

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 686/2025

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED: YES/NO

Makoti AJ


 SIGNATURE

DATE

In the matter between:

MOGARAMEDI JOEL MAKGATA

Applicant

and

FETAKGOMO TUBATSE LOCAL MUNICIPALITY
THE MUNICIPAL COUNCIL OF THE FETAKGOMO
TUBATSE LOCAL MUNICIPALITY
COUNCILLOR EDDIE EDWIN MAILA N.O.
(THE MAYOR)
COUNCILLOR VINCENT SHOBA N.O.
(THE SPEAKER)
MAVIS MAGOA

First Respondent
 Second Respondent
 Third Respondent
 Fourth Respondent
 Fifth Respondent

Delivered: This revised judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **03 June 2025**.

JUDGMENT

MAKOTI AJ

Introduction

- [1] Part A of this matter was first before court as an urgent application on 04 February 2025. It was struck off for lack of urgency. Mine is therefore to deal with the remaining orders sought in terms of Part A of the Applicant's Notice of Motion. I should explain that the Applicant no longer pursues all the extant orders which make part of the application in Part A of his Notice of Motion. The scope has now been significantly been reduced.
- [2] The specific orders that the Applicant is still asking for from this court are the following:
- [2.1] A declaratory order to the effect that his suspension has lapsed ex lege on 18 January 2025. This prayer is predicated on the provisions of regulation 6(6)(a) of the Local Government: Disciplinary Regulations for Senior Managers.
- [2.2] That the First to Fourth Respondents be interdicted and restrained from continuing with the disciplinary inquiry that is currently being pursued against him, pending final determination of the (review) application which is fully canvassed in Part B of the Notice of Motion.
- [2.3] Costs on scale B, including the costs occasioned by the employment of two counsel.
- [3] Much as it was on 04 February 2025, the application is opposed by the municipal Respondents. For the sake of convenience I group all municipal functionaries together with the Municipality itself and I refer to them as if they are one party, th

Respondent or Respondents. The Applicant is singular and I shall either refer to him in one of his names, as Mr Makgata, or simply just as the Applicant.

Whether this Court has jurisdiction to hear this application

- [4] The Respondents raised a technical point to the effect that the Applicant's case impugns the justification or fairness of his suspension. Accordingly, they contended that this Court does not have the necessary capacity to adjudicate an unfair labour practice dispute, referred to in common parlance as jurisdiction. The contention is by no means novel, having been dealt with in numerous legal authorities.
- [5] In *Baloyi v Public Protector and Others*,¹ for instance, the Court applied the principle that was enunciated in *Chirwa v Transnet Limited*² which is to the effect that the jurisdiction of the High Court is not ousted '*... simply because a dispute is one that falls within the overall sphere of employment relations*'. No doubt, the dispute in this matter plays itself out of employment relations between the Applicant and the Municipality. Does that, however, negate this court's ability to adjudicate the application. I doubt and my reasons follow below.
- [6] What the Applicant is seeking in this case are legality matters which, in my view, pertinently invoke the jurisdiction of this Court. The Labour Court too may have jurisdiction to determine such questions. I do not decide if it does. But the fact that the Labour Court may have jurisdiction does not imply that this court would not equally have capacity to decide the case. For instance, the Applicant is aggrieved by the Municipality's refusal to comply with mandatory statutory provisions. Legality questions are central matters for which the Constitution clothes this court with jurisdiction.³ He calls the conduct unlawful and against the grain of the Constitution.
- [7] It is unconvincing therefore the argument of the Municipality that, because the dispute is about the justification of the suspension, therefore this Court is not

¹ *Baloyi v Public Protector and Others* 2022 (3) SA 321 (CC) para 15.

² *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367(CC); 2008 (3) BCLR 251 (CC) para 60.

³ Section 169(1)(a) of the Constitution.

empowered to adjudicate it. Equally unpersuasive is the attempt to differentiate *Baloyi* from this case and purely on the basis that the former dealt with termination of employment. Though the facts may vary, and they routinely do, the principles upon which the Court's jurisdiction is founded remain unchanged.

