

SOUTH AFRICA / JUDGMENT

Malema and Another v Dr Ruth Segomotsi Mompoti District Municipality and Others (UM68/2021) [2021] ZANWHC 59 (20 May 2021)

[2021] ZANWHC 59

COURT

North West High Court, Mafikeng

BEFORE

Makoti

CASE / FILE NUMBER

UM68/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION - MAHIKENG

Reportable:

YES / NO

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to Judges: YES / NO

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to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

CASE NO: UM68/2021

In the matter between:

LEBUKU

CHARLES MALEMA

First Applicant

SEHOLE

SEKHOANE

Second Applicant

and

DR

RUTH SEGOMOTSI MOMPATI DISTRICT

First Respondent

MUNICIPALITY

DR

RUTH SEGOMOTSI MOMPATI

Second Respondent

DISTRICT

MUNICIPAL COUNCIL

CLLR
LERATO V SETLHAKE (SPEAKER)
Third Respondent
CLLR
KGALALELO SEREKO (MAYOR)
Fourth Respondent
TEKO
GAANAKGOMO
Fifth Respondent
(ACTING MUNICIPAL
MANAGER)
CLLR
BOITUMELO
MAHLANGU
Sixth Respondent
THE
MEC FOR COOPERATIVE
Seventh Respondent
GOVERNANCE HUMAN
SETTLEMENTS
AND TRADITIONAL
AFFAIRS
NORTH WEST PROVINCE

JUDGMENT

MAKOTI AJ

INTRODUCTION

- [1] The two Applicants in this matter were suspended from employment purportedly as a precautionary measure on 24 March 2021, amid allegations of misconduct. Although I will deal elaborately with the essence of the misconduct allegations at a later stage, it suffices at this stage to mention that the suspensions were carried out rather hastily and not in compliance with legislative and policy prescripts. Raising a number of grounds, the Applicants want the suspensions to be set aside and that they be re-instated to their employment positions.
- [2] This matter was instituted as an urgent application, as indicated, to have certain resolutions which led to the Applicants' suspensions set aside for want of compliance with the rule of law and the principles of legality. In addition, an order is sought against the Member of the Executive Council responsible for local government in the North West Province to take appropriate steps to enforce compliance by the Municipality with the provisions of s 54A of the Local Government: Municipal Systems Act.[1] This too shall be revisited below.

- [3] Quite predictably, at the forefront of the first to the fifth Respondents' opposition of the application is a point in limine contesting urgency. The question of lawfulness of the suspensions is quite essentially the main issue for determination. If the ultimate determination of the question is in the negative, that is, that the suspensions do not pass the test of lawfulness, the next question would be to determine a remedy that would be just and equitable[2] in the circumstances of the matter. I deal with the question of urgency first and, if I find that the matter is indeed urgent, then I will consider the merits of the application.

URGENCY

- [4] The legal principles governing urgent applications in terms of 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 of the Division is equally trite. The sub-rule 6(12) enables the Court to dispense with the normal rules relating to the forms and service as provided for in the Rules and dispose of the matter at such time, place and in such manner or in accordance with

such procedure as it may deem fit.

- [4] This 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]

- [5] 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 that it will not be possible to attain substantial redress should the application be heard on a future date.[5] The question whether the Applicants will not be able obtain substantial redress in a process in due course will be determined in

consideration of the full facts of the case. The duty falls on an applicant to make out a case for urgency.

- [6] The Applicants in this matter rely on the primary contestation that their respective suspensions were carried out in a deliberate and complete disregard of the laws and internal policies applicable to the Municipality. Also, that in two related matters that came before Snyman AJ and Nonyane AJ the Court found the Municipality to have contravened the principles of legality or lawfulness when removing Mayor Mahlangu and when suspending the Municipal Manager[6] from their respective offices. Both matters are, however, subject to applications for leave to appeal.
- [7] Despite the two litigation matters, which are quite costly and which were decided against the Municipality, it remains undeterred and bent on taking more contentious decisions in disregard of procedures set out in the law and its internal policies. On this occasion, it felt the urge to place the two Applicants on precautionary suspensions

without following legislative and policy procedures. Although they have admittedly acted with unusual rapidity when placing the two on precautionary suspensions, retorting that the urgency was justified, they then wish for the Court to treat this matter as one that is only ordinary. That cannot be accepted.

