

SOUTH AFRICA / JUDGMENT

Mere v Tswaing Local Municipality and Others (2017/2024) [2024] ZANWHC 124 (9 May 2024)

[2024] ZANWHC 124

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

2017/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: 2017/2024

Reportable:

YES

/ NO

Circulate

to Judges:

YES

/ NO

Circulate

to Magistrates:

YES / NO

Circulate

to Regional Magistrates:

YES / NO

In

the matter between:

KEOPARETSE
SHADRACK DION MERE Applicant
and
TSWAING
LOCAL MUNICIPALITY
First
Respondent
COUNCILLOR
NOTOMBIZODWA NORAH
MAHLANGU
(THE MAYOR) Second
Respondent
THABO
MEERKEN
(ACTING
MUNICIPAL MANAGER) Third
Respondent

CORAM:

PETERSEN ADJP

HEARD:

02 MAY 2024

Delivered:

09 MAY 2024

ORDER

(1)

The rules relating to forms, service and time periods, as prescribed by the Uniform Rules of Court are dispensed with and this matter is heard as an urgent application.

(2)

The Resolution (Resolution number 001/04/2024), passed by the First Respondent's Council on 11 April 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 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.

(4)

There is no order as to costs.

JUDGMENT

PETERSEN ADJP

Introduction

- [1] In this opposed urgent application brought on 02 May 2024, the applicant seeks relief in the following terms:
1. The rules relating to forms, service and time periods, as prescribed by the uniform rules of court are dispensed with in this matter is heard as an urgent application.
 2. The Resolution (Resolution number 001/04/2024), passed by the 1st Respondent's Council on 11 April 2024, in terms of which it was resolved to suspend the Applicant, is declared to be invalid and unlawful and is accordingly set aside;
 3. The Applicant's suspension is uplifted with immediate effect and the 1st and 2nd Respondents are ordered to allow the Applicant to resume his duties as the 1st Respondent's Municipal Manager;
 4. The Resolution by the 1st Respondent's Council on 11 April 2024, to appoint the 3rd Respondent as Acting Municipal Manager is declared invalid and unlawful and is accordingly set aside;
 5. The appointment of the 3rd Respondent as Acting Municipal Manager, pursuant to the Applicant's suspension, is declared unlawful and invalid and set aside;
 6. The 1st Respondent is ordered to pay the costs of this application on an attorney-client scale;
 7. Further and/or alternative relief."

Background

- [2] The applicant sketches the following background to the application. That following a recruitment selection and appointment process, as contemplated by Chapter 3 of the Regulations on Appointment and

Conditions of Employment of Senior Managers ("the Appointment Regulations"), and in accordance with a Council Resolution as per Regulation 17 of the Appointment Regulations, he was appointed as the first respondent's Municipal Manager with effect from 1 July 2023 until 30 June 2027.

- [3] By virtue of his appointment as Municipal Manager, the applicant asserts that as a senior manager his conditions of employment are subject to the provisions of the Local Government: Systems Act 32 of 2000 and the Disciplinary Regulations for Senior Managers, 2010 (Disciplinary Regulations). On 28 March 2024 the second respondent issued the applicant with a notice in which he was informed of the first respondent's intention to place

him on precautionary suspension in line with the Resolution passed by the first respondent's Council on 27 March 2024.

- [4] The applicant surmises that paragraphs 2 to 4 of the notice makes it apparent that the resolution arose as a consequence of certain concerns raised by the MEC of Co-operative Governance, Human Settlements and Traditional Affairs ("the MEC") regarding his appointment as the first respondent's Municipal Manager. The applicant contends that these concerns were nothing new when regard is had to correspondence between the MEC and the second respondent dated 14 July 2023.
- [5] Further to the second respondent's notice at paragraph 6, the applicant contends that he was instructed to make written representations within seven (7) working days explaining why he should not be suspended. The applicant maintains that he adhered to the second respondent's "instruction" and made written representations, why he should not be suspended. The subject matter subsequently served before the first respondent's Council during a Special Council Meeting on 11 April 2024. On 15 April 2024 the second respondent issued a further notice confirming the suspension of the applicant following a further resolution by the first respondent's Council to that effect.
- [6] The applicant places emphasis on paragraph 3 of the second notice:

"3. You are hereby placed on precautionary suspension for a fixed period of three months pending investigations

into allegations of misconduct against you and possible charges being preferred against you."

