

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable/Reportable

Case No: J3495/18

In the matter between:

JANET RUDMAN

Applicant

and

MAQUASSI HILLS LOCAL MINICIPALITY

First Respondent

MOTHUPI MOKGATLA N.O

Second Respondent

LENTIKILE JOHANNES MOGOEMANG

Third Respondent

Heard:11 OCTOBER 2018

Delivered: 24 OCTOBER 2018

Summary: Urgent Application - Affidavit in support of urgent application has to be considered in its entirety in assessing requirements of urgency - Section 139(1) of the Constitution - Section 54A of the Local Government: Municipality System Act – Appointment of and role of Municipal Manager - Local Sphere of government - Official appointed i.t.o ss 139(1)(b) of the Constitution has not the same powers as an administrator appointed in terms of ss 139(1)(c) of the constitution – R v Blom principle.

JUDGMENT

MABASO, AJ:

Parties

- [1] The applicant is Ms Janet Rudman (the applicant), the first respondent is Maquassi Hills Local Municipality (the Municipality), the second respondent is Mr Mothupi Mokgatla N.O (the Administrator), and the third respondent is Mr Lentikile Jonannes Mogoemang (Current Acting Municipal Manager).

Background facts

- [2] The applicant filed an urgent application in terms of Rule 8 of the rules of this Court, seeking a declaratory order in the following terms:
- 2.1 Declaring the termination of her appointment as an acting Municipal Manager of the first respondent unlawful and/or invalid therefore null and void and setting same aside,
 - 2.2 Declaring the appointment of the third respondent as an acting Municipal Manager be declared to be unlawful and or invalid therefore null and void and setting same aside.
 - 2.3 Further that the respondents be ordered to abide by the resolution taken by the Municipal Council of the first respondent during the special council meeting No: 10/18 held on 12 September 2018, and costs order in the event of opposition.

The application is opposed by the first to third respondents.

Urgency

- [3] In making a case for urgency, the applicant *inter alia*, avers that due to the withdrawal of her appointment, there is confusion within the Council as majority of the Council members persist that her appointment was lawful and that she must perform the functions as Municipal Manager and adhere to the instructions as per the resolutions of the Council. On the other hand, the Administrator put pressure on the administration to accept and acknowledge the appointment of the Current Acting Municipal Manager. These conflicting situations have brought uncertainty in that the administration is unable to

establish who is the accounting officer in the Municipality, so argued the applicant.

- [4] She further submits that there have been allegations of violence and intimidation following the termination of her appointment on 26 September 2018 and this Court's attention is drawn on the application before the North West High Court, Mahikeng. On the other hand, the respondents submit that this matter is not urgent as the applicant should have approached the statutory dispute resolution forum if she believes that there is a violation of her rights within the employment sphere. The respondents further aver that the grounds for urgency as set out by the applicant under paragraphs 8.1 to 8.17, do not justify urgency.
- [5] Rule 8 (2) of the rules of this Court provides that, an affidavit in support of an application for urgent relief must state the reasons for the urgency; why urgent relief is necessary and the reasons why the requirements of the rules were not complied with. However, each case has to be decided based on its own merits by a presiding judge who is called upon to decide as to whether a matter is urgent or not. Such a judge will have to use his/her own discretion. As indicated, what is required is that an applicant should set out the reasons for the urgency and must show an absence of substantial redress if the matter is not heard as a matter of urgency. I opine that what is essential in this matter, is the uncertainty that has been created within the community in the municipality as a result of the uncertainty of who the accounting officer is, and the period of the applicant's appointment as per the resolution of the Council.
- [6] I find the following passage, in the matter of *Sikwe v S A Mutual Fire and General Insurance*¹, relevant in explaining as to what *inter alia* should guide presiding officers on the considerations to be made when deciding on the issue of urgency:

¹ [1977] 3 All SA 231 (W).

'It does not follow that an application is necessarily defective if the form referred to in the Rule is not strictly adhered to. In my opinion, it is the substance of the affidavit, and not its form, which will weigh with a Court; if an affidavit sets out facts upon which a Court can decide that an applicant is entitled to relief in terms of the sub-rule, the Court will entertain the application. If the only reasonable inference from the facts set out in the affidavit is that the matter is one of urgency, then an applicant will have complied with the requirements of the sub-rule, even though he does not make a specific averment that it is urgent.'

