

SOUTH AFRICA / JUDGMENT

Thibini v Merafong City local Municipality and Others (J1113/17) [2017] ZALCJHB 235 (26 May 2017) [2017] ZALCJHB 235

COURT

Labour Court Johannesburg

BEFORE

Mabaso

CASE / FILE NUMBER

J1113/17

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: J1113/17

In the matter between:

LANGA REGINALD THIBINI Applicant

and

MERAFONG CITY LOCAL MUNICIPALITY First Respondent

ANTHONETTE RINKY NGWENYA AND OTHERS 2nd to Further Respondents

Heard: 23 May 2017

Order delivered: 26 May 2017

REASONS FOR THE ORDER

MABASO AJ

Introduction

and the Parties

- [1] On 26 May 2017, I made the order in paragraph 29 below, these are the reasons for the same order. The applicant approached this Court on an urgent basis, seeking an order that:

“1. the non-compliance with the rules of this Honourable Court pertaining to process and time limits be dispensed with and that this matter be treated as an urgent application in accordance with the provisions of rule eight of the rules of this Honourable Court;

2. That the First Respondent and Third to the fifty fifth's suspension of the applicant [a]s an Acting Municipal Manager or Chief Operating Officer, effected through a letter issued by the Third Respondent , dated 21 April 2017, be declared unlawful.
3. Directing that the First and Third to Fifty fifth Respondents' suspension of the Applicant is set aside and they must allow the Applicant to return to work and resume his duties as an Acting Municipal Manager or Chief Operating Officer with immediate effect.
4. Directing that the Respondents take all the necessary steps to ensure that the First and Third to Fifty-Fifth Respondents set aside the Applicant's suspension and allows the Applicant to return to work and resume his duties as an Acting Municipal Manager or Chief Operations Officer with immediate effect..." (sic)

[2] This matter was argued before this Court on 24 May 2017. I then directed the parties to file written submissions in respect of the application to strike out raised by the applicant in his replying affidavit, and as to whether this Court has jurisdiction to hear this matter, this was following the submission by the applicant's representative that he was abandoning his reliance on section 77(3) of the Basic Conditions of Employment Act,[1] and he was only relying on the provisions of the Labour Relations Act,[2] as contained in paragraph 142 of the supporting affidavit;[3] . The respondents' representative argued that based on that this submission this Court does not have jurisdiction to deal with the matter.[4]

[3] The applicant is Langa Reginald Thibini (the applicant), who is employed by the first respondent, Merafong City Local Municipality

(the Municipality), as a Chief Operations Officer and at the time of suspension, he was acting as a Municipal Manager. The third

respondent is the Executive Mayor of the employer. The second respondent, at the time this matter was referred, was an Acting Municipal Manager. The fifth to further respondents are councillors (the councillors).

Application to strike out the answering affidavit

[4] The applicant, upon receiving the answering affidavit proceeded to deliver the replying affidavit wherein he raised the point that the deponent to the answering affidavit, Mr Romeo Mohaudi (Mohaudi), has no personal knowledge of the contents thereof as he only joined the employer after the suspension in question. Moreover, the contents of the affidavit related to what happened preceding 21 April 2017, which is the date of the suspension. The respondents' representative, during argument, submitted that this point was not properly raised before this Court, as there was no substantial application in the form of a notice of motion supported by an affidavit, therefore, it should not be entertained.

- [5] In the PSA matter[5] the Labour Appeal Court held the following regarding the procedure to be followed where one applies for an application of this nature:

“That being the case, it would be unfair to ambush an opponent with an application to strike out without notice to such party, as has happened in this matter. The other party must be apprised of the grounds on which the application is based in order to facilitate informed and sensible opposition to such application, if it is opposed.

... [14] In my view applications to strike out must be brought upon proper notice to the other party. The notice must set out the grounds of the objection and refer to the specific portions of the affidavit to which the objection is taken. The facts and circumstances of the case will dictate whether it is necessary for the notice to be supported by an affidavit.” (Emphasis added.)