[8] The Applicants also contended that this application is intended to vindicate the rule of law and that the Court should show no tolerance to the blatant abuse of power by the first to fifth Respondents. About this, the Applicants have contended that the Speaker, in particular, is the culprit in the abuse of powers and that her quest to remove them from their respective positions is laced with ulterior motives. There can be no contestation, in my view, that the rule of

law should never be pushed to the periphery. This is in keeping with what Tuchten J said in the now famous Mogalakwena.[7]

[9] The Respondents, while contending that the suspensions were necessitated by the need to preserve the integrity of the investigations,[8] turned around and indicated that the investigations were actually completed and that the Municipality was pressing charges of misconduct against the Applicants. If the investigations are complete, why then did the Respondents find it necessary to place these two on precautionary suspensions, and to do so with such rapidity as to forsake the clear procedural requirements in terms of law. The Court cannot turn a blind eye to this, lest the rule of law be condemned to the doldrums. It will be remiss for the Court to not vindicate the rule of law.

[10] I find the Respondents' contentions to be missing important elements regarding precautionary suspensions, being to preserve the integrity of the investigations. Once the investigations are complete, what more can there be to justify the suspension of officials who were continuously present at work without undermining the investigations. This is what the Labour Appeal Court took into consideration when deciding in MEC for Education, North West Provincial Government v Gradwell:[9]

"... 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..." (Emphasis added)

[11] One remains mindful, of course, that the Applicants' main grounds for urgency are mainly predicated on the questions of lawfulness or legality of the actions taken by the Municipality through the municipal manager. The Applicants gave scant information with regard the important question of irreparable harm. Despite the apparent insufficiency as to facts relating to this important consideration, I am persuaded by the important questions of lawfulness and legality, which will be considered below, to exercise my discretion favourably and to determine this matter on urgent basis.

[12] This Court takes comfort from the judgement of the Constitutional Court in Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others^[10] which enjoins it to also consider the plight that other people may be suffering from the lack of basic services which the Municipality

should, as a matter of must, render to them. In this regard the Court held that:

“[12] However this Court may not ignore the plight of those people who are not parties to the court proceedings and whose interests lie at the heart of the matter, namely the people and communities who reside within the area of jurisdiction of the Municipality. We have a wide just and equitable remedial jurisdiction that is not necessarily dependent on a finding of constitutional impropriety.”

[13] Furthermore, I find sufficient basis that the nature of the questions raised in this matter warrant that this matter be dealt with on urgent basis. This is in line with the judgment in the case of Apleni v President of the Republic of South Africa^[11] where the Court held *inter alia* as follows:

“... Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the Rule of Law, and may have a detrimental impact upon the public purse, the relevant relief sought ought to normally be urgently considered.” [Emphasis added]

[14] There is no doubt in my mind that despite the Respondents’ fervent protestations, this application has to be adjudicated on urgent basis. This is also in keeping with a recent unreported judgment penned by Gura J of this Division in Groep and Others v Naledi Local Municipality and Others^[12] where he granted urgency based on the considerations of protecting the rule of law and legality.

LAWFULNESS / LEGALITY OF THE SUSPENSIONS

[15] The question of lawfulness of the Respondents’ decisions is unavoidably connected to one of the preliminary points taken by the Applicants against the opposition of this matter. The *in limine* point related to the authority of the deponent to the answering affidavit. The Applicants contended both on papers and orally that

one Mr Teko Gaanakgomo did not have authority to depose to the answering affidavit because his appointment as acting Municipal Manager was not in compliance

with the provisions of s 54A of the Municipal Systems Act.^[13] The relevant portions of the legislative instrument reads:

“(3) A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-

- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
- (b) the appointment was otherwise made in contravention of this Act.”

