REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: J 20/13

In the matter between:

DIPONE ORAPELENG TSIETSI RETLAOBAKA — **Applicant**

and

LEKWA LOCAL MUNICIPALITY — **First Respondent**

TSHABALALA LINDA BERNARD(*N.O.*) — **Second Respondent**

Heard: **25 January 2013**

Delivered: **07 February 2013**

Summary: (suspension of senior manager- regulations not complied with but regulations not applicable-invalid appointment)

JUDGMENT

LAGRANGE, J

[1] This is an urgent application which was launched on 11 January 2013. By the time the matter was set down for hearing on 17 January the respondents had filed a counter application disputing the applicant's employment status. The matter was postponed to allow both parties to file their respective answering affidavits and replying affidavits.

The application to uplift the applicant's suspension

[2] On 1 June 2010, the applicant was appointed as the Chief Financial Officer of the Lekwa Local Municipality, the first respondent. The first attempt to suspend the applicant was made on 20 November 2012. That suspension was set aside in terms of a settlement agreement which was made an order of this court on 7 December 2012.

[3] The municipality relaunched the suspension process on 18 December 2012 when it delivered a notice to the applicant at his home calling for his written representations why he should not be suspended from active employment pending disciplinary charges against him. The letter stated that a special sitting of the municipal council on 14 December 2012 had considered allegations of financial misconduct against him, brought by the Municipal Manager and/or the Executive Mayor "...in terms of section 5 of the Local Government Disciplinary Regulations for Senior Managers". The notice went on to state:

> *"5. The council then resolved that it was satisfied, as part of the provisions of section 5 (3)([...illegible...]) of the regulations that there is a reasonable cause to believe you have committed acts of financial misconduct and that from now onwards the matters to be dealt with in terms of section [...illegible...] of the regulations.*
>
> *6. You are hereby requested an expected, in terms of section 6 (2), to submit your written representations within 7 (seven) days from date of this notification."*

[4] Attached to the notice was a list of 10 provisional charges of misconduct against him. The applicant's lawyers' offices were closed and as a precaution he responded to the allegations of misconduct set out in the

letter on 20 December 2012. On 27 December 2012 he received a notice of his suspension, which was dated 24 December 2012, in terms of which his suspension was in force with immediate effect.

[5] Subsequently, the applicant's attorneys demanded that the council rescind its decision to suspend the applicant and thereafter launched this application. The applicant claims that his suspension was unlawful on two grounds, namely: a failure to comply with clause 6 (1) and clause 6 (2) of the regulations. He contended that it was also common cause that his suspension was contrary to the provisions of clause 6 (5) of the regulations. Clause 6 of the Local Government: Disciplinary Regulations for Senior Managers (Notice 344 of 21 April 2011, GG34213) states:

> *"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; 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 subregulation (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."

[6] The central argument of the applicant is that even though the respondent set out the allegations of misconduct in the notice of 18 December 2012, by failing to set out the reasons why he should not be present in the workplace, the applicant was unable to effectively respond on why his suspension was not necessary. In support of this argument, the applicant marshalled case authority for the proposition that it was not sufficient for the municipality nearly to set out the charges against the manager but also

to set out what purpose which the suspension would serve as envisaged under regulation 6(1). In particular, he cited the decision of Steenkamp J, in ***Biyase v Sisonke District Municipality & others*** **(2012) 33 *ILJ* 598 (LC)**, relied on by Van Niekerk J in ***Lebu v Maquassi Hills Local Municipality & others*** **(2)(2012) 33 *ILJ* 653 (LC)**.Van Niekerk J stated, inter alia:

> *"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"*[1]

(emphasis added)

[7] Mr Tsatsawane, appearing for the respondent, argued that in the decisions mentioned, the question of whether it was sufficient merely for the council to have reason to believe that a suspension was necessary, without conveying this to the employee, was not addressed. He argued on the basis of decisions such as ***South African Defence and Aid Fund and another v Minister of Justice*** **1967(1) SA 31(A)** that nothing in clause 6 required the council to provide its reasons under sub-clauses (1)(a) or (b) to the employee for the employee to respond to. All that was necessary was for the council to be satisfied that it had reason to believe his suspension was justified. Consequently, the respondent argued that a notice would comply with clause 6 provided it set out the charges and invited representations.

