

SOUTH AFRICA / JUDGMENT

Mamusa Local Municipality v Phetla and Others (UM117/2022) [2023] ZANWHC 57 (22 May 2023)

[2023] ZANWHC 57

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

UM117/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NO: UM117/2022

Reportable:	NO Circulate to Judges: NO Circulate to Magistrates: NO Circulate
to Regional Magistrates:	NO
In the matter between:	MAMUSA LOCAL MUNICIPALITY Applicant and MERCY MAEBA PHETLA First Respondent MM MASHELE N.O. Second Respondent NTHUSE LEBEPE N.O. Third Respondent KGABO MAPONYA

N.O.

Fourth Respondent

Delivered: This judgment

was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to 10h00PM on 22 May 2023.

JUDGMENT

ON LEAVE TO APPEAL

PETERSEN J

Introduction

- [1] On 01 July 2022, this Court granted an order in favour of the first respondent (applicant in the urgent application) against the applicant (first respondent in the urgent application) in the following terms:
1. The Applicant's non-compliance with the Rules of this Honourable Court relating to service, filing and time limits is condoned and the matter is dealt with as one of urgency in terms of Rule 6(12);
 2. The disciplinary proceedings instituted against the Applicant on 20 – 24 June 2022 in terms of the Local Government: Disciplinary Regulations for Senior Managers 2010 (the 2010 Regulations) is declared unlawful and null and void;
 3. The First Respondent is Interdicted and restrained from continuing with the disciplinary proceedings instituted against the Applicant on 20 – 24 June 2022 until the First Respondent complies with Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2014 ("the 2014 regulations");
 4. The appointment of the Second Respondent as the presiding officer of the disciplinary hearing is declared to be invalid, unlawful and null and void;
 5. The appointment of the Third Respondent as the evidence leader (initiator) of the disciplinary hearing is declared to be invalid, unlawful and null and void;
 6. The appointment of the Fourth Respondent as an investigation report of the allegation of the financial misconduct against the Applicant is declared to be in breach of the 2014 Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings;
 7. The first respondent is pay the applicant's costs, including the costs consequent on the employment of Senior Counsel.

- [2] The applicant approaches this Court with an application for leave to appeal to the Supreme Court of Appeal (SCA) alternatively to the Full Court of this Division. The application for leave to appeal lies solely on a question of law. The matter has otherwise been rendered moot as the first respondent is no longer in the employ of the applicant.
- [3] In light of the very narrow grounds of appeal relied on by the applicant, there is no need to have detailed regard to the facts which underscore the order of 01 July 2022.

The grounds of appeal

- [4] The grounds of appeal are formulated as follows:

“1. The learned Judge erred in finding, in paragraph 18 of his judgment, that the Local Government: Disciplinary Regulations for Senior Managers 2010 (“the 2010 Regulations”) were impliedly replied by the Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2014 (“the 2014 Regulations”).

1.1 The question of whether the 2014 Regulations repealed the 2010 Regulations were not an issue in dispute between the parties, nor was it an issue in respect of which the parties made submission in argument before the learned Judge.

1.2 There was, with respect, no basis for the learned Judge to find that the 2014 Regulations repealed the 2010 Regulations.

1.3 On the contrary, it is clear that the 2014 Regulations do not repeal the 2010 Regulations. This is clear from National Treasury Circular Number 76 issued in terms of the Municipal Finance Management Act 56 of 2003, attached hereto as Annexure “A”.

2. The learned Judge erred in finding, by implication in paragraph 19 of his judgment, that simply because the investigation into the first respondent commenced in respect of allegations of financial misconduct, the charges ultimately brought against her, which included charges of ordinary misconduct, were not determinative of the question whether the 2010 or the 2014 Regulations applied.

3. It follows that the learned Judge erred in granting the relief sought by the first respondent in prayers 2 to 6 in Part A of her Notice of Motion.

4. The learned Judge ought to have found that:

4.1 The 2014 Regulations were promulgated in order to complement the 2010 Regulations and the two sets of Regulations exist in parallel.

4.2 The applicant was entitled to discipline the first respondent in terms of the 2010 Regulations in circumstances in which:

4.2.1 the disciplinary board required in terms of the 2014 Regulations had not been established through no fault of the applicant; and/or

4.2.2 the charges against the first respondent were not limited to charges of financial misconduct but included charges of ordinary misconduct.

4.3 The learned Judge ought accordingly to have dismissed the application with costs.

5. It is submitted that there is a reasonable prospect that another Court would come to a different conclusion in respect of all of the above.”

The applicable legal principles

[5] Section 17(1) of the Superior Court Act 10 of 2013 provides as follows:

“17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that

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- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

The

submissions

The applicant

[6] In submissions before me, Adv Barnes SC sought to raise a further ground of appeal predicated on alleged conflicting judgments brought about by the judgment of this Court. Grounds of appeal cannot be raised from the Bar in circumstances where the other side and the Court’s attention have not been drawn thereto in the notice of application for leave to appeal. I accordingly refrain from expressing any view on the merits of this ground which was belatedly raised from the Bar.

