



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

REPORTABLE

Case No: J 2822/11

In the matter between:

RALEKGETHO LEBU

Applicant

and

MAQUASSI HILLS

LOCAL MUNICIPALITY

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

Heard: 08 December 2011

REASONS FOR JUDGMENT

LAGRANGE, J

Introduction

- ^{1]} Judgment in this matter was handed down on 13 December 2011, as set out in paragraphs [39] and [40] hereunder. The reasons for the judgment are set out below.
- ^{2]} This is an urgent application brought by the municipal manager, Mr R Lebu, of the Maquassi Hills Local Municipality, the first respondent, to prevent the municipality from proceeding with a disciplinary enquiry against him pending compliance with the Local Government: Disciplinary Regulations for Senior Managers, 2010 ('the regulations'). The regulations were issued by the responsible Minister for Cooperative Governance and Traditional Affairs in terms of section 120 of the Local Government: Municipal Systems Act, 32 of 2000.¹
- ^{3]} The application does not occur in isolation but is the latest episode in a legal saga which has been running since late last year, no doubt at considerable expense to the ratepayers of the respondent

¹ GN 344, GG34213, 21/04/2011

municipality. I am the fifth member of this Court to preside over yet another bout in this legal narrative. The previous events are summarised in the decision of Van Niekerk J between *Ralekgetho Lebu v Maquassi Hills Local Authority and others* (J 2695/11, unpublished judgment), dated 7 December 2012. I do not intend to repeat them here.

- 4] In the most recent case Van Niekerk J held that the applicant had been unlawfully suspended on 22 November 2011 and had reinstated him in his position as municipal manager with immediate effect. As a measure of his disapproval of the conduct of the councillors on the local authority, he made an order of costs on a punitive scale for which they were held jointly liable with the council.
- 5] On 30 November 2011, two days before the application concerning Mr Lebu's unlawful suspension was due to be heard, he was presented with a disciplinary charge sheet and notice of a disciplinary hearing scheduled for 8 December 2011. It is these proceedings that are the object of the applicant's attack in this application.
- 6] In essence, the applicant claims that the institution of these proceedings was contrary to the disciplinary regulations and were not properly authorised. For the purpose of dealing with the specific allegations as to why the applicant alleges that the conduct of the municipality in instituting these proceedings falls short of the requirements of the regulations the pertinent portions of the

regulations are set out below:

"Policy

4 (1) If a senior manager is alleged to have committed misconduct, the municipal council must institute disciplinary proceedings in accordance with this Disciplinary Code.

...

Disciplinary procedures

5. (1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.

(2) An allegation referred to in sub regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven [7] days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven [7] days to consider the said report.

(3) If the municipal council is satisfied that-

(a) There is reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven [7] days appoint an independent investigator to investigate the allegation [s] of misconduct; and

(b) There is no evidence to support the allegation [s] of misconduct against the senior manager, the municipal council must within seven [7] days dismiss the allegation [s] of misconduct.

(4) The investigator appointed in terms of sub regulation (3) (a) must, within a period of thirty [30] days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.

(5) The report contemplated in sub regulation (4) must be tabled before the municipal council in the manner and within that timeframe as set out in sub regulation (2).

(6) After having considered the report referred to in sub regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.

(7) the resolution in sub regulation (6) must-

(a) include a determination as to whether the alleged misconduct is that serious or a less serious nature;

(b) authorise the mayor, in the case of the municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to-

(i) appoint-

(aa) an independent and external presiding officer; and

(bb) an officer to lead evidence; and

(ii) sign letters of appointment."

7] To understand the applicant's claim that the regulations were not complied with in a number of respects when the municipality initiated disciplinary proceedings, a brief synopsis of the sequence of events and in particular the decisions taken by the council is useful.

8] In the special council meeting held in committee on 12 September 2011, a decision was taken to suspend the applicant. The reasons given for the suspension were that he had misled the council and

deviated from the council's procurement policy without authority.