Urgency

- [7] The essence of the urgency relied on by the applicant is predicated on the fact that his suspension is for three (3) months, with an indication that it may be extended further; the manner and circumstances of his suspension constitute an abuse of power which is detrimental to the public purse; that his contract of employment provides for an annual performance agreement which may qualify him for a performance bonus, which he asserts is a right which may occasion financial damage to him; that his suspension is akin to being arrested; and that his suspension occasions reputational damage.
- [8] That there is merit regarding the proper application of Regulation 6 by the Council of the Municipality is a valid ground to establish urgency.
- [9] That the suspension may not be extended longer than three (3) months in terms of law, with an unfounded indication that it may be extended further, does not create urgency. It is axiomatic that the suspension of the applicant implicates the appointment of a person to act in his stead. The financial implications thereof to the fiscus of the Municipality is obvious, but on its own cannot justify urgency.

[10] The applicant missing out on an assessment for an annual performance bonus is not a right as he asserts. In any event, the Municipality in question has consistently from historical records for the last decade alone, been described as a dysfunctional Municipality which has from time to time been placed under Administration in terms of section 139 of the Constitution of the Republic of South Africa. During this decade and even earlier, the applicant who has been its Accounting Officer was at the helm as the Municipal Manager. If performance bonuses have been paid to the applicant during his tenure with such a serious indictment that the Municipality is dysfunctional, it is mindboggling when one considers the impact on the residents who suffer because of lack of service delivery. No urgency could reasonably be asserted on this basis.

[11] The applicant relies on reputational damage and asserts that his suspension is tantamount to an arrest. The applicant has been at

loggerheads with the Municipality in the past to the point of litigating against it in the Labour Court. In the reported judgment

of *Mere v Tswaing Local Municipality and Another* (J1236/15) [2015] ZALCJHB 193; [2015] 10 BLLR 1035 (LC) ; (2015) 36 ILJ 3094 (LC) (7 July 2015) where the applicant sought similar relief to the present matter, he was unsuccessful. The application was dismissed with a costs order against the applicant. That judgment has not been appealed against. The reliance on reputational damage is therefore opportunistic and similarly does not establish urgency.

[12] 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. It is on this basis that I turn to the merits.

The underlying basis of the application

[13] The underlying basis of the application is predicated on Regulation 6 of the Disciplinary Relations for Senior Managers 2010 (“Disciplinary Regulations”) which provides:

“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.
- (2) Before senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven days of being notified of the council's decision to suspend him or her.
- (3) The municipal council must consider any representation submitted to it by the senior manager within seven days.
- (4) After having considered the matter set out in sub regulation one, as well as the senior manager's representations contemplated in subregulation 2, the municipal council may suspend the senior manager concerned.
- (5) The municipal council must inform –
 - (a) the senior manager and writing of the reasons for easier suspension honor before the date on which the senior manager suspended; And
 - (b) the minister and the MC responsible for local government in the province with such a suspension has taken place, has been notified in writing of such a suspension and the reasons for such within a period of seven days after such a suspension.
- (6)
 - (a) If a senior manager is suspended, disciplinary hearing must commence within three months after the date of suspension, failing which is suspension will automatically lapse.
 - (b) The period of three months referred to in paragraph (a) may not be extended by council."
- [14] The applicant contends that Regulation 6(1) demands the existence of allegations of misconduct to trigger the provisions of Regulation 6 in order to allow for consideration of a precautionary suspension in terms of Regulation 6. The applicant contends that the contents of the requirements of Regulation 6(1) have not been met as the notice of intention to suspend which was served on him on 28 March 2024 does not refer to any allegations of misconduct against him. It simply relates to the MEC's concerns regarding his appointment by the first respondent's Council. The applicant therefore contends that Regulation 6(1) is applicable as he pointed out in his written representations dated 4 April 2024.
- [15] The applicant surmises that as a consequence of his written submissions or written representations, the notice of suspension reveals a complete turnaround, as it now implied the existence of allegations of misconduct with reference to paragraph 3 thereof, as quoted above. Such allegations according to the applicant were never identified. The applicant further contends that the failure to disclose the so-called allegations of misconduct in the notice of intention to suspend by itself defeats the purpose of Regulation 6(2) which is

