

SOUTH AFRICA / JUDGMENT

Lebu v Maquassi Hills Local Municipality (J 2035/11) [2011] ZALCJHB 170 (21 October 2011) [2011] ZALCJHB 170

COURT

Labour Court Johannesburg

BEFORE

Steenkamp

CASE / FILE NUMBER

J 2035/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2035/11

In the matter between:

RALEKGETHU LEBUApplicant

and

MAQUASSI HILLS LOCAL MUNICIPALITYRespondent

Heard: 11 October 2011

Delivered: 21 October 2011

Summary: Urgent application – alleged unlawful suspension – alleged lack of authority – contractual requirements.

STEENKAMP J

Introduction

This is an urgent application to declare the applicant's suspension unlawful and wondering the respondent to reinstate him in his position as municipal manager. In the alternative, the applicant seeks an order compelling the respondent to provide him with certain information.

Background facts

The applicant was appointed as municipal manager on 1 November 2008 in terms of sections 56 and 57 of the Municipal Systems Act.¹ It is disputed whether his term is due to end on 31 October 2011 or 31 October 2012. That dispute is pending before this court under a different case number and it does not concern this application.

The applicant was suspended following a series of resolutions by the respondent. Those resolutions were adopted on 9, 12 and 20 September 2011, respectively. The applicant alleges that the resolutions were unlawful for non-compliance of the Disciplinary Regulations for Senior Managers, 2010² ("the Regulations").

In limine: Authority to depose to answering affidavit

The respondent's acting municipal manager, Mr Masindi Mapholi, deposed to the answering affidavit on its behalf. He alleges that he is duly authorised to do so. The applicant disputes that, as the respondent did not adopt a resolution authorising him to do so.

The applicant argues that, in terms of section 59 of the Systems Act, only the Municipal Council is vested with the powers of

authority to make any decisions pertaining to the municipal manager's contract of employment and conditions of service. Section

60 of the Systems Act provides as follows:

"60

- (1) The following powers may, within a policy framework determined by the municipal council, be delegated to an executive committee or executive mayor only:

decisions to expropriate immovable property or rights in order to immovable property; and

the determination or alteration of the remuneration, benefits or other conditions of service of the municipal manager or managers directly responsible to the municipal manager.

- (2) The council may only delegate to an executive committee or executive mayor or chief financial officer decisions to make investments on behalf of the municipality in a policy framework determined by the Minister of Finance."

The applicant argues that the decision to suspend him falls under section 60(1)(b) of the Systems Act, i.e. the determination or alteration of his conditions of service. That decision, he argues, could only be delegated to an executive committee or executive

mayor. It is common cause that there was no such delegation. Neither did the Council adopt a resolution authorising the acting municipal manager to oppose the application. Therefore, says the applicant, the acting municipal manager was not authorised to do so and his answering affidavit must be disregarded.

Mr Loyson, for the respondent, argued that it is trite that no resolution or delegation is required for the acting municipal manager to depose to an affidavit. That much is clear from the decision in *ANC Umvoti Council Caucus v Umvoti Municipality*.³ But it remains open to the other party to challenge the deponent's authority to initiate or defend litigation on behalf of the municipality.

It follows that the crisp issue to determine is whether the acting municipal manager required the delegated authority by the Council to oppose an urgent application by the suspended municipal manager.

This question turns on the interpretation of sections 59 and 60 of the Systems Act. Did the Council, in terms of those sections, have to delegate the authority to depose to an answering affidavit to the acting municipal manager. by way of a resolution?

The applicant relies on those portions of sections 59 and 60 of the Systems Act dealing with the "conditions of service" of the municipal manager. It may well be so that the suspension of the municipal manager falls within the determination or alteration of his conditions of service. But the objection to the authority of the acting municipal manager that the applicant raises is aimed at his authority to depose to an answering affidavit; not to decide on the suspension of the applicant. That authorisation does not, in my view, fall within the purview of section 59 or 60 of the Systems Act.

Obviously, not any person can purport to act on behalf of a municipality or oppose an application brought against the municipality. In this regard, the applicant placed reliance on *Kouga Municipality v SA Local Government Bargaining Council & Others*.⁴ In that case, it was held that any delegation by a municipal manager, on the facts before the court, had to be approved by the municipality. Therefore, employees in the human resources department of municipality did not have the required authority to act on behalf of the municipality. But the ratio of the court did not deal with the purported required authority of the acting municipal manager to oppose an application as in the present case. It is not authority for the proposition that the applicant advances.

The applicant also sought to rely on *Mbatha v Ehlanzeni District Municipality & Others*.⁵ But that case is not on point either. It relates simply to the exclusive power that a council has to discipline a municipal manager

and that such a decision could not be delegated to the mayor. That appears to me to be correct. It is not authority for the proposition

that a delegation is required to authorise a municipal manager to depose to an answering affidavit on behalf of a municipality,

though.

