IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 3093/18

In the matter between:

RISIMATI HITLER MALULEKE	**Applicant**
and	
GREATER GIYANI LOCAL MUNICIPALITY	**First Respondent**
THE SPEAKER, GREATER GIYANI MUNICIPALITY	**Second Respondent**
THE CHIEF-WHIP, GREATER GIYANI MUNICIPALITY	**Third Respondent**
THE MAYOR, GREATER GIYANI MUNICIPALITY	**Fourth Respondent**
THE MUNICIPAL MANAGER	
GREATER GIYANI MUNICIPALITY	**Fifth Respondent**

Heard: **11 September 2018**

Delivered: **4 October 2018**

JUDGMENT

MAHOSI J

<u>Introduction</u>

[1] The applicant approached this Court, by way of urgency, seeking an order to the effect that:

> '1. The investigation report by Paradigm Forensic Services (Pty) Ltd dated 25th June 2018 be declared unlawful, null and void;
>
> 2. The charges against the applicant relating to his previous employment period be declared null and void as they are irrational and unlawful.
>
> 3. The 5th respondent's decision to charge the applicant where the latter was acting as Municipal Manager be declared unlawful and *ultra vires*.
>
> 4. The 1st, 2nd, 3rd and 4th respondents and any person acting on their behalf be interdicted from proceeding with and be ordered to immediately suspend the disciplinary hearing against the applicant pending finalisation of this application.'

<u>Brief background facts</u>

[2] The background facts of the case are as follows: The applicant was employed by the first respondent (Municipality) on a five-year fixed-term contract as Chief Financial Officer (CFO), which came to an end in February 2017 (I will refer to this contract as the "first fixed-term contract"). It is common cause that during the first fixed-term contract, the applicant also had an acting stint in the capacity of Municipal Manager.

[3] Subsequently, the position of CFO was advertised and the applicant applied for that vacancy. Having successfully gone through the recruitment process, the applicant was again appointed on a fixed-term contract that is to end on 31 April 2022. (I will refer to this as the "second fixed-term contract").

<u>The suspension and charges</u>

[4] On 11 May 2018, the applicant was placed on immediate suspension with full pay. On 04 July 2018, he was served with a notice to attend a disciplinary hearing and a charge sheet. The charges levelled against the applicant include

inter alia, various acts of misconduct relating to misappropriation of Municipality's funds amounting to approximately R150 million. It is common cause that these alleged acts of misconduct occurred during the period of the first fixed-term contract.

[5] The disciplinary inquiry was scheduled to commence on 13 July 2018, however, it was postponed to 24 July 2018 in order to allow the applicant to sort out issues of representation. It was further postponed to 6 August 2018. On that date, the applicant raised points *in limine*, challenging the lawfulness of the charges relating to the alleged misconduct committed during the first fixed-term conduct, those committed when he was acting as a Municipal Manager and the lawfulness of the investigator's report. The chairperson dismissed some of the points *in limine* and ruled that others will require evidence during the hearing.

[6] On 23 August 2018, the applicant launched an *ex parte* urgent application in the Limpopo High Court. The application was struck off the roll for lack of urgency, with costs, on 30 September 2018.

[7] Undeterred, the applicant (without having withdrawn the matter from the High Court) launched an urgent application before this Court seeking an order set out in paragraph 1 above. The Municipality opposed the urgent application on the basis that (a) the matter was still pending before the Limpopo High Court and, (b) the application was not urgent.

Lis alibi pendens

[8] As intimated earlier, the applicant filed an urgent application at the Limpopo High Court for the identical relief sought in this application. It is, therefore, necessary to consider the underlying principles of the defence *lis alibi pendens.* In *Nestlé (South Africa) (Pty) Ltd v Mars Inc,*[1] Nugent AJA said the following:

> 'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that

[1] 2001 (4) SA 542 (SCA).

> there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (res judicata). The same suit between the same parties, should be brought once and finally.'

[9] In making out a case for *lis alibi pendens*, the Municipality contended that the relief sought by the applicant was similar to the relief he sought at the High Court. It was submitted that until the matter is formally withdrawn by the applicant, the matter is still pending and the applicant is precluded from instituting similar proceedings seeking similar relief in another court.