intended to afford a senior manager the right to be heard before decision is made as contemplated by regulation 6(4).

- [16] The applicant contends that it follows that Resolution No.001/04/2024 by the first respondent's Council that he be suspended and consequently the ensuing suspension itself is unlawful and invalid as the first respondent's Council was not entitled to invoke the provisions of Regulation 6 of the Disciplinary Regulations in the absence of allegations of misconduct.
- [17] In conclusion the applicant maintains that besides the apparent narrative relying on the provisions of regulation 6 under circumstances where there are no allegations of misconduct levelled against him, the decision to suspend him is even more absurd if one considers that the purported reasoning behind his suspension concerns an investigation and issues that were raised by the MEC as far back as July 2023, while the Respondents have done nothing as regard since then.

Discussion

- [18] The respondents challenge the jurisdiction of this Court, asserting that the matter should be before the Labour Court. In this regard, the applicant does not bring the application in terms of the Labour Relations Act, but under the principle of legality. I am satisfied that this Court is vested with jurisdiction and the point in limine on jurisdiction must fail. I am edified in this regard by the decision in *Gcaba v Minister for Safety and Security and Others* 2010 (1) BCLR 35 (CC) at paragraph 75:

"[75] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the

determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's

competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court... "

(emphasis added)

- [19] The applicant does not rely on the Labour Relations Act 66 of 1995 for the relief he seeks. The relief sought is based on a legality challenge. On that basis, this Court is vested with jurisdiction to entertain the application to the exclusion of the Labour Court.

[20] I fully align myself with the reasoning of Snyman AJ in *Mere v Tswaing Local Municipality and Another* supra in respect of Regulation 6. The application of Regulation 6 is correctly captured as follows:

“Clear right: Regulation 6

[35] There is no doubt that Regulation 6 of the Municipal Regulations does apply in this case. These regulations

also form part of the applicant’s contract of employment, by incorporation therein. If Regulation 6 has not been complied

with by the second respondent in effecting the suspension of the applicant, the applicant’s suspension would be unlawful, and the applicant would succeed in demonstrating the existence of a clear right...

[36] In *Mojaki v Ngaka Modiri Molema District Municipality and Others* (2015) 36 ILJ 1331 (LC) at para 29 the Court held as follows:

‘The object of regulation 6 of the regulations is to afford an employee a hearing before the decision to suspend him or her is taken. That object is achieved by calling on the employee to show cause why he or she

should not be suspended pending an investigation or disciplinary hearing.’

[37] Regulation 6 thus contemplates the opportunity to make representations before the final decision is taken to suspend a senior manager. That means that the senior manager must at least be placed in a position where he or she is able to make such representations... In *Lebu v Maquassi Hills Local Municipality and Others* (2) (2012) 33 ILJ 653 (LC) at para 16 the Court held as follows insofar as it concerns this notice:

‘The notice must contain at least a description of the misconduct that the manager is alleged to have committed, and the council’s justification for its in-principle decision, and invite representations in relation to both. Both the nature of the misconduct alleged and the purpose of the proposed suspension must be set out in terms that are sufficiently particular so as to enable the senior manager to make meaningful representations in response to the proposed suspension.’

