

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr: 931/2005

In the matter between:

R S B SESELE

Applicant

and

MATJHABENG LOCAL MUNICIPALITY
SJ LEEUW: EXECUTIVE MAYOR,
MATJHABENG LOCAL MUNICIPALITY

First Respondent

Second Respondent

JUDGMENT: H.M. MUSI J

HEARD ON: 12 MAY 2004

DELIVERED ON: 9 JUNE 2005

[1] Mr. R.S.B. Sesele (the applicant) is the municipal manager of Matjhabeng Local Municipality (the first respondent). Mr. S.J. Leeuw (the second respondent) is the executive mayor of the first respondent and is the functionary through whom the first respondent acted throughout the dispute forming the subject of this case. He is representing his municipality in these proceedings as well. In December 2004 the same

parties were before me in an urgent application wherein the applicant sought to stop his employers, the respondents, from dismissing him arbitrarily without giving him proper notice. That was an application for a final interdict and I granted it in a written judgment delivered on 27 January 2005. In granting the application I noted that the dispute between the parties was far from over and I remarked further

“The applicant will be well advised to carefully reconsider his position.

He may have won the battle, but the war is not over yet”.

That turned out to be a prophecy, for hardly a month had elapsed when sparks started flying again.

- [2] I must mention that at the outset of the hearing I specifically asked the parties if they would be comfortable with me hearing this matter in view of some remarks I had made obiter in the earlier case regarding the charges levelled against the applicant. The parties assured me that they were happy that I hear this matter since it did not involve the

merits of the dispute.

- [3] On the 16th February 2005 the second respondent issued a letter calling upon the applicant to make representations to him as to why the applicant should not be suspended pending the holding of a disciplinary enquiry on charges of poor performance. The letter sets out the details of the accusations levelled against the applicant. Such letter is annexed to the applicant's founding affidavits as annexure A.

The applicant was given up to the 22nd February 2005 at 14h00 to submit representations. When the representations were not forthcoming, the second respondent placed the matter before a council meeting of the first respondent on the same afternoon and a decision was taken to suspend the applicant with effect from 1 March 2005 pending the holding of a disciplinary hearing. The suspension was with full pay.

- [4] The applicant now wants this court to review and set aside the suspension aforesaid. This review application was brought on the basis of urgency and first came before

Ebrahim J on 14 April 2005 but it was postponed *sine die* and the applicant ordered to pay the wasted costs. It is not quite clear to me why the matter had to be postponed but it appears that the learned judge queried whether the action complained of was reviewable. The learned judge apparently had in mind the exclusions under subsection (cc) of section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). She suggested that the applicant should specifically address this issue. Apparently the applicant opted for a postponement in order to address the court's concern and supplementary heads of argument were subsequently filed.

- [5] The source of the applicant's complaint is the manner in which the respondents went about to suspend him. In essence he says that he had not been given an opportunity to be heard by making proper representations before he was suspended. His version is that he had been on sick leave, his doctor having booked him off sick from 15 February 2005 to 28 February 2005 and he annexed a medical certificate to

that effect. He says that the second respondent was well aware of this fact when he initiated suspension steps with the letter dated 16th February 2005, that the second respondent knew that he could not comply with the demand to make representations by the given deadline due to ill health. Implied in this assertion is an allegation of *mala fides* on part of the second respondent. I shall return to the factual issues around this averment in due course.

- [6] The legal issue to be resolved is whether the decision to suspend the applicant is an administrative action as set out in section 1 of PAJA, and much of the oral argument centred on this aspect. In this regard, it has to be accepted that though the move was initiated by the second respondent, the decision itself was that of the municipal council of the first respondent 22 February 2005. There is no dispute that the first respondent had the authority to take such decision. In this regard, this case differs from that of **L. D. TSOTETSI v N. MOHAPI ON BEHALF OF MOTHEO DISTRICT MUNICIPALITY AND OTHERS**, case number 2605/2004, an

unreported judgment of Wright J delivered on 12 August 2004, to which Mr. Daffue, for the applicant, referred. There the decision to suspend was that of the municipal manager who had no authority to do so. The suspension was held to be *ultra vires* and invalid. The lawfulness of the decision as such is not in issue in this case. But the procedure by which the decision was arrived at is in issue in the sense that it is alleged to have been irregular and unfair.

