

SOUTH AFRICA / JUDGMENT

Rand West City Local Municipality v Goba (J 748/21) [2021] ZALCJHB 157 (20 July 2021)

[2021] ZALCJHB 157

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J 748/21

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case

no: J 748/21

In

the matter between:

RAND
WEST CITY LOCAL MUNICIPALITY
Applicant
and
THEMBA
GOBA
Respondent

Heard:

14 July 2021

Delivered:

20 July 2021 (In
view of the measures implemented as a result of the Covid-19
outbreak, this judgment was handed down electronically by circulation
to the parties' representatives by email. The date for hand-down is
deemed to be on 20 July 2021.)

JUDGMENT**PRINSLOO, J****Urgency**

- [1] The Applicant approached this Court on an urgent basis for relief I will fully deal with *infra*. The Respondent took issue with urgency.
- [2] I have considered the facts and arguments placed before this Court in support and in opposition of urgency. Considering the nature of the relief sought, I am of the view that it will be in the interest of justice for this matter to be adjudicated urgently.
- [3] I have exercised my discretion to deal with this matter on an urgent basis. If this matter is not dealt with on the urgent roll, it will go to the back of the queue of opposed motions and on account of the well-known backlog experienced at this Court, it would in all probability not be adjudicated for the next 12 – 18 months. That would indefinitely delay and frustrate this application and the relief sought herein, to the severe detriment of the parties.

Background**facts**

- [4] The Respondent is employed as the Applicant's municipal manager in terms of the provisions of the Local Government Municipal Systems Act[1] (MSA) since July 2017. In his capacity as municipal manager, the Respondent is the head of administration and he is the accounting officer of the Applicant in terms of the provisions of the Local Government: Municipal Finance Management Act[2] (MFMA).
- [5] On 30 June 2020 the Auditor-General made negative findings which rendered expenditure of R 1,5 billion to be classified as unauthorised, irregular, fruitless and wasteful (UIFW). The Auditor-General's report is final and binding and the Applicant has to give effect to the findings and recommendations in the report. In order to do so, the issues were referred to the Municipal Public Accounts Committee (MPAC). MPAC is a committee of the Applicant's Council, established in terms of section 79 of the Municipal Structures Act[3] and section 129 of the MFMA.
- [6] The MPAC conducted its oversight role regarding the UIFW and recommended *inter alia* that the Respondent be suspended from his duties as a precautionary measure for the entire period of investigations, to avoid interference.

- [7] As a result of the Auditor-General's findings, the Member of the Executive Council: Department of Cooperative Governance, Human Settlements and Traditional Affairs (MEC) took steps to address the findings. In terms of section 106 of the MSA, Advocate Mokhare SC was appointed to conduct an investigation into and to prepare a report on the allegations. An investigation report was compiled and submitted on 28 February 2021. In the report Mokhare SC made findings of fact and law and he made recommendations to the MEC.
- [8] Mokhare SC made specific findings against the Respondent, inter alia that he had mismanaged finances of the Applicant to the tune of R 1,5 billion during his tenure as municipal manager. Flowing from the findings, Mokhare SC recommended inter alia that: "Council should immediately and urgently take steps to commence the process of suspending the municipal manager from office, pending an investigation on his gross misconduct or pending the disciplinary inquiry to be instituted against him." It was also recommended that disciplinary proceedings should be instituted against the Respondent for gross misconduct.
- [9] On 21 April 2021 the MEC wrote a letter to the Applicant's executive mayor and Council regarding the report on the outcome of the investigation conducted in terms of section 106(1)(b) of the MSA. The letter recorded that the investigation by Mokhare SC made serious findings of maladministration, fraud, corruption and malpractice and that it was recommended that disciplinary steps be taken against the Respondent. The Applicant was directed to fully implement all the recommendations expeditiously and to provide the MEC with an action plan, indicating how the recommendations will be implemented.
- [10] Pursuant to the MEC's directive, a special Council meeting was held on 6 May 2021. The Council resolved that a notice of precautionary suspension be given to the Respondent in accordance with Regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers, 2010 (Regulations). The Respondent was issued with such a notice on 7 May 2021 and he was invited to submit written representations as to why he should not be placed on precautionary suspension. The submissions were to be submitted by 14 May 2021. On the Applicant's version, the Respondent failed to respond to the substantive issues concerning his precautionary suspension and on 18 May 2021 a letter was written to him, requiring him to do so by no later than 14:00 on 19 May 2021. A response was received from the Respondent's legal representatives on 19 May 2021, stating that the letter of 14 May 2021 indeed contained such representations.
- [11] On 20 May 2021 the Applicant's Council resolved that the Respondent be placed on suspension, that a disciplinary hearing commences within three months of the date of suspension, failing which the suspension will automatically lapse.

