IN THE HIGH COURT OF SOUTH AFRICA GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case No: 39460/19

1)REPORTABLE: ~~Yes~~/No

(2)OF INTEREST TO OTHERS JUDGES: ~~Yes~~/No

(3)REVISED

10 December 2019

DATE SIGNATURE

In the matter between: -

MOROASHIKE DAVID MOKOENA — **Applicant**

and

WEST RAND DISTRICT MUNICIPALITY — **First respondent**

THE ACTING MUNICIPAL MANAGER:

WEST RAND DISTRICT MUNICIPALITY — **Second respondent**

THE EXECUTIVE MAYOR:

WEST RAND DISTRICT MUNICIPALITY **Third respondent**

Summery: Urgent application-declaring as unlawful and setting aside suspension of Municipal Manager- Failure by the Municipality to comply with Regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers 2010-Suspension challenged on the grounds of legality and the rule of law- Municipality alleged to have acted unlawfully in suspending the manager. The Applicant failing to satisfy the requirements of Rule 6 (12) of High Courts Rules. Legality and Rule of Law does not automatically render matter urgent. Requirements of urgency need to be satisfied even when urgency is based on failure to comply with the principles of legality

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JUDGMENT

Molahlehi J

Introduction

[1] This is an urgent application in terms of which the Applicant seeks an order declaring his suspension by the Municipality on 31 October 2019 from his duties and functions to be unlawful and invalid. He is further seeking to have the decision set aside and that he be immediately reinstated into his position.

[2] On 28 November 2019 this court made an order dismissing the Applicant's application. That order was erroneously noted as a dismissal of the application. It was not the intention of the court to dismiss the matter as it did not consider the merits of the application but only the issue of urgency. The order as corrected at the end of this judgment is that the application is struck of the roll for lack of urgency with no order as to costs.

[3] In the sphere of local government suspension of senior managers, such as the Applicant, is governed by the Local Government: Disciplinary Regulations for Senior Managers 2010 (the Regulations).

[4] The case of the Applicant is that his suspension by the Municipality was illegal in that it did not comply with the peremptory provisions of regulation 6 of the Regulations. The unlawful conduct arises from failure by the Municipality to comply with the requirements of regulation 6 of the Regulations. This breached the principle of legality and the Rule of Law and thus undermined the Constitution. It also according to the Applicant amount to an abuse of power.

[5] The respondents opposed the application.

The parties

[6] The Applicant is as stated an employee of the first respondent appointed as the municipal manager in terms of the Local Government: Municipal Structures Act, 117 of 1998, as amended ("the Systems Act").

[7] The first respondent is the West Rand District Municipality, a municipality established by the provisions of the Systems Act.

[8] The second respondent is the acting municipal manager appointed as such since the suspension of the Applicant. There is no relief sought against him.

[9] 6. The third respondent is the executive mayor for the Municipality cited as such in his representative capacity.

The background facts

[10] On 1 November 2019, in the morning the Applicant received the letter from the Executive Mayor headed "Notice of Intention to Suspend". The notice was supported by a Municipal Council Resolution of 31 October 2019 ("the Resolution"), in terms of which the Municipal Council resolved:

"1. To place the Applicant on precautionary suspension pending investigation on how he managed the entire process of the recruitment of the CFO,

2 That he had put the Municipality's name in disrepute.

3 To appointing the second respondent as the acting Municipal Manager with immediate effect."

[11] The notice of suspension further called upon the Applicant to make written representations to the Municipal Council within seven days, and show cause why he should not be suspended.

[12] It was further stated in the notice of suspension that the Executive Mayor, has considered the alleged misconduct and that in his view the:

"continued presence(of the applicant) in the municipality may raise criticism or suspicion of you tampering with evidence or influencing witnesses".

[13] It was for the above reasons that the Executive Mayor required the Applicant to vacate the workplace with immediate effect.

[14] Following the above, the Applicant gave instructions to his attorneys of record who addressed the letter to the Municipality requiring it to cease from the alleged unlawful conduct and to uplift the suspension immediately. The Municipality responded to the letter on 4 November 2019 and stated the following:

"We hereby acknowledge receipt of the correspondence sent to the WRDM Executive Mayor via email on Monday, 4 November 2019. We are currently experiencing challenges to retrieve email.

We regret that the Honourable Executive Mayor is currently out of the area on business and that we are therefore unable to respond to your correspondence. The response will be prepared and dispatched as soon as possible."

