

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

Reportable

Case No: 981/2022

In the matter between:

ANELE QABA

Applicant

AND

EUGENE JOHNSON

First Respondent

THE SPEAKER: THE MUNICIPAL COUNCIL OF THE

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY **Second
Respondent**

REASONS FOR JUDGMENT

GOOSEN J:

[1] The application was brought on an urgent basis to set aside the purported termination of the applicant's employment with the Nelson Mandela Metropolitan Municipality. The applicant is Mr Anele Qaba who is employed as a senior manager in the position of Executive Director of Economic Affairs. He is presently occupying the position of Acting City Manager in terms of a resolution of the municipal council dated 23 March 2022.

[2] The first respondent is Mrs Eugene Johnson who is the Executive Mayor of the Nelson Mandela Bay Municipality. The second respondent is the Speaker of the Council. Only the first respondent opposed the relief sought. An affidavit, which, in essence, confined itself to the challenge to the urgency with which the application was enrolled, was deposed to by the first respondent's attorney. After hearing argument, I made the following order:

1. The purported termination of the employment services of Mr Anele Qaba on 6 April 2022 by the first respondent, as executive Mayor, is declared unlawful and is set aside as being of no force and effect.

2. The first respondent, as Executive Mayor, is ordered to pay the costs of the application on a scale as between attorney and client.

[3] I indicated that I would provide reasons for making the order in due course. What follows are those reasons.

[4] The events giving rise to the purported termination of Mr Qaba's employment, and this application, occurred against this backdrop of the ongoing conflict within the Municipal Council regarding the appointment of a City Manager. I set out the nature of that conflict and its consequences in my judgment in Case No. 862/2022 delivered on 5 April 2022.¹ It suffices, for present purposes, to record that Dr Nqwazi was appointed to the position of City Manager at a council meeting on 16 March 2022. The lawfulness of that appointment is disputed on the basis that the vote was taken at a time when there was no longer a quorum of councillors present. On 23 March 2022, at a further council meeting convened as a continuation of the first meeting, resolutions were adopted purporting to rescind certain steps taken by the Executive Mayor pursuant to the resolution of 16 March 2022. The council also took the decision to appoint Mr Qaba as Acting Municipal Manager and authorized the suspension of Dr Nqwazi.

[5] Since 23 March both Dr Nqwazi and Mr Qaba have asserted the right to exercise the authority and powers of a City Manager. This gave rise to the application in Case No. 862/2022. For reasons fully set out in my judgment in that matter, the application was dismissed. I did not, however, make a definitive finding as to the lawfulness of the appointment of Dr Nqwazi or Mr Qaba. I indicated that it was within the power of the municipal council to resolve the impasse and expressed the hope that it would do so expeditiously.

[6] It appears from the present case that the municipal council has not yet acted to address the issue. Instead, on 6 April 2022, the first respondent sent a letter to Mr Qaba, which reads:

¹ The Municipality of Nelson Mandela Bay and Others v Anele Qaba and Others (Case No. 862/2022) (5 April 2022).

“TERMINATION OF SERVICE

This serves to inform you that your services as an employee is hereby terminated with immediate effect:

Note you are to:

- a) Vacate Municipal Offices immediately;
- b) Return all Municipal property/tools of trade immediately.”

[7] The first respondent also sent a letter to the head of the Safety and Security Directorate in the Municipality. It read as follows:

“EVICTION: MUNICIPAL BUILDINGS

I enclose herewith a copy of my letter to Mr Qaba, this serves to inform Safety and Security to evict Mr Qaba from municipal buildings.”

[8] In a later letter, also dated 6 April 2022, the first respondent furnished reasons to Mr Qaba for her purported termination of his services. It is reproduced below:

- “1. The abovementioned matter refers. Pursuant to my letter to you, terminating your services, find below, the reasons therefor.
2. Notwithstanding the fact that I met with you, you have failed to report to me, meet with me or verify any correspondence that you send out to all municipal employees pertaining to sensitive municipal issues and in so doing, create confusion within the municipality and within the public domain.
3. As a senior manager and a person who has acted as a municipal manager in the past, you know or ought to know when a person ceases to be a councillor, since a municipal manager is trusted with the notification of such declaration.