- [12] It is further apparent from the minutes of the Council meeting of 20 May 2021 that it was resolved that the investigation to be conducted in circumstances that do not compromise the credibility of the outcome of such an investigation and that after having considered the report into allegations of misconduct by the Respondent, disciplinary proceedings be instituted and that the executive mayor is authorised to appoint an independent, external presiding officer and an officer to lead evidence.
- [13] Pursuant to the Council resolution and on 20 May 2021, the Respondent was issued with a notice, placing him on precautionary suspension. The terms of his precautionary suspension are recorded in paragraph 7 of the suspension letter and more specifically it required of the Respondent to hand over his work laptop, iPad, cellular phone, keys and other assets of the Applicant in his possession.
- [14] Following his suspension and on 26 May 2021 the Respondent instituted urgent proceedings in this Court to challenge his precautionary suspension inter alia on the basis that it is invalid, unlawful and of no force and effect and that it be set aside. The urgent application was enrolled for hearing on 3 June 2021, but on 1 June 2021 the Respondent removed the application from the urgent roll and it was placed on the opposed roll in the normal course.
- [15] The Executive Mayor appointed MNS Attorneys in May 2021 to inter alia represent the Applicant in legal proceedings related to the Respondent's precautionary suspension, disciplinary action and in respect of all matters stemming from the MEC's report, to assist in the preparation of documents for disciplinary proceedings against the individuals implicated in the MEC's report and to conduct further investigations, if so required, in matters related to the implicated individuals. This appointment letter was not part of the annexures attached to the Applicant's papers, although reference was made throughout of the investigation and the fact that the devices were required for investigation purposes. As the Respondent took issue with the fact that no investigator was appointed, I permitted the Applicant to hand up this letter. The Respondent objected thereto, but as no case was made out that the Respondent would be prejudiced, should the Court take note of the content of the letter and because the issue was contentious and this Court must be enabled to consider all the facts, the letter was necessary and relevant in considering this application, I permitted the handing up of this letter.
- [16] On 14 June 2021 MNS Attorneys addressed a letter to the Respondent's attorneys of record, stating that as a condition of his suspension, the Respondent was required to return the electronic devices, including a laptop, iPad and cellular phone. As the Respondent failed to return the aforesaid electronic devices, it was demanded that he return it to the Applicant by 18 June 2021, failing which further steps would be taken to recover the devices.
- [17] The Respondent's attorney of record indicated on 17 June 2021 that the Respondent was not prepared to hand over to the Applicant the electronic devices in his possession and as directed in paragraph 7 of the notice of suspension.

[18] The Applicant filed this urgent application on 2 July 2021.