[16] When making submissions in Court, counsel for the Respondents conceded that the said Gaanakgomo does not meet the basic requirements for appointment as acting municipal manager. He, however, sought to persuade me to find that the decision to appoint Gaanakgomo as acting municipal manager should be accepted in terms of the authority in Oudekraal[14] to be of legal force and effect in that it has not been set aside by a Court having jurisdiction. I do not understand this authority to be suggesting that compliance with legal prescripts that have been clearly spelt out in legislation should be ignored. Also, it is important to always keep in mind that this provision was enacted to prevent wrongful appointments of persons as municipal managers.[15] To embrace the appointment which is in breach of the legislative prescripts would be tantamount to promoting an illegality. I cannot

do that as the main function of the Court is to uphold the law, and to do so without favour, fear or prejudice.

[17] The Respondents' attempt to rely on this authority and that of the Member of the Executive Council for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute[16] is in my view a great misapprehension of the law. The rule of legislative injunction would fail if it was so that the Court should

turn a blind eye on this conceded illegality. In any case the law is clear in that any appointment that does not accord with the

legislative requirements is null and void. This simply means that such appointment carries no legal force and effect. Admittedly, the MEC has told the Respondents that they should remove Gaanakgomo as acting municipal manager because his appointment was indeed null and void, meaning unenforceable.

[18] The second element of legality relates to the impugned decisions themselves, that is, whether they were executed in accordance with the law. If there is no compliance with the law, again, ours may become a lawless society where the rule of law and legality have no real meaning. Courts have to guard our constitutional and legislative dictates jealously. The Constitutional Court held in Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council[17] that:

"These provisions imply that a local government may only act within the powers lawfully conferred upon it . . . it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law." (Emphasis added)

[19] This Country's higher Courts have been at the forefront of cautioning and admonition functionaries in the public service to act only within the ambit of powers that have been reposed unto them and to uphold the rule of law. The concept of the rule of law was again discussed by the Constitutional Court in *Pharmaceutical Manufacturers of SA; In re: Ex Parte application of Pres of RSA*[18] as follows:

"The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power including judicial review of all legislation and conduct inconsistent with the Constitution."

[20] There can be no debate in my view that the Respondents were equally enjoined to follow legislative and policy dictates when taking and implementing the impugned decisions. The Courts have made it clear in many judgments through the past number of years that nobody is permitted to exercise power and authority over others, which was not conferred upon him or her in terms of the law.[19] Thus, all conduct must be viewed and assessed through the prism that is the rule of law.[20]

[21] The Applicants have, soundly in my view, referred to several incidents of breaches of the laws and policies by the Respondents. These relate to the exercise of powers and the manner in respect of which they allege that the decision to suspend them failed to comply with the legislated procedural requirements. Principal among their contentions is that Gaanakgomo has acted ultra vires in suspending them. That he could not have lawfully executed the functions of the office of municipal manager as his appointment into that position is in terms of the empowering statute, null and void.

[22] The Respondents, on the other hand, urged the Court to look beyond this and find that the decisions taken were justified. I cannot agree with the Respondents' contentions on this point as the Court specifically is enjoined in terms of the peremptory provisions of s 172(1) [21] of the Constitution to declare any law or conduct that is at odds with the supreme law, and other legislation, invalid.

[23] Recently the Supreme Court of Appeal in *Ngomane and Others v Johannesburg (City) and Another*[22] held conduct that breached the constitutional dictates to be unlawful and stated inter alia that:

"In the circumstances, the respondent's conduct must be declared inconsistent with the Constitution and therefore unlawful, as required by s 172(1)(a) thereof. This finding entitled the applicants to appropriate relief for the violation of their fundamental rights as envisaged in s 38 of the Constitution."

