REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2596/14

In the matter between:

MOKGELE ERNEST MOJAKI **Applicant**

And

NGAKA MODIRI MOLEMA DISTRICT

MUNICIPALITY **First Respondent**

THE MEMBER OF THE EXECUTIVE COUNCIL:

DEPARTMENT OF LOCAL GOVERNMENT AND

HUMAN SETTLEMENTS OF THE

NORTH WEST PROVINCE **Second Respondent**

KHULU NAIR *N.O* **Third Respondent**

THE CHAIRPERSON OF THE NORTH WEST

PROVINCIAL EXECUTIVE COMMITTEE **Fourth Respondent**

Heard: 30 October 2014

Delivered: 10 November 2014

Summary: Urgent interdict. Regulation 6 of the Municipal Regulations provides a right to a hearing before a suspension of an employee. Illegality of the suspension. Failure to comply with regulation 6 of the Regulations in suspending the municipal manager. Three days' notice instead of seven days regarded as substantial compliance with the regulation in the circumstances of the case. Municipal manager refusing to accept the letter notifying him of the intention to suspend. Failure by the applicant to show that he could not obtain substantial redress in due course. Failure to comply with the provisions of rule of the Rules fatal.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an urgent application in terms of which the applicant seeks an order on the urgent basis declaring his suspension to be invalid, unlawful and of no legal force and effect. The applicant further seeks an order setting aside the suspension and ordering that he be reinstated with immediate effect.

[2] The application is opposed by the second to the fourth respondents.

The parties

[3] The applicant, Mr Mojaki, is the municipal manager of the first respondent appointed in terms of section 54 A (a) of the Local Government: Municipal Systems Act 32 of 2000. The first respondent is a local government and district municipality constituted in terms of section 12 read with section 14 of the Local Government: Municipal Structures Act 117 of 1998. The second respondent is the Member of the Executive Council: Department of Local Government and Traditional Affairs of the North West Province. The first

respondent, Mr Nair is administrator appointed as such by the fourth respondent in terms of section 139 (1) (c) of the Constitution read with section 35 of the Structures Act.

Background facts

[4] There are a number of events that took place prior to the suspension of the applicant commencing on 2 July 2014. On that day, the fourth respondent evoked the provisions of section 139 (1) of the Constitution to dissolve the first respondent. That decision was rescinded on 21 July 2014 upon receipt of the urgent application which had been filed in the North West High Court.

[5] The fourth respondent took another decision to dissolve the municipality in terms of section 139 (1) (c) of the Constitution,[1] on 3 September 2014. In opposition to that decision, the first respondent unsuccessfully challenged that decision on an urgent basis in North West High Court.

[6] It would appear that the reason for the dissolution of the municipality was due to the allegation of failure by the municipality to deliver basic services in compliance with its legislative duties. It is also apparent that it was consequent to this dissolution of the municipality that the third respondent was appointed as the administrator of the municipality.

[7] According to the applicant, subsequent to the appointment of the administrator he received calls and messages from the Head of the Department (HOD) of the second respondent (the department) requesting a meeting with the municipal council. The applicant would not respond to the request unless the request was in writing.

[8] On 29 September 2014, the municipal council convened a meeting where the outcome of the urgent Court application was discussed and amongst others adopted a resolution to ignore the decision to dissolve it by the fourth respondent. The other decision taken by the municipal council was to challenge the decision of the fourth respondent in the Constitutional Court. That challenge is currently pending before the Constitutional Court. The

[1] Section 139 (1) (C) of the Constitution reads as follows:

essence of the challenge is that the decision to dissolve the municipality is both invalid and unlawful.

[9] On 7 October 2014, the applicant was served with a letter from the second respondent which he refused to accept. The letter was served on him whilst standing outside the premises of the municipality after he and other employees were refused access into the premises.

[10] The applicant says that he refused to accept the letter because it was expected of him to accept it whilst he was "locked out" of his office. On the same day, (7 October), the applicant received an sms from the administrator requiring him to report to the office.

[11] During the evening of 7 October 2014, it was reported on SABC television news that, the applicant was required to give reasons why he should not be suspended and that he had 48 hours to give reasons why he should not be suspended.

[12] The following day, 8 October 2014, the applicant addressed a letter to the administrator firstly indicating to him that he (the administrator) did not have the power to suspend him and secondly requesting the copy of the letter of his intention to suspend him. The letter which the applicant addressed to the administrator reads as follows:

> 'The abovementioned matter and your statement made on the SABC News on 7 October 2014 regarding your intended suspension of the Municipal Manager of the Ngaka Modiri Molema District Municipality (hereafter "the NMMDM"), refers. In this regard we reiterate and restate the following:
>
> 1. The NMMDM does not recognise you as the administrator of the NMMDM due to the fact that your "appointment" in the position of administrator emanated from illegal decision taken by the Provincial Executive to institute an intervention in terms of the provisions of section 139 (1) (c) of the Constitutional in the NMMDM on 3 September 2014.