The relief sought

- [19] The Applicant seeks an order directing the Respondent to return the electronic devices (laptop, iPad and cellular phone) belonging to the Applicant on the date of this order, pending the finalisation of the investigation and/or disciplinary hearing. The Applicant also seeks a cost order against the Respondent on a punitive scale.
- [20] The Applicant's case is that the devices currently in possession of the Respondent will assist the Applicant in the conduct of an investigation into the alleged acts of misconduct and to determine the Respondent's complicity in the irregular awarding of tenders. The Applicant submitted that it is entitled to have access to the electronic devices, which have been provided to the Respondent as part of his tools of trade for the execution of his duties. The devices were used by the Respondent in the performance of his duties as municipal manager and may contain information which is crucial for the Applicant's investigation. The LRA and the Regulations oblige the Applicant to conduct an investigation prior to disciplinary action being taken against any employee and it is this right and obligation the Applicant seeks to vindicate in pursuit of the right to fair labour practices.
- [21] The Applicant submitted that the Respondent's conduct frustrates further investigation into the allegations relating to UIFW. The Applicant has to commence with a disciplinary enquiry within three months from the date of the Respondent's suspension.
- [22] The Applicant seeks to obtain the electronic devices in order to further investigate allegations against the Respondent, which investigation must be completed before the disciplinary process could commence. The Applicant submitted that it would suffer prejudice if the electronic devices are not handed over. The Respondent on the other hand, will not suffer prejudice as the electronic devices belong to the Applicant, they were supplied to the Respondent as tools of trade and for the purpose of performing his duties. As he is currently suspended, there are no duties to be performed and there is no rational or legal basis for the Respondent's refusal, other than to frustrate the Applicant in its quest to perform its statutory obligations.
- [23] There is an urgent need from the Applicant's legal team's investigation into the alleged wrongdoing by the Respondent to obtain his official communication in relation to the transactions which are the subject of the findings and recommendations in the report. Any evidence that may assist the Applicant in the conduct of the investigation, must be secured.

The opposition

- [24] It is evident from the answering affidavit that, apart from the averments made in respect of urgency, the factual averments made by the Applicant are not disputed in any material respect.

[25] The Respondent has rather put up different defences in support of his refusal to hand over the electronic devices in question. The first defence relates to the Applicant's investigation. The Respondent's case is that the Applicant's claim that it needs the electronic devices for purposes of conducting an investigation into the alleged acts of misconduct and to determine

his complicity in the irregular awarding of tenders, is untenable.

[26] In support of this argument, the Respondent referred to the provisions of Regulation 5 and the fact that there was no compliance with Regulation 5. The devices can only be returned to the Applicant by consent or in the event that there is an appointed investigator in terms of the provisions of Regulation 5 and only if such investigator deems it necessary to have the devices for purposes of the investigation.

[27] The Respondent submitted that only the investigator could call for the delivery of the electronic devices for purposes of investigation. Neither the Mayor nor the acting municipal manager has been appointed as investigators, thus they are not entitled to call for the return of the devices. As there is no investigator appointed or investigation ongoing, the Mayor or the acting municipal manager will in all probability lock up the electronic devices in an office. The Respondent regards the request that he returns the electronic devices, as punitive.

[28] Furthermore, the Council resolved that the Respondent be charged with misconduct and that a disciplinary hearing be held, thus there is no further scope for any investigation. The Respondent submitted that the Applicant has adopted Mokhare SC's report and proceeded to suspend him with a view of instituting the disciplinary proceedings. The decision to proceed with disciplinary action has already been taken and there is no other investigation to be conducted.

[29] Secondly, the Respondent relies on the Applicant's 'Cellphone allowance and telephone usage policy' and based on the aforesaid policy, his case is that there is no basis in law that justifies the return of the electronic devices as ownership thereof vested in him.

Arguments and analysis

[30] In my view the merits of this matter are to be decided based on the relief sought and the defences raised in response thereto.

The investigation

[31] The gist of the Respondent's first defence is that there is no investigator appointed and also no scope for an investigation.