[24] In this case also, in the event of the finding being that the Respondents have acted in disregard of the law, the Court will have to make the declaration of invalidity. It was a rather startling argument on behalf of the Respondents that the Court was not entitled to make any pronouncement in respect of s 172(1)(a) of the Constitution carries no merits. One needs not go further than the Respondent's affidavit to determine whether the allegations of non-compliance with prescripts are indeed correct. Paragraph 3.2.2 of the Respondent's

answering affidavit reads thus:

“3.2.2 The deviation was necessitated by the applicant’s financial misconduct, insubordination and insolence which was ongoing.

3.2.3 Had the immediate suspension not been effected and the Regulations followed to the letter, the applicants would have embarked on a cover up exercise and destroyed crucial evidence.”

[25] Although none of the parties could state the exact date, it is uncontested that the investigations were started on or about 25 January 2021.[23] On the Respondents’ own version, the investigations have been concluded and the employer is pressing charges of misconduct against the Applicants. Despite the fact that the investigations had long started, the Respondents presented no evidence of an attempt by the Applicants to cover up and to destroy evidence. I find that this statement is borne out of sheer desperation to take the Applicants out of the Municipality and has no factual basis.

[26] It is also curious that the investigation was concluded a mere two weeks after the Applicants were placed on suspension. This creates an impression that the investigations team had already been in possession of the documents that were needed to compile the report. If that was not the case, and if indeed the Applicants were trying to stifle the investigations, there would in my view have been a complaint to the employer to that effect. Thus, the attempt to justify non-compliance with legislative prescripts deserves no further consideration. The ratio for so doing is patently contrived and has to be rejected.

RATIONALITY OF THE SUSPENSIONS

[27] Both applicants allege that the decisions by the Municipal Manager to suspend them are irrational and stand to be reviewed and set aside even on this ground alone. The question for rationality is whether the means, including the process of making a decision, are linked to the purpose or the required ends.[24] 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”. [25]

[29] It is common cause that the suspensions were not preceded by letters of contemplation calling upon the Applicants to provide reasons why they should not be placed on precautionary suspension. The fact that the investigations were far underway when the employer decided to suspend the Applicants, with no evidence of interference, suggests that the suspensions were not rationally connected to the purpose for which they were invoked.

[30] The allegations against the Applicants were not new, dating to December 2020 up to February 2021. Although the employer wanted to portray a picture that the Applicants had to be suspended with immediate effect because of risks, it sang a different tune when it alleged that: “They refused to process payments of service providers and by so doing they were gradually bringing service delivery by the municipality to its knees. I have already stated the fact that the applicants occupy very important and crucial positions within the municipality.”[26]

- [31] It defeats logic that the Applicants could have still been entrusted with the important financial responsibilities, that is, to pay service providers, while at the same time their presence at the Municipality was considered to have been too risky to keep in the municipality's employ. The contradiction is quite palpable. The impression created is that the immediate suspensions were intended to remove them from the positions because they were refusing to obey the orders to make payments to service providers. That they were given instructions to effect payments to some service providers militates against the suggestion that they posed serious harm to the Municipality and that they were on the verge of destroying evidence.
- [32] I can find no justification for the decision to place the Applicants on immediate suspension, or for deviation from the statutory provisions of regulations 6(2) and (3) of the Disciplinary Regulations. This case leaves more questions than answers, especially when regard is had to the fact that the Applicants are also accused of daring to challenge the authority of the Municipal Manager whose appointment is seriously problematic. The suspensions do not stand the important rationality test and have to be censured.

CASE AGAINST THE SEVENTH RESPONDENT

- [33] The Applicants also asked the Court to compel the MEC responsible for Local Government affairs to take appropriate steps to enforce compliance by the Municipality with its obligations in terms of s 54A of the Structures Act. The order against the MEC was sought because since he had informed the Municipality that the appointment of the Fifth Respondent as the acting Municipal Manager was unlawful, he had not taken any steps to set aside the offending conduct.
- [34] Reference to appropriate steps, one assumes that the Applicants envisage that the MEC should bring review application to set aside the acting appointment of the Fifth Respondent. I am not persuaded that this matter calls for such order to be made, given that the appointment is temporary. By the time an application contemplated in s 54(8) is adjudicated the acting appointment would have lapsed after a period of 90 days. It is only on that basis that I decline to entertain the issue. The invalidity of the appointment of the Fifth Respondent, with the concession having been made that he is not suitably qualified to hold the position having been made, is confirmed *ex lege*.
- [35] Also, I am of the view that it would be wrong to tell the MEC to invoke the provisions of s 54A(8), as that may impinge on separation of powers.

