

SOUTH AFRICA / JUDGMENT

Mbatha v Ehlanzeni District Municipality and Others (J1392/2007)

[2007] ZALCJHB 76 (23 November 2007)

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COURT

Labour Court Johannesburg

BEFORE

Cele

CASE / FILE NUMBER

J1392/2007

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IN

THE LABOUR OF SOUTH AFRICA

HELD

AT JOHANNESBURG

REPORTABLE

CASE NO: J1392/2007

In

the matter between:

HUGH
MBATHA
Applicant
and
EHLANZENI
DISTRICT
MUNICIPALITY
First Respondent
COUNCIL
OF EHLANZENI DISTRICT
MUNICIPALITY
Second
Respondent
EXECUTIVE
MAYOR OF EHLANZENI
DISTRICT
MUNICIPALITY
Third Respondent
J
NEIT
N.O.

Fourth Respondent

JUDGMENT

CELE AJ

Introduction

[1] This is an application in terms of section 158(1) (a) of the Labour Relations Act No. 66 of 1995 (“the act”) for an order to declare a resolution of the second respondent (“the council”) as ultra vires. The ground is that the resolution unlawfully delegated to the third respondent, the Mayor, the power to decide to suspend the applicant and to decide whether or not to institute disciplinary proceedings against him. The first three respondents opposed the application. The fourth respondent abides the decision of this court.

Background**facts**

[2] The applicant commenced employment with the first respondent “the Municipality” on 19 May 2006 in the position of a Municipal Manager. His employment was in terms of a written, fixed term contract of 5 years ending on 31 April 2011. The Mayor represented the Municipality as the employer when she signed that contract.

[3] On 4 May 2007 the council held its 27th special meeting and it passed resolution A76/2007. The intention of the council when it passed the resolution was to suspend the employment services of the applicant due to allegations of misconduct against him. The Mayor was delegated by council to deal with the matter relating to the allegations of misconduct until the issue was finalized.

[4] On 7 May 2007 the applicant was served with a precautionary suspension notice issued by the Mayor in pursuance of the delegation

of the council. The suspension was to take immediate effect but the applicant would be given full pay. The notice informed the applicant that the allegations were to be investigated but that there was a belief that his presence at work might jeopardize such

investigations. An annexure with charges preferred against the applicant was attached to the notice. The notice called on him to

respond within 7 days to the allegations. Instead, the applicant approached this court by way of an urgent application under case

number J1625/07, to review and set aside the council resolution. The respondents opposed the urgent application but before the matter could be heard in court, the council met on 14 May 2007 and revoked its resolution A76/2007. The council also lifted the suspension of the applicant. It was intended thereby to give the applicant an opportunity to make representations on why he was not to be suspended.

[5] The council met again on 17 May 2007. A special session of the council passed resolution A77/2007 which is the subject matter of the application at hand. The resolution purported to give authority to the Mayor to suspend the applicant, in the event of the applicant failing, in his reasons, to satisfy the Mayor on why he was not to be suspended with immediate effect so as to create free and uninhibited environment to investigate the allegations against him.

[6] On 18 May 2007 the Mayor issued a letter which informed the applicant of the revocation of resolution A76/2007 and the withdrawal of the precautionary suspension. It also afforded him an opportunity to file any written submissions he might wish to tender so that the council would decide not to impose a precautionary suspension on him. On 22 May 2007 the applicant issued a memorandum addressed to the speaker of the council and he sent a copy thereof to the Mayor. He required clarity and information to assist him in explaining to the council why he was not to be suspended. He noted that he was to answer to allegations of serious misconduct detailed in the precautionary suspension of 7 May 2007 which however, had been revoked by the council.

[7] On 29 May 2007 the Mayor issued a letter of suspension of the applicant with immediate effect on full remuneration for the initial

period of 90 days to investigate the allegations against him in a free and uninhibited environment. The applicant launched a second

urgent application under case number J1261/07 to halt his second suspension. The application was unopposed and a rule nisi was granted

on 6 June 2007, uplifting the precautionary suspension with immediate effect until the return date. The respondents filed papers to oppose the granting of the final order. However, on 8 June 2007 the respondents filed a notice of withdrawal of the intention to oppose the granting of the final order. The suspension notice of 29 May 2007 was simultaneously revoked. The council met on 30 May 2007 and it adopted the minutes and the resolutions that were passed by its special session on 17 May 2007. The applicant returned to work on 17 June 2007.

