



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 2695/11

In the matter between:

RALEKGETHO LEBU

APPLICANT

and

MAQUASSI HILLS LOCAL MUNICIPALITY

1ST RESPONDENT

**M. MAPHOLI N.O.
(ACTING MUNICIPAL MANAGER)**

2ND RESPONDENT

D. K. MOHADI

3RD RESPONDENT

G. V. KGABI

4TH RESPONDENT

M.D. MATETE

5TH RESPONDENT

T.S. SELETE

6TH RESPONDENT

K. G. MOJELA

7TH RESPONDENT

M. S. SEJESO

8TH RESPONDENT

K. S. KGAODI

9TH RESPONDENT

K.A. MOGAPI

10TH RESPONDENT

O. H. BATSIETSING

11TH RESPONDENT

G. P. MOTSWAKGOLE

12TH RESPONDENT

S. J. LESIE

13TH RESPONDENT

N. W. NTIANE	14 TH RESPONDENT
M.D. SERECTSI	15 TH RESPONDENT
J. PHEIFFER	16 TH RESPONDENT
G.J. VAN ZYL	17 TH RESPONDENT
N.L. TSHINGILANE	18 TH RESPONDENT
M.E. MOTAUNG	19 TH RESPONDENT
B.J.MAHUMAPELO	20 TH RESPONDENT
O.S. DUFFY	21 ST RESPONDENT

Heard: 2 December 2011

Delivered: 7 December 2011

Summary: Suspension of senior manager contrary to Local Government Disciplinary Regulations for Senior Managers, 2010. Suspension unlawful on account of failure to afford manager seven days' notice of justification for suspension.

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicant, the municipal manager of the first respondent (the municipality), seeks to have his suspension set aside. Although the applicant initially sought an interim order, the parties agreed that all of the relevant factual and legal issues raised had been fully canvassed, and that should the application be successful, a final order should be granted.

[2] The urgency of the application was not contested, and I deal with it on that basis.

[3] The question that is to be decided is whether the applicant's suspension should be set aside on the basis that the municipality failed to comply with the

provisions of the Local Government: Disciplinary Regulations for Senior Managers 2010, and the applicant's contract of employment. In particular, the issue raised by this application is whether the applicant's suspension is unlawful because the municipality, in breach of regulation 6 of the regulations referred to, failed to invite the applicant to make representations within a seven day period as to the purpose of the suspension before the municipality took a decision that he be suspended.

Background

[4] I do not intend to burden this judgment with a recitation of all of the facts. This matter has a sorry history. In December 2010 this court set aside the applicant's suspension in terms of an order granted under case number J 2455/10. On 21 October 2011 this court (per Steenkamp J) delivered a judgment in terms of which the applicant's suspension was declared unlawful and set aside, and the municipality ordered to reinstate the applicant. The municipality filed an application for leave to appeal against the judgment. The application was withdrawn on 26 October 2011 when the parties reached an agreement to the effect that the municipality would withdraw its application for leave to appeal and that the applicant would take special leave until 21 November 2011. The agreement provided further that the applicant would be reinstated and resume his duties on 22 November 2011, subject to the court's determination of yet another application, in this instance an application brought under case number J 2065/11 for a declaratory order to the effect that the applicant's contract remained in force until 31 October 2012. On 27 October 2011, Francis J made the agreement an order of court. On 31 October 2011, Basson J issued a rule *nisi* calling on the municipality to show cause on 18 November 2011 why a final order should not be granted declaring that the applicant's contract terminated on 31 October 2012, and restraining the municipality from terminating the contract for any reason that was not lawful and fair. On 14 November 2011, the municipality resolved to withdraw its opposition to the application for the declaratory order, and later filed a notice to that effect.

[5] On the same date, 14 November, at approximately 21h00, the municipality delivered a letter to the applicant advising him of the withdrawal of

opposition to his claim, but also notifying him of the municipality's intention to suspend him. The relevant portion of the letter reads as follows:

"Council resolved today (14 November 2011) not to challenge your view that your contract of employment is still valid until 31 October 2012 and has rescind its previous resolution to the opposite effect.

Our legal representative was instructed to no longer pursue or oppose any application in the labour court which challenges the validity and lawfulness of your contract of employment.

Council however has reasonable cause to believe that acts of misconduct has been committed by you as Accounting Officer as resolved to institute disciplinary proceedings. A report which includes reference to various alleged acts of financial misconduct and other transgressions was tabled to council. The alleged acts of misconduct are of a very serious nature and Council is therefore considering suspending you.

[The letter then sets out various allegations of misconduct]

You are given an opportunity in terms of Local Government Notice No. 344 [Local Government Disciplinary Regulations for Senior Managers, 2010] to make within seven [7] days written presentation to the municipal council why you should not be suspended. These submissions must reach council on or before 21 November 2011. 16h30' (sic).

[6] On 21 November 2011, the applicant's attorney responded to the letter, in essence contending that the municipality had an ulterior motive in effecting the suspension and that the letter failed to set out any purpose for the suspension, and advising the municipality that the applicant did not intend at that stage to respond to the allegations of misconduct.

