

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1429/19

NONTOBEKO MEMELA

Applicant

and

THE CITY OF TSHWANE METROPOLITAN

First Respondent

MUNICIPALITY

MOEKETSI MOSOLA

Second Respondent

Heard: 22 November 2019

Delivered: 28 November 2019

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant approached this Court seeking an order to find the First Respondent's (the Municipality) acting City Manager, Mr Moeketsi Ntsimane (Mr Ntsimane) guilty of contempt of Court.

[2] Mr Ntsimane opposed the application.

Brief history:

[3] This matter has a litigious history, which was set out in a previous judgment of this Court. However, in view of the facts of this application and the nature of

the relief sought, it is necessary to set out the chronology of events once again to put this application in proper context.

[4] The Applicant is employed by the Municipality as Group Head: Human Settlements. On 30 November 2018, she was suspended on allegations of financial misconduct, pending an investigation into the alleged transgressions.

[5] On 28 February 2019, the Municipality issued a notice to the Applicant extending her suspension for a further period of three months as per clause 16.4 of the 'Disciplinary Procedure Collective Agreement' (the collective agreement). In the said letter it was stated that:

'As per the stipulations of Clause 16.4 of the Disciplinary Procedure Collective agreement, I am hereby extending the suspension for a further period of three (3) months. This extension is based on the following circumstances outside the control of the city:

1. All the investigations into the allegations of misconduct have not been finalized; and;
2. The appointment of the Chairperson took longer than anticipated, as the original candidate could not commit to a timeframe to conduct the hearing, and a new Chairperson had to be identified. The City could not identify a potential Chairperson within a municipality, as both the Governance & Support Officer and the Chief Operating Officer were conflicted.

All the conditions previously set down in the initial suspension, are still valid and in force.

The formal charge sheet and full details of the hearing will be communicated as soon as possible.'

[6] The Applicant was of the view that the extension of her suspension was unlawful because she could only be suspended in circumstances where the disciplinary hearing had already been convened and she approached this Court on an urgent basis under case number J 540/19 seeking an order to declare the extension of her suspension unlawful.

[7] On 14 March 2019, the Court, per Van Niekerk J, declared the extension lawful and valid and held that it seems that the intention of the collective

agreement was that any period of suspension may not exceed six months, being two periods of three months each and that the Municipality was entitled to extend the Applicant's suspension by a further three months.

[8] On 4 June 2019, after the expiry of the second three-month period, the Applicant's attorneys addressed a letter to the Municipality advising that her suspension exceeded a period of six months and that it was unlawful. The Applicant received no feedback from the Municipality and when no further steps were taken to institute disciplinary action, the Applicant approached this Court on 12 June 2019 for an order *inter alia*, declaring her suspension unlawful. The matter was enrolled for hearing on 18 June 2019.

[9] On 12 June 2019, the Applicant was issued with another notice of further suspension, the wording of which was *verbatim* the notice issued on 28 February 2019. The Applicant's suspension was extended for a further period of three months, thus until 12 September 2019.

[10] The urgent application was heard on 18 June 2019 and on 20 June 2019 this Court per Whitcher J, found the Applicant's continued suspension unlawful and ordered the Municipality to uplift it immediately.

[11] On 24 June 2019, the Municipality filed an application for leave to appeal against the whole of the said judgment and orders. Leave to appeal was granted on 11 July 2019.

[12] The Applicant subsequently approached this Court in terms of the provisions of section 18 of the Superior Courts Act¹ for an order for the immediate implementation of the judgment and order of Whitcher J, pending the outcome of the appeal.

[13] Rule 5(1) of the Rules for the Labour Appeal Court (LAC) provides that:

'Every appellant who has a right of appeal must deliver a notice of appeal within 15 days, or any longer period that may be allowed by the court, on good cause shown, after leave to appeal has been granted.'

[14] In accordance with the provisions of the aforesaid Rule, the Municipality had to deliver its notice of appeal by 1 August 2019.

