

SOUTH AFRICA / JUDGMENT

## Mothogoane and Another v Lepelle-Nkumpi Local Municipality and Another (J 4115/18) [2018] ZALCJHB 411; (2019) 40 ILJ 1072 (LC) (11 December 2018) [2018] ZALCJHB 411

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

J 4115/18

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IN THE LABOUR COURT OF  
SOUTH AFRICA, JOHANNESBURG  
Reportable  
Case no: J 4115/18

In the matter between:

THABO  
BEN MOTHOGOANE  
First  
Applicant  
ROSINA MANGAKA  
NGOVENI  
Second  
Applicant  
and  
LEPELLE-NKUMPI LOCAL  
MUNICIPALITY  
First Respondent  
CLLR N. G. SIBANDA  
(MAYOR OF THE FIRST  
RESPONDENT)  
Second Respondent  
Heard: 22 November  
2018  
Delivered: 11 December  
2018

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**JUDGMENT****MAHOSI, J**

[1] This is an urgent application in terms of which the applicants seek an order in the following terms:

‘1. Dispensing with the requirements of Rule 7 of the Rules for the Conduct of proceedings in the Labour Court and hearing the above

application on an urgent basis in terms of Rule 8 of the abovementioned Rules; Declaring the Resolutions No: 6.1.01/2018/2019 and No: 7.2.02/2018/2019 by the 1st Respondent’s Council to be invalid, unlawful and of no force and effect and setting the same aside;

2. Declaring the Applicants’ suspensions as a consequence of the aforementioned Resolutions to be invalid, unlawful and of no force and effect and setting the same aside;
3. Ordering the Respondents to reinstate the Applicants with immediate effect and to forthwith comply with the Applicants’ contracts of employment and conditions of service;
4. Ordering the 1st Respondent to pay the costs of this application on a scale as between attorney and client;
5. That further and/or alternative relief that this Honorable Court deems fit and appropriate be granted to the applicant.’

[2] Prior to outlining the applicants’ case in detail and considering the issues that gave rise to the claim, it is necessary to summarise the facts that form relevant background to the dispute between the parties.

[3] The first applicant commenced his employment with the first respondent on 1 September 2017 as its Municipal Manager and the second applicant commenced his employment with the first respondent on 1 April 2018 as its Chief Financial Officer. They are both employed in terms of a fixed term contracts.

[4] On 26 October 2018, the first applicant was served with a notice of intention to suspend him in terms of which the following was stated:

‘1. Council in its special meeting held on 26 October 2018 noted that there are serious allegations of misconduct against you which require that Council should consider suspending you from duty as a precautionary measure pending a full investigation into the said allegations. Council consequently authorised the Executive Mayor to serve you with an intention to suspend you from duty pending

investigations of allegations of misconduct against you.

2. The allegations of misconduct against you are as follows:

2.1 The Municipality is implicated as one of the Municipalities which has invested approximately One Hundred and Fifty Million (R150 000 000) with VBS. The said institution is a mutual bank and not registered in terms of the Banks Act. A municipality is not allowed to invest with a Mutual bank. As the Municipal Manager and the Accounting Officer of the Municipality you are the most senior employee who could have been involved in the alleged investment.'

