IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 332/2024P

In the matter between:

FAITH KABO NENE	APPLICANT
And	
DISTRICT MUNICIPALITY OF ZULULAND	FIRST RESPONDENT
THE MINICIPAL MANAGER OF THE DISTRICT MUNICIPALITY OF ZULULAND	SECOND RESPONDENT
MEC: OF THE DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	THIRD RESPONDENT

JUDGMENT

PITMAN AJ

Introduction and background

[1] I heard argument in this matter yesterday. Due to its nature and effect, I prepared this judgment overnight. The application arises pursuant to orders granted in the applicant's favour by my sister Sibiya J ("the Court a quo") in a written judgement dated 8 April 2024. The applicant had been employed by the first respondent as its Director of Community Services on 1 August 2022. This was in terms of a written employment contract which records, on its first page, that the Municipal Manager of the first respondent, Ronald Ntokoza Hlongwa signed on its behalf *"duly authorised by the Municipal Council"*. It determined, inter alia, that the

term of employment would continue for a fixed period of five years ending on 31 July 2027.

[2] Of particular relevance is the fact that clause 5.2 of the agreement recorded that *"The employer will be entitled to terminate the employee's employment contract for any sufficient reason recognised by law, provided that the employer must comply with its disciplinary code and procedures, in the absence of which the disciplinary code and procedure of the South African Local Government Bargaining Council will apply, as well as in accordance with the Labour Relations Act, 1995."*

[3] On 20 December 2023, one year and four months later, without the first respondent complying with any of the requirements of clause 5.2, the applicant received correspondence from the same Municipal Manager of the first respondent who had signed her contract of employment, informing the applicant, inter alia, as follows:
"Based on the assessment of the MEC for COGTA, it has transpired that your appointment as the Director: Community Services does not comply with both the academic and experience requirements stipulated on the 2014 Regulations on the Appointment and Conditions of Service for Municipal Managers and Senior Managers… In the light of the above, during the meeting held on Thursday, 20 December 2023, Council resolved to terminate your employment contract with immediate effect…"

[4] The applicant took the immediate view that that termination was in violation of clause 5.2 and the next day, through attorneys she had urgently approached for assistance, communicated in writing with the first and second respondents, to the effect that the alleged termination of her employment was done without *"notice or any fair process"*, and that her salary for December was also being unlawfully withheld.

[5] Receiving no response, and not being able to contact her erstwhile attorneys due to the holiday season, the applicant urgently mandated her present firm of attorneys to correspond further with the respondents which they did in writing on 9 January 2024. This letter again recorded that the dismissal of the applicant was a breach of the contractual obligations between her and the first respondent and that

due process had not been followed by the first respondent. It again demanded payment of her December salary. The applicant also requested a copy of the *"assessment"* referred to in the termination letter and threatened litigation and a punitive costs order if not complied with.

[6] Once again there was no response, and the applicant accordingly drafted an urgent application dated 12 January 2024 which was set down for hearing on 23 January 2024. The notice of motion provided relief comprising essentially her reinstatement, payment of her salary and interdicts pending a review of the dismissal decision. The third respondent did not take part in the application. As a matter of convenience, I will refer hereunder to the first and second respondents as "the respondents" unless the context requires otherwise.

[7] That application was opposed. and an answering affidavit, dated 22 January 2020, was delivered. In addition, the respondents delivered a counter application which sought, inter alia, declaratory relief to the effect that the employment contract was null and void and that the decision to employ the applicant be reviewed ("the review application"). For reasons that are not entirely clear to me, the counter application, was sought and issued as an *"urgent"* application under a certificate of urgency signed by an advocate alleging that it was sufficiently urgent to be heard on 23 January 2024. In terms of Rule 6(7), the respondents were entitled to bring the counter-application, if they wished, and it seems to me that the submissions by their legal representatives that it should be treated as an urgent application were superfluous and unnecessary. I can only speculate that it was done in that fashion because the relief sought in the counter application included interim relief. To my mind, however, the labeling of the counter-application as an *"urgent application"* caused confusion to the extent that there may be an argument that the Court a quo ought not to have struck off the roll for want of urgency, as would an application brought *ab initio* where urgency was claimed but not supported by the facts. This issue is not relevant to this application in my view, however.

[8] After argument on 1 March 2024, the Court a quo, on 8 April 2024, found in favour of the applicant and granted the following orders:

1. *The first and second respondents are in breach of the contract of employment dated 1 August 2022 and are directed to pay the applicant her salary for December 2023 and for January to March 2024.*
2. *The first respondent is directed to reinstate the applicant to the position of Director of Community Services within five days of this order.*
3. *The first and second respondents are directed the pay the costs of the application on an attorney and own client scale.*
4. *The counter-application declaring the contract of employment dated 1 August 2022 null and void and reviewing the decision of the Municipal Council to appoint the applicant, is struck from the roll with costs on an attorney and own client scale.*

[9] Against that background, the respondents launched an application for leave to appeal those orders, in a document dated 12 April 2024. That application was argued on 30 April 2024 and in a judgement dated 17 May 2024 the Court a quo refused leave to appeal.