[8] On 20 June 2007 the Mayor served the applicant with a notice to attend a disciplinary enquiry. Annexured thereto was a document

containing four detailed charges which the applicant was to face in an enquiry which was scheduled for a hearing on 4 July 2000. The notice was also to serve as a rule nisi, calling on the applicant to show cause, within 7 days of the notice, as to why he was not to be suspended or to be placed on compulsory leave with full pay until the finalisation of the hearing.

[9] For the third time, the applicant approached this court with an urgent application seeking a declarator that the notice to attend the disciplinary hearing was unlawful and was to be set aside. The applicant took a position that the matter was still

subject to further investigations. He also awaited to be supplied with information he had requested with a view to making submissions

on why he was not to be suspended or charged. His initial stance was that no resolution of the council had been passed, permitting him to be charged. The matter was scheduled for oral evidence so that the respondents would prove that the council had taken the resolution permitting the charging and suspension of the applicant. When the matter resumed before me, after some adjournments, the parties were ad idem that the council had indeed passed resolution A77/2007.

The issue

[10] I was then left to consider whether the council acted legally and within its powers when it delegated its decision whether or not to charge and suspend the applicant to the Mayor.

Resolution A77/2007

[11] The issue of the charging and suspension of the applicant was discussed and all councilors who spoke on the motion were unanimous

in their support for the report presented to then by the Mayor. It was then resolved:-

“1. That council resolution A76/200, taken on 4 May 2007 be revoked.

2. That the lifting of the suspension in terms of council resolution A76/2007, be confirmed in order to allow Council can comply with the rules of natural Justice which include the opportunity to Adv. Mbatha to indicate or to give reasons why he should not be suspended;

3. That in the event of the employer not being satisfied with the reason that will have been presented by the Municipal Manager the necessary procedures to suspend the Municipal Manager, Adv Mbatha, complying with the rules of natural Justice be effected by the Executive Mayor immediately to create free and uninhibited environment to investigate serious allegations of irregularities against the Municipal Manager which include but not limited to, the following:

- (1) Irregularly and unlawfully appointing of PASQUA Africa as consulting engineers for the proposed new office of the Ehlanzeni District Municipality;
- (2) Irregularly and unlawfully conducting interviews for appointment of Managers directly responsible to the Municipal Manager;
- (3) Irregularly and unlawfully appointment of the Chief Financial officer on fixed term contract and

- (4) Irregularly and unlawfully appointing a service provider for Arts and Culture Festival, to market and brand Ehlanzeni District Municipality at an allegedly unauthorized cost of R7 million.

4. The procedures referred to in point 3 above, must be in accordance with clause 9 of contract of employment of the Municipal Manager dated 19 May 2006, which is a precautionary suspension pending the finalisation of the investigations into the allegations against him in point 3 above which procedures include the following:

- a) The letter of intent to suspend the Municipal manager, affording the Municipal Manager, Adv HM Mbatha the opportunity to file any written submissions with the Executive mayor that he may wish to file setting out his contentions, submissions or arguments or on terms of this suspension if such a suspension is to be effected, by not later than 7 days from the time of receipt of the letter;
- b) Consideration of the submission filed by Adv HM Mbatha with the Executive Mayor;
- c) Decision on the suspension of the Municipal Manager, Adv HM Mbatha by the Executive mayor;
- d) Implementation of the decision by the Executive mayor to suspend or not to suspend;
- e) That the Executive Mayor be authorized to take necessary decisions to have the necessary disciplinary procedures instituted against Adv HM Mbatha as and if necessary;
- f) That the appointment of an acting Municipal Manager be done by the Executive mayor as and if needed.

Submission by parties

- [12] Legal submissions were made by the parties without any additional evidence led on the subject matters.

