IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 5464/2018

In the matter between:

STEPHEN MZILOZI MOLALA Applicant

and

METSIMAHOLO LOCAL MUNICIPALITY 1st Respondent

LINDIWE TSHONGWE N.O. 2nd Respondent

THABO MABASA N.O. 3rd Respondent

MATOME MASHAO N.O. 4th Respondent

HEARD ON: 07 MARCH 2019

CORAM: PE MOLITSOANE, J

JUDGMENT BY: PE MOLITSOANE, J

DELIVERED ON: 20 AUGUST 2019

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[1] The applicant seeks an order that the first respondent be interdicted and restrained from continuing with the disciplinary proceedings instituted against him on the 3rd September 2018 until the first respondent complies with the Local Government: Municipal Regulations on Financial Misconduct Procedure and Criminal Proceedings (the 2014 Regulations). The applicant further seeks an order that the disciplinary proceedings against him be conducted within the prescripts of the 2014 Regulations.

[2] The application is opposed by the First respondent only. No substantial relief is sought against the 2nd, 3rd and 4th respondents as presumably all these respondents were cited because of the interest they may have in the relief sought and the outcome of this application. During the course of the preparation of this judgment I caused parties to file further heads of argument which necessitated that the said heads of argument be filed only on the 24th May 2019,

[3] During the hearing of this matter the First respondent raised three points *in limine*. I dismissed all three points raised without giving reasons and I undertook to furnish my reasons in my main judgment.

[4] The first preliminary issue raised was one of *lis alibi pendens*. Adv. Baloyi appearing for the first respondent submitted that the applicant had issued a substantially same application in the Labour Court and that application was still pending and had not been adjudicated upon. He further submitted that the applicant had to make an election whether he wanted to proceed with the matter before this court or the one in the Labour Court. It was submitted

that the applicant could not proceed with two matters raising the same issues in two different forums.

[5] On the other hand Adv. Louw appearing for the First respondent submitted that the issues raised before the Labour Court and this court were different. He denied that the applicant raised similar issues in two different forums.

[6] The First respondent being the one raising the defence of *lis alibi pendens* bears the onus of proving its requisites[1]. A party raising this defence *must allege and prove* the following:

1. 'Pending litigation,
2. Between the same parties or their privies,
3. Based on the same cause of action,
4. In respect of the same subject matter[2].'

[7] Except the *ipse dixit* of Counsel for the First respondent, which is denied by Counsel for the applicant that the same cause of action was pending before the Labour Court, no evidence was placed before this court supporting the allegations. Counsel for the first respondent could not enlighten this court as to when the application in the Labour Court was initiated. He could also not inform this court what the case number was in that court. He did not also hand any processes issued in that Court. Not only should the First defendant allege the requisites of the defence of *lis pendens* but it must also prove it. In this regard the First defendant failed. It cannot be expected of a court to accept allegations in the absence of their proof or admission by a party against whom such allegations are made. For these reasons I was not satisfied that the

[1] See Sikatele v Sikatele [1996] 1 All SA 445 (Tk).
[2] Amler's Precedents of Pleadings-9th ed by LTC Harms on page 251(reference to decided cases omitted)

first respondent had discharged its onus and I accordingly dismissed this point *in limine*.

[8] The second preliminary point raised by the First respondent was that this application was finally adjudicated upon and as a result, this application before me stood to be dismissed. The first respondent thus raised the defence of *res iudicatae*.

[9] Firstly, it will be convenient to decide the question of the finality of the order of the urgent court. This matter originally appeared before this court, differently constituted, on the 2nd November 2018 as an urgent application with a *rule nisi* returnable on the 6th December 2018. On the 5th November 2018 the judge seized with the urgent application delivered judgment and made the following order:

"The application is dismissed on the basis of lack of urgency and struck of the roll. The applicant is ordered to pay the costs for the application."

