



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable
CASE NO: J1229/2015

In the matter between:

SHELLA WILLIAM KEKANA

Applicant

and

MOGALAKWENA LOCAL MUNICIPALITY

Respondent

Heard: 16 September 2015

Delivered: 26 February 2016

**Summary: Declarator: To set aside suspension and dismissal based on
unlawfulness only without establishing grounds for unfairness.**

Case not made for relief sought. Application dismissed.

JUDGMENT

BALOYI AJ

INTRODUCTION

- [1] The Applicant, Shella William Kekana approached this Court following his dismissal that was preceded by suspension from the position of Municipal Manager. In essence the Applicant is seeking an order declaring all decisions and actions leading to his suspension and dismissal unlawful and consequently set aside. The relief sought is set out in the notice of motion as follows:

“1. Declaring that the following actions and/or decisions and/or proceedings are unlawful and setting same aside:

- 1.1 the precautionary suspension of the applicant by the respondent during November to December 2014;
- 1.2 the institution of disciplinary proceedings by the respondent against the applicant during December 2014;
- 1.3 the disciplinary hearing of the applicant conducted from 14th January 2015 until 25 March 2015 and the outcome thereof on 25 March 2015;
- 1.4 the resolution adopted by the respondent's council on 31 March 2015 to dismiss the applicant.
- 1.5 The resolution adopted by the respondent's council at the council meetings on 12, 19 and 24 December 2014 as well as 27 February 2015.”

- [2] The application is opposed with the Respondent moving for dismissal of the application with costs. At the commencement of arguments it was indicated on behalf of the Applicant that prayer 1.5 was no longer pursued. Reinstatement was instead suggested and the Respondent's vigorous challenge to such suggestion was impossible to overlook. Particular regard is had to the fact that the suggested reinstatement was not put across as an amendment to the notice of motion. Since the move towards reinstatement was objected to, I do not deem it necessary to deal with this issue in detail. It is worth mention that the

Applicant had initially filed this application in the High Court, North Gauteng and was dismissed for lack of jurisdiction. A separate review application presumably filed simultaneously with the aforesaid dismissed application was at the time this matter was argued still pending.

FACTUAL BACKGROUND

- [3] On 22nd July 2014 parties entered into a new fixed term contract of employment as the then existed one was to expire on 31st July 2014. The appointment in terms of the new contract was effective from 01st August 2014 for the period of three years. On 06th November 2014 the Municipal Executive Committee resolved to place the Applicant on special leave. On 04th December 2014 the Municipal Council ratified or adopted actions taken by the Executive Committee and imposed suspension on the Applicant instead of special leave. On 24th December 2014 he was served with notice to attend disciplinary hearing together with charges with the hearing scheduled to take place on 14th January 2015.
- [4] On 14th January 2015 the hearing was postponed by agreement and scheduled to run from 23rd to 27th February 2015 to enable parties to complete discovery process. On 23rd February 2015 the hearing was postponed to 26th February 2015 at the Applicant's instances. On 25th February 2015 the Applicant's Attorney sent a letter to the Respondent's Attorney advising of his withdrawal in the matter. On 26th February 2015 the Applicant's Counsel withdrew from the matter consequent to the Attorney's withdrawal. The Applicant did not attend the proceedings on the day in question. The proceedings were adjourned and rescheduled to run for the period between 23rd March 2015 and 27th March 2015 to enable the Applicant to secure legal representation.

- [5] On 23rd March 2015 the Applicant did not appear, instead he sent a medical certificate to the Respondent's Attorney advising that he was hospitalized and would remain in hospital for the next twenty one days. The said medical certificate in the form of a letter was heavily criticized for lacking certain qualities of a medical certificate according to the Respondent, which the chairperson accepted. As a result the disciplinary hearing chairperson ruled that the hearing should proceed after having satisfied himself that the Applicant did not show any exceptional circumstances to warrant further postponement.
- [6] The hearing eventually proceeded in the Applicant's absence and the chairperson handed down the outcome of the said disciplinary hearing on 25th March 2015 conveying a guilty finding coupled with sanction of dismissal. After conclusion of disciplinary hearing proceedings and prior to the handing down of the disciplinary hearing outcome, the Applicant attempted to obtain an interdict to the effect that the chairperson should not communicate his finding pending some review application still to be filed. The application for interdict was to be heard on 26th March 2015 at 14h00. The said application was however abandoned after it came to Applicant's attention that the chairperson had already handed down his outcome. According to the Applicant the ruling was deliberately handed down on 25th March 2015 in order to frustrate him towards obtaining the interdict which application was filed on the same date. As noted above, the Applicant subsequently filed two applications in the North Gauteng High Court one of which was disposed of on jurisdiction.
- [7] It is also of high importance to note that the disciplinary hearing chairperson found the Applicant guilty as charged except for charges 10 and 11. The chairperson went on to impose a dismissal sanction without submissions in mitigation on reasons that the Applicant had already waived his right to be heard. He saw no prospect of positive response from the Applicant if he was to be called to present mitigating

