



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 3883/2024

In the matter between:

DR AB XUMA LOCAL MUNICIPALITY

APPLICANT

and

LONWABO DELIHLAZO

FIRST RESPONDENT

KHANYISILE NKELE

SECOND RESPONDENT

BONGANI MNYANDE

THIRD RESPONDENT

NOMBUYISELO STEMELA

FOURTH RESPONDENT

SANDLA MDINGI

FIFTH RESPONDENT

TOBEKA SOGAWULA

SIXTH RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

NOBATANA AJ:

[1] The applicant has applied for leave to appeal the whole of the Judgment of this court delivered on the of 2025 in which the suspension of the respondents was declared to be unlawful.

[2] The grounds on which the applicant's application for leave to appeal is based are that:

- "1. The court erred in finding that the failure to the respondents a pre-suspension hearing rendered the decision to suspend them reviewable;
2. The court ought to have found that:
 - 2.1 employers are no longer required or obligated to give employees an opportunity to make representations prior to a precautionary suspension;
 - 2.2 the right to a hearing prior to a pre-cautionary suspension arises therefore not from the constitution, PAJA or as an implied term of the contract of employment, but is a right located within the provision of the Labour Relations Act, 66 of 1995, the correlative duty on the employers not to subject the employees to unfair labour practices. That being the case, the court ought to have found that, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes regarding those rights
3. In making the declaratory order of unlawfulness of the suspension notice, the court erroneously over-emphasized the failure to afford the respondents a pre-suspension hearing. The court should have given due consideration to the question whether the applicant was in law obligated to afford the respondents a pre- suspension hearing."¹

¹ Applicant's Notice of application for Leave to Appeal.

- [3] During argument of the application for leave to appeal Mr Nzuzo on behalf of the applicant, made the following submissions to substantiate the grounds for leave to appeal, set out in the notice of appeal referred to above.
- [4] In respect to the test for leave to appeal, he stated that the requirements for the granting of leave to appeal have in a long line of cases, been held to be the existence of a reasonable prospects of success on appeal. In this regard he referred the court to the following decisions *R v Baloi 1949 SA 523 at 524*, *R v Nxumalo 1939 AD 590 AD 580 at 582*, *R v Ngubane and others 1945 AD at 187*, *R v Sikosana 1980 (4) SA 559 (A) at 562*. He further submitted that in giving consideration to this application, this court is therefore enjoined by judicial authority to take cognizance of the test that is applicable to applications of this nature.
- [5] This, according to the applicant, necessarily entails that this court should consider the application objectively, and to the extent that human nature allows, not to be influenced by the fact that the same court reached the conclusion that it did in the main proceedings. Judicial authority, so it was further submitted on behalf of the applicant, enjoins the court to reflect dispassionately upon its decision and decide whether there is a reasonable prospect that the appeal court may disagree with its decision (emphasis added).
- [6] It was further submitted on behalf of the applicant, on the question, whether a failure to afford an employee a pre-suspension hearing, renders the suspension reviewable, a court setting aside an invalid administrative act, is concerned with judicial review, and the court has a discretion to grant or withhold the remedy. There are two review pathways for review, a review in terms of Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) "PAJA" and a legality review. If the action sought to be reviewed is an administrative action, PAJA is applicable, and if it is a review in the exercise of a statutory power, then it is a legality review.