[8] *Baloyi, supra*, gave us the following important dictum:

“[43] In this matter, the High Court based its finding on a holistic assessment of whether the dispute was located “within the compass of labour law” instead of determining whether the *specific causes of action* relied on by Ms Baloyi fall within the jurisdiction of the High Court or the Labour Court (or both). This approach is based on a misinterpretation of this Court's judgment in *Chirwa*, where it was expressly found that the jurisdiction of the High Court is not ousted merely because a dispute falls within the sphere of employment relations.”

[9] I dare not make the same error as the High Court in *Baloyi*. My understanding is that the question whether a Court has jurisdiction to adjudicate a dispute lies in the nature of the cause of action and the relief being asked for. In any case, even if it may be argued that the case in *Baloyi* was concerned with dismissal, not suspension, the Court found jurisdiction in *Apleni*⁴ to set aside his suspension which, in the Court's view, was unlawful. I conclude that this Court has jurisdiction and will determine the application on its merits.

The facts of the case

[10] The Applicant is a senior employee of Fetakgomo Tubatse Local Municipality (the Municipality). He is the Municipal Manager and accountable directly to Council. He is alleged to have committed serious acts of misconduct. As a result, he was placed on precautionary suspension on 18 October 2024. He challenged the suspension without success.

[11] Subsequent to suspending the Applicant the Municipality appointed Mr LG Verveen of Verveen Attorneys to investigate the misconduct allegations. The attorney

⁴ *Apleni v President of the Republic of South Africa and Another* (65757/2017) [2017] ZAGPPHC 656; [2018] 1 All SA 728 (GP) (25 October 2017).

recommended that the Applicant be charged to answer to the misconduct allegations. His [Verveen] role extended to also serve as the evidence leader or prosecutor of the misconduct allegations.

- [12] On 06 January 2025, ostensibly at his own election, the Applicant was served with charges of misconduct via email. He confirmed through the same medium to having received the emailed notice and disciplinary charges. He did this on the same date. A physical service of the notice and the charges took place the next day on 07 January 2025.
- [13] The notice invited the Applicant to attend the disciplinary hearing on 13 January 2025. He was advised that the hearing would take place at the South African Local Government Association (Salga) Offices in Polokwane. Time was set as 11h00. He was informed that Adv S Mononyane was appointed as the presiding officer to chair the hearing. Applicant was also advised that he was entitled to be represented by either an employee or a suitably qualified person, and at his own costs.
- [14] I do not intend to traverse all the exchanges that followed the serving of the notice to attend the disciplinary hearing. However, worthy of noting is that the Applicant objected to the conduct of the disciplinary hearing on 13 January 2025. To voice his objection he addressed a letter through legal representatives to the Municipality and raised a number of objections. He, amongst others, questioned the lawfulness of the disciplinary hearing.
- [15] His objections included the following:
- "6.13 It is our further instructions that the alleged or purported council meetings did not comply with Sections 29 of The Local Government: Municipal Structures Act, Act 117 of 1998, and that there for the alleged council meetings authorising the precautionary suspension of our client and the decision to proceed with disciplinary proceedings, is unlawful."**
- [16] The Applicant further objected to the service of charges through email. Also, and apart from complaining that the Municipality had failed to comply with the provisions

of regulation 6 of the Regulations. He cautioned that his suspension will be automatically lifted at the expiry of three months, dating from 18 October 2024.