- [7] It is important to decide whether the decision was an administrative action because if it is not then it will not be reviewable in terms of PAJA. Mr. van Rhyn, the senior counsel who argued the matter on behalf of the respondents submitted that the decision to suspend herein falls within the exclusion under subsection (cc) of section 1. The subsection specifically excludes executive powers or functions of a municipal council from the definition of an administrative action. That means that if the decision falls within the executive functions of the first respondent's council then it will not be reviewable under PAJA. Mr. van Rhyn cited *inter*

alia **FEDSURE LIFE ASSURANCE LTD AND OTHERS v**

GREATER JOHANNESBURG TRANSITIONAL

METROPOLITAN COUNCIL AND OTHERS 1998(12) BCLR

1458 CC; 1999(1) SA 374 CC where it was held that municipal functions like imposition of rates and levies are legislative and do not constitute administrative action.

- [8] Mr. Daffue countered by arguing that the exclusion aforesaid relates only to the executive functions of a municipal council, that the decision in question was not of an executive nature but rather administrative. He submitted that in deciding whether an action is administrative the court should look not at the nature of the organ but rather the nature of the specific function. He cited **PRESIDENT OF THE RSA AND OTHERS v SARFU AND OTHERS** 1999(10) BCLR 1059 CC.

- [9] Of course the approach contended for by Mr. Daffue in deciding whether a decision is an administrative action or not is correct. But even applying that approach, in my view, the

decision of the municipal council herein is not an administrative action. The nature of the power that the first respondent was exercising *in casu*, is cardinal. It is not in dispute that the first respondent is an organ of state. But one has to look at the capacity in which it was acting when it suspended the applicant. It was acting not in its public representative capacity exercising its legislative or executive functions or implementing legislation but rather in its capacity as an employer *vis-a-vis* an employee. It was in the same position as any other employer. In this regard it is noteworthy that the Labour Relations Act 66 of 1995 puts the state and its organs in the same position as any employer in their dealings with their employees.

- [10] Review in terms of PAJA has got to do with judicial oversight of the exercise of public power. Where an organ of state is not exercising a public power, the action concerned does not answer to the definition of administrative action. Hence it has been held that where a municipal council cancelled a contract in terms of the provisions of that contract, the act of

concellation was not an administrative action as the council was not then exercising a public power. See **CAPE METROPOLITAN COUNCIL v METRO INSPECTION SERVICES CC AND OTHERS** 2001(3) SA 1013 SCA.

It is noteworthy that section 1 of PAJA includes within the definition of administrative action a “natural or juristic person when exercising a public power or performing a public function”. It is the exercise of public power that is central to the definition. Absent the exercise of public power, there is no administrative action.

- [11] Even if I am wrong in my above conclusion and it is accepted that the municipal council was performing a public function when suspending the applicant, the decision still does not answer to the definition of administrative action, for want of another element. The decision is essentially a matter between an employer and its employee and cannot be supposed to have external, legal effect. Compare **RITCHIE AND ANOTHER v GOVERNMENT, NORTHERN CAPE,**

AND OTHERS 2004(2) SA 584 NPD. I hold therefore that the matter is not susceptible to review under PAJA.

- [12] Mr. Daffue also submitted that the decision is reviewable on broad constitutional grounds as an instance of procedural unfairness. In this regard it should be noted that the fact that the actions or decisions of a state organ do not fall within the definition of administrative action and therefore not reviewable under PAJA, does not mean that they are immune from judicial review. They can still be reviewed on common law grounds based on the principles of natural justice, providing for procedural fairness. Review on these grounds still takes place within the framework of the constitution because as was stated in **Pharmaceutical Manufacturers Association of South Africa and Another in re ex parte President of the Republic of South Africa** 2000(2) SA 674 CC at 692 F, the relevant common law principles “have been subsumed under the Constitution” and “gain their force from the Constitution”. Examples of review on this basis abound but I shall refer to only a few cases.

[13] In **MARAIS v DEMOCRATIC ALLIANCE** 2002(2) BCLR 171

C it was found that a decision by a political party to terminate the membership of the applicant was not an administrative action and not reviewable under PAJA but the court proceeded to review it on account of failure to comply with the requirements of procedural fairness and natural justice.

In **MAFONGOSI AND OTHERS v UNITED DEMOCRATIC MOVEMENT & OTHERS** (2003) 1 ALL SA 441 (Tk) a decision of a disciplinary tribunal of a political party to postpone the disciplinary hearing for a very short period and thereby denying the applicant legal representation was reviewed on the basis that it had been procedurally unfair.