4. On 23 March 2022, you were verbally abusive and grossly insubordinate toward me and the Deputy Executive Mayor, when we approached you to discuss the court order obtained on the same day, by the municipality.

5. Despite the fact that you allege that you are the acting city manager, your immediate superior would be myself. Notwithstanding this, you fail to report to me and in so doing operate on the basis that you only answer to yourself and thereby you have failed in your statutory duty, in terms of section 55 of the Systems Act, to advise me of pertinent issues, more especially the draft annual budget and its process.

6. On 31 March 2022 and at the Gqeberha High Court, you threatened 2 employees from the legal directorate of the municipality, which threats were included in the municipality's court papers and which threats, you did not defend, thereby accepting same.

7. On 6 April 2022, you sent a message to all staff, on Groupwise, whereby you once again threatened employees from the legal directorate. Your communication in the said message was further, factually incorrect in many respects.

8. All of the above is deemed to be a repudiation of your employment contract with the municipality, which repudiation, I have accepted in terms of my delegated authority. Having accepted such repudiation, your services with the municipality is terminated.

9. Trusting you will find this to be in order."

[9] Not surprisingly, Mr Qaba did not find the termination of his employment services 'in order' and instead commenced this application on 7 April 2022. The papers were served on the first respondent at 15h30 on 7 April 2022, following a directive as to enrolment obtained pursuant to Rule 12 of the Eastern Cape Rules of Court.

[10] The first respondent filed a notice of opposition during the morning of 8 April and an answering affidavit, deposed to by her attorney, was filed at 11h00 on 8 April 2022. The application was heard at 12h00. At the hearing the applicant was represented by Mr Beyleveld SC and the first respondent by Mr Ford SC.

[11] The applicant's case is a simple and straightforward one. It is that the purported termination of his employment is a clear breach of the principle of legality. He states that he is a duly appointed employee of the Municipality having been appointed in the capacity as a senior manager in the position of Executive Director: Economic Development, Tourism and Agriculture. He was appointed in terms of s 56 of the **Local Government: Municipal Systems Act**² (the **Systems Act**). On 23 March 2022, he was appointed by resolution of Council to act as the City Manager. The first respondent has no authority to summarily dismiss a duly appointed employee, employed in terms of s 56 of the **Systems Act**. Nor does she have the authority to overturn a resolution of the council appointing him as Acting City Manager.

[12] The applicant contends that the purported termination of his employment and attempt to evict him from municipal buildings is a flagrant illegality, which cannot be countenanced. It exacerbates the confusion surrounding the position of the City Manager; is directed to prevent him from acting in that capacity; and will seriously undermine the administration of the municipality. In the light of the breach of the principle of legality, the court should urgently intervene to set aside the purported termination.

[13] The first respondent's answering affidavit does not address the merits of the applicant's case. It is confined to challenging the urgency with which the application was commenced. Mr Ford, who appeared for the first respondent confirmed that he would deal solely with urgency, as he was entitled to do. The first respondent was not seeking additional time to enable her to deal with the merits.

[14] The affidavit of attorney Ms Koorsse, largely sets out matters of argument relating to urgency. It does, however, address an aspect of the conflict in relation to

² Local Government: Municipal Systems Act No. 32 of 2000.

the position of the City Manager. It is asserted that the council resolution of 16 March 2022, which appointed Dr Nqwazi, as City Manager must, as a matter of law stand until set aside by a court of law. The actions taken by the first respondent, by signing the employment contract of Dr Nqwazi on 17 March 2022 and informing the Member of the Executive Council (MEC) of the appointment are actions properly taken by her pursuant to the council resolution of 16 March. The municipal council resolution of 23 March did not, nor could it, set aside the resolution of 16 March. Accordingly, Mr Qaba could not be appointed to the position of Acting City Manager.