The issues

[15] The first issue to consider is whether the Applicant has made a case for urgency. Failing which the matter may be struck off the Roll for that reason. If the Applicant was successful in showing urgency, then the issue would be whether the suspension was justified.

[16] The Municipality accepted that it did not follow the provisions of regulation 6 of the Regulations in suspending the Applicant. It, however, contended that it was in the circumstances justified in doing what it did. During the hearing Counsel for the Municipality argued that the Municipality tried to conform to the Regulation as closely as it could and thus there was substantial compliance with the Regulation.

[17] The Applicant contended that the suspension is inherently urgent and deserve to be dealt with on an urgent basis because:

a. it involves a violation of the principle of legality and the rule of law.
b. the conduct involved therein is not in keeping with the proper administration of justice and,
c. the application was instituted to vindicate the rule of law, and to ensure that power is exercised within the confines of the legislation which grants that power.

d. The alleged unlawful conduct will impact on service delivery programmes that are being undertaken.

[18] As stated earlier in this judgment any disciplinary measures sought to be taken against a municipal manager or any other senior manager in the employ of a Municipality, is governed by Regulation 6 which deals explicitly with the issue of precautionary suspensions. The Regulation provides as follows:

"6. Precautionary suspension. -

(1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that—

(a) the presence of the senior manager at the workplace may-

(i) jeopardise any investigation into the alleged misconduct;

(ii) endanger the well-being or safety of any person or municipal property; or

(iii) be detrimental to stability in the Municipality; or

(b) the senior manager may-

(i) interfere with potential witnesses; or

(ii) Commit further acts of misconduct."

[19] The Regulation makes provision for the process to follow before suspending a manager in a municipality. The process set in the Regulation requires that a manager should be given an opportunity to make a written representation to the municipal council why he or she should not be suspended. He or she has seven days with which he or she has to show why he or she should not be placed on precautionary suspension. Regulation 6 further requires that:

"(3) The municipal council must consider any representation submitted to it by the senior manager within seven (7) days.

(4) After having considered the matters set out in sub-regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.

(5) The municipal council must inform—

(a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and

(b) the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven (7) days after such suspension.

(6) (a) If a senior manager is *lis pendend,* a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.

(b) The period of three months referred to in paragraph (a) may not be extended by council."

[20] In the heads of argument Counsel for the Municipality drew a distinction between two forms of suspension- a holding and punitive suspension. He argued that in the case of a holding operation suspension, the process is adopted for purposes of proper administration and thus precedes the rules of natural justice. He in this regard relied on the decision in Koka v Director General: Provincial Administration North West Government,[1] where the Court in dealing with the issue of holding suspension relied on the English case of Lewis v Heffer and Others[2].

[1] [1997] 7 BLLR 874 (LC).
[2] 1978 (3) All ER 354 (CA).

[21] In support of the contention that the Municipality had substantively complied with the provisions of regulation 6, Counsel relied on the decision in Lebo v Maquasi Hills Local Municipality,[3] where the Court held that:

> ". . . Sub- regulation 5(7) is drafted in peremptory language, though that is no necessarily determinative of whether non-compliance is fatal to the validity of any action taken."

[22] Reference was also made to Liebenberg v Electroral Commission and Others,[4] where the Court amongst others said:

> ". . . Therefore the failure by the Municipality to comply with the relevant statutory provisions does not necessarily lead to the action 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."

[23] In response to the allegation by the Applicant that he suffered reputational damage as a result of the decision to suspend him, Counsel for the Municipality referred to another Labour Court judgement of Mosiane v Tlokwe City Council, [5] where it was said:

> "18. The reasons advanced by the Applicant why urgent relief is sought relates to his reputation. This can hardly be a basis to approach this Court for relief on an urgent basis. All employees who get dismissed or suspended and believe that they are innocent, their reputations are tarnished by their dismissals or suspensions. They will eventually get an opportunity to be heard where the

[3] [2012] 4 BLLR 411 (LC).
[44] 2013 (8) BCLR 863 (CC) at paras 25 and 26.
[5] (2009) 30 ILJ 2766 (LC) at para 18.

employer should justify the charges against them. Should they fail to do so, such employees will be reinstated with no loss of benefits. I accept that some damage to their reputations would have been done. This Court however is not in the business of ensuring that an employee's reputation should not be tarnished. If so, it will open the flood gates and this Court will be inundated with many such applications."

