

SOUTH AFRICA / JUDGMENT

Makukau v Ramotshere Moiloa Local Municipality and Another (J633/16) [2016] ZALCJHB 486 (21 June 2016) [2016] ZALCJHB 486

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J633/16

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case

no J 633/16

In the matter between

GEORGE MAKUKAU

Applicant

And

RAMOTSHERE MOILOA LOCAL

MUNICIPALITY

THOMPSON

PHAKALANE

First

Respondent

Second

Respondent

Heard: 15 June 2016

Delivered: 21 June 2016

RULING

VAN NIEKERK J

- [1] The applicant is employed by the first respondent as its Director: Technical services. The present application has its roots in an urgent application filed in April 2016. That application was struck from the roll for lack of urgency on 22 April 2016, and came before me in the normal course.
- [2] The day before the hearing, on 14 June 2016, the first and second respondents filed a supplementary affidavit. On the morning of the hearing, the applicant filed what is described as his response to the supplementary affidavit. The latter raises a number of preliminary points to which I shall refer in due course.
- [3] The essence of the application concerns the applicant's suspension, and a notice dated 22 March 2016 directing the applicant to attend a disciplinary hearing to be convened on 7 April 2016. Two charges are recorded in the annexed charge sheet, each as vague as the other.
- [4] The disciplinary enquiry has not yet commenced, presumably on account of yet another urgent application, filed by the applicant on 16 May 2016, this time to interdict the respondents from continuing with the hearing. The parties agreed then that the hearing would not proceed pending the outcome of these proceedings.
- [5] The founding affidavit describes the purpose of these proceedings as twofold. First, the applicant seeks a declaratory order in terms of which certain actions or steps taken by the first respondent are declared unlawful and invalid for want of compliance with certain legislative or statutory prescripts. Secondly, the applicant seeks an interdict restraining the respondents from continuing to suspend the applicant and from continuing with the disciplinary hearing.
- [6] In summary, the declaratory order extends to an order that the first respondent's council meeting on 11 December 2015 was not properly and lawfully convened, or constituted and conducted in terms of the relevant provisions of the Municipal Structures Act and the first respondent's rules of order. The applicant also contends that the incumbent municipal manager, Mr Crossby Maema, was not lawfully removed or suspended as the municipal manager prior to the appointment of the second respondent as the acting municipal manager as provided for in regulations 5 and 6 of the Local Government: Disciplinary Regulations for Senior Managers and s 54A (1), (2), (2A) and (6) (a) and (b) of the Municipal Systems Act. Even if it were to be found that the second respondent was validly appointed as acting municipal manager, the applicant contends that his purported appointment on 11 December 2015 expired on 11 March 2016 and could not be extended by the first respondent's municipal council, and that in any event the first respondent means for counsel did not apply to the MEC for local government as required. (Section 54A (2A) of the Municipal

Systems Act (the Systems Act) provides that a person appointed in this capacity may not be appointed to act for a period that exceeds three months.)

- [7] The hearing of this application was confined to the issues of jurisdiction which I put to the parties, and the preliminary points

raised by the applicant in the papers, especially the applicant's response to the respondents' supplementary affidavit.

Jurisdiction is to be determined on the basis of the pleadings and not the substantive merits of the case – the pleadings disclose the basis on which the applicant has chosen to invoke the court's competence See *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) at para 75).

- [8] I will accept for present purposes (there does not appear to be a dispute in this regard) that the regulations form an integral part of the applicant's contract of employment, and that the applicant seeks to enforce his contract under s 77 (3) of the Basic Conditions of Employment Act on that basis. However, to the extent that the applicant seeks declaratory orders relating to the validity of the appointment of the second respondent (see prayer 2.1 to the extent that it refers to the Local Government Systems Act, 32 of 2000, prayer 2.3 and prayer 2.6, to the extent that it refers to the Systems Act), these seem to me to be matters that fall outside of the statutory jurisdiction of this court. In *Besani v Maquassie Hills Local Municipality* J 1751/2015, 12 February 2016) Prinsloo J confirmed that this court does not have jurisdiction to declare the resolutions of municipal councils invalid even where, as in that case, the subject matter of the resolution was to terminate the contract of a municipal employee. This court is not conferred with a general jurisdiction in respect of all and any employment matter, and it is incumbent on an applicant to identify the statutory provision in terms of which jurisdiction is claimed.

- [9] It is not at all clear to me on what basis the applicant contends that this court has jurisdiction to issue a declaratory order in relation to the lawfulness of the council meeting convened on 11 December 2015, the removal and/or suspension of the then incumbent

municipal manager, the appointment of the second respondent as acting municipal manager, the continued office of the second respondent

given the expiry of the three-month period established by the Systems Act. I will however afford the papers a generous reading and accept that the provisions of the disciplinary regulations for senior managers are part and parcel of the applicant's contract of employment and to the extent that the applicant seeks compliance with his contract of employment, that this court has jurisdiction under the BCEA. Whether the applicant is made out a case for relief, is of course, a different question.