2. The views of the NMMDM in this regard have been the subject of numerous letters exchanged between the NMMDM and the office of the MEC, as well as a review application under case number M390 in the North West High Court and as such we do not intend to reiterate same in detail herein. What should be noted however is the following:

   2.1 The decision taken by the Provincial Executive to institute an intervention in terms of the provisions of section 139 (1) (c) of the Constitution in the NMMDM on 3 September 2014 is illegal and as such null and void *ab initio;*

   2.2 The decision of the provincial executive is further subject to a review application under case number M390 in the North West High Court and as such the matter is *sub iudice;*

   2.3 Due to the fact that the municipal council of the NMMDM has resolved to challenge the above referred decision to dissolve the municipal council of the NMMDM and further fact that the matter is *sub iudice*, the Municipal Manager of the NMMDM still repots to the municipal council of the NMMDM;

   2.4 Your action to attempt to suspend the Municipal manager constitutes a further illegal decision in this matter, which will suffer the same fate as the decision by the provincial Executive taken on 3 September 2014. You do not have the authority to suspend the municipal manager of the NMMDM, as only the municipal council of the NMMDM has the authority to do so.

3. Despite the position held by the NMMDM, as briefly set out above (and dealt with in more detail in numerous other letters addressed to the office of the MEC and in the matter under case number M390/2014) and the NMMDM does not recognise you as the administrator of the NMMDM, we deem it necessary to reply to your "letter of intention to suspend" the Municipal Manager and we herewith request that you forward a copy o the letter to 1571 Tshesebe Close Unit 6 Mmabatho 2735.

4. The NMMDM will respond to your above referred to the letter of intention to suspend subsequent to receiving same.'

[13] The administrator responded with the letter on the same day 8 October 2014 which reads as follows:

> **'UNLAWFUL WITHDRAWAL OF LABOUR BY YOURSELF: NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY**
>
> 1. On Tuesday 30 September 2014 I issued notice giving employees of Ngaka Modiri Molema District Municipality ("the municipality") three days off duty, with full remuneration, while assessing the environment.
>
> 2. You are amongst the people who have not taken access cards recently introduced for the officials of the Municipality. I consider your conduct to be an act of insubordination, coming from a Senior Manager in the institution.
>
> 3. <u>This letter, therefore, serves as an official notification for you to return to official duties without any further delay.</u> You will agree with me that as an official of the Municipality you are required to perform services in order to justify your remuneration at the agreed date of the month. (my underlining)
>
> ....'

[14] In contending that his suspension was unlawful, the applicant relies on the provisions of his employment contract and specifically clause 13 which reads as follows:

> '13.1 The employer may suspend an employee on full pay if he or she is alleged to have committed a serious offence and the employer believe his or her presence at the workplace might jeopardise any investigation into the alleged misconduct or endanger the wellbeing of safety of any person or municipal property; provided that before an employee is suspended as a precautionary measure, he or she must be given an opportunity to make representation on why he or she should not be suspended as prescribed in the Local Government: Disciplinary Regulations For Senior Manager, 2010 and the local Government: Municipal Performance Regulations For Municipal Managers and Managers Directly Accountable To Municipal managers of 1 August 2006.

13.2 The employee who is to be suspended must be notified, in writing, of the reasons for his her suspension simultaneously or at latest within 24 hours after the suspension. The employee has the right to respond within seven (7) working days.

13.3 If an employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within (60) sixty days from the date of suspension, provided that the chairperson of the hearing may extend such period, failing which, the suspension must be terminated in writing and the employee must return to full duty.'

[15] The applicant further relied on the provisions of regulation 6(2) of Local Government: Disciplinary Regulations for Senior managers, promulgated under notice 344 of 21 April 201. Regulation 6(2) of the Regulations gives the municipality the power to suspend a senior manager after giving him or her the opportunity to make written presentation as to why he or she should not be suspended. The senior manager has seven days to make a submission in writing as to why he or she should not be suspended.

Urgency

[16] It was argued on behalf of the second to fourth respondents that instituting the proceedings five days after the suspension was unreasonable and therefore the urgency was self-created. Having regard to the facts and circumstances of this case, I disagree with that proposition.