- [32] It is evident that Mokhare SC recommended inter alia that: “Council should immediately and urgently take steps to commence the process of suspending the municipal manager from office, pending an investigation on his gross misconduct or pending the disciplinary inquiry to be instituted against him.” It is clear that Mokhare SC’s report made general findings and that his recommendation leaves scope for a further investigation.
- [33] It is further evident from the Council Resolution of 6 May 2021 that the Council resolved that the Respondent be considered for precautionary suspension and that Regulation 6 be applicable pending an investigation into the alleged gross misconduct and /or a disciplinary hearing.
- [34] Evidently Regulation 6(1)(a)(i) provides for an investigation to be conducted during the period of precautionary suspension.
- [35] The Council Resolution of 20 May 2021 also resolved that the Respondent be suspended as the Council has reason to believe that his presence at the workplace may jeopardise any investigation into the alleged misconduct and that the investigation be conducted in such a manner that it does not compromise the credibility of the outcome of the investigation.

This Council resolution clearly not only left scope for an investigation, but resolved how such an investigation is to be conducted.

- [36] The Respondent’s suspension letter dated 20 May 2021 stated that he has been placed on suspension because the Council has a reasonable apprehension that his continued presence at work will interfere with and jeopardise the investigation in that inter alia employees would not be able to freely engage with the investigative process and to ensure unfettered access to records.
- [37] The Executive Mayor appointed MNS Attorneys in May 2021 to inter alia represent the Applicant in the disciplinary action to be taken against the Respondent, to assist in the preparation of documents for disciplinary proceedings and to conduct further investigations, if so required.
- [38] Having regard to all the aforesaid, it is evident that there is no merit in the Respondent’s contention that there is no scope for a further investigation, as all the documents alluded to, indicated the contrary.
- [39] Mokhare SC’s report made general findings, but it did not formulate charges of misconduct to be levelled against the Respondent and his recommendation obviously leaves scope for a further investigation, in all probability to define and formulate charges to be levelled against the Respondent. The Respondent should know that once he is called to a disciplinary hearing, he will be expected to answer to specific charges and not to a general report. The Applicant is obliged to formulate the charges and that process could call for a further investigation to not only formulate the charges, but also to ascertain what evidence is available to inform or support the charges.

- [40] There is also no merit in the Respondent's contention that there is no ongoing investigation and that the Mayor or acting municipal manager seek to punish him by requesting the devices, which they will, according to him, lock up in an office when no investigation is ongoing. This version is not supported by the facts placed before this Court.
- [41] In its founding affidavit the Applicant made it clear that the electronic devices in possession of the Respondent will assist in the conduct of an investigation and that the Applicant is entitled to go through the electronic devices provided to the Respondent as part of his tools of trade in the execution of his duties. The Respondent's answer to this is that ownership of the cellular phone and iPad had passed to him by virtue of being due for an upgrade and that the said devices could only be returned by consent or if called for by an appointed investigator for purposes of an investigation. Evidently the Respondent did not dispute that the electronic devices would assist in the conduct of an investigation.
- [42] MNS Attorneys were appointed to assist in the preparation of documents for disciplinary proceedings and to conduct further investigations, if so required. In my view there is no merit in the contention that there is no investigation ongoing. Obviously attorneys were appointed to assist with the preparation of documents for disciplinary proceedings, which would include the drafting of charges and the compiling of evidence in support of those charges. The attorneys were also appointed to conduct further investigations.
- [43] In summary: there is no merit in the contention that there is no scope for a further investigation, as there is much scope and anticipation of such investigation. Equally so is the contention that there is no investigation ongoing without merit.

Ownership of the electronic devices

- [44] The Respondent's second defence is that there is no basis in law that justifies the return of the electronic devices as ownership thereof vested in him.
- [45] He relies on the Applicant's 'Cellphone allowance and telephone usage policy' and submitted that based on the aforesaid policy, ownership of the cellular phone and iPad had passed to him by virtue of being due for an upgrade. He is on a month-to month contract awaiting the new devices which were ordered by the Applicant's ICT manager. He had entered in a contract with a cellular phone service provider and the Applicant monthly subsidizes him as part a management benefit or perk in the amount of R 2000. The device belongs to him and not the Applicant.
- [46] It is evident from the Applicant's 'Cellphone allowance and telephone usage policy' that the Applicant regards cellular phones for use by the municipal manager or any other employee who occupies a position that requires him or her to have access to a subsidised mobile phone, as an essential tool of the trade rather than a service benefit.

