a trial judge. Where there is no misdirection of fact by the trial judge the presumption is that his conclusion is correct. Where an appellant cannot satisfy the appeal court that there has been some miscarriage of justice or violation of some principle in law or procedure, he will fail.

JURISDICTION – GROUND OF APPEAL

- [11] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*[11], and not the substantive merits of the case.
- [12] In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by

the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted,

establish that the applicant is asserting a claim under the Labour Relations Act of 1995 (“LRA”), one that is to be

determined exclusively by the Labour Court, the High Court would lack jurisdiction.

[13] It was stated in *Gcaba v Minister for Safety and Security and Others*:^[12]

“While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction.”

[14] The labour court has concurrent jurisdiction with the high court in relation to alleged or threatened violations of fundamental rights entrenched in chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the bill of rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court^[13].

[15] I have dealt at length with the jurisdictional challenge in the judgment. On both the pleadings as well as the so-called contractual “submission” to the jurisdiction of the CCMA, the applicant does not have reasonable prospects that another court would reach a different conclusion faced with the facts of the case. In respect of enforcement of both contractual and constitutional rights the High Courts retain their original jurisdiction assigned to them by the Constitution. The High Court and the Labour Court both have the power to enforce constitutional rights as far as their infringement arises from

employment^[14].

[16] The dispute I had to decide was a question of law. There were no factual disputes to be decided thus the rule in *Plascon – Evans* does not find application. The application does not seek to enforce any rights or remedies provided for in the LRA. First

respondent sought the Court’s assistance to protect him from a breach of his contract of employment and unlawful conduct by applicant and its appointees, which conduct is a threat to his constitutionally protected rights to dignity and reputation. The application does not seek to adjudicate a labour dispute or conduct as envisaged in Chapter VIII of the LRA. The Applicant want the Court to interdict the perpetuation of the unlawfulness of the procedure currently

under way in the disciplinary enquiry before the second respondent. Despite the apparent 'consent' by first respondent to the jurisdiction of the CCMA, the CCMA has no such jurisdiction

[17] I am of the view that the appeal does not have a reasonable prospect of success and that another court would not come to a different conclusion on the same facts.

THE OUDEKRAAL- PRINCIPLE GROUND

[18] The Second Respondent ("chairperson"), during the course of the disputed disciplinary enquiry, made a ruling ("the ruling") dismissing first respondent's point in limine that the disciplinary process was null and void for non-compliance with the 2014 regulations. Based on this dismissal applicant argued that this Court had no jurisdiction to entertain the lawfulness argument. The "Oudekraal – principle" enters the fray according to Applicant. That ruling still stands and unless set aside on review this Court is bound by it until first respondent applies to have it reviewed and set aside, according to applicant.

[18] The Applicant alleges that the Municipal Council's decision to institute disciplinary action against the Applicant employee is unlawful, invalid and null and void since it was instituted in terms of the wrong regulations (i.e. 2010 instead of 2014 regulations).

[19] The court decided that the ruling by second respondent does not constitute an administrative action. The ruling by the Second Respondent was not administrative action because as stated in Gcaba above 'it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.' The Labour Appeal Court in *PSA obo De Bruyn v Minister of Safety and Security*[15] held that "although there may conceivably still be employer acts which are almost indistinguishable from administrative acts it does not follow that because the remedy of judicial review may still exist for public servants that the Labour Court will entertain an application to review 'any act performed by the State in its capacity as employer' as a matter of course." Just as a refusal of a postponement by a presiding officer at a disciplinary enquiry will not be binding on this court, the ruling by the second respondent did not bind this court.

[20] I am of the view that the appeal does not have a reasonable prospect of success and that another court would not come to a different conclusion on the same facts.

"THE MOLALA V METSIMAHOLO LOCAL MUNICIPALITY AND OTHERS" GROUND

[21] Save for the fact that the 'Oudekraal – argument' was not raised or dealt with in the Molala-judgment, the facts were almost on all fours with the current matter.

[22] Taking into account the findings I made with regards to the Oudekraal argument in the judgment and in this judgment, the ground of appeal has no prospects of success at all. Applicant bases this ground solely on the fact that there is that difference between the Molala – matter and the facts in casu.

- [23] I am therefore of the view that the appeal does not have reasonable prospects of success and that another court would not come to a different conclusion on the same facts. It is also not in the interest of justice to grant leave to appeal on the grounds raised by the applicant.

THE RESOLUTION BY THE APPLICANT'S CONCIL DATED 30 MARCH 2021

- [24] Even if I am wrong on the above, Counsel for first respondent referred to a resolution by the applicant's council that dealt with this application. Applicant served and filed its application for leave to appeal on 29 March 2021. At no stage did it become apparent that the application was not authorised by first applicant's council but when the court's attention was drawn to the fact at the hearing of the application for leave to appeal on 14 May 2021. The resolution was duly served and filed by first respondent's attorneys, but did not find its way onto the court's file. It seems that applicant's counsel also did not have it at hand.
- [25] The resolution "ACKNOWLEDGED" the judgment and resolved further "That arising from the judgment.....,an appeal BE LODGED against the High Court ruling".
- [26] It is firstly not clear which "ruling" an appeal should be lodged against. Rulings or findings are not appealable but orders are. Secondly, and accepting that it was meant to read that the judgment/order were to be appealed against, it is common cause that first respondent already, without authority to do so, served and filed an application for leave to appeal a day before the resolution was taken. The resolution does not ratify the unauthorised application of 29 March 2021. The application for leave to appeal was therefore served and filed without proper authorisation by the council.
- [26] Therefore and for all the above reasons the leave to appeal is is refused and the application is dismissed with costs.

16 MAY 2021

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANT: ADV DLAMINI SC

INSTRUCTED BY: NGENGEBULE ATTORNEYS – luvuyo@ngengebule.co.za

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- [1] Mndebele v Govan Mbeki Municipality and Others (775/2021) [2021] ZAMPMHC 9 (23 March 2021).
- [2] Act 10 of 2013.
- [3] Erasmus; Superior Court Practice; RS 11, 2019, A255
- [4] Erasmus, supra.
- [5] LCC 14R/2014 (unreported).
- [6] 157/2015 [2016] ZASCA 112 (7 September 2016)
- [7] Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others (19577/09) [2016] ZAGPPHC 489 (24 June 2016).
- [8] Public Protector v SA Reserve Bank 2019 (6) SA 253 (CC).
- [9] Erasmus, supra, A2-72B.
- [10] 1948(2) SA 677 (AD) at 198 – 199.
- [11] Chirwa v Transnet Limited and Others [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC).
- [12] (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) ; (2010) 31 ILJ 296 (CC) ; [2009] 12 BLLR 1145 (CC) (7 October 2009) at para [75].
- [13] Gcaba v Minister for Safety and Security and Others (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) ; (2010) 31 ILJ 296 (CC) ; [2009] 12 BLLR 1145 (CC) (7 October 2009) at para [71].
- [14] Feni v Pan South African Language Board and Others (30640/2014) [2014] ZAGPPHC 654 (29 August 2014), para [16], with reference to Makhanya v University of Zululand.
- [15]
- [2012] 9 BLLR 888 (LAC).

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