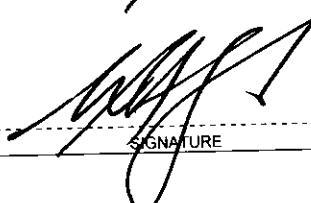


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

1/6/2015

Case Number: 28113/15

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO. ☒ YES
(2)	OF INTEREST TO OTHER JUDGES: YES / NO. ☒ YES
(3)	REVISED.
1/6/2015	
DATE	SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015 -06- 01
JUDGE'S SECRETARY REGTERS KLERK
GRIFPER VAN DIE HOE HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

SHELLA WILLIAM KEKANA

APPLICANT

and

MOGALAKWENA LOCAL MUNICIPALITY

1st RESPONDENT

MEMBER OF THE EXECUTIVE COUNCIL FOR COGHSTA,
LIMPOPO

2nd RESPONDENT

PP SELEPE

3rd RESPONDENT

ADV. M ZONDO N.O.

4th RESPONDENT

ADV W MOKHARE N.O.

5th RESPONDENT

TLHALEFI ANDRIES MASHMAITE

6th RESPONDENT

M R LEBELO

7th RESPONDENT

L D LANGA

8th RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 01 June 2015

Heard on: 13 May 2015

HUGHES J

1. In this urgent application the applicant seeks the relief as set out below:
 - 1.1 *That the non-compliance with the rules of this Honourable Court in respect of service and time be condoned and that the matter to be heard as one of urgency in terms of Rule 6(12) (a);*
 - 1.2 *Declaring that the following proceedings and/or decisions are unlawful:*
 - (a) The precautionary suspension of the applicant during November to December 2014;*
 - (b) The institution of disciplinary proceedings against the applicant during December 2014;*
 - (c) The disciplinary hearing of the applicant and the outcome thereof on 25 March 2015;*
 - (d) The dismissal of the applicant on 31 March 2015.*
 - 1.3 *Setting aside :*
 - (a) The precautionary suspension of the applicant during November to December 2014;*
 - (b) The institution of disciplinary proceedings against the applicant during December 2014;*
 - (c) The disciplinary hearing of the applicant and the outcome thereof on 25 March 2015;*
 - (d) The dismissal of the applicant on 31 March 2015.*

- 1.4 *Declaring that the third respondent is currently occupying the position of Acting Municipal Manager of the first respondent unlawfully;*
- 1.5 *Interdicting the third respondent from acting as the Municipal Manager of the first respondent and from performing any acts and responsibilities as Acting Municipal Manager;*
- 1.6 *That the first and any of the other respondents who may oppose the application pay the costs of this application, jointly and severally on a scale as between attorney and client.*

2. The applicant held the position of Municipal Manager of Mogalakwena Local Municipality until 31 March 2015. On 4 December 2014, the council adopted a motion to impose precautionary suspension proceedings against the applicant pending his disciplinary hearing. In the interim the second respondent (MEC), on 8 December 2014, appointed the third respondent, PP Selepe (Selepe) as Acting Municipal Manager. This entire process is the subject of a review application between the municipality and the applicant in this court.
3. The notification of the applicant's disciplinary hearing was issued on 24 December 2014 and was to be held on 14 January 2015. On 23 March 2015, in the absence of the applicant, an independent chairperson chaired the disciplinary hearing. The chairperson, on 25 March 2015, made a finding and proposed a sanction, which council endorsed and adopted after a municipal council meeting. The sanction imposed was dismissal with immediate effect.
4. The applicant's reason for his non-attendance at the hearing was that he was hospitalised from 18 March 2015 to 1 April 2015. The applicant is aggrieved that he was found guilty and sanctioned without being given a hearing to mitigate before the sanction was imposed.
5. The applicant contends, that the basis of the relief sought in this application, is the fact that the appointment of Selepe, whether lawfully or unlawfully, lapsed on 7

March 2015. However, in paragraph 11.2 and 12 of the applicants founding affidavit he states the follow:

"11.2 This application is for an order declaring my precautionary suspension, the institution of disciplinary proceedings against me, my disciplinary hearing and the outcome thereof as well as my eventual dismissal unlawful and invalid and setting same aside. I further seek an order declaring that Selepe is currently unlawfully occupying the position of Acting Municipal Manager and an interdict preventing him from performing any functions as such.

12.

