

SOUTH AFRICA / JUDGMENT

Shema v Ditsobotla Local Municipality and Others (J479/2023)

[2023] ZALCJHB 128 (24 March 2023)

[2023] ZALCJHB 128

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

J479/2023

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

LABOUR COURT OF SOUTH AFRICA

HELD

AT JOHANNESBURG

case : J479/2023

Of

interest to other judges

In

the matter between:

ISAAC

TSIETSI SHEMA

Applicant

and

DITSOBOTLA

LOCAL MUNICIPALITY

First

Respondent

THE

ACCOUNTING OFFICER, DITSOBOTLA LOCAL MUNICIPALITY

Second Respondent

MOKOTEDI

MPSHE (CHAIRPERSON OF THE FIRST DISCIPLINARY ENQUIRY)

Third Respondent

RALEBOGO

EZEKIEL MAFOLO (CHAIRPERSON OF THE SECOND ENQUIRY)

Fourth

Respondent

Date

of Hearing: 4 and 6 April 2023

Date

of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 24 April 2023

Summary:

(Urgent application - Seeking to consolidate disciplinary enquiries and declaratory relief about the procedure governing the second set of charges, or alternatively declaring the notice initiating the second enquiry a nullity and preventing chairperson from presiding on account of perceived bias – Authority of municipality to oppose the application not established – Uniform Rule 7(1) challenge to authority – Urgency – application premature – objections should have been canvassed with chairperson before launching application – Costs)

JUDGMENT

LAGRANGE J

The nature of the application

[1] This is an application for final relief brought on an urgent basis. The relief sought by the applicant may be paraphrased thus:

1.1 The issue of an order

1.1.1 that the application be heard on an urgent basis;

1.1.2 that the charges set out in a disciplinary notice dated 23 March 2023 ('the first disciplinary notice') be heard together with the charges being considered in a disciplinary hearing currently underway against the applicant, and

1.1.3 the issue of a declaration that the 2010 Disciplinary Regulations for Senior Managers[1] ('the regulations') apply to the charges in the notice which relate to the applicant's alleged misconduct when he was an acting municipal manager;

or, alternatively to the relief in paragraph 1.1.2,

1.2 the issue of a declaration that the first disciplinary notice of 23 March 2023 is null and void, and/or

1.3 the issue of an order that the respondents should comply with the disciplinary regulations if they pursue the charges contained in the notice.

1.4 the issue of an interdict prohibiting the respondents from prosecuting the disciplinary proceedings initiated by the disciplinary notice before the fourth respondent as the chairperson.

[2] The applicant also seeks a cost order. The application was purportedly opposed by the first and second respondents, but for the reasons set out in the judgment, their authority to oppose the application was not established.

Brief chronology and

background

- [3] The applicant in this matter, Mr I Shema, had acted as a municipal manager for a few months commencing in June 2022. He ceased acting when an administrator was appointed and he reverted to his full time post as a Legal Manager of the Ditsobola Local Municipality (the first respondent).
- [4] On 18 November 2022 he was given notice to attend a disciplinary enquiry two weeks later concerning nine charges of acting in an un-authorised or corrupt manner during his tenure as acting municipal manager. That hearing was chaired by Mr M Mpshe SC (the third respondent). It was scheduled to proceed on 27 and 28 March 2023, but was postponed without prior notice to Shema or his attorneys who were representing him at the enquiry.
- [5] These proceedings (the first enquiry) were delayed by Shema raising a number of preliminary points. The latest one raised by him was an objection to the continuation of the proceedings underway unless they were conducted in conformity with the Disciplinary Regulations because the charges concerned misconduct committed when the applicant was acting as the municipal manager.
- [6] The first enquiry was due to resume on 27 March but the chairperson had yet to issue his finding on the status of the disciplinary proceedings. There had been an indication that the proceedings on 27 and 28 might be conducted virtually instead of at the venue in Coligny, but the municipality's attorney, Mr R Mataka, did not respond to an enquiry for clarity in that regard. The applicant and his attorney, Mr W Schöltz, accordingly travelled to Coligny on 27 March but nobody else was in attendance at the venue. On enquiry they were advised that the use of the venue had been cancelled by Mataka, the week before. Communications to Mataka about the unexplained cancellation of the proceedings at that venue went unanswered, but were not disputed in the answering affidavit of the municipality.
- [7] On 23 March 2023, a couple of days prior to the scheduled resumption of the first enquiry on 27 March, a notice of another disciplinary enquiry was drawn up and was issued to Shema's attorneys by email at 02h27 on 27 March. It set out five new charges against him relating to alleged misconduct in the period December 2022 to February 2023, most of which also concerned the period of his acting tenure as municipal manager. The enquiry was

