



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1512/17

In the matter between:

SANDI MAJAVU

Applicant

and

LESEDI LOCAL MUNICIPALITY

First Respondent

ISAAC RAMPEDI N.O

Second Respondent

SPEAKER OF LESEDI LOCAL MUNICIPAL COUNCIL

Third Respondent

Heard: 20 February 2018

Delivered: 6 March 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] In his application, the applicant, Mr Sandi Majavu (Majavu) seeks an order declaring his dismissal and all other preceding disciplinary steps taken in that regard to be null and void. The application is unopposed.

Background:

[2] In support of this application, Majavu averred the following;

- 2.1. He was prior to his dismissal, employed by Lesedi Local Municipality (Municipality) as a Senior Procurement Officer.
- 2.2. During 2015, the Executive Mayor had approached him to facilitate the procurement of services through a service provider that had directly forwarded a quotation to his office contrary to the Municipality's procurement codes prescripts.
- 2.3. In view of the fact that the said service provider was not on the Municipality's database, or the Procurement Panel, he had refused to accede to the Executive Mayor's request and/ or instruction.
- 2.4. There were other unjustified requests that the Executive Major had made, which were equally refused by him. Moreover, there were other irregular requests made by the Acting Municipal Manager in respect of remedial work that was to be performed on behalf of the Municipality. Those requests were likewise refused by him on basis that they did not conform to the requirements of procurement prescripts.
- 2.5. As a consequence of him insisting on complying with the law and the Municipality's codes, the senior officials of the Municipality elected to ill-treat him and subject him to occupational detriment. These included taking away some of his responsibilities and the making of unwarranted deductions from his salary.
- 2.6. At some point, he had confronted the Municipality's Chief Financial Officer (CFO) to protest the purported unwarranted deductions, resulting in an emotionally charged exchange of words. As a result of, on 14 November 2016, the Municipality took a decision to place him on precautionary suspension.
- 2.7. The suspension was supposed to be for a duration of three months to allow the Municipality to conclude its investigations. However, the three months came and went without the Municipality preferring any charges of misconduct against him.

- 2.8. Aggrieved by the Municipality's inaction, he had referred an unfair suspension dispute to the Commission for Conciliation and Arbitration (CCMA). As a result of his referral, the Municipality then scheduled a disciplinary hearing for 3 March 2017.
- 2.9. At the disciplinary hearing, he had raised a preliminary point contending that the Acting Municipal Manager lacked the authority to institute corrective measure against him as he was not lawfully appointed. The preliminary point was dismissed by the chairperson of the disciplinary hearing.
- 2.10. Aggrieved by the ruling of the chairperson, he had approached this Court on urgent basis seeking to interdict the disciplinary hearing on grounds that the process would result in a null and void outcome based on the fact that the Acting Municipal Manager continued to occupy his position unlawfully. That application was dismissed by Van Niekerk J on 22 March 2017.
- 2.11. On 22 March 2017, the Municipality made known its intention to proceed with the disciplinary hearing against him. He then launched a second application to interdict the disciplinary process. The second application came before Snyman AJ on 4 May 2017, who likewise dismissed the application on grounds that the matter was *re judicata*.
- 2.12. On 22 May 2017, the Municipality reconvened the disciplinary hearing. He elected not to participate in the disciplinary process on grounds that the proceedings were a nullity.
- 2.13. On 14 June 2017, the Municipality sent a letter informing him of its intention to terminate the employment relationship based on the finding of guilt and a sanction of dismissal handed down by the chairperson of the disciplinary hearing.

