

SOUTH AFRICA / JUDGMENT

Shikwane and Another v Bojanala Platinum District Municipality and Others (J 774/20) [2020] ZALCJHB 191 (29 August 2020)

[2020] ZALCJHB 191

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

J 774/20

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

Source record

IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 774/20

In the matter between:

POGISO
SHIKWANE
First Applicant
OLGA
NDLOVU
Second Applicant
and
BOJANALA PLATINUM
DISTRICT MUNICIPALITY
First Respondent
BOJANALA PLATINUM
DISTRICT MUNICIPAL COUNCIL Second Respondent
THE SPEAKER OF

MUNICIPAL COUNCIL:

CLLR EMAH
TANKE
Third
Respondent
THE EXECUTIVE MAYOR OF

THE MUNICIPAL
COUNCIL:

CLLR MOLISIWA
FETSANG
Fourth Respondent
NAXIA SAB & T
FORENSIC INVESTIGATION COMPANY Fifth
Respondent
MR HOPE CHAANE N.O
(CHAIRPERSON OF
THE DISCIPLINARY
ENQUIRY)
Sixth Respondent

Heard: 17 & 21 August 2020 (via Microsoft Teams)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and publication on the Labour Court website and release to SAFLII. The date and time for the hand-down is deemed to be on 29 August 2020 at 09:00

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] On 14 August 2020, the First and Second Applicants (The Applicants) approached this Court on an urgent basis to seek a

variety of orders. At the hearing of this application, and after the filing of answering and replying affidavits, the Applicants abandoned several prayers related to their suspensions, and confined their relief for an order that the First, Second, Third, Fourth and Sixth Respondents be restrained and interdicted from proceeding with an internal disciplinary enquiry instituted against them, pending the determination of a review application launched in this Court on 4 August 2020 under section 158(i)(h) of the Labour Relations Act (LRA),^[1] under case number JR1012/2020.

[2] The application is opposed by the First to Fourth Respondents (The Respondents), whilst the Sixth Respondent (Chairperson of the disciplinary enquiry), filed a notice to abide by the Court's decision.

Background:

[3] It is not in dispute that on 4 March 2019, an official in the North West Department of Local Government and Human Settlements (NW: LG & HS) (The Department), erroneously transferred an amount of R134 146 685.00 (One Hundred and Thirty Four Million One Hundred and Forty Six Thousand Six Hundred and Eighty Five Rand) into the account of the First Respondent (Bojanala Municipality). A request for these amounts had previously been

made by the Head of the Department in January 2019 to the Director General of National Department of Human Settlements, and where approved, for a major portion thereof to be transferred to Rustenburg Local Municipality. Thus from the amounts transferred into Bojanala Municipality, only the small amount of R48 635.00 was meant for it, whilst the amount of R134 097 050.00 was meant for Rustenburg Local Municipality

- [4] The amount that did not reach Rustenburg Municipality (R134m) was meant to advance delivery on informal settlement upgrades and rural programmes in various villages falling within its jurisdiction, in particular, a poverty stricken area called Lethabong Ext
- 2. These programmes were meant to assist with the revitalisation of distressed mining towns and overall service delivery in the Province.
- [5] It took the Department just over one month before the monumental R134m error was discovered. On 1 April 2019, the Chief Financial Officer of that Department caused a letter to be sent to Second Applicant who is the current Chief Financial Officer (CFO) of Bojanala Municipality, advising that the R134m was erroneously deposited into their bank account, and requesting her to

transfer that amount to Rustenburg Local Municipality's bank account (details provided) in order to rectify the error.

- [6] At the time of the erroneous deposit, Bojanala Municipality's finances were running on empty, as it was surviving on bank overdraft facilities, from which R12m was already dipped into. Ordinarily, in the light of that error and subsequent request by the Department, the CFO together with the Municipal Manager, who is the first applicant in this case, would have transferred the R134m into Rustenburg Local Municipality without question and delay. This however was not to be so as argued on behalf of Bojanala Municipality. It argues that first, the amounts were not even disclosed to the Second Respondent (Council) by the Applicants. Second, at no stage were Resolutions taken by the Council on the use of R134m, and third, whatever expenditure flowed from the erroneous

acquisition of R134m, was unauthorised.

- [7] The amounts that were meant to uplift and advance service delivery in Rustenburg mining areas under distress, which services would have restored whatever little hope and dignity, and offered reprieve to those long-suffering communities, were instead according to investigations conducted by the Fifth Respondent (Nexia), utilised between 5 March 2019 and 30 August 2019,

on inter alia;

§ Payment of about R20m to service providers for desludging septic tanks, in circumstances where this expenditure was not budgeted for and with no evidence of any tender process being followed, or any real evidence of these services having been rendered.

§ Payment of unbudgeted R15.7m for ‘niceties’ such as catering and events management services.

§ Payment of unbudgeted R10.2m on traveling and travel agency services.