- [7] The right to a precautionary suspension hearing, so it was further submitted, was founded in non-compliance with the *audi alteram partem* rule, and constituted administrative action reviewable on administrative law grounds in terms of PAJA. This principle was dealt with in *Muller v Chairman Minister's Council House of Representatives and others* 1992 (2) SA 508 (C) in which it was said, if that were to be the case, so it is submitted, then the employees in the private sector would not have been entitled to such a relief based upon administrative law principles, as the decision to suspend would not constitute administrative action.
- [8] The Constitutional Court in *Chirwa v Transnet and others* [2008] BLLR 97 (CC), according to the applicants, held that labour practices in the public service do not constitute administrative action, and removed administrative action, as a basis for the right to a pre-suspension hearing for public servants. Mr Nzuzo referred the court to a Labour Appeal Court decision in *Member of the Executive Council for Education, Northwest Provincial Government v Errol Randal Grundwell* [2012] 8 BLLR 747 (LAC) in which it was held that “*The right to a hearing prior to a suspension arises therefore not from the constitution, PAJA [Promotion of Administrative Justice Act, No 3 of 2000] or as an implied term of the contract of employment, but it is a right located within the provisions of the Labour Relations Act, the correlative of the duty on employers not to subject employees to unfair labour practices. That being the case, the right is a statutory right for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights*”
- [9] The decision to suspend an employee, it was further submitted on behalf of the applicant, is not an exercise of a statutory power nor is performance of a public function. When a grievance is raised by an employee relating to the conduct of the state, as employer, and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action. Mr Nzuzo further referred the court to the constitutional court in the matter of *Long v South African Breweries (Pty) Ltd and Others* [2018] ZACC 7 in which it was held that when an employer suspends an employee, it is not a

requirement that the employee must be given a hearing prior to the suspension. He submitted that the legal position has now changed, employers are no longer required or obligated to give employees an opportunity to make representations prior to a precautionary suspension. He further referred to a decision in *Malo v South African Local Government and others* (JR327) (2024) ZALCJHB 270 (15 July 2024); and a decision of this division in *Mbude v Premier of the Eastern Cape* [2022]9BLLR 859 (ECB) (3 May 2022) [32]

[10] He accordingly submitted that the court erred in making a declaratory order to the effect that the suspension was unlawful, because a declaratory order is generally an order to resolve a matter where there is a dispute over the existence of some legal right or entitlement. There must be a legal basis upon which the declaratory order in favour of the applicant can be made. It would not be appropriate where one is dealing with events which occurred in the past, such events, if they give rise to a cause of action, would entitle the litigant to an appropriate remedy.

[11] He submitted that the court should have given due consideration of whether the applicant was in law obliged, to afford the respondents a pre suspension hearing. He further submitted on behalf of the applicant that the respondents did not make out a case for a breach of contract because “.....(sic) (*collective agreements*)...are not entirely exclusively contractual in nature, especially when concluded in a bargaining council between employer organisations and trade unions “*Marius Hendricks v Overstrand Municipality* (CA242013 [2014] ZALAC 107 (25 September 2014) accordingly the respondents in their founding papers did not make out a case for a breach of contract.

[12] Mr Madokwe on behalf of the respondents made the following submissions in respect of the applicable test for leave to appeal, he submitted that leave may only be granted where the judge or judges concerned are of the opinion that:

1.1 the appeal would have a reasonable prospect of success; or

1.2 there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration

[13] These requirements are contained in section 17(1)(a) of the Superior Courts Act, 2013 (Act No 11 of 2013). Mr Madokwe, further submitted that the use of the word “would” indicates a measure of certainty, that another court will differ to the court whose judgment is sought to be appealed against. In this regard he relied on the decision in *National Director of Public Prosecutions and others v Democratic Alliance and others (Society for the Protection of our Constitution as amicus curiae)* [2016] JOL 3023 (GP) at para 25.

[14] He stated that with regard to the requirement of some compelling reason, a discrete compelling issue of public importance which will have an effect on future matters, will constitute a compelling reason, see *Minister of Justice and Constitutional Development v South Africa Litigation Centre* 2016 (3) SA 316 SCA at 330 C. He stated that, it is not to say that merely because the court is of the view that an issue is of public importance, it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.