¹ Act 10 of 2013.

- [15] The urgent application filed in terms of section 18 of the Superior Courts Act was set down for hearing on 5 September 2019, by which date the Municipality had not yet filed or delivered a notice of appeal. The effect of the failure to deliver a notice of appeal as per Rule 5(1) of the LAC Rules, is that there was no appeal pending, thus the operation and execution of the Court order of 20 June 2019 was not suspended by operation of law.
- [16] There was no need for this Court to consider whether there were exceptional circumstances, as provided for in section 18 of the Superior Courts Act, as there was no appeal pending and the Court found that absent a pending appeal, the necessity to bring the application in terms of section 18 fell away.
- [17] As there was no appeal pending, the application in terms of section 18 of the Superior Courts Act was dismissed on 11 September 2019.
- [18] On 12 September 2019, the Municipality filed its notice of appeal with the LAC and an application for condonation for the late filing thereof was filed shortly thereafter.
- [19] The Applicant thereafter approached this Court on an *ex-parte* basis to find Mr Ntsimane guilty of contempt of Court.
- [20] On 18 September 2019, an order was issued by Gush J, calling upon Mr Ntsimane to appear in Court on 22 November 2019 to show cause why he should not be found guilty of contempt of Court for failing to comply with the order of this Court, issued on 20 June 2019.

Contempt of Court

- [21] In *Bruckner v Department of Health and Others*² the Court dealt with the requirements for contempt and it was held that:

‘It is trite that an applicant in a contempt of court application must prove beyond a reasonable doubt that the respondent is in contempt. An applicant must show:

- (a) that the order was granted against the respondent;

² (2003) 24 ILJ 2289 (LC).

- (b) that the respondent was either served with the order or informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and
- (c) that the respondent is in wilful default and mala fide disobedience of the order.'

[22] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; and in Mkhonto and Others v Compensation Solutions (Pty) Limited (Matjhabeng)* ³ the Constitutional Court confirmed the requisites for contempt of court as follows:

'I now determine whether the following requisites of contempt of court were established in *Matjhabeng*: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*. It needs to be stressed at the outset that, because the relief sought was committal, the criminal standard of proof – beyond reasonable doubt – was applicable.'

[23] The Applicant has to prove the aforesaid requisites beyond reasonable doubt.

Analysis

[24] Mr Ntsimane opposed the application and he raised mainly technical defences, which I will deal with in turn, as I will with the aforesaid requisites for contempt of court.

Existence of the Court order

[25] *In casu* the existence of the Court order dated 20 June 2019 is not disputed.

Service of the Court order

[26] Mr Ntsimane took issue with the service of the Court order and his case is two-fold.

[27] Firstly, Mr Ntsimane claims that there was no personal service of the Court order. Based on the facts before me, there is no merit in this complaint as the

³ CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC).

Applicant filed proof that Mr Ntsimane was indeed personally served with the Court order and that he had attached his signature to the service and filing sheet. Furthermore, not only did Mr Ntsimane depose to and file an opposing affidavit in this application, he was personally present in Court on 22 November 2019. This is hardly the conduct of a party that can complain that he was not personally served or that he was unaware of the proceedings.

[28] Secondly, Mr Ntsimane took issue with the citation of the parties and his case is that in respect of the order that was issued on 20 June 2019, the Respondents were the Municipality and the City Manager at the time, Mr Moeketsi Mosola. His case is that the Applicant failed to cite him in his personal capacity as a party to the contempt proceedings, but instead seeks an order for contempt against him in his official capacity as Acting City Manager. According to Mr Ntsimane, this renders the application fatally defective.