- [7] Considering the founding affidavit in its entirety, for example, the fact that the resolution by the Council to appoint the applicant to act as a Municipal Manager for a period of three months will expire in November 2018. Further, that referring a dispute to the Bargaining Council would have the effect that it would have to be conciliated and thereafter arbitrated if it is not resolved during the former process and that it could take more than three months to finalise the dispute. By that time the uncertainty in the municipality might have escalated to further violence. On this score, I conclude that the matter is urgent, and no prejudice would be suffered by the respondents, but the applicant might suffer prejudice as she will remain with a question of whether her removal was in terms of the law or not.

Salient points

- [8] The applicant is employed by the municipality as Divisional Head: Administration. As a result of administration and political crisis within the Municipality, it has been without a Municipal Manager since 26 July 2018, and with effect from 8 August 2018 without several "section 56 managers" (the Directors).
- [9] Following the findings by the Department of Local Government and Human Settlements, of serious maladministration, poor governance and poor financial administration which has been affecting service delivery in the Municipality, on 22 August 2018 the Bakone Bophirima Provincial Executive Council (the

PEC) resolved to appoint an administrator and an intervention team in five identified municipalities, the first respondent is one of those municipalities. This was in terms of section 139(1) of Act 108 of 1996.² This resolution was to be effective from 1 September 2018 at the Municipality. It provides *inter alia*, that:

‘4. Institutional Arrangements Between the Administrator and Municipal Officials (Administration and the Municipal Council)

- (a)...
- (b)...
- (c) The Municipal Council and all its functions, including such structures as the Mayoral Committee and the Municipal Public Accounts Committee, must obligatorily continue to function as normal, and the decisions and resolutions thereof must all be approved by the Administrator before the implementation.
- (d) ...’

Clearly, this permits the Municipal Council to continue with its functions, however, if resolutions are taken, the Administrator must approve them. Further, this resolution does not state as to when and how the approval should be executed.

[10] The Administrator was appointed on 17 September 2018. Prior to the appointment, a Special Council Meeting by the Municipal Council was held on 12 September 2018. Although some of the councillors were not in attendance, including the Municipal Mayor, a motion was passed in terms of which the Applicant was to be appointed as an acting Municipal Manager, and the Municipal Mayor was to sign the appointment letter. In case the Mayor was not available to sign the letter, then Councillor Mokgabi was to sign it.³

³ Ss 54A(1)(b) of Act no. 32 of 2000 which reads thus: The Municipal Council must appoint –an acting municipal manager under circumstances and for a period as prescribed.

Following this resolution, the Mayor refused to sign the appointment letter which was later signed by Councillor Mokgabi.

- [11] On 14 September 2018, the applicant received a memorandum from the Municipal Mayor advising her *inter alia*, that her appointment was invalid and that the municipality was placed under intervention in terms of section 139(1) (b) of the Constitution, she was further advised that she should desist from assuming any responsibilities of an acting Municipal Manager.
- [12] On 19 September 2018, the Administrator was introduced in line with the PEC's resolution, and his appointment was for six months. On 20 September 2018, there was a meeting that was held between the executive committee and the management of the Municipality with the Auditor General. After this meeting, a letter was written to a company called Business Connection signed by both the applicant and the Administrator in their capacities as acting Municipal Manager and Administrator. Five days later, on 26 September 2018, the applicant received a letter from the Administrator advising her that her appointment was being terminated. This letter reads thus:

‘ TERMINATION LETTER: ACTING MUNICIPAL MANAGER

The above matter bears reference.

This letter serves to inform you that your position as an acting municipal manager has been terminated with immediate effect. This termination is informed by the following reasons: -

The Constitution of the special council meeting which was held on 12 September 2018 was procedural.

The internal circular No: 01 of 2018 which outlines my roles and responsibilities as an administrator (which I believe you have received already)

you have therefore expected to submit a detailed report of the decisions you have taken and implemented since you have acted by no later than 1 October 2018 and of business.'

- [13] Subsequently, the third respondent was appointed as an Acting Municipal Manager by the Administrator and the applicant averred that the incumbent has less experience than hers.

Principles and application thereof

- [14] Section 2(a) and (b) (i) of the Local Government Municipality Systems Act (Municipality Systems Act)⁴ provides that the Municipality is an organ of state within the sphere of government which consist of political structures and administration of the Municipality. Other spheres of government are Provincial and National.

- [15] The Municipal Council has powers to employ the person needed to execute its functions as required by the Constitution, specifically section 160(1) (d) reads thus,

'May employ personnel that are necessary for the effective performance of its functions.'

The Municipal Council has the rights and duties to govern its initiative in local government affairs. See section 4 (1) of the Municipality Systems Act. These provisions give the Municipality its autonomy over personnel affairs.

