

SOUTH AFRICA / JUDGMENT

Pietersen v Dr Beyers Naude Local Municipality (P05/17) [2017] ZALCJHB 47 (14 February 2017) [2017] ZALCJHB 47

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

P05/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: P 05/17

In the

matter between:

MARTIN PIETERSEN

Applicant

and

DR BEYERS NAUDE LOCAL

MUNICIPALITY

Respondent

Heard:

02 February 2017

Delivered:

14 February 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The Labour Appeal Court in *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[1] has long confirmed that the Labour Court has the necessary jurisdiction to entertain urgent applications pertaining to the uplifting of suspensions. However, the Labour Court's intervention should only be in circumstances that are urgent, extraordinary or compellingly.

[2] This Court has over the years, decried well-heeled senior civil servants who in the face of serious allegations of misconduct have

continuously and unashamedly, approach it with contrived urgent applications to either set aside lawful and legitimate suspensions

imposed on them, or to intervene in internal disciplinary proceedings against them[2]. It is apparent that in most of these cases, the intention of the applicants is merely to circumvent the dispute resolution procedures

as provided for in the Labour Relations Act, or to seek reinstatement in their positions, even when their presence in the workplace had turned out or proved to be untenable.

[3] The floodgates however remain open despite the concerns raised by this court and the concomitant punitive cost orders made in such cases. One can only surmise that it is either because these undeterred applicants, have a understanding and meaning of the concepts of 'urgent', 'compelling' or 'exceptional', or alternatively, it is more their sense of self-righteousness and narcissistic instincts that drives them to approach this court irrespective of the merits of their applications.

[4] This urgent application before the court is a case in point, particularly in view of the nature of and the implications of the relief sought. The application initially came before Prinsloo J on 24 January 2017, and was postponed to afford the Applicant an opportunity to file his replying affidavit. The Applicant, a Municipal Manager, seeks an interim order, setting aside his suspension which took effect from 10 January 2017; and restraining the Respondent from suspending or terminating his contract of employment, pending the finalisation of his appeal(s) to the High Court and the Supreme Court of Appeal against his conviction and sentence in the Oudtshoorn Regional Court under case number OSH 182/2013. (My emphasis)

- [5] The nature of this type of relief is mind-boggling. It suggests that if granted, the Applicant should remain employed despite his criminal conviction, and until such time that he has exhausted all his rights to lodge an appeal up to the Supreme Court of Appeal against his conviction. Whether that appeal process takes a life time or not is irrelevant as far as the Applicant is concerned, as his 'right' to the position and the salary trumps everything else, including the clean and smooth administration of the municipality.

Background:

- [6] The Applicant, despite being plagued by a plethora of criminal charges and other allegations of misconduct, remarkably managed to be appointed as a Municipal Manager in three different local municipalities. He was initially appointed as Municipal Manager of Ukhahlamba District Municipality between 2001 and 2006. He was thereafter appointed to the same position in Oudtshoorn Municipality in 2007, was dismissed, and was then reappointed by the same municipality in August 2011.
- [7] The Applicant's brush with the criminal justice system emanates from what he referred to as a 'personal vendetta' waged against him by certain residents within Oudtshoorn. That had led to him facing eight separate criminal investigations arising out of his employment in that Municipality. In 2011 he was charged with fraud, and alternative counts of theft and contravening the various provisions of the Municipal Finance Management Act (The MFMA). He was subsequently convicted in the Oudtshoorn Regional Court and sentenced to ten months imprisonment. He had successfully appealed against his conviction and sentencing in the Western Cape High Court in 2015.
- [8] Having resigned from his position in Oudtshoorn, he was in December 2013, appointed a Municipal Manager of Camdeboo Local Municipality in Graff Reinet. Significant with his appointment is that at the time that he had applied and was interviewed for that post, there were further similar criminal charges pending against him before the Bellville Commercial Crimes Court. In regards to these charges, he had successfully applied for an acquittal and discharge in terms of the provisions of section 174 of the Criminal Procedure Act (The CPA) [3].
- [9] A separate investigation was similarly conducted by the Minister of Co-operative Governance & Traditional Affairs into the appointment of the Applicant in various municipalities, and a report in this regard was released in November
2013. The report traced his employment in Ukhahlamba and it was established inter alia that the municipality had litigated against him in respect of money owed on a municipality vehicle; and that the Auditor General's
- report into the handling of the municipality's finances and assets had made an adverse finding against him.

