

SOUTH AFRICA / JUDGMENT

Ndwandwe and Another v Nkosi and Another (D536/21) [2021] ZALCD 72 (3 September 2021)

[2021] ZALCD 72

COURT

Labour Court Durban

BEFORE

L R Naidoo

CASE / FILE NUMBER

D536/21

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, DURBAN****Not****Reportable****Case****No: D536/21****In**

the matter between:

BAMBA

EK

NDWANDWE First

Applicant

UMKHANYAKUDE DISTRICT

MUNICIPALITY Second

Applicant

And

MXOLISI

NKOSI First

Respondent

MAYOR

G.P

MOODLEY Second

Respondent

Heard: 3

September 2021

Delivered: This

judgment was handed down electronically by circulation to the parties' legal representatives by email by the Registrar.

The
date and time for handing-down is deemed to be 10h00 on date on which
the email is sent to the parties by the Registrar.

Summary: Opposed
Urgent application

JUDGMENT

NAIDOO, AJ

Introduction

- [1] This is an application for urgent declaratory and interdictory relief brought in terms of section 158(1)(a)(ii), (iii) and (iv) of the Labour Relations Act 66 of 1995 (“LRA”).
- [2] It is the latest salvo in series of legal skirmishes between the parties in various courts and an unfortunate display of public officials behaving badly at the expense of ratepayers.
- [3] This matter came before me on 30 August 2021 as an urgent application. It was postponed by consent to 3 September 2021 to allow the applicants to deliver a replying affidavit and for all of the parties to file heads of argument. The application was heard on 3 September 2021.

Background

facts

- [4] The first applicant is the Ministerial Representative (commonly referred to as the “administrator”) appointed by the MEC for Co-operative Governance and Traditional Affairs (“MEC”) in terms of section 139(1)(b) of the Constitution of the Republic of South Africa.
- [5] The first applicant’s powers and terms of reference are set out in his letter of appointment dated 7 February 2021. The appointment itself is not in dispute although the nature and extent of his powers have been placed in issue by the respondents.
- [6] The second applicant (“the municipality”) has not been dissolved as contemplated in section 139(1)(c) of the Constitution although it is common cause that it has not been functioning optimally, thereby necessitating the appointment of an administrator.
- [7] The first respondent is the municipal manager of the municipality. He initiated the complaint to the MEC which resulted in the appointment of the first applicant on the basis that the municipality was dysfunctional and was not capable of discharging its obligations.
- [8] The second applicant is the mayor of the municipality and purports to be the supervisor of the first respondent.

- [9] On 4 August 2021 the first applicant issued the first respondent with a notice of intention to suspend and called upon him to provide reasons as to why he should not be suspended. The first respondent refused to provide such reasons on the basis that the first applicant lacked the legal authority to effect such a suspension. He then initiated proceedings in the Pietermaritzburg High Court to inter alia interdict the first respondent from taking steps to place him on precautionary suspension. On 12 August 2021 the High Court struck the matter off the roll for lack of urgency.
- [10] On 13 August 2021, the first applicant purported to place the first respondent on precautionary suspension in terms of paragraph 3(i) of the terms of reference of his appointment which provides that he may “institute disciplinary processes contemplated in the Disciplinary Regulations for Senior Managers, 2010, and other disciplinary functions in respect of staff below senior managers contemplated in Section 67 of the Municipal Systems Act 32 of 2000”.
- [11] On 16 August 2021, the first respondent approached this court for an order inter alia setting aside his suspension on the basis that it was unlawful. The matter came before Whitcher J on 18 August 2021 when it was dismissed for lack of jurisdiction.
- [12] On 26 August 2021, the council of the municipality convened a meeting where it resolved inter alia that “Mr S.J Madela be appointed as an Acting Municipal Manager for 2 months pending submission of the Investigator’s report to Administrator and Council”.
- [13] The minute of the council meeting reflects that the suspension of the first respondent by the Administrator was “noted and confirmed” by Cllr S.W Mzinyane.
- [14] The pending High Court application has been withdrawn and the first respondent has expressed an intention to bring a new application in the High Court to have his suspension set aside. The first respondent has disavowed any intention to refer an unfair labour practice dispute to the Bargaining Council regarding the fairness of his suspension.
- [15] This application follows on the heels of the application which served before Whitcher J and relates to the same suspension which formed the subject matter of that application.
- [16] The first applicant seeks the following relief:
- (i) That the Applicants’ failure to comply with the rules of this court relating to notice, service and prescribed time period be dispensed with, that this application is heard on urgent basis in terms of Rule 8 of the rules of this Court.
 - (ii) That a rule nisi be issued calling upon the Respondents to show cause if any why the following orders should not be granted.

- (a) That it is declared that the First Respondent breached the authority, effect and terms of the precautionary suspension made by the First Applicant on 13 August 2021 by coming to work on Tuesday 24 August 2021, Wednesday 25 August 2021 and on 26 August 2021 and carrying out the duties as the Municipal Manager of the Second Applicant while the precautionary suspension is in force and operation.
- (b) That the First Respondent is directed to vacate the office of uMkhanyakude Municipality immediately after this order is made.
- (c) That the First Respondent be interdicted and restrained from coming to the offices of the Second Applicant which are situated at 13433 Kingfisher Street, Mkhuze, KwaZulu-Natal until such time that the precautionary suspension is lifted by the First Applicant or reviewed and set aside by the court of law.
- (d) That the Second Respondent undermined, breached and contravened the provisions of section 139 (1) (b) (ii) of the Constitution by issuing an instruction on 24 August 2021 to the First Respondent to ignore and disregard the authority, terms and effect of the precautionary suspension made on 13 August 2021.
- (e) That the Second Respondent be interdicted and restrained from issuing and or making any further instructions in future to the First Respondent or inciting the First Respondent to come to the First Applicant's premises which are situated at 13433 Kingfisher Street, Mkhuze, KwaZulu-Natal until such time that the precautionary suspension is lifted by the First Applicant or reviewed and set aside by a court of law.
- (f) That the First and Second Respondent be ordered to pay costs of this application jointly one paying and the other absolved.