[10] To counter this argument, the applicant contended that the matter before the High Court has been withdrawn. In support of his argument, the applicant relied on the notice of withdrawal which was attached to his papers. Although the notice had no court stamp, it was duly served on the attorneys of the Municipality on 10 September 2018. It is quite clear that the application before the High Court has been withdrawn and therefore the defence of *lis alibi pendens* has no merit.

<u>Urgency</u>

[11] As already pointed out, in this Court, as was the case in the High Court, urgency is strongly opposed. The Municipality argued that the applicant was served with the charge sheet on 4 July 2018 and further that he identified the issues brought in this application prior to 17 August 2018 when he received the bundle of documents from the Municipality. The Municipality further argues that the applicant failed to approach this Court prior to 17 August 2018, instead, he approached the Limpopo High Court on 27 August 2018 and only approached this Court on 3 September 2018. Furthermore, the applicant fully participated in the inquiry wherein evidence of one witness has been led and he raised certain points *in limine*. The Municipality argued that such urgency is self-created.

[12] The requirements for urgency are trite.[2] A party seeking urgent relief must set out the reasons for urgency and why urgent relief is necessary. In *Maqubela v SA Graduates Development Association and Others*,[3] considerations for urgency were set out as follows:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary.'

[13] In the case where a party seeks final relief on an urgent basis, such as the applicant in this matter, the bar is raised even higher and I find the following passage in *Tshwaedi v Greater Louis Trichardt Transitional Council*[4] instructive:

> '… An applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief…'

[14] The applicant argues that he will suffer irreparable harm and further that he will be unduly prejudiced if the disciplinary hearing is allowed to continue in its current form. His apprehension appears to be based on the fact that his right to a fair trial and procedure would be affected if he were to be subjected to a disciplinary enquiry which is based on irregular charges which are *ultra vires*.

[15] There is no merit in this submission. Having had regard to the papers before me, and particularly the fact that this matter involves allegations of misappropriation of millions of municipal funds, which are in their very nature public funds, and also the possibility that it might be out of the public purse that

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[2] See: *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).
[3] (2014) 35 ILJ 2479 (LC) at para 32.
[4] [2000] 4 BLLR 469 (LC) at para 11.

this litigation is funded and further, in keeping with the tenets of the Labour Relations Act[5] (LRA), to resolve labour disputes speedily, I will deal with the issues raised by the parties hereunder.

The relief sought by the applicant

The right to charge the applicant

[16] The applicant challenges the authority of the Municipal Manager to charge him. According to the applicant, this conduct by the Municipal Manager is *ultra vires*. He relies on Regulations 5(2) and 5(7) of the Local Government: Disciplinary Regulations for Senior Managers, 2010[6] for the contention that the authority to charge him resides with the Mayor and not the Municipal Manager. Thus, the Municipal Manager's right to charge him is limited to where he is the CFO and not when he acted as Municipal Manager. Regulation 5 provides as follows:

> '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 a 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

[5] Act 66 of 1995 as amended.
[6] Government Gazette No. 34213 dated 21 April 2011.

(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 the 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 of a serious or a less serious nature;

(b) authorise the mayor, in the case of 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 the letters of appointment.'

[17] The applicant argued that for the alleged acts of misconduct that occurred while he was the Acting Municipal Manager, it is only the Mayor who has the authority to charge him. The Municipal Manager is only entitled to charge senior managers reporting to him. The applicant offered the following explanation in

his founding affidavit[7] "*the post of Municipal Manager, hence the person occupying same or acting in such post reports to the Mayor. In the premises a person occupying or acting in such position may only be charged by the Mayor"*.

[18] This, however, does not assist the applicant's case for two reasons: The Municipality contended that the applicant was at all material times appointed as a CFO. Further that his appointment as Acting Municipal Manager was done in terms of Section 54 (A)(1)(b) of the Local Government: Municipal Systems Act (Regulations)[8] which states that the applicant was an acting Municipal Manager under circumstances and for a period as prescribed. In my mind, the fact that the applicant had an acting stint as Municipal Manager, did not confer on him, an unfettered status of Municipal Manager. It is clear that he did not cease to be a CFO during the time when he was the acting Municipal Manager. On his own admission, the founding affidavit states that he was appointed as a CFO.

