IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D462/16

In the matter between:

PETRUS JABULANI MAHLABA	**Applicant**
and	
THE MSUNDUZI MUNICIPALITY	**First Respondent**
THE ACTING MUNICIPAL MANAGER – BONIWE ZULU	**Second Respondent**
MORAR INCORPORATED	**Third Respondent**

Heard: **24 June 2016**

Delivered: **29 June 2016**

JUDGMENT

WHITCHER J

[1] The applicant seeks, on an urgent basis, orders declaring unlawful and setting aside his suspension by the second respondent. The application is squarely based on a legality challenge.

[2] The applicant has been employed as the Executive Manager of the Internal Audit Unit of the first respondent since July 2012. He works with an audit team whose primary functions, *inter alia*, includes to conduct audits, forensic investigations and report to the Audit Committee, to make recommendations to the Audit Committee, Executive Committee and Council of the first respondent and to determine whether there was mismanagement of public funds.

[3] In February 2016, the third respondent was appointed under the provisions of section 106(1)(b) of the Local Government: Municipal Systems Act 32 of 2000 to investigate various issues of irregularities within the first respondent.

[4] On 14 March 2016 what purports to be a subpoena was served on the applicant by the office of the third respondent in terms of section 4 of the KwaZulu-Natal Commissions Act No 3 of 1999, requiring him to appear before the third respondent's investigators and produce a specified list of documents.

[5] On 1 April 2016, the second respondent, in her capacity as the Acting Municipal Manager, sent a letter the applicant wherein she, *inter alia*, stated:

> *I am advised by the lead investigator [of the third respondent] that you are un-cooperative and have failed to produce any of the documents that you were required to produce in the subpoena, despite the lapse of the time period within which you were required to do so in terms of the subpoena.*
>
> *This is completely unacceptable. As you are no doubt aware, the Municipality is required, not only in terms of the law, but also in the spirit of good governance and in the interest of transparency and accountability, to cooperate with the Honourable MEC's investigation.*
>
> *You are also no doubt aware that you are required, as a municipal official, to carry out the lawful instructions of the Municipality. Given that the Municipality has resolved to cooperate with the investigation team and the fact that the Municipality is, in any event, required by law*

to cooperate, your failure to act accordingly is inexcusable and will not be tolerated.

This letter serves to inform you that you are required, forthwith, to make available to the Honourable MEC's investigators, all of the documents that you are required to produce in terms of the subpoena. You are also required to fully cooperate with the investigation team.

In the event that you fail to do so, the Municipality will have no other option but to take whatever lawful steps are open to it pursuant to your refusal to cooperate.

[6] The applicant sent a long written response wherein he claimed that he was cooperating with the investigation team but was experiencing problems producing certain documents. A number of emails were also exchanged in relation to the matter and other issues, including his alleged deliberate failure to attend a meeting with the second respondent regarding the issue.

[7] On the 8th April 2016, the second respondent placed the applicant on precautionary suspension with pay, claiming in the suspension letter that the investigators of the third respondent had informed her office that the applicant had persisted in his refusal to cooperate with their investigation team. The reason for the suspension is framed as a failure to cooperate with the investigation team. The applicant was further advised that possible charges of misconduct will be investigated against him in light of his failure to cooperate with the investigation.

[8] The applicant was invited to provide reasons why he believed his suspension should be uplifted, which he did in a detailed response drafted on his behalf by his attorneys. His response in essence indicated his willingness to comply with the subpoena, a claim that he had substantially complied with the subpoena and that he was having difficulties in producing certain documents.

[9] In his founding affidavit the applicant urged the court to take into account that his suspension was also effected in the following "exceptional circumstances". The applicant's audit team had occasion to investigate and report on a

number of alleged financial irregularities in the financial affairs of the first respondent in or about 2014/5. The report, submitted to council in April 2016, included recommendations arising from the investigations relating to charges of misconduct to be proffered against officials. The second respondent, in her capacity as Deputy Municipal Manager: Community Services, was implicated in these reports. The second respondent was appointed Acting Municipal Manager on 4 March 2016 and one month later she suspended the applicant.

[10] In the founding affidavit, the applicant's challenge to the lawfulness of the suspension was based on two grounds:

(i) The applicant is a senior manager as contemplated in section 56 of the Municipal Systems Act No. 32 of 2000 and his suspension did not comply with the requirements set out for the suspension of a senior manager. The respondent denied that the applicant is a senior manager as contemplated by the Act.

(ii) Exceptional circumstances exist in this matter in that the investigated (the second respondent) suspended the investigator (the applicant) involved in an investigation against the second respondent.

[11] In his replying affidavit, the applicant extended his legality challenge to a contention that the subpoena was not lawfully issued and so there was no lawful obligation on him to comply with the subpoena. In these circumstances, any decision taken by the second respondent based on non-compliance with the subpoena is likewise unlawful.