[29] It is evident from the Applicant's founding affidavit that the First Respondent is cited as the Municipality and the Second Respondent as: "*Dr Moeketsi Mosola (in the main application) a municipal manager within the meaning of section 55 of the Systems Act. The Second Respondent is cited in his capacity as the functionary who took the decision to suspend me. The Second Respondent is no longer in the employ of the First Respondent. Mr Moeketsi Ntsimane is currently acting in the Second Respondent's position, as such relief is now sought against Ntsimane by virtue of the position he currently holds.*"

[30] Mr Basson for Mr Ntsimane, submitted that in contempt of court applications, where the persons targeted are officials, their non-joinder in their personal capacities is fatal to the application as such officials must be cited in their personal capacities, by name, and not in their nominal capacities. In support of this argument, reliance was placed on the *Matjhabeng* judgment.

[31] In my view, reliance placed on *Matjhabeng* in support of this argument is misplaced.

[32] In *Matjhabeng* the Constitutional Court held that:

'It follows that the objection of non-joinder by the Municipality in *Matjhabeng*, specifically where the potential contemnor's section 12(1) rights are in the

balance, is not a purely idle or technical one – taken simply to cause delays and not from a real concern to safeguard the rights of those concerned. There is however a caveat: this should not be understood to suggest that joinder is always necessary. There may well be a situation where joinder is unnecessary, for example, when a rule *nisi* is issued, calling upon those concerned to appear and defend a charge or indictment against them. Undeniably, in appropriate circumstances a rule *nisi* may be adequate even when there is a non-joinder in contempt of court proceedings. This means that the rule is not inflexible.’

[33] *In casu*, Mr Ntsimane is cited as Respondent and an order was issued by this Court on 18 September 2019 for him to appear in Court on 22 November 2019 to show cause why he should not be found guilty of contempt of Court for failing to comply with the Court order dated 20 June 2019.

[34] Mr Ntsimane’s argument that his non-joinder in his personal capacity is fatal to the application is without merit and is an incorrect interpretation of the principles set out in *Matjhabeng*.

[35] The Constitutional Court held that officials concerned should have been cited in their personal capacities by name and not in their nominal capacities. In my view, this means that for an applicant to succeed with an application for contempt, he or she has to cite an official, acting in a nominal capacity, by name and not only by reference to the official’s nominal capacity. It is inconceivable that a nominal capacity could be held in contempt, but the incumbent of such a position could be held in contempt, hence the need to cite by name.

[36] The Practice Manual of the Labour Court⁴ also provides that the respondent in a contempt application, albeit in the capacity of the CEO, Director General, owner or proprietor, be cited with reference to the person’s full and proper names.

[37] *In casu*, Mr Ntsimane was cited in his capacity as the functionary who took the decision to suspend the Applicant, and he was cited by name. There is no merit in the argument regarding citation.

⁴ April 2013.

[38] I am satisfied that Mr Ntsimane has knowledge of the Court order.

Non-compliance with the Court order

[39] It is not disputed that the Court order of 20 June 2019 has not been complied with and the only issue remaining that I have to consider is whether the non-compliance with the Court order is wilful and *mala fide*.

[40] The main defence raised by Mr Ntsimane is that as part of the substantive and procedural law, he cannot be held in contempt of Court where the Municipality instituted steps to appeal the judgment that was granted in favour of the Applicant and for which the same Court has granted the Municipality leave to appeal.

[41] The Respondents' case is that the Municipality has noted its appeal and applied for condonation for the late noting of the appeal, wherefore the appeal is still pending and with the appeal pending, Mr Ntsimane is not compelled to comply with the order of 20 June 2019. The only way that he could be compelled to comply with the Court order, is if the Applicant approaches the Court for an order to execute the judgment granted in her favour, pending the finalisation of the appeal. The Applicant lodged such an application, but it was dismissed.

[42] Mr Ntsimane submitted that there was no legal or factual basis for this Court to find him in contempt of a Court order.

[43] It is correct that where an appeal is pending, the party seeking to appeal an order or judgment is not compelled to give effect to the order or judgment against which the appeal is pending.

[44] *In casu*, however there is no appeal pending.