9] The next special council meeting held in committee was held on 20 September 2011, which purported to consider the applicant's representations against what it now characterised only as council's 'intention' to suspend him. In resolution ICSLC no 7/2011 the applicant's immediate suspension was confirmed and it was resolved that:

"4. The Acting Municipal Manager must immediately appoint a suitable person or persons to conduct an investigation into any action and decisions taken by the municipal manager in terms of his statutory and delegate duties as head of the administration and/or as Accounting Officer of the municipality.

5. The appointed investigator must file a report to the council was in a suitable timeframe so the council could take any necessary steps to either approve the institution of disciplinary processes or uplift the Municipal Manager's current suspension."

10] The Acting municipal manager deposing to the respondents' answering affidavit says that he appointed an attorney, Mr B Manoko, to conduct the independent investigation.

11] At a subsequent special council meeting held in committee on 13 October 2011, the council resolved to oppose the applicant's application for a declarator that his employment contract was only due to end a year later in October 2012. The same resolution also

included this decision:

"4. Through the appointed attorneys; the acting municipal manager must institute disciplinary measures against the suspended municipal manager and any other municipal employees who were involved in a corrupt activities are performing their official duties." (sic)

12] According to the acting municipal manager, the final investigation report drawn up by Manoko was submitted on 7 November 2011 and was tabled at the council meeting of 14 November for consideration. The council then resolved to institute disciplinary proceedings against the applicant and appointed Manoko to act as the prosecutor. The relevant portion of the resolution in question reads:

"3. Having considered the report tabled by the Acting municipal manager concerning the investigation done by ATTORNEY R A MANOKO and the report that the allegations of financial misconduct and other transgressions is of a very serious nature, disciplinary steps immediately be taken against the municipal manager and the specific purpose appoint a prosecutor and a chairperson to facilitate this process in line with the regulations pertaining to senior managers.

5. Attorney BILLY MANOKO of Carltonville be appointed as Prosecutor.

6 SALGA or the MEC be requested to appoint a Presiding Officer for the hearing if a hearing is to be held."

(sic)

^{13]} On 5 December 2011, Mr G Williams, a Tokiso panellist, was sent a letter from the Acting municipal manager advising him that he had been appointed to chair the enquiry in terms of a council resolution.

The applicant's claims

Non-compliance with sub-regulation 5(2)

^{14]} The applicant complains that only two of the allegations of misconduct with which he was eventually charged were actually discussed at the first special council meeting. Also, these allegations were not tabled by the mayor or by himself (at that stage he had not yet been suspended and no Acting Municipal Manager had been appointed). This, he submits, is a breach of regulation 5(2), which is a mandatory step in the institution of disciplinary proceedings.

^{15]} I do not believe the obligation on the mayor to table the allegations constitutes a peremptory step in the sense that it is a necessary prerequisite which must occur before the council can consider any particular allegation against the municipal manager. What sub-regulation 5(2) does do is to place an obligation on the mayor to table such allegations if they are made, and the mayor would be failing in her duties if she did not do so when that happens. But merely because the mayor does not table allegations of misconduct against the municipal manager, does not prevent the council discussing

them.

^{16]} The second leg of the applicant's complaint of non-compliance with sub-regulation 5(2) is that only two issues, namely that he had misled the council and deviated from the council's procurement policy without authority, were discussed at the meeting of 12 September 2011, whereas he was charged with 11 counts of misconduct. On the applicant's interpretation of the regulations, only charges which corresponded to the allegations tabled in the council, and which had been the subject of a subsequent investigation in terms of sub-regulation 5(5), could form part of the charge sheet. Thus, on his version, even if the investigation into the allegations revealed a wider range of misconduct, the council would be obliged either to ignore these, or would have to repeat the process of the mayor tabling the other alleged misconduct now revealed.