[12] In his heads of argument, a further legality challenge was submitted on behalf of the applicant. It was contended that in effecting the suspension, the second respondent did not comply with the provisions of the National Treasury Circular No. 65 and the Audit Charter drafted in terms of the provisions of section 168(3) of the Municipal Finance Management Act. The Circular and Charter *inter alia* provide (i) for the concurrence of the Internal Audit Committee "with any appointment and *termination of the services of the chief audit executive*" (ii) that independence is enhanced when the Audit Committee concurs in the *appointment or removal of the chief audit executive"* and (iii)

that it is one of the duties of the Audit Committee to "resolve any difficulties or unjustified restrictions or limitations on the *scope of the internal audit activity or any significant disagreements between the Executive Manager (Internal Audit Unit) and management".*

[13] The applicant contended that these provisions obliged the second respondent to consult with the Audit Committee and to obtain their concurrence in the decision to suspend the applicant because a suspension is a temporary termination of services.

[14] I will deal with the last issue first. I agree with the respondent that the reliance on the provisions in question constitutes a misconstruction of the relevant circular and legislation.

[15] A suspension, and, in this case, a precautionary suspension, does not constitute a temporary termination of employment. A suspension is in law the holding of the duty to tender services in abeyance whilst all the *essentialia* and the *naturalia* of the contract of employment continues to be in full force and effect.

[16] The third provision contemplates attempts to limit the scope of work and work duties of the audit team, not disagreements concerning the suspension or the termination of the services of the chief audit executive.

[17] Even if I am wrong and the provisions, particularly the concept "removal", ought to be given a wide meaning to include a precautionary suspension, the respondent pointed out that this issue and the facts relied upon in relation thereto were not pleaded, but introduced in heads of argument.

[18] With regard to the status of the applicant, it is my finding that the applicant has failed to establish the existence of all the jurisdictional requirements set out in section 56 of the Local Government: Municipal System Act 32 of 2000 for this court to conclude that he is a senior manager as contemplated in Section 56 of the Act. In particular he has failed to produce a written contract of employment and has failed to establish that he is part of the first respondent's Senior Management Committee and that he was appointed by

the Municipal Council in terms of a Council Resolution. The objective documentation points to him being a level 3 process manager.

[19] I also reject the applicant's belated reliance in his replying affidavit on estoppel to claim he was appointed as a Section 56 Senior Manager. He did not establish the requirements of estoppel. In addition, as pointed out by the respondent, estoppel cannot be used to achieve that which legislation (in this case, section 56 of the Act) does not provide for or permit.[1] Moreover, estoppel will not supplement a deficient legal status and cannot be used to confer a legal status upon a person.[2]

[20] I turn now to the issue about the lawfulness of the subpoena. The subpoena was issued and signed by one Sanjay Rabichand who describes himself as the lead investigator of the third respondent acting in accordance with the provisions of section 4, read with section 3, 5, 6 and 7 of the KZN Commissions Act.

[21] The applicant argued that the subpoena was not lawfully issued because the power to issue subpoenas is vested in the Sheriff of the High Court.

[22] During argument, the respondent accepted that the subpoena was not issued by the Sheriff of the High Court. The respondent, however, contended that even if it is arguable that the subpoena was not lawfully issued, this did not assist the applicant for the reasons discussed below.

[23] The applicant's claim that the subpoena was unlawfully issued and that he accordingly was not obliged to comply therewith was not raised in the founding papers. It was belatedly claimed in the applicant's replying affidavit as a new matter.

[24] It is correct that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it in his affidavits filed in the notice of motion, whether he is moving an *ex parte* or on notice to the respondent and is not permitted to

[1] *City of Tshwane Metropolitan Municipality v RPM Bricks* 2008 (2) SA 1 at paras 11-12; *Stand 242 Hendrick Potgieter Road Ruimsig v Gobel* NO 2011 (5) SA 1 at para 23

[2] JC Sonnekus, *The Law of Estoppel in SA* (2nd ed, Butterworths) 182 and the cases cited therein.

supplement his replying affidavit (the purpose of which is to reply to averments made by the respondent in his answering affidavit) still less make out a new case in his replying affidavit.[3] In summary, an applicant cannot raise new matters in a replying affidavit as he is required to make out his case in the founding papers.

[25] However, I agree with Mr Van Rooyen, counsel for the applicant, that the above rule is not absolute, particularly where, as in this case, the point raised is a point of law based on facts set forth in the founding affidavit and admitted by the second respondent in its opposing affidavit and there is no prejudice to the other party.[4] With regard to the issue of prejudice, the second respondent was invited to deliver a further affidavit in response to this particular issue but elected not to do so. I will therefore consider this new issue.

[26] I find no merit in the applicant's claim because the respondent referred this court to relevant authority which holds that a subpoena, unless set aside, should not be disobeyed.[5]

[27] It is also relevant that the SCA has recently held that an administrative act and its consequences must be treated as valid until set aside in judicial proceeding even if it was actually invalid. The SCA in *Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Others*,[6] held as follows:

> "If a public body believes one of its administrative acts is invalid, it may not simply ignore it. This is because even invalid administrative acts are treated as valid until they are set aside. The public body contending for invalidity is thus duty bound to approach the court to have it set aside. Since it is administrative action which must be set aside, the delay rule applies. If there has been an undue delay, it must provide an acceptable and adequate explanation. If this is not done, the invalid administrative act may be insulated against being set aside. In such a case, the administrative act will continue to

[3] *Bayat and Others v Hansa and Others* 1955 (3) SA 547 (N) at 553D-E
[4] See: *Sarrahwitz v Maritz NO* 2015 (4) SA 499 (CC) at par [30].
[5] Herbstein & Winsen, *The Civil Practice of the High Court of South Africa* (5th ed) Volume 1, Cilliers, Loots & Nel at page 855.
[6] (2015) 2 ALL SA 657 (SCA).

