

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Reportable

Case NO: J536/2011

In the matter between:

TAUNG LOCAL MUNICIPALITY

Applicant

And

MPHO MOFOKENG

Respondent

JUDGMENT

Molahlehi J

Introduction

1] This matter came before this court on the return day, with the applicant seeking confirmation of the *rule nisi* which had been made by Gush J on 8 April 2011. In terms of the interim order the learned judge found that the matter was urgent and called upon the respondent to show cause why he should not be ordered to leave the applicant's premises, pending the finalisation of the investigation or until his suspension was revoked or declared invalid by a competent forum.

2] On 20 April 2011 when the matter came before this court, the applicant raised a new preliminary point concerning the respondent's supplementary answering affidavit. There is no need in this judgement to go into the details of the reasons for the objection the respondent having withdrawn the affidavit. The only issue that remains concerns the cost order occasioned by the withdrawal of the affidavit.

3] In my view, while the respondent can be criticised for the manner in which he handled the issue of the answering affidavit, I do not, however, believe that it would be fair for him to be required to pay the costs for that reason. The respondent withdrew his affidavit in light of a possible postponement that would have occasioned had he persisted with seeking to have the affidavits accepted by the court. In my view, the approach adopted by the respondent was the most

reasonable one considering the implications of insisting on having the affidavit admitted as that would have resulted not only in wasted costs but also delay in the finalisation of this matter.

Background facts

4]The respondent, Mr Mofokeng is an employee of the respondent, employed as the municipal manager. On 20 March 2011, the applicant took a decision to suspend the respondent pending the outcome of the investigation and a disciplinary enquiry. The applicant suspended the respondent because of the alleged serious financial irregularities, management of his fiduciary duties which had been submitted by the South African Municipal Workers Union (SAMWU) to the applicant. The allegations concern the following:

- The respondent used the amount of R56 000,00 of municipality to repair his damaged car
- He awarded a tender to a person of SA name similar to he's in the amount of hundred and R88 000,00 and ignore a tender which was less.
- He hired a car whilst receiving a travelling allowance

5]The applicant relied on clause 14 of the contract of employment in suspending the respondent. The suspension is more particularly based on the resolution taken by the applicant at its meeting which was held 24 March 2011. The resolution reads as follows:

"Item 6.5

RESOLUTION ON ALLEGATIONS LEVELLED AGAINST THE ACTING MUNICIPAL MANAGER (MPHO MOFOKENG) BY SAMWU (SOUTH AFRICAN MUNICIPAL WORKERS UNION)

1. *The Council takes note of the matter*
2. *The council regards the allegations as serious and as disturbing*
3. *That Council resolved to suspend the Acting Municipal Manager*
4. *That Council resolved to mandate the Mayor to handle this matter, exhaust all legal process and report to Council.*
5. *That Council resolved to appoint Mr G Human Director Community Services) to act on the position with all benefits and powers including signing Powers.*

6. *That Council resolved to add a case of insubordination on the allegations levelled against the Acting Municipal Manager (Mr Mpho Mofokeng).*

7. *In the event of him resisting vacating the office, court interdict be sorted to have him out."*

6]In his answering affidavit the respondent contends that applicant did not have either the power or authority to suspend his contract of employment. He further contends that the applicant did not have the power to suspend him because he was not appointed by the municipality but by the Member of the Executive Council (the MEC) of the Province in terms of s 139 of the Constitution read with s 106 of the Local Government Municipal Systems Act 32 of 2000. The respondent has subsequently conceded that the applicant did indeed have the power to suspend him and accordingly abandoned this point.

7]The issue of the validity of the resolution which led to the suspension of the respondent is based on what happened at the meeting of the applicant when the decision was taken to suspend him. The meeting was attended by 33 (thirty three) out of 44 (forty four) of the councillors of the applicant. The meeting seem to have proceeded without any difficulty until when it was about to discuss item 6.5 which was on the agenda of the meeting and which concerned the allegations, which SAMWU had levelled against the respondent.