[19] The applicant is currently employed as a CFO and he is responsible for the financial management of the Municipality. I accept that the applicant was the CFO and that he acted as a Municipal Manager at some point. Therefore, the challenge to the authority of the Municipal Manager to charge him is unsustainable. Moreover, it is the Council that must consider the Municipal Manager's report and having considered it, by way of resolution, authorise the Municipal Manager to (a) appoint an independent and external presiding officer and an officer to lead evidence; and (b) to sign their letters of appointment. It is therefore the Council that in effect institutes proceedings against the senior manager.

[20] The applicant further argued that because the Municipality failed to charge him during the period of the first fixed-term contract, the Municipality waived its right to charge him. He contended that the employment contract/relationship under which the alleged acts of misconduct were committed has lapsed and that there

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[7] Page 19 of the indexed bundle, at para 10.3.
[8] Act 32 of 2000.

is no continued employment relationship in that regard as he was appointed on a new fixed-term contract.

[21] To counter this argument, the Municipality submits that it currently employs the applicant in the same position as he previously occupied and that although the period has lapsed, the fact that the applicant is employed in the same position does not affect the ability of the Municipality to discipline him on misconduct committed during the period of the first fixed-term contract.

[22] A simple reading of the applicant's papers seems to offer an alternative in that he argues that because the Municipality failed to charge him during the period of the first fixed-term contract, the Municipality waived its right to charge him. He contended that the employment contract/relationship under which the alleged acts of misconduct were committed has lapsed and that there is no continued employment relationship in that regard as he was appointed on a new fixed-term contract.

[23] To counter this argument, the Municipality submits that it currently employs the applicant in the same position as he previously occupied and that although the period has lapsed, the fact that the applicant is employed in the same position does not affect the ability of the Municipality to discipline him on misconduct committed during the period of the first fixed-term contract.

[24] The Municipality submitted that it in fact did not waive its rights to charge the applicant, as it was not aware of the alleged misconduct during the period of the first fixed-term contract and that it would not have considered him for appointment on the second fixed-term contract had it known of the alleged misconduct at that time.

[25] The above arguments by the applicant are self-defeating. On the one hand, he contends that the first fixed-term contract which governed the employment relationship during the period that he is alleged to have committed the misconduct has lapsed. If I understand this argument correctly, so would be the

case for the charges. Therefore, the Municipality cannot charge him on misconduct allegedly committed during that period.

[26] On the other hand, the applicant makes an about turn and contends that the Municipality waived its right to discipline him. This cannot be, either the Municipal Manager has no authority or right to charge him or that he/she has. The applicant's argument suggests that the charges should be separated and the Municipal Manager should charge him for those alleged to have occurred under the title of CFO and then the Mayor should charge him for those alleged to have occurred under the title of Municipal Manager. As to how this could logically be viable is a fallacy. What the applicant in fact does is throw mud balls at the wall and hope that one of them will stick. This cannot be countenanced. Having said this, I am of the view that none of these arguments are sustainable.

[27] The law on the doctrine of waiver is well established. As early as 1920, Hoexter JA in *Administrator, Orange Free State v Mokopanele and Others*[9] pronounced that before a party can be held to have surrendered his right, he must know of his right. A similar approach was adopted some four years later in *Laws v Rutherford*[10] where the Court held that before a waiver can be upheld, it must be demonstrated that the person who is alleged to have waived his or her right knew that he or she was waving her right. It logically follows then that in order to constitute waiver, the relevant conduct of the party alleged to have waived the right must be clearly inconsistent with the exercise of the right alleged to have been waived. Simply put, the conduct of the Municipality and the exercise must be mutually exclusive.

[28] In my view, the Municipality did not waive its rights to charge the applicant, as it was not aware of the alleged misconduct during the period of the first fixed-term contract. The Municipality submitted that it would not have considered him for appointment on the second fixed-term contract had it known of the alleged misconduct at that time. This is a reasonable proposition. It is a trite principle in

[9] (1920) 11 ILJ 963 AD at p 968.
[10] 1924 AD 261.

our law that an employer has a right or prerogative to discipline an employee. In this matter, the Municipality is and remains the employer and the applicant remains an employee and CFO of the Municipality, who is responsible for public funds.

