

SOUTH AFRICA / JUDGMENT

Letsoalo v Kgetleng Local Municipality and Others (4204/2024)

[2024] ZANWHC 250 (8 October 2024)

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COURT

North West High Court, Mafikeng

BEFORE

Motsatsi

CASE / FILE NUMBER

4204/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO : 4204/2024

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In

the matter between:

GOPOLANG

CLEMENT LETSOALO

Applicant

and

KGETLENG

LOCAL MUNICIPALITY

First Respondent

COUNCILLOR

TC JACOBS (THE MAYOR)

Second Respondent

ANDREW

PHOLOSE

Third Respondent

CORAM:

MOTSATSI AJ

HEARD: 27 AUGUST 2024

DELIVERED: 08 OCTOBER 2024

ORDER
(1)
The application is
dismissed with costs.

JUDGMENT

MOTSATSI AJ

Introduction

1. This matter came before me as an urgent application on 20 August 2024. On the date of hearing, the Applicant filed a Notice of Removal from the Roll and Notice of Set Down for 27 August 2024.
2. The Applicant's Counsel, Mr Van Der Merwe, informed the court that following the service of the Notice of Motion, his instructing attorneys received a letter from the Respondents requesting that the timelines be extended. Counsel for the Respondents, Mr Ismail, confirmed that the parties agreed to postpone the matter and set it down for 27 August 2024.
3. At the commencement of the matter on 27 August 2024 and despite having postponed the matter, the Applicant had not filed his Heads of Argument. I admitted the Short Heads as well as further authorities handed from the bar by the Applicant and informed the parties that a full hearing would commence, and further that the judgment would be reserved to allow the court to consider the Heads submitted late as well and the authorities handed from the bar.
4. The Applicant challenges the legality of his suspension and seeks relief to set it aside and to have the decision to suspend him deemed unlawful and non-compliant with Regulation 6 of the Local Government Disciplinary Regulations for Senior Managers dated 21 April 2011 as published under GN R344 in GG 34213 ("the Regulations").
5. The exact relief for which the Applicant seeks relief appears on the Notice of Motion as follows:
 1. "The applicant's non-compliance with the Uniform Rules of Court is condoned and the matter is heard on an urgent basis in terms of Rule 6(12)(a).
 2. The Resolution (Resolution number N478/07/2024), passed by the First Respondents' Council on 26 July 2024, in terms of which it was resolved to suspend the Applicant, is declared to be invalid and unlawful and is set aside.

3. The Resolution (Resolution number N483/08/2024), passed by the First Respondent's Council on 7 August 2024, in terms of which it was resolved to suspend the Applicant, is declared to be invalid and unlawful and is set aside.
4. The Applicant's suspension is uplifted with immediate effect and the First and Second Respondents are ordered to allow the applicant to resume his duties as the First Respondent's Municipal Manager.
5. The First and Second Respondents are interdicted and restrained from continuing with disciplinary proceedings, and/or from suspending the Applicant in precaution of such contemplated disciplinary proceedings, until the First Respondent has complied with Regulation 6 of the Local Government Disciplinary Regulations for Senior Managers dated 21 April 2-11 as published under GN R344 IN GG 34213.
6. The appointment of the Third Respondent as the acting Municipal Manager is declared invalid, unlawful and null and void.
7. The First Respondent to pay the costs of this application.
8. Further and/or alternative relief."

Background

6. The Applicant is the current Municipal Manager of the Kgetlengrivier Local Municipality having been appointed into that position with effect from 15 February 2023, for a five year fixed term contract. On 27 July 2024, the Applicant was served with a "Notice of Intention to Suspend" by the First Respondent and afforded seven (7) days to make representations as to why he should not be suspended.
7. On 7 August 2024, the Applicant was served with a "Notice of Precautionary Suspension", which was to take immediate effect.
8. In his affidavit, the Applicant states that he submitted written reasons in response to the notice of 7 August 2024 and then draws the court's attention to events as evidence of his due submission of representations against suspension. In this regard Applicant referred the court to a "Notice of Intent to Suspend" served on him on 21 August 2023 and to written representations he made in that regard on 28 August 2023. He states that as a consequence of the process started in August 2023, he was then placed on precautionary suspension on 31 January 2024 by the First Respondent, however, that suspension was retracted on 15 February 2024.
9. He makes submissions that the Notice of Intention to Suspend issued in 2023 bore the same allegations of misconduct as the notice served on him on 2024, save that the 2024 notice included a further allegation of misconduct in that he had failed to comply with the Cellphone Allowance Policy and Supply Chain policies of the First Respondent. He avers that he submitted the required reasons and made representations as to why he should not be

suspended, however, on 7 August 2024, the First Respondent issued a notice for his immediate suspension.

