

SOUTH AFRICA / JUDGMENT

Sikhundla v Alfred Nzo District Municipality and Others (2666/2024)

[2024] ZAECMHC 66 (20 August 2024)

[2024] ZAECMHC 66

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

2666/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MTHATHA)

CASE

NO.: 2666/2024

In

the matter between:

ZAMILE

HEBERT SIKHUNDLA

Applicant

and

ALFRED

NZO DISTRICT MUNICIPALITY

1st

Respondent

THE

EXECUTIVE MAYOR

ALFRED

NZO DISTRICT MUNICIPALITY

2nd

Respondent

VUKILE

MHLELEMBANA

3rd

Respondent

LINDELANI

MALALA

4th

Respondent
SAKHUMZI
BACELA
5th
Respondent

JUDGMENT

JOLWANA J

- [1] The applicant approached this Court by way of urgency on extremely truncated time frames seeking an interim order interdicting the first respondent, its officials or political office bearers from convening an internal disciplinary inquiry against him. The said disciplinary inquiry was scheduled for the 01 July 2024 at 8:30 in the morning. The application consisted of two parts, the relief referred to above being sought in part A of the application. The relief sought in part B was for the reviewing and setting aside of the first and third respondents' decision to institute a disciplinary hearing against the applicant and that it be declared a nullity. This judgement pertains only to part A of the application.
- [2] The applicant is the first respondent's municipal manager. At the time of this application, he was on suspension pending certain disciplinary charges that had been preferred against him. The disciplinary hearing in respect of the said charges was already underway with some of the first respondent's evidence having been heard.
- [3] The charge sheet in respect of the charges relevant to this application is dated 18 June 2024. It contains charges of insubordination for the applicant's failure to return to the municipality a cellphone, WIFI router and an iPad which he had been directed to return. The second charge was that of breaching the condition for his suspension in that on 8 April 2024 he had attended at the first respondent's premises without prior consent having been sought and obtained. Apparently it was one of the conditions for his suspension that he would not enter the first respondent's premises without having been permitted to do so. The charge sheet indicated that the first respondent deemed these acts of the alleged misconduct to have resulted in the employer/employee relationship breaking down. As a result in the event of his conviction, the first respondent indicated in the charge sheet that it intended to apply for the ultimate sanction of dismissal.
- [4] The applicant's case is that while the first respondent is entitled to subject him to a disciplinary process, it is obliged both in terms of the contract of employment and the Local Government: Disciplinary Regulations for Senior Managers, 2010 [1] (the Regulations) to follow certain procedural steps before doing so. He contends that in setting the disciplinary process in motion, the first and third respondents failed to comply with these Regulations thus delegitimising the whole disciplinary process and in essence making it illegal even before it commenced. This, he contends, is in breach of his employment contract.

[5] Section 2 of the Regulations reads:

“(1) This Disciplinary Code-

- a. applies to all-
 - i. municipalities;
 - ii. senior managers; and
- b. is intended to –
 - i. provide an internal mechanism for management of misconduct;
 - ii. establish standard procedures for the management of misconduct;
 - iii. support constructive labour relations;
 - iv. ensure a common understanding of misconduct and discipline;
 - v. promote mutual respect between senior managers and council,
 - vi. promote acceptable conduct;
 - vii. avert and correct unacceptable conduct, and
 - viii. prevent arbitrary or discriminatory actions.
- c. prevails in the event of any inconsistency with any systems and procedures adopted by a municipality in terms of section 67(1) (h) of the Act to the extent that those procedures apply to senior managers”.

[6] As regards the actual disciplinary procedures provided for therein, Regulation 5 provides in quite some detail the procedures that must be followed in the event of an allegation of misconduct against a senior manager. It reads:

“(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 days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven 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 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 days dismiss the allegation[s] of misconduct.
- (4) The investigator appointed in terms of subregulation (3) (a) must, within a period of 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 subregulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in subregulation (2).
- (6) After having considered the report referred to in subregulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.
- (7) The resolution in subregulation (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.”
- [7] The provisions of Regulation 5 are what the applicant contends, a *condictio sine qua non* before he can be subjected to a disciplinary process. He alleges that none of the conditions provided for therein were complied with thus vitiating any contemplated disciplinary processes even before they started.
- [8] The fourth respondent did not participate in these proceedings. The fifth respondent filed a notice to abide together with an affidavit explaining his involvement or lack thereof in the disciplinary processes against the applicant. In that affidavit the fifth respondent confirmed that he is the prosecutor in the disciplinary hearing against the applicant which is partly heard and had been scheduled to continue on 8 July 2024. Most importantly, he said that he was not the appointed prosecutor in respect of the charges with which these proceedings are concerned. This therefore means that another prosecutor has been or would have been appointed specifically to deal with the charges relevant to these proceedings.
- [9] The first to the third respondents filed a notice to oppose the application. An answering affidavit was also filed. The deponent thereto is the acting municipal manager of the first respondent. She indicated therein that she deposed to it on behalf of the first to the third respondents. Purely for brevity, I shall henceforth refer to these three respondents merely

as the respondents save where it becomes necessary to refer to a specific respondent.