factors. He further took seriousness of the charges into account. Now the matter is placed before Court for relief as stated above.

- [8] It is highly necessary to point out that the Applicant was summoned to the disciplinary hearing to respond to nineteen charges of misconduct and part of the charges placed before this Court are as follows:

“1. CHARGE 1: Failure To Carry Out Functions And/Or Duties And Breach Of The Municipal Structures Act, 1998.

1.1 On 6 July 2014, 23 councillors of the Municipality were expelled by their political party being the African National Congress (ANC) (hereinafter the “*expelled councillors*”). A copy of the list of the names of the expelled councillors is attached hereto marked “A”.

1.2 By virtue of such expulsions, these individuals ceased to be councillors of the Municipality. Notwithstanding the expulsion of these councillors;

1.3 You failed/ and or refused to:

(a) Inform the chief electoral officer of the fact that the 23 expelled councillors ceased to hold office.

(b) Declare vacancies created by the expulsion of the 23 expelled councillors.

(c) Inform the Provincial Electoral Officer of the Independent Electoral Commission of the expulsion of the 23 individuals and to set in motion the process to replace the public representative councillors (hereinafter the “PR Councillors”) and to hold bi-elections for ward councillors to replace the 23 expelled councillors.

1.4 Your conduct as afore-stated constitutes a breach of the

Municipal Structures Act, 1998 and a failure on your part to carry out your functions and duties as Municipal Manager.

2. CHARGE 2: Incurring Irregular And/Or Fruitful And Wasteful Expenditure

- 2.1 Despite the expulsion of the 23 individuals as councillors on 6 July 2014, confirmed by the ANC National Executive Committee on 23 September 2014, you instructed and/or authorised the continued payment of the monthly salaries for the 23 expelled councillors by the Municipality, up to as lately as November 2014.
- 2.2 Alternatively you failed and/or refused to remove the expelled councillors from the Municipality's payroll.
- 2.3 This resulted in payment of these salaries being made to the expelled councillors.
- 2.4 Your conduct as afore-stated constitutes gross dereliction of duty, alternatively gross insubordination, and/or fruitless and wasteful expenditure or irregular expenditure in contravention of the Municipal Finance Management Act (MFMA).

3. CHARGE 3: Conduct Unbecoming Of A Municipal Manager And/Or Accounting Officer And/Or Breach Of Duty To Act In The Best Interest Of The Municipality

- 3.1 On 21 July 2014, you attended and participated in a special council meeting which resulted in a resolution being passed by the Municipal Council resolving as follows:
 - (a) Authorizing you to appoint a legal representative/legal team to institute legal action to protect the interest of certain councillors.
- 3.2 Your conduct as afore-stated constitutes conduct unbecoming

of a Municipal Manager and an Accounting Officer in that:

- (a) The attendees of the special council meeting included the 23 expelled councillors whom were not entitled to attend such meeting due to their expulsion. At the time you were aware that the expelled councillors were expelled and therefore no longer councillors of the Municipality, this fact notwithstanding, you participated in the meeting without objection.

3.3 Your conduct also constitutes a breach of your duty to act in the best interest of the Municipality in that you participated and/or were in approval of a resolution authorising appointment of legal representatives to represent individuals who were no longer councillors of the Municipality, when there was no duty on the Municipality to do so.

4. CHARGE 4: Irregular And/Or Unauthorised Expenditure And/Or Failure To Act In The Best Interest Of The Municipality

4.1 Pursuant to the resolution passed on 21 July 2014, you deposed to affidavits in the High Court applications instituted under the following case numbers:

- (a) 80496/2014
- (b) 80836/2014
- (c) 82129/2014
- (d) 84518/2014
- (e) 86390/2014
- (f) 89657/2014

4.2 These High Court applications were in furtherance of litigation instituted by the expelled councillors to challenge their expulsion. This litigation was in connection with a private dispute between the expelled councillors and the political

party to which the expelled councillors belonged.