[45] The Municipality did not note the appeal timeously, for which an application for condonation was filed and which has not yet been considered by the LAC. Noting of an appeal is however not where the appeal process ends. The procedure prescribed for an appeal requires that after an appeal has been noted, the appellant must serve a copy of the record on each of the respondents and file a copy with the Registrar of the LAC.

[46] Rule 5(8) of the Rules for the LAC provides that:

‘The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the court under rule 4(9).’

[47] *In casu*, leave to appeal was granted on 11 July 2019. In accordance with the provisions of the aforesaid Rule, the Municipality had to serve and file the record in the appeal by no later than 7 October 2019. When this matter was enrolled for hearing on 22 November 2019, it was common cause that the record in the appeal had not been served and filed.

[48] The effect of the failure to serve and file the record within the prescribed time, is set out in Rule 5(17) of the LAC Rules, which provides that:

‘If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representative for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent of the notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application.’

[49] The Municipality has not applied to the Applicant or the Judge President for consent to an extension of time, wherefore the appeal is deemed to be withdrawn. The appeal will remain deemed to be withdrawn until and unless there is a successful substantive application to re-instate the appeal.

[50] The effect of the failure to lodge the record within the prescribed period is that the appeal is deemed withdrawn and for purposes of this application, there is no appeal pending. The operation and execution of the Court order of 20 June 2019 is not suspended by operation of law and Mr Ntsimane's averment that he cannot be held in contempt of Court where the Municipality instituted steps to appeal the judgment that was granted in favour of the Applicant, is ill-advised as the appeal is deemed to be withdrawn.

- [51] The fact that the Respondents' appeal is deemed to be withdrawn with effect from 7 October 2019 was not known to them and when the issue was raised by the Applicant's legal representatives, Mr Basson requested a postponement for the purpose of complying with the Rules of the LAC.
- [52] The request for postponement was opposed and Mr Mthimkhulu for the Applicant who submitted that the Respondents have no intention of allowing the Applicant to return to work or to pursue the appeal and if postponement is granted for the Respondents' to file an application to reinstate the deemed withdrawn appeal, it will prolong the Applicant's suspension indefinitely.
- [53] I am not inclined to grant the postponement sought by the Respondents for a number of reasons.
- [54] Firstly, the Respondents are legally represented and I find it difficult to accept that they could be unaware of the provisions of the Rules of the LAC, that they had no idea that the record had to be filed within 60 days or the fact that because the record was not filed, the appeal was deemed to be withdrawn. It cannot be that they only discovered this state of affairs on 22 November 2019, six weeks after the record had to be filed and only because it was raised by the Applicant's legal representatives.
- [55] Secondly, the conduct of the Respondents displays a disregard for Rules and timeframes, notwithstanding the fact that the Rules of the LAC are no secret and must be adhered to when pursuing an appeal. The noting of the appeal was late and subsequent to filing the notice of appeal and condonation application, no effort whatsoever was made to pursue the appeal by filing the record. I fail to comprehend why a postponement should be granted to allow the Respondents an opportunity to comply with the Rules which they knew of and which they should have complied with from the onset, but consistently failed to do so.
- [56] In any event, it is too late to comply with the provisions of LAC Rule 5(17) as it the extension had to be sought within the prescribed period, which period is long gone.
- [57] Thirdly, I have already alluded to the sequence of events subsequent to the Court order of 20 June 2019 and the noting of the appeal on 12 September

2019. On 16 September 2019, Mr Ntsimane signed a letter, addressed to the Applicant, stating that he was extending her suspension for a further period of three months because the investigation into allegations of misconduct against her has not been finalised and that the draft charges would be served on her before the end of September 2019.

[58] This letter flies in the face of the letter written by the Respondents' attorneys on 12 September 2019, wherein they stated that the Municipality would be commencing with the disciplinary hearing against the Applicant in the next week or two and that she would be served with a charge sheet by close of business on 17 September 2019.