Various unlawful actions and /or decisions were taken by the Respondents in the course of events that led to my eventual purported dismissal as Municipal Manager on 31 March 2015. The actions and/or decisions, which will each be dealt with in detail below are the following:

12.1 The unlawful constitution of the Municipality's council on 6 November 2014 and unlawful resolutions taken at the meeting held at the Oasis Lodge in Mokopane on the said date;

12.2 The unlawful calling and constitution of the Municipality's special council meeting held at the Oasis Lodge on 4 December 2014 as well as the unlawful resolutions taken on the said meeting;

12.3 The unlawful appointment of Selepe as Acting Municipal Manager of the Municipality on 8 December 2014;

12.4 My unlawful suspension and the unlawful institution of disciplinary proceedings against me during November to December 2014;

12.5 The unlawful and irregular conducting of the disciplinary proceedings by the Chairperson on 23 and 25 March 2015;

12.6 The unlawful resolution taken by the council meeting of the First Respondent on 31 March 2015 under item 10 to dismiss me with immediate effect. "

6. The first, third, sixth, seventh and eighth respondent's (the municipality) disputed urgency and raised a *point in limine* of jurisdiction of this court to entertain this dispute. The MEC also disputed the urgency of this application and raised the defence of *lis pendens* in respect of the relief sought.
7. It is common cause, that in order to entertain the issue of urgency and the relief sought, the issue of this court's jurisdiction has to be determined. This would settle whether this court was competent to issue an order on urgency and the relief sought. I now turn to deal with the aspect of jurisdiction.
8. The municipality submitted that on informing the applicant of his dismissal he was advised of the process to be followed in terms of the Labour Relations Act 66 of 1995 (LRA), if he intended to challenge his dismissal. He had 30 days from the date of his dismissal or the date upon which he became aware of his dismissal to '*refer the dispute to the relevant bargaining council*'. Instead, 20 days after the applicant dismissal, on 20 April 2015, he launched this urgent application.
9. The municipality argued that this court did not have jurisdiction to make a declaratory order rendering the dismissal of an employee unlawful. The LRA, it contended in s186 and s191 sets out provisions as to what constitutes dismissal and the mandatory procedure to be followed by the applicant if one challenges the dismissal. A dismissed employee has 30 days to refer the disputed to the CCMA or Bargaining Council for conciliation and arbitration. If the arbitration award is then challenged, in terms s145 and s158 (1) (g) of the LRA, the Labour Court will have jurisdiction to review and set aside the award.
10. The municipality places reliance on the Constitutional Court cases of *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367(CC) and that of *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) amongst others.
11. The municipality emphasised that the determination of jurisdiction as stated in *Gcaba* (para [75] at 263C-G) is based on the pleadings before the court. Further,

a disgruntled employee cannot be seen to forum shop when the legislature specifically created legislation, the LRA, to deal with this specialised field, by the allocation of this specialised institution to adjudicate over these disputes and the protection of rights in this particular area of law.

12. The applicant in addressing this issue of jurisdiction conceded that jurisdiction was determined on the pleadings and not the substantive merits of the case. The applicant went on further to add that one looks at the formal terminology of the notice of motion and the content of the supporting affidavits and interprets these to establish the legal basis of the applicant's claim. As was stated in *Gcaba para [75] at 263E-F* It is not for the court to say that the facts asserted would sustain another claim, admissible in another court.
13. The applicant in argument emphasised that this application *'is based on the blatant unlawful manner in which the whole disciplinary process which commenced with his precautionary suspension was perpetrated by the Respondents and not whether an unfair suspension or dismissal in terms of the LRA has occurred'*.
14. On my perusal of the supporting affidavit of the applicant and the relief sought, the applicant premises his application on the unlawful and illegal contravention of the following legislation:
 - (a) Local Government: Municipal Structures Act 117 of 1998 (the Structures Act);
 - (b) Standing Rules and Orders of Municipality published in the provincial Government Gazette 1686 of 30 September 2009; and
 - (c) Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), with regards to council meetings held on 6 November 2014 and 4

December 2014 that culminated in the decision to convene the disciplinary proceedings and the eventual appointment of Selepe.

15. The applicant contends that disciplinary proceedings, the manner in which they were conducted and the outcome thereof was not conducted in terms of the Local Government: Disciplinary Regulations for Senior Managers Government Notice 344 in Government Gazette 34213 of 21 April 2011.
16. The applicant concludes that his dispute is not about an unfair suspension or dismissal but rather that of an unlawful suspension as a part of an unlawful disciplinary process that resulted into an unlawful dismissal. Further, the particular conduct, though it constitutes unfair labour practice, could give rise to other rights of action, provided the claim is not formulated or falls within the exclusive jurisdiction of the Labour Court, the High Court will have jurisdiction. In this instance the applicant argued that *'it can by no stretch of the imagination be said that what the Applicant is asserting is an unfair labour practice (suspension) or an unfair dismissal which ousts the' High court.*
17. In the determination of jurisdiction, I am of the view that it is prudent to understand that s23 of the Constitution regulates the employment relationship and guarantees fair labour practise and procedures between the employer and employee. Whilst, s33 of the Constitution guarantees the right to lawful, reasonable and procedurally fair administrative action between the State and the citizens of South Africa.
18. Do we find in s33 any indication that it regulates the relationship between the State and the employees of the State? In dispute or grievances involving the State and its employees, where the complaint is directed to the conduct of the State as an employer, especially so where it has no direct implications and or consequences on other citizen's, but for the employee involved, this conduct does not amount to an administrative action. See *Gcaba para [64] at 259G-260A.*

