THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C77/22

In the matter between:

MNYAMEZELI JACKSON PENXA **Applicant**

and

BEAUFORT WEST LOCAL MUNICIPALITY **First Respondent**

THE EXECUTIVE MAYOR OF THE BEAUFORT WEST LOCAL MUNICIPALITY – GIDEON PIETERSEN **Second Respondent**

THE DEPUTY MAYOR OF THE BEAUFORT WEST LOCAL MUNICIPALITY – LULAMA VALENTIA PITI **Third Respondent**

THE SPEAKER OF THE BEAUFORT WEST LOCAL MUNICIPALITY – NOEL CONSTABLE **Fourth Respondent**

NICOLAS ABRAHAMS *N.O* **Fifth Respondent**

[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

EBENEAZER FRANCOIS BOTHA *N.O* **Sixth Respondent**

[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

CASTRO LUYANDA DE BRUIN *N.O* **Seventh Respondent**

[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

SHARIFA ESSOP *N.O* **Eighth Respondent**
[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

LESLEY BOYCE JASON MDUDUMANI *N.O* **Ninth Respondent**
[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

SHAUN MICHELL MEYERS *N.O* **Tenth Respondent**
[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

JOSIAS DE KOCK REYNOLDS *N.O* **Eleventh Respondent**
[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

RALPH SKUZA *N.O* **Twelfth Respondent**
[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

ANNA MAGDALENE SLABBERT *N.O* **Thirteenth Respondent**
[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

JACOB JEFFREY VAN DE LINDE *N.O* **Fourteenth Respondent**
[Nomine Officio in his capacity as a councillor of the Beaufort West Municipality]

Heard: **10 and 25 March 2022**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the**

Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 05 April 2022.

Summary: **Urgent application – leave to amend is granted since there is no prejudice to the respondents. Precautionary suspension in breach of the applicant's contract employment which incorporates the Disciplinary Regulations.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] The applicant (Mr Penxa) approached the Court by way of urgency seeking an injunction against respondents declaring that his precautionary suspension was effected in breach of clause 16 of his contract of employment which incorporates Regulation 6 of Local Government Disciplinary Regulations for Senior Managers (Disciplinary Regulations).

[2] The matter served before me for the first time on 10 March 2022. Mr Penxa sought leave to amend his Notice of Motion and file a supplementary affidavit which was vehemently opposed by the respondents. I granted the leave sought by Mr Penxa and the matter was postponed to 25 March 2022. The parties have since filed further pleadings consequent to the order of 10 March 2022 and there is nothing controversial in that regard. I also promised to give the reasons for granting Mr Penxa leave to amend his Notice of Motion and file the supplementary affidavit in this judgment, which I now do.

Leave to amend and supplement

[3] Mr Penxa is employed by the first respondent (Municipality) as a Municipal Manager. He initially approached the Court seeking an order declaring his suspension unlawful due noncompliance with the Disciplinary Regulations. The application for leave to amend the Notice of Notion and file the supplementary affidavit mainly pertain to the introduction of a new cause of

action in terms of section 77A(3) of the Basic Conditions of Employment Act[1] (BCEA). In essence, Mr Penxa avers that decision to place him on a precautionary suspension was effected in breach of clause 16 of his contract of employment which incorporates Regulation 6 of the Disciplinary Regulations.

[4] It is well accepted that a Court hearing an application to permit an amendment has a wide discretion which should be exercised judicially.[2] The *locus classicus* is *Moolman v Estate Moolman*.[3] There the Court stated:

> '[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

[5] Principal objective when exercising a discretion whether to allow an amendment is a proper ventilation of the real dispute between the parties.[4] I, however, accept that a leave to amend will not be readily grated where the granting thereof would introduce a new cause of action[5], provided such an amendment will not be prejudicial to the other party.[6]

[6] In *Sondorp v Ekrhuleni Metropolitan Municipality,*[7] the Labour Appeal Court, confronted with the amendment of a pleading, albeit during trail, emphasised that:

> '…what the Court should be concerned about is ensuring that as much relevant facts and material as possible are placed before it, to facilitate and

[1] Act 75 of 1997, as amended.
[2] *Embling v Two Oceans Aquarium CC* 2000 (3) SA 691 (C) 694G–H.
[3] 1927 CPD 27 at 29.
[4] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) para 12.
[5] Bestenbier v Goodwood Municipality 1955 (2) SA 692 (C).
[6] *MacDonald, Forman & Co v Van Aswegen* 1963 (2) SA 150 (O) at 153H-154D.
[7] [2013] ZALAC 13; [2013] 9 BLLR 866 (LAC); (2013) 34 ILJ 3131 (LAC) at para 66.

expedite the determination of the real issue between the parties. In *Myers v Abramson*[8] the Court stated:

"The attitude of the Courts is that pleadings are made for the Court and not the Court for the pleadings (*Robinson v Randfontein Estates Gold Mining Co. Ltd*., 1925 AD 173 at p. 198), and in my opinion no Court would so interpret the rules, unless thereto compelled by the plain meaning thereof, as to create a situation wherein the Court loses its power to allow such amendments to the pleadings as are designed to ensure that the real issue between the parties is determined. It may well be that to allow the interposition of an application for an amendment during the hearing of an application for absolution may deprive the party applying for absolution of a tactical advantage he might otherwise enjoy over his opponent, but I do not think that this can outweigh the major concern of the Court to secure the expeditious and most direct determination of the real dispute between the parties."' (Emphasis added)

[7] In the present case, Mr Penxa sought leave to amend before the respondents could file their answering affidavit. The respondents' impugn is mainly that Mr Penxa was *mala fide* in seeking leave to amend as he was culpably remiss in appoint attorneys who gave him bad legal advice. Still, the respondents failed to point to any discernible prejudice or injustice that could not be compensated by costs and postponement.

[8] I was thus inclined to grant the leave to amend and file supplementary affidavit in order to secure the expeditious and most direct determination of the real dispute between the parties.

Urgency

[9] The second point taken by the respondents is urgency. They contend that the application is not urgent as Mr Penxa squandered the urgency and, any event, he has a substantial redress at the hearing in due course. I disagree. Mr Penxa approached the Court as soon as it was practicable. Even though the request for leave to amend was served on truncated time period, the

[8] 1951 (3) SA 438 (C) at 446D-G.

respondents have since been afforded enough time to supplement their answering affidavit and deal with the amended pleadings.

[10] The respondents seem to confound the real issue before this Court. Mr Penxa obviously disavows any reliance on the Labour Relations Act [9](LRA) or fairness claim, as it were. His claim is purely contractual. Thus, the dicta in *Public Service Association of South Africa obo Members v MEC for Agricultural and Rural Development (North West Province)*[10] and *Madzonga v Mobile Telephone Networks (Pty) Ltd*[11] relied upon by the respondents are distinguishable. I accordingly accept that this matter is urgent and have dealt with it as such in the interest of justice.

Dispute resolution clause

[11] The third point taken by the respondents pertains to the jurisdiction of this Court to deal with the matter. They contend that the parties are bound by clause 20.1 of the contract of employment which enjoins them to resolve any dispute by way of arbitration. Indeed, that is so. Nonetheless clause 20.3 (which is recorded a 19.3) provides that:

> 'Notwithstanding anything that set out hereinabove, should either party wish to approach a court, on an urgent basis, for urgent interdictory relief relating to the implementation, termination, or any other aspect of this contract, they shall be entitled to do so.'

[12] Patently, the respondents impugn in this regard has no merit and must fail.

Breach of contract

[13] I now deal with the merit. The respondents dispute that the precautionary suspension of Mr Panxa was not effected in accordance with Regulation 6(2) and accordingly in breach of clause 16 of the contract of employment.

[14] Clause 16 of the contract of employment provides:

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[9] Act 66 of 1995, as amended.
[10] (JR634/13) [2017] ZALCJHB 480 (12 October 2017) at para 37.
[11] (J 1867/2013) [2013] ZALCJHB 232 (30 August 2013) at para 62.

‘16. PRECAUTIONARY SUSPENSION

The Municipality may in terms of and subject to the provisions of section 6 of the *Disciplinary Regulations* suspend the Executive.’

[15] While Regulation 6 provides:

‘**Precautionary Suspension**

6.(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;

(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.’

[16] It is common cause that on 21 January 2022 Mr Penxa was served with a letter authored by the second respondent, Executive Mayor, with the following contents:

‘**ALLEGED BREACH OF CODE OF CONDUCT FOR SENIOR MANAGER**

My letter regarding the above matter dated 13 December 20221, refers.

Attached please find my report to Council on your alleged breach of the Code of conduct for senior Managers.

On 20 January 2022 Council unanimously accepted the attached report and furthermore resolved that you be put on special leave as from 24 January 2022 till 1 February 2022. Council also resolved that you must respond in writing within the aforementioned period on the allegations stipulated in my attached report.'[12]

[17] Mr Penxa, through his attorneys of record, took issue with the above letter and refused to accede to the demand contained therein. On 08 February 2022. he was placed on precautionary suspension in terms of Regulation 6(1) of the Disciplinary Regulations.

[18] Mr Penxa's main qualm in these proceedings is that he was not afforded an opportunity to make a written representation to the Municipality as to why he should not be suspended in terms of Regulation 6(2) of the Disciplinary Regulations. The respondents adamantly contend that Mr Penxa was afforded that opportunity in terms of the letter of 21 January 2022, an opportunity he rejected.