[15] The affidavit, and indeed argument of Mr Ford, goes on to assert that Mr Qaba bases the need for urgent intervention upon the effect that his termination has upon his function as Acting City Manager. Since he cannot properly occupy that position, his claim for urgency is unfounded. It was further submitted that he makes no case for being unable to obtain redress in due course, so far as his employment is concerned, and therefore no case for urgent enrolment is made out.

[16] There is, however, a fundamental difficulty with the argument. It proceeds from the premise that the resolution of 16 March and what followed must be acted upon notwithstanding what occurred on 23 March. Yet, what occurred on 23 March also occurred at a council meeting. Resolutions were taken and in the case of the position of City Manager, two such resolutions directly bear upon the capacity of Mr Qaba to act as Municipal Manager. The two resolutions are set out in the judgment in case no. 862/2022³. One of those resolutions was to suspend Dr Nqwazi and the other was to appoint Mr Qaba as acting City Manager.

[17] These resolutions can equally not be wished away as if they were never taken. They exist. It is precisely this state of affairs, which lies at the heart of the conflict in the council. As indicated in the judgment in case no. 862/2022, one set of councillors took one decision on 16 March and another set took diametrically opposing decisions on 23 March. No resolution for this legal conflict could be provided in case no. 862/2022 because the issue was not reached. It is also not reached in this matter. Until it is reached by way of competent legal proceedings brought by the properly cited parties, it remains a matter to be resolved by the

³ See para [8] of the judgment.

municipal council. If that means a court review process initiated by the council itself, then so be it.

[18] I am mindful that Mr Ford sought to rely upon the 16 March resolutions to indicate that Mr Qaba has not made out a case for urgency. However, Mr Qaba asserts urgency also on the basis that the conduct of the first respondent is egregious. She has acted without any authority to terminate his employment. She has done so without any regard to his statutory and contractual rights as an employee. Such disregard of the principle of legality is inherently prejudicial.

[19] Mr Beyleveld argued that a court will not, in a case where conduct is manifestly not lawful, countenance such illegality by refusing for procedural reasons, to hear the matter.

[20] In my view, the applicant's assertion of the need to deal with the case urgently is inextricably bound up with the lawfulness of the first respondent's actions. The first respondent chose not to deal with the substantive allegations of illegality. I indicated a preparedness to afford the first respondent more time within which to do so. She persisted, however, with her procedural challenge based upon urgency.

[21] The applicant's case is not complex. It asserts that the purported termination of his employment is unlawful. He points to s 56 of the **Systems Act**. He asserts that certain procedural steps by which a s 56 employee may be terminated were not taken. To answer these allegations would not, in my view, be unduly complicated or time consuming. The first respondent either has the authority to act as she did without following any of the well-recognized procedural steps or she did not. If she was properly vested with delegated authority to act on behalf of the council, no doubt the delegation would be readily available as required by s 59 of the **Systems Act**. By choosing not to join issue, it must be inferred that the first respondent is unable to do so. This has a bearing upon whether the matter is to be regarded as urgent.

[22] I did not understand Mr Ford to press the point that the enrolment would severely prejudice the first respondent in meeting the case. Such prejudice would usually be constituted by the entrance of a sustainable defence, which cannot be

properly presented because of the abridgment of notice periods. Instead, the contention was that the applicant had not fully or properly justified the abridgment of the time periods.

[23] I do not agree. No doubt more might have been said. But enough was indicated to warrant the hearing on the time frames given. It follows that the opposition based on a lack of urgency could not be sustained.

[24] I turn briefly to the merits. The letter of 6 April 2022 summarily terminated Mr Qaba's employment services. It was not preceded by any process which may lawfully entitle an employer to terminate the services of an employee. The termination occurred without affording him any of the normal legal rights and protection to which he would be entitled as an employee.