The applicant also relied on *Moila v Shai*⁶. But in that case, a power of attorney was filed, pursuant to a purported resolution. It transpired that no such resolution was

adopted. In the present case, there is no allegation that a purported resolution authorising the acting municipal manager to

depose to the answering affidavit was not properly adopted.

There appears to me to be nothing improper about the authority given to the acting municipal manager to oppose this application on behalf of the municipality. In terms of section 55(1) of the Systems Act, the municipal manager is responsible for the administration of the municipality and "carrying out the decisions of the political structures and political office bearers of the municipality".

He must carry out the decisions of the municipal council. And, as Nugent JA pointed out in *Manana v King Sabata Dalindyebo Municipality*⁷:

"In my view, section 55(1) is no more than a statutory means of conferring such powers on municipal managers to attend to the affairs

of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers.

Indeed... the Constitution vests all executive authority – which includes the authority to appoint staff – in the municipal council and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in the statute in that respect it must be construed to avoid that result."

The Council, in this case, decided to oppose the relief sought, and to defend its suspension of the applicant. The authority to depose to the affidavit opposing the application was given to the acting municipal manager. It does not appear to me that that authority was improperly given or that it required a separate resolution by the Council.

I will, therefore, consider the merits of the application by considering the affidavits filed by the applicant as well as the

respondent.

Urgency

The applicant was suspended on 21 September 2011. He launched this application the very next day, on 22 September 2011. It was

initially set down for hearing on 28 September 2011. On that day, it was postponed by agreement to enable the parties to file answering and replying affidavits; and set down for hearing on 11 October 2011.

I am satisfied that the applicant pursued the matter with the necessary urgency. Whether he is entitled to the relief sought on an urgent basis, is another matter. In order to decide whether he is, the background needs to be set out in more detail.

First resolution: 9 September 2011

At this meeting, the Council noted that the applicant was alleged to have contravened certain supply chain management policies. It resolved that:

“The Municipal Manager be suspended with immediate effect regarding all non compliance issues.”

Second resolution: 12 September 2011

It appears that, at or before this meeting, the Council realised that the resolution to suspend the applicant without affording him the opportunity to provide reasons why he should not be suspended, was contrary to Regulation 6 of the Regulations.

The Council rescinded the resolution taken on 9 September 2011 and adopted the following resolution:

“The Acting Speaker Cllr DK Mohadi must furnish the Municipal Manager with a letter in terms of the provisions of Regulation 6 of the Local Government Disciplinary Regulations for Senior Managers, 2011 to make written representations to the Council within 7 days of this decision, why he should not be suspended for misleading Council and deviation without authority from the Procurement Policy of Council.”

The acting speaker sent a letter to the applicant on the same day, headed: "Intention to suspend: municipal manager". It reads as follows:

"We refer to the above, and kindly advise that you are hereby, in terms of the provisions of Regulation 6 of the Local Government:

Disciplinary Regulations for Senior Managers, 2011, informed that the Municipal Council, at its meeting held on 12 September 2011 resolved to impose a precautionary suspension on you, on the following grounds:

You allegedly mislead [sic] Council by claiming that Council took a resolution to extend the services of Sediassy Management Consultancy and based on this false claim, extended the contract under the pretext of a so-called "deviation" from Council

Supply Chain and Procurement Policy and Regulations.

You allegedly failed to follow Council Supply Chain Policy by appointing "Edge Forensic and Risk Consultant" way beyond the initial agreed fee structure and terms of reference without following the Supply Chain Policy.

Kindly note that you are hereby given the opportunity to make written representation to the Municipal Council, indicating why you should not be suspended. Any representations made shall be made in writing to the Municipal Council within seven days from this letter, i.e. by no later than 19 September 2011, and be delivered to the office of the records manager. Any representations made will be duly considered by the Municipal Council and you will be informed in writing of the outcome of the consideration."

The applicant's attorneys responded on 19 September 2011 and made lengthy representations regarding the substance of the

allegations against the applicant. However, they also pointed out the following:

"5. In terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010, our client merely needs to justify that his continued presence will not:

5.1 jeopardise any investigation into the alleged misconduct;

5.2 endanger the well-being or safety of any person or municipal property;

5.3 that his continued presence will not be detrimental to stability in the Municipality;

5.4 , that our client will not interfere with potential witnesses or commit further misconduct.

6. It must be pointed out that you have not indicated or even alleged that there may be a possibility of the above stated occurring,

neither that he had any intention to Institute a disciplinary process."

