

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]**

Case No: 2082/2024

Date heard: 17/5/2024

Date delivered: 31 /5/2024

In the matter of:

ZAMILE HERBERT ZIKHUNDLA

APPLICANT

And

LINDELANI MALALA

1ST RESPONDENT

ALFRED NZO DISTRICT MUNICIPALITY

2ND RESPONDENT

This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail and publication to SAFLII. The date and time for hand-down is deemed to be 09H30 on 31 May 2024.

JUDGMENT

MJALI J:

- [1] The applicant is employed by the second respondent as a Municipal Manager and Accounting Officer. Following certain allegations, the applicant is on suspension pending the finalisation of the disciplinary hearing instituted by the second respondent. The disciplinary proceedings commenced and have not been finalised. The first respondent is an attorney hired by the second respondent as the chairperson of that disciplinary process. The applicant is represented in the hearing by advocate A M Bodlani SC on the instruction of

Messers AW Chopha Attorneys.

[2] On 13 May 2024 the first respondent gave a ruling that the disciplinary hearing was to proceed again on 20 to 22 May 2024 and on 27 to 31 May 2024 excluding 29 May 2024. The ruling was according to the applicant given without consultation with its legal representatives and as such the dates were not suitable for them as they would both be engaged in a medical negligence trial that was set down for those dates. When their request to have the dates changed did not yield the desired results, the applicant approached this court on an urgent basis seeking an order couched in the following terms.

2.1 Granting the applicant leave to bring this application by way of urgency in accordance with the provisions of the Uniform Rule 6(12) and that the usual forms of service have been dispensed with.

2.2 That pending the launch within a period of 30 (thirty) days from the date of this order, and finalisation of an application for the review and setting aside of the first respondent's ruling of 13 May 2024 postponing the internal disciplinary hearing of the second respondent, instituted against the applicant (the disciplinary hearing), for hearing from 20 to 22 May and 27 to 31 May 2024 excluding 29 May 2024:

2.2.1 The second respondent's disciplinary hearing be and is hereby stayed; and

2.2.2 the first respondent and /or any official, employee and/or agent of the second respondent and /or anyone acting at the instance of the first and second respondents in connection with the disciplinary hearing or otherwise, be and is hereby interdicted and restrained from continuing with the second respondent's disciplinary hearing.

2.3 Directing the first respondent to pay the costs of this application,

provided that should the applicant not launch the review application otherwise than because the dispute has become settled, the applicant shall pay the costs of this application.

[3] Consequent upon the certificate of urgency that was filed with the registrar on Tuesday, 14 May 2024, I issued an order on the same day that papers be served on the respondents and that the matter will be heard on Friday, 17 May 2024 at 10h00. The setting down of the hearing on Friday, 17 May 2024 was to afford sufficient time to the parties to file their answering and replying papers if they so wished before the day of the hearing. The first respondent did not oppose the application but simply filed a notice to abide the decision of this court. The application was only opposed by the second respondent. The second respondent's lengthy answering affidavit coupled with the application for condonation for its late filing was only filed with the registrar on the day of the hearing. The replying affidavit was also filed just before the hearing of the matter, necessitating some time for the court to read the papers before the hearing. Apart from its opposition on the grounds that the applicant has failed to meet the requirements for interdictory relief, the second respondent also raised points in limine, namely, firstly, whether urgency has been made out, secondly, whether it is appropriate to have launched the present application in medias res when such is clearly premature; and thirdly, whether the court's jurisdiction has been properly engaged – the applicant has not delineated whether the pending review is being brought in terms of PAJA or review in terms of the Labour Relations Act.

[4] That coupled with the unavailability of the court room, resulted in the hearing commencing only after 12h00 and continued until after 16h00. The application papers excluding the substantive heads of argument filed by both parties ran in excess of two hundred and twenty pages. During the much-contested hearing both counsel referred to a number of authorities to bolster their arguments for and against the relief sought. When it became clear that the decision on this application would not be taken on the day of the hearing bearing in mind the aforesaid as well as the fact that the disciplinary hearing sought to be stayed was scheduled for Monday 20 May, practically two days

after the hearing of this matter, counsel agreed to an order effectively staying the envisaged disciplinary hearing scheduled to take place on the dates stipulated in the notice of motion. Further to hold a pre-hearing on 31 May 2024 and reserved costs of this application.

- [5] The order agreed upon by the parties is practically the very relief that the applicant sought in this urgent application and as such there is no longer a live issue between the parties in so far as the resumption of the hearing on the stipulated dates. In addition to that, at the time of this judgment, the dates stated in the order sought to be stayed have now come and gone. Apart from staying the proceedings, the order effectively rendered all the other issues raised in limine moot. What remained for determination was the issue of costs. Section 16(2)(a) of the Superior Courts Act provides that the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs. Ordinarily, under the circumstances, the application would be regarded as mute and thus there would be no need for this court to pronounce thereon.
- [6] It is a well-established principle in our law that courts should refrain from making rulings on such matters, as the courts' decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic, or hypothetical and have no direct effect. The reasoning behind this principle is that courts' scarce resources must be used to determine live legal disputes rather than abstract propositions of law. Courts should refrain from giving advisory opinions on legal questions that are merely abstract, academic or hypothetical and have no immediate practical effect or result.¹ In *President of the Republic of South Africa v Democratic Alliance*, the Constitutional Court cautioned that 'courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now'².

¹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 21; *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) para 15.

² *President of the Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35; 2019

- [7] On the issue of costs. Properly construed, the order obtained by consent was what the applicant sought. It was under the circumstances the successful party in this application. The general rule is that costs must follow the event. There is no reason to deviate therefrom. In the result the following order shall issue.

The second respondent shall pay costs of this application.

**GNZ MJALI
JUDGE OF THE HIGH COURT**

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