

SOUTH AFRICA / JUDGMENT

Ntsoane v Thabazimbi Local Municipality (J 2585/14) [2014]

ZALCJHB 475 (2 December 2014)

[2014] ZALCJHB 475

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajane

CASE / FILE NUMBER

J 2585/14

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2585/14

MORUTSE EDWARD NTSOANE.....Applicant

and

THABAZIMBI LOCAL MUNICIPALITY.....Respondent

Heard: 6 November 2014

Delivered: 2 December 2014

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This matter came before this court on an urgent basis on 23 October 2014 and was removed from the roll by agreement. It then came before the Honourable Molahlehi J on 30 October 2014 and was postponed to 6 November 2014 on account of Counsel having taken ill.

- [2] The applicant, who is employed as the municipal manager of the respondent, seeks to have the extension of his special leave granted for the period from 2 October 2014 to 2 January 2014 be declared unlawful and the resolution of the Municipal council to extend the said period to be set aside. He further seeks an order that the respondent be directed to permit him to render his services, and that the Council's decision to suspend him be set aside. This relief is opposed by the respondent.

Background:

- [3] The applicant was appointed as the Municipal Manager, and accordingly also the accounting officer, of the respondent in terms of a five year fixed term contract effective from 1 June 2012 to 31 May 2017.
- [4] On 1 June 2014 the applicant and the Chief Financial Officer (CFO) of the respondent were requested to meet with the Regional Chairperson of the ANC, Mr Mataboge (Mataboge). During the meeting with Mataboge the applicant and the CFO were advised that the respondent intended to place them on special leave and that a resolution would be passed the following day to that effect. Mataboge requested their co-operation and requested them not to report for work the following day.
- [5] On 2 July 2014 the applicant unsuccessfully attempted to contact the Mayor. He was then placed on 3 months special leave in terms of a council resolution of 2 July 2014 with full benefits until an advisory team, which was to be provided by government advisors came to the municipality to do an analysis and assessment of its financial state of affairs.
- [6] Thereafter the applicant decided to return to work on 3 July 2014 where he discovered that the locks to his office had been changed. The Applicant's access to the Municipality's online financial systems had similarly been curtailed. Again attempts to contact the Mayor were made. On contacting the Mayor the applicant was advised that he and the CFO had been placed on special leave by way of a Municipal Council resolution the previous day and that his access had been curtailed for security reasons. This was confirmed during a meeting between the applicant and the Mayor on 6 July 2014. He had then requested that the council's decision be reduced to writing by the Mayor.
- [7] The Applicant addressed a letter to the Mayor on 18 August 2014 wherein he sought clarification of his status and requested to be advised when he would be permitted to return to work. The Applicant received a response to his letter from the acting municipal manager, Mr Booysen (Booyesen) on 2 September 2014, who confirmed the applicant's placement on special leave and advised that his powers were delegated to the acting municipal manager.
- [8] After receipt of the aforementioned letter the applicant again directed a letter to the Mayor on 16 September 2014 wherein he requested a response from the Mayor to his previous letter. The Mayor responded by way of a letter on 25 September 2014, the content of which response was identical to the response by the acting municipal manager, other than the date and the signatory. The respondent avers that the applicant avoided service of

correspondence on him and was deliberately evasive when contacted in order to arrange for such service.

- [9] The applicant submitted that his special leave is effectively nothing more than a disguised suspension, this is denied by the respondent. The applicant has chosen not to challenge the initial three month period of the special leave although he submits that it is unlawful and does not comply with the necessary regulations. The applicant does however take issue with the extension of the special leave for a further three month period by way of a further municipal council resolution on 16 September 2014.
- [10] He contended that this resolution only came to his attention on 30 September 2014 when it was sent to him with the initial resolution as well as a second resolution, rectifying the initial resolution. The reason for the extension of the special leave was allegedly due to an investigation being incomplete. There was further correspondence directed to the Mayor by the applicant's initial attorney of record, in terms of which the Mayor was advised of the alleged unlawfulness of the special leave and demands were made for the applicant to be allowed to return to his work.
- [11] Although not necessarily relevant for now, the applicant alleges that the respondent's cash flow was severely impacted by the protracted five month long strike by miners at the local mines which resulted in both the mines and unpaid, striking miners not paying municipal accounts. This resulted in employees of the municipality being partially paid or unpaid during June 2014 after which municipal employees went on strike. It is common cause that the respondent's financial situation was or remains dire.
- [12] The respondent alleges that the applicant and the CFO were both placed on special leave in order to investigate the financial affairs of the respondent, which had been under the control of the applicant. It is common cause that the respondent has not yet formally laid charges against the applicant.