URGENCY

[24] The approach to adopt when dealing with an urgent application is governed by the provisions of rule 6(12) of the Uniform Rules of the High Court (the Rules). The Court in terms of that rule has discretionary power to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as he deems feet.

[25] Rule 6 (12) of the Rules further provides that an Applicant in his or her founding affidavit:

"... shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course."

In dealing with the requirements of rule 6 (12) the Court in East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others,[6] 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 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

[6] (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

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."

[26] In addition an explanation has to be proffered as to the Applicant claims that he or she cannot be afforded substantial redress at a hearing in due course.

[27] The fact that an Applicant labels the matter to be urgent does not in terms of rule 6 (12) of the Rules make it urgent. As stated in East Rock Trading 7:

> "The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If however, despite the anxiety of an Applicant, he can be afforded a substantial redress in an application in due course, the application does not qualify to be enrolled and heard as an urgent application."

[28] In support of the contention that matter deserve to be dealt with as urgent the Applicant relied on the judgement in Apleni v President of the Republic of South Africa,[7] wherein, Fabricius J in dealing with the issue of urgency in a matter involving legality and the Rule of Law held that:

> ". . . Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the Rule of Law, and may have a

[7] [2018] 1 All SA 728 (GP).

detrimental impact upon the public purse, the relevant relief sought ought normally be urgently considered."

[29] In Moyane v Ramaphosa and Others,[8] Fabricius J, in applying the test for urgency refused to grant the Applicant an urgent relief. In that matter, the Applicant challenged the decision by President, Ramaphosa relating, initially to his suspension and later his dismissal. The challenge was on the grounds of legality, unlawfulness and unconstitutional conduct on the part of the President. The relief sought was on the basis that:

"... the matter was inherently urgent and was of such great importance, that it might have a severe economic impact which could literally touch every inhabitant in South Africa."

[30] In dealing with the issue of urgency, Fabricius J held that:

"The mere allegation that constitutional rights are infringed does not render the matter urgent. See: ***Hotz and Others v University of Cape Town 2018 (1) SA 369 (CC) at par. 15***. In any event, Applicant has not set forth at all, or explicitly, why he claims he cannot be afforded substantial redress at a hearing in due course. This is an absolute requirement in urgent applications . . . It is normally a factor which would justify the striking off the Roll of the whole application."

Analysis

[31] In my view, the facts in this matter are distinguishable from those in Apleni. The Court, in that case, dealt with the exercise of power to suspend by the person who did not have such power. After indicating that it could not make a finding concerning the

[8] (82287/2018) [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP) (11 December 2018).

disputed facts in the matter, the Court made the following finding concerning the power of the Minister to suspend the Applicant:

> "7 The point of law is that the Second Respondent has no power to suspend him from his position as Director-General. Only the First Respondent (referring to the President) can do so. Ministers do not appoint Directors-General as Cabinet makes these appointments. Ministers therefore also do not have the powers to suspend, implied or otherwise. These powers are vested in the President."

[32] It is clear that the Minister of Home Affairs in suspending the Director-General exercised powers she never had. The Director-General was appointed by President Zuma who never delegated any powers to the Minister to suspend him.

[33] The Applicant in his founding affidavit deals with the first of the provisions of rule 6 (12) of the Rules. He, in this respect, asserts why he believes that his application is urgent. He does not deal with the latter aspect of the rule, which requires that he should provide reasons why he could not be afforded substantial redress at a hearing in due course. As stated above in East Rock Trading, urgency is not there for the taking. It is not sufficient for an applicant to make an averment that he or she will not obtain substantial redress in due course. The Applicant should have taken the Court into his confidence and substantiate the averment that he will not be able to obtain substantial redress in due course. Put in another way; it is not sufficient to label a matter as being urgent. In a matter such as the present, it seems reasonable to expect the Applicant to have dealt with why the remedies provided for the Labour Relations Act would not provide him with redress in due course.

[34] It was in light of the circumstances as mentioned earlier and in particular having regard to the failure by the Applicant to satisfy the requirement of urgency that the

matter was struck of the Roll. However, in the circumstances of this matter I do not belief that costs should be allowed to follow the outcome.

Order

[35] In the premises, the Applicant's application is struck off the Roll for lack of urgency with no order as to costs.

E Molahlehi

Judge of the High Court;

Johannesburg

Representation:

For the Applicant:

Instructed by: Nozuko Nxusani Incorporated

For the Respondent: Adv J Nel

Instructed by: Lizel Venter Attorneys

Order made: 28 November 2019

Reasons made:10 December 2019.