IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NO: J230/08

In the matter between:

JACOB THEMBA DLADLA **APPLICANT**

and

COUNCIL OF MBOMBELA LOCAL MUNICIPALITY **1st RESPONDENT**

MBOMBELA LOCAL MUNICIPALITY **2nd RESPONDENT**

JUDGEMENT

AC BASSON, J

1] The Applicant Mr. Dladla, the Muniscipal Manager of the 2nd Respondent, brought an urgent application on Friday 8 February 2008

for an order in the following terms:

1.1 Declaring unlawful and therefore null and void a resolution taken by the First Respondent – the Council of Mbombela Local Municipality (hereinafter referred to as "the Council") on 31 January 2008 in terms of which the Applicant's special leave in terms of council resolution 4/7/3 dated 21 November 2007 is extended.

1.2 Declaring unlawful and therefore null and void council's resolution 4/7/3 dated 21 November 2007 in terms of which the Applicant was placed on special leave effective 22 November 2007 to 31 January 2008.

1.3 Declaring unlawful the Respondents' refusal to allow the Applicant to perform his duties and access to his office as the Municipal Manager in terms of his employment contract.

1.4 Permitting the Applicant to resume his duties as Municipal Manager with immediate effect.

2] The application came before my learned brother Cele, J on Friday 8 February 2008. The matter was postponed to the following week's urgent roll. When the matter came before me on Tuesday 13 February 2008, the Applicant was no longer on "*special leave*" but was placed, by the council, on "*suspension*" in terms of clause 9 of his contract of service. The decision to place the Applicant on suspension was taken by Council at a special meeting on 11 February 2008. The decision to suspend the Applicant in terms of his contract of service was thus taken *after* the urgent application was before my learned brother Cele, J on Friday 8 February 2008 (and postponed to 13 February 2008), but before the matter was argued before me on 13 February 2008.

3] When the matter came before me on 13 February 2008, the *causa* for the urgent application, namely the alleged unlawful decision to place the Applicant on "*special leave*", had fallen away and had been overtaken by the council resolution dated 11 February 2008 which now "*suspended*" the Applicant in terms of clause 9 of his contract of employment. The only matter that therefore remains to be decided by this Court is the issue of costs. Before turning to the merits of the only application now before this Court, it is necessary to give a very brief overview of the events which culminated in this urgent application.

Brief exposition of the events that led to this application

4] The Respondents explain in their supplementary answering affidavit that the Applicant, as the accounting officer of the Municipality in terms of section 55(2) of the Systems Act no 32 of 2000, is responsible and accountable for all income and expenditure of the Municipality and all assets and is responsible and accountable for the discharge of all liabilities of the Municipality and proper and diligent compliance with the Municipal Finance Management Act, 2003. The Respondents aver that they have firm reason to believe that the Applicant has since the inception of his appointment, failed to carry out his duties both as head of administration of the Municipality and as the accounting officer of the Municipality. These concerns became acute in during 2007 when it became apparent (according to the Respondents) that the Applicant's actions have compromised the ability of the Municipality to provide for an efficient, effective and transparent local administration which conforms to constitutional principles and which is financially and economically viable. As a result of the aforementioned concerns, the Council duly constituted a meeting on 24 October 2007 and resolved by council resolution that an independent service provider be

appointed to investigate the conduct of the Municipal Manager on various grounds including the Applicant's failure to implement council resolutions; defiance of council resolutions; alleged manipulation of tenders in relations to awarding thereof and the appointment of contractors; victimization and harassment of council employees; failure to comply with sections of the Municipal Systems Act and the Municipal Structures Act, 117 of 1998; non-utilization of managers, especially senior management staff accountable to the Municipal Manager in terms of the Systems Act and the Structures Act; deliberate ignorance in advising the Council on matters which has a significant bearing on financial matters of the Municipality; failure to represent the Municipality on matters related to labour disputes i.e. the CCMA; non-disclose to council of information, e.g. the proposal by the Bushbuckridge Local Municipality to incorporate Hazyview into their area of jurisdiction; failure to recognize the Executive Mayor, Executive Managers and Political Heads by not notifying them on matter which have a potential legal implication for Council e.g. the suspension of Mr. Lawrence Mabasa (Senior Manager PMU). The failure on the part of the Applicant to properly carry out his duties as Municipal Manager in the period prior to and leading up to the aforementioned resolution had a deleterious effect on the smooth and

effective functioning of the Municipality. This problem is confirmed in a letter from the MEC Local Government and Housing of Mpumalanga dated 14 December 2007 in which the MEC calls on the Council to show cause why it should not be placed under administration.