[59] It is evident from the letter signed by Mr Ntsimane that the Applicant was placed on further suspension because the investigation into the allegations of misconduct against her has not been finalised, but it was also communicated to her that the draft charges would be served on her before the end of September 2019. It seems logical that charges can only be drafted once an investigation into the allegations of misconduct has been finalised and based on the letters issued by the Municipality's attorneys as well as by Mr Ntsimane, the charge sheet was to be served either by close of business on 17 September 2019 or before the end of September 2019 and the disciplinary hearing was to commence within a week or two from 12 September 2019. To date, more than two months later, the Respondents have not issued the Applicant with a charge sheet and no disciplinary hearing has commenced.

[60] I have to endorse the aim of the Labour Relations Act⁵ (LRA) namely to resolve labour disputes speedily and without delay. Granting postponement in a case like this would not be in the interest of justice as it would undermine the statutory purpose of expeditious dispute resolution, a factor that weighs heavily in the Applicant's favour.

[61] It is for these reasons that I am not inclined to grant postponement.

[62] The Court order of 20 June 2019 was to the effect that the continuing suspension of the Applicant is unlawful and the Respondents were ordered to uplift the Applicant's suspension with immediate effect.

⁵ Act 66 of 1995 as amended.

- [63] On 16 September 2019, Mr Ntsimane signed a letter wherein he was extending the Applicant's suspension for a further period of three months. Clearly the extension of the Applicant's suspension was not in compliance with the Court order of 20 June 2019.
- [64] The only remaining question is whether Mr Ntsimane's conduct in extending the suspension of the Applicant constituted a wilful and *mala fide* disobedience of the Court order.
- [65] Even if I were to accept that, at the time that he had issued the letter to the Applicant, Mr Ntsimane was of the *bona fide* belief that the noting of the appeal suspended the execution and operation of the Court order that declared the continuous suspension of the Applicant unlawful and ordered its upliftment with immediate effect, such a belief cannot rescue him.
- [66] It is evident from the Respondents' conduct that notwithstanding letters to the effect that the Applicant would be charged and a disciplinary hearing be held before the end of September 2019, they are not serious to initiate disciplinary action and to bring her suspension to an end. The Applicant was suspended on 30 November 2018 and almost one year later, the Respondents are not one step closer to charge her with misconduct and to hold the disciplinary hearing, let alone to finalise the disciplinary proceedings.
- [67] If Mr Ntsimane believed as at 16 September 2019 that, because of the pending appeal he could act contrary to the Court order, this position had changed on 7 October 2019, when the appeal had become deemed to be withdrawn.
- [68] In view of the fact that the Respondents did not pursue the appeal as they were required to do in terms of the LAC Rules and that as a result the appeal is deemed withdrawn, Mr Ntsimane can no longer believe that he is entitled to act in contravention of the Court order of 20 June 2019.
- [69] To keep the Applicant suspended after the appeal is deemed to be withdrawn, shows that Mr Ntsimane acted *mala fide* when he extended the Applicant's suspension in contravention of the order issued by this Court on 20 June 2019.

[70] On the facts placed before me, it is highly questionable that the Respondents filed the leave to appeal with the intention to pursue it. All indications are, considering the facts holistically, that the leave to appeal was filed for the sole purpose of circumventing the effect of the Court order of 20 June 2019.

[71] Mr Basson submitted that extending the suspension of the Applicant is nothing more than a suspension in terms of the applicable disciplinary code and that this is not in defiance of the Court order of 20 June 2019. There is no merit in this argument. In my view, Mr Ntsimane acted in wilful and *mala fide* disobedience of the Court order of 20 June 2018 when he persisted with the Applicant's suspension in defiance of the order that specifically ordered the continued suspension of the Applicant unlawful and that it should be uplifted, in circumstances where there is no appeal pending and the Court order remained enforceable.