Applicant's

submissions:

- The resolution is ultra vires on the grounds that it purports to delegate to a political office bearer, the Executive Mayor, the power to decide to suspend the applicant and to decide to institute disciplinary proceedings against him. Such power cannot be lawfully delegated,
- The Mayor has no power whatsoever by virtue simply of holding that office. Every power that vests in a Mayor derives from a formal delegation of the council's powers to be exercised by the council. That is plain from the provisions of section 56 of the Local Government Municipal Structures Act 117 of 1998 ("the Municipal Structures Act"). The section tabulates several responsibilities and in section 56 (2) (f) it is provided that the Mayor is obliged to perform duties and to "exercise such powers as the council may delegate... in terms of section 59 of the Systems Act.

· Section 59 of the Local Government: Municipal Systems Act No.32 of 2000 (Municipal Systems Act) deals expressly with delegations in general. Section 60 enumerates certain powers that may be delegated only to either an executive committee or an executive mayor.

· A municipal manager's obligations are addressed in section 55 of the Municipal Systems Act. Therein it is provided that the municipal manager is accountable to the council. The provisions read in the preamble are that:

“As the head of the administration the municipal manager of a municipality is, subject to the policy directions of the council, responsible and accountable for...” Thereafter follows a comprehensive list of duties,

· It is plain that these provisions do not envisage the municipal manager being accountable to any political office bearer, including the Mayor, but rather being accountable to the council itself.

· There are some powers of the council that cannot be delegated and the power to hold the municipal manager to account is one example.

· A delegation can only be lawful if it conforms to the enabling legislation. The effect of a delegation is to remove that power from the council and to give it over wholly to the delegatee.

· A council may appoint an appeal committee to perform its appeal functions in respect of discipline in respect of a head of a department and to resolve that the decision of the appeal committee shall be the decision of the council, even though a collective agreement provides for appeals to lie to the council itself.

· However a municipal council has no power to delegate to an executive mayor the power to extend the term of the employment contract of a municipal manager.

· Naturally, a council may, and indeed, must logically authorize persons to implement decisions taken by it. That function must be distinguished from the power to take the decision reserved for the council to take.

· The reason why the resolution is invalid is precisely because it fails to make that distinction. Clause 4 of the resolution purports to vest in the mayor the power to decide if the representations about a possible suspension are acceptable or not, and further purports to vest in the mayor the powers to decide whether or not to institute discipline, and lastly purports to vest in the mayor the power to appoint an acting municipal manager. None of these delegations are valid. These decisions can be taken only by the council itself.

· The question of both a suspension, having regard to the representations made by the applicant and any question of instituting disciplinary proceedings must be referred by the mayor to the council.

· Accordingly, there is no lawful basis shown to take action against the applicant.

Respondents'

submissions

- The resolution was properly and regularly passed in terms of which the Mayor was duly delegated by the council to suspend the applicant and also to institute a disciplinary action against him.
- The resolution had been passed by the council in accordance with standing orders to prescribe rules and procedures for internal arrangements of a municipal council such as the council as envisaged in section 31 (sic) of the Municipal Systems Act.
- The delegation given to the Mayor was in accordance with section 59 and 60 of the Municipal Systems Act read with section 56 of the Municipal Systems Act.
- The decision to take disciplinary measures such as issuing the notice against the applicant was an administrative and operational necessity that was within the discretion of the council to delegate the execution thereof to the Mayor.
- Alternatively, the applicant's contract of employment contains various express conditions of service for example clauses 10.1 and 11.3. A material breach of faith or gross misconduct on the part of the applicant would give rise to an entitlement on the part of his employer to take disciplinary action against him and thereby give rise to the mechanism provided for in terms of section 60 by which the Mayor may take steps to alter the conditions of service. This can be by way of seeking the termination of the contract of employment pursuant to the convening of a disciplinary hearing. In this regard, the council was entitled to delegate to the Mayor the authority to issue the notice to the applicant.
- The authority delegated was consonant with her functions and powers as a Mayor as set out in section 56, particularly 56 (3) (f) of the Municipal Structures Act.
- The first three respondents were exercising their rights as an employer to take disciplinary action against their employee, the applicant, in terms of the employment contract and the Act.
- The applicant has never attacked or challenged the appointment of the acting municipal manager which appointment flows from the same resolution the applicant challenges.
- The council meeting on 30 May 2007 adopted the minutes of the council meeting on 17 May 2007 together with resolutions that were passed.
- The applicant has much to gain by contending the resolution to be fraud and/or that the council can not authorize the Mayor to take disciplinary steps against the applicant as this can only serve to frustrate any attempts on the part of the respondent to discipline the applicant.

