

SOUTH AFRICA / JUDGMENT

Lebu v JB Marks Local Municipality and Others; Moeketsane v Mokhatla and Others (UM27/2021; UM30/2021) [2021] ZANWHC 58 (17 March 2021) [2021] ZANWHC 58

COURT

North West High Court, Mafikeng

BEFORE

MZ Makoti

CASE / FILE NUMBER

UM27/2021; UM30/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION - MAHIKENG

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to Regional Magistrates: YES / NO

CASE NO: UM27/2021

In the matter between:

RALEKGETHO

LEBU

Applicant

and

JB

MARKS LOCAL MUNICIPALITY

First Respondent

MOKHATLA

TZ (ADMINISTRATOR)

Second Respondent

KHUMALO

CLLR K. (MAYOR)

Third Respondent

CASE NO: UM30/2021

TUMISANG
MOEKETSANE
Applicant
And
THUPI
ZACHARIA MOKHATLA
First Respondent
in his capacity as
Administrator and
personal capacity
JB
MARKS LOCAL
MUNICIPALITY
Second Respondent
KGOTSO
MOSES KHUMALO
Third Respondent
MEMBER
OF THE EXECUTIVE COUNCIL
Fourth Respondent
FOR COOPERATIVE
GOVERNANCE,
HUMAN SETTLEMENTS AND
TRADITIONAL
AFFAIRS, NORTH WEST
PROVINCE

JUDGMENT

MAKOTI AJ

INTRODUCTION

- [1] In these two opposed urgent applications the applicants are seeking orders from the court to declare their respective suspensions unlawful, invalid and to set them aside. The corollary to the orders sought, if granted, is that the applicants will be re-instated to their respective positions as senior employees of JB Marks Local Municipality ('the Municipality').
- [2] With the parties' permission, the two applications were conveniently consolidated and were heard simultaneously. It was convenient to do so because the factual and legal issues raised in both matters are substantially similar. To avoid confusion, also, I shall refer to the applicant in the first application under case numbers UM27/2021 as Lebu, and to the one in case UM30/2021 as Moeketsane.
- [3] The substantive position of Lebu at the Municipality is that of Municipal Manager ("MM"), while Moeketsane is the Chief Financial Officer ("CFO"). Prior to dealing with the merits of the applications, I deal with the question of urgency

URGENCY AND IRREPARABLE HARM

- [4] The principles governing urgent applications under Rule 6(12) of the Uniform Rules have become settled in our law. That the provisions of the sub-rule are to be read in conjunction with the practice directives applicable in the Division is equally trite. The sub-rule enables the Court to dispense with the normal rules relating to the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such

procedure it may deem fit.[1]

- [5] What is urgent must be determined on the merits of each case.[2] Properly construed, the sub-rule enjoins an applicant seeking to be heard on truncated timeframes to:

“... set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”[3]

- [6] What the sub-rule requires are facts, firstly, which the Applicant relies on for alleging that the application is urgent.[4] Thereafter, the Applicant must provide the Court with reasons why it alleges it will not be able to attain substantial redress should the application be heard in a future date.[5] The question whether an applicant will not be able to obtain substantial redress in a process in due course will also be determined by the facts of each case. The duty falls on an applicant to make out a case for urgency.

- [7] The applicants raised the contention that the suspensions will affect their future prospects of employment. They both indicated that their employment contracts end during the course of 2022. Lebu went on to state that the suspension has affected his sense of self-worth, and that it creates a sense that he has committed some ‘unknown

alleged misconduct’. It is on record that on his version, he is not new to this kind of suspension.

- [8] In addition, Lebu stated presumptuously that the adverse personal circumstances he is experiencing will be amplified by a prolonged period of suspension. Moeketsane’s complaint is that her right to qualify for performance bonus has been affected by the suspension. And, in similar vein, she complained that the suspension will deter prospective employers, taking into consideration that her fixed employment contract expires on 31 November 2022. In both cases, the nature and extent of harm suffered or apprehended do not seem irreparable.

