

SOUTH AFRICA / JUDGMENT

Khoza v Greater Kokstad Municipality and Another (15408/2024P) [2024] ZAKZPHC 84 (30 August 2024) [2024] ZAKZPHC 84

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

P C Bezuidenhout

CASE / FILE NUMBER

15408/2024P

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IN

THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG

CASE NUMBER: 15408/2024P

In the matter between: SIYABONGA
KHOZA
APPLICANT
AND
GREATER KOKSTAD
MUNICIPALITY
FIRST RESPONDENT
GREATER KOKSTAD

MUNICIPALITY: SECOND RESPONDENT
DISCIPLINARY BOARD

JUDGMENT

P C BEZUIDENHOUT J:

- [1] The matter was brought on an urgent basis on 19 April 2024 for a rule nisi in terms of Part A of the notice of motion pending the finalisation of the relief claimed in part B of the notice of motion which is an application to review certain actions. On 19 April 2024 when the matter came before the Court it was however by consent

adjourned in order for the parties to approach the senior civil judge for an expedited date on the opposed motion court roll. Also that the disciplinary proceedings which were scheduled for 23 to 26 April 2024 be stayed pending the hearing of the application.

Costs were reserved. Although the order does not specifically state that it was adjourned sine die it would appear that it must have been adjourned sine die for leave to be granted to approach the senior civil judge. The matter was then set down for hearing on the opposed roll on 6 June 2024.

[2] The relief sought in Part 1 of the notice of motion is:

“(a) That pending the outcome of the relief to be sought in terms of Part B of this Notice of Motion:

(i) the findings made against the Applicant arising out of the Second Respondent’s report dated 18 February 2024 purportedly compiled in terms of Regulations 6 of the Local Government: Municipal Finance Management Act No. 56 of 2003: Municipal Regulations on Financial Misconduct Procedures in Criminal Proceedings and the decision to charge the Applicant with financial misconduct be and is hereby suspended;

(ii) the decision of the First Respondent taken on 20 January 2024 to initiate disciplinary proceedings against the Applicant be and is suspended;

(iii) the Disciplinary proceedings initiated by notice given by the First Respondent to the Applicant dated 12 February 2024, advising of a purported disciplinary enquiry be and is hereby suspended;

(iv) the First Respondent be and is interdicted and restrained from taking any steps pursuant to the decision of the Second Respondent referred to in paragraph 2(a)(i) above;

(b) That the costs occasioned by the granting of the relief set out in Part A of this Notice of Motion, be and are hereby reserved for the Court hearing Part B.”

[3] The first issue which was taken by Respondents was that of urgency and that the matter was not urgent. It would appear that the matter was not dealt with as an urgent matter but was granted an opportunity to obtain a preferential date from the Judge President. The matter was then only heard in June and it appears to me that the question of urgency at this stage is no longer an issue. This was also not further challenged in argument by Mr. Morane SC who appeared on behalf of Respondents and therefore I will not deal with this issue any further.

[4] Mr. Titus who appeared on behalf of Applicant referred to the decision of *Stephen Mzilozi Molala v Metsimahalo Local Municipality and 3 others* case number 5464/2018 a Free State Division judgment which was handed down on 20 August 2019. He submitted that this Court was bound by that decision. Accordingly it should follow that decision in that case that the matter did not have to be heard by the Labour Court and could be heard by this Court. In support of his submission that this Court was bound by that decision he referred to *Patmar Explorations (Pty) Ltd and others v The Limpopo Development Tribunal and others* case no: 1250/2016 of the Supreme Court of Appeal. He referred to paragraph 3 where it was held:

“This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous.”

He submitted that when it refers to this court it refers to the High Court and therefore this Court is bound by that decision. That indeed is incorrect as that is not what the principle of stare decisis sets out. It is in actual fact set out in the summary at the start of the said judgment where it states:

“Stare decisis SCA does not depart from its own previous judgments unless satisfied clearly wrong/High Court/Judges in same division bound by judgment of that division unless satisfied clearly wrong.”

- [5] It is therefore clear applying the principle of stare decisis that a judge of a division is not bound by the judgment of single judge of another division. It is therefore not necessary to pursue that issue any further. Mr Titus unfortunately based his whole argument on the decision of Molala and that this Court is bound by it. Although this Court is not bound by the decision it can be considered and may be persuasive.
- [6] Mr. Titus relies on what is set out in paragraph 21 of the Molala judgment that it could not be correct that the High Court has no jurisdiction to entertain interdictory relief and that only the Labour Court has such exclusive jurisdiction in such matters.

“[21] It is contended by the First Respondent that this Court has no jurisdiction to entertain this interdictory relief as only the Labour court has exclusive jurisdiction. This contention cannot be correct. At the heart of this application is the issue of unlawfulness of the procedure currently taking place. The application does not seek to enforce any rights or remedies provided for in the Labour Relations Act. The application does not seek to adjudicate a labour dispute or conduct as envisaged in chapter VIII of the Labour Relations Act. What the Applicant seeks to achieve is to restrain the perpetuation of the unlawfulness of the procedure currently under way. The CCMA has no such jurisdiction contrary to the assertion by the First Respondent. It is my finding that this court has jurisdiction to adjudicate an interdictory relief where unlawfulness is an issue.”