^{17]} This would have absurd results. For example, if the original allegations made against the senior management member were allegations A and B, and the subsequent investigation revealed a prima face case of acts of misconduct A and C, the council would be obliged to table allegation C again and repeat the cycle, including another investigation of that allegation even though it had come to light in the previous investigation. It is true that the investigator is

appointed to investigate the initial allegations made, but I do not think that if an investigation authorised by the council reveals other misconduct, the council is then precluded from including those matters in charges which are subsequently formulated. There can be no material prejudice to a senior manager in facing charges formulated after an investigation which are not identical to the complaints originally referred to the council. The manager in question would still have the same opportunity to deal with those charges in any subsequent disciplinary enquiry.

^{18]} The applicant's contention is that if every charge of misconduct was not first tabled at the council by the relevant functionary, then all subsequent steps in the process are invalid as well as any additional charges finally formulated in the notice of the enquiry. For the reasons stated, I do not think that strict compliance with sub-regulation 5(2) is peremptory. The importance of that regulation is that claims of misconduct must come before a council meeting and must be investigated before steps can be taken against a senior manager. If further allegations emanate from that investigation then, provided the council considers those allegations before charges are issued, I believe the purpose of the regulations would have been achieved. The interpretation argued for by the applicant could never have been seriously intended by the authors of the regulations.

Non-compliance with sub-regulation 5(6)

^{19]} Another complaint of the applicant is that the council took a decision to institute disciplinary proceedings against him, at the special council meeting held on 13 October 2011, which took place before the investigator's report had been tabled before the council as required by sub-regulation 5(6). This claim appears to be correct.

^{20]} However, this authorisation was not acted upon. It was only after the council had received the report and considered it that charges were brought on 30 November 2011. As a result, it cannot really be said that disciplinary proceedings were set in motion by the resolution of 13 November 2011.

^{21]} The applicant also claims that the special council meeting of 12 September 2011 was not properly convened in terms of the standing orders governing council procedure and accordingly the decision of the meeting that the applicant should be requested to make representation why he should not be suspended was invalid and should be set aside. However, this challenge goes to the validity of the applicant's suspension and not to the holding of the disciplinary enquiry which is the subject of this application. Accordingly, it is not necessary to address this claim.

Non-compliance with sub-regulation 5(7)(b)(i)(aa)

22] The applicant also attacks the validity of the appointment of Williams as the chairperson of the enquiry. He says the appointment was in conflict with sub-regulation 5(7)(b)(i)(aa), in terms of which the mayor must be authorised to appoint the presiding officer, whereas in this case, the acting municipal manager made the appointment. Sub-regulation 5(7) is drafted in peremptory language, though that is not necessarily determinative of whether non-compliance is fatal to the validity of any action taken.

23] In the case of ***Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA)***, the SCA had to consider whether or not a notice announcing municipal rates assessments complied with the requirements of the Local Authorities Ordinance 25 of 1974 (KZN) in terms of which the notices were issued. At 659,[13] of the judgment Olivier, JA writing for a unanimous bench, said:

“ [13] It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others

v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434A - B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in *Ex parte Mothuloe (Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1138D - E, seems to be the correct one and does away with debates of secondary importance only."

24] Following this approach the real issue to be determined is whether the steps taken by the respondent were sufficient to achieve the objects of the regulation as determined by the language, scope and purpose of the enactment as a whole.

25] The applicant contends that the mayor's role is not simply to carry out the council's decision, but that she has a discretion as to whom to appoint as enquiry chairperson. The council's role in the appointment of an enquiry chairperson is simply to give the mayor a mandate to make the appointment using her discretion. In this instance, the mayor recused herself, for personal reasons, from most of the council discussions concerning the steps taken against the applicant.