[15] He referred to the court’s decision in *Tacmec Africa v The Minister of Health* (495/11) [2012] ZACA 64 (2 May 2012) the following was said:

“[17] First, the appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus whether or not a court of appeal agrees with the lower court’s reasoning would be of no consequence if the result would remain the same (*Western Johannesburg Rent Board (Pty) Ltd* 1948 (3) SA (A) at 354”

[16] In respect of the applicants grounds of appeal he stated that he intended to make the following submissions:

- 1 submissions regarding the lack of merit and reasonable prospect of success in respect of the pleaded grounds of appeal;
- 2 submissions regarding costs
- 3 conclusion

[17] He submitted that the application for leave to appeal must be dismissed with costs, as it lacks merit and prospect of success, and there is no compelling reason, why the appeal must be heard, for the following reasons:

[18] The appellant contends that the court erred in finding that the failure to afford a pre-suspension hearing rendered the decision to suspend the respondents reviewable. This ground according to Mr Madokwe is a non-stater, and does not go to the heart of the judgment of this court, that is sought to be appealed against by the applicant. The relief sought by the in the notice of motion was a declaration of illegality of the notice of suspension, and not a review of a decision not afforded to the respondents a pre-suspension hearing, whether or not the decision to suspend the respondents was reviewable, was irrelevant in the proceedings, according to Mr Madokwe.

[19] The crucial finding of the court was that, the failure of the applicant to comply with the provisions of clause 16 of the collective agreement, and accordingly the applicants letters of suspension were unlawful and stood to be set aside on the basis that the contravene the principle of legality.

[20] With respect to the second and third ground, he submitted that the judgment cannot be faulted, as the court correctly held that the violation of the respondents right to be heard is a right that emanated from clause 16 of the collective agreement, which is part of the respondents employment contract with the applicant. He relied on the decision in *Biyase v Sisonke Municipality* (2012)33 ILJ para 25, in which it was held that the contravention of the regulations renders a suspension unlawful.

- [21] Mr Madokwe, also made a submission that the notice of suspension in terms of clause 16 of Collective agreement is only valid for a period of 3 months. The three-month period of validity of the suspension notice, expired on or about the 12th November 2024 (as the notice was issued by the applicant on the 12th of August 2024). The hearing of the leave to appeal and the subsequent appeal, if leave to appeal is granted, will be an exercise in futility as the document on which the proceedings are based, is no longer legally valid. The proceedings are accordingly a mere academic exercise, and are devoid of any legal effect. He accordingly submitted that the application for leave to appeal must be dismissed for the above reasons.
- [22] The relief that was sought by the applicant is contained in paragraph 1.2 of the Notice of Motion and is stated as follows “1.2. *The Notice of Suspension served upon the applicants, issued by the respondent on the 12th August 2024 be and is hereby declared unlawful, unconstitutional and/ or null and void...*”. The rest of the relief sought is consequential relief, upon the declaration of invalidity.
- [23] The rationale for the contention by the respondents for the declaration of invalidity of the notice of suspension, is that it does not comply with clause 16 of the collective agreement in terms of which it was issued. The collective agreement in addition to it being part of the contract of employment between the applicant and the respondents, is, according to the decision of the Labour Appeal court relied upon by the applicants in these proceedings, “...*not entirely or exclusively contractual in nature, especially when it is concluded in a bargaining council between an employer’s organization and trade union*”² It has legal force. Its legal force it derived from section 23 of the Labour Relations Act
- [24] In addition, the respondents in the main application, in relation to the remedy they seek in those proceedings, stated quite categorically in paragraph 11.1 of their founding affidavit that that they “...*disavow any reliance on the provisions*

² *Marius Hendricks v Overstrand Municipality* (supra).

of the Labour Relations Act 66 of 1995 (“the LRA”) and any remedy in terms of the LRA”.

[25] It is trite that in an adversarial system like ours the court must decide the case as pleaded, and in application proceedings the notice motion and the affidavits constitute both pleadings and the evidence. I have already summarized the relief sought by the applicants in the main application, the applicant were clear that they did not seek any relief that might be available to them in terms of the Labour Relations Act, and accordingly in terms of the applicable principles, the court was confined to decide the case on the basis of the relief sought, by the respondent in their papers, what the court had to consider was whether the relief was competent, and whether the respondents in those proceedings had made out a case for the relief sought, if the respondents cleared both these hurdles, the court was bound to grant them the relief sought, which I deal with later in this judgement.

