THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1236 / 15

In the matter between:

MERE, SHADRACK KOTLHAO **Applicant**

and

TSWAING LOCAL MUNICIPALITY **First Respondent**

SEHULARO KGOSIETSILE (ADMINISTRATOR) **Second Respondent**

Heard: **02 July 2015**

Delivered: **07 July 2015**

Summary: Interdict application – principles stated – application of principles to matter – issue of clear right considered

Suspension – whether suspension unlawful – provisions of Municipal Regulations as it stands determinative as to whether suspension unlawful

Suspension – authority to suspend – whether administrator has authority to suspend – provisions of Section 139 of Constitution considered – administrator has authority to suspend

Clear right – interpretation of Municipal Regulations – substantial compliance shown

Interdict – no clear right shown – application dismissed

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an urgent application by the applicant seeking an order declaring that his suspension by the respondents is invalid and unlawful. The applicant further seeks an order that his suspension be uplifted with immediate effect and he be reinstated into his normal duties.

[2] This matter does not concern any issue of unfairness or unfair labour practice. The case of the applicant is squarely founded on whether his suspension was lawful in terms of the Local Government: Disciplinary Regulations for Senior Managers ('Municipal Regulations')[1], namely whether the respondents had complied with the pre suspension processes as contemplated by the Municipal Regulations itself in effecting his suspension. The case of the applicant also has a second leg, which concerns whether the second respondent, as administrator, in fact had the authority to effect the suspension of the applicant in the first place.

[3] This is yet another instance of a case arising out of a dysfunctional municipality, in which intervention of the provincial government was needed to fulfil the tasks in place and stead of the senior management and the council of the municipality, and then ending up before this Court. I remain concerned with the large number of these kinds of cases which find their way to this Court, which can only further serve to further hamper service delivery to the residents of such municipalities.

[1] GN 344 as contained in GG 34213 of 21 April 2011.

[4] The applicant is seeking final relief, and as such, the applicant must satisfy three essential requirements which must all be shown to exist, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[2] As these are motion proceedings in which the applicant seeks such final relief, insofar as there are factual disputes between the parties these disputes are to be decided in terms of the principles enunciated in *Plascon Evans Paints v Van Riebeeck Paints.*[3] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[4] the Court said:

> '…. where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

I will now set out the relevant background facts on which this matter is to be determined, arrived at applying the above principles.

Background facts

[5] Being a municipality, the first respondent is governed by the provisions of the Local Government: Municipal Systems Act[5] (the 'Systems Act'). The conducting of discipline against the senior managers of the first respondent is regulated by the disciplinary regulations promulgated in the Municipal Regulations referred to above, which are derived from the Systems Act.

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[2] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20.
[3] 1984 (3) SA 623 (A) at 634E-635C; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38.
[4] 2009 (3) SA 187 (W) at para 19.
[5] ref

[6] Where it comes to the suspension of senior managers as part of the disciplinary process in the Municipal Regulations, this is determined by Regulation 6 of the Municipal Regulations. The relevant part of this Regulation reads:

> '(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 subregulation (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.'

[7] The applicant was indeed appointed by the first respondent in terms of Section 54A of the Systems Act as a senior manager, having been appointed as its municipal manager in terms of a written contract of employment, commencing 1 April 2012. Clause 14 of the applicant's employment contract provides that he could be suspended if it was alleged he committed 'serious misconduct', and that the Municipal Regulations shall regulate and determine the conduct of discipline against the applicant.

[8] The undisputed evidence is that the first respondent was dysfunctional, resulting in intervention by the Provincial Government of the North West Province in terms of Section 139(1) of the Constitution, which provision will be dealt with more fully hereunder.

[9] On 29 April 2015, the Provincial Executive Council resolved to invoke Section 139(1)(b) for a minimum period of six months and a maximum period of twelve months, commencing 1 May 2015. According the respondents, this decision was necessitated by the first respondent being in what was called a 'crisis' of maladministration, to the extent that it was unable to even execute its mandate. The maladministration included nepotism relating to staff appointments, financial mismanagement, failure to pay over contributions and payments to third parties and statutory entities, and failing to recover monies owed to it.

[10] Pursuant to this intervention, the second respondent was appointed as administrator of the municipality, effective 15 May 2015, in terms of a written letter of appointment, setting out all of his powers. As administrator, and in terms of the appointment made, the second respondent in effect stepped into the shoes of the municipal council. The municipal council was so informed on 15 May 2015, and then disbanded. The second respondent actually commenced his duties on 17 May 2015, and would continue with such duties until a new council was elected.

[11] According to the second respondent, and following his appointment, he commenced an investigation into the affairs of the first respondent, which included determining the possible causes of the dysfunctionality. It was reported to the second respondent that certain employees were reluctant to provide information to the second respondent because of intimidation and fear

of victimization, on the part of the applicant. The fact is that the presence of the applicant at work could jeopardise the second respondent's investigation and witnesses could be interfered with. The second respondent also suspected the applicant of serious misconduct.