The submissions:

[3] Majavu's main contention is that the Acting Municipal Manager's appointment was contrary to the relevant legislative framework which regulates the appointment of acting municipal managers. Because the appointment of the Acting Municipal Manager was *ultra vires*, the cumulative effect thereof was that he lacked the legal authority to take corrective measures against him. His argument is further based on the following:

- 3.1. The appointment of municipal managers is regulated by the provisions of section 54A¹ of the Local Government: Municipal Systems Act.² Thus, in terms of the provisions of section 54A, an acting Municipal Manager may not occupy the vacant position for a period exceeding three months.
- 3.2. Since the Acting Municipal Manager was appointed in terms of the Council's resolution dated 29 October 2015, his tenure terminated on or about 29 January 2016, and the Municipality had not sought an extension from the Provincial MEC responsible for local government in terms of the provisions of subsection (2A)(b).
- 3.3. Instead of the Municipality approaching the MEC in terms of the provisions of subsection (2A)(b), it purported to extend the tenure of the Acting Municipal Manager through a resolution of Council on 30 March 2016, and an extension in that manner was not permissible

¹ Section 54A: **Appointment of municipal managers and acting municipal managers.**

- (1) The municipal council must appoint—
 - (a) a municipal manager as head of the administration of the municipal council; or
 - (b) an acting municipal manager under circumstances and for a period as prescribed.
- (2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.
- (2A) (a) A person appointed in terms of subsection (1) (b) may not be appointed to act for a period that exceeds three months.
 - (b) A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.
- (3) A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if—
 - (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
 - (b) the appointment was otherwise made in contravention of this Act.

² Act 32 of 2000, as amended

in law and in particular, in terms of the Local Government: Municipal Systems Act.

- 3.4. In terms of the provision of section 55(1)(g)³ of the Local Government: Municipal Systems Act, the Municipal Manager as the head of administration had the legal authority to discipline employees of the Municipality. The Municipal Manager must however be lawfully appointed in order to exercise the power bestowed upon him by the provisions of section 55 of the Local Government: Municipal Systems Act.
- 3.5. Because the tenure of the Acting Municipal Manager was unlawful, the decision to institute disciplinary action against him, the appointment of the chairperson and the prosecution of the charges and the resultant dismissal were null and void.

The legal position and evaluation:

- [4] There are several inherent difficulties faced by Majavu in this application irrespective of the fact that it remains unopposed. The first is that the Court must satisfy itself that it has the requisite jurisdiction to grant relief sought, even if a matter is unopposed. The rationale is quite obvious, it being that whatever order the court issues in the absence of jurisdiction, such an order would be of no force and effect.
- [5] A further difficulty, which is also aligned to the issue of jurisdiction, is that it is not mentioned in either the Notice of Motion or the founding affidavit as to which statutory provisions were relied upon in bringing this application⁴.

³ Section 55. **Municipal managers.** —

(1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for—
 (a) ...
 (g) the maintenance of discipline of staff;

⁴ See *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) at para 75, where it was held that;

"Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. If Mr Gcaba's case was heard by the High Court, he would have failed for not being able to make out a case for the relief sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal

Majavu challenged his dismissal on account of it being a nullity. One can only assume that as a result of the decision to dismiss and preceding steps in that regard having allegedly been taken by a person lacking the authority to do so, his contention is that the dismissal was invalid, hence the claim of nullity⁵. Whether that claim is grounded in the provisions of sections 157 and 158 of the Labour Relations Act (LRA)⁶ remains unclear though.

- [6] The above concerns are raised within the trite principle that even if the Court may have jurisdiction under these provisions, it does not automatically follow that the issues referred would be determined, specifically in view of the availability of alternative avenues to resolve those issues. In this case, Majavu has since been dismissed, and the Court is thus obliged to ascertain whether the impugned decision is one that would normally resort under the definition of dismissal or unfair labour practice as defined in Chapter VIII of the LRA, irrespective of the fact that he may have labelled it as a legality, lawfulness, or nullity challenge⁷.
- [7] It can be accepted for a moment that the decision to institute disciplinary proceedings against Majavu and to dismiss him, consists of an action by the local authority as an organ of state acting in its capacity as an employer, and thus falls within the purview of the court's powers under the provisions of section 157(2) (b) of the LRA⁸.

basis of the claim under which the applicant has chosen to invoke the Court's competence. While the pleadings including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits must be interpreted to establish what legal basis of the applicant's claim is. It is not for the court to say that the facts asserted by the applicant would sustain another claim, cognisable only in another court. If, however the pleadings, properly interpreted establish that the supplicant is asserting a claim under the LRA one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction".

