

SOUTH AFRICA / JUDGMENT

Phetla v Mamusa Local Municipality and Others (UM117/2022) [2022] ZANWHC 37 (1 July 2022)

[2022] ZANWHC 37

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

UM117/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION -

MAHIKENG

CASE

NO.: UM 117/2022

Reportable:

NO

Circulate

to Judges: NO

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to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between

MERCY

MAEBE

PHETLA

Applicant

and

MAMUSA

LOCAL MUNICIPALITY First

Respondent

MM

MASHELE

Second

Respondent
NTHUSE
LEBEPE Third
Respondent
KGABO
P
MAPONYA
Fourth
Respondent

Delivered:

This
judgment was handed down electronically by circulation to the
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The date and time for hand down is deemed to be 10H00 on 01 JULY
2022.

JUDGMENT

PETERSEN J

Introduction

[1] This matter came before me as an urgent application on Friday, 24 June 2022. The application is opposed by the first respondent with the second to fourth respondents abiding by the decision of this Court. The applicant seeks relief against the respondents in the following terms:

"PART A

"1. That the Applicant's noncompliance with the Rules of this Honourable Court relating to service, filing and time limits be condoned and the matter be dealt with as one of urgency in terms of Rule 6(12);

2. Declaring the disciplinary proceedings instituted against the Applicant on 20–24 June 2022 in terms of the Local Government: Disciplinary Regulations for Senior Managers 2010 (the 2010 Regulations) unlawful and null and void;
3. Interdicting and restraining the First Respondent from continuing with the disciplinary proceedings instituted against the Applicant on 20–24 June 2022 until the First Respondent complies with Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2014 ('the 2014 regulations?);
4. Declaring the Appointment of the Second Respondent as the presiding officer of the disciplinary hearing to be invalid, unlawful and null and void;
5. Declaring that the appointment of the Third Respondent as the evidence leader (initiator) of the disciplinary hearing is invalid, unlawful and null and void;

6. Declaring that the appointment of the Fourth Respondent as an investigation report of the a/legation of the financial misconduct against the Applicant is in breach of the 30 May 2014 Regulation;
7. Declaring that the First Respondent is in breach of the contract of employment entered into between the Applicant and the First Respondent on 19 April 2021;
8. An order for costs against the Respondents, in the event of opposition."

The parties

- [2] The applicant is employed by the first respondent as its Chief Financial Officer and by implication as a Senior Manager as contemplated in section 56 of the Local Government: Municipal Systems Act 32 of 2000 ("the Municipal Systems Act").
- [3] The first respondent ("the Municipality") is a local municipality established and governed by section 12 of the Local Government: Municipal Structures Act 117 of 1998 ("the Municipal Structures Act").
- [4] The second respondent is a duly admitted attorney and the presiding officer of the disciplinary proceedings instituted by the Municipality against the applicant.
- [5] The third respondent is a duly admitted advocate and the Municipality's representative.
- [6] The fourth respondent is a duly admitted attorney and the investigator tasked by the Municipality.

The essence of the application

- [7] The essence of the application is set out by the applicant as follows in the founding affidavit:

"In this regard in a nutshell I submit that the attack mounted by me against the aforesaid disciplinary proceedings stems from the fact that:

- (a) The above disciplinary proceedings brought against me by the First Respondent in terms of the Local Government: Disciplinary Regulations for Senior Managers 2010 ("the 2010 regulations") actually relate to alleged misconduct that happened in 2021 and 2022.
- (b) Although both the 2010 regulations and the Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2014 ("the 2014 regulations") provide for the investigation of financial misconduct but the procedure that has to be undertaken by the First Respondent in terms of the 2010 regulation is different from the 2014 regulations.
- (c) It is trite that the 2010 regulations deal with disciplinary procedures against Senior Manager of Municipalities that happened prior to the commencement of the 2014 regulations on 30 May 2014 and the 2014 regulations deal with disciplinary action that took place from 30 May 2014 thereafter.