[29] Equally unsustainable is the contention advanced by the applicant that the Municipality lacks authority to charge him. In *Fourie v Amatola Water Board,*[11] this Court relying on a Canadian authority held as follows:

> 'However, I am not persuaded that this principle is not the correct principle which should be adopted in the present matter. I say this also because of the fact that such prejudice that the applicant may suffer is clearly outweighed by the prejudice that the employer will suffer if the employer is not allowed to exercise its prerogative to discipline employees who are guilty of misconduct, especially serious misconduct'.

[30] Considering the above authorities, this Court is not inclined to deprive the employer herein the right of charging an employee, especially taking into account the severity of the alleged acts of misconduct.

Non-Compliance with Regulation 5 (3)(a).

[31] Another issue raised by the applicant relates to the appointment of the independent investigator. The submission made in this regard is that the forensic report is unlawful because the Municipality failed to appoint the investigator within seven days of being satisfied that there is reasonable cause to believe that the applicant committed an act of misconduct. To buttress his argument, the applicant relied on Regulation 5(3)(a).

[32] In essence, he contended that absent compliance with the peremptory provision of the Regulations, the report is null and void. The Municipality argued that there was no delay. It submits that it had to convene a Council meeting wherein the Council resolution was adopted on 11 May 2018 and a Special Council

[11] (P 830/00) [2000] ZALC 133 (16 November 2000) at para16.

Resolution was adopted on 31 May 2018 authorising the Municipal Manager to appoint an independent investigator.

[33] The Municipality argues that even if it is found that the decision to appoint the independent investigator was out of time, the proper procedure was for the applicant to have the appointment of the independent investigator and the forensic report reviewed and set aside. I am in agreement that there was lack of adherence with Regulation 5(3)(a) and that there was a delay in appointing the independent investigator. However, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole. (See *Liebenberg NO and Others v Bergrivier Municipality)*[12]

[34] In my view, there is unchallenged evidence that on 11 May 2018, the Council considered the report by the Municipal Manager and resolved to place the applicant on precautionary suspension pending representation on why he should not be put on suspension. The applicant was afforded seven days within which to make representation prior to his suspension as required by Regulation 6(2). It was on 25 May 2018, after the applicant's failure to make representation that the Council resolved to appoint the independent investigator. Although there was non-compliance with Regulation 5(3), there is no argument that the Municipality neglected to comply with the provisions of the Regulations. The evidence is compelling that the Municipality was conscious of the importance of the requirements in the overall scheme to ensure fairness. It cannot be said that non-compliance with Regulation 5(3) rendered the investigator's report unlawful.

<u>Can the Court intervene in an incomplete disciplinary enquiry?</u>

[12] 2013 (8) BCLR 863 (CC).

[35] This Court has innumerable times, expressed an unwillingness to interfere in incomplete disciplinary inquiries. In *Jiba v Minister: Department of Justice and Constitutional Development and Others*[13] the Court held:

> 'Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings …'[14] (my emphasis)

[36] The guiding principle, which this Court must follow, is the question whether there exists, any truly exceptional circumstances, which warrants the granting of the relief as sought by the applicant. More so, where he seeks final relief. The applicant failed to show that there are exceptional circumstances warranting granting of the orders as sought.

[37] I am not persuaded that the applicant has made out a case for the relief he seeks. This is a typical case where the litigant is clearly abusing the court's processes and scarce judicial resources have been channelled on a meritless application brought before an urgent court which is already clogged. The applicant has not demonstrated how his rights to a procedurally fair inquiry are infringed. For these reasons, the application must fail.

Costs

[38] The respondents sought an order of costs *de bonis propriis* against the applicant. The rule of practice that costs follow the result does not apply in Labour Court matters.[15] However, in a case where the conduct of the litigant

[13] [2009] 10 BLLR 989 (LC).
[14] At para 17.
[15] *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC).

was frivolous, *mala fide* and forum shopping the court must show its displeasure. In this matter, while the disciplinary hearing was still in progress, the applicant approached the High Court and after his application was struck off the roll with costs he rushed to this Court with a similar application. I am of the view that the costs of this litigation must be borne by the applicant.

[39] In the circumstance, I make the following order:

<u>Order</u>

1. The application is dismissed with costs.

D. Mahosi

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the applicant: Mr MH Letsela of Letsela Attorneys

For the respondents: Advocate Y Saloojee

Instructed by Lebea and Associates