Points in limine:

- [13] The respondent raised two points in limine namely, the lack of urgency and lack of jurisdiction. In respect of the issue of jurisdiction, the respondent contends that the applicant is obliged to refer the dispute to arbitration and further that the applicant is obliged to refer a suspension dispute to the CCMA or bargaining council and not this court. This is disputed by the applicant who contests that the present challenge is aimed at setting aside an unlawful decision, which falls within this courts jurisdiction by way of the content of section 158 of the Labour Relations Act (the LRA).

Evaluation:

- (a) Urgency

[14] It is my view that once a party approaches the court on an urgent basis, and the matter is removed from the roll on the set-down date either by agreement between the parties or as a result of a request by a party, or for whatever reason, the matter loses its urgent character. This is so unless it can be shown on subsequent set down dates that urgency still exists, i.e., between the dates that the matter was launched, removed from the urgent roll and on the subsequent set-down dates. This view is premised on the simple notion that a party approaches the court on an urgent basis on the grounds that if urgent relief is not granted promptly on the urgent roll as requested, an injustice or something drastic or harmful is likely to happen instantly, or in the alternative, that the harm or injustice has occurred, which necessitates the court's immediate intervention.

[15] It is trite that when it comes to urgency as contemplated in Rule 8 of the Rules of this Court, there are two considerations, firstly

whether the reasons that makes the matter urgent, have been set out and secondly whether the applicant seeking relief will not obtain a substantial relief at a later stage. Moshoana AJ emphasised this point in *Vermaak v Taung Local Municipality*[1], in the following terms:

“The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a Court to be placed in a position where the Court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the Court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date”.

[16] In his original pleadings, the Applicant had stated that his case was sufficiently urgent as he would not receive substantial redress if the matter were to be heard on the normal roll. Despite the urgent summary as given by way of background as above, it is important to restate some of the facts. The applicant alleges the following;

15.1 This was a case of total disregard of the law by the Municipality as it chose to bypass the requirements of Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers and those on discipline of local government officials. The Municipality is law unto itself and must be stopped.

15.2 When it occurred to him on 30 September 2014 that the rumour that the Municipality had decided to place him on further period of special leave until January 2015, he had acted with speed by consulting his former attorneys to take legal steps to return him to work. He contended that he further took steps to have the matter resolved out of Court but the Municipality decided not to cooperate.

15.3 Any delay in approaching the court was as a result of the withdrawal of his previous attorneys.

[16] It was common cause that the Applicant was placed on special leave for a period of three months with effect from 2 July 2014. The applicant's conditions of employment as a senior manager are governed by the Local Government: Regulations: Appointment and Conditions

of Employment of Senior Managers promulgated in terms of the Local Government: Municipality Systems Act of 2000 (the Regulations) as he had correctly pointed out. In terms of these Regulations, a senior employee qualifies to take leave under certain permissible circumstances.

- [17] It has become fashionable for municipalities in clear circumvention of Clause 6 (Precautionary suspension) of the Local Government;

Disciplinary Regulations For Senior Managers, 2010 to willy-nilly place senior managers on 'special leave' when there is cause to conduct an investigation into the running of its affairs. Special leave which is governed by clause 32 of the Regulations

essentially provides that it may be granted in accordance with the policies of the municipality where there is such an application from the senior manager. It therefore follows that the granting of special leave cannot be at the behest of the Municipality nor imposed on the senior manager. Once 'special leave' is imposed on a senior manager such as the applicant in this case, this amounts to nothing but a suspension[2], which lawfulness needs to be assessed.

