REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 431/12

In the matter between:

LOUIS NOTHNAGEL	**Applicant**
and	
KAROO HOOGLAND MUNICIPALITY	**First Respondent**
JAN PETRUS JULIES	**Second Respondent**
ERNEST SAAYMAN	**Third Respondent**

Heard: **8 June 2012**

Delivered: **11 June 2012**

Summary: Suspension of senior municipal employee – urgent interdict – disciplinary regulations for senior managers – *Lebu v Maquassie Hills Municipality* and *Biyase v Sisonke District municipality* followed.

JUDGMENT

STEENKAMP J

Introduction

1] This is yet another one of those cases where it appears that an internal political squabble between a former municipal manager, on the one hand, and a newly elected mayor and newly appointed municipal manager, on the other hand, may well be at the heart of the dispute. On the face of it, though, the applicant (a senior municipal employee and a former municipal manager) has been suspended pending a disciplinary hearing concerning allegations of financial irregularities. Whether those allegations have any basis, is not for this court to decide. That is for another forum and another time. What is before this court today, is an urgent application to uplift the suspension. Either way, the ratepayers of Williston, Fraserburg and Sutherland will have to foot the bill to a greater or lesser extent. Whether that is a prudent way to spend the meagre resources of a small municipality, is not for this court to decide either.

Background facts

2] The applicant was suspended, purportedly in terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010[1] ("the regulations") on 22 May 2012. He has brought an urgent application to have that suspension set aside on the basis that it is unlawful. He disavows any reliance on an unfair labour practice contemplated by s 186(2)(b) of the Labour Relations Act.[2] Instead, he founds his claim in administrative law and the alleged non-compliance with the regulations issued in terms of the Systems Act.

3] The Karoo Hoogland Municipality is a municipality within the meaning of s 2 of the Systems Act. It operates from the small town of Williston in the Northern Cape. Its geographic area comprises the districts of Williston,

1 Issued in terms of s 120 of the Local Government: Municipal Systems Act, Act No 32 of 2000 ("the Systems Act") and published as Government Notice No 344 in *Government Gazette* No 34213, 21 April 2011.

2 Act 66 of 1995 ("the LRA").

Fraserburg and Sutherland.

4] The applicant has been employed in local government for some 17 years. He is currently the Director: Corporate Services of the Municipality. He served as its municipal manager in terms of s 57 of the Systems Act from June 2009 until October 2011, whereafter he reverted to his post of Director: Corporate Services.

5] The third respondent (Saayman) was appointed as municipal manager at the end of 2011. His appointment appears to have been controversial, as he obtained the lowest scores in an evaluation of six shortlisted candidates. It is not part of the dispute before me to decide whether Saayman's appointment was a proper one.

6] The second respondent (Julies) is the incumbent mayor. He assumed the post in January 2012. During the first meeting of the municipal council of his tenure, allegations of the irregular payment of performance bonuses and honoraria were discussed. This much is common cause. The applicant alleges that, at the meeting of 12 January 2012, the mayor threatened to suspend him. Saayman (the municipal manager) denies this in his answering affidavit and points out that the applicant was not at that meeting; however, instead of placing the full facts before the court by way of a minute of the meeting, Saayman (apparently on behalf of all three respondents) merely "put the applicant to the proof" of what happened at the meeting.

7] On 13 January 2012, after having been informed of what had allegedly transpired at the council meeting, the applicant addressed an internal memorandum to the municipal manager and council members with the heading, "Beweerde skorsing." He referred to an sms that he had sent out on the day of the meeting in which he had said, *inter alia*:

> "Ek bring dit onder u aandag dat ek vanmiddag verneem het dat ek klaarblyklik [sic] geskors gaan word... die geloofwaardigheid van die gerug word bevraagteken, maar ek bring dit tog onder u aandag want ek het

reeds by 2 vorige geleenthede aan u genoem dat daar sulke beweringe is... ek vertrou dat u my belange in hierdie verband sal beskerm sou dit blyk waar te wees".

He continued:

"Ek bring dit verder ook onder u aandag dat ek vanoggend (13 Januarie 2012) weer van die beweerde skorsing verneem het en wel by monde van 'n Raadslid. Ek begin ongelukkig vermoed dat daar wel warhead in die gerug mag wees en plaas derhalwe die volgende op rekord:

Skorsing van 'n werknemer impliseer beweerde (ernstige) wangedrag. Ek was by geen wangedrag betrokke nie.