⁵ Steenkamp and Others v Edcon Limited (2016) 37 ILJ 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC) at para [189]

⁶ Act 66 of 1995, as amended

⁷ PSA obo Members v MEC for Agricultural and Rural Development (North West Province) (JR634/13) [2017] ZALCJHB 480 (12 October 2017) at para [37]

⁸ Section 157(2)(b) of the LRA states:

"The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from
(a) ...

- [8] In *Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and Another*⁹, it was held that;

“The supposition, that public servants had an extra string to their bow in the form of judicial review of administrative action *i.e.* acts and omissions by the state *vis-à-vis* public servants, evaporated when the Constitutional Court in *Chirwa v Transnet Ltd and Others*, held that the dismissal of a public servant was not ‘an administrative act’ as defined in PAJA and therefore not capable of judicial review in terms of that Act. Any uncertainty regarding the interpretation of the *Chirwa* judgment was removed in the subsequent decision in *Gcaba v Minister for Safety and Security and Others*. The result is that a public servant is confined to the other remedies available to him or her.”¹⁰

And,

“But it does not follow that because the remedy of judicial review may still exist for public servants that the labour court will entertain an application to review ‘any act performed by the State in its capacity as employer’ as a matter of course. Recourse to review proceedings, in terms of section 158(1)(h), takes place in the context of the law relating to judicial review as well as the other elements of the system of dispute resolution which the LRA has put in place and also other applicable statutes.”¹¹

- [9] In *Chirwa v Transnet Ltd and Others*¹², Skweyiya J had long held that;

‘... The LRA is the primary source in matters concerning allegations by employees of unfair dismissal and unfair labour practice irrespective of who the employer is, and includes the state and its organs as employers.’

(b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; ...”

⁹ [2012] 9 BLLR 888 (LAC); (2012) 33 ILJ 1822 (LAC)

¹⁰ At para [28]

¹¹ At para [30]

¹² (2010) 31 ILJ 296 (CC) at para 18

- [10] In *Hendricks v Overstrand Municipality and Another*¹³, the Labour Appeal Court in re-emphasising the above principles as enunciated in *Gcaba* and *Chirwa* held that;

‘These dicta of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practices ... should ordinarily pursue the remedies available in ss 191 and 193 of the LRA, as mandated and circumscribed by s 23 of the Constitution. ...’

- [11] Flowing from the above authorities, and further from a reading of the majority decision in *Steenkamp*¹⁴ and the judgment of the apex court in *National Union of Metal Workers of South Africa v Intervale (Pty) Ltd and Others*¹⁵, the legal position should be clearer in regards to employees seeking to challenge employer’s decisions to dismiss on account of either illegality, unlawfulness or nullity.

- [12] The lessons from *Intervale* is that the provisions of the LRA make conciliation a mandatory prerequisite for a matter to be referred to the CCMA/Bargaining Council for arbitration and/or to this Court for adjudication. Furthermore, in ordinary circumstances, this Court would lack jurisdiction to entertain a dispute where the applicant had failed to comply with those basic statutory requirements.

- [13] In *Steenkamp*, it was further held that;

‘The LRA created special rights and obligations that did not exist at common law. One right is every employee’s right not to be unfairly dismissed which is provided for in section 185. The LRA also created principles applicable to such rights, special processes and fora for the enforcement of those rights. The requirement for the referral of dismissal disputes to conciliation is one of the processes created by the LRA. The CCMA, bargaining councils and the Labour Court are some of the fora. The principles, processes, procedures and fora were specially created for the enforcement of the special rights and obligations created in the LRA.

¹³ (2015) 36 ILJ 163 (LAC) at para 10 – 12.