§ Payment of R8.6m for repairs and maintenance

§ R12m for employee related third party costs, and

§ R5.9m for operating expenditure

- [8] According to the Applicants, when the amounts were received, a non-transaction account in the amount of R120m was opened whilst waiting for the ‘owner to identify themselves’. They had then enquired with the bank about the amounts received and were assured that they were meant for Bojanala Municipality’s account. The Applicants rely in this regard on what appears to be a bank deposit made by the Department on 4 March 2019. It needs to be said at this stage that in any event, the enquiries made with the bank were merely to confirm the obvious. A bank can only confirm what is in the bank holder’s account and who the depositors were. Unless otherwise told, a bank would not know whether amounts in a holders’ account were erroneously deposited or not.
- [9] The Applicants nonetheless further confirmed that the original depositor had identified themselves on 1 April 2019. Thereafter a Mr Wolmarans (The former Mayor of Rustenburg Municipality) had together with the Substantive Accounting Officer at the Department, agreed that the amounts could be utilised by Bojanala Municipality in the light of its parlous financial position. The Applicants further contend that the use of these funds commenced with effect from 7 May 2019, and with the full knowledge of the Fourth Respondent (Mayor), and at her behest.
- [10] It is significant to note that at the time that the use of the amounts commenced, a request had already been made by the Department for the amounts to be transferred into Rustenburg Local Municipality account. According to the Nexia’s report, upon the request for the transfer of the funds to the intended recipients made on 1 April 2019, the Municipal Manager responded on 21 May 2019, and proposed that the funds be transferred back in three instalments. The Head of Department’s response on 30 May 2019 was that all the amounts must be transferred once and not in batches. In the replying affidavit, the Applicants contend that the amounts were transferred or paid back in full in four batches between July 2019 and 27 August 2019.
- [11] It appears that the Department gave up chasing after the R134m erroneously transferred with the Applicants or Bojanala Municipality, as what had followed was the appointment of Nexia by the Department, even though it is not clear when that appointment was made. Equally unclear is when the Council discovered the erroneous payment and expenditure, as it contends that once it became aware, a Special Council meeting was convened on 3 October 2019. This is now some seven months since the erroneous transfer, or at least six months since the request for a re-transfer to Rustenburg Local Municipality was made. At that meeting possible acts of misconduct perpetrated by the Applicants were tabled by the

Mayor and in particular, the failure to notify the Council of the erroneous payment.

- [12] Flowing from the above Special Council meeting and the presentation of the Mayor's report, the Council unanimously resolved to issue notices of intention to suspend both Applicants, and provided them with seven days within which to make representations as to why they should not be suspended, in accordance with Regulations 5 and 6 of the Local Government Regulations for Senior Managers of 2010 (The Regulations)[2].
- [13] On 14 October 2019, the Applicants submitted their representations as to why they ought not to be placed on precautionary suspension. These representations were considered by the Council at a meeting convened on 16 October 2019, and it was resolved that there was reasonable cause to believe that acts of misconduct were committed, and that both the Applicants were to be placed on precautionary suspension with full pay and with immediate effect.
- [14] On 23 October 2019, the Respondents convened another special Council meeting, and rescinded the 16 October 2019 Resolution which had placed the applicants on suspension, since there was uncertainty as to whether that initial meeting was properly quorate. In the same meeting of 23 October 2019, another Resolution was taken in terms of which the Applicants were again placed on precautionary suspension with full pay.
- [15] At the meeting of 23 October 2019, and before the Resolution was adopted, the Mayor had declared an interest in the matter and recused herself. Cllr Nic Rakolle was appointed as Acting Mayor for the proceedings. Furthermore, Cllr Rakolle was authorised to appoint an independent investigating officer to investigate the allegations against the Applicants. Bojanala Municipality contends that this meeting was fully quorate, and that both the Economic Freedom Fighters (EFF) and Democratic Alliance (DA) Councillors had distanced themselves from the Resolutions taken by the Council.
- [16] Cllr Rakolle had on 23 October 2019 addressed correspondence to the MEC for the Department of Corporative Provincial Local Government requesting that the latter assist in the appointment of investigators, which investigations were to be funded by the Department. The investigations were however not completed within the 30 days contemplated in Regulation 5(4) of the Regulations, but Nexia had issued an interim report on 16 January 2020
- [17] On 19 January 2020, the Council was convened to consider the investigators' report, resolved to adopt it, and proceeded to appoint the Chairperson and Initiator of disciplinary hearings to be instituted against the applicants. These Resolutions were according to the Respondents, again taken unanimously, albeit the EFF left the proceedings at some point and never to return to the meeting.