[12] For the above reasons, and on 1 June 2015, the second respondent prepared a letter headed a 'notice of intention to suspend' to be given to the applicant. This letter advised the applicant of the intention to suspend him based on an allegation only referred to as 'serious misconduct' as contemplated by his employment contract. It was recorded that the applicant was given 48 hours to provide reasons in writing as to why he should not be suspended, and that these written reasons had to be submitted by 9 June 2015 at 12h00.

[13] A meeting was then held between the applicant and the second respondent on 2 June 2015 in which this letter was discussed, and handed to the applicant. In this meeting it was explained to the applicant that his suspension was contemplated because the statutory deductions from the employees' salaries were never paid over to the institutions concerned, as well as instances of financial maladministration and some R30 million being unrecovered for several years. I accept that the applicant was indeed aware why he was being suspended, having been so informed in this meeting.

[14] On 8 June 2015, the applicant responded to the letter of intention to suspend given to him on 2 June 2015. The applicant said that he was 'unable to make sense' of the allegations of serious misconduct because he was not provided with the 'form of the misconduct'. It was recorded that particulars of the misconduct had to be set out in the notice of intention to suspend, and because this was not done, it was not 'clear' to the applicant as to what to answer. The applicant states that he was unable to speculate as to what the second respondent wanted, and he was unable to provide reasons as to why he should not be suspended. The applicant contended that his suspension was in violation of the Municipal Regulations.

[15] The second respondent considered the applicant's letter of 8 June 2015, and resolved to proceed with the suspension of the applicant. The applicant was then suspended by way of written notice dated 17 June 2015, presented to him on 18 June 2015. The suspension notice referred to the meeting held on

2 June 2015. The notice recorded that the reasons for the suspension of the applicant was the general failure of the applicant as accounting officer of the municipality in terms of the Municipal Finance Act, especially relating to budgeting and revenue collection. It was further recorded that the view of the second respondent was that the applicant's presence at work could lead to a tampering with the evidence and/or intimidating those persons likely to testify against him. The applicant was notified that disciplinary proceedings would be instituted against him and he would be presented with a formal charge sheet in due course.

[16] The applicant then brought this application now before me, challenging the lawfulness of this suspension.

Urgency and jurisdiction

[17] It is now trite that the Labour Court has jurisdiction to entertain an application for urgent intervention in the case of suspension of an employee, in terms of Section 158 of the LRA.[6] But it must always be remembered that the Labour Court should only so intervene in exceptional circumstances. As the Court said in *Booysen v Minister of Safety and Security and Others*[7]:

> '…. such an 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.'

[18] Therefore, the applicant has to show compelling and extraordinary circumstances as to why this Court should now intervene, and not allow the disciplinary process against the applicant to run its course, in the normal course. As to whether the applicant succeeded in doing so *in casu*, will be dealt with hereunder.

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[6] Section 158(1) reads: '(1) The Labour Court may (a) make any appropriate order, including (i) the grant of urgent interim relief (ii) an interdict; (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act; (iv) a declaratory order ….'.

[7] (2011) 32 ILJ 112 (LAC) at para 54. See also *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 46.

[19] Then, and as to the issue of urgency, I accept that this matter is urgent. In any event, and in the argument submitted by both parties before me, the issue of urgency was not really placed in contention. The applicant was suspended on 18 June 2015, first engaged the respondents through his attorneys on 22 June 2015 to demand the uplifting of his suspension, and brought this application on 24 June 2015. There are thus no hallmarks of self-created urgency and I am satisfied the applicant acted promptly and immediately upon being suspended.[8] Both parties have had the opportunity to fully state their respective cases in the pleadings and in argument, with a complete set of affidavits filed, and it is my view that it is in the interest of justice to finally determine this matter. I thus conclude there are proper grounds to finally determine this matter as one or urgency.

[20] I will now proceed to consider the applicant's application on the merits thereof, firstly considering the issue of the existence of a clear right. In this regard, I shall firstly consider the applicant's case relating to the lack of authority of the second respondent to have suspended the applicant in the first place.

Clear right: authority of the second respondent

[21] I will first deal with the issue of whether the second respondent had the authority to suspend the applicant, because if this part of the applicant's case is upheld, it will not be necessary to determine the case of the applicant relating to Regulation 6 of the Municipal Regulations, and the suspension would be unlawful based on this ground alone.

[22] The applicant's case of the lack of authority of the second respondent is founded on five contentions. Firstly, according to the applicant, it is only the municipal council of the first respondent that has the authority to place the applicant on precautionary suspension, and no one else, even if these was intervention by the Provincial Government. Secondly, the applicant submitted that the authority to suspend came from Regulation 6(4), which made specific

[8] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd* (2007) 28 ILJ 2796 (LC) at para 12; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 – 24.

reference to the municipal council only. Thirdly, applicant contended that only the municipal council can appoint a municipal manager in terms of the Systems Act and it followed that only the same council could have the authority to suspend such manager. Finally, the applicant contended that Section 139(1)(c) of the Constitution[9] only made provision for intervention where it comes to 'executive obligations', and the suspending of senior managers does not constitute such an 'executive obligation', leaving the issue in the hands of the municipal council. Finally, the applicant submitted that the second respondent, if regard is had to the terms of reference of his appointment, was not empowered in terms thereof to take any disciplinary action against senior managers.