[17] The other issue relating to urgency has to do with the requirements of rule 8 of the Rules of the Court. In terms of rule 8 the Rules, the applicant in an urgent application must in the founding affidavit provide reasons for urgency and why urgent relief is necessary. Rule 6(2) of the High Court Rules has similar provisions as rule 8 of the Rule of the Labour Court. The requirements of rule 6(12) received attention in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others.*[2] In that case, the Court held that:

'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the

[2] [2012] JOL 28244 (GSJ) at paras 6-7.

circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.'

[18] In the present application, the applicant explains the reason for the urgency and why the need for the urgent relief from paragraphs 61.4 to 16.6 of his founding affidavit in the following terms:

'16.4 I do not know when my disciplinary hearing will take place, but it will only be within three months from 10 to October 2014, in terms of the provisions of regulation 6 (6) (a) of the DRSM. In this regard I submit that it could not be expected of me to wait for the suspension to run its course.

16.5 For the sake of the institutional continuity of the First Respondent [it] is also imperative that the matter be dealt with on an urgent basis. The vacuum occasioned by my unlawful suspension has resulted in a breakdown in the continuity of leadership and the execution of the duties and functions of the municipal manager and accounting officer in the administration of the First Respondent. The detrimental effect which this breakdown has on the administration of the First Respondent and the services delivery of the municipal services to the community is self-evident, if one takes cognisance of the statutory

powers, functions and duties bestowed on a municipal manager and accounting officer.

16.6 For the above referred to reasons the relief requested cannot be obtained in due course and it is therefore imperative to request the court to hear this application as one of urgency and to dispense with the provisions of the rules in as far as the time periods are consent.'

[19] It is not good enough to say that the relief cannot be obtained into course. The averment that the relief cannot be obtained in due course must be substantiated. Failure to substantiate the averment that the relief cannot be obtained in due course may be fatal to the applicant's application.

[20] The applicant averse that he would not be able to obtain the relief into course. It is, however, apparent from the above that the case of the applicant in as far as the reason for urgency and the need for the urgent relief is concerned, has very little to do with his suspension but more with the dissolution of the first respondent by the fourth respondent.

[21] It is thus my view that the applicant has failed to explain the reason why he would not be able to obtain substantial relief in due course. The urgent relief is sought for the purposes of addressing the alleged illegal action of dissolving the first respondent and not the suspension. Put in another way, the applicant has not explained why there is a need for the Court to deal with his suspension in an urgent way and why the substantial redress of the suspension cannot be obtained in due course.

[22] In my view, the applicant has failed to make out a case justifying the Court to dispense with the requirements of the time frames as provided for in the rules and why this matter should be treated as one of urgency. The applicant's application stands to fail for this reason alone.

A clear right

[23] The case of the applicant is based on both the contract of employment and regulations governing the discipline and suspension of senior managers. He contends that the suspension was unlawful because it does not comply with

the provisions of regulation 6 of the Regulations which entitles him to a hearing prior to a suspension.

[24] The focal point of the applicant's case is in fact that he was not afforded the opportunity to respond to the letter calling on him to show cause why he should not be suspended. This is the letter he refused to accept when served on him by two messengers from the administrator's office. The other aspect of the applicant's case is that the letter which the administrator served on him gave him only forty-eight hours' notice to respond and not seven days as provided for in the Regulations. It was in this respect that failure to comply with the seven days requirement was said to be fatal and thus justifying the intervention by the court.

[25] The case of the second to the fourth respondents is that although the forty-eight hours' notice given to the applicant to make his submissions is less than the required seven days by the regulations, there was, however, substantial compliance with the requirements. I am in agreement with the submission based on the authorities below.

[26] The proposition of substantial compliance is based on the approach which was adopted in *Weenen Transitional Council v Van Dyk*,[3] where the Supreme Court of Appeal held that:

> '[13] It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of section 166 of the ordinance is to follow a common sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature is a section from the language, scope and purpose of the enactment as a whole and the statutory the requirement in particular.'

[27] In *Lebo v Maquasi Hills Local Municipality and Others*,[4] the applicant attacked the appointment of the chairperson of the disciplinary hearing as not being in compliance with sub-regulation 5(7) (b) (i) (aa) of the Regulations. The

[3] 2002 (4) SA 653 (SCA) at para 13.
[4] [2012] 4 BLLR 411 (LC).

appointment of the chairperson of the disciplinary hearing in that case was in terms of the regulation supposed to have been made by the Mayor but was instead was made by the municipal manager. In dealing with the issue of non-compliance with the provisions of rule 5(7)(b)(i) (aa), in Lebu matter Lagrange, J observed:

> '... Sub- regulation 5 (7) is drafted in peremptory language, though that is not necessarily determinative of whether non-compliance is fatal to the validity of any action taken.'