[7] In the heads of argument of Adv Barnes SC a summary of argument in support of the grounds of appeal is provided as follows:

“SUMMARY OF ARGUMENT

- 30. The Municipality contends that 2010 regulations have neither been repealed by the 2014 regulations, nor by any law – as evidenced by National Treasury’s circular 76 of 2015.
- 31. The 2014 regulations and with Sections 171, 172 and 175 of the Municipal Finance Management Act (“MFMA”), were designed to deal exclusively with instances where senior managers are charged with financial conduct.

32. Out of the charges that the CFO faced, 7 of them did not emanate from financial misconduct.
33. At the time of the hearing and in particular prior to instituting the charges, the Municipality did not have a Disciplinary Board to give effect to the 2014 regulations in respect of investigations relating to financial misconduct because the North West Provincial Treasury had not yet seconded an official to form part of the Board when the Municipality suspended and charged the CFO, this notwithstanding the Municipality's request to Treasury.
34. In the event and to the extent that the allegations the CFO faced only emanated from financial misconduct, the Municipality could not invoke the 2014 regulations because the Board had not been constituted, thus did not exist at the time when the CFO was suspended and charged, and did not exist as at the date of launching the (main) application.
35. The two authorities that the CFO/Court relied upon for the proposition that the 2014 regulations ought to be preferred over the 2010, are distinguishable from the present case that in both the authorities the senior managers were only facing allegations of financial misconduct, and the two municipalities had already established a Disciplinary Board, which is not the position with the Municipality in the main proceedings.

WHAT THE LEARNED JUDGE OUGHT TO HAVE FOUND

36. We respectfully submit that the court should have found that:
 - 36.1 The 2010 regulations have not been repealed by the 2014 regulations;
 - 36.2 The municipality did not have a disciplinary board to give effect to the 2014 regulations in respect of investigations relating to financial misconduct on the part of senior managers, particularly when the CFO was charged;
 - 36.3 The 2014 regulations enjoy exclusive jurisdiction in respect of financial misconduct only in instances where senior manager faces allegations of financial misconduct;
 - 36.4 The allegations that the CFO faced and was charged with, were not limited to financial misconduct.
 - 36.5 The appointment(s) of the Second, Third and Fourth respondents are lawful and valid.
 - 36.6 The disciplinary inquiry against the CFO should have proceeded.
 - 36.7 The application ought to have been dismissed with costs."

The respondent

- [8] The essence of the opposition to the application for leave to appeal is captured as follows in the heads of argument drafted by Mr Matsilele for the first respondent:

"First ground of the leave to appeal

9.1 The court correctly held that by implication the 2010 Regulations were “repealed” by the 2014 Regulations when regard is had to the Transitional arrangement. The dispute between the parties and the submission thereof was about the use of the 2010 Regulations instead of the 2014 Regulations.

9.2 This Court correctly applied itself to the dispute between the parties, when regard is given to the fact that the parties argued whether the correct Regulation was used in the appointment of the investigator, initiator, the Presiding (sic) and whether the Applicant followed the correct regulations when instituting disciplinary action against the First Respondent. The investigation report of the 4th respondent is all about financial misconduct and that is the report that was used to institute disciplinary action against the First Respondent.

9.3 It is so argued by the Respondent that the 2014 Regulations do not expressly repeal the 2020 (sic 2010) provisions or provide for any consequence or remedies if not complied with.

9.4 In paragraph 1.3 of the notice of application for leave to appeal the Applicant is trying to parachute new evidence which was not before the court when judgment was delivered, without making an application to file new evidence.

SECOND GROUND OF THE LEAVE TO APPEAL

9.5 This court correctly held that the Applicant has limited the relief sought to the disciplinary proceedings instituted unlawful (sic) in terms of the 2010 Regulations and not the charges which are not of a financial nature. The investigations against the First Respondent commenced on the basis of allegations of financial misconduct.

THIRD GROUND OF THE LEAVE TO APPEAL

9.6 The court correctly granted the relief sought by the First Respondent on the basis of the evidence presented, which was overwhelming in favour of the First Applicant and supported by relevant authorities.

9.7 The court correctly held that the unlawful use of the 2010 Regulations by the Municipality vitiates in the first instance the appointment of the fourth (sic) as investigator of the allegation of financial misconduct against the Applicant and in the second instance it by implication vitiates the disciplinary proceedings before the Second Respondent.

9.8 In paragraph 4 the Applicant wanted the court to waive the application of 2014 Regulation (sic) and allow them to use 2010 regulation notwithstanding the transitional arrangement on how to apply the above two regulations, which was going to be a serious injustice and also defeat the intention of the legislature.”

National Treasury’s Circular 76 of 2015 and paragraphs 18 of the Main Judgment which is assailed read with paragraph 17 of the Main

Judgment

[9] The gist of the applicant's case in the application for leave to appeal is that the "...2010 regulations have neither been repealed by the 2014 regulations, nor by any law – as evidenced by National Treasury's circular 76 of 2015."