3. Council views these allegations as very serious as they involve an abuse of huge amounts of money which belongs to the Municipality hence it resolved to conduct its own investigation into the allegations. In view of the seriousness of the allegations, and the position you hold in the Municipality as head of the administration at the municipality, Council is of the view that the integrity of the investigation as its findings may be compromised in the event you remain in active duty pending investigations. Furthermore it will be detrimental to the interests of the Municipality if the investigations are conducted while you are still on duty since there is a potential that you may interfere with the investigations, there is a likelihood that you may temper with or destroyed documents which are necessary for the investigations since you are the custodian of all the documents at the Municipality, potential witnesses feel intimidated as the witnesses will need your permission to consult with the investigators and may commit further acts of misconduct. The above are some of the reasons why Council intends placing you on precautionary suspension.
4. In the circumstances you are requested to provide the reasons as to why you should not be suspended pending the conclusion of the investigation and possible disciplinary hearing. Your reasons should be submitted to the Mayor by not later than Friday the 2nd November 2018 before 16:00. In the event the Mayor does not receive the said reasons as stated above Council may unfortunately take the decision without your input.'
- [5] The second applicant was also served with a similar letter of intention to suspend him from his duty. The applicants were both required to provide reasons by no later than 2 November 2018 at 16:00 as to why they should not be suspended pending the conclusion of the investigation and possible disciplinary hearing, failure of which the Council would take a decision without their input. On 29 October 2018, the first applicant addressed an email to the respondents requesting that he be provided with the report that was served before Council and which resulted in the resolution as well as a copy of the resolution.
- [6] On 1 November 2018, the applicants' attorney addressed a correspondence to the second respondent requesting to be provided with the item and report that served before the Council and which resulted in the resolution of intention to suspend the applicant as well as the minutes of the Council reflecting the attendance by councillors, the procedure followed and the resolution. As no response was forthcoming, the applicants' attorney addressed further two letters to the second respondent on 6 November 2018.
- [7] On 8 November 2018, the applicants received correspondence from the second respondent in terms of which they were provided with the requested Council resolution. The applicants were further requested to make representation before 8:00 the following day. On 9

November 2018, the applicants' attorney addressed a correspondence to the second respondent advising that the applicants would only be able to make their representation by 12 November 2018. On the same day, the Council took a resolution to suspend the applicants with immediate effect notice of which was served on them on 13 November 2018.

- [8] On 15 November 2018, the applicants' attorney addressed a letter of demand to the respondents, demanding the upliftment of the applicants' suspension. In the absence of a response, the applicants brought this application. The Municipality opposed this application for lack of urgency and on merit.

### Urgency

- [9] As earlier intimated, in this matter, urgency is strongly opposed. The Municipality argued that the applicants were served with the notices of intention to suspend them on 26 October 2018, but failed to make representations because of their legal representative's unavailability in that he was involved in several urgent applications wherein he represented the Mahikeng Local Municipality. It was argued, on behalf of the Municipality, that this was an indication that the matter was never urgent for the applicants and further that if there was urgency, such urgency is self-created.

- [10] The requirements for urgency are trite.[1] A party seeking urgent relief must set out the reasons for urgency and why urgent relief is necessary. In *Maqubela v SA Graduates Development Association and Others*, [2] considerations for urgency were set out as follows:

'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant to adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary.'

- [11] In the case where a party seeks final relief on an urgent basis, such as the applicant in this matter, the bar is raised even higher and I find the following passage in *Tshwaedi v Greater Louis Trichardt Transitional Council* [3] instructive:

'... An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief...'

- [12] It is not in dispute that the Council took a resolution on 9 November 2018 to suspend the applicants and that they were served with notices of suspension on 13 November 2018. This application was filed on 16 November 2018. Having had regard to the papers before me, and particularly the fact that this matter involves allegations of misappropriation of millions of municipal funds, which are in their very nature public funds, and also the possibility that it might be out of the public purse that this litigation is funded and further, in keeping with the tenets of the Labour Relations Act [4] (LRA), to resolve labour disputes speedily, I will deal

with the issues raised by the parties hereunder.

The relief sought by the applicant

[13] The applicants challenged both the legality of resolutions of the first respondent and the applicants' suspensions on three grounds. The first ground is that the resolutions are unlawful for lack of compliance with section 160(3)(c) of the Constitution and section 30(3) of the Municipal Structures Act[5]. The second ground is that the suspensions are not compliant with Regulation 6 of the Disciplinary Regulations[6] and the third ground is that there is no rationale behind the decision to suspend.

Constitutionality

[14] The applicants' contention is that none of the resolutions in question were taken pursuant to a vote in terms of section 160(3)(c) of the Constitution and section 30(3) of the Municipal Structures Act. Section 160 of the Constitution that provides as follows:

‘(1) A Municipal Council—

- (a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;
- (b) must elect its chairperson;
- (c) may elect an executive committee and other committees, subject to national legislation; and
- (d) may employ personnel that are necessary for the effective performance of its functions.