4.3 Through your action of deposing to the affidavits in the aforementioned applications, you involved the Municipality in litigation in which it had no direct interest.

4.4 You also expressly, alternatively, tacitly authorised and/or approved the payment of the legal expenses incurred by the expelled councillors in the aforementioned high court applications.

4.5 Your conduct aforesaid constitutes:

- (a) Failure to act in the best interest of the Municipality.
- (b) Irregular and/or unauthorised expenditure of Municipal funds.

5. CHARGE 5: Irregular Expenditure And/Or Fruitless And Wasteful Expenditure

5.1 You authorised and/or approved processing of payment to the legal representatives of the expelled councillors for litigation under the following High Court case number:

- (a) 65154/2014
- (b) 73549/2014
- (c) 80496/2014
- (d) 80836/2014
- (e) 82129/2014
- (f) 84518/2014
- (g) 86390/2014
- (h) 89657/2014

5.2 These High Court applications were in furtherance of litigation instituted by the expelled councillors to challenge their expulsion from the ANC. This litigation was in connection with

a private dispute between the expelled councillors and the political party to which the expelled councillors belonged.

5.3 Your conduct as afore-stated constitutes the incurrence of irregular expenditure on behalf of the Municipality and/or fruitless and wasteful expenditure.

6. CHARGE 6: Failure And/Or Refusal To Table The Auditor General's Report For The Financial Year 2012/2013

6.1 The Auditor General's report for the financial year of 2012/2013 dated November 2013 was provided to you. Despite receipt of the report, you have failed and/or refused to table the Report before the Municipal Council as required.

6.2 Your conduct as afore-stated constitutes gross dereliction of duty and therefore gross misconduct.

7. CHARGE 7: Improper And/Or Unauthorised Use Of Municipal Funds And/Or Resources

7.1 During MAY alternatively JUNE 2014, you irregularly and in contravention of the Municipality's supply chain management policy in contravention of section 217 of the constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") appointed or caused to be appointed security offices or security company at the Municipality's cost for your personal protection and in furtherance of the factional fights and for the protection of the expelled councillors to which you have so firmly aligned yourself. The purpose of appointing the said security officers or company was to:

- (a) Prevent councillors from gaining access to Council Chamber and therefore prevented them from performing their duties and responsibilities as duly elected councillors.
- (b) Guard expelled councillors.

7.2 Your conduct constitutes gross dereliction of duty, alternatively gross insubordination, and gross misconduct.

8. CHARGE 8: Gross Insubordination

8.1 You have made yourself guilty of gross insubordination when you expressly and by conduct, refused to recognise the duly elected councillors of the Municipality as councillors and instead recognised the expelled councillors as councillors."

APPLICANT'S CASE

[8] Unlawfulness is where the Applicant's case is rooted. Lack of authority on the bodies which made decisions sought to be set aside resulted in non-compliance with regulations and such decisions fall to be set aside based on legality. The Applicant effectively contends that since administrators have no inherent powers, their unlawful decisions can be set aside without visiting elements of their discretion. In support of this argument the Applicant relied on *Biyase v Sisonke District Municipality & Another*¹ and *Hoexter*².

[9] In essence the Applicant attacked the Respondent's decisions for not being compliant with regulations as set out in Municipalities System Act 32 of 2000 and consequently the manner in which the disciplinary hearing was conducted. In addition or parallel to the declaratory order sought the Applicant called upon the court to exercise its review powers in terms of section 158(1)(h) of the LRA read with section 158(1)(a)(iv). The Applicant in support of this proposition relied on *Hendricks v Overstand Municipality*³ as well as *Manamela v Department of Co-operative Governance Human Settlements & Traditional Affairs*,

¹ [2012] 33 ILJ 598 (LC)

² .Cora Hoexter: Administrative Law in South Africa, 2nd Ed.

³ (2015) ILJ 163 (LAC).

*Limpopo Province*⁴. According to the Applicant reinstatement kicks in as soon as suspension and dismissal are set aside as the effect of the declarator will bring status *quo*, that is, as if suspension and dismissal had not happened. Applicant's further arguments revealed that the challenge to suspension would in fact kick in upon successful challenge to dismissal.