Ek het nog nooit enige kennis van enige beweerde wangedrag van u of die Raad ontvang nie, nog is enige beweerde optrede of gebrekkige prestasie deur mself, deur u of die Raad onder my aandag gebring."

8] He received no response and addressed a further memorandum to the municipal manager and council members. He pointed out that, in terms of the Systems Act, the council had to establish an equal, fair, open and non-discriminatory work environment. He expressed the opinion that he is being victimised and complained of unfair treatment. Still he received no response.

9] The next significant moment in the saga was on 17 February 2012. An article appeared in a newspaper, the *Diamond Fields Advertiser*, quoting Saayman as saying that "previous councils" had mismanaged funds, employed "cronies" for which there was no financial planning, gave contracts to friends and made irregular appointments of senior managers that were not in accordance with section 57 of the Systems Act. The mayor, Julies, said that this was "only the tip of the iceberg of gross mismanagement".

10] As the previous municipal manager, the applicant took the view that these allegations reflected on his tenure. He and the Chief Financial Officer, MK Botha, wrote a letter to Julies and Saayman on 22 February 2012, quoting from the article. They continued:

> "Graag word dit pertinent onder u aandag gebring dat, met die mees onlangse gerugte van beweerde optrede teen ons as Senior Bestuur, tesame met die voorgemelde ernstige aantygings, daar 'n doelbewuste heksejag aan die gang is teen ons."

They reserved their rights.

11] The applicant was also made aware of an extract from the minute of a special council meeting of 12 January 2012. The extract from that minute was to be tabled at the council meeting of 6 March 2012 and read as follows:

> "Besluit dat:
>
> die regsdienste van advokaat Charlton Rex gebruik kan word om 'n opinie in te win rakende aangeleenthede in die Munisipaliteit>"

12] Adv Rex was the respondents' counsel in these proceedings. It appears that the council paid him a fee of R62 500, 00 on an invoice dated 1 February 2012. According to the applicant, no proof was submitted to the council that Adv Rex actually presented it with an opinion or other legal advice. This was not denied in the respondents' answering affidavit.

13] Saayman appointed the applicant as acting municipal manager in terms of s 59 of the Systems Act in his absence for the periods 28 March – 2 April and 10 – 13 April 2012.

14] On 4 May 2012 Saayman informed the applicant of the Municipality's intention to suspend him in terms of regulation 6. Saayman informed him that the following allegations of serious misconduct against him would be investigated:

> "1. Financial misconduct – you contravened section 172(2) of the Municipal Finance Management Act 56 of 2003 in that you contravened and/or failed to comply with a condition of the delegated power of authority and also contravention of regulation 32 of the Local Government Performance Regulations for Municipal Managers and managers directly accountable to Municipal Managers when you deliberately and intentionally awarded to yourself a performance bonus without following prescribed procedures.

2. Financial misconduct you contravened [*sic*] section 172(2) of the Municipal Finance Management Act 56 of 2003 in that you contravened and/or failed to comply with a condition of the delegated power of authority and also contravention of regulation 32 of the Local Government Performance Regulations for Municipal Managers and managers directly accountable to Municipal Managers when you deliberately and intentionally awarded to yourself an 'duplicate' honorarium whilst acting as Municipal Manager.

3. Prejudicing the administration, discipline or efficiency of the Municipality.

4. Contravention of the Code of Conduct for municipal staff members."

15] The letter went on to state:

"The Municipal Council has reason to believe that your presence at the workplace may jeopardise any investigation into the alleged misconduct and or [*sic*]you may interfere with potential witnesses.

You are hereby afforded the opportunity in terms of clause 6(2) of the aforementioned Regulations to make written submissions to the Municipal Council as to why you should not be suspended within seven (7) days from date hereof. A failure to do so will be construed as a waiver of your aforementioned right."

16] The applicant responded in these terms on 7 May 2012:

"I deny the so-called allegations against me in this regard.

I am also of the opinion that the Council had ulterior motives in effecting a disciplinary investigation in this regard."

17] Unfortunately the applicant did not set out any further basis for his denial. In this application he annexed a minute of a council meeting of 9 December 2011 in terms whereof the finance committee of the Council – including Julies, the first respondent – approved an honorarium to the applicant, who was not present. They also approved a performance bonus.

