



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA122/21

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

OBO TUMELO MAKOFANE

Appellant

and

MATJHABENG MUNICIPALITY

First Respondent

ZINGISA TINDLENI: MUNICIPAL MANAGER

Second Respondent

Heard: 18 August 2022

Delivered: 17 August 2023

Coram: Waglay JP, Coppin JA et Tokota AJA

JUDGMENT

WAGLAY JP

Introduction

- [1] The appellant brought an urgent application in the Labour Court seeking a declaratory order to have his suspension declared unlawful and to have it set aside. The Labour Court dismissed the application on the grounds that it had no jurisdiction to entertain the application because the appellant, having

disavowed any reliance on the Labour Relations Act¹ (LRA), failed to set out on what basis he sought the Labour Court's intervention. The Court opined that, as a creature of statutes, unless the basis for the Court's jurisdiction is pleaded or is obvious, which in this case it was not, it could not adjudicate the matter.

- [2] Briefly, the appellant employee (Appellant) was employed from 1 February 2015 as an Executive Director: Strategic Support Services. His position fell within the ambit of a service manager and as such, his employment was regulated in terms of section 56 of the Local Government: Municipal Systems Act² (Municipal Systems Act). The appointment of persons in the position of the Appellant is made by the Municipal Council, in this case, the Matjhabeng Municipality (Respondent).
- [3] It is alleged that on 1 February 2019, the Appellant appointed four persons to various positions within the Respondent. He signed their contracts of employment on behalf of the Respondent designating himself as an acting Municipal Manager. The Appellant was neither the Municipal Manager at the time, nor acting in that position. Not only was he not entitled to appoint staff as he did, but also, in effecting the appointments of these four individuals, no process was followed. The appointments were irregular and purportedly unlawful.
- [4] It was only sometime towards the second half of 2020 that the Respondent discovered these irregular appointments. It laid a criminal complaint and the Municipal Manager, the second respondent herein, called upon the Appellant to provide her with a report on the four irregular appointments he had made. No report was provided.
- [5] The Hawks investigated the complaint and proceeded to charge the Appellant and the four individuals appointed by him under the Prevention and

¹ Act 66 of 1995, as amended.

² Act 32 of 2000.

Combatting of Corrupt Activities Act³. They were arrested and appeared in court on 23 March 2021. The Appellant was released on bail.

- [6] It is instructive to note that the local newspaper, “The South African”, published the following report on 23 March 2021:

‘ ...

Hawks spokesperson Colonel Katlego Mogale said the five had appeared in court following their arrests during an operation by the National Clean Audit Task team this morning.

“The accused who are aged between 55 and 36 are part of the ongoing investigation by the Directorate for Priority Crimes Investigation into corruption related activities within the municipalities around the country,” Mogale said.

Mogale said the suspects were allegedly implicated during the National Clean Audit Task Team investigation into fraud, forgery, uttering and contravention of the Municipal Finance Act within the Matjhabeng Local Municipality [Respondent].

“It is reported that one of the suspects facilitated appointments of the other accused which resulted in the municipality being prejudiced of an actual loss of over R1 million,” he said.

The court granted, Tumelo Makofane, 55, [the Appellant] bail of R15 000, while...

Mogale said the court ordered that the five accused adhere to adhere to [sic] several stringent bail conditions. He said they were ordered not to interfere with state witnesses or the investigation and not to enter the premises of Matjhabeng Local Municipality.

They were ordered to attend court on all the required remand dates and to hand in their passports to the investigating team before 4pm on Tuesday.

³ Act 12 of 2004.

Mogale said the suspects were also ordered not to leave the district of Welkom without the consent of the investigation team.

“The case was remanded to 4 May 2021 for further investigation...”

- [7] The published report properly records the Appellant's bail condition which includes that he not *“enter the premises of Matjhabeng Local Municipality”*. On 24 March, the Appellant's attorneys, by letter to the Municipal Manager, confirmed the bail conditions attached to the Appellant's bail stating that the Appellant *“is not allowed to tender his services at the workplace as long as said matter proceeds”*. The correspondence then goes on to confirm that the Appellant was *“not on suspension”*, tenders his services to the Respondent and to that end, requests the Respondent to provide him *“with a direction where to report for duty”*.
- [8] The Municipal Manager, in response, informed the Appellant's attorneys that, because the Appellant's employment was regulated by the Municipal Systems Act, only the Council of the Respondent could decide what action, if any, could be taken against the Appellant, and that the Council meeting was scheduled for 31 March 2021.
- [9] According to the Municipal Manager, the Council met on 31 March 2021 and after being appraised of the Appellant's position, that he could not enter the Respondent's premises, the Council decided to appoint one Olyan to act in the Appellant's position to ensure that *“there is no interruption in service delivery”* in the absence of the Appellant.
- [10] According to the Appellant, on 30 March 2021, he attended the Magistrate's Court and applied on an urgent basis to have his bail conditions amended so he could return to work. He states that the bail conditions were indeed amended and on that day the condition forbidding him from entering his workplace was lifted.
- [11] According to the Appellant, he sent the Municipal Manager a WhatsApp message advising the Manager about the *“amended”* bail conditions. The Municipal Manager denies receiving such a message.

