

SOUTH AFRICA / JUDGMENT

Nkosi v Emadlangeni Local Municipality and Another (D495/20)

[2020] ZALCD 15 (22 October 2020)

[2020] ZALCD 15

COURT

Labour Court Durban

BEFORE

Schumann

CASE / FILE NUMBER

D495/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not

reportable

Case

No:D495/20

In

the matter between:

LUCKY

CYRIL NKOSI

Applicant

and

EMADLANGENI

LOCA

First Respondent

MR

MATHE (N.O)

Second Respondent

Heard

: 20

October 2020

Delivered

This Judgment was handed down electronically by circulation to the parties and /or

their legal representatives by email. The date and

time for handing-down is deemed 10h00 on 22 October 2020.

Summary:

Review

JUDGMENT

SCHUMANN, AJ

[1] In this matter the Applicant seeks an order that a ruling by the Second Respondent delivered on 28 September 2020 be reviewed and set aside. On an urgent basis, and pending the final determination of the review proceedings, the Applicant seeks an order that the Respondents be interdicted from continuing with disciplinary proceedings against him in which the Second Respondent is the Chair. It is this portion of the relief sought by the A (Part A of the Notice of Motion) which is before me.

[2] The ruling in question by the Second Respondent is annexed affidavit. The following is apparent from the ruling and the founding affidavit:

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The Applicant is employed by the First Respondent in the capacity as municipal manager.

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After an exchange of correspondence between the Mayor of the First Respondent and the Applicant on 29 August 2019 the First Respondent's council took a resolution that the Mayor should issue a letter to the Applicant calling on him to provide reasons why he should not be suspended.

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Such a letter was duly sent on 30 August 2019 and the employee responded on the same date declining to make any representations.

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On 4 December 2019 the Applicant was issued with a notice to attend a disciplinary hearing which was scheduled to be held on 18 December

2019. The hearing was adjourned and sat again on 16 January 2020 at which point the Applicant was furnished with documents the First Respondents intended to use at the hearing. The Applicant was directed to furnish a request for any further documents required by no later than 22 January 2020.

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Certain documents were given to the Applicant who also requested audio recordings of the meeting of the First Respondent's council held on 29 August 2019. The hearing was adjourned to 17 April 2020 but did not proceed because of the national lockdown and was later set down for 14 August 2020.

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On that date the Applicant was furnished with other documents requested but was informed that the recording of the would be made available after the sitting. The matter was adjourned to 18 September 2020.

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On that date and after the Applicant was informed that the recordings of the council meeting were not available, the Applicants

representative submitted written notice of a point in limine that the First Respondent had not complied with the provisions of Regulation 5(1) in that the Mayor did not present a report to council on the allegations of misconduct and that council had not passed a resolution to appoint an independent investigator as required by Regulation 5(3). (The Applicant had been provided with the recordings of 29 August 2019 by the administrator and alleged that those recordings did not properly substantiate that any resolution as contended for by the First Respondent had been passed at the council meeting of 29 August 2019.)

- [3] Applicant's point in limine before the Second Respondent was that the disciplinary process had not been lawfully instituted and that the second respondent should rule on this issue. The Second Respondent dismissed the point in limine. His primary reason for doing so was that he had no power to determine the legality of the disciplinary enquiry and that this did not fall within the scope of his function as the appointed disciplinary chair (at paragraph 27 of the ruling) However, he stated that, in the event he was wrong in such conclusion, he would deal with the substantive merits of the Applicant's objection to the process. After a survey of the facts and relevant authorities he concluded that form should not be elevated over substance and that the steps taken by the First Respondent were sufficient to comply with the regulations in question.
- [4] In a short opposing affidavit in the proceedings before me, the First Respondent pointed out that the Applicant had, in any event, wrongly conflated the processes relating to his suspension with those which preceded the institution of disciplinary proceedings. The Applicant had left a considerable gap in his narration of the events that transpired between the events of August and early September 2019 and the notice to attend a disciplinary hearing issued to the Applicant on 4 December 2019. These included on that 26 September 2019 an attorney, Mr S.A. Mdledle was duly appointed to investigate allegations of misconduct against the Applicant (as required by the Regulations) and by November 2019 had prepared a written report consisting of 103 pages which was presented to the first respondent council on 7 November 2019. The resolution to institute disciplinary proceedings against the applicant was taken at the council meeting on that date.
- [5] The First Respondent further pointed -out that there had been a very lengthy delay in institution proceedings and that, significantly, no case had been made out by the Applicant that the circumstances of the matter were exceptional or that a grave injustice would result the Applicant if interim relief the determination of the review proceedings.

[6] To the extent that the Applicants ultimate prospects of success on review are relevant to the establishment of a prima facie case for interim relief, I concur with the First Respondent's submissions that the Applicant has inappropriately merged the

processes required for his suspension with those required for the institution of the disciplinary proceedings against him. On the basis of the authorities I was referred to by the First Respondent and those contained in the ruling of the Second Respondent, and although the issues have not been fully ventilated thus far on the papers, the Applicant's prospects of ultimate success in the review application appear to be questionable. I also have some difficulty with the ultimate relief sought by the Applicant. The review is aimed not at the legality of the institution of disciplinary proceedings per se but at the ruling of the Second Respondent. Quite what effect such review would have if successful is unclear.

[7] However, it is on the issue of exceptional circumstances and the requirement of a grave injustice against the Applicant that I am persuaded the application for interim relief must fail. There is nothing exceptional about the circumstances of this matter. That the Applicant complains about the legality the process against him and/or the ruling of the chair is it, the ruling by the Second Respondent which challenge is cogent and reasonable.

I am guided in my approach to this matter decision of Myburgh AJ in *Maqoda v Director-General of, Rural Development and Land Reform and Another* (2017) 38 ILJ 2795 (LC). That the Applicant may in the fullness of time be successful in the review does not, in itself, constitute a grave injustice if the disciplinary enquiry proceeds and does not justify intervention by this court in media res.

[8] I took time to peruse various unreported authorities handed up by the Applicants counsel during argument and I am unpersuaded that they assist the Applicant. The facts of those cases are largely distinguishable from the case and the requirement of exceptional circumstances and a grave injustice are a common thread running through the overwhelming majority of the relevant cases, as confirmed in *Maqoda*. No such case has been made out in the papers before me.

[9] At the hearing of the matter I indicated that the application was dismissed with costs and that these reasons would follow. In making the order I did I was referring to the urgent application for interim relief and not to the application for review which was not before me at that stage. For purposes of clarity I therefore restate the order granted as follows:

[9.1] Part A of the Applicants notice of motion is dismissed with costs.

P Schumann

Acting Judge of the Labour Court of South Africa

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Prepared on 10 October 2026 · Esheria