



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable
Case no: J404/15

In the matter between:

MOTSEMME ELIE TSIETSI

Applicant

And

CITY OF MATLOSANA LOCAL MUNICIPALITY

First Respondent

RAMAGAGA SETH (ADMINISTRATOR)

Second Respondent

Date heard: 5 March 2015

Delivered: 13 March 2015

Summary: Precautionary suspension of municipal manager in terms of Regulation 6; requirements of letter of intended suspension; the nature of the suspension as precautionary as well as the limit to its duration specified in the regulation must not be overlooked determining whether the regulation has been complied with.

JUDGMENT

RABKIN-NAICKER J

[1] In this urgent application the applicant, the municipal manager of the first respondent (the municipality) seeks an order as follows:

“Declaring the Applicant’s suspension to be invalid, unlawful and of no legal force and effect and setting the same aside, alternatively, uplifting the Applicant’s suspension with immediate effect;

The Respondents are directed to reinstate the Applicant with immediate effect and to forthwith comply with the Applicant’s contract of employment and conditions of service;”

- [2] The applicant was appointed on the 22 February 2012 as Municipal Manager in terms of Section 54A of the Local Government: Municipal Systems Act, Act 32 of 2000 (the Systems Act). His terms and conditions of employment are therefore subject to the Local Government: Disciplinary Regulations for Senior Managers¹ (the Regulations).
- [3] The Municipality has been subjected to a provincial intervention as contemplated by the provisions of Section 139(1)(b) of the Constitution and was placed under administration. The second respondent was appointed as administrator from the beginning of February 2015. The applicant has sought to challenge the validity of the said intervention and powers and appointment of the second respondent in the papers. I made it quite clear to Mr Scholtz, attorney for the applicant, that I was not going make any findings in relation to these allegations as this court does not have jurisdiction to do so.
- [4] On the 9 February 2015, the applicant received a letter from second respondent (precautionary suspension letter) informing him of his intention to invoke the provisions of Regulation 6, i.e. to place him on precautionary suspension. The letter read as follows:

“RE: NOTICE OF INTENTION TO SUSPEND/YOURSELF

- 1. The above matter refers.
- 2. Kindly take notice that as the Administrator of City of Matlosana Local Municipality, I have received allegations of serious misconduct against you, which allegations include but are not limited to financial misconduct in your capacity as the Municipal Manager of City of Matlosana Local Municipality. I take the allegations in a very serious light and I intend to institute an investigation in order to determine if the allegations are true or not.

¹ Promulgated under GN344 in GG 3143 of 21 April 2011

3. I have applied my mind to the allegations, the nature and seriousness thereof, and I intend to invoke the provisions of the Municipal Systems Act 32 of 2000 as amended, specifically clause 6(1) of its regulations, to put you on precautionary suspension while conducting investigations into the allegations of misconduct against you.
4. However before I finalise the decision on whether I should place you on precautionary suspension, I need to obtain representations from you to inform me if there are any reasons why I should not suspend from duty while the investigations are carried out.
5. For you benefit and in order to afford you a fair opportunity to make representations, I enlist the allegations that have been made against you below. The list may not be exhaustive and, as I indicated earlier in this letter, the investigation may exonerate you or it may lead to more allegations being made against you. The allegations are:
 - 5.1. It is alleged that you have, in your capacity as Municipal Manager and the accounting officer of the Municipality, appointed some or all of the following service providers and suppliers without following the required supply chain management procedures:
 - 5.1.1 **HMIT Solutions** to provide meter reading services to the Municipality;
 - 5.1.2 **Owamajola/Constructability 10 JV** to disconnect and reconnect municipal services for defaulting consumers of such services;
 - 5.1.3 **SO Matshida Constructions** for the supply and storage of illuminatin paraffin;
 - 5.1.4 **Babatsho Construction and Projects 65 CC/Tigane Developers and Property Administration JV** to supply and deliver primus stoves to the indigent residents;
 - 5.1.5 **Godracias Trading Enterprises CC** to supply and deliver of paraffin lantern lamps to the indigent members of the society in Matlosana;
 - 5.1.6 **Trifecta** for debt collection services;
 - 5.1.7 **Sun Success Construction Projects CC** for the upgrading of the pavilion at the Alabama and Tigane stadiums.

