

SOUTH AFRICA / JUDGMENT

Mokapane and Others v Mogalakwena Local Municipality (J 244/15) [2015] ZALCJHB 97 (18 March 2015) [2015] ZALCJHB 97

COURT

Labour Court Johannesburg

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

J 244/15

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

J 244/15

DATE: 18 MARCH 2015

Not Reportable

In the matter between:

MOKAPANE VAALTYN LETSOALO.....First Applicant

SECOND AND FURTHER APPLICANTS AS PER

ANNEXURE 'A' HERETO.....Second and Further Applicants

And

MOGALAKWENA LOCAL MUNICIPALITY.....Respondent

Date heard: 04 March 2015

Delivered: 18 March 2015

RABKIN-NAICKER J

- [1] The applicants, some 160 employees brought an urgent application seeking an order directing the respondent to pay amounts deducted from their January 2015 salaries. The application is therefore in essence for a final mandatory interdict. The application was first set down on 24 February 2015 when Steenkamp J granted an order by consent which resulted in the applicants returning to the workplace. The remaining relief sought was postponed for hearing on 4 March 2015 with costs of the 24th February to stand over.
- [2] The context and background to the application may well be somewhat disheartening to those citizens who rely on municipal services provided by the respondent. The founding affidavit records that the council of the municipality has been racked by conflict and strife between two factions of the African National Congress which has an overwhelming majority of seats on the council of the respondent. For our purposes it is only necessary to record that one of the factions was opposed to the suspension of the municipal manager, Mr Shella William Kekana, (the Kekana faction). The other faction favoured his suspension (the anti-Kekana faction).
- [3] Various high court applications have ensued in the wake of the above conflict which were referred to in the founding papers. For the purposes of this judgment it is necessary to record that the conflict manifested itself in a strong police presence at the main municipal building and new security personnel being brought in by the anti-Kekana faction. It is averred in the founding papers that since November 2014, the staff have been unable to return to duty, fearing for their safety and well-being. The police and security guards, they claim, act on the instructions of the anti-Kekana faction and HAVE barred them from entering the premises.
- [4] The applicant employees therefore stationed themselves inside the main municipal yard and at the library building and adjacent to the main municipal building. They aver this amounted to reporting for duty and attendance registers are annexed to the papers recording the names of those who attended at the library.
- [5] It is not disputed that on 24 November 2014 members of the SAPS acting on the instructions of the anti-Kekana faction cordoned off all the entrances and exits to the municipal buildings at approximately 16h00. According to the applicants they proceeded to use tear gas and rubber bullets to forcibly expel employees and the security guards appointed by the Kekana-faction were ordered to leave. On the respondents version this “scuffle” ended on the same day. On the 25th November the majority of the council’s employees returned to work – more than 1000 of them. It is respondents case that the applicants did not report for duty in support of the Kekana faction. They aver that the applicants were addressed on a number of occasions by Kekana.

- [6] Returning to the legal skirmishes between the factions, I record that on 4 December 2014, Kekana approached the high court and obtained an interim order against the police services to immediately remove all persons from the municipal buildings not having the permission of “SW Kekana the municipal manager of the applicant”. Kekana was suspended on 4 December 2014 and on 8 December 2014, the MEC for Cooperative Governance & Traditional Affairs seconded a Mr Selepe (Selepe) to act in his stead.
- [7] On the 6 January 2015, the applicants tried to gain entry to the premises and aver that they were again prevented from doing so by the police who made use of water canons and rubber bullets. The respondent avers that the ‘scuffle’ broke out in that the applicants were infiltrated by a group of security guards (those no longer employed by the respondent) who were heavily armed together with a group of members of the Mahwelereng Residents Association. Kekana who was on suspension and Mabuela, an expelled councilor, were also present.
- [8] The applicants received a notice issued by Selepe on 8 January 2015 stating that they had embarked upon an unprotected strike and the ‘no work no pay principle applied’. On 28 January 2015, amounts substantially less than their normal salaries were paid into applicants bank accounts. Certain amounts that had been deducted in respect of an item referred to as ‘unpaid leave’.
- [9] It is applicants’ case that they attempted to return to work on various occasions since 24 November 2014, but on each occasion were prevented from doing so. These include 8 December 2014, 6 January 2015 and again on 23 February 2015.
- [10] The respondent denies that they have not been able to return to the workplace. Other employees have been at their work stations. However it is respondent’s case that the applicants had not been prepared to report for duty in the normal way but rather entering in a singing crowd which included other persons such as the former security guards removed by the anti-Kekana faction.
- [11] The respondent acknowledges that members of the SAPS entered its premises on 3 November 2014 and that they had prevented a group of people, including the applicants, from entering the premises on 6 January
2015. They aver that the SAPS were there to maintain law and order, and protect the municipality’s assets.