- [18] The issue however in this case remains that of urgency. Upon being placed on special leave with effect from 2 July 2014, on his own version, he merely met the Mayor on 6 July 2014 and requested written confirmation of being placed on special leave. When that was not forthcoming he wrote a letter to the Mayor on 18 August 2014. No response was received until 10 September 2014. He took no further steps until 16 September when he wrote another letter to the Mayor demanding a reply to his letter of 18 August

2014. Only on 25 September 2014 did he receive a reply from the Mayor. On his version, he had further cooperated with the Municipality after being placed on special leave despite being aware that such leave could not be unilaterally be imposed on him, and also being fully appreciative of the fact that the special leave was effectively an unlawful suspension. He contended that he had cooperated with the Municipality on the understanding that an assessment or investigations would be concluded after three months and he would be allowed to resume his duties.

- [19] Further on the applicant's version, he had heard rumours from 22 September 2014 that his 'special leave' was to be extended for a further period of three months. He only contacted the Mayor on 30 September 2014 and requested resolutions taken in respect of him by the Municipality. He was furnished with copies of resolutions taken on 2 July 2014, 21 July 2014, and of 16 September 2014, with the latter effectively extending the 'special leave to 2 January 2015. On 1 October 2014 the applicant had instructed his former attorneys to send a letter to the Mayor, essentially complaining about being placed on special leave. A response was received on 3 October 2014 in which the Mayor essentially conformed that the special leave would remain in force.

[20] On the same date, the Applicant's former attorneys sent a letter of demand, placing the Respondent on terms that if he was not returned to work on 6 October 2014, he would approach the court on an urgent basis. Notwithstanding a lack of timeous response, the Applicant reported for duty on 6 October 2014, and following a meeting with the Mayor, he was advised that their discussions would be confirmed in writing. When no such written confirmation was received by 9 October 2014, the applicant had instructed his former attorney to brief counsel in order to bring this application. The former attorney resigned from her firm on 14 October 2014,

necessitating him instructing his current attorneys of record to take up the matter on the same date.

[21] As already indicated elsewhere in this judgment, the moment an urgent application is removed from the urgent roll on the set-down date for whatever reason, it invariably loses its urgent status. Other than this factor, it is apparent from the applicant's own version that for a period of three months whilst he was on special leave, with the full knowledge and appreciation that the special leave was an unlawful suspension, he cooperated with the Respondent and did absolutely nothing to get redress from this court.

[22] As it was correctly pointed out on behalf of the Respondent, the underlying causa for the suspension or special leave, i.e.

investigation into the financial affairs of the Respondent remains the same. The applicant on his own version has always been fully

appreciative that the assessments and investigations must take their course. Since these are still on-going, the extension of that special leave for the purposes of concluding those investigations cannot suddenly make the matter urgent. Furthermore, on his own version, he had through his inaction or action, acquiesced in the 'unlawfulness' allegedly perpetrated by the Respondent as he was aware from 2 July 2014 that the special leave/suspension was unlawful. A matter cannot be urgent when an applicant decides that it should be. If this were the case, such urgency is clearly self created. This Court has not been placed in a position where it can fully appreciate that if it does not issue a relief as a matter of urgency, something more than what has already happened in this case is likely to happen, or that what has taken place since 2 July 2014 with the applicant's full cooperation needs to be remedied.

[23] The applicant remains on special leave with full benefits, which leave has been extended to 2 January 2015. He has not demonstrated in view of his inaction between 2 July 2014 and 29 October 2014 when this application was launched, why urgent relief is suddenly

necessary. Accordingly, as correctly pointed out on behalf of the Respondent, the matter should be struck off the roll. In the light of these conclusions, no purpose will be served in determining a further preliminary point raised by the respondent in regards to whether this dispute should have been referred for private arbitration or not, or the merits of the application. I further do not deem it appropriate having had regard to considerations of law and fairness, for a cost order to be made.

Order:

- i. The applicant's application is struck off the roll on account of lack of urgency.
- ii. There is no order as to costs.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv L Pillay

Instructed by: Mokonyane Inc

On behalf of the Respondent: Adv JL Basson

Instructed by: Mohulatsi Attorneys INC

[1] Case no: JR315/13 at para 12

[2] See Heyneke v Umhlathuze Municipality

(2010) 31 ILJ 2608 (LC) and also South African Municipal Workers Union obo Matola v Mbombela Local Municipality

[2014] ZALCJHB 434 (10 November 2014)

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