[10] The case was subsequently re-enrolled by the applicant on the same documents. Adv. Baloyi submitted that this application was dismissed as opposed to being struck off the roll for lack of urgency. According to him this matter having being dismissed, the applicant could not re-enrol it as it had already being adjudicated upon. The option for the applicant, so he submitted, was to appeal the order of the urgent court. Adv. Louw for the applicant contended that the application was struck off the roll as opposed to being dismissed. He urged me to dismiss this defence of *res iudicatae.*

[11] The courts have had occasion to deal with this issue raised by the first respondent. **<u>In Commissioner for South African Revenue Services (Pty) Ltd: Commissioner for South African Revenue Service v Hawker Aviation Services Partnership & Others</u>**[3] the court said the following:

"[9] One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance and is not a pre-requisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court(or a Judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the Court's control, to forge its own rules which must 'as far as practicable be in accordance with' the rules. Where the applicant lacks the requisite element or degree of urgency the court can for that reason decline to exercise its powers under Rule 6(12) (a). The matter is the not properly on the court's roll and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."

[12] The Labour Appeal Court in *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*[4] also had occasion to consider the question of dismissal of an application on the grounds of urgency in circumstances similar to the one *in casu*. Musi AJA came to this conclusion:

"Although I agree that the appropriate order in a matter where urgency has not been shown should be striking the matter from the roll, it seems to me that even where the word 'dismissed' is used it does not necessarily mean that the dismissal amounts to a final order. One will have to enquire, where there is doubt, whether the matter was dismissed on the merits or not. If it was

[3] 2006(4) SA 292 (SCA) at 299-300
[4] (2013) 34 ILJ 1138 (LAC)

dismissed on the merits then the order is not final. A finding that a matter is not urgent does not mean that there are no merits in the applicant's case. Even if a matter is dismissed for lack of urgency it can and should be re-enrolled. To reason otherwise would be to allow form to triumph over substance."

[13] In my view the court faced with the issue of whether the order of the court dismissing the application amounts to a final order entitling the successful party to raise the defence of *res judicata,* must enquire if the dismissal was on the procedural aspect of urgency or on the merits. The decision on the issue of urgency does not necessarily relate to the merits of the case. Although in motion proceedings the phrase '*absolution from the instance*' is not used, Jones, J in ***Vena v Vena***[5] equates the said phrase to a dismissal for lack of urgency as in both instances the cases may be re-enrolled.

[14] I have scrutinised the judgment of the urgent court dismissing the application for lack of urgency. In that case it is not the case for the First respondent that the dismissal of the application was on the merits. It is clear that the Judge in the urgent court dealt solely with the question of urgency, this much is supported by the reasons given for the order as well as the order made that *'the application is dismissed on the basis of lack of urgency and struck of[f] the roll'.* Whether the Honourable judge in the urgent court chose to dismiss the application or struck it off the roll is of no consequence as the decision so made, did not relate to the merits of the case and the case could still be re-enrolled. To think otherwise would be to elevate form over substance and would amount to going against the tide and caution as alluded in *PT Operational Services* (*supra*).

[5] 2010(2) SA 248(ECP) at 253 D-E

It is my finding that the order of the urgent court was not final as the applicant was still free to initiate these proceedings *de novo* by giving due notice. The defence of *res judicata,* therefore, does not avail the first respondent in this regard and I accordingly dismissed this second point *in limine*.

[15] The last point *in limine* raised on behalf of the first respondent was that the Applicant filed a further set of affidavit without leave of the court. Perusal of that affidavit reveal that it amplified the affidavits already filed and even if it is taken into account, it takes this matter nowhere and I accordingly also dismissed this point. At the most such an affidavit only called for its striking off.

[16] This application centres on the applicable legislation where it is alleged that the incumbent had committed financial misconduct and disciplinary steps are instituted after the coming into effect of the 2014 Regulations.

[17] The Applicant contends that in view of the non-compliance with the 2014 Regulations, the disciplinary proceedings against him are unlawful. The applicant contends firmly that the applicant should have been charged in terms of the 2014 Regulations and not in terms of the Local Government: Disciplinary Regulations for Senior Managers,2010(the 2010 Regulations). On the other hand, it is contended on behalf of the First Respondent that the Applicant was correctly charged with the 2010 regulations.

[18] The crisp issue for determination is whether the applicant should have been charged with the 2014 Regulations as opposed to the 2010 Regulations , and if not, whether the failure to charge him as

aforesaid rendered the disciplinary proceedings unlawful entitling the Applicant to an interdict.