> have effect and be treated as valid, despite its invalidity. If the public body has not delayed unduly and shows that the act is invalid, a court is bound to make a declaration of invalidity. There is no discretion afforded a court not to do so. If a declaration of invalidity is made, a court is then granted discretion under its just and equitable powers to suspend the invalidity for any period and on any condition…[7]

[28] When the issue of non-compliance with the subpoena arose between the applicant and the second respondent, the subpoena had not been set aside. Accordingly, the applicant had no right to ignore it.

[29] It is evident from the letters exchanged between the applicant and the second respondent that the Municipality had resolved to cooperate with the investigation and instructed the applicant to cooperate with the investigation. This resolution and instruction took the issue beyond the subpoena and transformed the matter into that of an instruction from an employer to an employee to assist and cooperate with the investigators. Thus, when the disagreement between the applicant and the respondent arose, it concerned an issue of a work instruction: an instruction to cooperate with the investigation. The heading of the suspension letter, namely "the failure to cooperate with the investigation" confirms this.

[30] I turn now to the issue of "exceptional circumstances". I point out that this issue was pleaded with reference to the LAC judgment in *Booysen v Minister of Safety and Security and Others*[8] in which the court held:

> "…The Labour Court has jurisdiction to interdict any *unfair* conduct including disciplinary action. However, such intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive." [emphasis added]

[7] Para [34].
[8] [2010] ZALAC 21 at para 54.

[31] As correctly pointed out by the respondent, the need to show exceptional circumstances, as discussed by the LAC, applies only to instances where an applicant is seeking to challenge the *fairness* of a suspension, having referred the suspension dispute to the CCMA or relevant Bargaining Council. The applicant in this case has disavowed any reliance on the unfairness of his suspension and has not indicated that he has referred his suspension to the CCMA or to the relevant Bargaining Council. He thus cannot rely upon the existence of exceptional circumstances to support a legality challenge.

[32] To the extent that I may have misconstrued the matter and that the applicant is actually suggesting that the exceptional circumstance is that second respondent suspended the applicant for 'ulterior' purposes, which I accept falls within a legality challenge, I deal with the matter as follows.

[33] The SCA in *National Director of Public Prosecutions v Zuma*[9] held as follows:

> "[37] A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful, if in addition, reasonable and probable grounds for prosecuting are absent,[10] something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded.[11] The motive behind prosecution is irrelevant because as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal.[12] The same applies to prosecutions.[13]
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> [38] This does not, however, mean that the prosecution may use its powers for 'ulterior purposes'. To do so would breach the principle of legality. The facts in the *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order*[14] illustrate and explain the point. The police had confiscated machines belonging to Highstead for the purpose of charging it with gambling offences. They were intent on

[9] (573/08 [2009] ZASCA 1 (12 Jan 2009).
[10] *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A); *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 ALL SA 375 (SCA).
[11] Thompson v Minister of Police 1971 (1) SA 371 (E)375A-D.
[12] Tsose v Minister of Justice 1951 (3) SA 10 (A) 17.
[13] *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A).
[14] 1994 (1) SA 387 (C).

> confiscating further machines. The object was not to use them as exhibits – they had enough exhibits – but to put Highstead out of business. In other words, the confiscation had nothing to do with the intended prosecution and the power to confiscate was accordingly used for a purpose not authorised by the statute. This is what 'ulterior purpose' in this context means. This is not the case before us. In the absence of evidence that the prosecution of Mr Zuma was not intended to obtain a conviction the reliance on this line of authority is misplaced as was the focus on motive.[15]"

[34] This means that the applicant had to convince this court, with sufficient supporting facts, that the second respondent used her powers to suspend for 'ulterior purposes'. In my view, the applicant has failed to provide a sufficient evidentiary basis for this court to make such a profound finding. The fact that the applicant's audit team had investigated the second respondent and recommended that action should be taken against the second respondent, read together with the fact that his suspension (on an unrelated matter) followed one month after the second respondent's appointment as Acting Municipal Manager is questionable but not sufficient for me to arrive at a finding that she used her powers for an 'ulterior purpose' considering that the letter of suspension repeatedly states that the third respondent's investigative team laid the complainant against the applicant and were pursuing the complaint.

[35] In conclusion, while there are a number of aspects in this case which brings into question the fairness of the suspension, I find no merit in the legality challenge.

Order

[36] The application is dismissed with no order as to costs.

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Whitcher J

[15] *Beckenstrater v Rottcher & Theunissen* 1955 (1) SA 129 (A).

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Adv Van Rooyen, instructed by Lister & Lister Attorneys
For the first and second respondents: Adv J Nxusani, SC, instructed by Kathy James Attorneys