10. In its letter of suspension, the First Respondent writes:-

“Kindly be informed that Council in its Special Council meeting held on 07 of August 2024 resolved as per ITEM 483/08/2024 to place you on precautionary suspension following a preliminary investigation into allegations of misconduct against you and after considering that you made no representations to the office of the mayor within the prescribed time to the Notice of intention to suspend issued against you dated 27 July 2024.”

11. The Applicant is challenging the lawfulness and validity of his suspension and submits in his papers that the First Respondent failed to comply with Regulation 6. He contends that the allegation levelled against him were previously raised and investigated and found not to be worthy of any immediate action.

Urgency

12. The Applicant submits, on urgency that an allegation of a failure by the Respondents to properly apply and give effect to Regulation 6, in itself rendered the application urgent. The Applicant furnished additional ground for urgency in that his appointment was for a fixed non-renewable and short period, and that he stood to suffer reputational damage which may not be capable of being remedied in the short period remaining of the appointment. He further argues that it would be in the interest of the functioning of the Municipality and the interest of the public at large that the application be resolved speedily.
13. The Respondents attacked urgency and counter-argued that the provisions of Rule 6(12) were not complied with in that the Applicant had a duty to set forth explicitly the circumstanced 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. The Respondent further argued that urgency predicated on the unlawfulness and legality of Regulation 6 alone should not render the matter urgent and that the period of appointment of the Applicant, and claims that the suspension would tarnish his reputation did not demonstrate the absence of substantial redress in the ordinary course of proceeding.
14. The Applicant relied, among other authorities cited in his Heads of Argument, a judgment of this division by Judge Petersen, on 9 May 2024, *Mere v Tswaing Local Municipality and Others* (2017/2024) [2024] ZANWHC 124 where he found that when there is merit regarding the proper application of Regulation 6 by the Council of the Municipality, then a valid ground is established for urgency. The Learned ADJP concluded in the determination of urgency and stated that: -

“Of all the grounds relied on to establish urgency, I am satisfied that urgency has been established on the very underlying basis of the application, which is predicated on the alleged failure by the respondents to properly apply and give effect to Regulation 6”.

15. I am therefore satisfied, based on the fact that the application emanates from an exercise of power by the First Respondent, and in alignment with the position of this Division of the High Court on an allegation based on the application of Regulation 6, that this matter deserves urgent consideration of this court.

The Merits

16. The essence of the dispute is the legality of the suspension issued by the First Respondent on the Applicant. The issue is particularly, the interpretation of Regulation 6 of the Disciplinary Relations for Senior Managers 2010 (“Disciplinary Regulations”) 6(1), and the extend that the Municipal Council must “have reason to believe” that the Applicant should be denied access to his work place.

17. Regulation 6(1) provides as follows:-

“6. Precautionary suspension

- (1) The municipal council may suspend the senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that –
- (a) The presence of the senior manager at the workplace may –
- (i) jeopardize any investigation into the alleged misconduct;
- (ii) endanger the well-being 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 potential witnesses; or
- (ii) commit further acts of misconduct.
18. The Applicant contends that in order to render his suspension lawful, it had to be implemented in terms of the stipulations set out in Regulation 6, in that (i) there must be an allegation and (ii) the municipality must have reason to believe that his presence in the workplace was unwarranted. He states that the fact that the Municipality and the Mayor had 12 months to complete the investigation against him was proof enough that the allegations were false. He argues further that the Municipal Council paid mere lip service to the wording of Regulations 6(1) and did not appreciate their obligation to properly consider whether reasonable grounds exist to remove him from his workplace pending the finalization of their investigations. He made reference to the minutes Council Meeting of 7 August 2024 and concludes that the minutes fails to set out any reason for the requirements that he be removed, drawing him to the conclusion that the Council could not have had “reason to believe” that this presence could fall into any of the category listed in Regulation 6(1)(a) or (b), and therefore that no belief existed at the time of the Special Council Meeting,

and neither was such a belief formed at the meeting. He argues that if the court were to accept that such required belief existed, such belief would be unsubstantiated, misplaced and mala fide.