- [7] It was submitted that at the heart of this applications is the issue of unlawfulness of the procedure currently taking place. The application did not seek to enforce any rights or remedies provided for in the Labour Relations Act. It does not seek to adjudicate a labour dispute or conduct as envisaged in the Labour Relations Act. What the applicants sought was to restrain the unlawfulness of the procedure that was presently being undertaken. Applicant contends that the disciplinary proceedings are unlawful as he should have been charged in terms of the 2014 Regulations and in terms of the Local Government Disciplinary Regulations for Senior Managers 2010.
- [8] It was held in Molala that the court was informed that the same issues were raised before the Labour Court. Therefore that there was a lis pending between the same parties. It however sets out that except for the ipse dixit of counsel of First Respondent in this regard there was nothing before court nor was there any evidence that there was any matter pending before the Labour Court. The Court could not be enlightened as to when this application in the Labour Court was initiated. The proceedings commenced in a disciplinary hearing and a

point in limine was taken that the charges related to financial misconduct and that the 2014 Regulations accordingly applied. It is clear

from the judgment that the charges against Applicant were all for financial misconduct. For reason which will become apparent

later it would appear that the facts of that case is different to the present one where, in the report, mention is made of financial

misconduct, none of the charges related thereto.

- [9] Mr. Titus referred to the extract of the minutes of the meeting of First Respondent on 6 December 2023 Annexure “SK3” where under “items resolved” it was noted in paragraph 9.4 that the counsel resolved to institute an investigation on the identified discrepancies that the possibility of the existence of an act of serious financial misconduct in the asset sales proceeds during the auction of 3 to 4 May 2023 especially the none receipt of an amount of R350 000.00. He also referred to the minutes of a meeting on 14 December 2023 where under discussion by council “it was registered that they were not satisfied with the CFO’s response after reading and understanding his written response because it was not clear or explained why the remainder of R350 000.00 was not initially deposited to Municipal account but to another account by the Auctioneer and that they also wanted to know who was the owner of the account that the money was deposited to.” It was then agreed that the investigation should continue.
- [10] He submitted that it was a preliminary investigation which was conducted that it was resolved that the council consider the report of the erroneous deposit of the amount of R350 000.00 into an account which was not that of First Respondent. That after the Chief Financial Officer, who is Applicant in this matter, was placed on precautionary suspension the service provider Riley Auction Africa paid an amount of R350 000.00 in two instalments of R250 000.00 on 7 December 2023 and R100 000.00 on 8 December 2023 and that it was reported to the South African Police Services.
- [11] It was further submitted that on 18 February 2024 Second Respondent delivered a report to the speaker of a full investigation into the allegations of financial misconduct but no mention was made of the Municipal Systems Act nor was it referred to. The final report was submitted on 18 February 2024 from the Municipal Disciplinary Board Chair Person. The report of the independent investigator F W Ntombela attorneys was tabled before council on 19 January 2024. It was submitted that the evidence leader appended his signature on 9 February 2024, nine days prior to the recommendation of Second Respondent to institute disciplinary action against him, and that the charge sheet was served on him on 12 February 2024, six days prior to

a recommendation of Second Respondent to institute disciplinary proceedings. It was therefore submitted that the financial

misconduct regulations were not followed and accordingly it was irregular and also that the attorney who had to do the investigation

was not qualified to do so as attorneys do not fit into that requirement.

- [12] It was submitted that it was an unlawful act which is being challenged and accordingly it is not bound to proceed in the Labour Court. What is being interdicted is an unlawful act and accordingly it can be done in this Court and once again he relied on the decision in the Molala case.
- [13] It was submitted by Mr. Morane SC that there was a fundamental difference between the facts of this case and the Molala case which Applicant relied upon. In the Molala case the charges all related to financial misconduct but that is not the position in the present case. He submitted that there were two issues. Firstly whether to entertain the application relating to uncompleted proceedings (the disciplinary hearing) and secondly whether the financial misconduct regulations applied.
- [14] He referred to the decision of *Jiba v Minister of Justice & Constitutional Development & Others* [2005] ZALC 15; [2009] 10 BLLR 989 (LC) where it was held that there should not be intervention in uncompleted proceedings.
- [15] The charges as set out in the charge sheet attached to the papers can be summarised as follows. Applicant was charged firstly with misrepresentation in that he intentionally concealed information by presenting the report and not disclosing that there were outstanding amounts due in respect of the sale of the redundant equipment. The second charge is dereliction of duty in that he did not take reasonable care in his role as the executive officer upon receipt of fraudulent information. Thirdly that he intentionally withheld information that there was money missing and fourthly that he breached the employer's policy and procedure also relating to the proceeds which had to be deposited by Riley Auction. The fifth charge that he failed to act in good faith in executing his duties and the sixth that he brought the employer's name into disrepute.
- [16] It was submitted that these charges were not financial misconduct and accordingly that the Molala decision did not apply and the financial regulations also did not apply. Mr. Morane SC also referred to the disciplinary code and proceedings in respect of Local Government Regulations for Senior Managers 2010, Regulation 13(1) reads:
- "A Senior Manager has a right to refer a dispute against any disciplinary finding and or sanction imposed on him or her at the disciplinary hearing to the Bargaining Council, Commission for Conciliation, Mediation and Arbitration or a credited agency in terms of section 133 of the Labour Relations Act 1995 (Act No. 66 of 1995)."*
- [17] Accordingly that would have been his remedy and not to approach this honourable Court. The Chairperson of the internal disciplinary hearing held that two point in limine were raised by Applicant at the hearing namely that the decisions by council on 14 December 2023 and 19 January 2024 were not passed by a majority and secondly that it was financial