[28] The same approach was adopted by the Constitutional Court in *Liebenberg NO and Others v Bergrivier Municipality*,[5] where it was held that:

> '[25] In *African Christian Democratic Party v Electoral Commission and Others*, (footnote omitted) this Court, in the context of assessing a local authority's compliance with municipal electoral legislation, held that "[a] narrowly textual and legalistic approach is to be avoided". (footnote omitted) Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular. (footnote omitted)
>
> [26] Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.'

[29] The object of regulation 6 of the Regulations is to afford an employee a hearing before the decision to suspend him or her is taken. That object is achieved by calling on the employee to show cause why he or she should not be suspended pending an investigation or disciplinary hearing. In the present instance, the applicant was issued with the letter calling on him to show cause within 48 hours' why he should not be suspended. He for reasons totally unsatisfactory and with an attitude that is unbecoming for a senior manager

[5] 2013 (8) BCLR 863 (CC).

refused to accept the letter. His version that he did not read the letter seems farfetched. However, even if that version was to be accepted it was his choice not to read the letter and the administrator cannot be faulted for not affording him the opportunity to make his representation in terms of regulation 6 of the Regulations on that basis. Had he acted as a responsible manager, he may have found that in fact the allegations made against him did not require him more than three days to respond.

[30] The version that seems highly probable and which on the basis of the legal principles should be accepted is that of the administrator. In this respect, the testimony of the two witnesses who served the applicant with the letter is that after handing the letter to him he opened it and after reading it handed it back to them saying that he does not accept such a letter whilst he was not in the municipality. Accepting the version of the administrator means that the applicant was aware before the suspension of the need for him to persuade the administrator not to suspend him. The handing back of the letter to the messengers was nothing but the continuation of defiance and undermining of the authority of the administrator by the applicant. It only dawned on the applicant that the administrator was determined to assert his authority of running the municipality when he watched the news in the evening.

[31] It would appear to me that it makes no difference whether the applicant was given three or seven days to make his submission as to why she should not be suspended. On the facts as appears on his founding affidavit, it is apparent that the submission he would have made would not address the question why he should not be suspended based on the allegations contained in the notice of intention to suspend. His response throughout is that the administrator had no authority over him and that he was not accountable to him. This, in my view, is the likely answer that would have come even if the seven days requirement of the regulation was complied with. The attitude of the applicant is well expressed in the following terms:

> ‘9.8 Until such time as the matter has been decided on by the Constitutional Court, I must report to the municipal council of the First Respondent and implement their instruction, as the Third Respondent

> has no authority as the administrator of the First Respondent due to the fact that the appointment of the Third Respondent, and all his actions, are illegal, invalid and null and void *ab initio."*

[32] In my view, whilst the administrator may be criticised for failing to respond to the applicant when he requested the copy of the letter, this, however, does not detract from the fact that the applicant was made aware of the action which the administrator intended taking and being offered an opportunity to make his presentation which he failed to do.

[33] The forty-eight hours' notice was given in a situation which was on the papers of both parties volatile. The applicant did not assist the situation by refusing to take the letter but be that as it may that is the choice he made.

[34] The allegation that the applicant refused to obey the instructions from the administrator, is in my view very serious taking into account in particular the level of his responsibility and seniority. It is for this reason, that I am of the view that the facts and the circumstances justified the action taken by the administrator to suspend him. In other words, there exists an objectively justifiable basis for the administrator to deny the applicant access to the workplace.

[35] During the hearing, various cases dealing with the issue of the legality of a suspension in particular arising from non-compliance with the provisions of the Regulations and provisions of the employment contract were submitted. I do not deem it necessary to deal with those cases because, in my view, their facts and circumstances are different to those of the present case.

Conclusion

[36] The applicant has failed to show that he could not obtain a substantial relief in due course and for that reason alone his urgent application stands to fail.

[37] It is common cause that the respondents have not complied with the provisions of regulation 6 of the Regulations in suspending the applicant. The applicant was, however, given three days to make his submission. There is no evidence that he could not in the circumstances of this case make his

submission in the three days provided for in the notice. Having regard to the totality of the facts and circumstances of this case and in particular volatility of the situation, I am of the view that there was substantial compliance with regulation 6 of the Regulations.

[38] As concerning the issue of costs, I do not believe it would be fair to allow costs to follow the results.

Order

[39] In the premises, the applicant's application to interdict his suspension by the second to the fourth respondents is dismissed with no order as to costs.

Molahlehi, J

Judge of the Labour Court Johannesburg

Appearances:

For the Applicant: Adv NG Laubsher

Instructed by: Lizel Venter Attorneys

For the Second to the Fourth Respondents: Advocate Mokhari SC with Adv T Ngcukaitobi

Instructed by : Hogan Lovells