[8] I accept that it may be so that this interpretation was not argued in any of the reported cases cited above, but in my view it would be an unduly narrow reading of the provisions on precautionary suspension if they were read to imply that it was not necessary for the Council to convey why it believed the suspension was necessary. As the applicant points out responding to the charges does not in and of itself address the reasons for

[1] *Maquassi Hills* at 660,[16].

the suspension on which the employer might rely under subclauses 6(1) (a) or (b). The whole object of inviting representations from the employee on whether he or she should be suspended would be rendered nugatory if the employee is in the dark as to why the employer believes he or she should not be at the workplace until the disciplinary proceedings concluded. Without knowing the employer's reasons, the employee could only guess what they might be and his or her response would be mostly superfluous and speculative answers to unknown propositions. I accept that before taking the decision to suspend the employee the council only needs to have reason to believe it would be desirable for one or more of the reasons mentioned based on the information it has before it, but that information also includes the employee's representations on the purpose of the proposed suspension, which clearly must be made known to the employee for those representations to be meaningful.

[9] It is obvious that the notice of 18 December 2012 contained no explanation of the purpose the suspension was supposed to serve and consequently the applicant could not have known which of several reasons might have been behind the intention to suspend him, which would necessarily undermine his ability to make a representation on the issue.

The counter application

[10] The respondent contends that irrespective of the merits of the applicant's case on the lawfulness of his suspension discussed above, his invocation of the rights in regulation 6, is incorrectly premised on an assumption that he is indeed a senior manager to whom the disciplinary regulations of 2011 apply. The respondent argues that the applicant's employment as chief financial officer was never perfected in terms of the requirements of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act').

[11] The applicant effective date of employment was 1 June 2010. On 3 June 2010, the council had resolved to appoint the applicant on a three year contract with effect from that date. On 22 June 2010, a letter of appointment was sent to the applicant confirming the appointment from

the effective date and stated that the appointment 'included' his stipulated remuneration package and "...as per section 57 of the Local Government: Municipal Systems Act 32 of 2000 an employment contract and performance agreement to be entered into and signed between the Administrator and yourself on or before but not later than 2010-07-31."

[12] By 30 June 2010, the applicant had signed an employment contract, but this was never countersigned by the Administrator and nor was a performance agreement ever concluded though it clearly was the parties' intention to do so. Moreover, the contract signed by the applicant was not for a three year term but for a five year term. Mr Scholtz, appearing for the applicant, argued that the Council resolution of 3 June 2010 had been primarily concerned with the effective date of appointment but it is difficult to read the Council resolution any other way than to have also intended a three year agreement. Even a year later in November 2011 the council took another resolution that the acting municipal manager should be authorised to conclude a contract with him in terms of the original resolution of 3 June 2010.

[13] It was argued by the applicant that since the resolution to appoint him and his signature of the contract took place in 2010, he was appointed under the Systems Act prior to its amendment on 29 April 2011. In 2010, the Systems Act did not require the signature of both parties before service commenced as section 57(3) of that Act required after the amendment. However even prior to the amendment the appointment of a senior manager was subject to the conclusion of a performance agreement.

[14] Subsequent to the promulgation of the amendment of the Systems Act, the requirements for validating an appointment of a senior manager were made more stringent and I am satisfied that the applicant's purported contract did not meet those pre-requisites and he could not have been validly appointed to his position after they were promulgated. However, even in their un-amended form, his appointment was subject to the conclusion of a performance agreement 'within a reasonable time' which condition has never been fulfilled after more than twenty months since he was employed. In any event, in view of the disjuncture between the term of

the contract he signed and the clear intention of the council that his initial contract should only be for a three year term, it is clear both that there was no consensus on this vital term of the contract and it was not a contract having the term authorised by the Council.

[15] In the circumstances, while it is clear that the applicant was employed by the council, his appointment as a senior manager to whom the disciplinary regulations apply was not finalised and accordingly the regulations on which the applicant relies to assert his rights not to be suspended are of no application to him.

[16] Although the respondents cannot be estopped from asserting the invalidity of the applicant's appointment because that would be tantamount to validating an appointment which the Systems Act does not permit, it is clear that at the time of attempting to suspend him, it gave the impression that it accepted he was validly appointed under that Act, and his response to the steps it took was quite understandable. Accordingly, I do not think it would be fair to make him pay the respondent's costs in either application.

Order

[17] In the light of the analysis above,

17.1 the application to lift the applicant's suspension by the respondents is dismissed, and

17.2 it is declared that the applicant has at the date of this judgment not been validly appointed as Chief Financial Officer in terms of the Systems Act.

[18] Each party must pay its own costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: WP Scholtz of Scholtz Attorneys

FIRST RESPONDENT: K Tsatsawane instructed by Gildenhuys Malatji