- [12] Curiously, the Appellant does nothing on 31 March 2021, which is a Wednesday but returns to work on 1 April 2021 and says that he then became aware that Olyan was appointed to act in his place. He does not say that he remained at the workplace or asked whether he could remain at the workplace nor does he say if he raised any issue concerning his position while he was at the workplace.
- [13] Nothing happens for a week after that. On 7 April 2021 and then again on 12 April 2021, the Appellant's attorney writes to the Municipal Manager. The letter of 7 April mentions a letter of 1 April, this letter is not on record. The letter of 7 April enquires about the Appellant's status consequent on an employee having been appointed to act in his place. The letter of 12 April 2021 serves to "unconditionally tender" his services, adding that the Respondent must indicate "when and where" must the Appellant render his services.
- [14] On 12 April, the Appellant again reported for duty and was informed that the Council of the Respondent had decided, because of his bail conditions, not to permit his entry at work and had, in the interim, appointed someone else to fill in for him while he remained indisposed. Interestingly, the letter also indicates that once the bail conditions are relaxed, the Council will reconsider its decision as it was only the Council who had the authority to do so.
- [15] I presume it is this letter that in the eyes of the Appellant constituted his suspension. I say this because the appellant does not in any way indicate when it is that he was supposedly suspended. The appellant then goes on and refers to the Local Government Disciplinary Regulations for Senior Managers (Regulations) to demonstrate that his suspension was not in compliance with the Regulations and as such, he avers that, his suspension was unlawful. He goes further and states, in support of seeking to be placed back at work, that his suspension was causing him to "suffer severe reputational harm".
- [16] The Respondent denies that the Appellant was suspended. They maintain that the Appellant continues to be bound by his original bail conditions that

forbid him to enter the Respondent's premises and that is the reason he is not permitted to attend the Respondent's workplace.

[17] There are a number of issues that raise concern: (i) There is no correspondence that was forwarded from the Appellant's attorneys to the Respondent that mentions that the bail condition forbidding the Appellant's entrance to the Respondent's premises was lifted; (ii) the letter of 12 April, tendering service, is also of little value because it requests the Respondent to inform the appellant "*where*" the appellant should report to work, this was exactly what the Appellant's attorney had sought in its letter of 24 March, when it confirmed the Appellant's restrictive condition; (iii) The Appellant has attached two pages which purport to evince the uplifting of the restrictive bail condition, neither of these pages are readable, the Appellant was aware of this, these pages are as useless in this Court as they were in the Labour Court and were attached as part of the record with no attempt to have them transcribed, or presented as readable copies thereof; (iv) if the restrictive bail condition was removed on 30 March, why was there no attempt made to draw the Council's attention to this, because the Appellant and his attorney were aware that the Municipal Council was to meet on 31 March to deal with this issue, more importantly, why did the Appellant not return to work on 31 March 2021; (v) the Respondent denies that the restrictive condition was lifted and this is recorded in the answering affidavit, yet the Appellant fails to respond thereto in any way. There is no response in his replying affidavit to gainsay or challenge the Respondent's denial of the Appellant's version that the restrictive bail condition had been removed; and finally, (vi) the Appellant's claim of reputational harm because he was not allowed to return to work is misguided particularly when one has regard to the media report on his arrest.

[18] Crucially, there is a dispute between the parties as to whether the bail condition forbidding the Appellant from entering the Respondent's premises was lifted. Absent the fact that the Appellant's bail conditions had been changed, the question of returning to work and the issue of suspension does not arise. The Appellant avers that the restrictive bail condition was lifted, but the Respondent denies this. As stated earlier, the Appellant does not take

issue with the Respondent's denial, nor is there any document (readable) to prove that the restrictive condition was in fact lifted. Not once in any of the letters filed of record does the Appellant's attorney say that the restrictive bail condition was indeed lifted by the criminal court. The Appellant avers that he sent a "WhatsApp" message to the Municipal Manager to inform her that his bail conditions were relaxed, and he could return to work. The Municipal Manager denies receiving such a "WhatsApp" and although the Appellant filed a reply, he makes no comment in his replying papers in response to the Municipal Manager's denial that the WhatsApp was received by him.

- [19] The only acceptable evidence before the Labour Court for the disallowing the Appellant to return to the work premises is based on the fact that he is criminally charged, out on bail, and, the bail conditions forbid him from attending his workplace lest he interferes with witnesses who may be called to give evidence against him. There was no genuine dispute of fact on the papers concerning the removal of the bail condition that the Appellant could not go to his workplace. Accordingly, there was no basis on which that issue ought to have been referred to oral evidence. There was no such application either.
- [20] In the circumstances, the Appellant has failed to get off the starting blocks. Having regard to the facts and circumstances recorded above the Appellant has failed to satisfy this Court that he was indeed suspended or that his application could not have been dismissed by the Labour Court on that basis.
- [21] In any event, the conclusion of the Labour Court on the question of jurisdiction cannot be faulted. The Appellant bore the onus to, *inter alia*, prove that the Labour Court had jurisdiction to hear and determine the matter. This implies that the Appellant should have pleaded the basis for jurisdiction and proved it. Since the Appellant did neither, the Labour Court was justified in dismissing the application.
- [22] Finally. since the Appellant had disavowed any reliance on the LRA, this matter would constitute an ordinary civil matter and the costs should therefore follow the result.

[23] In the result, the following order is made:

Order

1. The appeal is dismissed with costs.

B Waglay JP

Coppin JA and Tokota AJA concur.

APPEARANCES:

For the Appellant: Adv Du Preez

Instructed by: Kramer Weihman & Joubert Inc

For the Respondent: Adv R Arcangeli

Instructed by: Ndumiso Voyi Inc.