- [18] On 20 January 2020, the Applicants were presented with a 'charge sheet' authorised by the Council and drafted flowing from the interim report. The Council again met on 1 July 2020 to consider a final report submitted by Nexia, approved it and authorised the amendment to the charges preferred against the Applicants, and the convening of a disciplinary enquiry. An amended charge sheet was then presented to the Applicants.
- [19] Six broad charges related to the expenditure were preferred against the Applicants, and include inter alia, gross dishonesty (with 7 counts); gross dereliction of duties (with 5 counts); gross negligence (3 counts); breach of section 62(1)(d) of the MFMA, failure to prevent unauthorised, irregular and fruitless and wasteful expenditure (4 counts); and breach of section 37(1) of the MFMA, alternatively gross dereliction of duties.
- [20] Aggrieved, the Applicants had initially referred an alleged unfair labour practice dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), which was subsequently set down for a hearing on 3 March 2020. Their complaint was that their suspensions were unfair since the Respondents had failed to comply with the provisions of the Regulations, and that the Resolutions taken by the Council to suspend them and appoint an investigator were unfair. At those proceedings, the Respondents' preliminary points that the CCMA lacked jurisdiction to arbitrate the matter and rule on the validity of Council Resolutions or interpret the disciplinary code were dismissed. Thus, the unfair suspension dispute remains pending at the CCMA.
- [21] Equally aggrieved was the EFF, which had launched an application at the Mafikeng High Court on an urgent basis on or about 28 January 2020. The Applicants were cited as respondents in that urgent application together with the Respondents in this case, the Premier of North West Province, the MECs for Finance, and Cooperate Governance and Local Government, and Nexia.
- [22] In that application, EFF sought a variety orders, including a declarator that the Council Resolutions and meetings since October 2019 as referred to in this judgment were unconstitutional, irregular and had no legal effect; that the precautionary suspensions of the Applicants (despite being cited as respondents in that case) be declared irregular and unlawful; and the rescission of the Resolutions that led to their suspensions. That urgent application was struck off the roll on account of lack of urgency.
- [23] The Respondents further contend that after the Applicants were served with the amended charges, a disciplinary hearing was scheduled for 28 January 2020. The Respondents contend that the proceedings were postponed to 9 and 10 March 2020 after the Applicants requested further particulars. The Applicants on the other hand contend that the Initiator was not ready to proceed.

[24] The declaration of the National State of Disaster and National Lockdown intervened and the disciplinary enquiries were held in abeyance. Nexia had submitted its final report in May 2020, which was adopted by the Council at a meeting held on 1 July 2020, leading to the amendment of the charges against the Applicants. The disciplinary enquiry was scheduled to take place from 11 to 21 August 2020.

[25] On 4 August 2020, the Applicants launched a review application in this Court under case number JR1012/20. In that application, the Applicants seek a variety of orders, including a review and setting aside of the decisions related to their suspension, investigations

and convening of the disciplinary hearing. The basis of that relief was that these processes were unlawful, illegal, null and void, and of no force and effect, since they were not in compliance with the provisions of the Regulations. They further seek orders declaring their suspensions unlawful and illegal and of no force and effect; and in the alternative, an order that the suspensions are in violation of section 49 of the Municipal Structures Act[3]. It is not clear what the basis of the reliance on the latter provisions are, as they merely deal with the powers of the Mayor and those of the Deputy Mayor.

[26] At the disciplinary hearing scheduled to be held on 11 August 2020, the Applicants sought a postponement on the basis of the review application which was launched on 4 August 2020. The request for postponement was refused. The Applicants' counsel at those proceedings (Adv. Molapo), withdrew as representative after the Chairperson furnished reasons for refusing a postponement. The Applicants' attorney (Maake), also withdrew from those proceedings as attorney of record and left the proceedings. The Applicants were then afforded an opportunity to seek new legal representatives, with the matter being postponed to 13 August 2020.

[27] On 13 August 2020, the Applicants arrived at the hearing accompanied by Maake who had previously withdrawn from the matter, and who had presented the Chairperson with a copy of this urgent application. They sought a postponement of the proceedings as they wanted to brief new counsel. Again, the request for a postponement was refused. The proceedings commenced and on 14 August 2020, the Applicants pleaded not guilty to all the charges. The matter was then postponed to 20 and 21 August 2020, but at the instance of the Court, the disciplinary enquiry was postponed indefinitely pending delivery of this judgment.

[28] This application was brought under the provisions of sections 157 and 158 of the LRA. In seeking an interim order pending the determination of the review application, the Applicants contend that they should not be subjected to a disciplinary hearing in circumstances where there are reasonable prospects that it may be in violation of the Regulations. They further contend that they have established exceptional circumstances necessitating the intervention of this Court in the internal disciplinary enquiry.

[29] In alleging the violation of the provisions of the Regulations, the Applicants contend that the Municipality and the Council took a decision to charge them without a final report into the allegations of misconduct having been tabled before the Council. This relates to their suspension and the charges preferred in January 2020, on the basis of the Nexia interim report.

[30] According to the Applicants, it only came to their attention in or around July 2020 that the Council only adopted the final Nexia report in terms of Regulations 5 on 1 July 2020. Subsequent to that information coming to their attention, their legal representative had then on 17 July 2020, demanded particulars related to the Resolutions and minutes of the Council meeting held on 1 July 2020. Such information was only provided on 22 July 2020 at the disciplinary hearing

scheduled for that date. They contend that it had become apparent that the Regulations were not complied with in regards to the

appointment of Nexia to investigate the matter, its report that was tabled and adopted in July 2020, and the fact that it was that report that had formed the basis of the charges, their suspension and subsequent disciplinary enquiry. It is at that point that they took a decision to seek a review to challenge the legality and the institution of the disciplinary hearing and the appointment of the Chairperson, and then subsequently launched this application.

[31] In opposing the application, the Respondents raised three grounds. The first is that the matter is not urgent. The second is that the Applicants have not demonstrated exceptional circumstances justifying the intervention of the Court in incomplete internal disciplinary proceedings, and the third preliminary point raised is that of *lis alibi pendens*.

Evaluation:

Urgency:

[32] To the extent that the Applicants seek urgent interim relief, the principles applicable in this regard are trite. In accordance with Rule 8 of the Rules of this Court, the Applicants are required to set out in the founding papers, the reasons why the matter deserves the urgent attention of this Court, and indicate why they cannot obtain substantive relief in due course, instead of approaching the Court with this extraordinary urgent procedure.