(my underlining)

4. PURPOSE OF THIS APPL/CATION

4.1 This application is brought on an urgent basis for the relief sought in the notice of motion and is occasioned by the fact of my suspension from employment as the Chief Financial Officer of Mamusa Local Municipality ("the municipality"? on the 1st of February 2022 and the subsequent disciplinary process launched against me by the First Respondent on 20 24 June 2022."

The merits

[8] The relevant facts on which the application is based are set out as follows in the founding affidavit:

"7. As aforesaid I am the Chief Financial Officer of the First Respondent and my appointment was with effect from 19 April 2021. I am appointed in terms of a fixed term contract for a period of five years in terms of clause 2.2 of the employment contract ...

8. I aver that on 31 January 2022, the Council of the First Respondent ("the Council) sat and allegedly took a resolution that I will be suspended as CFO. I hasten as will be fully canvassed hereunder that my suspension by Council was unlawful as Council took the decision to suspend me without the required quorum.

9. It also worthwhile to state that at the time of my unlawful suspension as indicated above I was also appointed to Act as the Municipal Manager of the First Respondent. It was in that Council Meeting where I was suspended, that Council also took a resolution to appoint Mr GJ Mothibi as Acting Municipal Manager of the First Respondent. I wish to state that by virtue of the same defect occasioned by my suspension, the appointment of the Acting Municipal Manager is also tainted by the fact that the Council resolution for the appointment of the Acting Municipal Manager was taken by Council that did not quorate.

10. As aforesaid I was unlawfully suspended by the Acting Municipal Manager on the 1st of February 2022, without a proper resolution by Council as the Council that sat and decided on my matter did not quorate and further more my response to the intention to suspend me was not deliberated by Council.

11. At the time of my suspension I was appointed as an Acting Municipal Manager (AMM) and the Municipal Mayor confirmed that I was still an AMM at the time of the alleged suspension. The Municipal Mayor continued to give me instruction as an AMM and CFO which I executed...

12. On the 20 April 2022 I was served with a Notice of Set down and the charges proffered against me, which charges except the one that deals with me performing my duties as instructed by the Mayor which is about the contravention of the suspension condition.

13. The investigation report also indicates that the investigating officer was appointed to investigate allegations of financial misconduct. The foregoing notice and the charges outlined and stipulate that the charges that have been brought against me are in terms of regulations 8 of the Local Government: Disciplinary Regulations for Senior Managers 2010 ...
14. A notice to appear at a disciplinary hearing on 09th May 2022 was delivered to me without providing me with documentary evidence that the First Respondent will rely on to prove its case and to allow me to prepare my defence. In light of this procedural defect in the process the said hearing was subsequently postponed to the 20 24 June 2022.
15. The Court will note that the notice of the disciplinary hearing provided to me and the ruling of the Chairperson has different period of the hearing ...
16. I specifically herein deal with the definition of Financial Misconduct in terms of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA").
17. On 06 June 2022, I received an email containing the Evidence Leader's bundle of documents, which were not indexed and paginated and the indexed and the paginated bundle was only provided to me three days before the disciplinary hearing.
18. On 20 June 2022, at the disciplinary hearing, my legal representative raised a list of preliminary points addressing various issues rendering the disciplinary process embarked upon by the First Respondent to charge me flawed.
19. The preliminary points raised by my legal representatives at the start of the disciplinary hearing are attached hereto and marked "MMPB".
20. The presiding officer after hearing the parties dismissed the preliminary points and ruled that the use of the 2010 regulation by the First Respondent was correct.
21. It suffices to mention that my legal representative immediately after the presiding officer's ruling requested that the matter be stood down for the purpose of reviewing and setting aside the presiding officer's decision on the preliminary points and the presiding officer blatantly refused me the postponement and ruled that the hearing would be adjourned for the following day and that if I so wished I could exercise my right to approach the Court however. he categorically stated that the hearing will proceed."

Urgency

- [9] Against the backdrop of the merits of the application, the applicant deals with the issue of urgency as follows in the founding affidavit:

"31. I submit that the matter is urgent and cannot await adjudication according to the normal roll of this Honourable Court.