[7] On the same date, 21 November, the municipality's attorney telephoned the applicant's attorney and advised him that the council had resolved to suspend the applicant with immediate effect, and that the applicant was not to report for duty on 22 November 2011.

[8] On 22 November 2011, the municipality addressed a letter to the applicant, which reads as follows:

'Disciplinary Enquiry: Suspension- Municipal Manager

We acknowledge receipt of your legal representative's letter dated 21 November 2011 informing council that you do not wish to make written presentation to the municipal council why you should not be suspended.

It is with regret that we wish to advise you that Council Resolved on 21 November 2011 to suspend you with immediate effect with full benefits in terms of Local Government Notice No. 344 (Local Government: Disciplinary Regulations for Senior Managers, 2010) from performing your duties pending the outcome of a disciplinary enquiry as council has reasonable cause to believe that acts of misconduct has been committed by you as Accounting Officer and resolved to institute disciplinary proceedings.

Council is of the view that your presence may-

- Be detrimental to stability in the municipality
- Interfere with potential witnesses
- Conduct further acts of misconduct
- Place the property of council at risk...

[9] After receipt of the letter, the applicant instructed his attorney to initiate these proceedings.

The applicable legal principles

[10] The applicant contends that his suspension is unlawful for want of compliance with the Local Government: Disciplinary Regulations for Senior Managers 2010, and the applicant's contract of employment. It is not disputed that the applicant falls within the definition of 'senior manager' for the purposes of the regulations.

[11] The process for a precautionary suspension is dealt with specifically in regulation 6. The regulation reads as follows:

"6. Precautionary suspension.—(1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that—

- (a) the presence of the senior manager at the workplace may—
- (i) jeopardise any investigation into the alleged misconduct;

- (ii) endanger the well-being or safety of any person or municipal property;
or
 - (iii) be detrimental to stability in the municipality; or
 - (b) the senior manager may—
 - (i) interfere with potential witnesses; or
 - (ii) commit further acts of misconduct.
- (2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven (7) days of being notified of the council's decision to suspend him or her.
- (3) The municipal council must consider any representation submitted to it by the senior manager within seven (7) days.
- (4) After having considered the matters set out in sub-regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.
- (5) The municipal council must inform—
- (a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and
 - (b) the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven (7) days after such suspension.
- (6) (a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.
- (b) The period of three months referred to in paragraph (a) may not be extended by council."

Analysis

[12] In the course of preparing this judgment, I have had the benefit of reading two judgments by Steenkamp J, one of them the judgment delivered in respect of the dispute between the same parties and referred to above (case number J 2455/11). Both judgments concern the interpretation and application

of regulation 6. In *Biyase v Sisonke District Municipality & others*¹ Steenkamp J observed:

[13] The sub-regulation appears to contain an inherent contradiction: The council must give the manager an opportunity to make representations before he or she is suspended; but must do so within seven days of the council's decision to suspend him or her.

[14] How can the council give the manager an opportunity to make representations before deciding to suspend him if the decision to suspend has already been taken?

[15] In order to make sense of this provision, one has to give meaning to the clause "within seven days of being notified of the council's decision to suspend him or her."

[16] In *Nell v Mulbarton Gardens (Pty) Ltd* the phrase "within seven days of the posting of a written notice" was construed to mean "within seven days after the posting of a written notice", and the first day was excluded. That seems like an obvious and sensible interpretation.

[17] If the provision to make representations before suspension is to have any meaning, it must mean that the manager must have a period of seven days within which to make representations before a final decision to suspend is taken.'

[13] In the present instance, it is not disputed that the applicant received notice of the nature of the misconduct that he is alleged to have committed and that he was afforded seven days within to make representations in relation to those allegations. That notice is contained in the letter dated 14 November 2011. What is at issue, as I have indicated, is whether the municipality was obliged, in terms of regulation 6, to provide a justification for the applicant's suspension and to afford the applicant seven days within which to make representations regarding that justification before making any decision to suspend him. In his judgment delivered on 21 November 2011,² Steenkamp J said the following:

¹ Unreported, D 999/11, 28 November 2011.

² *Lebu v Maquassie Hills Local Municipality* J 2035/11, unreported, 21 October 2011.

[32] Similarly, in terms of regulation 6(1), it is not sufficient for the Council to allege that the senior manager has committed an act of misconduct in order to suspend him; it must also have reason to believe that his presence may jeopardise the investigation, endanger the well-being or safety of any person or municipal property, or be detrimental to stability in the Municipality; or that he may interfere with potential witnesses or commit further acts of misconduct.

[33] In argument, Mr Loyson, for the respondent submitted that it is clear from the facts of this case, as set out in the answering papers that the applicant in his position as municipal manager and accounting officer could interfere with the investigation and has in fact committed acts of misconduct. The problem is that none of this was alleged before he was suspended, as required by regulation 6 and the contract of employment. Therefore, the applicant was not given an opportunity to make representations why he should not be suspended, based on those reasons.'