Analysis

- [13] As alluded to earlier, the position of the parties changed on the facts of the case in respect of the resolution being challenged, as time went on until the hearing of the application. Some of the submissions they made related to the time when the applicant

challenged the passing of the resolution. It is not my understanding of the applicant's case that he seeks to challenge the

authority of the council to discipline him. He has infact conceded to that in many an instance. Nor do I understand him to be submitting

that the Mayor may not carry out any instructions of the council in the execution of disciplinary steps taken by the council against him.

[14] As I understand it, the challenge is whether or not the council has legitimate power and authority to delegate its decision-making task of disciplining the applicant to a political heard, such as the Mayor. If the council had itself decided to take disciplinary steps and to suspend the applicant from duty, the challenge, if any, in my view, would have been of a different nature.

[15] Mr Henrico for the respondents, submitted that the challenge raised by the applicant is at odds with the fact that it is the Mayor who signed the contract of employment of the applicant, on behalf of council. If the council took a decision to engage the services of an Acting Municipal Manager and left the execution of that decision to the Mayor, that would, in my view, be consistent with the functions of the Mayor.

[16] The parties referred me to sections 55-60 of the Municipal Systems Act and to section 56 of the Municipal Structures Act. In respect of delegated powers of the Mayor, section 56 of the Structures Act reads:

“(3) The executive Mayor in performing the duties of office, must-

(a) . . .

(f) perform such duties and exercise such powers as the council may delegate to the executive Mayor in terms of section 59 of the Local Government: Municipal Systems Act, 32 of 2000 (the Municipal Systems Act);”

Section 59 of the Municipal Systems Act reads:

“Delegations- (1) A Municipal council must develop a system of delegation that will maximize administrative and operational efficiency and provide for adequate checks and balances, in accordance with that system, may-

- (a) Delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality's other political structures, political office bearers, councilors, or staff members.
- (b) Instruct any such political structure, political office bearer, councilors, or staff member to perform any of the municipality's duties, and
- (c) Withdraw any delegation or instruction.

- (2) A delegation or instruction in term of subsection (1)-
 - (a) Must not conflict with the Constitution, this Act or the Municipal Structures Act;
 - (b) Must be in writing;
 - (c) Is subjected to any limitations, conditions and directions the Municipal council may impose,
 - (d) May include the power to sub-delegated, delegated power;
 - (e) Does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and
 - (f) Must be reviewed when a new council is elected or, if it is a district council, elected and appointed.
- (3) The Municipal Council-
 - (a) In accordance with procedures in its rules and orders, may, or at the request in writing of at least one quarter of the councilors, must, review any decisions taken by such a political structure, political office bearer, councilor or staff member in consequence of a delegation or instruction, and either confirm, vary or revoke the decision subject to any rights that may have accrued to a person; and
 - (b) May require its executive committee or executive Mayor to review any decisions taken by such a political structure, political office bearer, and councilor or staff member in consequence of a delegation or instructions.
- (4) Any delegation or sub-delegation to a staff-member of a power conferred on a Municipal Manager must be approved by the Municipal council in accordance with the system of delegation referred to in subsection (1)”

[17] Section 60 then deals with some restrictions on delegation and, in so far as is relevant, reads:

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

- (a) ...
- (b) 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,”

[18] It is accordingly, clear from section 59 of the Municipal Systems Act that the council may delegate appropriate powers to various functionaries of a Municipality. Such delegation must be in writing. The council retains the power to withdraw such delegation. The delegation does not divest the council of the power or the performance of the duty. The delegation is subject to a review by the council. The delegation of appropriate powers is therefore made subject to checks and balances. Mr. Sutherland for the applicant referred me to the decision in Reddy and Another Town Council for the Borough of Kloof 1964(3) SA 280

(D), for a submission that the effect of delegation is to remove that power from the council and to give it over wholly to the delegatee. The delegation of appropriate powers in the Reddy decision was in terms of section 5 (2) of Ordinance no 19 of 1942 (N). The licencing officer, as a delegatee became the licencing authority and the local authority which delegated its powers, had no control whatsoever over the proceedings, of the licencing officer. Section 59 of the Municipal Systems Act is on the other hand, differently structured. Section 59 (1) (a) for instance excludes the delegation of appropriate powers to set tariffs. Therefore, it would depend on the enabling legislation whether the effect of delegation is to remove that power from the council and to give it over wholly to the delegatee.