- [9] I find these contentions to be missing important elements regarding precautionary suspensions, being to preserve the integrity of the investigations. What the urgency rule requires is that an applicant must succinctly set out the nature of the harm apprehended and that the harm must be irreparable. There are safeguards that the law presents for cases of suspension. This is what the LAC stated in MEC for Education, North West Provincial Government v Gradwell:[6]

“... And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer.” (Emphasis added)

[10] The applicants’ complaints that their suspensions impact negatively on their good names and reputations do not hold. As was held in the case of *Long v SA Breweries*[7]:

“... Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court’s finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound.” (Emphasis added)

[11] I am mindful, of course, that the applicants also predicate their urgency are predicated on the question of lawfulness or legality[8] of the actions taken by the Administrator. These questions of lawfulness and legality will be considered below. At this stage I

merely find that the approach to court on urgent basis to challenge the suspensions appear to be abusive of the court’s processes.

Though I am not satisfied with the applicants’ grounds for urgency, however, in view of the important questions that the court has to determine, I am willing to exercise my discretion in favour of dealing with this matter urgently.

QUESTIONS OF LAWFULNESS / LEGALITY

[12] Both applicants contend that their suspensions by the Administrator are unlawful because he does not have the authority, without the Municipality’s Council, to suspend them from employment. The basis for their argument is derived from the case of *Rudman v Maquassi Hills Local Municipality and Others*[9] in which the court held that an Administrator who is appointed in terms of the provisions of s 139(1)(b) of the Constitution merely

exercises oversight on the functions of Council. The contention is that Council retains its autonomy[10] to run the affairs of the Municipality if it is not dissolved by the Provincial Executive.

[13] The case of *Mogalakwena Local Municipality Provincial Executive Council, Limpopo and Others*[11] is also used by the applicants (as in *Rudman*) as authority for the proposition that Administrator lacks authority to suspend or discipline them, and that at the authority is reposed only in Council. Reliance by the applicants on this case is not properly conceived in that the fact upon which the court reached its decision in *Mogalakwena* are distinguishable. In that case the court was concerned with an interim interdict and a threat of suspension of the municipal manager in circumstances where there were even suggestions that the power was being excised for an improper purpose by an Administrator who was not impartial. In that case the court did not deal with the question as to whether the Administrator had acted *ultra vires* s 139(1)(b) of the Constitution by taking of disciplinary steps[12]. On the established facts of this case, however, the Administrator has been specifically empowered

by the Provincial Executive to take such actions as may be necessary to instill labour discipline in the Municipality, including in my view, the suspension of the two applicants.

[14] When asked as to what should the court make of the contents of the Administrator's terms of reference, and his appointment letter, which empower him to take control of all labour matters, the applicants' representatives suggested that the contents should be ignored as they do not have legal force and effect. Their contention was that, because the s 139 of the Constitution speaks of executive functions, the powers granted in terms thereof are not administrative and that there is no need to follow authorities in *Oudekraal*[13] and *Kirland*[14] to apply for an order to set aside the terms of reference.

[15] The above contention must be rejected. The Constitutional Court provided clarity on reviews of executive decisions and actions under the principles of legality in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*[15] when it held inter alia that:

"[38] The conclusion that PAJA does not apply does not mean that an organ of state cannot apply for the review of its own decision; it simply means that it cannot do so under PAJA. ..."

[16] Similarly, in this case, the impugned decisions should be challenged through review proceedings, not as administrative decision, but as executive decisions offending legality and the rule of law. By not applying for an order to review that terms of reference in terms of which the Administrator empowered to take the impugned decisions, the applicants have acted to their own peril. They have overlooked an important principle that even executive decisions are liable to legality review, a principle which the Court elaborated on by stating that:[16]

"[40] ... Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review." (Emphasis added)

[17] Reverting to the question whether the Administrator is empowered to take disciplinary action against the applicants, I am persuaded by and align with the judgement in *Abaqulusi Local Municipality and Others v The Premier for the Province of KwaZulu Natal*[17] in which it was held that:

"... The suggestion by the applicants that s 139(1)(b) did not authorise a decision of the nature of the impugned decision permitting

disciplinary proceedings against Mr Ntanzu, and that the remedy in circumstances of an errant municipal manager lay in s 139(1)(c), can, be rejected. It would be absurd to require that an entire municipality would have to be dissolved, depriving elected councillors in the democratic process also of their powers, especially where they are not to blame but simply are unable to muster the required majority, and the problem only lies with an errant municipal manager. ... If the respondents' contention in respect of the distinction between executive and administrative

action is incorrect, then s 139(1)(c) could also not provide a remedy to dealing with a possibly errant municipal manager.” (Emphasis added)

[18] Furthermore, the judgment of Abaqulusi[18] is in full accord with what Snyman AJ said in *Mere v Tswaing Local Municipality and Another*[19] where he held amongst others as follows:

“In order for the administrator to effectively discharge his or her duties, then surely the administrator must exercise control and

supervision over the senior managers of the municipality. ...”

[19] What can be gleaned from the above authorities is that the applicants’ contention that the Administrator did not have the power to suspend them and that power is reposed in the exclusive terrain of Council is untenable. What they are propagating for is akin to absolute or unfettered autonomy of the municipal Council, concerning which the court in *Mnquma Local Municipality and Another v Premier Eastern Cape and Others*[20] remarked when rejecting a similar contention, that:

“[45] ...This provision underlines the fact that the autonomy of municipalities is relative. The duty to perform a monitoring function is accompanied by the right to take corrective measures. Intervention is authorised by the subject matter of this judgment, namely section 139 of the Constitution.” (Emphasis added)

[20] In light of the authorities above, I have no difficulty dismissing the applicants’ contention that the Administrator acted unlawfully by taking the decision to suspend them from employment as a precautionary measure. As explained in *Mnguma*, the authority or power to suspend the applicants is necessary or incidental to the powers that were expressly conferred upon the Administrator by the Provincial Executive. To hold otherwise would be to render his management of the affairs of the Municipality ineffective.

RATIONALITY OF THE SUSPENSIONS

[21] Both applicants allege that the decisions taken by the Administrator to suspend them were irrational and that they stand to be reviewed and set aside even on this ground alone. The relevant question for rationality test is whether the means, including the process of making a decision, are linked to the purpose or the required ends. It is a natural and inescapable denouement that the process leading to a decision “must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred”.[21]

[22] The contentions of irrationality of the suspensions are predicated on allegations that the notices of intention to suspend did not properly disclose the nature of the misconduct that they are alleged to have committed.[22] I am in full agreement that it is a requirement that the information contained in the notices of intention to suspend must provide sufficient clarity for the intended recipient. To determine whether the letters contain sufficient information to enable the applicants to understand the allegations against them requires a

consideration of how they reacted to the letters.

[23] Despite their complaints, the applicants have provided elaborate representations to the allegations of misconduct, doing so with help of lawyers. Amongst others, the notices of intention to suspend specifically allege that the applicants have committed unlawful procurement in relation to Fukuza Suppliers and Projects (Pty) Ltd, and that she fraudulently completed or backdated relevant procurement documentation relating to Steiner Hygiene Potchefstroom. How allegations of this nature can be said to be unintelligible is not comprehensible.

[24] The conception of intelligibility was considered by the Constitutional Court in the case of Minister for Safety and Security v Van Der Merwe and Others and it was explained in relation to police's warrants of search and seizure as follows:[23]

"[43] The intelligibility requirement is a common law principle introduced by the courts and is quite separate and distinct from the requirements of sections 20 and 21. As the name suggests, intelligibility is on the one hand about ensuring that the police officer understands fully the authority in the warrant to enable her to carry out the duty required of her, and on the other that the searched person also understands the reasons for the invasion of his privacy." (Emphasis added)

[25] In my understanding of the principle, when applied to the circumstances of this case, a notice of intention to suspend must carry sufficient information to help an intended recipient to understand the nature and the bounds of the issues raised in it.[24] I do not understand sufficient information to be synonymous with precise or absolute information. This requires the court to consider

whether, objectively speaking, the totality of the information expounded in the notices is capable of understanding by the person

against whom the warrant was issued. I find the information clear and unambiguous.