(2) The following functions may not be delegated by a Municipal Council:

- (a) The passing of by-laws;
- (b) the approval of budgets;
- (c) the imposition of rates and other taxes, levies and duties; and
- (d) the raising of loans.

(3)

- (a) A majority of the members of a Municipal Council must be present before a vote may be taken on any matter.
- (b) All questions concerning matters mentioned in subsection (2) are determined by a decision taken by a Municipal Council with a supporting vote of a majority of its members.
- (c) All other questions before a Municipal Council are decided by a majority of the votes cast.’

[15] Section 30(3) echoes the provisions of section 160(3)(c) and it provides as follows: ‘Quorums and decisions

(1) A majority of the councillors must be present at a meeting of the council before a vote may be taken on any matter.

(2) All questions concerning matters mentioned in section 160(2) of the Constitution are determined by a decision taken by a municipal

council with a supporting vote of a majority of the councillors.

(3) All other questions before a municipal council are decided by a majority of the votes cast, subject to section 34. 5

(4) If on any question there is an equality of votes, the councillor presiding must exercise a casting vote in addition to that

councillor's vote as a councillor.

(5) Before a municipal council takes a decision on any of the following matters it must first require its executive committee or executive mayor, if it has such a committee or mayor, to submit to it a report and recommendation on the matter—

(a) any matter mentioned in section 160(2) of the Constitution;

(b) the approval of an integrated development plan for the municipality, and amendment to that plan; and

(c) the appointment and conditions of service of the municipal manager and a head of a department of the municipality.'

[16] In *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others*[7] the Court stated as follows:

'...On the other hand, the procedure envisaged in section 160(3)(c) is that if the motion does not concern any of the functions which are set out in section 160(2) of the Constitution, a decision can be taken by a majority of the votes cast. This would mean that a mere majority of the quorum required would suffice in order to pass a motion. Following the scenario sketched above, this would mean that if 13 council members out of a complement of 24 or 25 attend a meeting, a motion would then be carried if seven of the council members in attendance voted in favour of it...'

[17] In raising the constitutional challenge, the third respondent relied on his knowledge, as a Municipal Manager, of the fact that the Council has never before put a matter for vote as required. In its answering affidavit, the Municipality submitted that the motions to adopt the resolutions in question were unanimous, making it unnecessary to vote. This was simply denied by the applicants in the replying affidavit.

[18] There is a real dispute of fact that exists on the papers in relation to the question whether the decision was taken by a majority of votes casted. To establish this, the Court has to consider the facts as set out in the pleadings in accordance with the well-known principles set out in *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd*[8] which were restated by the LAC in *Kwa-Zulu Natal Tourism Authority and Others v Wasa*[9] where it stated as follows:

‘...a founding affidavit must set out all of the essential evidence which, if left unchallenged, would prove the applicant’s case and grant it the relief sought. Alternatively, challenges to the averments the applicant makes could arguably not be sustained.

However, where an applicant can or should anticipate that the facts essential for it to prove its case would be challenged, it should not proceed by way of application but by way of action. The reason for this is that where there will be dispute of fact the court will be unable to determine on the papers before it where the truth lies and it will simply dismiss the application on the basis that the applicant had failed to discharge its onus by proving its case on a balance of probabilities. While the Court always has a discretion to refer certain issues in an application for oral evidence, where there are disputes of fact, this is not automatic. In my view, a Court will or should however never refer an application to be determined by the leading of oral evidence, thus converting an application to a trial, where an applicant, in total disregard of the principle that where disputes of facts are anticipated a matter should be instituted by way of action, proceeds nonetheless by way of an application.’

[19] The first applicant only made a bold statement that he knows for a fact the resolutions were not taken pursuant to a vote and relied on his knowledge that the Council has never before put a matter for vote as required. To counter this, the Municipality submitted that the decision was taken unanimously. The Municipality’s submission was met with a bare denial from the applicants and no basis was laid for disputing the veracity or accuracy of the averment.