[19] Mr Hendricks, who appeared for the respondents, submitted that Mr Penxa, as senior employee, ought to have known that the letter of 21 January 2022 was an invitation to make representation as to why he should not be suspended. This submission is untenable because the letter of 21 January 2022 does not make any mention of the Municipality's intention to place Mr Penxa on precautionary suspension. It is very strange that Mr Penxa was expected to speculate about things not recorded in the letter of 21 January 2022 while the letter effecting his suspension is unequivocal, making specific reference to Regulation 6(1).

[12] See annexure 'JP2' to the founding affidavit, page 100.

[20] To my mind, the letter of 21 January 2022, does not need any interpretation as it is plainly written. Clearly, it has nothing to do with intention to suspend Mr Penxa as contented by the respondents. As correctly submitted by Mr Coetzee, appearing for Mr Penxa, he (Mr Penxa) was invited to respond to the allegations of misconduct as contained in the report attached thereto and nothing more.

[21] Furthermore, the respondents' contention that there was a substantial compliance with Regulation 6(2) is fallacious. It cannot be overstated that 'suspension is a measure that has serious consequences for an employee, and is not a measure that should be resorted to lightly'.[13] Moreover, when suspending the Accounting Officer, an act that would invariably interrupt leadership and in turn impedes the rendering of the Municipal services, the Municipality must comply with Regulation 6(2) to the letter; which is not insuperable obligation, in any event.

[22] It follows that the precautionary suspension of Mr Penxa was not in line with Regulation 6(2) as he was not afforded an opportunity to make representation as to why he should not be suspended, the process that the parties have contractually agreed to.

Relief

[23] This Court has, on several occasions, intervened and granted a relief of specific performance;[14] save in instances where there is evidence to show that there is complete breakdown in the relationship of trust and confidence and it is proved that the employment relationship has deteriorated to such an extent as to cause the employer hardship.[15]

[13] *Lekabe v Minister Department of Justice and Constitutional Development* (2009) 30 ILJ 2444 (LC); *Lebu v Maquassi Hills Local Municipality* [2012] 33 ILJ 642 (LC); [2012] 4 BLLR 411 (LC) at para 40; *Biyase v Sisonke District Municipality and Another* (2012) 33 ILJ 598 (LC); and *Rudman v Maquassi Hills Local Municipality and Another* [2019] JOL 41158 (LC*).*

[14] See: *Ngubeni v National Youth Development Agency and Another* (2014) 35 *ILJ 1356 (LC), Wereley v Productivity SA and Another* (2020) 41 *ILJ* 997 (LC) and *Solidarity and Others v SA Broadcasting Corporation* (2016) 37 *ILJ* 2888 (LC)).

[15] *Gama v Transnet SOC Limited and Others* (J370/18) [2018] ZALCJHB (22 November 2018) at para 47.

[24] Pertinently, in two dicta of this Court pertaining to the case of *Mpane v The Passenger Rail Agency of South Africa,*[16] the applicant employee, Ms Mpane, successfully vindicated her right to enforce policies and procedures incorporated into her employment contract and a relief of specific performance. In *PRASA I*, Prinsloo, J ordered the respondent employer to comply with the terms of Ms Mpane's employment of contract, which include any applicable policies and procedures incorporated into her contract of employment, prior to taking any decision to terminate her employment. In *PRASA II*, Van Niekerk, J ordered that Ms Mpane be reinstated consequent to a dismissal in breach of her contract of employment and the respondent employer was once more directed to comply with its contractual obligations towards the applicant in respect of its performance management and development policy read with its disciplinary code and procedure prior to the decision to terminate her services.

[25] In the present case, likewise, there is no evidence that there is a total breakdown in the relationship of trust and confidence; alternatively, that the employment relationship has deteriorated to such an extent as to cause the Municipality hardship if specific performance is ordered.

Conclusion

[26] In the circumstances, I am satisfied that Mr Penxa has made out a case for the grant of the final relief in terms of the Notice of Motion, as amended.

Costs

[27] Turning to the issue of costs, the circumstances of this case dictate that each party should pay its own costs.

[28] In the circumstances, I make the following order.

Order

1. The application is heard as one of urgency as contemplated in Rule 8 of the Rules of the Labour Court.

[16] *Mpane v Passenger Rail Agency of South Africa and Others*, unreported J 3745/18 (9 June 2020), per Prinsloo, J (*PRASA I*); and case no J608/2020 (13 July 2020), per Van Niekerk J (*PRASA II*)

2. The suspension of Mr Penxa's from his duties and role as the Municipal Manager was effected in breach of clause 16 of the contract of employment read together with Regulation 6(2) of the Disciplinary Regulations.

3. The suspension of Mr Penxa from his duties and role as the Municipal Manager at the First Respondent is declared unlawful and set aside.

4. The respondents shall permit Mr Penxa to resume his duties and role as the Municipal Manager at the Municipality within one (1) day of the granting of this order.

5. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate A Coetzee

Instructed by:	CMB Attorneys
For the Respondents:	Advocate CS Hendricks
Instructed by:	Crawfords Attorneys