[10] Not happy with that refusal, on 21 May 2024 the respondents launched a petition to the Supreme Court of Appeal. The petition's founding papers are dated 20 May 2024. The whole of the judgment of the Court a quo is sought to be appealed. I make the point at this stage that the petition does not state what order/s would eventually be sought from the SCA on appeal (if leave were given) and the judgment of the Court a quo were to be set aside.

[11] Neither does the respondents' notice of application for leave to appeal in the Court a quo. It seems unlikely that the appeal court, if leave is granted, will be asked to determine the respondents' review counter-application, which was struck from the roll and, for that matter, the significant issue relating to the respondent's submission that the agreement is invalid to the extent that they were entitled to unilaterally terminate it without a self-review application in the face of the applicant's denial that it was invalid.

[12] During argument before me the applicant's attorney submitted that the applicant has not yet prepared the answering affidavit in the review application as she is in the process of attempting to raise funds to do so, having been rendered

impecunious by the respondent's unilateral, and without prior warning, termination of the employment agreement and the unilateral stopping of all salaries to her simultaneously therewith. In the petition, the respondents persist with the submission that there was no obligation on the Municipality to seek a self-review of its appointment of the applicant as, by operation of law, the contract was null and void and that all that was required was that the first respondent unilaterally declare that to be so.

[13] The review application launched by the respondents remains alive. I was advised in argument that the respondents have done nothing to further pursue it.

[14] The applicant launched this application on 24 May 2024, (4 days after the petition was delivered) being then an urgent application for relief provided for in section 18 of the Superior Courts Act, 10 of 2013, ("section 18") in the form of orders directing, inter alia, the immediate implementation of orders 1 and 2 of the Court a quo as set out above, notwithstanding (and pending) the outcome of the petition to the Supreme Court of Appeal (the SCA").

[15] Section 18

The section reads as follows:

"18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4)*(a)* If a court orders otherwise, as contemplated in subsection (1)-

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(b) **'Next highest court'**, for purposes of paragraph *(a)* (ii), means-

(i) a full court of that Division, if the appeal is against a decision of a single judge of the Division; or

(ii) the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division."

[16] The judgment in **KGA Life Limited v Multisure Corporation (Pty) Ltd and others 2023 JDR 0009 (ECMA)** is a useful place to start regarding the law, because it carefully analyses the requirements of section 18, as against the SCA decisions of **University of the Free State v Afriforum 2018 (3) SA 428 (SCA)**, **Premier of the Province of Gauteng v Democratic Alliance [2021] 1 All SA 60 (SCA)**, **Knoop NO v Gupta (Execution) 2021 (3) SA 135 (SCA)**, and **Ntlemeza v Helen Suzman Foundation 2017 (5) SA 402 (SCA)** all of which consider the effect and requirements of this section.

The KGA decision set out in paragraph [42] the following:

"[42] From the SCA judgments the following is evident:

(a) The suspension of a court order pending an appeal is the norm.

(b) An execution order pending an appeal is extraordinary relief for which an applicant have to make out a case on the specific facts in the matter

(c) This requires the applicant, as a first hurdle,

I. to demonstrate that exceptional circumstances exist which warrant departure from the norm, and

II. to prove on a balance of probabilities, that

i. he or she will suffer irreparable harm if the execution order is not granted and

ii. the respondent will not suffer irreparable harm should the execution order be granted.

(d) Failure on the part of the applicant to prove any one of these facts, is fatal to the application.

(e) Facts may be relevant to both the requirements of exceptional circumstances and irreparable harm.

(f) The position as to whether the court retains a discretion to grant the relief and the role of the prospects of success in the exercise of that discretion remains unclear. However, it would seem that the prospects of success on appeal do not take centre stage in the determination of an application for an execution order in terms of section 18(1) and (3) since these were not considered in the cases before the SCA."

[17] As regards the prospects of success of the petition or appeal, the SCA in **University of the Free State v Afriforum 2018 (3) SA 428 (SCA) at paragraph [15],** agreed with the approach of Binns-Ward j in **Minister of Social Development Western Cape v Justice Alliance of South Africa**, (cited by the SCA in this decision as **[2016] ZAWCHC 34**) to the effect that the prospects of success in the appeal remain a relevant factor and that *"the less sanguine a court seized with an application in terms of s 18(3) is about the prospects of the judgment being upheld on appeal, the less inclined it will be to grant the exceptional remedy…."*. The converse should also apply in my view.

[18] The application before me was brought on an urgent basis. Any challenge to urgency was abandoned by Advocate Topping SC for the respondents at the outset of the hearing. I accordingly do not need to consider that issue any further.