[19] The Applicant contends that the disciplinary proceedings against him were instituted and proceeded with in breach of section 4(1) of the 2014 Regulations which rendered the proceedings unlawful. It is further contended that this alleged non-compliance with the 2014 Regulations has a cascading effect in respect of other various requirements which includes:

1. The absence or omission of a preliminary investigation by the disciplinary board to determine the veracity of allegations;
2. The absence or omission of a determination by the disciplinary board to the Council of the Municipality subsequent to such an investigation;
3. The absence or omission of a determination by the disciplinary board to determine whether the allegations against the Applicant are frivolous, vexatious, speculative or unfounded, so that the investigation against him could be terminated.
4. There were no terms of reference for an investigation done by an independent investigator;
5. The ‘independent investigator’ who was appointed by the Council was not appointed in terms of the supply chain management prescripts.

[20] It is necessary to set out a brief background to these proceedings. On the 8th August 2018 the Council of the Municipality (First Respondent) resolved to institute disciplinary proceedings against the Applicant. The applicant was served with the necessary notice of the disciplinary proceedings which were to commence on the 11th September 2018. On the 11th September 2018 the

proceedings were postponed to the 8th October 2018.On the 9th October 2018 the disciplinary proceedings commenced and a preliminary point was taken on behalf of the Applicant that the disciplinary proceedings had not been properly sanctioned for various reasons as fully set out in paragraph [19] above. The contention by the Applicant is that the charges against him are in the nature of financial misconduct and the proceedings should thus have been dealt with in terms of the 2014 Regulations. This contention was rejected by the Chairperson of the disciplinary tribunal hence this matter ultimately found its way to this court.

[21] It is contended by the First Respondent that this Court has no jurisdiction to entertain this interdictory relief as only the Labour court has exclusive jurisdiction. This contention cannot be correct. At the heart of this application is the issue of unlawfulness of the procedure currently taking place. The application does not seek to enforce any rights or remedies provided for in the Labour Relations Act. The application does not seek to adjudicate a labour dispute or conduct as envisaged in Chapter VIII of the Labour Relations Act. What the Applicant seeks to achieve is to restrain the perpetuation of the unlawfulness of the procedure currently under way. The CCMA has no such jurisdiction contrary to the assertion by the First Respondent. It is my finding that this court has jurisdiction to adjudicate an interdictory relief where unlawfulness is an issue.

[22] After this application was heard and during the preparation of the judgment, I caused a request to be sent to the parties to file further heads of arguments and deal specifically with the following issues arising out of Regulation 20 of the 2014 Regulations:

1. What is the effect, if any, of the 2014 Regulations on the Local Government: Disciplinary Regulations for Senior Managers specifically with regard to the proceedings regarding alleged financial misconduct allegedly committed after the coming into operation of the 2014 Regulations, in light of the transitional arrangements;
2. Would the position remain the same where an official is charged with both financial misconduct and any other misconduct not related to finances?

[23] It is submitted on behalf of the Applicant that Regulation 20 supports the contention that any allegation of financial misconduct which arise after the coming into operation of the 2014 Regulation, namely, 30 May 2014 or which investigation commenced after the said date is to be dealt with in terms of the 2014 Regulations.

[24] On the other hand it is contended on behalf of the respondent that the 2010 Regulations deal sufficiently with the issue of misconduct which includes financial misconduct as contemplated in section 171 and 172 of the 2014 Regulations. It is firmly contended that Regulation 20 has no bearing or effect on the 2010 Regulations.

[25] As a starting point our law recognises the presumption that a statute does not apply retrospectively, or put differently, a statute applies prospectively. This in my view also applies to subordinate legislation. There are exceptions to this presumption. One of these exceptions is the rule that statutes which deal with matters of procedure are of necessity both retrospective and prospective. In

<u>Curtis v Johannesburg Municipality</u>[6] the Court said the following:

"Every law regulating legal procedure must, in absence of express provision to the contrary, necessarily govern, so far as applicable the procedure in every suite which comes to trial after its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the suite may have been then pending. To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective. Whether the expression is an accurate one is open to doubt, but it is a convenient way of stating the fact that every alteration in procedure applies to every case subsequently tried, no matter when such case began or when the cause of action arose."

[26] Du Plessis[7] opines that legislation that does not interfere with vested rights or create new duties or impose new obligations can also be subject to the presumption against retrospectively. He says further:

"In the case of the presumption against retrospectivity an element of legal certainty, not derived from considerations of fairness, also come into the picture. Individuals should know what the law is in order to be able to confirm their conduct accordingly."