[38] A similar approach was followed in *Retlaobaka v Lekwa Local Municipality and Another* (2013) 34 ILJ 2320 (LC) at para 8 where the Court said:

‘The whole object of inviting representations from the employee on whether he or she should be suspended would be rendered nugatory if the employee is in the dark as to why the employer believes he or she should not be at the workplace until the disciplinary proceedings are concluded. Without knowing the employer’s reasons, the employee could only guess what they might be and his or her response would be mostly superfluous and speculative answers to unknown propositions. I accept that before taking the decision to suspend the employee the

council only needs to have reason to believe it would be desirable

for one or more of the reasons mentioned based on the information it has before it, but that information also includes the employer's representations on the purpose of the proposed suspension, which clearly must be made known to the employee for those representations to be meaningful.'

[39] The Court in *Tsietsi Tsietsi v City of Matlosana Local Municipality and Another* [2015] 7 BLLR 749 (LC) at para 21 also analysing the recent authorities relating to Regulation 6 said:

'In my judgment, the above authorities on which applicant relies, should not be understood to amount to the following two propositions:

12.1 that the particularity of the allegations of misconduct must be of such detail as to allow for the setting out of a defence in response

thereto in the applicable representations in terms of regulation 6. Or as applicant averred to: "show that the allegations have no prospects." This is because the suspension in terms of the Regulation is precautionary, and resorted to in order for an investigation to take place as to whether charges should follow, and not a disciplinary sanction in its own terms.

12.2 that a municipality must set forth evidence to show that the person involved may interfere in the conduct of the investigation against him or herself. Reference to the position of the senior official and the attendant powers and responsibilities that he or she has, read with the allegations of misconduct as set out in the pre-suspension letter, should suffice.'

I agree with the above reasoning in *Tsietsi*.

[40] Therefore, and for a senior manager to be lawfully suspended in terms of Regulation 6, the municipality must have reason to believe that at least one of the circumstances as contemplated by Regulation 6(1) exist. The municipality must then notify the senior manager of its intention to suspend him or her, and provide, at the very least, basic particulars as to what motivated this intention to suspend, so that the senior manager can provide informed answers as to why he or she should not be suspended. Detailed evidence or particulars need not be provided. The senior manager must then be given at least seven

days to provide such a response. Once this response is given, it must be considered by the municipality, and if it decided to continue with the suspension, the senior manager must be informed in writing of the suspension and the reasons why he or she is being suspended, with reference to the grounds set out in Regulation 6(1).

[41] If the above is not adhered to, the suspension may well be unlawful.

In *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC) at para 20. the Court held:

‘These provisions may well be unduly onerous. But it is common cause that the parties are bound by them. Failure to do so would make the suspension unlawful for want of compliance with the regulations.’

[21] The notice of intention to place the applicant on precautionary suspension of 28 March 2024 based on the Resolution of Council on 27 March 2024 fails to set out any alleged misconduct on the part of the applicant. Paragraph 3 of the notice at most sets out “issues” with the appointment of the applicant as the Municipal Manager of the first respondent. It should be clear, that the content of this notice falls gravely shy of the tenets of Regulation 6 to merit suspension. If this were the only basis on which precautionary suspension was considered to be appropriate, the suspension would be unlawful. Clearly no suspension followed this notice, which in all probability was predicated on the reasons the applicant furnished on 4 April 2024. If the first notice

was competent, which clearly, it was not, the suspension of the applicant should have followed as a direct consequence.