Resolution of 20 September 2011

On 20 September 2011, the Council adopted the following resolution:

"The written representation forwarded by the municipal manager dated 19 September 2011 regarding the intention to suspend him is not accepted by Council.

The municipal manager is suspended with immediate effect with full pay and benefits."

On 21 September 2011 the respondent wrote to the applicant in these terms:

"Kindly take note that Council has resolved (ICSLC Res No 07/2011) to suspend you from further continuing with your designated duties as the Accounting Officer of the Municipality. Your suspension is with full pay and benefits.

...

Council has resolved that an investigation must immediately commence into the allegations made against you which Council will resolved [sic] to institute disciplinary action against you, or not, depending on the outcome of the investigation.

...

You are lastly required to hand in all keys and other access tools to the premises at other places within the municipal premises to the speaker."

Further correspondence regarding the legality of the suspension, specifically with regard to the question whether the relevant

council meetings were properly constituted, followed between the parties' respective attorneys. It suffices to say that the matter

could not be resolved and the present application ensued.

Non-compliance with contract and Regulations

The applicant founds his claim squarely on the basis that the suspension is in breach of the applicant's contract of

employment and the regulations. He does not base his claim on an unfair labour practice in terms of section 186(2)(b) of the Labour

Relations Act .8

The contract of employment includes the following terms:

"PRECAUTIONARY SUSPENSION

"The employer may suspend an employee on full pay if he or she is alleged to have committed a serious offence and the employer believes his or her presence at the workplace might jeopardise any investigation into the alleged misconduct or endanger the well-being or safety of any person or municipal property; provided that before an employee is suspended as a precautionary measure, he or she must be given an opportunity to make representation on why he or she should not be suspended in line with the prescribes of the LRA and BCEA as amended."

This contractual clause must be read together with regulation 6, quoted above. That regulation specifies that the municipal council

must inform the senior manager in writing of the reasons for his or her suspension on or before the date of suspension.

In the present case, the respondent did not provide the applicant with any reasons for his suspension. It did provide him with the opportunity to make representations in terms of regulation 6(5)(2). It also clearly alleged that he has committed an act of misconduct, as envisaged in regulation 6(1) and clause 18 of the contract of employment. But the respondent has not complied with the rest of regulation 6(1) read with the contract of employment.

The relevant clause in the contract of employment is drafted in the conjunctive and not disjunctive: it specifies that the Council may suspend an employee if he is alleged to have committed a serious offence and the Council believes his or her presence at the workplace might jeopardise any investigation into the alleged misconduct or endanger the well-being or safety of any person or municipal property.

Similarly, in terms of regulation 6(1), it is not sufficient for the Council to allege that the senior manager has committed an act of misconduct in order to suspend him; it must also have reason to believe that his presence may jeopardise the investigation, endanger the well-being or safety of any person or municipal property, or be detrimental to stability in the Municipality; or that he may interfere with potential witnesses or commit further acts of misconduct.

In argument, Mr Loyson, for the respondent, submitted that it is clear from the facts of this case, as set out in the answering papers that the applicant, in his position as municipal manager and accounting officer, could interfere with the investigation and has in fact committed further acts of misconduct. The problem is that none of this was alleged before he was suspended, as required by regulation 6 and the contract of employment. Therefore, the applicant was not given an opportunity to make representations why he should not be suspended, based on those reasons.

It seems clear to me that the respondent has not complied with the provisions of the contract of employment or of the regulations

before suspending the applicant. The applicant has therefore established a clear right for the relief it seeks.

This conclusion may appear to be overly technical. One may be tempted to, of the allegations against him, his presence at the workplace

would place him in a position where he could interfere with the investigation or commit further acts of misconduct. But, as Halton

Cheadle has pointed out, suspension is the workplace equivalent of arrest. It is not something that an employer should resort to lightly, and when it does, it should give the employee a proper opportunity to be heard. That can only be done in circumstances

where the employer has explained why it deems a suspension necessary, and the employee has had a proper opportunity to respond

to those reasons.

It must also be borne in mind that the language of the contract of employment and the regulations is clear in this case. The employee has a contractual right to know what the reasons are for his intended suspension, and to make representations in regard thereto. This is not a case where the employee's claim is based on an implied right to fairness. In *South African Maritime Safety Authority v McKenzie*⁹ the Supreme Court of Appeal has now held that no such an implied right can be read into contracts of employment generally. Therefore,

Lagrange J held in *Mahlalela v Pensions Fund Adjudicator*¹⁰, with reference to the earlier judgment in *Mogothle v Premier of the Northwest Province & others*¹¹:

"In that case, the court held that a trio of decisions by the Supreme Court of Appeal had established an employee's contractual right to fair dealing that can be enforced by the Labour Court under the provisions of s 77(3) of the Basic Conditions of Employment Act 75 of 1997, which exists independently of any statutory rights to protection against unfair labour practices."