26] I do not believe that regulation 5(7)(b)(i)(aa) was intended to give the mayor the discretion not to exercise her function of appointing a chairperson. Moreover, it does not seem to me that the discretion she was afforded by the regulation was to give her the exclusive power to decide who should be appointed as a chairperson. The more probable explanation for giving her the power to identify the suitable appointee was to deal with the practical problems which might arise from the unavailability of candidates and to avoid a situation in which the mayor would have to revert back to the council every time a preferred candidate was not available. Thus, on a proper interpretation of the regulations, it does not seem that the role played by the mayor under the regulations was anything more than a practical one: the performance of her role was not a substantive prerequisite for making the appointment of a chairperson, which would render any appointment invalid if she personally did not make it.

27] In any event, because the mayor simply failed to fulfil her function of making an appointment, there is another basis on which the validity of the appointment can also be considered.

28] One of the charges brought against the applicant was that the mayor had indirectly benefitted from one of his alleged acts of impropriety because he supposedly used funds of the municipality to pay for an air flight of the mayor's friend. The mayor refused to sign a letter

appointing Williams as the chairperson because she claimed that the council had already taken the decision. Accordingly, so she reasoned, she had no role to fulfil. In consequence, the acting municipal manager signed the letter of appointment, in her stead.

29] It is clear that in the case of senior managers other than a municipal manager, sub-regulation 5(7)(b)(i)(aa), intended that the municipal manager could make the appointment on being authorised to do so by the council, but in the case of the municipal manager the appointment would be made by the mayor. In this instance, the mayor was not co-operative. The council eventually took the decision itself and effectively instructed the acting municipal manager to make the appointment. I believe this decision was well within the council's powers and was an appropriate step where the mechanism for appointment envisaged in the regulations had become dysfunctional because the mayor was clearly not acting as a neutral party in the matter of disciplinary action being taken against the applicant.

30] The fact that the regulations set out a two stage procedure for the appointment of a chairperson cannot detract from the powers of a council set out in the Local Government: Municipal Systems Act 32 of 2000 ('the MSA'). The relevant sections of the MSA read:

“8 General empowerment

(1) A municipality has all the functions and powers conferred by or assigned to it in terms of the Constitution, and must exercise them subject to Chapter 5 of the Municipal Structures Act.

(2) A municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.

11 Executive and legislative authority

(1) The executive and legislative authority of a municipality is exercised by the council of the municipality, and the council takes all the decisions of the municipality subject to section 59.

(2) A municipality may exercise executive and legislative authority within its boundaries only, but may, by written agreement with another municipality and subject to Chapter 5 of the Municipal Structures Act and other applicable national legislation, exercise executive authority in the area of that other municipality.

(3) A municipality exercises its legislative or executive authority by-

....

(a) administering and regulating its internal affairs and the local government affairs of the local community;

...; and

(n) doing anything else within its legislative and executive competence.

(4) A decision taken by a municipal council or any other political structure of the municipality must be recorded in writing.”

31] In view of these provisions I am satisfied that the council was acting well within its powers when it decided whom to appoint as chairperson of the inquiry and in instructing the acting municipal

manager to implement its decision. It was not necessary therefore for the council to pass a motion of no-confidence in the mayor as a prelude to removing her from office as the applicant's representative suggested when asked what a council was to do in such circumstances.

Non-compliance with section 29(1) of the Municipal Structures Act

32] There is a further attack on the validity of the appointment of Williams as a chairperson, which was belatedly raised by the applicant. The applicant contends that the appointment of the chairperson of the applicant's disciplinary enquiry was made in a council meeting that was not properly constituted in terms of section 29(1) of the Local Government: Municipal Structures Act 117 of 1998. Section 29(1) of the Local Government: Municipal Structures Act 117 of 1998 states:

"29 Meetings of Municipal Councils –

- 1) The speaker of a municipal council decides when and where the council meets subject to section 18(2), but if a majority of the councillors request the speaker in writing to convene a council meeting, the speaker must convene the meeting at the time set out in the request."*

33] Section 18(2) of the same Act stipulates the requirement that the council must meet at least quarterly and is of no relevance to this

matter.