Other Financial Misconduct

- 5.2 In this regard it is alleged that you have made and/or authorized advance payments to be made to service providers in breach of the Municipal Finance Management Act and associated Treasury Regulations. Some of the irregular payments include the irregular payments made to Owamajola/Constructability for the services not yet rendered to the Municipality.
- 5.3 It is also alleged that you have committed unauthorized expenditure through variance through a process call Municipal Manager's resolution. The variances were not taken to Council for the financial years 2010/2011 and 2013/2014;
- 5.4 Furthermore it is alleged that you have made irregular and/or unauthorized payment to Quantana Transport Services, a service provider that was not appointed properly by the Municipality following its supply chain management processes.

Undeclared conflict of interest

- 5.5 It is alleged that on or about 2012 you received a cash donation, from a company rendering services to the Municipality. In breach of the regulations, you have failed to declare the donation received from Lourens Attorneys.
6. As a result of the above serious allegations misconduct against, (sic) I am of the considered view that it will not be in the best interest of the Municipality that the investigations should be conducted while you are present at the Municipality. It is my view that your presence in the Municipality might prejudice the investigations in that you might interfere with the investigations or intimidate witnesses. You may also continue with the conduct that is being complained of if you are allowed to continue in the position of accounting officer of the Municipality.
7. In the circumstances, I intend to put you on precautionary suspension with full benefits while pending finalization of the investigations unless you provide me with good reasons why I should not do so.
8. I therefore require you to provide me with written representations within seven (7) days of receipt of this letter and provide me with written representations stating why I should not place you on precautionary suspension, with full

remuneration, pending the finalization of the investigations. Your written representations in this regard should reach me by no later than Tuesday 18 February 2015.

9. Should I not receive your representations as required, a final decision on your possible suspension might be taken without the benefit of your answers.”

[5] The applicant approached his attorney and avers that he sought assistance on the “extreme vagueness of the allegations contained in the notice of intention to place me on a precautionary suspension; and the notice not reflecting any justification, to which I could respond, for removing me from office.” There followed a letter from his attorney to the administrator which *inter alia* raised the issue of the alleged invalidity of the Section 139(1)(b) process which it was recorded may invalidate the appointment of second respondent. The balance of the letter is in the nature of a request for further particulars, in order it is alleged for the applicant to make well informed representations. This request was not acceded to as the second respondent recorded in a letter that the information being sought was the subject of investigations and as such further details will not be furnished as it may prejudice the investigations. By 23 February 2015, no representations had been received from applicant and he was put on precautionary suspension.

[6] The attorney for applicant also wrote a letter on 13 February 2015 regarding a lock on the applicant's office which was preventing him gaining entry and stating that this action constituted a *de facto* suspension. In reply, second respondent stated that: “please be advised that there are currently forensic investigations being conducted the Municipality and further that your client is on leave and as such, my office had to take measures to prevent loss of documents and uncontrollable access to the office. There has never been any intention to deny your client access to the office except that he is on leave, it was expected that my office might be made aware if he intends to access it, which access shall not be unreasonably denied”.

[7] The applicant essentially disputes the legality of his suspension on the basis that there has been lack of compliance with the prescripts and procedures contained within, and the purpose and intent of Regulation 6 which reads:

'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.'

[8] Applicant avers that the second respondent did not provide any explanation for his belief that he may prejudice the investigations and that the precautionary suspension letter essentially does not disclose any reason as to why a precautionary suspension may be warranted. He concedes that one or more of the allegations of misconduct in the letter prima facie reflect allegations of misconduct. He avers that the purpose of the regulation is to afford him an opportunity to answer to these allegations and states that:

"I am however entitled to make use of the opportunity to show that the allegations have no prospects and with the aim of avoiding a suspension. It was impossible for me to do so, given the vagueness of these allegations."