[26] The nature of the relief sought by the respondents was a legality review, this much was correctly conceded by Counsel for the applicant, during argument of the present application for leave to appeal. As stated above the respondents approached this court seeking relief that “1.2 *The Notice of Suspension served upon the applicants, issued by the respondent on the 12th August 2024 , be and is hereby declared unlawful, unconstitutional and/ or null and void...*” i.e. they were challenging the lawfulness of the Notice of Suspension, the requirement of Lawfulness was usefully discussed by Fabricius AJ in *Vorster and Another v Department of Economic Development and Tourism, Limpopo Province, and others* 2006 (5) SA 291(T) as follows:

*“[18] Lawfulness is relevant to the exercise of all public power, whether or not the public power constitutes administrative action, Lawfulness depends on the terms of the empowering statute. If the exercise of public power is not sanctioned by the relevant empowering statute, it will be unlawful and invalid, see **Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and others** 2000(2) SA*

674 (CC) (2000 (3) BCLR 241); **Affordable Medicines Trust and others v Minister of Health and Another** 2006(3) SA 247 (CC) (2005 (6)SA311(CC)). According to the provisions of s 6(2) of the Promotion of Administrative Justice Act, the court has the power to judicially review administrative action if the action itself contravenes the law or is unauthorized by the empowering provision. Lawfulness lies at the heart of administrative justice and underpins the whole constitution. It is the fundamental principle of the rule of law. The exercise of public power in whatever form can only be legitimate where it is lawful, and the rule of law, at least to the extent it expresses this principle of legality, is accepted to be a fundamental principle of constitutional law. This is so understood internationally (not necessarily only in South Africa) before the advent of the new constitutional dispensation, and certainly thereafter. See Dicey: **Introduction to a study of the Law of the Constitution** 10 ed (McMillan Press, London, 1959) at 193 art 20(3) of the German Basic Law, for example. The principle is expressly stated in the 1996 Constitution in s 2. In **Fedsure Life Assurance and others v Greater Johannesburg Transitional Metropolitan Council and others** 1999(1) SA374...it was held that central to our constitutional order that the legislature and the executive, in every sphere, are constrained by the principle that they exercise no power and perform no function beyond that conferred upon them by law. The common law principle of ultra vires remain under the new constitutional order, however, in the context of the constitutional principle of legality. In the context of 'administrative action', the principle of legality is enshrined in s 32(1) of the Constitution of 1996"

- [27] It was common cause throughout the proceedings that the collective agreement in addition to it being part of the contract of employment between the applicant and the respondents, is, according to the decision of the Labour Appeal in *Marius Hendricks v Overstrand Municipality* (supra) court relied upon by the applicants in these proceedings, "...not entirely or exclusively contractual in nature, especially when it is concluded in a bargaining council

between an employer's organization and trade union" It has legal force. Its legal force it derived from section 23 of the Labour Relations Act.

[28] The respondent as a local arm of the executive was bound to act within its prescripts in issuing the Notice of Suspension to the applicants. It is not in dispute that the suspension notice did not comply with clause 16 of the collective agreement, and accordingly the notice, stood to be set aside as being unlawful and in contravention of the principle of legality. It is not in dispute that this court had the power to set aside the notice on the grounds of being unlawful. That is the case that was pleaded by the respondents and had to be decided by this court.

[29] In *Fischer v Ramahlele*, 2014(4) SA 614 (SCA) it was held at paragraph 13 of the judgment that

"[13] Turning the to the nature of civil litigation in our adversarial system it is for the parties, either in pleadings or in affidavits, which serve the function of pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our constitution, for it is impermissible for a party to rely on a constitutional ground that was not pleaded. There are cases where the parties may expand on those issues by the way in which they conduct the proceedings, there may also be instances where the court may mero mutu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the provision that no prejudice will be caused to any by it being so decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute, and that dispute alone." (emphasis added)

[30] There is accordingly no merit for the grounds of the application for leave to appeal relied upon in its application for leave to appeal and the submissions made on his behalf in support of the said grounds, the sum total of which

amount to this, that the court ought to have looked beyond the papers filed by the applicant to determine what the real dispute was between the parties, and ought to have decided the case based on that dispute i.e. that the real dispute was the unfairness of the suspension, and that the court ought to have found that the respondents had remedies in the Labour Relations Act, i.e. conciliation and arbitration as part of unfair labour practice in terms of the Labour Relations Act, and that the respondents were no longer in law entitled to a pre-suspension hearing.

