

SOUTH AFRICA / JUDGMENT

Rudman v Maquassi Hills Local Municipality and Others (J 3495/18) [2018] ZALCJHB 371 (8 November 2018) [2018] ZALCJHB 371

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J 3495/18

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 3495/18

In the matter between:

JANET
RUDMAN
Applicant
and
MAQUASSI HILLS LOCAL
MUNICIPALITY
First Respondent
MOTHUPI MOKGATLA
N.O
Second
Respondent
LENTIKILE JOHANNES
MOGOEMANG
Third Respondent
Heard: 2 November 2018
Delivered: 8 November 2018

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and

Background:

- [1] This application represents round two of the on-going dispute between the parties. The applicant (Ms Rudman) having initially approached this court on an urgent basis on 11 October 2018, obtained an order on 25 October 2018 (per Mabaso AJ), in terms of which the termination of her appointment as acting Municipal Manager was declared unlawful and accordingly set it aside. The first and second respondents were further directed to abide by the Council's Resolution under number 10/18 dated 12 September 2018 in terms of which Rudman was appointed.
- [2] The ink had hardly dried on the Court order of 25 October 2018 when an application for leave to appeal was launched and served on Rudman on the very same day and some four hours after Mabaso AJ's judgment was delivered. Rudman approached this Court in terms of the provisions of section 18 of the Superior Courts Act[1], for leave to execute the judgment and order pending the application for leave to appeal and/or any subsequent appeal proceedings. The respondents strenuously opposed the application to execute, stating that no basis had been laid in accordance with the provisions of section 18(1) and (3) of the Superior Court's Act for the granting of the order sought by Rudman.
- [3] The facts of this matter are succinctly set out by Mabaso AJ in his judgment, and will not be repeated save to state the following common cause facts;

3.1 Rudman is employed by the first respondent, Maquassi Hills Local Municipality (Municipality) as its Divisional Head: Administration.

3.2 On 22 August 2018, following concerns raised by the Department of Local Government and Human Settlements surrounding serious maladministration, financial mismanagement and poor governance at the Municipality, which had seriously impacted on service delivery programmes, the Bakone Bophirima Provincial Executive Committee (PEC) resolved to appoint the second respondent (Mokgatla), as an Administrator in accordance with the provisions of section 139(1) (b) of the Constitution of the Republic.[2] The appointment was for a period of six months. The Municipality was one of the five municipalities identified in the North West Province, where administrators and intervention teams were appointed. The Resolution of the PEC was to be effective from 1 September 2018.

3.3 The Municipality has been without an Executive Municipal Manager and other executive officials (Section 56 Managers) since July/August 2018. On 12 September 2018, and in the absence of the Municipal Executive Mayor, the Speaker and other Councillors, the Council of the Municipality resolved to appoint Rudman as the Acting Municipal Manager and three other officials as Acting Section 56 managers.

3.4 Rudman's acting appointment was to be for a period of three months until 12 December 2018. For reasons that were to become immediately obvious, the Executive Mayor, who was authorised to sign off Rudman's letter of appointment refused to do so. The appointment was however signed off by another Councillor as mandated by the Council Resolution.

3.5 On 18 September 2018, Rudman received correspondence from the Executive Mayor indicating that her appointment as acting municipal manager was invalid owing to the activation of the processes contemplated by the provisions of section 139(1)(b) of the Constitution of the Republic.

3.6 Mokgatla as the appointed Administrator was introduced to the Municipality on 19 September 2018. On 26 September 2018, Rudman received a letter from Mokgatla advising her of the termination of her acting appointment. On the same date, Mokgatla appointed the third respondent (Moegoemang), as the Acting Municipal Manager.

[4] Following the urgent application, Mabaso AJ's order, and the filing of the application for leave to appeal, Rudman on 26 October 2018 sought an undertaking from the respondents that they would abide by the order of the Court pending the final determination of the appeal proceedings. The undertaking was not forthcoming hence this application.

Urgency:

[5] The issue of whether this application is urgent or not needs to be disposed of as follows; To the extent that the order sought to be executed pending the application for leave to appeal was granted on an urgent basis, it is my view that given the haste that such an application for leave to appeal was launched, followed promptly by the application to execute, it would defeat the purpose of the order granted on an urgent basis to suggest that the matter does not deserve the urgent attention of the Court. The application was launched on 29 October 2018 to be heard on 2 November 2018. Rudman acted with alacrity, and the nature of the application is such that it is indeed urgent.