8]According to the applicant the respondent left the meeting to answer a cell phone call towards the end of item 6.4 of the agenda of the meeting. On his return he handed the cell phone to the ANC Chief Whip who was apparently requested by the person on the phone to request the speaker to postpone the meeting. It would appear that the Chief Whip refused to communicate the request to the Speaker whereupon the respondent approached the Speaker and informed her/him of the request to postpone the meeting. The Speaker's attempt to have the meeting postponed was resisted by the majority of those present in the meeting. And thereupon 13 councillors walked out of the meeting. The remainder of the councillors continued with the meeting and appointed the ANC's Chief whip to be the Acting Speaker.

The contention of the parties

9]It seems common cause that the decision to suspend the respondent was unlawful due to the fact that the decision was taken without the necessary

quorum. Ms Hassim for the applicant did not dispute that the decision to suspend the respondent was unlawful as a result of the procedure that was followed in arriving at that decision. She however, relying on the decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1 (SCA), contended that the decision remained valid and should be enforced because it was never set aside on review by the court. She further contended that the respondent could not rely on the “collateral” defence in resisting the confirmation of the interim order that had been made by the court.

10]As indicated earlier the respondent on the other hand initially contended that the applicant did not have the power and authority to suspend him. In opposing the confirmation of the interim order Mr Lengane, for the respondent contended that the court should not confirm the interim order because the resolution upon which the applicant sought to rely on was unlawful and also that the applicant did not have the *locus standi* to institute this proceedings.

The law

11]It is generally accepted that an unlawful administrative decision remains valid until it is set aside by a competent court. The authorities say that an unlawful act is invalid in law but is however valid as a matter of fact. As a general rule an unlawful administrative decision is in fact valid and has legal consequences until such time that it is set aside by a court.

12]It has been pointed out in *Oudekraal supra* that whilst an unlawful act is void in law it is however in fact valid and derives its validity and the force of law from its factual basis. Thus the enquiry in generally is not whether the decision has its basis in law but rather whether such a decision exist in fact. The next enquiry once it has been established that the decision is unlawful but exists in fact would be to determine whether it has been set aside on review. In general this question arises in the determination of whether or not the decision is enforceable or whenever there is an attempt at coercing such unlawful administrative act.

13]It follows that the parties opposing the existence of the decision should not seat and do nothing about it because in the interest of certainty and with the passage of time, *de facto* the decision would be entrenched. This is likely to arise in particular when an attempt is made at reviewing the decision.

14]In as far as challenging an unlawful administrative decision on review is concerned, the authorities seem to be in agreement that the court has discretion

whether or not, to refuse to grant the relief. The discussion whether or not to grant or refuse the review is used as a mechanism to strike a balance between the consequences of legality and certainty. The delay in taking steps could result in the uncertainty as to the status of that decision. See *Oudekraal supra* at paragraph 36 and *Bruyns v Makatana Bay Lodge CC* (2010 JOL 26057 (KZN) at paragraph [23], *Bullock NO v Provincial Government, North West Province and Seale v Van Rooyen NO and others*; Provincial Government, North West Province v Van Rooyen NO and others [2008] 3 All SA 245 (SCA).

15]In *Oudekraal supra* (at paragraph 36) the court drew a distinction between the remedy sought under the review and collateral defence in case involving the challenge to an unlawful administrative act. In this respect the court had the following to say:

“On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.”

16]In the present case it is common cause that the respondent has not to date sought to have the unlawful resolution of the applicant to suspend him set aside on review. The respondent has now in these proceedings raised “collateral defence,” that the court should not permit the applicant to coerce him into complying with the decision or in a sense enforcing the decision.

17]The issue that has arisen in the present matter is whether a party affected by an unlawful administrative decision can ignore such a decision and when coerced through the court resists such attempts through “collateral” defence and seeks to have it set aside on the basis of such a defence.

18]The issue of the consequences of an unlawful administrative decision received attention in a number of the courts decisions. The issue received much attention since the *Oudekraal supra*. The issue of the legality of the administrative decision in that case arose in the context where the Surveyor-General granted an extension of the time for the lodging of the town plans. The plans related to the establishment of a settlement development in an area which had significant

religious and cultural sites for one of the communities.