[27] It is not in dispute that most of the charges against the Applicant are in the form of financial misconduct. Save for Charge 7 in which the Applicant is charged with the *'Failure to exercise his statutory and fiduciary duties as Accounting Officer, alternatively putting the Municipality into disrepute'* are all clearly financial misconduct. Although Charge 7 does not *ex facie* appear to be a financial misconduct further scrutiny of same will reveal that it is also a financial misconduct. In Annexure to the founding affidavit, the following appears in the

[6] 1906 TS 306
[7] Re- Interpretation of Statutes- Lourens Duplessis Butterwoths

Agenda of the Special Council Meeting held on the 11th June 2018[8]:

"… Mr Molala should have foreseen that the ….irregular secondment would result in prejudice to the interests of the Municipality and possible fruitless and wasteful expenditure which could have been avoided had he advised the then Administrator in respect of the alleged irregularity of his secondment."

[28] The above clearly indicates that the allegations referred herein are meant to indicate that the Applicant should have foreseen that his alleged irregular secondment would result in prejudice to the interests of the Municipality; and *"possible fruitless and wasteful expenditure."*(my emphasis).

This clearly indicates that the Municipality wants to charge the Applicant with financial misconduct also in respect of this charge which according to the First Respondent is a fruitless and wasteful expenditure. I am accordingly of the considered view that all the charges herein relate to alleged charges of financial misconduct.

[29] The 2014 Regulations came into operation on the 30th May 2014.The charges against the Applicant were allegedly committed around the dates as more fully set out herein after:

- Charge 1: Counts 1.1 to 1.11 and all other counts not specifically indicated hereinafter: All arose after August 2014;
- Charge 1: Counts 1.12; 1.13; 1.14; and 8: the date of the commission of the offence is not indicated;
- Charge 4: the date of the commission of the offence is indicated as 2014 but the date and month has not been indicated;

[8] Pages 128 pargraphs (i) and(ii) of the Annexure FA 11, item 5 to founding Affidavit

- Charge 5: the date of the commission of the offence is not indicated;
- Charge 7: the date of the commission of the offence is not indicated;

[30] It is so that both the 2010 and 2014 Regulations provide for investigation of financial misconduct. What, however, is different is the procedure in the two pieces of legislation which must be followed in the investigation for alleged financial misconduct. Regulation 20 of the 2014 Regulations deal specifically with the transitional arrangement. Prior to 30 May 2014 disciplinary procedures against Senior Managers of municipalities were regulated exclusively by the 2010 Regulations. Regulation 20 specifically provides that any disciplinary process instituted before the commencement of the 2014 Regulations and not yet completed must be finalised in terms of the prescripts applicable at the time or may by agreement in writing be finalised in terms of these Regulations (2014 Regulations). In my view Regulation 20 essentially fortifies the presumption against retrospective application of statutes.

[31] It would make no sense that the legislature should specifically provide that parties may agree in writing to choose to ignore the procedure set out in the 2010 regulations in circumstances where the disciplinary proceedings have commenced and yet, without an express provision to that effect allow them freedom of the choice in respect of whether to apply the 2010 or 2014 Regulations for financial misconducts which arose after the coming into operation of the 2014 Regulations. Clearly the transitional arrangements were intended to bring clarity to matters already commenced with.

It is our common law principle that the Legislature does not promulgate and make meaningless, invalid or purposeless legislation[9]. The 2014 Regulations could not have been promulgated without a purpose. Clearly as indicated above the 2014 Regulations deal with the procedure to be followed in dealing with allegations of financial misconduct and by necessary implication apply prospectively. In my view, in answer to the question I raised in paragraph [22] (1) above, Regulation 20 supports the view that any allegations of misconduct whereof the investigation commenced after the 30th May 2014 or the allegations thereof arose after the said date, falls to be dealt with in terms of the 2014 Regulations.

[32] It is so, as argued by the respondents that the 2014 Regulations do not expressly repeal the 2010 provisions or provide for any consequences or remedies if not complied with. It is further argued that the provisions of the 2014 are directory as opposed of being directory. It has to be borne in mind that this court still relies on common law maxims and presumptions in interpreting legislation as long as they are not in conflict with the values of the Constitution. Section 175 of the Municipal Finance Management Act provides, *inter alia*, as follows:

"(1) The Minister, acting with the concurrence of the Cabinet members responsible for local government, may make regulations prescribing-

a) the manner, form and circumstances in which allegations and disciplinary and criminal charges of financial misconduct must be reported to the National Treasury, the MEC for Local Government in the Province and the Auditor- General including….