RESPONDENT'S CASE

- [10] The Respondent's attack to Applicant's case is laced with several preliminary issues. In the fore front is plea of lack of jurisdiction in that this Court cannot deal with dismissal dispute as forum of first instance. Furthermore the relief sought by Applicant in setting aside Council resolutions does not fall within the jurisdiction of this Court. On proper application of section 191 of the Labour Relations Act the Applicant should have referred the dispute to the CCMA or Bargaining Council.
- [11] A plea of suspension being moot forms part of jurisdictional points raised by the Respondent on the basis that it has since been superseded by the dismissal. Lastly the relief sought against resolutions formed part of a pending matter before the High Court. An attack on the notice of motion for not conforming with standards of review applications as set out in Rule 7A of the rules of this Court and/or procedures in terms of PAJA called for dismissal of the application for being fatally defective. In so far as the merits, the Respondent's contention is that it followed proper procedures and had good reason to dismiss the Applicant in the light of serious charges against him.

EVALUATION

- [12] In terms of section 158(1)(a) this Court may make appropriate order

⁴ Unreported, case number J1886/2013

including a declaratory order. Furthermore the Court may in terms of section 158 (1)(h) review any decision taken or act performed by the state in its capacity as employer on such grounds as are permissible in law. These two provisions are relevant for consideration of this application when following the path created in terms of Applicant's papers. Given the background facts of the matter and sequence of events as placed before this Court, what logically follows is interrogation on when and where the remedies in the form of declarator or review applicable in so far as the case for the Applicant is concerned. Secondly whether the point of lateness raised by the Respondent regarding the need for condonation application in respect of challenge to the suspension is sustainable.

[13] Before getting deeper into the matter it is imperative to move the issue of jurisdiction out of the way. Without hesitation this Court has jurisdiction to pronounce on unlawfulness of the dismissal claim as a forum of first instance in the light of provisions of section 157 of the Labour Relations Act. Accordingly there is no jurisdictional barrier for this Court to deal with this matter. Since prayers for setting aside resolutions adopted by Council were abandoned, jurisdictional issues raised in that respect thus fall away. There is therefore no need to make determination in this regard.

[14] Turning to the substance of this matter, it is now a settled position that when exercising the discretion when dealing with a declarator where unlawfulness of suspension or dismissal is an issue, the Court is also required to visit the unfairness part of the suspension or dismissal in order to arrive at unlawfulness. In *Member of the Executive Council for Education North West Government v Gradwell*⁵ the employer's justifiable reason to believe that the employee had engaged in serious misconduct is key to the finding towards unlawfulness or otherwise. This reasoning was followed with approval in *Ravhura v Zungu NO and*

⁵ [2012] 33 ILJ 203 (LAC)

*Others*⁶ wherein the Court had this to say:

“[11] Accordingly, the presence of unlawfulness on the conduct of one of the contracting parties in an employment relationship will no *ipso facto* result in the other party’s entitlement to the *status quo* order being granted without the consideration of the fairness of such conduct. In dismissal cases at least, there appears to be no evidence of this Court adopting an approach that unlawfulness is stand-alone ground for it to intervene in favour of the aggrieved party, for instance to the exclusion of the considerations of fairness. Hence, a need that disputes in dismissal cases be referred to conciliation first. In my view, a warning has already been given against the consideration of unlawfulness as a stand-alone ground, in the case dealing though with allegations of unlawful suspensions, of *Member of Executive Council for Education, North West Provincial Government v Gradwell* where the Court held:

“...the judge erred in his approach to determining the lawfulness of a suspension in terms of para 2.7(2). His choice not to consider the serious allegations against the respondent was mistaken. As a general rule, a decision regarding the lawfulness of a suspension in terms of para 2.7(2) will call for a preliminary finding on the allegations of serious misconduct as well as determination of the reasonableness of the employer’s belief that the continued presence of the employee at the workplace might jeopardise any investigation etc. The justifiability of a suspension invariably rests on the existence of a *prima facie* reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible meaningfully to engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable.”