19]The SCA in analysing the consequences of an unlawful administrative decision had the following to say:

[26] . . . the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

20]In arriving at the above the court accepted the analysis by Laurence Baxter in Administrative Law at page 355-356 where the principle is stated as follows:

[27] 'There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are "voidable" because they have to be annulled.'

21]The key issue in this matter is whether the respondent having not taken any step to have the decision set aside can rely on the "collateral defence" to stop the confirmation of the *rule nisi*. Ms Hassim for the applicant suggested in her submission and specifically relying on paragraph [26] and [27] of *Oudekraal supra* that unless the decision to suspend the respondent was set aside on review it is extant and consequently the respondent has no right to be on the applicant's premises. The essence of the learned counsel's argument was that collateral defence could not avail to the respondent. She also emphasised having accepted that the decision to suspend the respondent although unlawful its unlawfulness was based on latent and not patent defect. In other words the defect in the decision arose from failure to follow the correct procedure in arriving at the decision rather than a substantive defect.

22]In *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and others* 1993 (2) SA 245 (C), the court was seized with having to answer two questions concerning whether or not the respondents were precluded from challenging the registration of the Industrial Council by the Minister of Labour including whether the respondents were by reason of the lapse of time precluded from challenging that decision. After discussing the application of the “delay rule,” the court (at page 252J), in accepting that the “collateral defence” does apply in case of challenging the validity of an administrative decision had the following to say:

“ . . .the validity of administrative acts and subordinate legislation can be challenged not only directly in review proceedings, but also indirectly or, as is sometimes said, collaterally, ie ‘proceedings which are not themselves designed to impeach the validity of some administrative act or order’. . . Obvious examples are enforcement proceedings and criminal prosecutions, the latter according to Baxter . . ., being ‘one of the hardest methods of securing review’. In such proceedings, therefore, the need for judicial scrutiny of an administrative act or subordinate legislation arises not for the purpose of affording a discretionary remedy, viz review or a declaratory order, but for the purpose of determining the entitlement of the party seeking enforcement, or the guilt or innocence of an accused person. The defendant or accused in such proceedings cannot, it seems to me, be precluded from raising invalidity as a defence merely on the grounds of delay . . .”

23]The court went further (at page 253G), to suggest that the court has a discretion to either uphold or reject collateral defences that may be raised when attempts are made to coerce an invalid administrative decision. It seems to me that this view is correct if regard is had to those instances where a party seeking to rely on collateral defences has previously acceded to the implementation of the invalid decision and after substantial lapse of time seeks to dispute the factual existence of the decision. This analysis derives from the comment the court made when saying the following:

“A Court, however will not in every case permit an administrative act to be challenged in collateral proceedings. Where, however, enforcement of such an act or order is resisted, whether in criminal or civil proceedings, on the ground that in making it the official acted beyond his powers, our Courts, to my knowledge, have never refused to allow the question of validity to be canvassed.”

24]A similar view was expressed by the SCA in *Oudekraal supra* where at paragraph [35] of that judgement the court had the following to say:

"[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only "if the right remedy is sought by the right person in the right proceedings". Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law."

25]The SCA disagreed with the court a quo that where an unlawful decision is challenged collaterally the court has no discretion to allow or disallow the raising of the defence. In this respect the court held that:

"[36] It is important to bear in mind (and in this regard we respectfully differ from the court a quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity."

26]On the facts of the case in *Oudekraal supra* the SCA found that the City Council's reliance upon a collateral challenge to the validity of the Administrator's decision in that case was, misplaced. It is important to note that the SCA did not decide the matter on the basis of the collateral defence but rather on a different basis.

27]In *Mthethwa v Municipal Manager, Uthungulu District Municipality & others* [2007] JOL20640 (N) the court held that:

"It should be borne in mind that the analysis of these issues took place in the context of the council claiming that it was simply entitled to ignore the unlawful administrative act. The court recognised that, where a public authority seeks to coerce a subject into compliance with an unlawful administrative act, the subject may be entitled to ignore the unlawful act and raise what is known as a "defensive" or "collateral challenge" to the validity of the administrative act without taking positive steps to set it aside and that, in such a case, a court has no discretion to allow or disallow the defence in question because "the validity of the administrative act constitutes the essential pre-requisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity".