- [17] In response the Municipality warned through its own lawyers that the Applicant should attend the disciplinary hearing and raise his objections before the presiding officer. It was indicated that the hearing will / may continue in the Applicant's absence should he fail to attend the disciplinary hearing. Additionally, the Municipality's lawyers argued that there had been substantial compliance with the regulations. Also that the Applicant was not prejudiced by the mode of service of the disciplinary.
- [18] The disciplinary inquiry was convened on 13 January 2025 as it had been scheduled. The Applicant did not personally attend the proceedings. He was represented by his lawyers who raised objections *in limine*, including that the hearing could not take place in a place which is outside of the area of the Municipality's jurisdiction. That objection was upheld by the presiding officer who then postponed the case to 24 February 2025.
- [19] On that date, 13 January 2025, the proceedings adjourned without the actual reading of the charges and the Applicant's plea to them. This statement happens to be the pivot upon which this application oscillates. It is the point of convergence of the facts and the law. But before I take a sojourn into the law, there are additional considerations to make. At first are the reasons advanced by the Municipality on why the reading of charges did not happen on 13 January 2025. In its view it was impeded by the Applicant's absence from the proceedings. Then, it accused the Applicant of bad faith and using tactics to avoid facing the charges against him.
- [20] The Municipality charged at the Applicant in one of its lawyers letters⁵ that '*... you and your client seem to be hell bent on playing games, causing delays, and taking whatever technical points you can think of, with the aim of frustrating the orderly conduct of the disciplinary process*'. As to whether the issues that were raised on

⁵ Dated 17 January 2025.

behalf of the Applicant were unmeritorious and purely delaying tactics will become apparent later in this judgment.

The regulations relied upon by the Applicant

[21] For purposes of this application I concern myself with only the issues that relate to the application in Part A. They relate to the important question whether the precautionary suspension has lapsed. Then, the interdictory relief that the Applicant is asking for. The following regulations require mentioning:

[21.1] Regulation 6(1) empowers Council to suspend a senior manager on full pay where allegation have been made that the manager has committed acts of misconduct. Council will suspend a senior manager if it has reason to believe that the presence of the manager at workplace may: jeopardise investigations; endanger the well-being or safety of any person or municipal property; may be detrimental to the Municipality; where senior manager may interfere with the investigations; or if he or she may commit more acts of misconduct. It is common cause that Council deemed it appropriate to place the Applicant on precautionary suspension. The lawfulness or otherwise of the decision is not before.

[21.2] Regulation 6(6)(a) stipulates that where a senior manager has been placed on suspension the Municipality must commence disciplinary hearing within a period of three (3) months. It further states that the suspension will lapse automatically if the disciplinary hearing does not commence within the said period of three months. The period of three months fell on 18 January 2025. By then the charges of misconduct had not yet been read.

[21.3] At regulation 10(1)(a) it is commanded that disciplinary hearing must commence within three months of a decision to institute disciplinary inquiry. Paragraph (b) sets out the timeframes by stating that the hearing must start '*... not less than seven days ...*' calculated from the day on which the disciplinary charges are served. If it is accepted that the charges were

validly served upon the Applicant on 06 January 2025, then the regulatory injunction to not commence the hearing in less than seven days would be offended. The seventh day fell on the date on which the hearing was to take place.

[21.4] Subregulation 14(3) espouses that the evidence leader commences a ‘... *disciplinary hearing by reading out the charges ...*’ which are preferred against a senior manager. I have mentioned that the charges were not read out at the hearing on 13 January 2025.

[22] Binding provisions of legislation have to be given effect to. The regulations are subordinate legislation. They are binding to all the parties. Ensuring compliance with subordinate legislation, it has to be said, is an advancement or the upholding of the rule of law. The exception will be, of course, where the facts of a particular case militates against it, that is, where compliance was or is rendered impossible by some factor or more.⁶ By this I mean that if the Municipality has failed to commence a hearing within three months, then what the law requires must be done.

[23] It is axiomatic from the pleadings that the parties approach the question of what must happen from different points. They point fingers at each other. The Municipality alleges that commencing the hearing was rendered impossible only by virtue of the Applicant’s non-attendance of the proceedings on 13 May 2025. That the Applicant was employing delaying is not factually correct. The Applicant was represented at the inquiry by a legal representative who objected to the proceedings taking place at a place outside to the Municipality’s jurisdiction. The opposition was upheld. The result was a postponement of the disciplinary inquiry.

[24] Further, it was noted that the Applicant had not been granted the full seven days to apply for further particulars, if he so wished. This led to the presiding officer issuing

⁶ Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007) para 68.

directives as to when such requestion should be made. That was another way in which the Municipality was accused of flouting the regulations.