- [16] Moreover section 54A (1) of the Municipality Systems Act gives the Municipal Council the local public administration powers to appoint a Municipal Manager or an Acting Municipal Manager. The appointment of the latter is the case herein. In the recruitment and appointment of a Municipal Manager, section 54A does not suggest that either the National or Provincial sphere of

⁴ Act 32 of 2000.

government are to be involved, but subsections 54A(7)(a) of the Municipality Systems Act provides that,

‘the municipal Council must, within 14 days, inform the MEC for local government of **the appointment process and outcome**, as may be prescribed.’

- [17] Once a Municipal Council has recruited and appointed a Municipal Manager in contravention of the provisions of section 54A of the Municipality System Act, in terms of ss 8(a) of the same Act the MEC for local government must within 14 days of receipt of violation take appropriate steps to enforce compliance by the Municipal Council, and this subsection further provides that steps that may be taken may include *“an application to court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council”*. Subsection 54A(9) of the Municipality Systems Act provides the circumstances whereby the Minister may be involved.⁵
- [18] It is trite that legislation is to be interpreted textually, contextually and purposively. The phrase “appointment” is the keyword both in ss 7(a) and (8) of the Municipal Systems Act, as it is not defined in the original Act and even the Municipal Systems Amendment Act⁶ did not define this word. To understand its meaning, one has to be guided by the provisions of subsection 8(a) Municipality System Act which requires that if an MEC becomes aware that the appointment is not in line with the provisions of the Act, he/she may approach the appropriate court for a declaratory order on the validity thereof. I conclude that the appointment means that if the Municipal Council has appointed such a municipal manager the MEC for Local government has no powers to rescind such appointment unilaterally, but he has to notify the relevant municipal council if the appointment is not in terms of the law and if no rectification is possible then approach court for a declaratory order.

⁵ “Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that subsection

⁶ Act no 7 of 2011

[19] Even the Constitution, under section 139(1) (b) does not give the MEC or Provincial government powers to withdraw the appointment of a Municipal Manager unilaterally. The only time when a PEC will have powers to have total control of the municipality is where an administrator has been appointed in terms of the provisions of section 139(1)(c) of the Constitution because at that time the Municipal Council would have been dissolved.

[20] *In casu*, it is common cause between the parties that the Administrator was not appointed in terms of section 139(1) (c) of the Constitution. This subsection reads thus,

'dissolving the municipal council and appointing an administrator until the newly elected municipal council has been declared elected, if the exceptional circumstances such step.'

Clearly, under this subsection, the Municipal Council will not exist because it would have been dissolved. As stated in paragraph 9 above, the PEC resolution allowed the Municipal Council to continue with its duties, but the Administrator was to be an overseer thereof. Considering applicable legislation herein, especially the provisions of section 139(1) of the Constitution, it does not seem to suggest that an administrator appointed by the PEC will have more powers regarding the termination of the appointed Acting Municipal Manager than the Municipal Council, the MEC for local government or the Minister.⁷

[21] *In casu*, the Administrator was appointed in terms of the provisions of subsection 139(1) (b) of the Constitution, this subsection does not dissolve the Municipal Council, as was correctly found by Tuchten J, in *Magalakwena Local Municipality and Another v MEC for Co-Operative*⁸ concluded that

⁷ See also ss (7)(a) to (9) of the Municipal Systems Act.

⁸ [2014] 4 All SA 67 (GP)

“...nothing in section 139(1)(b) gives a province to divest municipality or its council of its power to take administrative action...”.

- [22] *Magalakwena*⁹'s authority reaffirms that the principle that the municipality retains its autonomy. Instead it gives the Provincial Executive Council a right to maintain essential national standards, prevent the Municipal Council from taking unreasonable actions that are detrimental to the interests of the province as a whole and maintain economic unity. Its role becomes that of an overseer.
- [23] The Administrator herein, before 26 September 2018, did not replace the Municipal Council. The latter despite being notified of the PEC resolution, it proceeded to have a Special Council Meeting and made a resolution for the appointment of the applicant to the position of acting Municipal Manager, which such resolution is, therefore, an administrative action.¹⁰ Mr *Saloojee*, on behalf of the applicant correctly conceded that the appointment might have been suspect. Moreover, he submits that considering that the Administrator co-signed a letter with the applicant to Business Connexion dated 20 September 2018, where it shows that the Administrator was accepting the appointment of the applicant. I am inclined to accept the Applicant's assertion that indeed the Administrator's conduct amounts to approval of her appointment by the Municipal Council. If the Administrator did not approve the appointment of the Applicant, clearly he would not have co-signed the letter to the Business Connexion.
- [24] Moreover, he would have indicated his disapproval of the applicant's appointment before the meeting with the Auditor-General, taking into account that the position of a Municipal Manager is a crucial position as its functions are equal to that of an accounting officer and head of the Municipality.¹¹ I

⁹ *Idid*.