18] In a letter dated 22 May 2012 and delivered to the applicant on 23 May

2012, Julies and Saayman informed the applicant of the Municipality's decision to suspend him. Apart from repeating the allegations of misconduct quoted in the 4 May letter, they stated:

> "This letter serves to inform you that the Municipal Council, after considering your submissions in terms of section [*sic*] 6(2) of the Local Government: Disciplinary Regulations for Senior Managers, 20 [*sic*] (Government Gazette No 43213) decided to suspend you from work with immediate effect with full pay and retention of your benefits in terms of clause 6(4) thereof pending a disciplinary investigation that must be concluded and pending the outcome of the disciplinary investigations."
>
> It went on to state that the reasons for suspension are:
>
> "1. The Municipal Council has reason to believe that your presence in the workplace may jeopardise any investigation into the alleged misconducts [*sic*];
>
> 2. and or [*sic*] that you may interfere with potential witnesses;
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> 3. That your presence at the workplace may be detrimental to the stability of the municipality;
>
> 4. That you may commit other acts of misconduct."

19] The applicant submits that his suspension is unfair, and that the process followed was irregular and unlawful. He launched this application on 1 June 2012 for hearing on Friday 8 June 2012. The respondents filed answering affidavits on 6 June and the applicant replied on 7 June.

The regulations

20] The relevant clauses of the regulations are the following:

> "DISCIPLINARY CODE AND PROCEDURES
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> 2. Purpose and application.—(1) This Disciplinary Code—
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> (a) applies to all—
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> (i) municipalities;

(ii) senior managers; and

(b) is intended to—

(i) provide an internal mechanism for management of misconduct;

(ii) establish standard procedures for the management of misconduct;

(iii) support constructive labour relations;

(iv) ensure a common understanding of misconduct and discipline;

(v) promote mutual respect between senior managers and council;

(vi) promote acceptable conduct;

(vii) avert and correct unacceptable conduct; and

(viii) prevent arbitrary or discriminatory actions.

(c) prevails in the event of any inconsistency with any systems and procedures adopted by a municipality in terms of section 67 (1) (h) of the Act to the extent that those procedures apply to senior managers.

3. Principles.—(1) This Disciplinary Code is informed by the following principles—

(a) Discipline—

(i) is fundamentally a corrective measure and not punitive; and

(ii) must be applied in a prompt, fair, consistent and progressive manner.

(2) This Disciplinary Code is necessary for the efficient delivery of services, and ensure that senior managers—

(a) have a fair hearing in a formal or informal setting;

(b) are timeously informed of allegations of misconduct made

against them; and

(c) receive written reasons for any decisions taken against them.

(3) A disciplinary hearing must—

(a) take place in the area of jurisdiction of the municipality; and

(b) be concluded within the shortest possible time.

(4) Except in exceptional circumstances, a disciplinary action may not be taken against a senior manager until a full investigation has been carried out.

4. Policy.—(1) If a senior manager is alleged to have committed misconduct, the municipal council must institute disciplinary proceedings in accordance with this Disciplinary Code.

(2) The maintenance of discipline is the responsibility of the municipality.

(3) Discipline must be effected with due regard to—

(a) the Code of Conduct for municipal staff members as contained in Schedule 2 of the Act; and

(b) the Code of Good Practice provided for in Schedule 8 of the Labour Relations Act, 1995 (Act No. 66 of 1995).

(4) The principles of natural justice and fairness must be adhered to notwithstanding criminal or civil action having been instituted.

(5) Disciplinary procedures may not be dispensed with as a result of criminal, civil or other action having been instituted, or pending the outcome of such action.

5. Disciplinary procedures.—(1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.

(2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven (7) days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting

within seven (7) days to consider the said report.

(3) If the municipal council is satisfied that—

(a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven (7) days appoint an independent investigator to investigate the allegation(s) of misconduct; and

(b) there is no evidence to support the allegation(s) of misconduct against the senior manager, the municipal council must within seven (7) days dismiss the allegation(s) of misconduct.

(4) The investigator appointed in terms of sub-regulation (3) (a) must, within a period of thirty (30) days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.

(5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).

(6) After having considered the report referred to in sub-regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.

(7) The resolution in sub-regulation (6) must—

(a) include a determination as to whether the alleged misconduct is of a serious or a less serious nature;

(b) authorise the mayor, in the case of municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to—

(i) appoint—

(aa) an independent and external presiding officer; and

(bb) an officer to lead evidence; and

(ii) sign the letters of appointment.