¹⁴ *supra*

¹⁵ [2014] ZACC 35; 2015 (2) BCLR 182 (CC); [2015] 3 BLLR 205 (CC); (2015) 36 ILJ 363 (CC)

Indeed, the LRA even provides for special remedies for the enforcement of those rights and obligations. The special remedies include interdicts, reinstatement and the award of compensation in appropriate cases. These special rights, obligations, principles, processes, procedures, fora and remedies constitute a special LRA dispensation.¹⁶

And,

“I conclude that invalid dismissals and a declaratory order that a dismissal is invalid and of no force and effect fall outside the contemplation of the LRA. Such an order cannot be granted in a case based on the breach of an obligation under the LRA concerning a dismissal.”¹⁷ [footnotes omitted]

[14] In this case, Majavu essentially seeks a declaratory order, which on the principles enunciated in the authorities referred to above is impermissible. His claim came about in circumstances where;

- a) On no less than two occasions he had approached this Court on an urgent basis, to challenge the authority of the Municipality to discipline him on the allegations that the Acting Municipal Manager did not have the requisite authority to institute disciplinary steps against him,
- b) On the second occasion, his application was dismissed by Snyman AJ (as opposed to struck off the roll). His application for leave to appeal in that regard was also dismissed, and his third application to interdict the disciplinary proceedings pending an appeal against Snyman AJ's order was equally dismissed.
- c) One would have expected that in the face of his applications having been dismissed, he would have availed himself for a disciplinary hearing as the basis of his challenge to that hearing had been dealt with by the Court. He nonetheless failed to attend the enquiry, on the very same basis that were decisively dealt with by Snyman AJ.

¹⁶ At para [105]

¹⁷ At para [136]

- d) Even more instructive, Snyman AJ had dismissed his second application on the grounds that the matter other than lacking urgency was also *res judicata*. As to the reason Majavu would want to approach the Court again on effectively the same grounds his dismissal was deemed to be a nullity, when that issue was decisively dealt with by Snyman AJ is incomprehensible.
- e) The fact that Majavu has since been dismissed in his absence, makes it even more incomprehensible as to the reason he would want to approach the Court in the manner he had done, when he had all the other avenues available to him.
- f) As stated in *Steenkamp*, the LRA does not contemplate a claim for an invalid dismissal, and by implication, a dismissal deemed to be a nullity. An employee who is aggrieved by his or her dismissal should approach any competent forum with a referral of unfair dismissal as regulated in the provisions of section 191¹⁸ of the LRA. As pointed out by Cameron J in *Intervale*, where there is no referral for conciliation in terms of the provisions of the LRA, this Court is not at liberty to assume jurisdiction of the dispute.

¹⁸ Section 191: **Disputes about unfair dismissals and unfair labour practices**

- (1)(a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to -
 - (i) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (ii) the Commission, if no council has jurisdiction.
- (b) A referral in terms of paragraph (a) must be made within -
 - (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;
 - (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.
- ...
- (4) The council of the Commission must attempt to resolve the dispute through conciliation.
- (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved-
 - (a) the council or the Commission must arbitrate the dispute at the request of the employee if -
 - (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b)(iii) applies;
- ...

[15] In the end, and as already pointed out, it did not help matters that Majavu failed to articulate any grounds upon which he sought relief. The allegation relied upon in contending why he should not have been subjected to discipline or dismissed for that matter, are matters that could have been placed before the South African Local Government Bargaining Council (SALGBC) for ventilation, together with the substantive fairness of that dismissal. Majavu was dismissed in June 2017, and he is yet to refer a dispute to the Bargaining Council. Further approaches to this Court for relief are clearly ill-conceived. The application therefore stands to be dismissed for lack of jurisdiction.

Order:

[16] In the premises, the following order is made:

1. The applicant's application is dismissed.

E Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. F.R Memani

Instructed by:

Wakaba & Partners
IncorporatedFor the 1st, 2nd and 3rd Respondents:

No Appearance

LABOUR COURT