[19] Mr Sutherland also referred me to a decision in *Bester v Sol Plaatje Municipality & others* [2004] 7 BLLR 728 (NC). That was in support of a proposition that council may appoint an appeal committee to perform its appeal functions in respect of discipline of a head of department and to resolve that the decision of the appeal committee shall be that of council, even though a collective agreement provides for appeals to lie to the council itself. Paragraph 4 (c) of the judgment makes it clear that the “appointment of an appeal committee” is in fact the “delegation of the power to hear the appeal”. I must be misunderstanding the submission he made because to me, it seems to support the case of the respondents and not that of the applicant. Mr Henrico relied on the same case in support of one of his submissions. I note though, that it is one of the grounds on which Majiedt J granted leave to appeal. The success of the appeal would have the effect that the delegatee had no authority to hear the appeal through delegated power, since he was neither an official nor a staff member of the municipality. In the case before me, the delegatee, being the mayor, is a political office bearer of the municipality.

[20] The decision in *Mgoqi v City of Cape Town and Another* 2006 (4) SA 355 (CPD) which Mr. Sutherland also referred me to, provides an appropriate example that not all the power of the council is capable of being delegated to an executive mayor. Paragraph 101 of that judgment reads:

“[101] The city’s attack on alderman Mfeketo’s decision may be predicated on three grounds. The first is that she did not have the authority to appoint, or to extend the appointment of Dr Mgoqi. This was a power that vested in the council alone and was not capable of being delegated to an executive mayor, as alderman Mfeketo was at the time.....I shall accept that the decision to extend Dr Mgoqi’s term of office by amending his employment agreement, which was due to expire on February 2006, in fact constituted an appointment, or appointment, for which no provision was made in such agreement.”

[21] Sections 56(3) (f) of the Municipal Structures Act and Section 59 of the Municipal Systems Act do not provide a solution to whether resolution A77/2007 is valid or not. Section 60 of the latter Act permits the delegation to an executive mayor of the power to determine or alter the remunerations, benefits or other conditions of service of the Municipal Manager. This section has come very close to giving the council authority to delegate to the Mayor the power to discipline the Municipal Manager. The section does not stipute the extent to which the delegated powers of the Mayor may permit the determination or alternation of the

Municipal Manager's conditions of service.

[22] Section 82 of the Municipal Structures Act states that a Municipal council must appoint a Municipal Manager who is the head of administration and also the accounting officer for the Municipality. It is inevitable that, in the execution of their statutory duties, a conflict might arise between the Municipal Manager and a Mayor. It would not be desirable, in the administration of justice, that the Municipal Manager must live with a constant fear that, in the event of such conflict, the Municipal Manager is at the mercy of a Mayor with disciplinary powers. Justice would be better served, in my view, if both officials involved in a conflict situation, make representations to the council which in turn can, after a deliberation on the matter, decide on whether any disciplinary

actions ought to be taken, and if so against whom. The composition of the council will not detract from the ability of the council to deliberate on whether or not disciplinary measures need to be resorted to. My considered opinion is that the power to discipline

the Municipal Manager must reside exclusively in the council. I conclude therefore that this power to discipline a Municipal Manager

is vested in the council alone and is not capable of being delegated to an executive Mayor. The purported delegation of disciplinary

powers of the council was consequently unlawful for want of legality. However, once a decision to discipline and/or to suspend a Municipal Manager has been considered and then taken by the council, the Mayor may take such appropriate steps as are required by law, in the execution of that decision.

[23] I therefore proceed to make the following order:

1. The notice to attend a disciplinary enquiry (Annexure 'B') issued by the third respondent dated 20 June 2007 is unlawful and is therefore set aside.
2. Costs of this application are to be paid by the first, second and third respondent jointly and severally to include costs for both counsel.

Date of Hearing: 16 August 2007

Date of Judgment: 23 November 2007

APPEARANCES;

For the Applicant:

Werksmans incorporated

For the Respondent: Ngobe Nkosi Attorneys

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