[10] I assume that this assertion by the applicant can only be predicated on the following extract from National Treasury MFMA Circular 76 of 2015 ("MFMA Circular 76 of 2015") at page 1:

"To give effect to the priorities outlined in government outcomes, and to address requests to provide further regulations to deal with matters of financial misconduct and to give effect to the concept of consequence management, the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings were promulgated on 31 May 2014 to complement the Local Government: Municipal Systems Act, 2000 (Act No 32 of 2000) ('MSA') as amended and the regulations issued in terms thereof. These Regulations must be read together when implemented."

[11] MFMA Circular 76 of 2015, however, further provides as follows at page 3:

"Process initiated before the promulgation of the Regulations

If an allegation was reported before the promulgation of the regulations, municipalities should deal with it in terms of the law

that was applicable at the time the offence was committed. The parties can however agree to utilise the regulations provided that

there is written agreement to that effect.

Process to follow after the promulgation of the Regulations

If an allegation is reported after 1 July 2014, the provisions of the regulations will have to be fully implemented."

[12] Paragraphs 17 and 18 of the Judgment of this Court reads as follows:

"[17] Adv Maodi for the Municipality submits in his heads of argument that since Provincial Treasury has not seconded its official as yet, it means that the Board could not be constituted and the Municipality would continue to make use of the 2010 Regulations which have never been repealed. This submission loses sight of the Transitional arrangements and Short title and commencement in the 2014 Regulations, which reads as follows:

"Transitional arrangements

20. Any disciplinary process instituted before the commencement of these Regulations and not yet completed -

(a) must be finalised in terms of the prescripts applicable at the time when the process was instituted; or

- (b) may, by agreement in writing between the affected official, political office-bearer or director of the municipal entity and the municipal council or board of directors, be finalised in terms of these Regulations.

Short title and commencement

21. These Regulations are called the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings and takes effect on 1 July 2014.”
- [18] The 2010 Regulations by implication were “repealed” by the 2014 Regulations when regard is had to the Transitional arrangements. The 2010 Regulations apply only to disciplinary processes instituted before the commencement of the 2014 Regulations and which were not completed at that stage. It is therefore clear that any disciplinary proceedings instituted after 1 July 2014 when the 2014 Regulations came into effect, must be instituted in accordance with the prescripts of the 2014 Regulations. The institution of disciplinary action against the applicant by the Municipality in terms of the 2010 Regulations was therefore clearly unlawful.”
- [13] In my view, MFMA Circular 76 of 2015 accords with the ratio of this Court at paragraph [18] of the main judgment. I re-iterate what the Circular provides:

“Process to follow after the promulgation of the Regulations

Discussion

- [14] If under the Transitional Arrangements, disciplinary proceedings instituted before the commencement of these Regulations had not been completed, it had to be finalised under the prescripts of the 2010 Regulations unless the parties agreed in writing that disciplinary proceedings be finalised in terms of the 2014 Regulations. There is no provision in the 2014 regulations that disciplinary proceedings predicated on financial misconduct after the coming into operation of the 2014 Regulations, could be disposed of in terms of the 2010 Regulations. MFMA Circular 76 of 2015 in my view does not state so either. In any event, it is inexplicable how a Circular could circumvent the operation of Regulations which have the power of law.
- [15] It must finally be underscored what was said at paragraph [19] of the main judgment:
- “[19] In respect of the further issue in dispute as set out supra, the applicant has limited the relief sought to the disciplinary proceedings instituted unlawfully in terms of the 2010 Regulations*

and not on the charges which are not of a financial nature. The investigation against the applicant commenced on the basis of allegations of financial misconduct. It is on this basis that fourth respondent was appointed and enjoined with his mandate. The fourth respondent had no further mandate in respect of the investigation. Notwithstanding this, sight cannot be lost of the fact that the investigation was initiated in terms of the 2010 Regulations.”

(my emphasis)

[16] The disciplinary proceedings against the first respondent were predicated on financial misconduct and the 2014 Regulations had to be followed. The argument that this Court was not called upon to consider the 2014 Regulations and the parties not having addressed the issue does not avail the applicant. It follows axiomatically from the first respondent's case in the main application that if the 2010 Regulations could not be utilised that the 2014 Regulations would be applicable.

Conclusion

[17] I am not persuaded that there are reasonable prospects that another court would come to a different conclusion. The application for leave to appeal accordingly stands to be dismissed.

Order

[18] Consequently, the following order is made:

- (i) The application for leave to appeal to the Supreme Court of Appeal (SCA) alternatively to the Full Court of this Division is dismissed.
- (ii) The applicant is ordered to pay the costs of the application for leave to appeal.

A H PETERSEN

JUDGE OF THE HIGH COURT

NORTH WEST HIGH COURT, MAHIKENG

APPEARANCES

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