[20] The issue here is not whether what the Municipality says is true but whether applying the *Plascon Evans* test, the Court is obliged to accept the version of the Municipality.[10] On a full conspectus of all the evidence, the applicant’s averments are not sufficient to satisfy the Court on a balance of probabilities that the resolutions were taken without voting. In the absence of the facts being tested by leading oral evidence, the Court has no choice but to accept the respondent’s version that the motion was passed unanimously by the majority of the quorum required as contemplated by section 60(3) of the Constitution. Where a decision is unanimous, it means everyone is in total agreement. There was, therefore, nothing before the Council to be debated or to be put to vote. The applicants’ constitutional challenge can, therefore, not succeed.

Non-Compliance with Regulation 6

[21] The applicants attacked the validity of the notices of suspension on the basis that they contain no specificity as they set out almost verbatim the wording of the Regulation 6(1). In essence, they allege that the respondents failed to provide substantive explanation or justification for not allowing the applicants to remain in active duty pending investigation. Regulation 6 provides as follows:

‘Precautionary suspension

6.(1) The municipal council may suspend a 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) jeopardise 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 a 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 [7] 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 [7] days.
- (4) After having considered the matters set out in subregulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.
- (5) The municipal council must inform -
  - (a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and
  - (b) the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven [7] days after such suspension.
- (6)
  - (a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.

- (b) The period of three months referred to in paragraph (a) may not be extended by council.’
- [22] It is apparent from the reading of the aforementioned Regulation that what is required for the suspension to be lawful is at least a reasonable belief on the part of the Municipality that prima facie, the employee had committed an act of serious misconduct, an objectively justifiable reason to deny the employee access to the workplace and a reasonable opportunity to make representations prior to the decision to suspend being taken. The applicant’s contention is that the Municipality failed to satisfy the latter two requirements.
- [23] The reasons proffered by the Council for placing the applicants on precautionary suspension were that, given the seriousness of the allegations and the positions they hold: (a) they might compromise the integrity of the investigation and its findings in the event they remain in active duty pending investigations, (b) it would be detrimental to the interests of the Municipality if the investigations are conducted while they are still on duty since there is a potential that they may interfere with the investigations,
- (c) there is a likelihood that they may temper with or destroy documents which are necessary for the investigations since they are the custodian of all the documents at the Municipality (d) the potential witnesses may feel intimidated and will need their permission to consult with the investigators and (e) they may commit further acts of misconduct.
- [24] The applicants’ contention was that the allegations in their notices of suspension were identical, notwithstanding the fact that they occupy two different positions. This, they argued, amounted to nothing more than lip service to the requirements of Regulation 6.
- [25] It is not surprising that the applicants’ notices of suspension were identical. They are both the most senior employees of the Municipality and they are charged with the same offence. To add to that, they conceded that they were responsible for the investments made and that the facts in relation thereto are not in dispute. The seriousness of the allegations against them is also not disputed. The fact that their notices of suspension were identical does not render them non-compliant with Regulation 6(1).
- [26] The applicants further attacked the legality of the notices of suspension on the basis that they contain no specificity as they set out almost verbatim the wording of Regulation 6(1). They submitted that although the reasons to suspend them would apply to each and every senior manager in circumstances where there are allegations of serious misconduct, their position is different because the decision to suspend them was premised on an instruction from the Provincial Government, or at least as a consequence of political pressure. Further that to an extent that they cooperated with the forensic auditors appointed by the Provincial Treasury to determine whether any legal provisions were flouted by Municipalities by investing with VBS, they see no possibility of tempering with or destruction of documents and they cannot see any reason why their presence at the workplace may be detrimental to the stability of the Municipality. There is no merit to the applicants’ contention that their position is different.

[27] It is common cause that the resolution to place them on precautionary suspension pending internal investigations was taken by the Council. Whether the Council's resolution was informed by political or societal pressure is of no consequence. The fact of the matter is that the applicants invested an obscene amount of public money with VBS. I agree with the Municipality's contention that it could not be that such an amount of money, that has caused public outcry, could go unnoticed and unaccounted for. Had the Municipality not acted, it could have failed in its respective constitutional and legislative duties.

[28] I find the applicants' precautionary suspension to have been motivated by objectively justifiable considerations as envisaged

by Regulation 6(1). In fact, given the seriousness of the alleged misconduct the applicants are charged with, their removal as a precautionary measure is compelling.