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.

(2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven (7) days of being notified of the council's decision to suspend him or her.

(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 suspended, 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."

Jurisdiction

21] This court has confirmed in a number of decision that it has jurisdiction and the power to interdict a suspension that does not conform to the subordinate legislation quoted above – most recently in *Biyase v Sisonke District Municipality & another*[3] and the two cases involving *Lebu v Maquassi Hills Local Municipality.*[4]

Urgency

22] The respondents have argued that the matter is not urgent. I disagree. Given that the applicant is resident and works in Willowmore, some 500km from Cape Town, and that he had to travel to Cape Town in order to consult his attorney and counsel, the time lapse of one week to launch the application is not unduly long. The applicant also gave the respondents sufficient time to file answering papers and the applicant wasted no time in replying.

23] Mr *Engela* pointed out that, in *Biyase*[5] a similar time lapse was condoned and the matter was deemed to be sufficiently urgent.

Clear right?

24] In terms of regulation 4(4) the municipality is enjoined to adhere to the

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3 (2012) 33 *ILJ* 598 (LC).

4 (2012) 33 *ILJ* 642 (LC) and (2012) 33 *ILJ* 653 (LC).

5 *Supra* para [23].

principles of natural justice and fairness when instituting disciplinary steps and deciding on precautionary suspension.

25] The regulations are in the form of subordinate legislation and binds all the parties to this application. The applicant has a right to be treated fairly and lawfully in terms of the regulations and the principles of natural justice.

26] Should the respondents not have adhered to those principles, the applicant would have established a clear right for the relief sought. But in the letters of 4 May and 22 May 2012, the respondents purport to act in terms of the regulations. Did they do so?

27] The applicant submits that the respondents have not acted in accordance with regulations 5(3), 5(4) and 5(5). Mr *Engela* argued that the council did not appoint an independent investigator within seven days to investigate the allegations of misconduct; that the investigator did not submit a report within 30 days; and that no such report was tabled before the council.

28] Regardless of Adv Rex's independence, it does indeed appear from the uncontested evidence before me that he has not submitted a report that has been tabled at council since his apparent appointment on 6 March 2012 or the earlier payment of his invoice in February 2012. It seems clear, on the evidence before me, that the respondents have not complied with regulation 5.

29] As far as regulation 6(1) is concerned, the respondents did set out almost *verbatim* the wording of that regulation in their letter of 4 May 2012. Was that proper compliance, or was it mere lip service, as Mr *Engela* argued?

30] As this court pointed out in *Maquassi Hills (1):*[6]

> "[I]n terms of regulation 6(1), it is not sufficient for the Council to allege that the senior manager has committed an act of misconduct in order to suspend him; it must also have reason to believe that his presence may jeopardise the investigation, endanger the well-being or safety of any person or municipal property, or be detrimental to stability in the Municipality; or that he may interfere with potential witnesses or commit

6 (2012) 33 *ILJ* 643 (LC) para [32].

further acts of misconduct.

31] Although the respondents did repeat these words, they set out no basis for any of these fears – ie why they had "reason to believe" that the applicant's presence at the workplace may lead to any of these consequences. Indeed, it is difficult to fathom how the respondents could reasonably have entertained any of these fears when they appointed the applicant as acting municipal manager during April 2012 – shortly before they suspended him and during the period when, they say, Adv Rex was busy with his investigation.

32] The same pertains to the decision to suspend that was allegedly taken in terms of regulation 6(3) and 6(4). There is no evidence before me that the council did indeed "consider" the applicant's submissions before taking the final decision to suspend him. When I asked him for a minute of such a council meeting, Mr *Rex* could point to none in his clients answering papers.

33] The applicant must also be criticised for the way in which he went about making representations. If he is convinced of his innocence, as he says he is, it serves little purpose for him to simply deny that he committed the misconduct. He should have placed the council in a better position to consider his representations by setting out in full why he should not be suspended, perhaps in an abbreviated form setting out the factors he has placed before this court. But even so, it does not appear from the evidence before this court that the respondents have considered his representations or the factors set out in regulation 6(1) at all. They may appear to have complied with the regulation in form, but they have not done so in substance.

34] As this court pointed out in *Mogothle v Premier of the Northwest Province & others*[7] and reiterated in *Maquassie Hills (1)*[8]*:*

> "[S]uspension is the workplace equivalent of arrest. It is not something that

7 (2009) 30 *ILJ* 605 (LC).