19. The Respondents, in their answer contained in the Answering Affidavit of the Second Responded challenged the version of the Applicant and explained the events as follows: -

19.1. A Notice of Intention to Suspend was issued on 21 August 2023 and the Applicant delivered his representations on 28 August 2023.

19.2. The MEC of the Department of Cooperative Governance and Traditional Affairs intervened in the matter. At that point, the Applicant's

appointment was called into question by the MEC in terms of in terms of provisions of s 54A of the Local Government: Municipal Systems Act 32 of 2000.

19.3. The First Respondent then resumed its disciplinary processes, initially halted by the intervention and process of the MEC, and issued a precautionary suspension on 2 February 2024 and then on the realization that its processes were erroneously conducted for want of compliance, the First Respondent then retracted the suspension on 15 February 2024.

19.4. The Respondent avers that sequentially, Special Council meetings were held on 21 February 2024, 30 March 2024, 19 April 2024 and 26 July 2024. As a result of the inaction by the MEC or Minister, and by the consequent operation of Section 54A of the Systems Act, the Council would revert to internal disciplinary proceedings which had been halted and resolved on 27 July 2024 among others, that the Second Respondent issue a Notice of Intension to suspend the Applicant within two days of that meeting.

19.5. On 27 July 2024, the second Respondent, in accordance with the Council resolution, issued a Notice of Intention to Suspend the Applicant. The Notice contained the following charges: -

- a) "Non-Compliance with section 57 of Local Government: Municipal Systems Amendment Act, Act 03 of 2022.
 - b) Contravention of Local Government: Upper limits of Total Remuneration Packages payable to Municipal Manager and Managers directly accountable to the Municipal Manager, Government Gazzeted,2760.
 - c) Failure to disclose disciplinary record at previous employment placing the Municipality into disrepute.
 - d) Non-compliance with Kgetlengrivier Cellphone allowance policy and Non-compliance with supply chain policies."
20. The Respondent contends that the Applicant failed to deliver his written representations on 3 August 2024 and on 6 August 2024 submitted his earlier response to the Notice of Intention to Suspend dated 21 August 2023. The Respondents argue that the Council was not obligated to entertain the out-of-time representation however, the representations were included as

part of the item for discussion before the Special Council meeting of 7 August 2024. The representations, it is alluded by the Respondents, were inadequate and failed to respond to the charges levelled against Applicant.

21. A further Council meeting was held on 7 August 2024 where the following resolutions were taken:

COUNCIL RESOLUTIONS

1. That Council TAKE NOTE of the report of the response of the Municipal Manager in relation to the contravention of Local Government: Municipal System Amendment Act, Act 03 of 2022 read with the Local Government: Regulations on appointment and conditions of employment for Senior Managers, as well a other Local Government Laws and Regulations.
2. That Council TAKE NOTE of the seriousness of the alleged contravention of legislation.
3. That Council TAKE NOTE of the Notice of intention to Suspend issued by Honorable Mayor Cllr Jacobs TC to the Municipal Manager (Mr. C.C Letsoalo) dated the 27th of July 2024 and sent via email at 18:41 PM; that the Municipal Manager had 7 days from receipt of the letter, to submit submissions

to the Office of the Mayor as to why he should not be placed on precautionary suspension.