[6] It is further common cause that Rudman is only acting in the position until December 2018, and it is apparent that the matter is time sensitive. It follows that the probabilities are that the leave to appeal (which was not launched on an urgent basis), if granted by Mabaso AJ, will only come before the Labour Appeal Court long after December 2018 has passed, thus making the order sought to be immediately executed meaningless as it would have lost its practical effect.

The

legal framework:

- [7] Rudman seeks an order in terms of section 18(1) and (3) of the Superior Courts Act. This implies a two-staged enquiry to establish whether exceptional circumstances exists under subsection (1) for such an order to be granted, and whether under subsection (3), she has demonstrated on a balance of probabilities that she will suffer irreparable harm if the Court does not grant the order, and further that the respondents will not suffer irreparable harm if the Court so orders[3].
- [8] In *Mokgatla and Others v South African Municipal Workers Union and Others*[4], it was held that the previously enjoyed discretion of the Court when determining whether to grant an order allowing execution pending

the outcome of an appeal or not has since been curtailed by the enactment of sub-sections (2) and (3). Similarly in *Ntlemeza v Helen Suzman Foundation*[5], it was held that;

“In UFS v Afriforum & another [2016] ZASCA 165 (17 November 2016), para 9, this court stated that it was immediately discernable from ss 18(1) and (3) that the Legislature proceeded from the well-established premise of the common law, that the granting of relief of this nature constituted an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. It noted that the exceptionality is further underscored by the requirement of s 18(4)(i); that the court making such an order ‘must

immediately record its reasons for doing so’. I interpose to state that the reasons contemplated in s 18(4)(i) must relate to the court’s entire reasoning for deciding ‘otherwise’ and must therefore also include its findings on irreparable harm as contemplated in s 18(3)”[6]

- [9] The enquiry into whether exceptional circumstances exist entails a demonstration that the facts and circumstances of that particular case are uncommon, unusual and/or out of the ordinary to the extent that a departure from the ordinary rule that an appeal suspends the operation of the judgement in order appealed against should not apply[7]. In *Incubeta Holdings (Pty) Ltd v Ellis supra*, Sutherland J held that:

“[22] Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be “exceptional” must be derived from the actual predicaments in which the given litigants find themselves”.

- [10] In this case, it was submitted that exceptional circumstances exist in that;

- a) Mokgatla as the Administrator acted ultra vires in unlawfully terminating Rudman’s appointment, and that the noting of the leave to appeal allowed him to perpetuate and benefit from acting ultra vires of his powers;
- b) Mokgatla in law lacked the authority to appoint and/or terminate the appointment of an acting municipal manager and that the termination constituted self-help in conflict with the provisions of the Constitution of the Republic.

- c) The application for leave to appeal was devoid of merits, lacked prospects of success, and was instituted with the sole intention of rendering the judgment and order of this Court moot.

[11] In opposing the application on behalf of the respondents, it was submitted that;

- a) Mokgatla was appointed by the North West Provincial Executive Council in terms of the provisions of section 139(1)(b) of the Constitution of the Republic and was effectively the Administrator of the Municipality;
- b) Rudman failed to demonstrate that there exceptional circumstances existed that favoured the granting of the application, and further failed to demonstrate why she was so determined to retain her acting appointment notwithstanding the lack of approval from the Administrator. It was particularly so taking into account that the Municipal Council lacked the necessary authority when appointing her in the position.
- c) Rudman had not revealed exceptional circumstances why she should remain the acting municipal manager subsequent to her removal by the administrator. She remained employed in her original position, and there was nothing exceptional about acting in the position, especially since she had no right to act in the position in the first place. She had merely made bare allegations that there were exceptional circumstances without showing what those were.
- d) The respondents further did not foresee irreparable harm to Rudman should she return to her position as Divisional Head: Administration, especially since she had no entitlement or right to the acting position.
- e) On the other hand, the respondents contend that they would suffer irreparable harm should an unlawfully appointed individual continue acting as municipal manager, in circumstances where the Administrator had removed her in the exercise of his authority in terms of the resolution of the PEC.
- f) The respondent further contended that they had of prospects of success on appeal on the basis that
 - i. This Court's finding that the municipality was placed under administration in terms of the provisions of section 139(1)(b) of the Constitution as opposed to the provisions of section 139(1)(c) of the Constitution thereby enabling the municipal council to continue conducting its business including the appointment of the acting municipal council, constituted a misdirection;
 - ii. The Court erroneously found that Rudman had a right to the acting appointment, and committed a misdirection by binding the Administrator to the resolution of the Municipal Council dated 12 September 2018, despite the fact that the Council was accountable to the Administrator, and further that the Council required the approval of the Administrator to execute its decisions.