[33] It is further trite that urgent relief will be denied in circumstances where any urgency claimed is self-created; or where it is apparent that the applicant failed to act with the necessary haste in approaching the Court, and furthermore, where the respondent would suffer prejudice should urgent relief be granted[4].

[34] Aligned to the question of whether a matter is urgent whether the requirements for interim relief have been met. Thus, the Applicants

must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) and must convince the Court that they have no other satisfactory remedy[5].

[35] The Applicants submitted that the urgency arose upon receipt of the 1 July 2020 Special Council Meeting Minutes and the Resolutions arising therefrom, which copies they had only obtained on 22 July 2020. They further rely on the fact that they had launched the review application on 4 August 2020, and the refusal of the Chairperson to postpone the disciplinary enquiry after a request. They contend that they had acted immediately upon the knowledge of the irregularities after 22 July 2020, and that the fact that they had subjected themselves to the disciplinary enquiry cannot take away their rights to approach the court in circumstances where they had realised that the process was irregular. They further contend that even though they had suspicions of the irregularities in January 2020 when the EFF launched its application in the Mafikeng High Court, at the time, there was insufficient proof of those irregularities, and they could thus not have acted at the time.

[36] The history of this matter has been outlined above in this judgment. Since the Resolution taken by the Council and notices of intention to suspend in October 2019, clearly the information obtained by them on 22 July 2020 cannot be the starting point of a challenge to that Resolution and subsequent decisions to subject them to a disciplinary process.

[37] As correctly pointed out on behalf of the Respondents, the process of discipline against the Applicants started as early as 3 October 2019 when they were served with notices of intention to suspend them. At the time they did not question the validity of that process as they had duly complied and submitted lengthy representations as to the reason they ought not be suspended. When a decision to institute a disciplinary process against them on 20 January 2020 based on the very interim report of Nexia was taken, no action was taken by them. Instead, the EFF brought an application to challenge all the decisions and Resolutions taken by the Municipality since 3 October 2019 that lead to inter alia the suspensions, and decision to convene a disciplinary enquiry.

[38] The Applicants' contention that at the time they only harboured suspicions about the legality of their suspension or disciplinary

enquiry, and that they had been requesting an investigation report since 28 January 2020 is mere red herring, and clearly not sustainable on the common cause facts. In the EFF's application[6], which must have been served on them as they were the respondents amongst others cited, the EFF challenges all Council meetings and Resolutions taken on 3, 16 and 23 October 2019, and 16 and 19 January 2020. Equally challenged is the appointment of Nexia, the submission of its report and its adoption to 'fastrack the commencement of the disciplinary process against the 5th and 6th Respondents, and beat the three months' time frame within which to commence the disciplinary process'. The 5th and 6th respondents are the Applicants in this matter. This attack was launched in support of the contention by EFF that the provisions of Regulation 5 and 6 of the

Regulations were not complied with. Equally under attack by the EFF was the appointment of the Chairperson and Initiator to commence the disciplinary process. To cap it, the founding affidavit attributes the whole of its paragraph 17 to the precautionary suspension of the Applicants in this case; attacking the Resolution to adopt and implement the findings of Nexia's interim report, and to proceed with the disciplinary hearing against the Applicants in this case.

[39] In the light of the substantive contents of the EFF's founding affidavit before the Mafikeng High Court, it is therefore extraordinary that the Applicants would simply allege that as at January 2020, they had merely harboured a suspicion that they were subjected to an irregular, invalid or unlawful process. Any information in regards to any grounds upon which they wanted to, or could have either approached this Court or launched a review application on their own, was readily and freely available from the EFF's founding affidavit and application. At the time, the Applicants were legally represented, and there is no indication as to what steps were taken other than merely requesting copies of the investigation report. Of significance is that had the EFF's application been successful, the Applicants would have benefitted immensely, as all the Resolutions and decisions of the Municipality and the Council would have been declared unlawful, invalid and of no force and effect.

[40] The contrived nature of the urgency claimed in this case is further discernible from the Applicants' inaction even after the EFF's application was dismissed, when they were served with the amended charges on 1 July 2020. Still, nothing was done to mount any challenge despite what was contained in the EFF's application. Not once did they challenge the basis of the amended charges, nor did they seek to challenge the Council's processes leading to the amended charges. Even after

the receipt of the further particulars furnished on 22 July 2020, this Court was only approached on 14 August 2020, some 15 days since that information was received. Even then, this was after the launching of the review application.

[41] The Respondents correctly point out that it took the Applicants eight months from when the initial Resolution to place them on suspension was taken, to approach this Court on an urgent basis. The Nexia report, whether interim or final, was always the basis of the Resolutions taken leading to their suspensions and subsequent disciplinary steps decided upon.

[42] Without pronouncing on the validity of the Nexia report at this stage, there is nothing in Regulation 5 or 5(5) that suggests that a report of the investigators to be tabled before the Council must be final. On the contrary, Regulation 5 (5) simply requires of an investigator to within 30 days of his or her appointment, to submit a report with recommendations. Regulation 5(5) equally enjoins the Council to table such a report in the manner and time frames set out in sub-regulation (2). Thus, there is nothing in the Regulations that stipulates that an interim report is unacceptable. To this end, the applicants could easily have brought any application as at January 2020, and it follows that the urgency claimed in this case is

clearly self-created[7].