[10] In their rather overly lengthy answering affidavit replete with annexures running to more than two hundred pages overall, the respondents deal at length with the disciplinary hearing that was already underway and was partly heard. I am at a loss as to why this extent of proximity was considered necessary. It induces a sense of disquiet whenever litigants find it necessary to annex lengthy annexures with no

specific reference to relevant parts or paragraphs thereof, it being left to the court to make the connection between what is said in an affidavit and the lengthy annexures. To expect a court to trawl through mounds of annexures trying to figure out which portion

thereof is relevant and in what way should not be countenanced as it inter alia makes the adjudicatory function even harder for the court. I believe that Cloete JA was expressing this principle in *Wevell Trust*[2] when he said:

“It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein, and the issue and averments in support of the parties’ cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent’s affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.”

[11] This principle applies with even more force to the court that must make sense of what case is sought to be made in respect of a very lengthy annexure where no specific paragraph or portion thereof is specifically dealt with in the affidavit.

[12] In essence, the respondents appear to be making the point that the charges preferred against the applicant on 18 June 2024 are not new charges in that they are the consequence of the applicant’s current suspension. I understand the respondents’ case to be that the charges in issue in these proceedings are not part of the charges that are already being heard. That is why they are not being heard with those charges. They just arise out of them and therefore are not new charges. What the respondents do not say, at least cogently and with the necessary degree of specificity is either that the Regulations are inapplicable to the applicant or even better, that they were complied with in

relation to these charges. I therefore take it that the respondents accept that the Regulations are applicable to the applicant. If the Regulations are applicable to the applicant which appears to be the case, I do not know what the respondents’ case is regarding the Regulations. It could very well be that it is a matter best left for determination by the court that will be hearing part B of this application.

[13] The respondents also submit that this court lacks jurisdiction and that the applicant should have, instead, approached the Labour Court. This, the respondents contend, is on the basis that it is the Labour Court that ordinarily has jurisdiction. The respondents further say that the Labour Court has concurrent jurisdiction with this Court only in matters relating to the termination of an employment contract. However, Section 77 (3) of the Basic Conditions of Employment Act[3] seems to suggest otherwise. It provides:

“the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment

irrespective of whether any basic condition of employment constitute a term of that contract”.

[14] The respondents do not say that the applicant’s cause of action does not concern an employment contract. They seem to be saying that because his employment contract has not been terminated, therefore this Court lacks jurisdiction. This contention is very difficult to understand. However, because the respondents’ counsel was not present when the matter was dealt with in court, an issue I will say more about later, it is better that I do not pronounce definitively on the respondents’ case on this issue so as to enable the court hearing part B to effectively pronounce on it without being

in any way fettered.

[15] The respondents have also raised the issue of the inappropriateness of the relief sought in media res. This, on the basis that no exceptional circumstances have been set out in the applicant’s founding affidavit. It is important at this stage to point out that the respondents have elected not deal effectively and definitely with the only issue that is the very genesis of this application. The alleged failure of the respondents to comply with the Regulations, in particular, the basis on which a senior manager could be dismissed on charges that are very different from the ones that were placed before the municipal council. It seems to me to be quite an exceptional circumstance for an organ of state such as the first respondent and its officials to seek to terminate an employment contract of a senior manager, such as the applicant, without complying with what, on the face of it, are requirements that must be complied with before any contemplated disciplinary process is set in motion. Put differently, on the respondents’ contentions while the Regulations require the municipal council of the first respondent to be involved in the process of taking disciplinary action against its senior managers, the municipal council could very well learn at a later stage that a municipal manager or any of the senior managers was dismissed as a *fait accompli*. This, on the respondents’ proposition, is because these charges emanate from the charges that are currently underway which are known by the municipal council.

[16] The respondents do not deal with the fact that the mischief sought to be prevented by the Regulations, namely, the dismissal of senior managers without the municipal council’s involvement or knowledge and even approval would thereby be defeated. The absurdity of that proposition becomes very difficult to miss when these possibilities are considered. The charge sheet in respect of the relevant charges makes it clear that the first respondent has

every intention to seek the applicant's dismissal in the event of a guilty finding. This, without having complied with the prescribed regulatory mechanism to get to that point. All these reasons speak to and make it clear that not only has the applicant a prima facie right to be protected from what appears to be a possible flagrant disregard of a legislated process for subjecting a senior manager to a disciplinary process but also the applicant has shown the required exceptional circumstances for stopping the disciplinary process in medias res.

- [17] In *Fedsure Life Assurance*[4] the Constitutional Court established quite concretely that a municipality does not have power to act outside the constraints of the applicable legislative framework. It said:

"There are a series of provisions in chap 10 itself which make it plain that a local government's powers to act are limited to the powers conferred by the Constitution or laws of a competent authority.