scheduled to start on 4 April 2023 the date on which this application was enrolled for hearing. The enquiry was scheduled to run until 7 April 2023 and was chaired by another chairperson, Mr R Mafolo, an attorney (the fourth respondent).

- [8] Shema notified the municipality on the evening of 27 March that he would consent to the consolidation of the second enquiry with the first under the chairmanship of Mpshe. Apart from contending that it made sense to have one enquiry, he expressed grave concerns that Mofolo would not act impartially because he believed Mofolo had allegedly acted in a grossly unfair manner in conducting an enquiry into another colleague who was dismissed. Shema's letter requested a response to the proposal by 10h00 on 28 March, failing which he would bring an urgent application *inter alia* to compel consolidation of the two enquiries as proposed. No answer was received to this proposal even after a follow up email by Schöltz the following day.
- [9] On Friday, 31 March the application was launched and on 3 April the municipality filed a notice of opposition. Shema responded to this by issuing a notice on the same day under Rule 11 of the Labour Court Rules, read with Rule 7 of the Uniform Rules of the High Court calling on the municipality's attorneys and the municipality to furnish proof of their authority to oppose the application.
- [10] On 4 April, Shema filed a brief supplementary affidavit attached to which was Mpshe's ruling in the first enquiry that his attorney had received that morning. Without setting out the chairperson's reasoning in detail, he effectively concluded that the disciplinary provisions of the collective agreement did not apply to Shema in respect of misconduct he allegedly committed while he was an acting municipal manager. By implication, the disciplinary regulations applied to that misconduct. On the same day, the municipality sought a postponement so that it could file an answering affidavit. A timetable for filing an answering and replying affidavit was agreed to and hearing was postponed to 6 April.
- [11] The question of the current status of the enquiry that was scheduled to begin the same morning of the court hearing on 4 April naturally arose as an issue. The court was advised by the municipality's counsel, Mr M Ndziba, that despite the pending urgent application, the second enquiry had already been concluded. The municipality had withdrawn the charges relating to Shema's tenure as acting municipal manager in view of Mpshe's ruling in the first enquiry, but led evidence on the remaining charges. It turned out that while the court was in session on 4 April, the chairperson had not only heard the municipality's evidence but had found Shema guilty on those charges in his absence. Only the question of the sanction remained to be determined. It was agreed between Shema and the municipality that, pending the outcome of this application, no further step could be taken in the second enquiry and an order was made to this effect.

The application

Authority to oppose the application

- [12] The court entertained representations and the affidavits filed on behalf of the first and second respondents on a provisional basis, reserving the determination of the authorisation to oppose the application for later.
- [13] In response to the challenge to the authority of the municipality and its attorneys to act, the municipality's attorneys furnished a letter dated 2 April 2023, issued by the new acting municipal manager, Ms M Lehoko, purportedly appointing the firm Morathi & Mataka Attorneys to act on the municipality's behalf in opposing the urgent application. The challenge to authority to defend the proceedings is not so much about whether Morathi & Mataka was authorised to act by Lehoko, but whether she herself had the necessary authority as acting municipal manager.
- [14] Shema disputes her authority contending that s 151(2) of the Constitution confers the legislative and executive authority of a municipality on the municipal council. Consequently, only the municipal council itself can authorise participation in legal proceedings or it may delegate an individual such as the municipal manager to exercise such power. The municipality's counsel suggested that such a delegation had taken place, but claimed the supporting document could not be found in the time available. However there was no evidence on affidavit by the time the hearing recommenced on 6 April why this could not have been obtained, to support his assertion from the bar. There was also no request for an extension of time to do so. The deponent to the answering affidavit on behalf of the municipality and the second respondent (the accounting officer of the municipality) is the former acting