[14] Furthermore, in respect of bodies that have definite rules prescribing the procedure to be followed in making decisions and by whom, the decisions would be reviewable on the basis that whoever took the decision had no authority and therefore acted *ultra vires* or that he failed to follow the prescribed procedure. This is in line with the principle of

legality embodied in our constitution. The case of **L.D. TSOTETSI v N MOHAPI**, referred to above, is an example of review on this basis.

- [15] This court has in the past reviewed suspensions of top state employees on similar grounds. Precedents are legion but it is unnecessary to detail any. Mr. Daffue has referred to the case of **L. JANSE VAN RENSBURG AND OTHERS v DIE DEPARTEMENTSHOOF, DEPARTMENT VAN TOERISME-OMGEWINGS- EN EKONOMIESE SAKE, VRYSTAAT PROVINSIE AND ANOTHER**, number 2473/2004, an unreported judgment of Hancke J delivered on 28 July 2004. In this case a provincial department had a code of conduct for its senior managers which set out not only the procedure to be followed in cases of precautionary suspensions but also the grounds therefor. The applicants had been suspended without following the prescribed procedure and in the absence of the grounds that should have informed the decision. The suspensions were reviewed and set aside.

[16] Now for the facts of the instant matter. I have not been referred to any code of conduct. It is common cause, however, that in line with the *audi alteram partem* rule, the second respondent was obliged to give the applicant an opportunity to be heard before putting the matter to the council for a decision. Indeed the letter dated 16th February 2005 purports to give the applicant the opportunity to state his case. The applicant's case is that he could not be expected to have made any representations as he was on sick leave at the time and that the second respondent knew this before he put the matter before the council meeting on 22 February 2002. He cites the provisions of the Basic Conditions of Employment Act 75 of 1997 to the effect that the an employer is not entitled to demand of an employee who is on valid sick leave to perform any functions in relation to his or her employment.

[17] Now, there is a dispute of fact as to whether the second respondent was aware of the applicant's illness when the letter date 16/02/2005 was issued. The second respondent

says that he only became aware of that fact upon receipt of a letter from the applicant's attorneys on 18/02/2005. On the other hand, the applicant says that the second respondent would have been made aware of the fact on 15 February 2005 at the earliest. In my view, this dispute is not a genuine dispute of fact. In his replying affidavit the applicant has referred to an internal memo that was circulated within the municipal chambers on the 15th February 2005 wherein it is advised that Mr. B. Maritz would be acting in the place of the municipal manager (the applicant). This memo was written at the instance of the applicant and supports his version that he had informed his secretary, Nadia Ferreira, of his illness and that this was communicated to his employers. The applicant had further arranged that Maritz should act in his place for the duration of his sick leave. The memo makes it clear that Maritz will be acting up to the 28 February 2005, which is the date on which the applicant's sick leave would end. Quite clearly the memo must have come to the attention of the second respondent.

[18] Interestingly the letter initiating the suspension process follows on the heels of this memo. Is it a co-incidence? I do not think so. It appears that the second respondent seized on the opportunity presented by the applicant's illness to suspend him, and if so, that would mean that there was no genuine intention to give the applicant an opportunity to be heard before being suspended. This inference becomes inescapable when taking into account that, on his version, the second respondent became aware that the applicant was on sick leave on the 18th February 2005, yet he hurriedly went ahead and put the matter to the council meeting within hours of the deadline of 2 o'clock on that very same afternoon; this when he had been advised that the applicant would be unable to meet the deadline set for the representations due to ill health. The applicant was due to return on 29 February 2005. The question arises: why not wait for a few days in order to hear the applicant first?

[19] It is clear that the second respondent realised that he had acted irregularly and then sought to cure the defect by

issuing a further invitation to the applicant by a letter dated 1 March 2005 to make representations. This latter letter is a contradiction in terms. It informs the applicant that he is “suspended with immediate effect from all municipal duties and/or functions” pending the disciplinary hearing. Yet it invites the applicant to give reasons why he should remain in active service for the duration of his suspension. How could the applicant remain in active service when he has already been suspended from all his functions? On the very same day that the letter was written the applicant’s suspension took effect in terms of the resolution of the municipal council of 22 February 2005. What purpose then would further representations serve since the decision to suspend had already been taken? In my view, not only was the conduct of the second respondent improper and unfair but was *mala fide* as well. Clearly the suspension of the applicant was procedurally irregular and unfair.