COSTS

- [37] The Applicants have asked for costs to be granted against the Respondents who decide to oppose the application. It is trite that the awarding of costs is a matter for the court's discretion.[27] Also common in litigation is that costs follow the cause. I can find no reason why the Applicants who have succeeded in this application should not be awarded costs. I am also mindful that the now famous Biowatch[28] case propagates for the awarding of costs

to a litigant who attains success against the State in a matter of this nature. Under the circumstances, the First to Fifth Respondents should bear the costs of this application.

ORDER

[37] I make the following order:

- (1) The Applicants' non-compliance with the rules relating to service and filing of this application is hereby condoned and this matter is heard as on urgent basis in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.
- (2) Resolution No. 102/2020/21 passed by the Second Respondent at a meeting that took place on 23 March 2021 is declared to be unlawful and invalid, and is accordingly set aside.
- (3) The Applicants' suspensions with immediate effect are declared to be inconsistent with regulation 6 of the Disciplinary Regulation, are unlawful and invalid, and are accordingly set aside; and that the Applicants may resume their service with the First Respondent with immediate effect.
- (4) The orders sought against the Seventh Respondent is hereby dismissed.
- (5) The First to the Fifth Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other Respondents are to be absolved.

M.Z MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION: MAHIKENG

APPEARANCES

DATE OF HEARING

: 21 APRIL 2021

DATE OF JUDGMENT

: 20 MAY 2021

COUNSEL FOR APPLICANT :

Advocate G Mashego

COUNSEL FOR RESPONDENTS :

Advocate CZ Muza

[1] Act No. 32 of 2000.

[2] S 172(1) and (2) of the Constitution.

[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] I find that the applicant has shown that it will suffer prejudice which cannot be redressed at a hearing in due course.”
- [6] Mr J Mononela.
- [7] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others [2014] 4 All SA (GP) (19 June 2014).
- [8] Investigations started in January 2021.
- [9] 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’).
- [10] Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others (CCT 186/14) [2014] ZACC 31; 2015 (1) BCLR 72 (CC) (18 November 2014).
- [11] [2018] 1 All SA 728 (GP) at [10].
- [12] (Case No: UM253/2020) at par [46].
- [13] Act No. 32 of 2000.
- [14] Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others (25/08) [2009] ZASCA 85; 2010 (1) SA 333 (SCA) (3 September 2009).
- [15] Mawonga and Another v Walter Sisulu Local Municipality and Others 2021 (1) SA 377 (SCA).
- [16] 2014
- (3) SA 481 CC.
- [17] 1998
- (12) BCLR 1458 (CC) at para [56].
- [18] [2000] ZACC 1; 2000
- (3) BCLR 241 (CC) at para [40].
- [19] Affordable Medicines Trust and Others v Minister of Health and Another (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005).
- [20] 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).

- [21] S 712(1)(a) reads: “When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;” (Emphasis added)
- [21] S 712(1)(a) reads: “When deciding a constitutional matter within its power, a court—
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;” (Emphasis added)
- [22] Ngomane and Others v Johannesburg (City) and Another 2020 (1) SA 52 (SCA).
- [23] Annexure MM3 p 375 par 2.1.
- [24] National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others 2019 ZACC 28, at paras [63] and [64].
- [25] 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.
- [26] Answering Affidavit p 341 para 117.
- [27] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another 201 5 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.
- [28] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009).

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Prepared on 10 October 2026 · Esheria