Costs

[72] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[73] Mr Mthimkhulu submitted that the Respondents should pay the Applicant's costs on a punitive scale. This is so because the Applicant's attorneys have written more than five letters to the Respondents urging them to comply with the Court order of 20 June 2019 and to allow the Applicant to return to work, with the only response being to extend the Applicant's suspension. In the same breath, the Respondents took no steps to pursue the appeal and their conduct is clearly a strategy to keep the Applicant suspended for an indefinite period. Before this Court nothing but technical arguments were put forward and there is no reason not to award costs on a punitive scale.

[74] There is merit in the argument that costs should be awarded in favour of the Applicant. However, I fail to comprehend why taxpayers and ratepayers of the City of Tshwane should be burdened with a cost order. I further fail to comprehend how taxpayers' money is being spent by delaying a disciplinary hearing in circumstances where the Applicant was suspended as far back as November 2018 under the premise that this was a precaution while an

investigation was ongoing and where she was informed that the disciplinary hearing would commence in September 2019. By late November 2019, no steps were taken to charge the Applicant or to hold the disciplinary hearing as promised.

- [75] By delaying the disciplinary action for a full year, the Municipality and effectively the taxpayer retained the financial obligation to pay the Applicant a salary at a senior level, with no value added by the Applicant. The taxpayer does not have the benefit of the services rendered by the Applicant, but is paying her salary for a full year whilst she is on suspension, nor does the taxpayer have control over the period of suspension and the Respondents' failure to hold a disciplinary hearing timeously.
- [76] *In casu*, taxpayers monies are being spent on litigation that is fruitless and seeks to avoid or delay a disciplinary hearing. In this application the Respondents raised technical points lacking in merit and this at a time where this Court would have expected that the Municipality would resolve and finalise the disciplinary process as expeditiously and inexpensively as possible. In fact, it had almost a year to do so since the Applicant was placed on suspension.
- [77] Considerations of good corporate governance and the moral obligation owed to employees, demand that respect be accorded to employees and that the strategy of denying an employee effective access to justice by the application of corporate muscle must be avoided. This is not to say that an employer ought not to discipline its employees where circumstances warrant such, but an employer should not employ a conscious strategy to deny an employee access to justice by unduly delaying a disciplinary hearing and by imposing an indefinite suspension⁶.
- [78] Regrettably taxpayers will be burdened with the costs of this litigation and I have already alluded to the fact that burdening taxpayers will not serve the requirement of fairness. Taxpayers have no say in how litigation is handled and this is a case where taxpayers will be unfairly prejudiced if the Municipality is to pay the costs.

⁶ *SABC v CCMA and Others-Unreported* Case number J 2055/19, handed down on 18 October 2019.

[79] I intend to make an order for costs, on a punitive scale, *de bonis propriis* for the Municipality's attorneys and Mr Ntsimane in his personal capacity to pay the costs of this application. Since the Municipality's attorneys and Mr Ntsimane were not given notice of my intention to make such an order, I intend to afford them seven days within which to make submissions as to why an order in the terms that I intend making should not be confirmed.

[80] In the premises I make the following order:

Order

1. The Respondents' application for postponement is dismissed;
2. The Second Respondent, Mr M Ntsimane, is found guilty of being in contempt of the order of this Court dated 20 June 2019 by suspending the Applicant and by keeping her suspended;
3. Mr M Ntsimane is committed to imprisonment for a period of three months, which sentence is wholly suspended on condition that he complies with the Court order of 20 June 2019 within five days from date of this order;
4. The costs of this application are to be paid *de bonis propriis* jointly and severally by Mr Ntsimane and Diale Mogashoa Attorneys, the one paying the other to be absolved, on the scale as between attorney and client;
5. The order for costs in paragraph 4 above is provisional and both Mr Ntsimane and Diale Mogashoa Attorneys are afforded seven days to make submissions as to why the order should not be confirmed.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr L Mthimkhulu of Werksmans Attorneys

For the Respondents: Advocate J Basson with Advocate I Hlatletoa

Instructed by: Diale Mogashoa Attorneys

LABOUR COURT