- [6] The Constitutional Court in *Helen Suzman Foundation*,[6] in emphasising the discretion, given to a presiding judge, who is tasked with making a ruling as to whether or not a strike out should be granted, in terms of Rule 6(15) of the Uniform Rules of Court, said the following:

“Is the additional evidence scandalous, vexatious or irrelevant? Two requirements must be met before a striking out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and (ii) the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced.”[7] (Footnote omitted.)

- [7] The above dicta are summarised as follows: (a) It is not a strict rule that an application to strike out must be delivered in the form of a notice

accompanied by an affidavit. A notice alone may suffice depending on the circumstances of the case and the nature of the application

before such presiding officer; (b) A party objecting to the submittal to the averment in an affidavit and or affidavit has to show that such submittal would be prejudicial to him because it is scandalous, vexatious or irrelevant.

- [8] Taking into account that, the applicant has approached this Court on an urgent basis and that the application to strike out is not in the form of “a notice” , but raised in the replying affidavit. I have noted that Rule 6(15) does not define the word notice, but states as to what should be contained in such notice therefore, I opine that the applicant cannot be faulted for not delivering a separate notice stating the grounds upon which he relies , as this might have delayed this urgent application. The respondents delivered confirmatory affidavits after being notified of the concerns raised. However, the concerns about this notice were that the applicant’s basis for the strike out is that the deponent to the answering affidavit has “lack of personal knowledge” of what is contained in the answering affidavit. Taking into account that the applicant is not specific as to which points in the affidavit are scandalous, vexatious and/or irrelevant, results in the failure of the objection to meet the requirements of a strike out as per the *Helen Suzman* dictum.

[9] Further, the applicant does not indicate as to how he will be prejudiced by the submittal of the affidavit, taking into account

that most averments are common cause and the applicant had an opportunity to deliver the replying affidavit without identifying

which paragraphs he does not agree with. Moreover, that deponent to the answering affidavit is acting in the representative capacity. Therefore, in the circumstances, the application to strike out fails.

Relevant

Background

[10] The applicant is an admitted attorney, with two law degrees. In 2001 he was appointed as Legal Administration Officer at Mogale City, and between 2004 to 2007 he worked as a Legal Service Manager at Bitou Municipality. In December 2007 he joined Western Area Municipality as an Executive Director in Corporate Support Services. In December 2013 he joined the employer as its Chief Operations Officer until 2014, when he was appointed in the capacity of an Acting Municipal Manager.[8] With this résumé, it is clear that the applicant is well acquainted with the law,[9] unlike an uneducated person who, upon receiving a notice of intention to suspend, might not know what to do and understand the

background

of such notice. Even if that notice is not properly drafted and/or detailed. Further, looking at the founding affidavit in this matter, it is clear that the applicant knew very well as to what the allegations were against him.

[11] Amongst other things, the pleadings show the following regarding the allegations against the applicant, and I must mention that his affidavit is detailed specifically about the following:

1.1 Rooipoort Landfill Site's allegation: the Gauteng Department of Agriculture and Rural Development (GDARD) issued an environmental audit report indicating, among other things, that it previously audited this site, and there was no proper compliance with the relevant legislation. This audit blames the poor management of the site. The consequences thereof could result to the closure of the site or a fine payable by the employer not exceeding 10 million Rand. This site falls within the jurisdiction of the employer, and in terms of the provisions, section 62, of the Local Government Municipal Finance Act 56 of 2013, the applicant as accounting officer was responsible for this. Meaning, it was his responsibility to make sure that whoever that was involved in this project on behalf of the Council was doing the right job. Following this misfortune, the members of the portfolio committee visited the project for inspection.

1.2 Under the heading "Rooipoort Landfill Site", he states the following:

“88. Around May 2016, I was visited by the Third Respondent who was in the company of some councilors notably including, councilor, Lephuthing [13th Respondent] who is an MMC for the Integrated Environmental Management portfolio. In that meeting the Third Respondent confronted me together with Lephuthing that they have been informed by Mantjane that I have appointed a service provider which I have a personal interest on and was does not have capacity to operate and maintain the landfill site. I responded that I have no interest in the service provider, other than ensuring that we comply, to the extent agreed upon with GDARD, the landfill site’s license conditions seeing that failure to do so carries with it punishment in my personal capacity. I further informed them that I have never met the Service Provider personally before. It is now occurring to me that the very same meeting was the beginning of the process which the First Respondent and Third to Fifty fifth Respondents have now embarked upon to get rid of me”[10]