(i)…..

[9] See in general Steyn Uitleg van Wette 119-124

(ii) steps taken in connection with such financial misconduct:

b) matters relating to internal investigations by municipalities.. allegations of financial misconduct:

c) …..

d) criteria for the composition and functioning of a disciplinary board which hears a charge of financial misconduct".(my emphasis)

[33] Section 175 required of the Minister to make regulations prescribing, inter alia, the steps to be taken in connection with financial misconduct which includes internal investigations and the criteria for the composition and functioning of a disciplinary board which hears a charge of financial misconduct. The legislature could never have promulgated the 2014 Regulations in line with the provisions of section 175 and not have intended such Regulations to apply in relevant cases. It is my considered view that it is unnecessary to traverse the second query of my request to both Counsel in light of my finding that all the charges relate to financial misconduct.

[34] Both the 2010 and 2014 Regulations govern the procedures to be followed in instances of alleged financial misconduct. Both pieces of legislation do not govern substantive rights or remedies. In **Veldman v Director of Public Prosecutions**[10] the court said:

"[26] Generally legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to basic notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."

[10] 2007(3) SA 210 (CC)

[27] Accordingly, the respondent argued that the presumption against retrospectivity in this case would be applicable only if the relevant legislation was substantive in nature……

[28] The distinction between procedural and substantive provisions cannot always be decisive in the operation of the presumption against retrospectivity. As Marais JA recognised in Minister of Public Works v Hafejee NO:[11]

"It does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon the existing rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not."

[35] Both pieces of legislation are purely procedural in nature. There is no provision in the 2014 Regulations which indicates that the said legislation was not meant to apply prospectively. It is contended by the First Respondent that there is no disciplinary board in place and that the Applicant is well aware of this. It is further contended that it was never the intention of the Legislature that the Municipality should be expected to comply with such a 'cumbersome procedure 'as envisaged in the 2014 Regulations. These arguments hold no water. The First Respondent does not explain why the disciplinary board cannot be established save to say it does not exist. The argument does not explain what makes the procedure cumbersome as the 2014 Regulations require and prescribe it. These arguments stand to be rejected.

[36] I am satisfied that the Applicant has in this case established a clear right. He is entitled to insist on the requirement of the correct legal prescript being followed. It is clear that there has been non-

[11] 1996(3) SA 745(A)

compliance with the prescripts of the 2014 Regulations as fully set out above.

I. there was no disciplinary investigation by the disciplinary board in order to determine the veracity of the allegations of misconduct ;

II. there were no recommendations by the Diciplinary Board to the Council as envisaged in Regulations 5(1) and (2) of the 2014 Regulations;

III. there was no determination whether the allegations were frivolous,vexatious ,speculative by the disciplinary board. It is indeed so that there is a measure of overlap between the two Regulations but the 2014 Regulations allows the disciplinary board to decide after its investigation a discretion to decide whether the allegations are frivolous, vexatious or not.

[37] The Applicant has established that he stood to suffer irreparable harm if the proceedings were allowed to continue in view of the fact he is entitled to a fair process of discipline. Seeing that the attack on the procedure goes to the heart of the issue of unlawfulness I am satisfied that the Applicant had no alternative remedy other than to approach this court for an interdict. The balance of convenience favour the granting of the relief sought.

[38] In light of my reasons above I am of the view that this application ought to succeed and I make the following orders:

<u>ORDER</u>

1. The First Respondent is interdicted and restrained from continuing with the disciplinary proceedings pending and

instituted against the Applicant until the First Respondent complies with the Local Government: Municipal Regulations on Financial Misconduct Procedure and Criminal Proceedings;

2. It is declared that the appointment of the Fourth Respondent as Presiding Officer of the disciplinary hearing is invalid, unlawful and null and void.

3. It is directed that the disciplinary hearing against the Applicant be conducted within the prescripts of the Local Government: Municipal Regulations on Financial Misconduct Procedure and Criminal Proceedings;

4. The First Respondent is ordered to pay the costs of this application.

P.E. MOLITSOANE, J

On behalf of Applicant:	Adv. M C Louw
Instructed by:	Peyper Attorneys
	BLOEMFONTEIN
On behalf of Respondents:	Adv. Baloyi
Instructed by:	Fixane Attorneys
	BLOEMFONTEIN