[9] In the answering papers, the second respondent reflects the view that applicant took a decision not to avail himself of the opportunity to answer the allegations contained in the precautionary suspension letter, which were which were furnished with sufficient particularity, and as a result he is the author of his own misfortune. Argument submitted on applicant's behalf latched onto the fact that certain of the content of the regulation were repeated verbatim in the letter of 9 February. It was also argued by Mr Scholtz that the vagueness and or lack of particularity in which second respondent set forth the allegations of misconduct in the letter under question, being the first requirement in terms of sub-regulation 1 and the justification for suspension, being the second requirement, barred the Applicant from making well informed representations to the respondents. Further, he submits that no motivation or foundation is given for the respondents reason to believe that applicant's continued presence in the workplace may result in the matters set out in Regulation 6(1)(a)(i) and (ii).

[10] Applicant placed reliance *inter alia* on the case of **Lebu v Maquassi Hills Local Municipality & others (2)**². In that case Van Niekerk J had this to say about Regulation 6:

“[16] The procedure relevant to the suspension of a senior manager in terms of regulation 6 can be summarized 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 jeopardize 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.....”

²(2012) 33 ILJ 653 (LC)

- [11] Reference was also made to an unreported judgment in which Steenkamp J stated that in explaining the municipality's apprehension that an employee might jeopardize an investigation that repetition of the words of the Regulation is not enough but that a basis for these fears has to be set out "i.e. why they had reason to believe that the applicant's presence at the workplace may lead to any of these consequences"³
- [12] In my judgment the above authorities on which applicant relies, should not be understood to amount to the following two propositions:
- 12.1 that the particularity of the allegations of misconduct must be of such detail as to allow for the setting out of a defence in response thereto in the applicable representations in terms of Regulation 6. Or as applicant averred to: "show that the allegations have no prospects." This is because the suspension in terms of the Regulation is precautionary, and resorted to in order for an investigation to take place as to whether charges should follow, and not a disciplinary sanction in its own terms.
 - 12.2 that a municipality must set forth evidence to show that the person involved may interfere in the conduct of the investigation against him or herself. Reference to the position of the senior official and the attendant powers and responsibilities that he or she has, read with the allegations of misconduct as set out in the pre-suspension letter, should suffice.
- [13] In dealing with Regulation 6(1) it is important not to lose sight of the principle that the suspension is precautionary and not punitive, and it contains a safeguard that the suspension may not be extended indefinitely. In this regard the LAC judgment in **Member of the Executive Council for Education, North West Provincial Government v Gradwell**⁴ is instructive. That matter dealt with precautionary suspension in terms of the SMS Handbook in the Public Service. The court per Murphy AJA stated that:

"[44] The proposition that all suspensions should be procedurally fair to avoid the stigma of an unfair labour practice, on the other hand, requires some qualification. Fairness by its nature is flexible.

³ *Nothnagel v Karoo Hoogland Municipality and others* C431/12

⁴ (2012) 33 ILJ 2033 (LAC)

Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it. When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration. The SMS Handbook for example imposes a 60-day limitation. And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in-depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements of procedural fairness."

- [14] In this application, the case made for the applicant seeks to have allegations of misconduct contained in the precautionary suspension letter presented in such detail so that he can virtually plead in relation thereto. As the second respondent pointed out, the nature of the information sought by applicant through his attorney's request for further particulars, in order to make his representations, may actually prejudice the investigation if provided.
- [15] In view of the above, I am quite satisfied that the precautionary suspension letter recorded above meets the requirements of section 6(1) of the Regulations. The LAC **Gradwell** judgment cautions us not to forget the purpose of precautionary suspension nor overlook safeguards contained in prescripts such as Regulation 6. The jurisprudence of this court in these matters should not be read as setting the bar so high that the duty to investigate alleged financial irregularities by accounting officers in

municipalities is rendered near impossible to carry out. For all the above reasons, I make the following order:

Order

1. The application is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: Mr W Scholtz of Scholtz Attorneys

Respondents: Adv B Hitchens instructed by Waks Silent Inc