1.3 The applicant confirms that the accusations mentioned in the preceding paragraph took place after the GDARD head conducted the audit at the site.[11] He indicates the steps that he took, by interacting with the parties within the relevant Municipality’s department, after being made aware of the GDARD’s report.[12]

1.4 The notice of intention to suspend, calling upon him to give reasons why he should not be suspended pending the finalisation of the investigation in respect of the Rooipoort Landfill Site issue, which letter also indicates that it is a serious allegation against him, and the Council was concerned that he might interfere with, among others, potential witnesses.[13]

1.5 To show that the applicant knew about the Rooipoort Landfill Site, long before he could even receive a letter of suspension, on 21 April 2017, in his founding affidavit he says:

“On 4 April 2017, there was media announcement which reached the Carltonville Herald titled “Lack of management places Rooipoort Landfill Site at Risk”, wherein it was alleged that more than 50 % of the

budgeted R10,000.000. 00 had been spent with no improvement of the site. In the article or media announcement, a copy of which is annexed marked “LRT15”, the impression is created that I have been acting corruptly, mismanaging the funds of the First Respondent and that I have been abusing my position”.

The applicant with this information, after being advised of the intention to suspend him a day before – as an attorney – should have known that the allegations against him were that of maladministration.

In light of what has been stated under this paragraph, a simple question that begs for an answer is: why did the applicant not respond to the allegations and state why he should not be suspended?[14] Also taking into account that the applicant, in his founding affidavit in this Court, detailed what he knows about the issue of

the Rooipoort Landfill Site. Therefore, to now say that there was no reasonable cause; on the part of the Council to suspect allegations

of misconduct, to me it amounts to a thinly veiled defence.

[12] A special Council meeting was held on 30 March 2017 and based on the information at the Municipality's disposal it formed a view that there is some misconduct in respect of, among others, the applicant. That then resulted to the opinion that there was a reasonable cause to take disciplinary measures against the applicant, because it was made to believe that he had committed financial

misconduct.[15]

[13] On 3 April 2017, the applicant was issued with a letter by the first respondent informing him of the resolution of intention to suspend him. In terms of this letter the applicant was given seven days to indicate as to why he should not be suspended and some of the things that are raised in that letter are the following:

"A progress report was presented to the Section 80 meeting of Integrated Environmental Management on 29 March 2017. The annexures of the progress report included the Environmental Audit Report for the Rooipoort Landfill Site (10 February 2017) by GDARD.. In the contents of the Audit Report, GDARD remarked as follows: 'The Department is not pleased to see that there were no improvements on partial and non-compliance issues identified in the previous audit and that no actions have been undertaken by MCLM to address some of the partial compliance issues identified in the previous audit'"[16]

This letter was received by the applicant on 3 April 2017 and he was expected to give reasons by no later than 10 April 2017 as to why he should not be suspended.

[14] On 10 April 2017, the applicant sent a letter requesting further information to enable him to properly respond to the allegations. He then transmitted a letter to the municipal mayor which partly reads thus: "In light of your intended action which appears to be drastic under the circumstances, I would be pleased to be furnished certain information and /or documents prior to me exercising my right to respond as it is accorded to me in line with the rules of natural justice."[17] Two days later, the Municipality responded to this request. According to the response it is clear that he was provided with the information that he needed. The applicant sent another letter to the Municipality requesting further details and according to this correspondence he mentions, among other things, that the Municipality was embarking on a witch-hunt. I have perused the letter concerned. According to me, there is nothing that suggests any motive and/or witch hunt on the part of the respondents. Still the applicant failed to respond to the letter which requested him to provide reasons why he should not be

suspended.

[15] On 19 April 2017, the applicant sent another letter to the Municipality wherein he, inter alia, stated the the following: "the requested transcripts are requested to assist me in understanding how council arrived at its decision to intended to suspend me" and further mentioned a statement in his request for the transcript records of three meetings that were held by different committees. Furthermore, he stated that:

“With reference to Item 23/2017, in particular, paragraph 3 thereof where it is stated that you requested my intervention on the concern raised by Mr Mantjane around May 2016. How did you make such a request and when in May 2016 to be specific I note that you have not provided the response hereto to enable me to be able to answer.”