[20] But this is typical of the way that the respondents have been going about in their zeal to get rid of the applicant. In my

earlier judgment between the same parties, I pointed out clearly that the right of the respondent to terminate the applicant's contract was not in issue. What was in issue was the manner of doing it. I deplored the questionable tactics that the respondent had adopted in the previous incident. Certainly those remarks seem to have eluded the respondents and their legal representatives, for they have now proceeded in the same fashion. Again it is not their right to suspend the applicant which is in issue. The issue is the manner of doing it. It is beyond me why would the respondents not let the applicant return from sick leave and then commence the suspension process properly.

- [21] It is also noteworthy that in the original notice of suspension no indication whatsoever is given as to why it is thought necessary that he should vacate his office pending the disciplinary hearing. The reasons for suspending him are made *ex post facto* in the letter dated 1 March 2005 and are vague. The ground on which it is proposed to terminate his services is poor performance and this is an old averment.

Now suddenly new allegations emerge *inter alia* that his presence threatens labour relations.

[22] Mr. van Rhyn has also raised the argument that since the suspension itself was a decision of the municipal council, it can only be reviewed if it is unconstitutional or *ultra vires* the powers of the municipality. This argument was premised on the proposition that the decision was an executive function falling within the exclusions set out in section 1 of PAJA. I have found that the respondents were not exercising a public function when suspending the applicant. Nor is the authority of the municipality to take the relevant decision an issue. The point is that the decision was arrived at through an irregular and unfair procedure. It is reviewable in terms of the traditional common law principles that are now embodied in the constitution, especially section 33.

[23] I should remark in passing that this appears to be a typical labour dispute that should properly have been dealt with in terms of the provisions of the Labour Relations Act 66 of

1995 and I am aware of the jurisprudence developed by the Labour Court in matters of this nature. However, no objection was raised to the jurisdiction of this court and, at any rate, we are here dealing with alleged infringements of the rights contained in sections 33 and 23 of the constitution, matters over which this court has concurrent jurisdiction with the Labour Court in terms of section 157(2) of the Labour Relations Act.

- [24] I have found that the decision to suspend the applicant is reviewable but that does not automatically lead to its setting aside. In this regard various considerations come into play. Firstly, the question of prejudice. In **MANONG AND ASSOCIATES v DIRECTOR GENERAL DEPARTMENT OF PUBLIC WORKS AND OTHERS** (2004)¹ ALL SA 673 C it was remarked that the concept of prejudice in our administrative law has been retained in section 1 of PAJA. It stands to reason that a procedurally unfair decision must have caused the aggrieved party some prejudice to warrant setting aside. The suspension *in casu* is with full pay and the

applicant has not shown in his papers how he would be prejudiced. All that Mr. Daffue could say in argument was that the suspension was calculated to humiliate the applicant and that it deprived him of the right to do the job for which he was hired. But that is a normal consequence of a suspension even if it was arrived at through a fair procedure. Moreover, this is merely a precautionary suspension pending the disciplinary hearing. I was informed during the hearing that the disciplinary hearing has already been set down. In

MABITO v MPUMALANGA PROVINCIAL GOVERNEMENT

AND OTHERS (1999) 8 BLLR 821 LC it was held that whilst the *audi alteram partem* rule was an important element of natural justice, the interests of good public administration required flexibility in its application. And what practical purpose would the lifting of the suspension serve given that the disciplinary hearing has been set in motion? It may well be that by the time this judgment is delivered the hearing would be concluded. It is time that the disciplinary hearing be allowed to run its full course without further disruptions so that the merits of the dispute between the parties can be

resolved once and for all.

[25] In my view, it would be inappropriate to set aside the suspension and the proper course is to strike the matter off the roll. As far as costs are concerned, the applicant and the respondents have respectively been partly successful and partly unsuccessful. It is only fair and proper that each party should carry their own costs. The following order is made:

The application is struck off the roll and there shall be no order as to costs.

H.M MUSI, J

On behalf of Applicant:	Advocate J.P. Daffue Instructed by Lovius Block Attorneys
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BLOEMFONTEIN

On behalf of Respondents: Advocate A.J.R. van Rhyn SC
Assisted by
Advocate W.J. Edeling
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