5] The person appointed to carry out the investigation is a certain Mr. Nkosi (hereinafter "Nkosi") of an attorney's firm in Nelspruit. Nkosi's preliminary report that served before the Council on 21 November 2008 stated that various instances of serious misconduct on the part of the Applicant were found and, if correct, could justify his dismissal from the Municipality. Nkosi's preliminary report further sets out, *inter alia*, evidence of past and continuing conduct of the Applicant that hampers, prevents and undermines the Council's ability to perform its obligations in terms of the Systems Act and its mandate of development and service delivery in respect of the area under its jurisdiction. Nkosi's also informed the Council that the failure of the Applicant to implement Council resolutions had a fundamentally deleterious effect of the workings of the Council. Nkosi also informed the Council that he was of the opinion that an uninhibited investigating of the Applicant's conduct would not be possible while the Applicant continued to be present at the municipal offices in his capacity as

Municipal Manager.

6] On 21 November 2008, Council was thus provided with information and *prima facie* evidence to the effect that the Applicant's conduct and execution of his duties had caused serious harm to the operations and the image of the Respondents and, if the Applicant was allowed to continue in similar manner, would cause further harm to the Respondents. In order to put a stop to the continuing harm, Council decided that it was necessary to remove the Applicant from the workplace immediately. Against this background the Applicant was put on "*special leave*" with full pay on 22 November 2007. This was done in accordance with the Applicant's contract of service which provides, *inter alia*, that –

> "8.4 The Municipality may grant the Municipal Manager special leave with pay for a reasonable number of working days… by decision of Municipal Council:"

The special leave was to endure until 31 January 2008 by which time Nkosi's investigation and special report was expected to be complete. *Clause 8.4* is a sub clause of the general clause which regulates the

Applicant's leave: *Clause 8.1* deals with annual leave, *clause 8.2* with sick leave, *and clause 8.3* with family responsibility leave. *Clause 8.4* deals with special leave.

7] In a letter to the Applicant, dated 22 November 2007, the Applicant was not only advised by the Executive Mayor of the Respondents that he was placed on "*special leave*", he was also advised not to report for duty and not to interact with any Council employees or officials, councilors or any departments which deal with the Council. The Applicant responded to this letter in a letter of even date. In this letter the Executive Mayor was specifically advised that the attempt to place the Applicant on special leave was not in accordance with his contract of service. The Applicant further specifically advised Council that:

> "3) If it is the intention of the Municipality to suspend me, the suspension must be in accordance with my Contract of Employment and the South African Local Government Bargaining Council Collective Agreement as well as applicable legislation."

8] The expanded preliminary report of Nkosi was made available to the Council and served before the Council's meeting on 31 January 2008.

From this report it appears that substantial work still had to be carried out in relation to the investigation into the Applicant's conduct and the report itself. At this meeting it was decided to extend the Applicant's special leave until 15 March 2008. The resolution further removed the Applicant's entire authority to act on behalf of the Municipality.

9] On 11 February 2008 (two days before the urgent application again served before this Court), a further resolution was placed at a special meeting of the Council in terms of which the Applicant was placed on suspension with full pay and with retention of all benefits *(see also paragraph [2] supra).* The "*suspension*" was effected in terms of clause 9 of this contract of service which reads as follows:

> ***9. Precautionary suspension***
>
> *9.1 The Municipality may suspend the Municipality Manager on full pay if it is alleged that he has committed a serious misconduct and the Municipality in its sole and absolute discretion believes the presence of the Municipal Manager may jeopardize any investigations.*
>
> *9.2 The Municipal Manager shall in view of clause 9.1 above, be notified in writing of his suspension, and shall be*

entitled to respond to the allegations within 7 (seven) working days.

9.3 If the Municipality suspends the Municipal Manager as above then a disciplinary hearing must be held with in 90 (ninety) days."