- [43] Other than the factors pointed out which establish self-created urgency, the Applicants have another hurdle to surmount, which is that of demonstrating that they have no alternative remedies. As already indicated, Courts will be reluctant to grant urgent relief where the applicant had access to readily available alternative remedies. Equally so would it have been had the Applicants persist with declaratory relief in regards to the suspensions [8].
- [44] In this case, it is common cause that the Applicants have referred an alleged unfair labour practice to the CCMA, and after the preliminary points raised by the Respondents, the matter at that forum is still pending. Irrespective of the basis of their challenge to their suspensions before the CCMA, at the core of that challenge is the procedural and substantive fairness of those suspensions flowing from the Resolutions taken by the Council.
- [45] Equally not supportive of the urgency sought is the contention that the review application was not brought before the Court as a delaying tactic. In this regard, that application was launched on 4 August 2020. It was alleged that the Registrar of this Court was approached to expedite the review application and place it on the semi-urgent roll, and that the Judge President of this Court is still to be approached to have the review application expedited. These steps are indeed belated, in the light of the history of this matter as outlined in the judgment, and the steps that could have been taken as far back as October 2019. Clearly the review application is a contrived legal strategy, in bolstering the arguments for the urgent intervention of this Court. It follows that urgency ought to fail on these grounds.
- [46] Ordinarily, in circumstances where no basis is laid for a matter to be treated as urgent, the Court would strike it off the roll, and for it to be placed on the ordinary roll in due course. This application however ought to be disposed of on the merits, with the question being whether a proper case has been made out for the relief sought.
- [47] Clearly the Applicants seek an order to stop the disciplinary hearing from proceedings. To the extent that they had relied on the provisions of section 158 of the LRA for the relief sought, it has repeatedly been stated that this Court, even though it has the power to intervene in incomplete internal disciplinary hearing, will not as a rule do so, unless in exceptional circumstances, such as where a failure to intervene may lead to a grave injustice or whether justice might be attained by other means [9].
- [48] As to what constitutes exceptional circumstances is dependent on the facts of each case, and in my view, and within the context of urgent interim applications, such circumstances would arise where a case has been made out for such relief. The prima facie right relied upon by the Applicants appears to be predicated on their fixed term contracts of employment which conditions are subject to the Regulations.

[49] The fact that the Applicants' contracts of employment are subject to the Regulations is settled, and debates on the binding nature of these Regulations is superfluous. It needs to be reiterated however that the fact that the provisions of section 77(3) of the BCEA or those of section 158 of the LRA enjoins this Court to determine disputes brought before it under those provisions does not automatically imply that the Court should accordingly exercise its jurisdiction and grant the relief sought. This point was made in *Mohlomi v Ventersdorp / Tlokwe Municipality and Another*[10], where it was held that;

'The enquiry whether or not to entertain such a review application however does not stop just because it may be accepted that the Labour Court in general terms has jurisdiction to do so. Simply put, the fact that the Labour Court has jurisdiction / power does not mean that the Court should exercise this power. In other words, and even though the Court may have jurisdiction to consider such a review under Section 158(1)(h), it does not mean that it is appropriate for it to exercise such power, especially where there are other specifically prescribed alternative means by way of which the issue can be resolved.'

[50] At the core of the Applicant's complaint is that Regulation 5 was not complied with when Nexia was appointed to conduct the investigations, making the subsequent appointment of the Chairperson and the convening of disciplinary hearings unlawful. In this regard, it would be recalled that in the Council meeting of 23 October 2019, Cllr Rakolle was authorised to appoint an investigating officer to investigate the allegations of misconduct or financial misconduct against the Applicants. It would further be recalled that at the time, given the parlous nature of the Municipality's finances, Cllr Rakolle had asked the Department to assist with the investigations and their funding.

[51] The interim/progress report submitted by Nexia dated 16 January 2020, and upon which the Council had acted is titled 'Forensic investigation into the utilisation of erroneous payment'. It further states that the Provincial Treasury of North West Provincial Government appointed Nexia to conduct a forensic investigation with regards to the erroneous transfer of funds to Bojanala Municipality. It further states that it focused on the involvement/role played by officials in the Department and Bojanala. Several findings were made in regards to the conduct of the Applicants, and primary was they knew of the erroneous payments at all times but nonetheless failed to disclose that transfer to the Council.

[52] In the light of the above, the question that arises is whether should it matter that Nexia was not appointed and funded by the Council in the light of the provisions of Regulation 5[11]. My unequivocal answer is no. This so in that first, Regulation 5 does not prescribe how the investigator must be appointed. In my view, if the investigations into allegations of misconduct by public officials are officially sanctioned whether at local, national or provincial level, they enjoy legal standing, and can be utilised for the purposes of compliance with Regulation 5(3), as long as the Council has taken a decision in that regard, and second, where the investigations reveal misconduct on the part of the employees sought to be suspended or disciplined.