Evaluation:

- [12] As it was stated in Incubeta, the issue is what specific predicament does Rudman finds herself in if the order is not granted. To the extent that this application was brought in her own personal capacity without the support of the Council which had appointed her in the position, the ‘predicament’ in question can only be in regard to her.
- [13] Rudman’s acting appointment was made in terms of a resolution of Council, which resolution the respondents placed in dispute, it being contended that it was not lawfully or validly adopted. Aligned to that contention is the contention that it is only the Administrator that can make such appointment. Those were issues that were canvassed before Mabaso AJ and dealt with in the judgment. In a nutshell, it was found that even though the appointment was suspect in the way it was concluded, its timing, taking into account that there was a resolution that was taken by the PEC, which resolution was communicated to the Council, the appointment could only be declared by a court of law to be invalid. The message therefore was that it was not within Mokgatla’s powers as Administrator to simply terminate the acting appointment of Rudman in the absence of a court order or having confirmed the termination with the Municipal Council. This was so since Mokgatla himself had confirmed Rudman’s acting appointment, and further since in terms of the guidelines issued to the Administrator by the PEC, the Municipal Council was not dissolved as contemplated in section 139(1)(c) of the Constitution. In essence, the Council as concluded by Mabaso AJ, continued to maintain its autonomy to make acting appointments.
- [14] The submission made on behalf of the respondents was the Administrator was empowered to approve the decisions and resolutions of the Council, which decisions and resolutions included the appointment of acting municipal manager, and thus the power to terminate acting appointments was corollary.
- [15] In this case, the resolution in terms of which Rudman was appointed to act as Municipal Manager was adopted on 12 September 2018. The Administrator was appointed on 17 September 2018 in terms of a resolution of the PEC backdated to 1 September 2018.

He was however introduced to the Municipality on 19 September 2018. At the time that the Administrator took over, the acting appointment had already been made in terms of a resolution taken before his taking over, and whether he could terminate that appointment depended on his terms of reference and the authority vested in him by virtue of the resolution of the PEC and those of provisions of section 139(1)(b) of the Constitution under which his appointment was made. In essence, the issue in the light of the timeline of the appointments of both Rudman and the Administrator remains whether the latter could rescind Rudman’s appointment which was made before he effectively assumed his position.

- [16] In my view, the circumstances of this case, other than the time sensitive factor, and barring the politics that are apparently at play in the Municipality, are indeed unique and exceptional. Central to this dispute ultimately is the principle of legality, lawfulness and transparency insofar as the powers of an administrator appointed under the provisions of

section 139(1)(b) of the Constitution of the Republic are concerned. The Administrator was appointed in accordance with the provisions of section 139(1)(b) of the Constitution, not section 139 (1(c)[8]. It cannot in my view be correct that an Administrator, in the absence of discernable reasons, can simply override a resolution of a Municipal Council that continues to enjoy autonomy albeit under administration. On Mokgatla's version the acting appointment of Rudman was unlawful, and in that case, the issue is

whether he could simply rescind it given his powers.