PRESENT APPLICATION

10] The Applicant argued that the resolutions by Council dated 21 November 2007 and 31 January 2008 in terms of which the Applicant was placed on "*special leave*", was unlawful. It was further argued that by doing so, Council effectively placed the Applicant on suspension unlawfully purporting to act in terms of clause 8.4 of the employment contract and in breach of the clear provisions of clause 9 of the employment contract which provides specifically for preventative suspensions. It further argued on the strength of a letter dated 1 February 2008 from the Respondents' attorneys addressed to the Applicant and the resolution that, *de facto*, the Applicant has been placed on suspension contrary to the provisions of *clause 9* of the contract of service. In the letter dated 1 February 2008, the Applicant was advised that he was not to visit the premises of the Municipality during his period of special leave. Council on behalf of the Applicant also referred to Court to paragraph 67.5 of the Respondents'

supplementary answering affidavit where the following is stated:

> "*The Council, for the reasons already mentioned, chose to characterize its actions as granting the applicant special leave. A further motivation for this characterization is that the Council did not want the applicant's name and reputation to be publicly tainted by his being "suspended". If, however, the honorable court finds that the Council's action could not be regarded a special leave in terms of clause 8 of the applicant's contract of employment, it still does not equate to the applicant's being instructed not to attend at the office being unlawful. In the circumstances that pertained to the applicant [sic] was quite entitled to suspend the applicant on full pay pending finalisation of the investigation into his conduct."*

11] It was pointed out on behalf of the Applicant that, in terms of clause 9.1 of the contract of service, the Municipal Manager may be suspended on full pay if it is alleged that he has committed a serious misconduct and the municipality may do so in its sole and absolute discretion where it believes that the presence of the municipal manager may jeopardize any investigation. In terms of *clause 9.2* of the suspension clause, the Municipal Manager shall be notified in

writing of his suspension and he shall be entitled to respond to the allegations within 7 working days. In terms of clause 9.3 a disciplinary hearing must be held within 90 days of the date of the suspension.

12] On behalf of the Applicant it was argued that, because there was no compliance with any of the provisions of clause 9, the Council could not lawfully pass a resolution purportedly in terms of clause 8.4 of the agreement because the Municipal manager did not ask to be placed on special leave and therefore did not consent to the special leave, nor was he given an opportunity to make representation as to why he should be placed on special leave.

13] I am in agreement with the submission on behalf of the Applicant that, *prima facie*, it would appear that the special leave clause was used to *de facto* suspend the Applicant pending the outcome of the investigation. The placement on suspension had all the elements of a *de facto* precautionary suspension: Firstly, the Applicant was placed on "*special leave*" in order to remove him from the premises of the Respondents pending the outcome of the investigation. Secondly, the Applicant was specifically instructed by Council (in the letter from its attorneys dated 1 February 2007) not to visit the premises of the

Respondents. Thirdly, by the time the first resolution was taken on 22 November 2007, Nkosi had already concluded in his preliminary report (in terms of which *prima facie* evidence was presented to the Council that the Applicant's conduct and execution of his duties had caused serious harm to the operations and image of the Respondents) that if he (the Applicant) was allowed to continue in similar manner, further harm would be caused by the Respondent.

14] The Council had, in my view, in light of the preliminary report compiled by Nkosi and presented to the Council on 22 November 2006, ample justification and reason to suspend the Applicant with full pay provided that the procedures were followed as provided for in clause 9 of the contract of service. Instead the Council decided, contrary to the contract of service, to place the Applicant on special leave. The conditions of the special leave as well as the rationale for the special leave had all the elements of a precautionary suspension. By doing so, the Respondents acted, at least on a *prima facie* basis, contrary to the provisions of the Applicant's contract of service. I have taken note of the argument advanced on behalf of the Respondents (and encapsulated in paragraph 67.5 quoted *supra*) namely that the Respondents did not want to taint the Applicant's name by suspending

him and that the Respondents, in any event, had ample reason to suspend the Applicant pending the finalization of the investigation into his conduct. I am of the view that this submission misses the point: Firstly, the Respondent is a signatory to a contract which expressly affords it the *right* to suspend the Municipality if it is alleged that he has committed a serious misconduct. At the time when the Applicant was placed on special leave, such evidence was already available to the Council. The Council therefore had the right to suspend the Applicant. Secondly, the Applicant has certain rights in terms of the precautionary suspension clause and that is firstly to be informed in writing of the suspension and secondly to be afforded an opportunity to respond. It is trite in our law that a suspension must be fair. These points were completely ignored by the Respondent. In the present case the Applicant was *de facto* suspended but under the guise of a special leave provision. (See in this regard *Salojee v McKensie NO and* Others (2005) 3 BLLR 285 (LC) where the Court *inter alia* found that placing an employee on special leave pending transfer for disciplinary reasons effectively constituted a suspension.)The resolution was therefore, in my view unlawful and taken for an unlawful purpose. This conclusion is reinforced by the subsequent actions by the Council and the resolution taken on 11 February 2008:

If the special leave which was intended to serve as a suspension was not unlawful, there would have been no need for the Respondents to convene an urgent special meeting for purposes of suspending the Applicant in terms of clause 9 of the contract of service – a step which they should have taken in the first place. I am in agreement with the submission on behalf of the Applicant that the resolution of 11 February 2008 is a tacit acknowledgement by the Respondents of the Applicant's rights to challenge the resolutions in Court. In conclusion: Employers must act in terms of their own disciplinary codes in disciplining employees. Similarly, where a contract of employment provides for a procedure in terms of which an employee may be suspended, the employer should act in terms of that provision. See *University of the North and Others v Ralebipi and Others* (2003) 11 *BLLR* 1120 (LAC) where the Court held that the suspension of the employees in question breached their new employment contracts and ordered that it be set aside. In *Popcru & Others v Minister of Correctional Services & Others* [2006] 4 BLLR 385 (E) the Court held that an employer is not entitled to deviate from the disciplinary code because it is binding. In *SAPU & Another v Minister of Safety and Security and Another* (2005) 5 BLLR 490 (LC) the Court likewise held that a suspension was unlawful because it was done in contravention

of applicable codes in respect of discipline.

Is the Applicant entitled to costs in respect of this urgent application?

15] The award of costs is a matter which falls wholly within the discretion of the Court. In coming to a conclusion, the circumstances of the particular case should be taken into consideration including but not limited to the conduct of the parties which may have a bearing on the question of costs. In labour matter there are further considerations that will be taken into account such as the fact that there is an ongoing relationship between the disputing parties and the fact that a cost order may strain future labour relations between the parties. The latter will typically be relevant where one of the disputing parties is a trade union who represents members in the employ of the employer (the other disputing party). Where a party is successful, a disputing party would generally be entitled to costs. I have already alluded to the fact that I am of the view that the Applicant would have been successful had the application to interdict proceeded on the merits. In light of this fact, the Applicant would have been entitled to an appropriate cost order. The merits of the application was, however, not argued for the reasons set out above. There is, however, a more compelling

argument why costs should be awarded in favour of the Applicant: Because the resistance to the claim was effectively withdrawn when the resolution (on 11 February 2008) was taken to suspend the Applicant in terms of clause 9 of the contract of service, the need to seek an interdict fell away. Support of this proposition is to be found in CB Prest *The Law and Practice of Interdicts* (1993) at page 365 and the decisions in *Lensvelt & Co Ltd v Goodman & Hughes* 1917 EDL 286 and *Society for the Prevention of Cruelty to Animals NO, WO 916 (Bloemfontein) v De Swart & Others* 1969 (1) SA 655 (O).

16] On behalf of the Applicant it was argued that although the resolution of 11 February 2008 in terms of which the Applicant was suspended in terms of clause 9 of the contract of service, effectively rendered the application before this Court obsolete, that does not mean that this exonerated the Respondents from paying the costs of this application. It was further argued that there is no reason why the Applicant should not be awarded costs on attorney and client scale.

17] I am in agreement with this submission: The Applicant had advised the Respondent as far back as 22 November 2007 (which is the date of his suspension) that the Council had no legal basis to suspend him in

terms of clause 8.3 of his contract of service and that the Council had to suspend him in terms of clause 9 of his contract of service if it so wished. This the Council eventually only did on 11 February 2008.

18] In the event, I am of the view that a cost order should in principle be made against the Respondents. In respect of the scale of the cost order, I am of the view that the circumstances of this case warrant a special cost order. The Respondents had ample opportunity to correctly suspend the Applicant. When the special resolution was taken on 11 February 2008, the Applicant had already incurred considerable legal costs in bringing an urgent application to declare the resolutions dated 22 November 2006 and 31 January 2008 unlawful. The matter was, at that time already before this Court and was about to proceed on the merits on the 13th of February 2008.

19] The following order is made: The Respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved on an attorney client scale including the costs of two counsel.

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AC BASSON, J

Date of application: 13 February 2008

Date of judgment: 25 February 2008
For the Applicant:

P Pretorius SC and Adv WR Mokhare

Instructed by: Werksmans

For the Respondent:
SG Barrie SC and PA Buirski

Instructed by: Cliffe Dekker Inc