[53] A second consideration is that in circumstances where it is common cause that the Municipality in this case was struggling financially,

it would not have made any commercial sense to duplicate the investigations already initiated at Provincial Government level in

respect of the same issues pertaining to the Applicants' involvement in the expenditure of the R134m. Any questions surrounding the validity or lawfulness of the process followed by the Council in sanctioning the investigations by Nexia, and adopting its report are further laid to rest in the light of what was stated in *Liebenberg NO and Others v Bergrivier Municipality*[12], as follows:

'[25] In *African Christian Democratic Party v Electoral Commission and Others*, (footnote omitted) this Court, in the context of assessing a local authority's compliance with municipal electoral legislation,

held that "[a] narrowly textual and legalistic approach is to be avoided". (footnote omitted) Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular. (footnote omitted)

[26] Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.'

[54] In this case, I am satisfied that the Council on 23 October 2019 adopted a resolution authorising Cllr Rakolle to appoint an investigator. Nexia's report which was sanctioned by the Provincial Government was adopted by the Council to prefer charges against the Applicants for the alleged involvement in acts of misconduct. To that end, the Resolutions and decisions in that regard by the Council substantially complied with the provisions of Regulation 5.

[55] Other than the fact that the prima facie right relied upon is unsustainable, it was also pointed out on behalf of the Respondents that the review application is fatally defective for non-compliance with the provisions of Rule 7A(2)(b) of the Rules of this Court, as the applicants have not called upon them to dispatch the reasons and record of proceedings or decisions sought to be set aside. As things stand, because of the hurried manner with which the review application was brought before the Court, that application cannot be said to be even close to being ripe for a hearing.

- [56] Even if the review application was properly before this Court, it is trite that a pending review does not in itself establish a *prima facie* right, but that such a right may be established by showing prospects of success in the review application[13]. To this end, and in the light of the defective nature of the review application, it would not even be necessary to consider whether it enjoys any prospects of success.
- [57] Any contentions by the Applicants that they will suffer irreparable harm if the disciplinary enquiry is proceeded with is equally without merit. The Applicants have already subjected themselves to the disciplinary enquiry. The rights that they rely upon, viz, contractual and procedural rights entailed in the Regulations are open to them to exercise and vindicate in that enquiry, inclusive of an internal appeal in the event of an adverse outcome.
- [58] The contention that a disciplinary hearing will tarnish their dignity and affect their reputation as professionals and individuals is nothing but cliché and self-righteousness in the face of legitimate disciplinary processes designed to determine their culpability. They had in their elaborate representations, stated why they ought not be suspended. If they have confidence in their version of events, and are of the view that they are wrongly implicated, the disciplinary process is open to them to restore their dignity and reputation. Contrived legal processes and the raising of technical points in order to circumvent that disciplinary process will definitely not achieve that objective. It follows that any harm that the Applicants may be afflicted with is not irreparable if they were to be ultimately vindicated, whether at the disciplinary enquiry, an internal appeal, the CCMA or any other subsequent legal processes under the provisions of the LRA.
- [59] In the light of the conclusions reached above, it follows that the balance of convenience cannot favour the granting of interim relief, and clearly the Applicants have failed to satisfy the requirements for urgent interim relief. Furthermore, no case has been made out for any exceptional circumstances necessitating the intervention of this Court. There is no doubt that justice for the Applicants is attainable through other means and alternative remedies available to them.
- [60] This case ultimately involves the determination of whether the Applicants are guilty of any wrongdoing in the expenditures related to the R134m that was erroneously transferred to Bojanala Municipality. It raises important considerations related to holding public officials accountable in instances where malfeasance is alleged in the use of public finances entrusted in their care. There is nothing complicated about the facts of this case. If they point to misconduct, like the rest of ordinary employees faced with disciplinary processes at the workplace, the Applicants must subject themselves to those processes, and where there is a need at some point to approach this Court, to join the litigation queue like ordinary employees. This Court, especially its urgent roll, cannot serve at the pleasure and convenience of the high ranking public officials with deep pockets, especially if they have not made a proper case for urgent relief that they seek.

- [61] The Respondents sought punitive order of costs against the Applicants. This Court has on numerous occasions lamented the abuse of its urgent roll by well-heeled applicants harbouring a false sense of entitlement to that roll[14]. The Court has for reasons that can only be imagined, become the first port of call whenever high ranking and well-paid employees find themselves reluctant to subject themselves to internal disciplinary processes. This application, other than its failure to satisfy the requirements of urgency was doomed from the start, and was brought before the Court mid-stream a disciplinary hearing, with a clear intention to stop that hearing indefinitely. (The backlog in this Court is common knowledge).
- [62] The Applicants have clearly attempted to avoid the disciplinary process as can be gleaned from not only their conduct but also those of their representatives. The Applicants' representatives had either sought postponements and when these were declined, had withdrawn from the matter, thus granting the Applicants a postponement by default. Having withdrawn from the matter and after obtaining a postponement by default, the representative would then re-surface in the same proceedings, to seek postponements on the basis of ill-considered applications brought before this Court. The review application was clearly a ruse to obtain interim relief, whilst this application, as presented to the Chairperson of the disciplinary enquiry during the hearing, was also a further stratagem to postpone the disciplinary enquiry. Clearly there were no bona fides in bringing this application, which by all accounts, was vexatious, as further evident from the postponement of these proceedings on 17 August 2020 in order for the Applicants to file a replying affidavit. Incidentally, in the founding affidavit, other than reference to the annexures, not even one sentence was attributed to any attempt at explaining the circumstances surrounding the use of the amounts erroneously deposited into Bojanala Municipality account.
- [63] It was only in the replying affidavit that any such attempts were belatedly made. Inasmuch as it is appreciated that motion proceedings are concerned with common cause facts and legal issues, it is however trite that a case cannot be made out in a replying affidavit. The replying affidavit as correctly submitted on behalf of the respondents, took their case no further. Instead, what the Applicants then did after causing the Respondents to answer to a variety of allegations in respect of their claims surrounding their suspensions, was to abandon any form of relief in this regard on the hearing date. Even then, this was after defence

of *lis alibi pendens* was raised .