However, since this decision, the SCA decisions referred to in *Mogothle* have been revisited by the SCA in its recent decision in the *McKenzie* case. In that case the SCA unequivocally held that, in the absence of specific provisions in a contract of employment to the contrary, an employer did not owe an employee a contractual obligation to act fairly. Wallis JA distinguished the authority of the previous

decisions referred to by Van Niekerk J [in *Mogothle*], finding in effect that those decisions did not establish the existence of a contractual right to fairness. It might be that there could be sound reasons not to follow the apparently authoritative dicta in *McKenzie*, but none were advanced and accordingly I must accept for present purposes that the latest pronouncement of the SCA on the non-existence of a contractual duty of fairness must prevail. Consequently, insofar as the applicant relies on a contractual obligation of fair dealing, he cannot succeed."

But as I have pointed out, the applicant in this case has a clear contractual right, and there is no need to read such a general

implied term into his contract of employment. There is a specific provision in the contract – and in regulation 6 – dealing with the employee's rights prior to suspension.

The sentiments expressed by Van Niekerk J in *Mogothle* are therefore still applicable to the case before me, even if no general right to fair dealing can be implied in the contract of employment. In this case, the contractual rights pertaining to the reasons for suspension are set out in the applicant's contract of employment and in the Regulations.

And, as Nugent JA recently pointed out in *Manana v King Sabata Dalindyebo Municipality*¹²:

"The evidence in this case establishes the existence of a contract of employment between the municipality and [the applicant]. And he wishes to enforce the contract... That he might have been entitled to other relief under the remedies provided for under the Labour Relations Act does not somehow extinguish his contractual rights."

The right that the applicant relies upon in this case is clearly stated in his contract of employment. He has established a clear

right for the relief sought.

Irreparable harm

The applicant is suffering harm in that he does not know why he should be suspended, and he has not had an opportunity to address

those purported reasons.

The applicant is employed in a high-profile and politically sensitive position as the municipal manager. It may well be that he has committed serious misconduct. That is for another tribunal to decide. But at the moment, he is suffering harm to his dignity and reputation; and he has not been given an opportunity to prevent that, contrary to the clear provisions of his contract of employment and the Regulations.

Alternative remedy

As I have pointed out, the applicant does not allege an unfair labour practice in the form of unfair suspension as contemplated by s 186(2)(b) of the Labour Relations Act.¹³ Had that been the case, he would have had an alternative remedy by referring an unfair labour practice dispute to the relevant

bargaining council in terms of s 191 of the LRA. But his claim is founded on a breach of contract. The only alternative remedy would be a claim for damages. That would be nearly impossible to quantify and would in any event be too late, as it would not be heard before he is due to face a disciplinary hearing, which is to take place within 60 days from the date of suspension in terms of the Regulations.

Conclusion

I have come to the conclusion that the applicant has satisfied the requirements for an interdict¹⁴ and is entitled to the relief sought.

In the light of that conclusion, I need not consider the question whether the relevant Council meetings were properly constituted and the resolutions validly adopted.

With regard to costs, I take into account that the applicant has had to incur legal costs in order to compel the respondent – an entity that is funded by its ratepayers – to abide by its contractual obligations. It should not have been necessary. In law and fairness, costs should follow the result.

Order

I therefore make the following order:

The applicant's suspension is declared to be unlawful and is set aside.

The respondent is ordered to reinstate the applicant into the position that he occupied immediately before his suspension with

immediate effect.

The respondent is ordered to pay the applicant's costs.

Anton J Steenkamp

Judge

APPEARANCES

APPLICANT: Attorney W Scholtz.

RESPONDENT: Adv Ernst Loyson

Instructed by Eric H Louw attorney.

1Local Government: Municipal Systems Act, Act 32 of 2000.

2Notice No 344, published in Government Gazette No 34213 of 21 April 2011.

3 2010

(3) SA 31 (KZN).

4(2010) 31 ILJ 1211 (LC).

5[2007] ZALC 89; (2007) 16 LC 10.7.1; [2008] 5 BLLR 417 (LC).

6(2007) 28 ILJ 1028 (LAC).

7 [2011] 3 BLLR 215 (SCA) para [17].

8Act 66 of 1995.

9 2010

(3) SA 601 (SCA); [2010] 3 All SA 1 (SCA).

10(2011) 32 ILJ 1932 (LC) paras [11] – [12].

11(2009) 30 ILJ 605 (LC); [2009] 4 BLLR 331 (LC).

12 [2011] 3 BLLR 215 (SCA) para [23].

13Act 66 of 1995.

14As set out in *Setlogelo v Setlogelo* 1914 AD 221.

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