8 *Supra* para [35].

> an employer should resort to lightly, and when it does, it should give the employee a proper opportunity to be heard. That can only be done in circumstances where the employer has explained why it deems a suspension necessary, and the employee has had a proper opportunity to respond to those reasons."

35] In this case, even though the applicant was given an opportunity to make representations, the respondents have in teh first place not laid the ground to explain the reasons why he should not remain in the workplace; and secondly, it does not appear that they considered either his representations or the factors outlined in regulation 6(1) before confirming the decision to suspend. As Van Niekerk J held in *Maquassi Hills (2)*:[9]

> "The purpose of any suspension must be rational, and a municipality must be in a position to establish the reasonableness of its belief...
>
> The notice must contain at least a description of the misconduct that the manager is alleged to have committed, and the council's justification for its in-principle decision, and invite representations in relation to both. Both the nature of the misconduct alleged and the purpose of the proposed suspension must be set out in terms that are sufficiently particular so as to enable the senior manager to make meaningful representations in response to the proposed suspension."

36] In a judgment handed down just over a month ago, the Labour Appeal Court confirmed, in a slightly different context (pertaining to the SMS Handbook) that "there must be an objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the misconduct."[10] The court added that:

> "As a general rule, a decision regarding the lawfulness of a suspension ... will call for a preliminary finding on the allegations of serious misconduct as well as a determination of the reasonableness of the employer's belief that the continued presence of the employee at the workplace mught jeopardize any investigation etc."

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9 (2012) 33 *ILJ* 653 (LC) para [16].

10 *MEC for Education, North West Provincial Government v Gradwell* (Case no JA 58/10, LAC, Johannesburg, 25 April 2012) paras [22] and [28]..

37] In the present case the respondents have not established such an objectively justifiable reason. Neither have they set out the purpose of he suspension with sufficient particularity. I am satisfied that the applicant has established a clear right for the relief sought.

Irreparable harm?

38] Although the applicant is being paid, he is still suffering ongoing harm that cannot simply be remedied in due course, should the allegations against him prove to be unfounded in the ensuing three months (or longer) provided for in regulation 6(6).

39] The applicant is a senior manager and long-standing local government official. There can be little doubt that his reputation is being sullied by the mere fact of his suspension in the small town of Williston. As Van Niekerk J remarked in *Mogothle:*[11]

> "In regard to the prejudice suffered by the applicant, *Muller*'s case, *supra*, although it dealt with the additional dimension of a deprivation of remuneration during a period of suspension, emphasises the personal and social consequences that suspension brings. The link between the freedom to engage in productive work and the right to dignity was recently emphasised by Nugent JA in *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA) [also reported at [2004] 1 All SA 21 (SCA) – Ed], where he stated:
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> "The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity . . . for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful." (At paragraph [27].)"

Alternative remedy?

40] As was the case in *Maquassi Hills*, the applicant in this case has

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11 *Supra* para [47].

disavowed any reliance on s 186(2)(b) of the LRA. His claim is based on the failure of the respondents to comply with the Regulations. I need only repeat the words of Van Niekerk J in *Mogothle*[12] that are equally apposite to this case:

> "The respondents' claim, in these circumstances, that an action for damages will cure any loss that the applicant has suffered, takes no account of the fact that a claim for damages is costly, time consuming and complex and that, in any event, it cannot account for the detrimental consequences of indefinite suspension, especially those of a more incorporeal nature referred to by Nugent JA in the *Watchenuka* judgment, *supra*."

Conclusion

41] The applicant has made out a proper case for the relief he seeks. I agree with both parties that costs should follow the result. My only regret is that it is the ratepayers of Williston and surrounds who will foot the bill.

Order

42] I grant an order in the following terms:

42.1 The forms and service provided for in the Rules are dispensed with and the matter is heard as one of urgency in terms of rule 8.

42.2 The suspension of the applicant by the first respondent is set aside.

42.3 The first respondent is ordered to pay the costs of the application.

AJ Steenkamp

12 *Supra* para [48].

Judge of the Labour Court

APPLICANT:	Adv RB Engela
	Instructed by Wessels & associates, Cape Town.
RESPONDENTS:	Adv CM Rex
	Instructed by Mthembu & Van Vuuren Inc, Bloemfontein.