- [47] The subsidised cellular phone and iPad in possession of the Respondent, were issued to him or acquired for his use as essential tools of trade to enable him to execute his official duties as municipal manager. The fact that the contract period expired and that the devices are due for an upgrade, is of no moment and does not change the fact that they are essential tools of trade.
- [48] The Applicant's case is that the Respondent used those devices in the execution of his duties and there might be information on those devices which may be linked or relevant to the allegations of misconduct and for that reason, the Applicant is entitled to access those devices. The Applicant seeks an order for the electronic devices to be handed over pending the finalisation of the investigation or the disciplinary hearing.
- [49] I can see no merit in the Respondent's defence. He is suspended and as a result he is not executing any official duties. He does not need essential tools of the trade at a time when he is not performing official duties. The Applicant on the other hand needs access to the tools of trade for purposes of investigating the allegations against the Respondent, prior to proffering charges against him. The Applicant submitted that as part of the legal team's investigation into the alleged wrongdoing by the Respondent, there is an urgent need to obtain his official communication in relation to the transactions which are the subject of the findings and recommendations. Any evidence that may assist the Applicant in the conduct of the investigation, must be secured.
- [50] No convincing reason has been put forward as to why the devices could not be handed over. In fact, it is evident from the opposing affidavit that the Respondent has not proffered a single reason or basis for his refusal to handover his laptop. The cellular phone and iPad had been subsidized by the Applicant as tools of trade for purposes of the execution of his official duties. The devices were not issued to the Respondent or subsidized for his personal use or other recreational purposes – they were tools of trade. The Applicant is entitled to have access to the information on the devices, as it relates to the execution of his official duties.
- [51] I am satisfied that the Applicant has made out a case for the relief it seeks.

Costs

- [52] The last issue to be decided is the issue of costs.
- [53] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the Labour Relations Act[4] (LRA) to make orders for costs according to the requirements of the law and fairness.
- [54] Mr Nhlapo for the Applicant submitted that an adverse cost order on a punitive scale should be granted against the Respondent, given the fact that he has no legal basis for his refusal to hand over the electronic devices, which are merely requested for the purpose of completing an investigation. The Respondent's refusal is mala fide and a pure display of insubordination and arrogance and he fails to act in the best interest of the Applicant. The conduct of the

Respondent caused this application, an unnecessary expenditure on the Applicant, who is already in a dire financial position.

- [55] Mr Nhlapo further submitted that the Respondent's case that he will only hand over the electronic devices to an investigator, is disingenuous as an investigator had been appointed, the attorneys so appointed are running with the case and the Respondent persists in refusing to hand over the electronic devices.
- [56] Mr Makgate for the Respondent submitted that there is no basis laid for a punitive cost order and the matter is not complex to justify the briefing of two counsel. He submitted that cost should follow the result.
- [57] In *In Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and others*[5] the Court has lamented the fact that the urgent roll in this Court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another, in workplace disciplinary hearings. All of this is indicative of an attempt to use this Court and its processes to frustrate the workplace proceedings already underway. Although the facts in *Ngobeni* were different from the facts in *casu*, the same principles apply. The Court's proper role is one of supervision over the statutory dispute resolution bodies. It is not the Court's function to micro-manage discipline in workplaces.
- [58] In *Zungu v Premier of Kwa Zulu-Natal and Others*[6] the Constitutional Court confirmed the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.
- [59] This is a case where the Court has to strike a balance, considering the requirements of law and fairness. The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[7] it was emphasized that:
- '...unless there are sound reasons which dictate a different approach, it is fair that the successful party be awarded its costs. The successful party has been compelled to engage in litigation and incur legal costs. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in the Labour Court, whether as applicant in launching proceedings or as respondent opposing proceedings.'
- [60] In my view this is a case where it is appropriate to make a cost order. A cost order is a method of ensuring that decisions to litigate (or forcing an applicant to litigate) in this Court are taken with due consideration of the law and the prospects of success, more so where an application is filed on an urgent basis.