¹⁰ See: *Mlokothe v Trollip and Others* (193/2017) [2017] ZAECPHC 43 (5 September 2017).

¹¹ *City of Johannesburg Metropolitan Municipality and others v Hlophe and others* [2015] JOL 32984 (SCA), para 19, underpinned in *Mlokothe's* judgment (fn 10 above), where the Court held that: the municipal manager is the head of administration and the accounting officer of a municipality. Subject to the policy directions of the municipal council, the municipal manager is responsible and accountable for the management of the municipality's administration in accordance with the Systems

agree that the applicant supports this point in the replying affidavit, although, the respondents submit that the issue of co-signing a letter is only mentioned in the replying affidavit, but the applicant was responding to what is contained in the answering affidavit, and the letter in question forms part of the founding affidavit. Taking into account, the principle in *R v Blom*¹² where it was held that “*select a conclusion which seems to be the more natural, or plausible, conclusion from among several considerable ones, even though that conclusion be not the only reasonable one*”.¹³ I conclude that the circumstances of this case support that the Administrator approved the appointment of the applicant as the acting Municipal Manager.

- [25] The SCA in the *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*¹⁴ said

‘Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.’¹⁵

- [26] Now, taking into account that sections 7 and 8 of Municipality Systems Act, provides that an MEC may take necessary steps to enforce compliance by the Municipal Council with the Act in respect of the appointment of a Municipal

Act and other legislation applicable to the municipality. The municipal manager is also responsible and accountable for the management of the provision of services to the local community in a sustainable and equitable manner. Moreover, as accounting officer he or she is responsible and accountable for all income, expenditure and assets of the municipality and for the discharge of all its liabilities. The municipal manager therefore heads the administration of a municipality and holds its purse. This necessarily means that the city manager has the power and the duty to ensure that the city complies with its obligations in terms of a court order. (footnotes omitted)

¹² 1939 AD 188 at 202-203. Underpinned by the LAC judgment (*Nkomati Joint Venture v Commission for Conciliation, Mediation and Arbitration* (JA25/2017) [2018] ZALAC 11; [2018] 8 BLLR 773 (LAC), para 10)

¹³ See: *SATAWU v TOKISO Others* (2015) 36 ILJ 1841 (LAC), in para 12 and 13.

¹⁴ [2004] 3 All SA 1 (SCA).

¹⁵ Ibid at para 26.

Manager. I conclude that even though the appointment of the applicant as an acting Municipal Manager is suspect, in the way it was concluded, its timing, taking into account that there was a resolution that was taken by the PEC, and such resolution was communicated to the Council, the appointment could only be declared by the court of law to be invalid. Considering that in terms of the guidelines that were issued to the Administrator by the PEC it did not state anywhere that the Municipal Council was dissolved (139(1) (c) of the Constitution), and the Municipality is controlled by the Municipal Council maintaining its autonomy and as I have concluded that the Administrator had confirmed the appointment of the applicant as the acting Municipal Manager. In order for the Administrator to rescind the decision to appoint the applicant, he should have approached the Municipal Council, and he and the Municipal Council would then have powers to withdraw the appointment, taking into account that the applicant was acting as a Municipal Manager. In case the Municipal Council refused to comply with his approach then he can approach an appropriate court for a declaratory order because an administrative action had already been taken and remain binding until set aside by a court of law.

[27] The conclusion above consequentially invalidates the appointment of the third respondent.

[28] I make the following order:

Order

1. The requirements of rule 8 of the rules of this Court are hereby dispensed with, and the application is treated as urgent;
2. The termination of the applicant's appointment as an acting Municipal Manager of the First Respondent by the Administrator is unlawful and invalid therefore null and void and is set aside;

3. the First and Second respondents are to abide by the resolution taken by the Municipal Council of the first respondent during the special council meeting No: 10/18 held on 12 September 2018;
4. The appointment of the Third Respondent as the First Respondent's acting Municipal Manager is declared unlawful and invalid therefore null and void and is set aside; and
5. There is no order as to costs.

S. Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv Saloojee
Instructed by : Cronje Attorneys

For the Respondents: Adv Mkhari SC
Instructed by : Kgomo Attorneys