- [64] The above abuse of this Court's processes is glaring and it is apparent that punitive cost orders made in the past and in similar matters against recalcitrant applicants have not had the desired effect. The abuse of the overburdened urgent roll in particular continues unabated, and in the end, it is the Municipality, and by default, the ordinary tax payer, that continues to be burdened with the costs of having to defend such matters that ought not to have come on the urgent roll in the first place. In these circumstances, and given the conclusions reached in this judgment, it cannot be in the public interests, nor do the

requirements of law and fairness permit that the tax payer should be continually burdened with such costs.

[65] The mere fact that there is an ongoing relationship between the parties is neither here nor there where this application was not brought with bona fides, and further where that relationship is abused for incorrect ends.

[66] Accordingly, the following order is deemed appropriate;

Order:

1. The First and Second Applicants' urgent application is dismissed costs payable on a scale as between attorney and client.
2. Such costs shall be payable by the First and Second Applicants, jointly and severally, the one paying, the other to be absolved.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the First and Second Applicants: K. A Tema, instructed by K Maake Attorneys

For the First – Fourth Respondents P.W Makhambeni, instructed by Majang INC Attorneys

[1] Act 66 of 1995, amended

[2] Issued by the Minister of Cooperative Governance and Traditional Affairs on 21 April 2011 under Government Gazette 34213. Regulation 5(1) provides that; 'Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council'

[2] Issued by the Minister of Cooperative Governance and Traditional Affairs on 21 April 2011 under Government Gazette 34213. Regulation 5(1) provides that;

'Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council'

[3] Local Government Municipal Structures Act 117, of 1998. Section 49 provides: Functions and powers of mayors (1) The mayor of a municipality (a) presides at meetings of the executive committee: and (b) performs the duties. including any ceremonial functions, and exercises the powers delegated to the mayor by the municipal council or the executive committee (2) The deputy mayor exercises the powers and performs the duties of the mayor if the mayor is absent or not available or if the office of the mayor is vacant. The mayor may delegate duties to the deputy mayor.

[3] Local Government Municipal Structures Act 117, of 1998. Section 49 provides:

Functions and powers of mayors

(1) The mayor of a municipality

(a) presides at meetings of the executive committee: and

(b) performs the duties, including any ceremonial functions, and exercises the powers delegated to the mayor by the municipal council or the executive committee

(2) The deputy mayor exercises the powers and performs the duties of the mayor if the

mayor is absent or not available or if the office of the mayor is vacant. The mayor may delegate duties to the deputy mayor.

[4] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; See also *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*

(2016) 37 ILJ 2840 (LC) at para 26; *Minister of Law and Order v Committee of the Church Summit*, 1994 (3) SA 89 (BGD) at 99F-G; *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32, where it was held; ‘Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. ...’ See also *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* [2016] ZALCJHB; [2016] BLLR 1151 (LC); (2016) 37 ILJ 2840 (LC) at para 26

[4] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; See also *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*

(2016) 37 ILJ 2840 (LC) at para 26; *Minister of Law and Order v Committee of the Church Summit*, 1994 (3) SA 89 (BGD) at 99F-G; *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32, where it was held;

‘Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. ...’

See also Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another [2016] ZALCJHB; [2016] BLLR 1151 (LC); (2016) 37 ILJ 2840 (LC) at para 26

[5] Setlogelo v Setlogelo 1914 Ad 221; Webster v Mitchell 1948 (1) SA 1186 (W); National Treasury v Opposition to Urban Tolling Alliance 2012

(6) SA 223 (CC);

[6] Annexure 'PPS 17' to the Founding Affidavit.

[7] See Golding v HCI Managerial Services (Pty) Ltd & others

[2015] 1 BLLR 91 (LC) at para 24, where it was held that; 'As Prest points out, a matter which is inherently urgent may be rendered not urgent and fall outside the provisions of the [High

Court] rules where an applicant delays in bringing the application as one of urgency. A delay of nine days may not appear to be lengthy, given the deplorably slow pace at which the wheels of justice often turn; but in circumstances where the applicant knew when the disciplinary hearing was due to commence and yet gave the respondents less than one day before this application was to be heard to file answering papers, having taken nine days to draft his own lengthy founding papers, I agree with Mr Pretorius that the urgency is self-created.'

[7] See Golding v HCI Managerial Services (Pty) Ltd & others

[2015] 1 BLLR 91 (LC) at para 24, where it was held that;

'As Prest points out, a matter which is inherently urgent may be rendered not urgent and fall outside the provisions of the [High

Court] rules where an applicant delays in bringing the application as one of urgency. A delay of nine days may not appear to be lengthy, given the deplorably slow pace at which the wheels of justice often turn; but in circumstances where the applicant knew when the disciplinary hearing was due to commence and yet gave the respondents less than one day before this application was to be heard to file answering papers, having taken nine days to draft his own lengthy founding papers, I agree with Mr Pretorius that the urgency is self-created.'