32. I further reiterate that if the unlawful conduct of the Respondents was to be allowed to continue, I stand to suffer irreparable harm which may have seriously financial prejudice as the Respondents seem to be hell bent to proceed with the above unlawful process despite glaringly clear evidence of unlawfulness. This meaning I will continue defending a flawed process using my own funds to finance my legal fees, which in this case include travelling and accommodation.
33. It is clear from the foregoing that without the intervention of this Honourable Court, the Respondents will indeed proceed with the unlawful action and will also prevent me from going back to my work since the process is entirely flawed.
34. It is clear from the above that if the unlawful conduct is not interdicted I stand to suffer tremendous prejudice because the impugned proceeding based on misconduct have a bearing on my right to dignity and integrity.
35. I am quite alive to the fact that unless the relief sought in the notice of motion is granted by this Honourable Court the Respondents will continue with their unlawful action.
36. It is submitted that once the Respondents are interdicted as aforesaid, the Respondents may still be entitled to charge me using the correct procedure, which is an area still open to the First Respondent."

[10] I am satisfied that the applicant has demonstrated urgency.

The legal framework relied on by the applicant

[11] The legal framework on which the applicant relies for the relief sought is predicated in the main on the alleged unlawful invoking by the Municipality of the Local Government: Disciplinary Regulations for Senior Managers 2010 ("the 2010 regulations"). The applicant sets out the legal framework in terms of which disciplinary action should be instituted against Senior Managers as follows in the founding affidavit:

"22. I submit that section 175 of the MFMA, deals with the procedure that was to be followed by the First Respondent in bringing the charges against me and interalia provide that:

'175 Regulations on financial misconduct procedure and criminal proceedings:

- (1) The Minister Acting with concurrence of the Cabinet member responsible for local government, may make regulations prescribing
 - (a) The manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the MEG for local government in the province and the Auditor General, including
 - (i) Particulars of the alleged financial misconduct; and
 - (ii) Steps taken in connection with such financial misconduct;

- (b) Matters relating to internal investigations by municipalities and municipal entities of allegations of financial misconduct;
 - (c) The circumstances in which the National Treasury or the MEG for local government in the province may direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct;
 - (d) Criteria for the composition and functioning of a disciplinary board which hears a charge of financial misconduct.
 - (e) The circumstances in which the findings of a disciplinary and any sanction imposed by the board must be reported to the National Treasury or the MEG for local government in the province and the Auditor General and
 - (f) And other matters to the extent necessary to enforce the provisions of this Act.
23. It appears from the provisions of section 175 above, that the Minister is empowered to make regulations prescribing the procedural steps to be taken by the First Respondent in connection with complainants of financial misconduct against senior managers. The Minister thus on 30 May 2010⁴ as indicated above enacted the 2014 regulations.

Financial misconduct is defined as follows:

24. Section 171 of the MFMA defines what constitute financial misconduct and provides as follows:

'[171] Financial misconduct by municipal officials

- (1) The accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently
 - (a) contravenes a provision of this Act;
 - (b) fails to comply with a duty imposed by a provision of this Act on the accounting officer of a municipality;
 - (c) makes or permits, or instructs another official of the municipality to make, an unauthorized, irregular or fruitless and wasteful expenditure;
 - (d) provides incorrect or misleading information in any document which in terms of a requirement of this Act must be
 - (i) submitted to the mayor or the council or the municipality, or to the AuditorGeneral, the National Treasury or other organ of state; or
 - (ii) made public."

25. Subsection 4(1) of the MFMA in turn provides that:

'A municipality must

- (a) investigate allegations of financial misconduct against the accounting officer, the chief financial officer,·
- (b) if the investigation warrants such a step, institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other official in accordance with systems and procedure referred to in section 67 of the Municipal Systems Act, read with Schedule 2 of that Act.

26. The 2014 regulations

- a. In terms of the preamble to the 2014 regulations, the Minister of Finance acting in terms of Sections 168 and

175 of the Local Government: Municipal Finance Management Act enacted the 2014 ("the 2014 regulation"].