[22] The second respondent in all probability realizing the faux pas revisited the approach adopted with the notice of 28 March 2024. On 15 April 2024 the second respondent issued a second or further notice to the applicant following a further Resolution by Council. The content of the second or further notice is terse in that simply states that the applicant is placed on precautionary suspension for a fixed period of three months pending investigations into allegations of misconduct against him and possible charges being preferred against him. The Resolution adopted by Council is silent on the specific basis why it believed that the applicant had committed serious misconduct. The applicant was further not afforded an opportunity to make a written representation to the Municipal Council why he should not be suspended, within seven

(7) days of the Council’s decision, which pails in consideration to substantive compliance with Regulation 6(1)(a) and (b). In *Matlala v Greater Tzaneen Local Municipality*

[2020] ZALCJHB 2 (3 January

2020) at paragraph 34, the Labour Court held that:

“[32] Giving the applicant seven days to make representations on why he should not be suspended is only part of what is required. It cannot legitimize the failure to properly inform the applicant of the basic tenets of what he is alleged to have done wrong, and why it was necessary to suspend him with reference to at least one of the grounds listed in Regulation 6(1)(a) and (b). The point is simply that how can it be said that the applicant had a proper opportunity to make representations if these basic requirements were not met? Even though the applicant ultimately did make representations as he was called on to do, this equally cannot remedy

these failures...”

(emphasis added)

[23] All the facts considered the suspension of the applicant was unlawful in that the respondents failed to comply with the peremptory prescripts of Regulation 6.

[24] In *Matlala v Greater Tzaneen Local Municipality* [2020] ZALCJHB 2 (3 January 2020) at paragraph 34, the Labour Court held that:

“...There appears to be an ex post facto justification of the suspension, but considering the provisions of Regulation 6 and the purposes thereof, such an approach cannot be permitted.”

[25] As in *Matlala supra* the applicant also has no alternative remedy available to him, considering the fact that he has approached this Court on a legality

challenge and does not assert any rights in terms of the Labour Relations Act. >

[26] The concluding sentiments expressed in *Matlala* at paragraphs 37 to 39 are equally apposite in the present application:

”[37] Lastly, the consideration of prejudice favours the applicant. He would be prejudiced in the conduct of his duties should he be excluded from the workplace without proper cause or reason. The longer this suspension endures, the more difficult it will be for a person fulfilling the kind of functions of the applicant to properly and effectively resume work. The situation is exacerbated by the fact that the respondent’s council immediately appointed a new acting municipal manager. The simple reality also is, and as matters stand, there is no indication of what the applicant has even done wrong, and on a prima facie basis, at the very least, he appears to have been doing a proper job until the suspension landed. It is in the interest of the public and the statutory functions the applicant is meant to discharge under the Systems Act that the applicant’s suspension be lifted.

[38] However, this is not the end of the road for the respondent. Nothing stands in the way of it still being able to suspend the applicant going forward. It must just comply with Regulation 6. It must formulate the prima facie basis on which it alleged that the applicant had committed serious misconduct. It must then indicate what reasons as contemplated by regulation 6(1) would necessitate the applicant’s suspension. And then the applicant must be called upon to make representations by way of a notice of intention to suspend reflecting this particularity. If it is true that the applicant committed serious misconduct, then this should not be hard to do.

[39] In sum therefore, I am satisfied that the applicant has met the requirements necessary in order for him to obtain the relief he

seeks. The applicant has a clear right to the relief he seeks, has no alternative remedy available to him, and considerations of prejudice favour him. The applicant’s application must thus succeed, his suspension be uplifted, and he be allowed to immediately resume his duties.”

[27] The application must therefore succeed.

Costs

[28] In the exercise of my discretion as to costs, there respondents though unsuccessful advanced an arguable case and as in Matlala where the facts are analogous to the present case, the Labour Court there correctly in my view highlighted an abiding reality, “that that there is still a proper process that can follow, and an ongoing employment relationship between the parties...” The Labour Court therefore made no order as to costs. I align myself with that approach.

Order

[29] In the result, the following order is made:

(4) There is no order as to costs.

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT

OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION

MAHIKENG

APPEARANCES

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Prepared on 13 October 2026 · Esheria