- [10] It was also established in that report that when he was initially dismissed from Oudtshoorn, it was as a result of having used municipal funds to defend a personal defamation claim against him, and when he resigned, he was paid a settlement amount. In essence, the report viewed the Applicant's appointment at Camdeboo Municipality as null and void on the basis of his unsuitability on a number of grounds.
- [11] In 2014 the Applicant again stood trial as a co-accused in the Oudtshoorn Regional Court on charges of fraud and corruption. He had again utilised the provisions of section 174 of the CPA to secure an acquittal. In early 2015, he was again tried as a co-accused in the Oudtshoorn Regional Court on similar charges as before, and again secured an acquittal in terms of the same provisions
- [12] During August 2016, three local municipalities, viz, Camdeboo, Ikwezi and Baviaan were amalgamated into Dr Beyers Naude Local Municipality, the Respondent. At the time of the amalgamation, the Applicant was the incumbent Municipal Manager of the Camdeboo and was appointed as the Respondent's acting Municipal Manager, which appointment was confirmed on 15 September 2016 at a Special Council meeting. That appointment was for a period until 30 November 2017.
- [13] At the time of the Applicant's appointment by the Respondent, there were five criminal charges pending against him in the Oudtshoorn Regional Court. On 7 December 2017, that court issued an ex tempore judgment in terms of which the Applicant was found guilty on all the five charges under case number OSH183/13. Sentencing in the light of the conviction is set to take place in March 2017. Subsequent to his conviction, the Applicant wrote a letter to the Respondent advising it of the Court's findings. He stated his intention to challenge the finding and requested special leave until 13 December
2016. He was granted the leave as requested. Upon obtaining legal advice, the Respondent's Council at a meeting of 30 December 2016 resolved that the Mayor should appoint an independent investigator, and to request the Applicant to submit written representations as to the reason he should not be suspended.
- [14] On 6 and 9 January 2017, the Applicant had personally and through his attorneys of record, submitted his representations. The Council then took a decision after consideration of those representations to place the Applicant on suspension with full pay with effect from 10 January 2017. No charges had been laid against the Applicant as yet in the light of the on-going investigations, which were expected to be finalised by 30 January 2017.

Evaluation:

- [15] Since the nature of the relief sought by the Applicant is interim, it is trite that he must demonstrate (a) a prima facie right (although open to some doubt) to the final relief that will be sought in due course; (b) an apprehension of irreparable harm, if the application is not granted and the applicant ultimately establishes his claim; (c) that the balance of convenience favours him; and (d) the absence of any other satisfactory remedy[4]. Prior to

dealing with these requirements, the issue however is whether this application should be treated as urgent.

Urgency:

- [16] The application was launched on 17 January 2017, some ten days after the suspension was confirmed. Having set the matter down on an urgent basis on 24 January 2017, it had to be postponed as the Applicant needed time to file a replying affidavit. The Applicant contends that the application should be accorded urgency on the basis that he had no alternative remedy in that once he was suspended, and his contract of employment was terminated, he would lose his income and would certainly face financial ruin. He further averred that given the nature of his job, which required that he be seen as a person of integrity, he would not be able to secure alternative employment timeously so as to prevent financial ruin to him and his family.
- [17] The Labour Appeal Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[5] explained the requirements of Rule 8 as follows;
- “Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules”.*
- [18] The import of the above is that an applicant has to set forth explicitly the circumstances which he avers renders the matter urgent; and must state the reasons why he claims that he cannot be afforded substantial redress in due course. The court can at its discretion, and in the light of the averments made, come to the assistance of the applicant because substantial redress cannot be obtained at a later date, or even if obtained at a later date, it would be of little value.
- [19] The mere fact that an applicant is entitled to approach the court on an urgent basis, including having the luxury to decide when the matter should be set down and when the respondents should file any answering papers, does not in itself lead to an inference that a matter is urgent. Thus, it is not up to the applicant party, notwithstanding these luxuries, to determine whether a matter is urgent or not. It is also the haste with which the applicants also approached the court to assert their right to the relief sought that indicates whether the matter should be treated as urgent or not.
- [20] The difficulty in this case is that the Applicant has not even come close to setting out the reasons why this application should be treated as urgent. It took him ten days after his suspension was confirmed before he could approach the Court. Be that as it may, he made no attempt to explain this ten days’ delay, and I am not convinced that he had acted with the necessary haste with which he expects this court to treat his matter. Furthermore, to the extent that the Applicant has raised ‘financial

ruin' as a result upon which urgency is sought, it was common cause that he was suspended with full pay, and the purported

'financial ruin' is not real as long as he remains on paid suspension. The averments surrounding the Applicant's

integrity and his ability to secure alternative employment are nevertheless misplaced in that he has merely been suspended and not dismissed, and the court cannot indulge in suppositions.