19. In addition, whether the employer is a public or private organ does not dictate whether the conduct complained of constitutes an administrative action, as per Ngcobo J in *Chirwa para [142] at 415E-G and [150] at 417H-418A*.
20. Likewise in this matter, the fact that the employer is the municipality an organ of State, whom the applicant is aggrieved with, does not make the action or conduct complained of by the applicant an administrative action.
21. The conduct of the municipality complained of by the applicant, in my view, has direct implications and consequences upon the applicant and no one else. In no way whatsoever are the citizens of the municipality affected by that complained of by the applicant in the founding affidavit paragraph 12 and as set out in paragraph 5 above.
22. The applicant argued that the reviewing and setting aside of Selepe's appointment has been overtaken by the fact that his appointment lapsed on 7 March 2015. In terms of the Systems Act, the municipal council can only appoint an acting manager for a period of three months, s54A (2A) (a). The applicant reiterated that this was the core of his relief sought against Selepe. He further argued that no extension was sought or granted and if any extension was sought it would only be for a further three months, s54A (2A) (b), and this was not the case in this matter.
23. In reply, the municipality pointed out that the secondment of Selepe was authorised by the MEC, by way of a letter of secondment dated 8 December 2014, which appointed Selepe "*as Acting Municipal Manager with immediate effect until the post is filled*". The municipality argued that this appointment was in line with s54A (6) (a) of the Systems Act. For easy reference I have set out the relevant section below:

54A Appointment of municipal managers and acting municipal managers

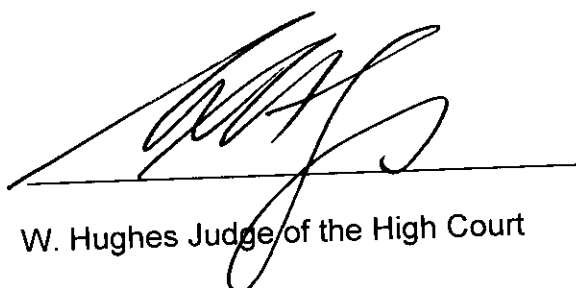
(6) (a) The municipal council may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed.

24. Consequently, in my view, on an examination of the pleadings and relief sought, the assertion sought by the applicant cannot be considered as an administrative action.
25. When jurisdiction is raised as a *point in limine* as was stated in *Gcaba* it's determined on the pleadings, which must be interpreted to establish the legal basis of the applicants claim. It is not for this court to determine on the facts asserted that they give rise to another claim in another court.
26. The applicant argues that *'the applicant's case is not an unfair suspension or dismissal but an unlawful suspension as part of an unlawful disciplinary process culminating in an unlawful dismissal.'* This clearly squarely falls within the ambit of the employer and employee relationship, which is entrenched in the LRA.
27. The situation complained of by the applicant is such that it deals with the conduct of the employer within the suspension, disciplinary and dismissal proceedings of the employee. As such, the applicant's complaint is to be adjudicated by the Labour Court. This is the court that is competent to hear and determine the labour related issue between the parties.
28. In this instance, the process that culminated into the dismissal of the applicant is governed by s191 of the LRA. This deals with aspects of dismissal of an employee. The dismissal of an employee could never amount to an administrative action as is sought to be asserted by the applicant, See *Chirwa* and *Gcaba*.

29. In the result, my conclusion is, that the court that has the power and is competent to adjudicate the dispute as asserted by the applicant in his pleadings is the Labour Court. Thus, this court does not have the jurisdiction to adjudicate.
30. I do not deem it necessary to deal with the issues raised by the MEC as I lack jurisdiction.
31. The cost are awarded to the successful parties, and as such, the costs will follow the result on a party and party scale, which would be inclusive of the employment of two counsels where applicable.
32. In conclusion I make the following order;

32.1 The application is dismissed.

32.2 The applicant is ordered to pay the costs of the ~~defendants~~ ^{respondents} who opposed this application.



W. Hughes Judge of the High Court