[26] I also find the contention based on intelligibility to be an opportunistic one because nothing prevented the applicants to make inquiries from the Administrator. They were assisted by lawyers when they made representations and there is no explanation as to why they did not first enquire about what they allege to have lacked proper understanding of. There is another reason why this contention cannot hold, being that they also accuse the Administrator for failing to consider their representations. Surely they must have been satisfied that they had presented sufficient representations to persuade the Administrator against suspending them, something that would have been impossible if they truly lacked understanding of the allegations of misconduct against them. The contention of unintelligibility is unsustainable on the basis facts of these matters.

[27] The applicants further allege that their suspensions were irrational because the source of their suspensions is an investigation report by the Special Investigations Unit (“SIU”), which investigations were concluded some four (4) months ago. This is disputed by the Administrator who has indicated that there are further allegations of misconduct which require an investigation. Also, he stated that he fears that the applicants may interfere with the investigations. The principle as explained in *Long v SA Breweries*[25] is that:

“[25] In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee.”

[28] The final question of rationality was that the Administrator had failed to give a copy of the SIU report to the applicants. In *Mere*,[26] *supra*, Snyman AJ explained that it was not required for purposes of suspension that evidence be provided to the employees. In contrast to a disciplinary inquiry, the hearing concerning the invocation of suspension involves an employer setting out the details of the allegations on which suspension is based, and the employee being invited to make written representations as to why they should not be suspended.[27] In the case of *Independent Municipal and Allied Trade Union obo Hobe v Merafong City Local Municipality and Others*[28] it was held that:

“[A]n employer contemplating suspending an employee need not demonstrate with any degree of certainty that the employee is guilty of misconduct or that the employee probably will interfere with the investigation of the alleged misconduct. Obviously, it is not necessary for the employer to place evidence before the employee but simply to outline the allegations of misconduct that will be investigated.”

[29] In view of the above authorities, I find the contentions raised by the applicants in this connection wanting and they are accordingly rejected.

ULTERIOR MOTIVES

[30] The applicants have also raised a contention that their suspensions were implemented with ulterior motives. The contentions are based on the publication of a media statement on 11 February 2021 in which the MEC responsible for Local Government was quoted as having mentioned that the SIU investigations were completed. Thus, according to them, the suspensions are ‘not true and legitimate precautionary suspension’. Lebu takes the point further by alleging that the decision to suspend was influenced by the MEC’s media statement.

[31] Furthermore, the applicants lament that the failure by the Administrator to provide them with a copy of the SIU report is an indication or proof that the decision was influenced by ulterior motives. When quizzed as to the timing of the media statement, both counsel representing the applicants indicated that the suspensions took effect on the same day but before the media statement was issued. If that be the case, the contention that the decision to suspend was influenced by the MEC media statement is not logical. There is no evidence before me that the suspensions were implemented with ulterior motives or *mala fide*.

[32] Ultimately, I find that there are no facts in this matter that warrant a finding that the suspensions were influenced by an ulterior motive. Accordingly, there is no basis for the court to temper with of the decision taken by the Administrator to suspend the applicants. In the premises, both applications stand to be dismissed. I now deal with the question of costs.

COSTS

[33] It is trite that the awarding of costs is a matter for the court's discretion.[29] In their papers the applicants have asked for an order of costs against the Administrator de bonis propriis. That position changed when the court engaged with counsel as to what warrants the imposition of costs on such punitive scale. Even if his actions were wrongful, the Administrator did nothing other than carrying out the instructions given to him in terms of his appointment letter and the terms of reference.[30] The injudicious granting of punitive cost orders against public officials was rebuked by the Constitutional Court recently.[31]

[34] In any event, the applications have failed to provide compelling reasons why a cost order should be made against the Administrator, or against any of the respondents. What remains is the question whether the applicants should be ordered to pay the costs of this application. I can see no reason why the costs should not follow the cause and, in the circumstances, the applicants must pay the costs of these applications, including the costs occasioned by the employment of senior counsel.

ORDER

[34] I make the following order:

16.1 The application in terms of case number UM27/2021 is dismissed and the applicant, Mr Lebu Ralekgetho, is ordered to pay the costs of suit including the costs occasioned by the employment of senior counsel.