(iii) That the relief sought in paragraph (a) to (e) operate as interim relief immediately.

Urgency

- [17] The application was launched on Friday, 27 August 2021 and set down for hearing on Monday, 30 August 2021. Although the respondents had delivered answering affidavits by 30 August 2021, the matter was postponed to 3 September 2021 to allow the applicants to file a replying affidavit and for the parties to deliver heads of argument.
- [18] The issue of urgency was vigorously opposed by the respondents. Although I am not persuaded that the degree of urgency was warranted, this court has a discretion to hear the application if it is convenient to do so.
- [19] A material consideration is that by the time the matter was due to be heard on 3 September 2021, the full set of affidavits and heads of argument had been filed. In the circumstances, no purpose would be served in delaying the hearing of the matter.

Lack of Authority

- [20] The first and second respondents have challenged the applicants' authority to bring this application. The challenge is pertinently raised in both answering affidavits.
- [21] In addition, the first respondent delivered a notice in terms of Rule 7 of the Uniform Rules of the High Court in which he takes issue with the authority of the first applicant and the attorneys of record to represent the municipality. There has been no formal response to this notice.
- [22] It is trite that the first applicant bears the onus to prove that he is authorised to institute proceedings in his own name and on behalf of the second applicant. Other than a bald allegation in the founding papers that he is so authorised, there is a notable absence of such proof.
- [23] When pressed on this issue, Mr Xulu for the applicants referred me to the first applicant's terms of reference. He was however constrained to concede that the terms of reference do not expressly provide that he was authorised to institute legal proceedings in his own name or in the name of the municipality. Mr Xulu sought to suggest that such authority could be inferred from the terms of reference. He further submitted that it should not be a bar to granting interim relief as it is an issue that can be cured on the return date.
- [24] There are several difficulties with this approach. The applicants elected to bring this application on an urgent basis. They were aware of the authority challenge as at 30 August 2021. In the replying affidavit they sought to rely on the provisions of section 139(1)(b) of the Constitution read with paragraphs 3(f) and (i) of the terms of reference as proof of such authority. As indicated earlier, it was ultimately conceded that these provisions do not expressly confer such authority.
- [25] There were several ways to resolve this issue which the first applicant inexplicably failed to address. The obvious solution would have been to obtain a resolution from the council of the municipality, authorising such legal proceedings. A council meeting was held the day before this application was brought and the launching of this application must have been within the contemplation of the applicants at the time of the meeting. Mr Xulu was unable to proffer an explanation for the failure to obtain a resolution at that meeting authorising the institution of legal proceedings as well as authorising either the first applicant or the acting municipal manager to institute these proceedings on behalf of the municipality. It would have been the obvious thing to do.
- [26] The second option would have been to obtain confirmation from the MEC that the first applicant had such authority arising either from his existing terms of reference or amending his terms of reference accordingly. In the absence of such confirmation, I am not persuaded that such authority can or should be inferred especially where it has implications for the public purse.

- [27] In *Magodongo v Khara Hais Municipality & Others*[1], Steenkamp J analysed the various authorities dealing with the powers of a municipal manager to act on behalf of a municipality. He concluded that ordinarily, a municipal manager, as the accounting officer of a municipality, would have delegated powers to institute legal proceedings on behalf of a municipality. It is only absent such a delegation that a council resolution is necessary.
- [28] In this case, it is likely that the acting municipal manager appointed on 26 August 2021 would have such delegated powers but he is not cited as a party to these proceedings nor has he deposed to any affidavits in support thereof. This omission is not explained.
- [29] It is not disputed that the system of delegations applicable to the second applicant does not empower the first applicant to institute legal proceedings on behalf of the second applicant. It is common cause that there is no council resolution authorising him to do so.
- [30] The applicants have placed no evidence before this court that they have the requisite authority to institute these proceedings. This issue is dispositive of the application and it falls to be dismissed on this basis alone. It is accordingly not necessary for me to deal with the remaining objections raised by the second respondent or to consider whether the applicants have met the requisites for an interim interdict.

Costs

- [31] It is necessary to make an observation about the conduct of the parties that gave rise to this application. Whilst I am not persuaded that the applicants have demonstrated exceptional and compelling circumstances which warrant the intervention of this court, the first and second respondents' conduct is not consistent with the conduct expected of responsible public officials.
- [32] It is accordingly in the interests of law and fairness that each party be liable for his or its own costs.

I make the following Order:

- [1] The application is dismissed.
- [2] No order as to costs.

L R Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the first and second applicants: Adv N N Xulu instructed by Seethal Attorneys

For the first respondent: Adv

M Sibeko instructed by Ngwane Attorneys

For the second respondent: Adv T Kadungure instructed by Dlodlu Attorneys

[1]

(2018) 39 ILJ 406 (LC)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCD/2021/72.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/ndwandwe-and-another-v-nkosi-unknown-topic-alcd-2021>

Prepared on 12 October 2026 · Esheria