misconduct and that the allegations had to be referred to the Financial Misconduct Board for investigation to consider the report and adopting a resolution to institute a disciplinary process. The meeting of 14 December 2023 did not arise before him for decision. The meeting of 19 January 2024 considered the report of F W Ntonbela attorneys and thereafter passed a resolution to institute disciplinary proceedings.

- [18] The disciplinary board delivered the report of the allegations against the employee. It considered all the reports and recommended disciplinary steps be instituted. The Chairperson of the Disciplinary Board expressly states that the report of the Independent Investigator was considered. The points in limine were accordingly both dismissed.
- [19] It was submitted that in paragraph 17 of the judgment in the Jiba matter that the court should only intervene in uncompleted disciplinary proceedings when the circumstances are truly exceptional. In the definitions of chapter 1 of the Local Government Disciplinary Regulations for Senior Managers, financial misconduct is defined as “means any misappropriation, mismanagement, waste, theft of the finances of a municipality and also includes any form of financial misconduct specifically set out in section 171 of the Local Government Municipal Finance Management Act 20023 (Act 56 of 2003). It is submitted that it was an independent presiding officer that it was serious misconduct and the charges were not for financial misconduct. It was thus uncompleted as the preliminary points raised were dismissed but the disciplinary hearing was still to continue.
- [20] The Molala case does not bind this Court and as the facts are different it can also be distinguished from the present case. Applicant in this case was not charged with any financial misconduct but was charged with other serious misconduct in terms of the Disciplinary Regulations. The disciplinary hearing started and certain points in limine were argued and a ruling was made thereon. The disciplinary hearing could then have proceeded on the specific charges. The matter did not proceed further and as set out above Applicant could, at that stage, then in terms of Regulation 13(1) of the Disciplinary Regulations, have proceeded in terms of the provisions thereof.
- [21] It is unfortunate that the application was based upon the Molala decision and the incorrect reliance on the principle of stare decisis. The facts, in my view, are totally different and it is accordingly distinguishable from the facts in the present case and this Court is not bound by that decision.
- [22] A consideration of all the facts indicate that the charge sheet was given to Applicant and First Respondent was entitled to have an investigation done. The issues which are now being raised can be raised by Applicant in the disciplinary proceedings when it proceeds as the points in limine have been ruled on. In my view it would be more appropriate for Applicant if he does not want to proceed with the disciplinary hearing which has not yet been finalised to either follow the procedures set out in section 13 of the Regulations which I have referred to above or to proceed with such relief in the Labour Court. It is a Labour issue. The charges with which he is being charged are issues which can be dealt with in the Labour Court and

accordingly that would be the more appropriate court.

[23] In respect of the issues of costs it was submitted by Applicant that the costs be reserved for decision by the court hearing the second part of the relief sought in the notice of motion which relates to review proceedings. Having come to the conclusion that this is not the correct forum for this matter and therefore the prospects of the review I am in agreement with the submission by Mr. Morane SC that the costs issue should be decided at this stage. Accordingly I make the following order:

Order:

The application for the relief in Part A of the notice of motion is dismissed with costs, such costs to include the costs of Senior Counsel on scale C.

P C BEZUIDENHOUT J.

JUDGMENT

RESERVED ON: 6 JUNE 2024

JUDGMENT

HANDED DOWN ON: 30 AUGUST 2024 COUNSEL FOR APPLICANT: MR TITUS Instructed by: MACGREGOR ERASMUS ATTORNEYS INC. Durban Tel: 031 201 8955 Ref: Mr Titus/gb/KH05/001 Email: mpho@meattorneys.co.za c/o GRANT & SWANEPOEL INC Pietermaritzburg Email: saxon@gsalaw.co.za COUNSEL FOR RESPONDENTS: MR MORANE SC Instructed by: SM MBATHA INC Durban Tel: 031 701 8015 Ref: Mr Mbatha Email: reception@smmbathainc.co.za c/o SLK Kunene & Partners Tel: 033 345 7760

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