[25] Section 56(1)(a) of the **Systems Act** stipulates that a municipal council must appoint a manager, such as the applicant, who is directly accountable to the municipal manager. The municipal council is required to consult with the municipal manager.⁴ The Disciplinary Regulations for Senior Managers⁵ seek to regulate all aspects relating to the disciplinary process related to senior managers i.e. those appointed in terms of s 56 of the **Systems Act**.⁶ Their purpose is, *inter alia*, to promote mutual respect between senior managers and council⁷, and to prevent arbitrary or discriminatory actions.⁸

[26] In terms of Regulation 5(1) any allegation of misconduct against a senior manager must be brought to the attention of the municipal council. The allegation of misconduct must be tabled by the mayor or municipal manager (as the case may be) before the council.⁹ Once such allegation is tabled the council must act. If satisfied that there is reasonable cause to believe that an act of misconduct has been

⁴ See *Democratic Alliance v Kouga Municipality and Others* [2014] 1 All SA 281 (SCA).

⁵ GN 344 of 2011: Local Government: Disciplinary Regulations for Senior Managers, 2010, Government Gazette No 34213.

⁶ The term 'senior manager' is defined in the Regulations to mean those appointed in terms of s 56 of the **Systems Act**.

⁷ Regulation 2 (b)(v).

⁸ Regulation 2 (b)(viii)

⁹ Regulation 5(2).

committed, it must appoint an independent investigator.¹⁰ If not satisfied the council must dismiss the allegation of misconduct.¹¹ The report of the investigator must be tabled before the municipal council¹², and it is the council that decides, by way of a resolution, to institute disciplinary proceedings against the senior manager.¹³ The enquiry proceeds before an independent and external investigator.¹⁴

[27] In the event that the circumstances warrant a precautionary suspension, it is the council which is entitled to impose such suspension.¹⁵ Upon completion of the disciplinary enquiry, the appointed presiding officer may impose sanctions as are provided in Regulation 12. This includes dismissal.¹⁶ In terms of Regulation 12(3) the municipality must implement the sanction. These Regulations, as read in the context of s 56 of the **Systems Act** indicate that the authority to discipline and dismiss a senior manager is vested in the municipal council. Such authority is itself regulated and is subject to due process.

[28] In *Mbatha v Ehlanzeni District Municipality and Others*¹⁷ the question arose whether a municipal council may delegate to an executive mayor the power to decide to discipline a municipal manager. The court, after examining sections 55 to 60 of the **Systems Act** and s 56 of the **Structures Act**¹⁸, came to the conclusion¹⁹ that the power resides exclusively with the council and that it may not be delegated to an executive mayor.

[29] This judgment relates to the position of a municipal manager appointed in terms of section 54A of the **Systems Act**. However, the provisions of s 54A mirror those in s 56. The basis of the court's judgment was that only appropriate powers may be delegated to an executive mayor. Such considerations would apply equally in relation to the exercise of disciplinary powers by an executive mayor over senior managers appointed by a municipal council.

¹⁰ Regulation 5(3)(a).

¹¹ Regulation 5(3)(b).

¹² Regulation 5(5).

¹³ Regulation 5(6).

¹⁴ Regulation 5(7).

¹⁵ Regulation 6(1).

¹⁶ Regulation 12(1)(f).

¹⁷ [2002] 5 BLLR 417 (LC).

¹⁸ Local Government: Municipal Structures Act No. 117 of 1998.

¹⁹ Ibid at para [22].

[30] Even if it might be open to a municipal council to delegate to an executive mayor the authority to decide to institute disciplinary proceedings against a senior manager (which is doubtful) it certainly can never be the case that a municipal council can delegate authority or power to act unlawfully. In other words, the council cannot delegate to an executive mayor authority to act contrary to either the **Systems Act** or the Regulations promulgated thereunder.