He further asked the question: “when did you become aware or realise my failure to report to you as you requested”.

Jurisdiction of this Court

[16] The applicant approached this Court for a declaratory order to declare his suspension unlawful, as per prayer 2 of the notice of motion. I could only find section 158(1)(a)(iv) of the LRA which gives this Court the power to make a declaratory order.[18] I have taken into account that, in the Member of the Executive Council for Education, North West Provincial Government v Gradwell,[19] the LAC indicated the following in respect of a party who is approaching this Court on an urgent basis relying on this section:

“Disputes concerning alleged unfair labour practices must be referred to the CCMA or 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. The final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings. The determination of 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 unfair labour practice proceedings”.[20]

[17] In casu, the applicant has not approached either the CCMA or the Bargaining Council for an unfair suspension dispute, he opted to approach this Court directly; despite those processes being available for him to utilise in terms of the provisions of section 191 of the LRA which relates to unfair labour practice based on suspension. Considering that the applicant asks this Court to declare his suspension by the Council to be unlawful, in the provisions of the LRA, I do not think the LRA allows for this because it deals with fairness of suspension. Taking into account, that in the same judgment the LAC, in paragraph 47, says “I am, therefore, of the view that the judge a quo ought not to have exercised his discretion to grant the declaratory. I doubt also whether he had the legal competency to do so.” (Emphasis added.)

- [18] Recently the Constitutional Court had to deal with the matter whereby parties had approached the Court asking it to declare their dismissal unlawful, in accordance with the provisions of the LRA. The Constitutional Court held that it could not have been the intention of the legislature that a dismissal could be declared unlawful, instead of fairness. [21] I, therefore, conclude that relying on the provisions of the LRA, asking the Court to declare a suspension unlawful is misplaced under these circumstances.
- [19] However, in respect of prayer 3 of the notice of motion, taking into account the averments in paragraph 120 to 126 of the founding affidavit it is clear that the applicant is asking this Court to set aside the decision of the Municipality, which this Court, in terms of section 158(1)(h) of the LRA it has powers to do so, as the Municipality is part of the state. Under those circumstances, this Court may have the power to do so. As it would be detailed below, I am of the view that no proper case has been made in support of this prayer.
- [20] If I am wrong in the above, paragraphs 17 and 19 above, taking into account that the LAC[22] has held thus:

“It is now the trite that the jurisdiction of the Labour Court to resolve the dispute is determined from pleadings. But the pleadings cannot be taken at face value. They need to be properly construed to ascertain what legal basis of the applicant’s claim is.”[23] (Footnotes omitted.)

As set out below, I will still not agree with the applicant that he has made out a case which requires this Court to interfere with the decision of the Municipality.

Urgency

- [21] On 21 April 2017, the applicant was suspended by the respondent. Following his suspension the respondent did not immediately approach this Court. He only delivered this application on 12 May 2017 – 20 days after his suspension. The question that has to be answered is whether the urgency is self-created.
- [22] Molahlehi J, in the matter of Mojaki[24] in respect of urgency, refers, with approval, to the East Rock Trading matter in the following:

“The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the Court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.”

[23] The respondents argued that since the application was filed 20 days later, the applicant has not shown any extraordinary or compelling

circumstances that an urgent should be granted. I have taken into account that the applicant in the founding affidavit states clearly

that his contract is about to expire on 31 May 2017, if the applicant did not approach this Court, but decided to approach the Bargaining Council with an unfair labour practice dispute, I am of the view that by this date his matter could not have been resolved . Therefore, the only option that was available to him is this Court, under those circumstances, the matter urgent.

A Clear Right

[24] Taking into consideration the affidavits, one concludes that the issue is about regulations, [25] where the relevant provisions read thus:

“6. Precautionary suspension.—(1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that—

- (a) the presence of the senior manager at the workplace may—
 - (i) jeopardise any investigation into the alleged misconduct;
 - (ii) endanger the well-being or safety of any person or municipal property; or
 - (iii) be detrimental to stability in the municipality; or
- (b) the senior manager may—
 - (i) interfere with potential witnesses; or
 - (ii) commit further acts of misconduct.”