[29] The applicants further challenged their suspension on the basis that the Municipality failed to comply with Regulation 6(2). The submission made in this regard was that the applicants were deprived of an opportunity to show that the allegations of misconduct are unfounded and that the suspension would not be justified.

[30] As earlier intimated, the notices of suspension were served on the applicants on 26 October 2018 and they were required to make representations by 2 November 2018. They only requested further particulars from the Municipality on 29 October 2018 and on 1 November 2018. They were provided with the resolution on 8 November 2018 and were further required to make representations on 9 November

2018. This was the day on which the Council was due to hold a special meeting to consider the applicants' representations. The applicants did not make the representations, instead they instructed their attorney to address correspondence to the Council, which records:

'6. Mr Scholtz has been involved in several urgent applications during the last few days and is currently representing the Mahikeng Local Municipality in a disciplinary enquiry held in Mahikeng. Considering the stance adopted by you, the extremely short notice afforded in terms of your aforementioned letter and our Mr Scholtz's unavailability, we will only be able to provide you with our client's representations by Monday, 12 November 2018.'

[31] As per their notices of intention to suspend, the Council passed a resolution to suspend them without their input. Although, the applicants were required to make representations on 2 November 2018, it was only on 9 November 2018, after the applicant's failure to make representations that the Council resolved to suspend them. They were not only afforded seven days within which to make representations prior to their suspension as required by Regulation 6(2), but that period was extended for them. They were also provided with a copy of the resolution as per their request.

[32] Although the period of extension provided was short, the applicants were afforded reasonable time as required by Regulation 6(2). In addition, it is apparent from their founding affidavit that they had enough information which would have enabled them to

make representations within the period afforded to them in that they attended a briefing session on 28 August 2018 in relation to the provincial forensic audit. It was quite unfortunate that their attorney had other matters that were more pressing than theirs, which made it impossible for them to make representations by 9 November

2018. I therefore find that the evidence is compelling that the Municipality was conscious of the importance of the requirements in the overall scheme to ensure fairness.

[33] For the aforementioned reasons, I am satisfied that the suspension was both fair and lawful in that there was compliance with regulation 6. The applicants had a reasonable and fair opportunity to make representations in response to the allegations made against them, which were clearly set out in the notices of suspension and their suspension is on full pay and shall continue for a period of three months ending on 9 February

2019. Of importance is that should the disciplinary proceedings not commence prior to 9 February 2019, their suspensions shall automatically lapse.

[34] In the circumstances of this case, taking into account the applicants' positions, the serious nature of the allegations against them, the possibility that they could adversely influence the investigation, the public interest in ensuring that allegations of corruption and mismanagement at the highest levels of the public service are acted against swiftly and efficiently, I am satisfied that the suspension was both fair and lawful. For these reasons, the application must fail.

#### Costs

[35] The rule of practice that costs follow the result does not apply in Labour Court matters.[11] However, in this case I am of the view that the costs of this litigation must be borne by the applicants. This is a typical case

where the litigant is clearly abusing the court's processes and scarce judicial resources have been channelled on a meritless

application brought before an urgent court which is already clogged.

[36] In the circumstance, I make the following order:

#### Order

1. The application is dismissed with costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Mr F. Scholtz of Scholtz Attorneys

For the Third Respondent:

Advocate T.B. Hutamo,

Instructed by:

Mapotene Mangena Inc. Attorneys

[1] See: Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977

(4) SA 135 (W).

[2]

(2014) 35 ILJ 2479 (LC) at para 32.

[3]

[2000] 4 BLLR 469 (LC) at para 11.

[4] Act 66 of 1995 as amended.

[5] Act 117 of 1998.

[6] Local Government: Disciplinary Regulations for Senior Managers, 2010.

[7] 2015 (10) BCLR 1187 (CC) at para 20

[8]

[1984] 2 ALL SA 366 (A); 1984 (3) SA 623 (A).

[9]

(2016) 37 ILJ 2581 (LAC).

[10] Kwa-Zulu Natal Tourism Authority and Others v Wasa (2016) 37 ILJ 2581 (LAC).

[11] Zungu v Premier of the Province of Kwa-Zulu Natal and Others (2018) 39 ILJ 523 (CC).

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