4. That Council TAKE NOTE that the Municipal Manager had up until the 3rd of August 2024 to respond to the Notice of Intention to suspend as per the letter and council resolution N478/07/2024 and that as of the 6th of August 2024,08:30 am; the Office of the Mayor has not yet received any submissions or representations made by the Municipal Manager and that such time period to make submissions has expired and lapsed although the Municipal Manager responded after the prescribed period of 7 days. Council TAKES NOTE of the submissions made by the Municipal Manager Mr. G .C Letsoalo with its supporting documents (1). Response to the Honorable Mayor dated 26 August 2023, (2). Minutes of the special council meeting held on the 21st of February 2024 and, (3).Retraction of suspension of Mr Gopolang Clement Letsoalo from the office of the Mayor dated 15th February 2024) in response to the Notice of Intention to Suspend dated the 6th of August 2024. Council also takes note that of the date of submissions were made by the Municipal Manager which / exceeded the

time frames of 7 days upon receipt of the Notice of Intention to Suspend as per Resolution N478/07/2024.

5. That based on the representations made by the Municipal Manager, Mr G.C. Letsoalo and after considering the above representations, Council hereby places the Municipal Manager Mr. G.C Letsoalo on precautionary suspension and Council mandates the Honorable Mayor within 2 days of this sitting, to place the Municipal Manager on precautionary suspension pending the finalization of the investigation and disciplinary process if applicable.

6. That Council takes TAKES NOTE, APPROVES and MANDATES the Honorable Mayor (Cllr Jacobs), to appoint an independent investigator (attorney) to investigate the alleged acts by the Municipal Manager and anyone found to have contravened Section 120 of the Municipal Systems Act 03 of 2022, Municipal Structures Act and the MFMA and MANDATES the Mayor to sign the appointment letter.
7. That Council TAKE NOTE and MANDATES the investigating officer within 30 days of such appointment, to furnish Council with an investigative report with recommendations into the alleged contravention of the Local Government: Municipal Systems Amendment Act, Act 03 of 2022 read with the Local Government by the Municipal Manager : Mr. G.C . Letsoalo (sic).
8. That the investigation be broadened to all alleged facts.
9. That signatory powers and functions vested in the Municipal Manager (Mr. G.C. Letsoalo) in all municipal bank accounts, be suspended immediately, pending the investigation process.
10. That Mr. Andrew Pholose (Director: Community Services & Public Safety) be appointed as the Acting Municipal Manager for Kgetlengrivier Local Municipality, pending investigations.
11. That Mr. Andrew Pholose in his acting capacity as Acting Municipal Manager, be vested with signatory powers and functions in municipal bank accounts.
12. That Council be informed on the progress of the investigation at the next Council meeting.
22. It is to be noted at this juncture that the Item that was placed before the Council recommend resolutions for the Council and particularly

recommendations 1 and 4 which were as follows:-

1. That Council TAKES NOTE of the report.
4. That Council CONDONES the time frame in terms of the Disciplinary Regulations for Local Government for Senior Managers.
23. In his Heads of Argument, the Applicant's Counsel argues that the law in *Hadebe v Msundizi Municipality* (D1558/18)[2018] ZALCD 13 (17 August 2018), argued by the Counsel for the Respondents as a guide to assess formulation of a "believe"

by a municipal council, is not correct law as it states that municipal council only requires a belief "in general terms" that the presence of a senior manager at the workplace may jeopardize the investigation. He makes submission for the court to rather rely on *Mothogoane and Another v Lepelle-Nkumpi Local Municipality and Another* (J 4115/16) [2018 ZALCJHB 411; (2019) (December 2018), in which the court decided that it is not sufficient for the municipal council to base their belief on general or hypothetical possibilities, but rather on "objective justifiable considerations". I am inclined to agree with the Applicant.

24. In consideration of the minutes of the Council meeting of 7 August 2024, I have noted that the draft resolutions or recommendations contained in the Item for discussion differ substantially from the final resolutions, a clear indication that the Item which served before Council in the Special Council meeting of 7 August 2024 was discussed, debated and therefore duly considered by the Council members of the First Respondent. Further, I have noted dissension of three participant political parties in the Council meeting, and of the view that reasonable belief on the part of the Council had been formulated that, prima facie, the Applicant had committed acts of serious misconduct and objectively, the Council had justifiable reasons to deny the employee access to the workplace.

Costs

25. At this point, no case has been made out for this court to deviate from the trite principle that the costs should follow the result.

Order

26. In the result, the following order is made:

- (i) The application is dismissed with costs.

N. V. MOTSATSI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION MAHIKENG

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