[25] As the applicant’s affidavit in paragraph 127 to 134 alleges that there was no basis for his suspension and the Municipality failed to hear his representation. This is surprising because he was given an opportunity to make representation, but he failed to do that. Instead, he claimed that the allegations against him were not clear in the notice of intention to suspend. However, taking into account that according to his admission the charges relate to corruption and or allegations of misconduct emanated from Rooipoort Landfill Site. Moreover, this confirms that he was made aware of this back in May 2016. It is clear that these are serious allegations and by saying the Committee did not decide on the seriousness

has no basis.

[26] The applicant acknowledges that the allegations against him are of corruption, which obviously emanate from the project however he is saying his presence at the employer's premises will not jeopardise any investigation or endanger any well-being or safety of any person, this is stated in paragraph 128. I do not agree with this statement of the applicant, taking into account that the applicant was given an opportunity to make representations he should have stated all of this during the representation, but he decided, instead to make "a representation" to this Court. This kind of approach cannot be encouraged.

[27] Based on the above, I am of the view that the applicant has failed to present a convincing case, therefore, this application should be dismissed.

The costs

[28] According to paragraph 88 of the founding affidavit, he avers that the municipal manager and other respondents were aware of the allegations of corruption against him back in May 2016 however they waited until March 2017 to take action against the applicant given that his last day of employment was to be 31 May 2017. It leaves much to be desired as to how, the Municipality was expecting that the disciplinary process will be finalised within two months, as these are serious allegations which required more time. There is no evidence as to whether he would be working after 31 May 2017 or not, therefore, it would not be in the interest of justice to make a costs order against him.

Order

[29] In the circumstances, the following order is made:

1. The Application is heard as one of urgent as provided for in terms of Rule 8, and the Applicant's failure to comply with the normal time period, forms and service as provided for in the Rules of this Court is condoned.
2. The application to strike out is dismissed.
3. The applicant's case is dismissed.
4. There is no order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Moretlwe

Instructed by: Ramolao Ramotsehoa Attorneys

For the Respondent: Mr Moosam

Instructed by: De Swardt Vogel Myambo Attorneys

[1] 75 of 1997. Section 77(3) 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 constitutes a term of that contract.”

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“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 constitutes a term of that contract.”

[2] 66 of 1995, as amended. (LRA)

[3] Paragraphs 135 and 142.

[4] The parties complied with this order on 25 May 2017.

[5] Public Servants Association of South Africa v Minister of Department of Home Affairs and Others

[2012] ZALAC 35; [2013] 3 BLLR 237 (LAC). (PSA)

[6] Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others

[2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC). (Helen Suzman Foundation)

[7] Id at para 12.

[8] Para 147 to 149.

[9] Page 45, paragraph 131.

[10] Page 34, paras 88, 89-98, 101, 108, 125

[11] Page 32, para 81.

[12] Page 33 to 37, paras 82 to 100.

[13] Page 400.

[14] Page 44, para 129.1.

[15] Answering affidavit at para 27.

[16] Page 401, 41.

[17] Page 412.

[18] Section 158(1)(a)(iv) of the LRA provides: “(1) The Labour Court may— (a) make any appropriate order, including— . . . (iv) a declaratory order.”

[18] Section 158(1)(a)(iv) of the LRA provides:

“(1) *The Labour Court may—*

(a) make any appropriate order, including—

. . .

(iv) a declaratory order.”

[19]

[2012] 8 BLLR 747 (LAC).

[20] Id at para 46.

[21] Steenkamp and Others v Edcon Limited [2016] ZACC 1;

(2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC).

[22] Member of the Executive Council of the Western Cape Provincial Government Health Department v Coetzee and Others [2015] 11 BLLR 1108 (LAC).

[23] Id at para 89.

[24] Mojaki v Ngaka Modiri Molema District Municipality and Others

[2014] ZALCJHB 433; (2015) 36 ILJ 1331 (LC) at para 17.

[25] Local Government Disciplinary Regulations for Senior Managers, 2010.

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