[21] Central however to the issue of urgency is whether the Applicant cannot obtain substantive relief in the normal course. This in my view also depends on the merits of his application and the relief that he seeks. As already indicated earlier in this judgment, the nature of relief he seeks is far-reaching, and it is inconceivable if not unreasonable, to expect an employer to keep an employee in its employ after a criminal conviction, pending the final determination of an appeal process. To the extent that he remains suspended, there is no basis in the light of the other considerations why it can be concluded that he cannot obtain substantive relief in due course. In the end however, it is my view that the urgency claimed in this case is clearly self-created, and the matter ought to be struck off the roll. I however propose to dispense of the merits of the application given the nature of the pleadings and the relief sought.

The merits:

[22] Notwithstanding the nature of the relief sought, it is still not clear on the papers as to on what basis the suspension is challenged. No reference was made to the suspension being unlawful, invalid or unfair, and it is not clear what right is sought to be protected. All that the Applicant had alleged was that he had a clear right to fair labour practices, and that the suspension was a breach of that right and the right to remain employed pending the finalisation of the criminal proceedings against him, which included his right to appeal to the higher courts if the need arose.

[23] It was only in the replying affidavit that the Applicant had amplified the allegations of unfairness pertaining to his suspension, contending that the impending disciplinary hearing was unfair as it was premature, and that the suspension went against the parties' agreement reached at the commencement of his employment concerning the pending criminal charges against him.

[24] A difficulty that arises is that it is trite that a case can only be made out in the founding and not replying affidavit, and not much value can be placed on the averments only made in the replying affidavit. In regards to the alleged agreement however, the Applicant's case was that at the time of his employment by Camdeboo, and having disclosed the pending criminal charges against, an agreement was reached with him that the contract would terminate in the event of him being convicted, and further that it was an expressed term of the contract between himself, the then Mayor, and the Chief Whip, Alfred Pannies, that the contract would be terminated if he were to be convicted, but only after he had exhausted all legal

avenues open to him to have the conviction set aside. Thus according to this agreement, the Respondent could not suspend or terminate his contract until he had exhausted all criminal procedures available to him.

- [25] There are disputes of fact pertaining to the alleged agreement relied upon by the Applicant. Whether the Applicant can in essence rely upon it in contending that his suspension is unfair has to be examined within the context of the position he holds and the implications of his criminal conviction. This conviction clearly puts his suitability for the position of Municipal Manager into question, and that agreement, cannot in my view supersede the proper administration of the Respondent's affairs. Furthermore, the Applicant was afforded an opportunity to make representations as to why he should not be suspended, and his contention that his presence in his position could not prejudice the running of the municipality's administration fails to appreciate the implications of his criminal conviction.
- [26] To conclude then, the Applicant has not established nor demonstrated a clear, let alone a prima facie right to the relief that he seeks. As also pointed out on behalf of the Respondent, he has alternative remedies available under the provisions of the LRA to seek redress in respect of his suspension. Significantly though, having had regard to the circumstances of this case, issues surrounding alleged 'financial ruin' in circumstances where the Applicant has been placed on suspension with full pay, or protection of 'integrity' in the face of a criminal conviction, can hardly qualify as urgent, extraordinary or compellingly factors, requiring the court's intervention. On the contrary, it is the very circumstances that the Applicant finds himself in as a result of his criminal conviction that militates against any inclination to place him back in his position. To the extent that this is the case, there would be no need to consider other requirements pertinent to such applications.
- [27] In the light of the above, it follows that his application ought to be dismissed. It is further my view that given the circumstances of this case, and further having had regard to the requirements of law and fairness, the Applicant should be burdened with the costs of this application. This is so in that as matters stand, the Applicant was suspended with full pay, and he is still to be called to a disciplinary enquiry. There was therefore no need in the light the circumstances of this case for him to approach this court for interim relief, especially of the nature that he seeks.

Order:

- i. The Applicant's application is dismissed with costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. J Van Der Schyff

Instructed by:

Ezechiel Beddy & Associate Attorneys Inc.

For the Respondent: Adv. J Partington

Instructed by:

Chris Baker & Associates

- [1] (2012) 33 ILJ 2033 (LAC); See also *Booyesen v Minister of Safety and Security and Others* (2011) 32 ILJ 112 (LAC) at para 54
- [2] See *Mosiane v Tlokwe City Council* (2009) 30 ILJ 2766 (LC) at para 15 – 16; *Manamela Ida v Department of Co-operative Governance & Traditional Affairs & others* Case no: J 1886 / 2013
- [3] Act 51 of 1977
- [4] *National Treasury and others v Opposition To Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) at 235
- [5] 2010 31 ILJ 112 at para 18

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