[31] I have touched upon the question of delegation inasmuch as that may be the source of lawful conduct on the part of the first respondent. It must be emphasized, however, that the first respondent does not in fact claim such authority. She has chosen not to challenge the allegation made by the applicant that her conduct is in breach of the principle of legality. The letter dated 6 April 2022 providing reasons for the summary dismissal suggest that the first respondent was exercising delegated authority. She has offered no evidence to support that claim in these proceedings.

[32] As will be seen from the reasons given by the first respondent, the complaints relate to alleged failure to report to the first respondent, allegations of abusive conduct and the like, and unauthorized communications with staff. These are quintessentially matters that concern misconduct which, if established, may entitle the council to institute disciplinary proceedings. Thus the very reason for the summary dismissal required compliance with the Regulations for Discipline of Senior Managers. There was no such compliance.

[33] Yet, the first respondent framed these allegations as evidencing ‘a repudiation’ of the employment agreement which she was entitled to accept, thereby cancelling the agreement. I am not aware of any legal authority which would entitle an employer to reply upon alleged disciplinary breach of an employment contract as constituting a repudiation, entitling it to summarily cancel and dismiss. If it were so, it would allow an employer to circumvent agreed or statutorily prescribed disciplinary procedures.

[34] It follows from what I have set out above that the purported termination of the employment services of the applicant was unlawful. The conduct of the first

respondent was in breach of the principle of legality and it cannot be allowed to stand.

[35] I turn now to the question of costs. Mr Beyleveld sought to persuade me to order the first respondent to pay the costs personally and on a punitive scale. He motivated his request on the basis that the first respondent was motivated to remove Mr Qaba in the light of the ongoing conflict about the City Manager position and that she did so by acting without any authority. This court should, in the circumstances, reflect its disapproval of such egregious unlawful conduct by making a punitive costs order. Such costs should not be borne by the municipality since these actions arise from the underlying political conflict within the council.

[36] There is considerable force in the arguments made by Mr Beyleveld. It seems clear from the background to this matter and indeed the reasons proffered for the actions taken by the first respondent, that the political conflict within the council lies at the heart of the matter. The council is plainly divided in its approach to the position of the City Manager. Those councillors who held the day on 16 March believe that those who did so on 23 March acted unlawfully. Those who held sway on 23 March hold the opposite view. Two officials are caught up in the resulting uncertainty. It is this situation which must be addressed.

[37] The first respondent by purporting to summarily dismiss Mr Qaba has not served to resolve the problem. Her conduct was plainly unlawful – egregious even – and high handed. She did so in the exercise of her functions as a political office bearer of the municipality, even though she has no authority to dismiss a senior manager. Such conduct by an employer against an employee merits a punitive award of costs.

[38] The only question is whether these should be paid by the first respondent personally. Mr Ford submitted that there was nothing to suggest that the first respondent acted *mala fide*. For this reason, a personal cost order should not be made.

[39] I gave serious consideration to such an order. I decided, however, to accept that the first respondent acted in what she considered to be the interests of the municipality. She may have done so upon poor advice or perhaps even without proper advice. It should, however, be emphasized that this acceptance does not mean that egregious illegality such as that which occurred here will not in future be appropriately sanctioned by a personal cost order. Political office bearers would be advised to ensure that their conduct falls within the ambit of their authority. For the present, it suffices to order the first respondent, in her official capacity, to pay the costs on a punitive scale.

[40] It is for the reasons outlined above that I made the order of 8 April 2022.

G. G GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

<i>Obo the Applicant</i>	:	<i>Adv A. Beyleveld SC</i>
<i>Instructed by</i>	:	<i>Lulama Prince Inc, Mill Park, Gqeberha</i>
 <i>Obo the First Respondent</i>	:	 <i>Adv E. A. S. Ford SC</i>
<i>Instructed by</i>	:	<i>Rushmere Noach Inc, Greenacres, Gqeberha</i>
 <i>Heard</i>	:	 <i>8 April 2022</i>
 <i>Made available</i>	:	 <i>12 April 2022</i>