municipal manager, Mr O Mathusi, who states he was employed in that capacity until 30 March 2023. While Lehoko confirms the

contents of Mathusi's affidavit and that she is authorised to depose to her confirmatory affidavit on behalf of the first two respondents, nowhere in her affidavit does she confirm her authority to defend the application or appoint attorneys to act on their behalf. She makes no reference to the letter signed by herself and submitted by Morathi & Mataka as proof that they were mandated to act in the application by the municipality. I accept that Schöltz, on behalf of Shema, had not queried Mataka's status as the legal representative of the municipality in the disciplinary proceedings against Shema, but that does not mean that the authority to act in court proceedings can be assumed.

- [15] I am aware also that such challenges to authority are often used opportunistically[2]. However, as things stand, the authority of Lehoko to appoint Morathi and Mataka to oppose the application has not been established. From the papers it is also self evident that the position of municipal manager has been in flux, with one person after another performing in an acting capacity for terms of short duration. In such circumstances, it is particularly important that the court should be confident that litigation is engaged in with the necessary authority. Accordingly, the matter stands to be determined on the basis of the applicant's papers.

Urgency

- [16] Having given the municipality an ultimatum to agree to consolidate the enquiries under Mpshe's chairmanship by 10h00 on 28 March, Shema served the application on the respondents on Friday 31 March and set it down for hearing on Tuesday 4 April.
- [17] The respondent's attorneys state they only received instructions from Lehoko to oppose the application on 2 April.
- [18] On 3 April Shema asked the municipality to stand down the enquiry pending the outcome of the urgent application, but in keeping with its practice, it did not even bother to respond. The municipality argued that Shema should rather have attended the enquiry and first addressed the issues raised in the urgent application to Mofolo, before rushing to court. Even on the basis that I cannot entertain submissions made on behalf of the respondents, absent proof of authorisation to oppose the application,

this is an issue the court has to consider in any event.

- [19] In relation to the issue of urgency, the question is not whether the court might, in exceptional instances, intervene in incomplete internal disciplinary proceedings, when the lawfulness of the proceeding itself is at stake. In such cases it is possible that the court might intervene[3], though only in compelling circumstances, and attempts to get the court to intervene in incomplete disciplinary proceedings are not to be encouraged[4]. The critical question before the court in this case is whether a party should first raise their objection with the presiding chairperson before approaching the court.
- [20] In argument, Mr Schöltz contended that there was no point in raising an issue about the status of the proceedings before Mafolo, because he could not pronounce on the lawfulness of the institution of the second enquiry, including his own appointment. On the one hand, the lawfulness of the enquiry concerned the same issue which had been before Mpshe in the first enquiry, namely whether or not the second enquiry could proceed to deal with charges arising during Shema's tenure as acting municipal manager unless those charges were dealt with in terms of the regulations. It also concerned whether or not Mathusi had the authority to sign the notice of the second enquiry in the capacity of acting municipal manager on 23 March 2023, in circumstances where his letter vacating the position stated "This resignation/ withdrawal is effective, immediately",

and was signed on 20 March 2023, three days before he signed the notice.

- [21] At the time the application was launched, Mpshe's ruling had not been handed down, but was known by the morning on which the application was set down for hearing and the second enquiry was due to commence. The ruling was favourable to Shema and no doubt he could have used that ruling to argue before Mafolo that he should not continue with the second enquiry unless it was conducted in terms of the disciplinary regulations. It is noteworthy that in the first enquiry Shema had in fact raised this objection with the chairperson and obtained a ruling in his favour, without having to approach the court.

Moreover, as it turned out, the municipality in effect acceded to the ruling and consequently withdrew the charges Shema was facing in the second enquiry arising from his tenure as acting municipal manager, but proceeded with the remaining ones, which did not.