- 27. Section 171(4) provides that that a Municipality must investigate a/legations of Financial Misconduct against the Accounting Officer, the Chief Financial Officer, a Senior manager or other officials of the municipality unless those allegations are frivolous, vexatious, speculative or obviously unfounded and if the investigation warrant such a step, institute disciplinary proceedings against the accounting officer, chief financial officer or that senior manager or other officials in accordance with systems and procedure referred to section 67 of the Municipal Systems Act, read with schedule 2 of that Act.
- 28. In regulation 1 of the 2014 regulations "financial misconduct is inter alia defined to mean any act of financial misconduct defined in section 171 of the MFMA.
- 29. Regulation 2 of the 2014 regulations provide that chapter 2 dealing with Financial Misconduct Procedures applies to alleged financial misconduct.
- 30. In terms of regulation 3(1)(a) of the 2014 regulations 'any person must report an allegation of financial misconduct against the accounting officer to the municipal council, the provincial and national treasury.
- 31. Regulation 4 provides for the established a disciplinary board and its functions.
- 32. Regulation 5 of the 2014 regulations provides that:

On receiving a report in terms of regulation 3(1), if the municipal council ... is satisfied that there is reasonable cause to believe that an act of financial misconduct has been committed, it must within seven (07) days refer the matter to the disciplinary board to conduct preliminary investigation into the a/legation as envisaged in terms of section 171(4) of the MFMA.
- 33. A disciplinary board must conduct a preliminary investigation to determine whether or not the allegation is founded and make a recommendation to the council as to whether sufficient grounds exist to warrant a full investigation into the allegation."

[12] The essence of the application is captured by Adv Dlamini SC for the applicant as follows in his heads of argument:

"4. The question to be asked by the Court in this matter 'is what does the Applicant wants (sic) from this Court?' In this regard, its submitted that the Applicant on the pleaded case simply wants to interdict the process followed by the First Respondent to bring the charges against her in contravention of the First Respondent's own statutory and regulatory framework. In this regard, the Applicant submits that the noncompliance by the First Respondent with its own statutory requirements renders the disciplinary process currently in place unlawful."

The issues in dispute

[13] From the essence of the application, it can be discerned that the main issue in dispute is predicated on the Municipality invoking the 2010 Regulations to charge the applicant with financial misconduct. A further dispute arises, as raised by the Municipality on the additional charges proffered against the applicant, which are not a financial nature. Whether or not the further dispute avails the Municipality, must be considered against the relief sought in the Notice of Motion.

[14] In respect of the main issue in dispute, the Municipality in its answering affidavit states that whilst the Council of the Municipality resolved on 31 May 2021 to formulate a Disciplinary Board for Financial Misconduct Procedure and Criminal Proceedings, the resolution has not yet been given full implementation and the Board does not yet exist. The reason for the Board not being in existence, despite the Resolution of Council taken more than a year ago, is that the Office of Provincial Treasury which had to second an official from its Office to the board to commence its formulation has not been done. On this basis contends the Municipality it was still at liberty to invoke the 2010 Regulations, which it maintains have never been repealed.

[15] In respect of the further issue in dispute, the Municipality contends that the 2014 Regulations must only be used in relation to financial misconduct. The Municipality contends that the applicant, however, faces other charges, which are not limited to financial misconduct. The Board it therefore maintains would lack jurisdiction to entertain the referral. The Municipality therefore conflates the charges based on alleged financial misconduct with the nonfinancial charges.

Discussion

[16] Adv Dlamini SC referred this Court to three judgments in which the issue of the 2014 Regulations and 2010 Regulations were dealt with. A clear and distinct feature of those cases is that the Municipalities in question had the necessary Boards established in terms of the 2014 Regulations but failed to bring the charges of financial conduct in terms of those regulations. In the present matter, the facts are distinguishable in that the Board has not been established, brought about by the inexplicable failure by Provincial Treasury to second an official from its Office to ensure that the Board can be established and correctly

constituted. The question to my mind which should rather be begged, is whether this inaction on the part of Provincial Treasury avails the Municipality in its continued use of the 2010 Regulations.