[8] MEC for Education, North West Provincial Government v Gladwell

(2012) 33 ILJ 2033 (LAC) at para 46 where it was held; 'Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of section 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of section 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings,

except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.’ (Footnotes omitted)

[8] MEC for Education, North West Provincial Government v Gladwell

(2012) 33 ILJ 2033 (LAC) at para 46 where it was held;

‘Disputes concerning alleged unfair labour practices must be referred to the CCMA or a bargaining council for conciliation and arbitration in accordance with the mandatory provisions of section 191(1) of the LRA. The respondent in this case instead sought a declaratory order from the Labour Court in terms of section 158(1)(a)(iv) of the LRA to the effect that the suspension was unfair, unlawful and unconstitutional. A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of the unfairness of a suspension will usually be better accomplished in arbitration proceedings, except perhaps in extraordinary or compellingly urgent circumstances. When the suspension carries with it a reasonable apprehension of irreparable harm, then, more often than not, the appropriate remedy for an applicant will be to seek an order granting urgent interim relief pending the outcome of the unfair labour practice proceedings.’ (Footnotes omitted)

[9] See *Booyesen v Minister of Safety and Security and Others*

[2011] 1 BLLR 83 (LAC), (2011) 32 ILJ 112 (LAC) at para 36; *Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and others*

[2009] 8 BLLR 833 (LC) [2009] at para 3; and *Jiba v Minister: Department of Justice and Constitutional Development and others*

[2005] ZALC 15; [2009] 10 BLLR 989 (LC), (2010) 31 ILJ 112 (LC) at para 17.

[10] [2018] 4 BLLR 355 (LC); (2018) 39 ILJ 1096 (LC) at para 34

[11] Disciplinary procedures 5.

- (1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.
- (2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven [7] days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven [7] days to consider the said report. (3) If the municipal council is satisfied that –

- (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days appoint an independent investigator to investigate the allegation[s] of misconduct; and
- (b) there is no evidence to support the allegation[s] of misconduct against the senior manager, the municipal council must within seven [7] days dismiss the allegation[s] of misconduct. (4) The investigator appointed in terms of sub-regulation (3)(a) must, within a period of thirty [30] days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.
- (5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).
- (6) After having considered the report referred to in sub-regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.
- (7) The resolution in sub-regulation (6) must- (a) include a determination as to whether the alleged misconduct is of a serious or a less serious nature; (b) authorise the mayor, in the case of municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to -
 - (i) appoint (aa) an independent and external presiding officer; and (bb) an officer to lead evidence; and (ii) sign the letters of appointment.

[11] Disciplinary procedures

5.

- (1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.
- (2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven [7] days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven [7] days to consider the said report.
- (3) If the municipal council is satisfied that –
 - (a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days appoint an independent investigator to investigate the allegation[s] of misconduct; and
 - (b) there is no evidence to support the allegation[s] of misconduct against the senior manager, the municipal council must within seven [7] days dismiss the allegation[s] of misconduct.
- (4) The investigator appointed in terms of sub-regulation (3)(a) must, within a period of thirty [30] days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.

- (5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).
- (6) After having considered the report referred to in sub-regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.
- (7) The resolution in sub-regulation (6) must- (a) include a determination as to whether the alleged misconduct is of a serious or a less serious nature; (b) authorise the mayor, in the case of municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to -
 - (i) appoint
 - (aa) an independent and external presiding officer; and
 - (bb) an officer to lead evidence; and
 - (ii) sign the letters of appointment.

[12]2013

- (8) BCLR 863 (CC)

[13]See South African Informal Traders Forum and Others v City of Johannesburg and Others

[2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014) At para 25. See also National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012

- (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 50, where it was held that; “Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite”

[13]See South African Informal Traders Forum and Others v City of Johannesburg and Others

[2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014) At para 25.

See also National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012

- (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 50, where it was held that;

“Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or

imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite”

[14] Mosiane v Tlokwe City Council

[2009] ZALC 39; [2009] 8 BLLR 772 (LC); (2009) 30 ILJ 2766 (LC), where Francis J held at paras 15 - 16; “A worrying trend is developing in this Court in the last year or so where this Court’s roll is clogged with urgent applications.

Some applicants approach this Court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this Court will grant them relief on an urgent basis. All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant Bargaining Councils and then approach this Court for the necessary relief. Other employees would still approach this Court for relief in the ordinary manner and not on an urgent basis.”

[14] Mosiane v Tlokwe City Council

[2009] ZALC 39; [2009] 8 BLLR 772 (LC); (2009) 30 ILJ 2766 (LC), where Francis J held at paras 15 - 16;

“A worrying trend is developing in this Court in the last year or so where this Court’s roll is clogged with urgent applications.

Some applicants approach this Court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this Court will grant them relief on an urgent basis.

All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant Bargaining Councils and then approach this Court for the necessary relief. Other employees would still approach this Court for relief in the ordinary manner and not on an urgent basis.”

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/2020/191.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/shikwane-and-another-v-bojanala-unknown-topic-alcjhb-2020--6a3ea51d3b1caa9129813b82>

Prepared on 12 October 2026 · Esheria