Whether the Applicant's suspension lapsed automatically

[25] Regulation 6(6)(a) tells us in unequivocal terms that the suspension will lapse if the disciplinary hearing is not commenced within three months. So, there can be no doubt as to what the regulation espouses to serve, which is twofold. The first is that it encourages local government employers to speed up their investigations into allegations of misconduct against a senior manager and to start the inquiry without delays. With regard to the second, the regulation requires the hearing to commence in earnest within three months, to protect the interests of the employee who is on suspension.

[26] In *Tshabalala v Moqhaka Local Municipality*⁷ (Tshabalala) the court had occasion to distill the implications of the regulation. It stated amongst others that:

"7. What this construction contemplates is a disciplinary process that is commenced by the service of charges on the employee and which culminates in the commencement of the disciplinary hearing. A disciplinary hearing is an integral part of the disciplinary process or proceedings; it does not constitute the proceedings in themselves. Read sequentially, the regulations contemplate that the disciplinary hearing is convened by the presiding officer and commenced by the reading of the charges to the senior manager accused of misconduct."

[27] That the charges were not read is common cause. The Municipality's contention is that the charges could not be read because of the obstructive conduct of the Applicant. It is not that simple. The Municipality only has itself to blame. I say this because the Municipality committed a litany of errors. It waited until the very last minute to serve the charges against the Applicant. When it did so it failed to afford him the full seven days to decide whether to ask for further particulars or not. Worse, the venue for the disciplinary inquiry was outside of its jurisdiction area. All these in breach of the clear provisions of the regulations.

⁷ (JA88/2024)[2024] ZALAC 60 (21 November 2024).

- [28] I do not agree with the Municipality's attempt to blame the Applicant for standing his ground and refusing to accede to the disciplinary hearing taking place outside of the area of jurisdiction. It is not a tactic, nor one that the Court should frown about, for the Applicant to have insisted that the Municipality should do things according to binding laws. The Municipality was at all times represented by lawyer(s) when investigating and preferring misconduct charges against the Applicant. It had access to legal advice. Thus, its failure to start the hearing was entirely of its own doing. In any case, that point is moot because the presiding officer upheld the technical objection. He issued directives on the further conduct of the proceedings.
- [29] What the Court did in *Tshabalala* was to draw a distinction between two different terms, which are proceedings and hearing. How these terms are used in the regulations signifies a distinction between those two words. Regulation 14(3) tells that that a hearing, quite apart from proceeding, commences when the charges are read out to the senior manager concerned. The LAC in *Tshabalala* visited with approval to the *dictum* that was posited in *Mgengo v Lekwa-Teemane Local Municipality*⁸ in which it was held that the issuing of disciplinary charges did not commence the disciplinary hearing.
- [30] I am persuaded that the failure by the Municipality to commence the disciplinary hearing within three months triggered the application of regulation 6(6)(a). The Municipality can only look at itself with some embarrassment for its failure to follow the law. I conclude that the suspension of the Applicant is lifted automatically, *ex lege*. In my view the Applicant should be allowed to forthwith return to his post as Municipal Manager and to execute the duties for which he is contracted to perform at the Municipality.

Whether disciplinary proceedings ought to be interdicted

- [31] The Applicant is asking for temporary interdict against the initiated disciplinary proceedings. There are a number of considerations here. The Applicant first

⁸ *Mgengo v Lekwa-Teemane Local Municipality and Others* (J452/20) [2020] ZALCJHB 255 (11 June 2020).

contends that the decision by Council to set the disciplinary proceedings in motion was taken unlawfully. He intends to, in Part B of the Notice of Motion, have the decision reviewed and set aside. Then there is the whole question about the appointments of the evidence leader and the presiding officer. Those decisions, too, the Applicant impugns and is intent on seeking to have them reviewed and set aside.

- [32] On behalf of the Municipality it was contended that the application has not satisfied the requirements for interim interdict. The requirements are well known and I plan not to regurgitate them.⁹ None of the requirements is a stand alone. They must all exist for the Applicant to be afforded interdictor relief.