....

[A] local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law- to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law..."

- [18] As I conclude I do need to deal, even if very briefly, with the issue of urgency which the respondents have raised. Common cause facts are that on 18 June 2024 the second respondent made a written demand for the return of work tools and gadgets which remained with the applicant even after his suspension and during the running of the disciplinary hearing. On 25 June 2024 the applicant responded to the demand through his attorneys of record. In that response the applicant drew the attention of the respondents through the third respondent to the non-compliance with the

provisions of the Regulations giving them until the close of business on that same day. On 26 June 2024 a directive was sought from me in chambers

through a certificate of urgency. I directed that the matter may be heard on 01 July 2024 at 8:00 that morning. Amongst other things I directed that service be effected in terms of rule 4 of the Uniform Rules of Court. I further directed the applicant's attorneys to ensure that all the parties were allowed access into the court precinct by 07:30 on 01 July 2024.

- [19] I considered the matter to be extremely urgent even taking into account the time lapse between the 18 June 2024 when the demand for the return of the tools of trade and gadgets was made and the 25 June 2024 when the applicant responded to that demand. In the judicious exercise of my discretion I issued an appropriate directive as indicated above. All the papers were subsequently filed including the very substantive and lengthy answering affidavit. On reading the papers, I became aware of further developments that had taken place since the issuing and service of the papers. These further developments were contained in the applicant's replying affidavit in respect of which his attorney has deposed to

a confirmatory affidavit. On 29 June 2024 Ms Balfour, the person apparently appointed as a prosecutor in respect of the charges with which this application is concerned sent a message to the applicant's attorney indicating that the message was written on behalf of the first respondent. The essence of the message was that on 01 July 2024 at 8:30 which was the date and time indicated in the charge sheet the applicant was required to attend the disciplinary hearing at the first respondent's premises. The applicant understood the message to mean that the disciplinary process he sought to have interdicted would continue as scheduled while the hearing of his urgent application was underway.

- [20] I interpose now to point out the very important fact that the sheriff had served the papers on all the respondents by 27 June 2024. Therefore, the message from Ms Balfour was clearly intended to mean that the fact that the respondents had been served with the papers indicating that the application would be heard on an urgent basis at 08:00 on 01 July 2024 did not deter the respondents from starting the disciplinary hearing at the scheduled time, at least until the court would have heard the application and made the determination in respect of part A of the application. This seemed to me to be an unnecessary escalation and complication of the matter on the face of a pending urgent application that was to be heard 30 minutes earlier than the time scheduled for the start of the disciplinary hearing. In all the circumstances it seemed to me that the applicant would not be able to obtain substantial redress in due course. This is because he faced the distinct possibility of being dismissed without a court having made a determination on the applicability or otherwise of the Regulations to his disciplinary process.
- [21] At 08:00 when the matter was called, only the applicant's counsel Mr Bodlani and his attorney Mr Chopha were present in court. Despite the answering affidavit having been filed, there was no appearance for the respondents. I enquired from Mr Bodlani if he had heard from the respondents' counsel or their attorneys, the response was in the negative. I therefore continued hearing the application in the absence of any appearance by or on behalf of the respondents. It was at 08:11 when Mr Madlanga, the respondents' attorney walked into the court room. He was not robed for the court. For that reason, I could not hear him even if he wanted to be heard. In any event, when he walked into the court room I was already delivering the order granting the interim relief as prayed for by the applicant.
- [22] In all the circumstances and for the reasons stated above I issued the following order:
1. The applicant was granted leave to bring this application by way of urgency in accordance with the provisions of Uniform Rule 6(12) and that the usual forms of service were dispensed with.
 2. That pending the finalisation of part B of this application –

2.1 the first respondent and/or any official or political office bearer of the first respondent, acting at the instance of the first respondent or otherwise, is hereby interdicted and restrained from convening, entertaining and continuing the internal disciplinary hearing of the first respondent, instituted against the applicant and set down for hearing on 01 July 2024 at 08:30.

2.2 that the disciplinary hearing is hereby stayed; and

3. That the costs of this application shall be payable in part B.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances: Counsel for the applicant: A Bodlani SC Instructed by : A.W. Chopha Attorneys
Mthatha Counsel for the 1st, 2nd & 3rd respondents : No appearance Instructed by : Madlanga & Partners Inc. Attorneys c/o : Nodada Attorneys Inc. Mthatha Date heard : 01 July 2024 Date delivered : 20 August 2024

- [1] Local government: Disciplinary Regulations for Senior Managers, 2010 published in Government Gazette Number GoN 344, G. 34213 dated 21 April 2011.
- [2] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200 C-E.
- [3] Basic Conditions of Employment Act 75 of 1997.
- [4] Fedsure Life Assurance Ltd and other Greater Johannesburg Transitional Metropolitan Council and others [1998] ZACC 17; 1999 (1) SA 374 (CC) at 399 B-D

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