[19] In summary, the applicant, in her affidavit, alleges the following exceptional circumstances:

a) From the moment of the unilateral termination of her contract of employment with the first respondent on 20 December she has received no income at all. She did not even receive her salary for that December in respect of which she had worked.

b) As a consequence of not having her salary she cannot pay her monthly creditors, some of them have initiated processes to *"strip"* her of her assets as she is by now in default of various credit agreements. In addition, she states that her life insurance policies which she has had for years have lapsed due

to her inability to maintain the payments. She put up various correspondences in support thereof.

c) She states that her monthly financial obligations of those set out in her initial founding affidavit in the main application and confirms again. She confirmed that she cannot pay them because she has no income.

d) She states that in addition thereto she is responsible for maintaining members of her extended family who rely on her for school fees and general sustenance. She has been unable to assist in financially as a consequence of the conduct of the first respondent.

e) She states that her lack of finances has also resulted in an inability to pay for the legal representatives and that in order to keep their assistance she has had to enter into AOD's with her lawyers.

f) None of these financial difficulties are denied by the respondents.

g) She also challenges the *bona fides* of the respondent's dismissal because she claims it is settled law that the respondents were not permitted to terminate her contract of employment unilaterally and/or without any notice to her and that they were obliged in law to approach the court for a declaratory order and/or review of her appointment before they could simply ignore it as they did.

[20] In argument the applicant's attorney, Mr. Shamase, submitted that additional exceptional circumstance were:

a) The respondents did not have clean hands in relation to these issues because it was well established law that for an entity such as the first respondent to set aside a decision it had taken (in this case the decision to employ her by thereafter dismissing her) it was obliged to launch what has been referred to as a "self-review" application. In support of that submission, he relied upon **Mohlomi v Ventersdorp/Tlokwe Municipality and Another** [2018] 4 BLLR 355 (LC). At paragraph [82] of that judgement the court held *that "it is significant that despite the Systems Act providing for an appointment of a manager been null and void if it is not in compliance with the System Act, it does not follow that the municipality (such as the first Respondent) can simply revoke, ignore or cancel the appointment. If the municipality wants to treat the appointment null and void, then it must approach the Court for an order to that effect".* He argued that section 56(6) of the Systems Act adds to

a conclusion that an approach to court is a necessary prerequisite to the termination of the employment agreement. It reads as follows:

"(6) If a person is appointed to a post referred to in subsection (1) (a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which steps may include an application to a court for a declaratory order on the validity of the appointment or any other legal action against the municipal council."

While this section deals with the obligations of the MEC vis a vis the Municipality, it reaffirms, it was argued, the requirement to get the authority of the Court in circumstances such as these.

b) He argued further that the serious allegations set out hereunder regarding the actual motivation for the dismissal (as referred to below) had not been denied and were accordingly to be accepted as true. Those allegations evidenced a wholly contrived plot to dismiss her unjustifiably. He submitted that this demonstrated further the unclean hands and immoral conduct on behalf of the respondents. These facts, he pointed out, were that the applicant had specifically challenged the real motivation for, and *bona fides* of, her dismissal when she set out in her initial founding affidavit, that in October 2023 she had reported inappropriate sexual conduct and abusive behaviour by the first respondent's Mayor against her. As a consequence, on 12 December 2023 (8 days before her employment was terminated), she had obtained a protection order against him. Immediately thereafter she heard that queries about her employment had been leaked to the press and within days (on 20 December) her employment was terminated. In paragraphs 30 and 31 of her founding affidavit in the main application she stated that after receiving the termination of employment letter on 20 December 2023 she contacted the Municipal Manager, Mr. Ntokozo Hlongwa, who told her that the mayor had told him she would receive her salary if she apologised to him. She also received other *"intelligence"* from a friend that the mayor had indicated that if she apologised to him she would *be "reinstated to her position".* It was argued that because these facts were never denied by the same Ntokozo Hlongwa against whom the allegations were directed, and who deposed to all affidavits herein on behalf of the respondent's, they stood as proved and established the true reason for the dismissal.

[21] As far as irreparable harm in respect of the parties is concerned, it was argued on behalf of the applicant that failure to grant execution of the judgement leaves the applicant in the position of irreparable financial loss for the reasons that have already been set out above. It was argued that the respondents would not suffer any irreparable loss because there was no indication on the papers that she was not doing the job that she was employed to do, properly and fully and that accordingly any compensation pending the determination of the validity of the employment agreement would be entirely justifiable. I pause to add that it is common cause that the applicant has since the start of the contract not given any reason to criticise her performance in the position to which he was appointed.