34] At the special in-committee meeting of 14 November 2011, the council resolved to appoint Manoko as the prosecutor in the enquiry and that the South African Local Government Association ('SALGA') or the MEC be requested to appoint a Presiding Officer if the hearing was held. As it turned out Ms L Tredoux of SALGA was not available to chair the enquiry and at the postponed in-council meeting held on 5 December 2011, the resolution appointing Williams as the chairperson, was adopted.

35] Somewhat belatedly, Mr Scholtz, challenged the validity of the meeting convened on 5 December 2011. The meeting had originally been convened on 2 December 2011 to deliberate on the appointment of a chairperson of the enquiry, given Tredoux's unavailability. However, the speaker postponed this meeting to 6 December 2011. Despite this, the councillors convened the meeting a day earlier on 5 December 2011, which is a date on which the speaker was unable to attend. On that day, the speaker wrote a letter to the Deputy Director General of Local Government and Traditional Affairs complaining that thirteen councillors were meeting in his absence on matters unknown to him and had elected a chairperson despite him remaining in office. He complained that this was contrary to the provisions of section 29(1) of the MSA.

36] There was no evidence that the renegade councillors had

approached the speaker to request him to convene the meeting on 5 December instead of the following day which he had chosen for the postponed meeting.

Specific performance of the applicant's contractual rights

^{37]} The applicant also contends that steps taken contrary to the provisions of the regulation are a material breach of this contract of employment. The applicant asserts his contractual rights independently of any argument about whether or not the council acted within its powers when it took the steps it did. In so far as the steps taken by the council were not in strict conformity with the regulations, it is correct that they breached the applicant's contract of employment. Nevertheless, not every breach of a contract is a material one and not every breach of contract warrants an order of specific performance.

^{38]} What is material in the regulations from the applicant's perspective is that claims of misconduct against him must be considered by the council and it may only take disciplinary steps against him after considering a report by an independent investigator. In this instance, I do not believe that the inconsistencies between the strict letter of the regulations and what actually transpired amounted to a material breach of the council's obligations towards him. Moreover, to order

specific performance of some of the prior steps, such as resubmitting all the subsequent charges to another investigation, would be an unjustifiable imposition on the council and would make no difference to the applicant other than to delay the commencement of disciplinary proceedings further. Specific performance is a discretionary remedy² and in exercising its discretion a court may have regard to the injustice which an order of specific performance may give rise to.³ Because I also believe that no material breach of the applicant's contract of employment was caused by less than strict adherence to the regulations, an order of specific performance would not be appropriate in this context.

2 See **Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A)** at 777A-B, viz:

"Even where performance is possible it is not always ordered because the Court has a discretion in the matter. This discretion must be exercised judicially but is not confined to specific types of cases, nor is it circumscribed by rigid rules."

3 See **Haynes v Kingwilliamstown Municipality 1951 2 SA 371 (A)** at 378H-9A:

"(W)here it would operate unreasonably hard on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."

Conclusion

39] In the light of the reasons above I reached the conclusion set out in the judgment handed down on 13 December 2011, namely:

“I find that the appointment of the chairperson of the applicant’s disciplinary enquiry was made by a council meeting that was not properly constituted in terms of section 29(1) of the Local Government: Municipal Structures Act 117 of 1998.”

Order

40] The order below was consequently issued on the same date:

- a. Accordingly, the respondents are interdicted from proceeding with the disciplinary enquiry involving the applicant which was scheduled to commence on 8 December 2011, until such time as it has properly appointed a chairperson in terms of the powers of the council of the first respondent.
- b. No order is made as to costs.



R Lagrange, J

Judge of the Labour Court of South Africa



APPEARANCES:

FOR THE APPLICANT: W.Scholtz instructed by Scholtz Attorneys

FOR THE RESPONDENT: Eric H Louw instructed by Eric Louw Attorneys