- [22] These events in the first enquiry illustrate that approaching a chairperson to make a ruling about whether the enquiry they are presiding over is properly convened is not necessarily a fruitless endeavour, even if the chairperson ultimately does not have the final say over what they are empowered to do. The position of the chairperson is no different in this respect, to a CCMA commissioner, whose jurisdiction to hear a matter is challenged. The Labour Court is the forum which has the power to decide if the commissioner has jurisdiction in a matter. The commissioner's ruling on jurisdiction is always subject to the possibility of being set aside on review. However, that does not mean a commissioner should not make a ruling when called upon to do so. Ordinarily, a chairperson of a disciplinary enquiry also does not have the power to determine the lawfulness of their appointment or the validity of the proceedings. However, if persuaded that their appointment is flawed or that the proceedings are unlawful, the chairperson can ask the employer to rectify the irregularity or they can recuse themselves.
- [23] If the chairperson dismisses an in limine objection to the lawfulness of the proceedings nothing prevents the aggrieved party from approaching the court on an urgent basis to set aside the proceedings notwithstanding the chairperson's ruling. The court can address the issue on its merits and is not bound by the chairperson's ruling.[5]
- [24] In the circumstances, I am not persuaded that Shema had no alternative but to approach the court to stop the enquiry proceeding based on either of his contentions that the enquiry was unlawful, even if Mpshe's ruling had not become available before 4 April. Accordingly, the application was premature. It could have been prepared in advance of the hearing and launched together with a prayer to stay the proceedings pending the outcome. The same considerations apply to Shema's perception that Mafolo would not be an impartial chairperson. The proper way to deal with such concerns initially was by way of a recusal application.

Costs

- [25] The applicant should not have brought this application when it did and there is no reason, having failed for lack of urgency, to warrant any cost award in his favour. Likewise, the municipality had sufficient time to obtain proof of authority of the acting municipal manager to oppose the application and instruct lawyers. By being unresponsive to the urgent correspondence from Schöltz in the days leading up to the application being launched and refusing to engage on the issue of consolidation of the enquiries, the municipality's conduct also contributed to the application being launched. At face value, consolidating the proceedings would appear to have been a more economical way of conducting them. Moreover, even though Shema should have placed his objections before Mafolo, the respondents knew that the application was pending before the court and

provided no reason why it was imperative for the enquiry to proceed, when the very lawfulness of the proceeding was the subject matter of the pending urgent application enrolled for hearing on the same day the enquiry was due to start. Instead they proceeded, seemingly with haste, to try and conclude the enquiry on the very same day. Such conduct, even if authorisation for opposing the application had been established, would not have placed their prayer for costs in a favourable light.

Order

[1] The application is struck off the roll for lack of urgency.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives For the Applicant W P Schöltz of Schöltz Attorneys For the First and Second Respondents M Ndziba instructed by Morathi & Mataka Inc.

[1] Notice 344, GG 34213, 21 April 2011

[2] See e.g. Eskom v Soweto City Council 1992

(2) SA 703 (W) at 705C and 705H-I

[3] E.g. Mashiane v NACOSA (J 591/2021) [2021] ZALCJHB 82 (3 June 2021) at paras [6] to [9]

[4] See: Booysen v Minister of Safety & Security & others

(2011) 32 ILJ 112 (LAC) para [54] Jiba v Minister: Department of Justice & Constitutional Development & others

(2010) 31 ILJ 112 (LC) para [17], and for example, Mantzaris v University of Durban-Westville & others

(2000) 21 ILJ 1818 (LC); Mashiya v Sirkhot NO & others

(2012) 33 ILJ 420 (LC) and Mahumani v Member of the Executive Council: Finance, Economic Affairs & Tourism, Limpopo (2010) 31 ILJ 2009 (GNP).

[5] See Mndebele v Govan Mbeki Municipality and Others (775/2021)

[2021] ZAMPMHC 9 (23 March 2021) at paras [17] to [19].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2023/128.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/shema-v-ditsobotla-local-municipality-and-others-unknown-topic-alcjhb-2023--6a3ea5103b1caa9129808ae7>

Prepared on 12 October 2026 · Esheria