- [17] Inasmuch as it is the respondents' contention that it is not clear as to the reason that Rudman seeks to cling to the acting position when she had no right to that position, it is equally a mystery as to the reason that Mokgatla (together with the Executive mayor and other officials within the Municipality), would in the absence of discernable reasons, desperately seek her removal, when her acting period is due to end on 12 December 2018, and make an acting appointment of his choice. It may be correct that Rudman's contract of service does not accord her the right to the acting position. However, that right was bestowed upon her by the Council resolution, which as things stand, remains intact.
- [18] Whether Mokgatla in this case acted ultra vires as found by Mabaso AJ is ultimately an issue that can be put to rest by the Labour Appeal Court in due course if it comes to that point. For now though, and in the light of Mabaso AJ's judgment, the position is that prima facie, Mokgatla had indulged in self-help in violation of the authority/resolution of the Council and section 193 of the Constitution.
- [19] A further issue raised by Rudman was that her predicament was that she faced possible discipline by the Administrator for implementing the instructions of the Municipal Council to continue to act in the position as appointed in accordance with its standing resolution. Her fears ultimately proved to be founded, in that as fate would have it, she was served with a notice of intention of suspension on 30 October 2018 by Mokgatla, a day after she had launched these proceedings. The notice appears to be in response to tasks she had performed in her acting capacity, i.e. when she addressed correspondence to National Treasury on 2 October 2018 and to the Municipality's bank enquiring about the Administrator's powers in relation to the handling of the Municipality's bank account.
- [20] On the whole, the above factors clearly point that the circumstances in this case are unique and exceptional. The irreparable harm that Rudman anticipated proved to be real. The irreparable harm contended by the respondents in my view appears to be self-created. In this regard, the Administrator appointed an acting Municipal Manager in circumstances where one was appointed already in accordance with a Council resolution which was standing, and there is no discernable evidence from the papers that other than rescinding that appointment, he had equally disapproved or rescinded that council resolution. To this end, it is my view that it is not necessary for this judgment to interrogate the merits of the leave to appeal and respondents' prospects in that regard in due course, as that is also a matter to be still decided by Mabaso AJ when determining the application for leave to

appeal. In the end, I am of the view that Rudman has satisfied the requirements of section 18(1) and (3) of the Supreme Courts' Act, and should thus be entitled to the relief that she seeks.

[21] The provisions of section 162(1) of the LRA enjoins this Court to make an award of costs upon a consideration of the requirements of law and fairness. In my view, and given the facts of this case, I see no reason why Rudman should be burdened with costs in circumstances where she was compelled to approach the Court to defend a decision and position sanctioned by what is a standing council resolution. Furthermore, I see no reason why the Municipality and the Administrator should not be jointly and severally liable for such costs.

[22] Accordingly, the following order is made;

Order:

1. The requirements of Rule 7 of the Rules of this Court are dispensed with and the matter is heard as one of urgency.
2. The applicant is granted leave to execute the judgment and order of Mabaso AJ under this case number, handed down on 25 October 2018, pending the respondents' application for leave to appeal and any intended appeal that may follow should the appeal be granted.
3. The First and Second Respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.

E. Tlhotlhamajje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Y.F Saloojee

Instructed by:

Scholtz Attorneys

For the Respondents:

T. Mokhatla

Instructed by:

Kgomo Attorneys

[1] Act 10 of 2013, Which provides: '18. Suspension of decision pending appeal (1) Subject to subsections (2) and (3), and unless the Court under exceptional circumstances orders otherwise, the operation and

execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. (2) Subject to subsection (3), unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A Court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the Court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the Court does not so order and that the other party will not suffer irreparable harm if the Court so orders. (4) If a Court orders otherwise, as contemplated in subsection (1)- (i) the Court must immediately record its reasons for doing so; (ii) the aggrieved party has an automatic right of appeal to the next highest Court; (iii) the Court hearing such an appeal must deal with it as a matter of extreme urgency; and (iv) such order will be automatically suspended, pending the outcome of such appeal. (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.’

[1] Act 10 of 2013, Which provides:

‘18. Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the Court under exceptional circumstances orders otherwise, the operation and

execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A Court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the Court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the Court does not so order and that the other party will not suffer irreparable harm if the Court so orders.

(4) If a Court orders otherwise, as contemplated in subsection (1)-

(i) the Court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest Court;

(iii) the Court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.’

[2] The Constitution of the Republic of South Africa (Act 108 of 1996) Provincial intervention in local government 139

(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including— a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to — (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or (iii) maintain economic unity; or c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

[2] The Constitution of the Republic of South Africa (Act 108 of 1996)

Provincial intervention in local government

139

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(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

- c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.
- [3] University of the Free State v Afriforum and Another 2018 (3) SA 428 (SCA) at para [9] – [11]
- [4] Gauteng High Court, Johannesburg Local Division CASE NO: 21815/2014 at para 5
- [5] Ntlemeza v Helen Suzman Foundation and Another [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) (9 June 2017)
- [6] Ntlemeza v Helen Suzman Foundation supra at para [38]
- [7] Incubeta Holdings (Pty) Ltd and another v Ellis and another 2014 (3) SA 189 (GJ)
- [8] Annexure “RJ23” (Page 103) of the Main application

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