[14] Mr Louw, who appeared for certain of the respondents, and despite the municipality's withdrawal of its application for leave to appeal against the judgment, invited me to decline to follow Steenkamp J, at least in so far as his judgment suggests that a senior employee is to be afforded at least seven days to make representations on both the misconduct alleged and the purpose of the suspension, before any decision to that effect is made final. I must decline to accept that invitation. In my view, Steenkamp J's interpretation of regulation 6 is correct. It is consistent with the principle of *audi alteram partem* that the regulation clearly seeks to meet, and with the chronology set out in the regulation. The terms of the regulation clearly contemplate an in-principle decision to suspend, taken on the basis of a reasonable belief that the senior manager has committed misconduct and that at least one of the requirements in paragraphs (a) and (b) is present. The municipality is then required to consider the matters set out in sub-regulation (1) together with any representations received, and then and only then, may the municipality suspend the employee. I would add that in my view, it is not sufficient for a municipality merely simply to reproduce the justifications listed in paragraphs (a) and (b). In the present instance, that is what the applicant has done, with the omission only of the factor listed in paragraph (a) (i) on the basis, presumably, that the investigation

initiated into the applicant's conduct has been completed. Suspension is a measure that has serious consequences for an employee, and is not a measure that should be resorted to lightly. There appears to be a tendency, especially in the public sector, where suspension is applied as a measure of first resort and almost automatically imposed where any form of misconduct is alleged. The purpose of removing an employee from the workplace, even temporarily and on full pay, must be rational and reasonable, and must be conveyed to the employee concerned in sufficient detail to enable the employee to compile the representations that he or she is invited to make in a meaningful way. Of course there are those instances where precautionary suspension is a necessary measure, and where the reasons to remove an employee from the workplace as a precautionary measure are compelling. But those cases will be the exception rather than the norm.

[15] To the extent that this application is predicated on the terms of the applicant's contract of employment, I agree with the conclusion reached by Steenkamp J that the applicant's contract ought to be read subject to regulation 6.

[16] The procedure relevant to the suspension of a senior manager in terms of regulation 6 can be summarised as follows:

- a. A municipality is entitled to suspend a senior manager on full pay, if it reasonably believes that a senior manager has committed an act of serious misconduct.
- b. The municipality must have reason to believe that the continued presence of the senior manager at the workplace will either jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or municipal property. It will also be sufficient that the municipality believes that the manager's continued presence in the workplace will be detrimental to stability in the municipality, or that the manager may interfere with potential witnesses, or commit further acts of misconduct. The purpose of any suspension must be rational, and a municipality must be in a position to establish the reasonableness of its belief.

- c. A municipality may do no more than take a decision in principle, before affording the affected senior manager at least seven days' notice of its intention to suspend him or her. The notice must contain at least a description of the misconduct that the manager is alleged to have committed, and the council's justification for its in-principle decision, and invite representations in relation to both. Both the nature of the misconduct alleged and the purpose of the proposed suspension must be set out in terms that are sufficiently particular so as to enable the senior manager to make meaningful representations in response to the proposed suspension.
- d. The council is required seriously to consider any representations made by the affected senior manager. It must take those representations seriously and make a decision, in the light of those representations and its own interests as defined by sub-regulation 6 (1), on whether the manager should be suspended. It follows that if the senior manager's representations are rejected, the reasons for that rejection ought to be furnished.

[17] In the present instance, the municipality notified the applicant of its justification for his suspension on the same day that he was suspended. The municipality also failed to articulate the purpose of the applicant's suspension. In my view, therefore, the applicant's suspension constituted a breach of regulation 6 and he is entitled to the relief that he seeks.

[18] Finally, there is no reason why those respondents that opposed these proceedings should not be liable for the applicant's costs. The municipality was advised on 14 November 2011 that it had failed to state the purpose of the applicant's suspension, but it persisted nonetheless. There is also a sense in which the temporal coincidences relevant to the municipalities decision-making suggest that the municipality has conducted itself in Machiavellian fashion, concluding settlement agreements on a return to work and withdrawing its opposition to the litigation initiated by the applicant, all the while remaining intent on removing him from the workplace. My only regret is that the costs order that I intend to make will be met ultimately, no doubt, by the municipality's ratepayers. Had the individual respondents been put on notice that they would

be called upon to show cause why they should not pay the costs of the application from their own pockets, I would have seriously considered a motion to that effect.

I accordingly make the following order:

1. The applicant's suspension effected on 22 November 2011 is declared unlawful and set aside
2. The applicant is to be reinstated into the position of municipal manager with immediate effect.
3. The first, second, sixth and twenty-first respondents are ordered to pay the costs of these proceedings, jointly and severally, the one paying the other to be absolved.

André van Niekerk
Judge

APPEARANCES

APPLICANT:

Mr WP Scholtz, Scholtz Attorneys

FIRST, SECOND, SIXTH

AND TWENTY-FIRST RESPONDENTS:

Mr EH Louw, Eric H Louw
Attorneys.