[17] Adv Maodi for the Municipality submits in his heads of argument that since Provincial Treasury has not seconded its official as yet, it implies

that the Board could not be constituted and the Municipality would continue to make use of the 2010 Regulations which have never been repealed. This submission however, loses sight of the Transitional arrangements and Short title and commencement in the 2014

Regulations, which reads as follows:

"Transitional arrangements

20. Any disciplinary process instituted before the commencement of these Regulations and not yet completed
 - (a) must be finalised in terms of the prescripts applicable at the time when the process was instituted; or
 - (b) may, by agreement in writing between the affected official, political officebearer or director of the municipal entity and the municipal council or board of directors, be finalised in terms of these Regulations.

Short title and commencement

21. These Regulations are called the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings and takes effect on 1 July 2014."

[18] The 2010 Regulations by implication were "repealed" by the 2014 Regulations when regard is had to the Transitional arrangements. The 2010 Regulations applied only to disciplinary processes instituted before the commencement of the 2014 Regulations and which were not completed at that stage. It is therefore clear that any disciplinary proceedings instituted after 1 July 2014 when the 2014 Regulations came into effect, must be instituted in accordance with the prescripts of the 2014 Regulations. The institution of disciplinary action against the applicant by the Municipality in terms of the 2010 Regulations was therefore clearly unlawful.

[19] In respect of the further issue in dispute as set out supra, the applicant has limited the relief sought to the disciplinary proceedings instituted unlawfully in terms of the 2010 Regulations and not on the charges which are not of a financial nature. The investigation against the applicant commenced on the basis of allegations of financial misconduct. It is on this basis that the fourth respondent was appointed and enjoined with his mandate. The fourth respondent had no further mandate in respect of the investigation. Notwithstanding this, sight cannot be lost of the fact that the investigation was initiated in terms of the 2010 Regulations which was unlawful.

Conclusion

- [20] It must follow that the unlawful use of the 2010 Regulations by the Municipality vitiates in the first instance the appointment of the fourth respondent as investigator of the allegations of financial misconduct against the applicant; and in the second instance it by implication vitiates the disciplinary proceedings before the second respondent. In respect of the relief sought in prayer 7 of the Notice of Motion I am not convinced that an order should be granted in that regard, having regard to the fact that the real issue is the unlawful use of the 2010 Regulations.
- [21] The applicant is accordingly entitled to the relief sought in Part A of the Notice of Motion in respect of prayers 2 to 6.

Costs

- [22] Costs follow suit. There is no basis on which any contrary order should follow in this regard. The applicant is accordingly entitled to costs, which includes the costs of employment of Senior Counsel.

Order

- [23] I accordingly make the following order:
1. The applicant's noncompliance with the Rules of this Honourable Court relating to service, filing and time limits is condoned and the matter is dealt with as one of urgency in terms of Rule 6(12);
 2. The disciplinary proceedings instituted against the applicant on 20–24 June 2022 in terms of the Local Government: Disciplinary Regulations for Senior Managers 2010 (the 2010 Regulations) is declared unlawful and null and void;
 3. The first respondent is interdicted and restrained from continuing with the disciplinary proceedings instituted against the applicant on 20–24 June 2022 until the first respondent complies with Local Government: Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings dated 30 May 2014 ("the 2014 regulations");
 4. The appointment of the second respondent as the presiding officer of the disciplinary hearing is declared to be invalid, unlawful and null and void;
 5. The appointment of the third respondent as the evidence leader (initiator) of the disciplinary hearing is declared to be invalid, unlawful and null and void;
 6. The appointment of the fourth respondent as an investigation report of the allegation of the financial misconduct against the applicant is declared to be in breach of the 2014 Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings;
 7. The first respondent is to pay the applicant's costs, including the costs consequent on the employment of Senior Counsel.

A H PETERSEN

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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Date of Hearing 24 June 2022

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July 2022

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