[22] For the respondents it was argued that section 56(2) of the Local Government: Municipal Systems Act ("the Systems Act") applicable at the time provided that *"a decision to appoint person referred to in subsection (1) (a) (ii)… Is null and void if- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or (b) the appointment was otherwise made in contravention of this act…"*

[23] It was common cause that the applicant was a section 56 appointment, and it was accordingly argued by the respondents that because, as far as the respondents were concerned and had decided by December 2023 that the applicant did not have the qualifications necessary for the job at the time of her appointment in 2022, the contract of employment was null and void and they were simply entitled to unilaterally assert that to be so, thereby immediately terminating the relationship between the first respondent in the applicant and the immediately right to refused to pay her anything further. It was argued that the judgement of the Court quo in ordering the reinstatement of the applicant was ordering an illegality which was not permitted. It was argued further that there was no obligation by the first respondent to self-review the decision to employ the applicant before summarily and unilaterally cancelling it because it was in the respondent's view, null and void *ab initio*. It was also argued that because the agreement was in effect null and void, any terms therein providing for the circumstances as to how the agreement could be terminated were irrelevant and of no force and effect. It was therefore argued that any order by this court ordering the operation the execution of the Court a quo's judgement would

amount to countenancing an illegality, which it was submitted, could not be permitted.

[24] Mr. Topping SC also submitted that permitting her to continue in this *"illegal"* contract would cause irreparable harm to the first respondent as it may incur wasteful and irregular expenditure in paying the applicant which could not be recovered due to her admitted financial problems.

Analysis

[25] In my view, the facts set out above in paragraphs [19] and [20], which facts I accept, constitute sufficiently exceptional circumstances allowing for the operation and execution of the orders of Sibiya J. I am alive to the judgments that have held that the circumstances should be out of the ordinary and of an unusual nature to warrant a departure from the *"norm"* of suspension. In my view they are. I reject the argument by Mr. Topping SC that financial destruction because of a judgment is invariably a possible consequence and therefore quite usual. I have considered the facts herein carefully and holistically. The unilateral conduct of the first respondent has caused the applicant peculiarly and extraordinary financial hardship in my view. They are full set out above. The facts, particularly in relation to the effects of the first respondents conduct on the applicant in this matter are extraordinary.

[26] I cannot agree that continuing paying the applicant for a job she was doing properly (which is not disputed) pending a final determination as to the validity of the employment agreement could practically constitute wasteful and irregular expenditure simply because of the fact that it may later be proved she did not have the correct qualifications. In my view further, the submissions about her lack of funds as a reason for being concerned about recovery if she loses the litigation is incomprehensible and in breach of her rights to be able to defend herself, with lawyers, against what she perceives as unlawful conduct by the first respondent, particularly in circumstances where the first respondent's conduct is the immediate and direct cause of that financial harm in the first place. More particularly that is so where the respondents have not even bothered to move their review of her appointment any further forward.

[27] I appreciate that the bar is set fairly high by section 18, as submitted by Mr. Topping SC. The section determines that proof of the irreparable harm suffered and the fact that the first respondent will not suffer irreparable harm by the applicant, is to be on a balance of probability. In my view, on the basis of the facts set out above, I am of the view that the applicant has discharged that onus.

[28] While the strength of the proposed appeal may only be a small factor to consider, such consideration in my view falls in favour of the applicant. Mr. Topping SC has not been able to refer me to any decisions that support the submission that the first respondents conduct by unilaterally declaring its decision to appoint the applicant to be reversed was permissible. I am not aware of any legal precedent or principle that permits an administrative decision such as the appointment of the applicant, to be reversed unilaterally, even on alleged illegality grounds, when opposed by the individual effected by it, and without the intervention of the Court.

[29] In my view, the decisions I have referred to above have the effect that the first respondent ought to have launched a self-review application first. The applicant would then have been entitled to defend it. Until that application was concluded she would have remained in her position and would have been paid her salary.

[30] The respondents unilaterally subverted that process to the applicant's substantial detriment. In my view a proposed appeal against orders 1 and 2 of the judgment of the Court a quo has little prospects of success.

[31] Mr. Shamase argued that the applicant is entitled to punitive costs in this application as the respondents' opposition is mala fide and obviously without merit. I do not agree that the opposition to this application was frivolous or mala fide.

[32] I accordingly make the following orders.

1. In terms of section 18(1) and (3) of the Superior Courts Act, 10 of 2013, it is directed that the orders of Sibiya J as set out in paragraphs 1 and 2 of her typed order dated 8 April 2024, be and are immediately operational and executable pending the decision and outcome of the first and second

respondents petition for leave to appeal Sibiya J's judgment dated 20 May 2024.

2. The first and second defendants are directed to pay the costs of this application on scale B.

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M. B. PITMAN
ACTING JUDGE OF THE HIGH COURT
PIETERMARITZBURG

CASE INFORMATION

Date reserved: 20 June 2024

Date delivered: 21 June 2024

Appearances

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