[31] The case before court was also not about, the unfairness or otherwise of the suspension and whether the respondents were entitled to a hearing before, the suspension as contended by the applicant. It was about whether the Notice of suspension issued, by the applicant complied with peremptory provisions of section 16 of the collective agreement which had the force of law, and accordingly the decisions of *Chirwa v Transnet and others* [2008]BLLR97 (CC); *Northwest Provincial Government v Errol Randal Grundwell* [2012]8 BLLR 747 (LAC); *Muller v Chairman Minister's Council House of Representatives and others* 1992 (2) SA 508 (C); *Malo v South African Local Government and others* (JR327)(2024) ZALCJHB 270 (15 July 2024); and a decision of this division in *Mbude v Premier of the Eastern Cape* [2022]9BLLR 859 (ECB) (3 May 2022) [32] do not find application, on the facts of the case as pleaded by the respondents.

[32] With respect to the test of the application for leave to appeal, I am in agreement with Mr Madokwe that the test in order for the applicant to succeed in an application for leave to appeal, is that, leave to appeal may only be granted where the judge or judges concerned are of the opinion that:

- 1.2 the appeal would have a reasonable prospect of success; or
- 1.2 there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration

[33] These requirements are contained in section 17(1)(a) of the Superior Courts Act, 2013 (Act No 11 of 2013) “*the Superior Courts Act*”, the use of the word “would” indicates a measure of certainty that another court will differ to the court whose judgment is sought to be appealed against at para 25 in this regard he relied on the decision in *National Director of Public Prosecutions and others v Democratic Alliance and others (Society for the Protection of our Constitution as amicus curiae)* [2016]JOL 3023(GP) at para 25 in which it was stated in respect of the new section 17 (1)(a) of the Superior Courts Act:

“[2] *The Superior Courts Act has raised the bar for the granting of leave to appeal. In Mont Chevaux Trust (IT2012/28 v Goosen & 16 others Bertelsman J held as follows:*

It is clear that the threshold for the granting of leave to appeal against a judgment of a High Court has been raised by the new Act. The former test whether leave should be granted was a reasonable prospect of success that another court might come to a different conclusion...the use of the word ‘would’ on the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against”.

[34] With regard to the second ground of some compelling reason for the appeal to be heard, it has been held that the compelling reason must relate to discrete issue of compelling and public importance, which will have an effect on future matters, that will constitute a compelling reason, see *Minister of Justice and Constitutional Development v South Africa Litigation Centre* 2016 (3) SA 316 SCA at 330 C. It is not to say that merely because the court is of the view that an issue is of public importance, it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. In *Tecmed Africa (Pty) Ltd v Minister of Health and Another* (495/11) [2012] ZASCA 64 (21 May 2012) the following was said:

“[17] First, the appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus whether or not a court of appeal agrees with the lower court’s reasoning would be of no consequence if the result would remain the same (Western Johannesburg Rent Board (Pty) Ltd 1948 (3) SA (A) at 354”

[35] The test for leave to appeal, as alluded by the applicant has been superseded by the provisions of section 17(1) (a) of the Superior Courts Act, which has raised the bar from a mere possibility, to a certainty that another court will find differently from the court whose judgment is being appealed against.

[36] Having regard to what is stated above both in relation to the merits of the application for leave to appeal, and the test for leave to appeal, I am of the view that the application for leave to appeal must fail. The applicant has not made out a case that the appeal would have a reasonable prospect of success, and that there is any compelling reasons why the appeal must be heard, and accordingly the following order will issue:

1. The application for leave to appeal is dismissed with costs.

M. NOBATANA
ACTING JUDGE OF THE HIGH COURT

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Matter heard on

:

28 MAY 2025

Judgment delivered on

:

19 June 2025