28]Recently, the court in *Gardner & others v Central University of Technology, Free*

State [2010] JOL 25682 (LC), in agreeing with what is said by Daniel Pretorius, in her article in the *South African Law Journal*, "The Status and Force of Defective Administrative Decisions Pending Judicial Pronouncement", held that the view expressed in *Oudekraal supra* should be viewed within the particular factual context of that case. I align myself with this view.

29]The Constitutional Court in *Helicopter & Marine Services (Pty) Ltd and Another v A Waterfront Properties (Pty) Ltd and Others* 2006 (3) BCLR 351 (CC), accepted that collateral attacks could be mounted against an attempt at coercing an unlawful administrative decision. However the court declined to determine whether a collateral attack as identified by the SCA in *Oudekraal supra* is too narrowly drawn or not.

30]It seems to me that the starting point in applying the above principles is to accept that although the resolution to suspend the respondent was unlawful and therefore *ultra vires* the powers of the applicant, it does not as matter of fact lead to the conclusion that the resolution and the subsequent actions arising from it should be regarded as if they had no basis upon which they occurred. In law the suspension may be invalid because it is based on an unlawful resolution but it is however valid to the extent that it exists as a matter of fact. In other words although the resolution is unlawful it may survive and remain effective if not challenged on review or, as is the case presently, a collateral defence is raised to challenge its coercion.

31]The analyses of the submission made by Ms Hassim, suggest that if the collateral defence is accepted then account should be taken of the fact that the defect in the resolution was latent and not patent. In other words consideration should be given to the substance of the resolution and not the mere procedure in adopting it.

32]In general and depending on the nature and circumstances of the case that may be put before the court, I would agree with the sentiment expressed in the submission made by the learned counsel. In the present case the fact that the defect is limited to procedure is immaterial in the assessment of its validity and force in law because it offends one of the basic principles of our law namely the rule of law. The rule of law is foundational to any relationship between the parties in a constitutional democracy. The parties to any relationship are required to act lawfully in their interaction with each other. The rule of law in labour matters

requires an employer, as is the case in the present instance, to take decisions that are authorised by the law in order to comply with the provisions of s 23 of the Constitution. Section 23 of the Constitution provides everyone with the right to fair labour practices.

33]The manner in which the resolution in this matter was taken does not only undermine the rule of law but also fundamentally undermines the constitutional right to fair labour practice of the respondent. Thus the fact that the defect is limited to a procedural defect does not detract from the fundamental requirement of compliance with the rule of law.

34]It is thus my view based on the above that the resolution to suspend the respondent whilst it existed in fact it is a legal nullity in all respects including its purported authorisation for the institution of these proceedings. In this respect the point raised by the respondent regarding the *locus standi* of the applicant in instituting these proceedings including the collateral defence stands to succeed.

35]In conclusion I make the following findings:

- a. The resolution taken by the applicant was until the findings of this court valid in fact and not in law.
- b. The respondent has successfully mounted collateral defence to the validity of the resolution passed by the applicant.
- c. The resolution together with all the acts that followed thereafter are invalid and of no force and effect in all respects
- d. The application to have the *rule nisi* confirmed stands to fail.

Costs

36]I have already dealt with the issue of costs as concerning the withdrawal of the respondent's supplement answering affidavit. As concerning the costs of the matter having to stand down on the 7th April to 8th April 2011 there is no reason in law and fairness why the respondent should not pay the costs occasioned by that postponement. And as concerning the cost of this application, I see no reason why they should not in law and fairness follow the results.

37]In the premises, the following order is made:

1. The rule nisi made on the 8th April 2011 is discharged.

2. The respondent is to pay the costs occasioned by the postponement of the matter on the 7th April 2011.
3. There is no order as to cost concerning the filing and the withdrawal of the supplementary answering affidavit of the respondent.
4. The applicant is to pay the costs of this application.

Molahlehi J

Judge of the Labour Court of South Africa

Date of Hearing: 20 April 2011

Date of reasons: 28 April 2011

Representation

For the applicant: Adv SK Hassim instructed by Mkhonto & Associates

For the respondent: Adv Lenagane instructed by DMS Attorneys