Evaluation

- [12] I return to my statement in the first paragraph of this judgment that this urgent application is for a mandatory final interdict. The onus is therefore on the applicants to establish the three requirements for a final interdict: a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.[1]

[13] In *Jaffit v Garlicke & Bousfield Inc* 2012 (2) SA 562 (KZP) the court focused on the first requirement as follows:

“A party seeking to establish a clear right so as to justify a final interdict is required to establish, on the balance of probability,

facts and evidence which prove that he has a definite right in terms of substantive law. (See Nienaber v Stuckey 1946 AD 1049 at 1053 and 1054; Mosii v Motseoakhumo 1954 (3) SA 919 (A); and De Villiers v Soetsane 1975 (1) SA 360 (E) at 362.).... where the authorities refer to a clear right, it is reference rather to a right which is clearly established. (Compare Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa 9 ed at 93; and Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5 ed at 1458.)

[14] I must therefore decide whether on the papers, the applicants have clearly established the right to be paid their salary for the period in question on the basis that they tendered their services to their employer. I find on the papers, and taking into account the Plascon Evans rule, that the right has not been clearly established. On the respondents version the applicants were aligned with a particular faction and were addressed by leaders of the faction while the standoff was taking place. They were supported in their attempt to go into the building en masse by armed former security guards and other persons not employed by the municipality. Mr. Hulley for the applicants submitted in court that there was no reason why they should not have gone in to work in a singing group. Over and above the fact that it was not just the applicants that wished to enter en masse, in the whole context of the matter, what the applicants describe as their attempts ‘to gain entry’ to the building simply cannot be equated with an attempt to reach their work stations and tender the services they are remunerated for.

[14] There are no angels in this matter. The major problem that the court has had in determining this application is this: neither the ‘employers’ nor ‘employees’ in this case appear to have been motivated in their actions by employment related issues. Rather power politics was at play. This is why there was no strike or lock-out, no matters of mutual interest or rights disputes raised as issues in the disputes between them. On both sides of the divide persons were united not because of their different interests arising from an employment relationship, but because of other allegiances. The situation of certain employees being outside of the building containing their workstations, and a police presence guarding the entrance to that building, arose from factors unrelated to employment relations. One may pose the following question:

Should our employment legislation (hard fought for by previous generations) and the labour court be used to adjudicate these type of battles?

[13] In any event, given my finding that the applicants have failed to clearly establish a right to the relief they seek, their application stands to be dismissed. Taking into account the real genesis of the dispute, the persons involved would be better served by attempting to solve their problems in the municipal or party political structures from whence the problems

stem. I believe it is appropriate for me to make no costs order in this application and let both sides bear their own costs. The real losers in this dispute are the members of the community the respondent is supposed to serve. In all the circumstances, I make the following order:

Order

1. The application is dismissed.

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Adv G.I. Hulley S.C.

Instructed by: Phungo Incorporated

Respondent: Advocate Kenndy Tsatsawane

Instructed by: Hogan Lovells SA

[1] (Setlogelo v Setlogelo 1914 AD 221 at 227).

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