⁶ [2015] 4 BLLR 423 (LC)

- [12] As a general rule therefore, a decision regarding the lawfulness of a dismissal will call for a preliminary finding on the allegations of serious misconduct on the part of the Applicant as well as a determination of the fairness of the employer's dismissal".
- [15] Save the Applicant's denial of allegations as contained in the charges and clinging on lack of authority regarding initiation of processes which led to his suspension and dismissal, he remained silent on the key aspect around fairness as such, which is a stepping stone towards finding on unlawfulness. It does not seem that the Applicant had intentions to react to the allegations of misconduct which are undoubtedly serious. Insofar as there are disputes of fact particularly around Applicant's denial coupled with silence on facts regarding fairness, then on the principles set out in *Plascon-Evans*⁷, the Applicant is not entitled to the declaratory relief he seeks which is final in nature.
- [16] In *NDPP v Zuma*⁸, the court reaffirmed the principle in paragraph 26 at page 290 as follows:
- "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the **Plascon-Evans** rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."*

⁷ 1984 (3) SA 623 A

⁸ 2009 (2) SA 277 SCA

- [17] It is not in dispute that the Applicant absented himself from the disciplinary proceedings on 26th February 2015, the date on which his Senior Counsel withdrew from the matter. Regarding his non-appearance on 23rd March 2015, the Applicant was according to the medical certificate still in the first week of his 21 days of hospitalization. Instead of utilizing the new legal team to represent him in the disciplinary hearing in accordance with previous postponement ruling, he elected to issue instructions to file an application to interdict the disciplinary hearing chairperson from making or communicating his disciplinary hearing ruling pending review application to be filed later. It is worth noting that the application was filed with the Registrar of the North Gauteng High Court at Pretoria on 25th March 2015.
- [18] The cumulative effect of the Applicant's conduct is that he was more obsessed with applying all means to avoid disciplinary hearing, which is where dispute on fairness of his dismissal emanates. He was never concerned with clearing his name in the simple disciplinary process but saw it necessary to bombard the Respondent with constant litigation. This was in any event within his rights, however the matter as it stands turns on issues of procedure which he had an opportunity to raise objections before the chairperson about the disciplinary proceedings not being properly constituted or otherwise. In the absence of the Applicant not having dealt with fairness as pointed above, the challenge to procedures by way of declaratory is not appropriate. Arbitration as argued by the Respondent is the route to take since such challenge to procedure is in fact rested on unfairness of such procedures.
- [19] I am thus in agreement with what the court held in Manamela's⁹ case where the Court had this to say in paragraph 55.3;

".... The Court should further at all times carefully consider what the

⁹ See footnote 4 above.

actual and true nature of the contention of invalidity and unlawfulness by the applicant is, in order to avoid a designed circumvention of the provisions of the LRA relating to suspensions under the guise of unlawfulness or invalidity, where it is in fact is an issue of unfairness.”

[20] In the circumstances I find no reason to suggest that the Applicant made out a case for the declaratory relief sought. The same goes onto the apparent review sought as remedy available to the Applicant. While noting that the indirect review may find its way within a declarator, in this instant matter it is not to be the case. Certainly the Applicant's application appears to be lacking in essential considerations for the review applications in the following respects;

- (i) the review is not unambiguously prayed for in the notice of motion except for the desired outcome, '*set aside*';
- (ii) the persons whom their decisions are sought to be reviewed are not cited in the proceedings nor called upon to oppose the application if they wished.
- (iii) there is no direction calling upon the decision makers whose decisions are subject matter of the application to dispatch records nor indication of waiver and/or dispensing with records of such proceedings leading to the decisions sought to be reviewed.
- (iv) the submissions towards unlawfulness sought through declaratory as set out in Applicant's papers do not establish grounds of review.

[21] Since the unlawfulness of the dismissal was not proved, the claim on unlawfulness of suspension would have the similar ending as determination depended on establishment of dismissal being unlawful. What follows is that the argument for a need to first condone the

lateness of prosecution of suspension claim will not require any determination. For the reasons stated above the application falls to be dismissed. Both parties sought costs against each other. In the light of no prospect of future relationship to be nurtured between the parties, there is no reason why costs should not follow the result. There is no persuasive submission warranting awarding costs to include cost occasioned by use of two Counsels.

[22] In the premises the following order is made;

22.1 The application is dismissed.

22.2 The Applicant is ordered to pay the Respondent's costs.

Baloyi AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. J H Dreyer SC with Adv. JAL Pretorius

Instructed by: Mapotene Mangena Inc.

For the Respondent: Adv. W Mokhare SC with Adv. T Mokhatla

Instructed by: Hogan Lovells (SA) Incorporated as Routledge
Modise Inc.

LABOUR COURT