- [61] The Court in Ngobeni has granted an order for costs on a punitive scale because the Court considered the application to be wholly misguided and one that served to frustrate one of the fundamental purposes of the LRA, which is the expeditious resolution of workplace disputes within a defined structure. In the Court's view the applicant's conduct warranted an order for costs on a punitive scale.
- [62] In casu the Respondent had no convincing or justifiable reason to refuse to return the electronic devices. He persisted in his refusal notwithstanding a request from MNS Attorneys that he returns the electronic devices. His refusal was misguided, the defences he had put up in this Court were lame and opportunistic, his conduct forced the Applicant to approach this Court for relief and undermined one of the fundamental purposes of the LRA – the expeditious resolution of labour disputes.
- [63] This Court is ordinarily reluctant to make orders for costs against individual employees, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is however not an immutable or inflexible rule.
- [64] The Applicant had to bring an application, that should not have been brought, had it not been for the Respondent's conduct and fairness dictates that the Applicant, and ultimately the tax payers of this country, cannot be expected to endure enormous costs in instituting litigation that ought not to have been brought in the first place. Ultimately, the Respondent is the author of his own misfortune as he is quite capable of considering the consequences of forcing the Applicant to approach this Court on an urgent basis, in circumstances where he failed to put up any acceptable reason in law for refusing to return the Applicant's laptop. His counsel conceded that if an investigator was appointed, there would be no problem to hand over the devices. An employer representative investigator had indeed been appointed, which representative is authorized to conduct further investigations.
- [65] I am alive to the fact that the Respondent is an individual, but I cannot ignore the fact that his conduct ultimately forced the initiation of this application in circumstances where it was unnecessary and constituted a waste of this Court's time and resources. To make matters worse for the Respondent, he was legally represented and did not oppose this matter as an unrepresented layperson. I am further alive to the fact that the Respondent is a senior manager, suspended with full pay, and that he is not a person without means. I am however not inclined to grant costs on a punitive scale.
- [66] In the present circumstances, the interests of justice require that the Respondent pays at least a portion of the Applicant's costs. In my view, a sum equivalent to 50% of the Applicant's costs will best serve those interests.
- [67] In the premises I make the following order:

Order:

1. The application is urgent and any non-compliance with the Rules relating to time periods and service is condoned;
2. The Respondent is ordered to:
 - 2.1. Hand over the laptop that belongs to the Applicant as well as the cellular phone and iPad subsidised by the Applicant in terms of the Applicant's cellphone policy;
 - 2.2. The aforesaid electronic devices are to be handed over to MNS Attorneys as appointed representatives of the Applicant;
 - 2.3. The aforesaid electronic devices are to be handed over to MNS Attorneys within 24 hours from the handing down of this judgment.
 - 2.4. The return and handing over of the aforesaid electronic devices are pending the finalisation of an investigation, and if necessary, pending the finalisation of the Respondent's disciplinary hearing.
3. The Respondent is to pay the Applicant's costs, to include the cost of one counsel and limited to 50% of the taxed costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant:

Advocate S B Nhlapo with Advocate N Ntingane

Instructed by:

Mncedisi Ndlovu & Sedumedi Attorneys

For the Respondent:

Advocate T Makgate

Instructed by:

Koikanyang Attorneys

[1] Act 32 of 2000.

[2] Act 56 of 2003.

[3] Act 117 of 1998.

[4] Act 66 of 1995, as amended.

[5] (2016) 37 ILJ 1704 (LC).

[6] (2018) 39 ILJ 523 (CC) at para 24.

[7] (2012) 33 ILJ 2117 (LC) at para p 2119 I-J.

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