- [10] To the extent that the applicant relies on the Labour Appeal Court's decision in *Mbashe Municipality v Sabelo Dumezweni & 7 others* (PA 4/2014, 19 May 2015) to contend that this court has jurisdiction to determine the legality of an employee's appointment in terms of the Systems Act, it should be recalled that that case concerned the validity of the contract of

employment, which required reference to the Systems Act. All that the LAC said was that when the legislature confer jurisdiction on this court to enforce a contract of employment, it must have made a valid contract of employment and that this court was therefore entitled to decide whether the contract in issue was valid by reference to whatever statute was applicable, even if it was a statute over which this court had no direct jurisdiction. The present application raises a rather different issue. The applicant ventures far upstream from the terms of his contract to a direct and substantive attack on the removal from office of other employees, the validity of the appointment of other employees (in particular, the second respondent), the validity of resolutions adopted by the first respondent's council and whether or not meetings of the first respondent's council were lawfully convened. These are issues that are removed from the applicant's contract of employment and any dispute about a failure to comply with the terms of that contract.

- [11] It is convenient at this point to dispose of the dispute regarding the applicant's suspension. Notwithstanding the averments made in the papers before me and the nature of the submissions advanced on behalf of the applicant (based as they are on a species of legality review), at the hearing of the application, I raised with the parties the three-month time limit placed on suspensions by regulation 6 (6). The regulation provides, in subparagraph (6) (a) that if a senior manager is suspended a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse. Subparagraph
- (b) provides that the period of three months may not be extended by a municipal council. Adv. Matyolo, who represented the respondents, fairly and correctly conceded that the period for which the applicant could be validly suspended had lapsed. For that reason, I granted a declaratory order on 15 June 2006 to the effect that the applicant's suspension had lapsed in terms of regulation 6, and that he was accordingly entitled to return to work with immediate effect.
- [12] In regard to the balance of the application, it seems to me that the only substantive points for determination relate to the pending disciplinary hearing and in particular, the first respondent's compliance, if any, with the provisions of regulations 5 to 10. In brief, regulation 5 requires an allegation of misconduct against a senior manager to be brought to the attention of a municipal council, for the matter to be tabled before council, for there to be an independent investigation of the allegations if council is satisfied that there is reasonable cause to believe that an act of misconduct has been committed, alternatively, for counsel to dismiss the allegations. The regulation further prescribes the procedure to be followed after the submission of the investigators report for the appointment of a presiding officer at a disciplinary hearing. The balance of chapter 2 of the regulations, and especially regulations 8, 9 and 10, concern the charge sheet, notice of the disciplinary hearing and the conduct of the hearing itself. It seems to me that the matter is ripe for hearing on the single substantive point of whether in convening the hearing there has been compliance with the regulations, and I intend to enrol the matter for hearing, on that basis, and to direct the

registrar to allocate the soonest possible date.

[13] My view on the jurisdiction of this court in relation to the declaratory relief sought disposes with the points in limine raised by the application in relation to the supplementary affidavit filed by the applicant, at least in as far as the affidavit relates to the respondents' contention that there has been proper compliance with the relevant legislative and regulatory requirements concerning the applicant's suspension and the convening of the disciplinary hearing, as well as the locus standi of the second respondent in these proceedings. It also seems to me that to the extent that the additional set of affidavits provides some factual information on the application or otherwise of the regulations leading up to the convening of the disciplinary hearing, they ought to be admitted.

[14] Finally, I should add that a ruling in the above terms does not assume that the applicant has made out a proper case for intervention

by this court at this point, and that he ought not more properly to pursue other remedies available to him in other forums. This is not a point on which I express any view, and it will be for the court to decide, if necessary, at a later date. It is also appropriate for the court to determine the issue of costs, both in respect of the present application and the costs reserved on 26 May 2016 under case number J929/2016.

[15] For the above reasons, on 15 June 2016, I ordered that the applicant's suspension is declared to have lapsed in terms of regulation 6 of the disciplinary regulations for senior managers, and that the applicant is accordingly entitled to return to work with immediate effect. My ruling on the preliminary issues is recorded below.

I make the following order:

1. The application is postponed to 8 July 2016 for the determination only of the following issues:
 - a. The first respondent's failure, if any, to comply with the Local Government: Disciplinary regulations for senior managers, in respect of the initiation of disciplinary proceedings against the applicant, and whether in consequence of any such failure the court ought to exercise its discretion to intervene in the disciplinary proceedings at this stage.
2. The costs of proceedings on 15 June 2016 are reserved for determination on 8 July 2016, as are the costs previously reserved on 26 May 2016 under case number J 929/2016.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. M Marcus, instructed by Lebea and Associates

For the respondents: Adv. X Matyolo, instructed by RS Tau Attorneys

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Prepared on 14 October 2026 · Esheria