16.2 The application in terms of case number UM30/2021 is dismissed and the applicant, Ms Tumisang Moeketsane, is ordered to pay the costs of suit including the costs occasioned by the employment of senior counsel.

M.Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

APPEARANCES

DATE OF HEARING

: 07 March 2021

DATE OF JUDGMENT

: 17 March 2021

COUNSEL FOR APPLICANT (LEBU) : Mr W Scholtz

COUNSEL FOR APPLICANT : Adv P Grundlingh

(MOEKETSANE)

COUNSEL RESPONDENT

: Adv E. Van Graan SC

[1] Ezokuthutha Transport (Pty) Ltd and Another v MAN Financial Services (SA) (RF) (Pty) Ltd and Others (UM57/2019).

[2] Ntozini and Others v African National Congress and Others (18798/2018)

[2018] ZAGPJHB 415 (25 June 2018).

[3] Erasmus: RS 13, 2020, D1-50.

[4] Salt v Smith 1991

(2) SA 186 (Nm); Cekeshe v Premier, Eastern Cape 1998

(4) SA 935 (Tk) at 948F; also, East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[5] Jiba v Minister: Department of Justice and Constitutional Development and Others (2010) 31 ILJ 112 (LC) at para [18].

[6] MEC for Education, North West Provincial Government v Gradwell (JA58/10)

[2012] ZALAC 8; [2012] 8 BLLR 747 (LAC); (2012) 33 ILJ 2033 (LAC) (25 April 2012) ('Gradwell').

[7] (2019) 40 ILJ 965 (CC).

[8] Masetlha v President of the Republic of South Africa and Another [2007] ZACC 20; 2008 (1) SA 566 CC[2007] ZACC 20; ; 2008 (1) BCLR 1 (3 October 2007).

[9] (J3495/18)

[2018] ZALCJHB 371 (24 October 2018) at paras [20] – [22].

[10] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others (35248/14) [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) (19 June 2014).

[11] Ibid.

[12] Abalungisi Local Municipality and Others v Premier of the Province of KwaZulu-Natal and Others (3357/2020P) [2020] ZAKZPHC 30 (30 July 2020)

- [13] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004).
- [14] MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014).
- [15] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017).
- [16] Ibid.
- [17] Abaqulusi Local Municipality and Others v Premier of the Province of KwaZulu-Natal and Others (3357/2020P) [2020] ZAKZPHC 30 (30 July 2020).
- [18] Ibid.
- [19] Mere v Tswaing Local Municipality and Another (J1236/15) [2015] ZALCJHB 193; [2015] 10 BLLR 1035 (LC); (2015) 36 ILJ 3094 (LC) (7 July 2015).
- [20] Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others (231/2009) [2009] ZAECBHC 14 (5 August 2009).
- [21] Democratic Alliance v President of the Republic of South Africa [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (Democratic Alliance) at para 36.
- [22] Retlaobaka v Lekwa Local Municipality and Another (2013) 34 ILJ 2320 (LC) at para [8].
- [23] Minister for Safety and Security v Van Der Merwe and Others (CCT90/10) [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC); 2011 (2) SACR 301 (CC) (7 June 2011).
- [24] Goqwana v Minister of Safety NO & Others (20668/2014) [2015] ZASCA 186; [2016] 1 All SA 629 (SCA); 2016 (1) SACR 384 (SCA) (30 November 2015).
- [25] Long v SA Breweries (Pty) Ltd and Others (2019) 40 ILJ 965 (CC).
- [26] FN 14, *supra*.
- [27] Mashego v Mpumalanga Provincial Legislature and Others (2015) 36 ILJ 458 (LC), at para 11. Also, Gradwell *supra*.
- [28] [2017] 10 BLLR 1040 (LC) the court held at para 21.
- [29] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.
- [30] Public Protector v South African Reserve Bank 2019 (9) BCLR 1113 (CC) at para [80] – [83].
- [31] Public Protector v South African Revenue Services and Others (CCT63/20)

[2020] ZACC 28 (15 December 2020).

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