Prima facie right

- [33] The parties are contractually bound to each other through an employment agreement. In so far as proving *prima facie* right, I do not believe that it can be contested that the Applicant has a right to not be subjected to an illegality or unlawful actions by the employer, even if such right may be open to doubt.¹⁰ He has the contractual right to be at his post and to perform the duties attached to the position. I am not, by any means, undermining the employer's concomitant right to keep order by disciplining misconducting employees. When maintaining discipline at its workplace the Municipality must comply with the laws that bind it.

Irreparable harm

- [34] More than ten years ago the court in *Nothnagel v Karoo Hoogland Municipality*¹¹ it was recognised the possibility that a party who has been placed on precautionary suspension from duty may still suffer irreparable harm. The court held in that matter that:

⁹ City of Tshwane Metropolitan Municipality v Afriforum and Another (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016) at para 49.

¹⁰ *Ibid*, para 50.

¹¹ Nothnagel v Karoo Hoogland Municipality and Others (C 431/12) [2012] ZALCCT 19; (2014) 35 ILJ 758 (LC) (11 June 2012) para 38.

“38. Although the applicant is being paid, he is still suffering ongoing harm that cannot simply be remedied in due course, should the allegations against him prove to be unfounded in the ensuing three months (or longer) provided for in regulation 6(6).”

[35] The Applicant has been on precautionary suspension since 18 October 2024. He challenges the foundation of the disciplinary processes, including charges, but actually starting with the decision by Council which he alleges was taken unlawfully. If he is successful in that challenge, even at a later stage, he would have endured the process to the fullest.

Balance of convenience

[36] The disciplinary inquiry instituted against the Allicant has not moved far. I have already pointed out the challenges that were encountered right from the beginning of the disciplinary proceedings, whereby the Municipality took a misstep of scheduling to host the inquiry on the seventh day from the date of service of the misconduct charges and picking a venue for the hearing that was outside of its area of jurisdiction.

[37] I am mindful that in *Lekabe v Minister of Justice and Constitutional Development*¹² (Lekabe), in which the provisions of the Senior Management Handbook in the Public Service was at issue, it was held that the employer’s right to discipline its employee is not fatally affected by the failure to adhere to the timeframes stipulated in legislation or policy. An interdict, if granted, will not permanently take away the Municipality’s right to discipline the Applicant. The converse may be true where an employee may end up being terminated from employment in unlawful proceedings. To reverse that will be cumbersome, taking into account that once dismissed the employee will have no income that he currently derives as salary.

[38] The interdict sought will exist temporarily until the final determination of the review application in terms of Part B of the Notice of Motion is reached. What is not permanently taken away is the right of the Municipality to discipline Mr Makgata.

¹² *Lekabe v Minister Department of Justice and Constitutional Development* (J1092/08) [2009] ZALC 18; (2009) 30 ILJ 2444 (LC) (5 February 2009).

- [39] My considered view is therefore that the balance of convenience favours the granting of the interdictory relief. I do not stop here as I have to consider whether the other requirements have also been satisfied.

Absence of an alternative remedy

- [40] On behalf of the Municipality it was submitted that the Court should avoid being drawn into granting an interdict at this stage. That the Applicant can still institute review application once the disciplinary inquiry is concluded. It was impressed upon me by counsel for the Municipality that the Court does not easily temper with incomplete disciplinary proceedings. This contention has its foundation in, *inter alia*, *Jiba v Minister of Justice*¹³ (Jiba). This authority was decided over a decade ago by the Labour Court which explained when and how a Court may entertain a case arising from an incomplete disciplinary process. As I have pointed out, the intention is the avoidance of piecemeal approach to cases.
- [41] In *Jiba* the Court held that though the it will have jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it will not do so save where exceptional circumstances exist. The court held much the same in an earlier decision in *Lekabe, supra*. The general principle enunciated, as above, was also affirmed by the Court in *Booyesen v Minister of Safety and Security and Others*¹⁴ which restated that intervention in incomplete disciplinary cases was to be discouraged, save in cases where exceptional circumstances may necessitate it.
- [42] Then, recently in *Nkosi v Alfred Duma Local Municipality and Others*¹⁵ the principle that the Court will intervene at interlocutory stages only in exceptional circumstances was again reaffirmed. The Court however went on to consider the nature of the dispute that lay before it and found that it was not merely a question procedural unfairness. It went on to state that:

¹³ *Jiba v Minister of Justice and Constitutional Development and Others* (J167/09) [2009] ZALC 57; (2010) 31 ILJ 112 (LC) ; [2009] 10 BLLR 989 (LC) (19 May 2009) at para 17.

¹⁴ [2011] 1 BLLR 83 (LAC) (1 October 2010).

¹⁵ (D224/2024) [2024] ZALCD 22 (3 July 2024) at para 39.

“[39] ...; the dispute concerned the fundamental legality of the process as a whole. If allowed to run its course, unimpeded by this court’s intervention, Mr Nkosi will be obliged to endure a disciplinary inquiry which has been established, *prima facie*, to be unlawful, and will be further obliged to risk the termination of his services by the Chairperson, the validity of whose appointment is in serious doubt. To require Mr Nkosi to subject himself to such process, by declining to issue the order he seeks at this stage, would be entithetical to the purpose for which this court was established.”

[43] Why should the Applicant in this case have to be subjected to a process the legality of which is being challenged? I have traversed the application and cannot find good reason for it.

[44] The issues out of *Nkosi* are so similar with those that arise in this application. At issue in this case, as I have already pointed out, is the Municipality’s initial decision to subject the Applicant to disciplinary inquiry. The facts are clear that he is also challenging the lawfulness of the appointments of both the evidence leader and the presiding officer.

[45] I find that, on the balance of the facts of this case, the interdictory relief sought by the Applicant is warranted. I am fortified in this regard by what the Court held in *Apleni v President of the Republic of South Africa*¹⁶ where it envisaged protection to the rule of law and the public purse through litigation of this nature, even on urgent basis where urgency requirements may be satisfied.

Costs

[46] Both parties have asked for costs in their favour. Through the default position is that costs follow the result, it is trite that the awarding of costs rests in the discretion of the court. It is a discretion that must be exercised judiciously.

[47] The Applicant has succeeded in two respects. First, in so far as the question of his suspension is concerned. The suspension is uplifted by operation of law. Then, the second success relates to the interdict. In that respect too the Applicant managed

¹⁶ *Apleni v President of the Republic of South Africa and Another* (65757/2017) [2017] ZAGPPHC 656; [2018] 1 All SA 728 (GP) (25 October 2017) at para [10].

to persuade me that he ought to not be subjected to a process the foundation of which raises serious legality questions, which he is challenging.

ORDER

[48] The following order is made:

- [i] It is hereby declared that Applicant's precautionary suspension has lapsed in terms of regulation 6(6)(a) of the Disciplinary Regulations for Senior Managers.
- [ii] The Municipality is ordered to forthwith allow the Applicant to resume his duties as it Municipal Manager.
- [iii] The Municipality is hereby interdicted and restrained from persuing or continuing with the disciplinary proceedings currently underway against the Applicant pending the final determination of the review application in Part B of the Notice of Motion.
- [iv] The Respondents are ordered to pay the costs of this application, jointly and severally the one paying the others to be absolved, which costs shall be calculated on party and party scale B, including the costs of counsel.



M Z MAKOTI

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE**

APPEARANCES:

HEARD ON : 28 MAY 2025
JUDGMENT DELIVERED ON : 02 JUNE 2025

JUDGMENT REVISED ON : 03 JUNE 2025

For the Appellant:

Adv Liversage SC

Adv Marx

JAJ CAN DEN HEEVER ATTORNEYS

HENSTOCK VAN DEN HEEVER ATTORNEYS

For the Respondents:

Adv. M Gwala SC

Instructed by:

KA-MBONANE COOPER ATTORNEYS

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Polokwane