[23] This matter does not concern the validity or legitimacy of the appointment of the second respondent as administrator and/or the terms of reference of his appointment. As was stated in *Tsietsi v City of Matlosana Local Municipality and Another*[10], this Court in any event does not have jurisdiction to decide such questions.

[24] Mr Scholtz, representing the applicant, argued that because the appointment of the second respondent was made pursuant to Section 139(1)(c) of the Constitution, his terms of reference could only relate to an "executive obligation', and this did not include the disciplining or suspension of senior managers such as the applicant.

[25] Section 139(1))(c) of the Constitution provides:

> 'When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including- …. *(c)* dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.'

[26] I cannot agree with the narrowed interpretation Mr Scholtz seeks to place on 'executive obligation' where it comes to interventions in terms of Section

[9] Constitution of the Republic of South Africa, Act 108 of 1996.
[10] [2015] 7 BLLR 749 (LC) at para 3.

139(1), for the reasons I will now set out. In *Premier, Western Cape and Others v Overberg District Municipality And Others*[11] the Court said:

> '…. Broadly stated for present purposes, however, s 139 of the Constitution permits and requires provincial governments to supervise the affairs of local governments and to intervene when things go awry. ….'

[27] What is thus envisaged is a supervisory function in extraordinary circumstances where the municipality cannot fulfil its functions.[12] Where this supervisory function is discharged to the extent of dissolving the municipal council and appointing an administrator in its stead, this has to mean that the administrator for all intents and purposes steps into the shoes of the municipal council and fulfils the functions that the council normally does. In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[13] it was held as follows

> 'Section 139 empowers the provinces to intervene where a municipality cannot or does not fulfil an executive obligation in terms of the Constitution. If it intervenes, the provincial government may take appropriate steps to ensure that the obligation in question is fulfilled. The steps taken may include the provincial government itself assuming the responsibility for the obligation or even dissolving a municipal council and replacing it with an administrator. ….'

[28] The Court in *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others*[14] specifically dealt with the meaning of 'executive obligation' as contemplated by Section 139(1) and said the following:[15]

> '…. Co-operative government not only relates to the provision of support and assistance to local governments, but also involves an aspect of supervision. Section 155(6) of the Constitution in fact pertinently provides that a provincial government must by legislative or other measures provide, not only for the support, but also for the monitoring of local government. In

[11] 2011 (4) SA 441 (SCA) at para 1.
[12] See *City of Cape Town v Premier, Western Cape, and Others* 2008 (6) SA 345 (C) at para 48.6.
[13] 2010 (6) SA 182 (CC) at para 66.
[14] [2012] JOL 28311 (ECB).
[15] Id at para 43.

terms of subsection (7) both the national and provincial governments have legislative and executive authority to "see to the effective performance by municipalities of their functions . . .". This provision underlines the fact that the autonomy of municipalities is relative. The duty to perform a monitoring function is accompanied by the right to take corrective measures. Intervention is authorised by the subject-matter of this judgment, namely, section 139 of the Constitution. ….'

In this context, the Court then held:[16]

'…. It must be acknowledged that the use of the term "executive obligation" was intentional. In the context of the autonomous position occupied by local government in the constitutional framework, the aim was to limit intervention to a failure to fulfil obligations that are executive in nature. The term must, in my view, be given a meaning consistent with the ordinary meaning attributed to it in a democratic dispensation and the executive authority of the national and provincial executives in terms of the Constitution. The obligation of local government is to provide government at a local level and to discharge the functions associated therewith. This obligation is exercised within the functional areas referred to above and extends to the obligation to, within those functional areas, implement and administer legislation in relation thereto, provide the services associated therewith, provide an administration to do so, develop policy in relation thereto and initiating by-laws to effectively govern within those functional areas. ….'

The Court concluded:[17]

'To conclude, the purpose of section 139(1) is to enable a provincial executive to take steps that are necessary to place a municipality in a position to fulfil its executive obligations. The section has both legal and political safeguards built into it, namely, the objective determination of whether there has been a failure to fulfil an executive obligation, to intervene in a manner that is appropriate …..'

[16] Id at para 61.
[17] Id para 79.

[29] Applying the reasoning in *Mnquma Local Municipality,* where the dysfunctionality of the municipality is such so as to warrant the extreme intervention by the Provincial Government in the form of the dissolution of the municipal council and the replacement thereof with an administrator, then it has to follow as a matter of common sense and logic that the administrator must be permitted to do what the municipal council would normally do. That has to be what the supervisory function entails. If the municipal council had the authority to suspend the applicant, as it clearly did, then the administrator equally must have the authority to do so in its stead.

[30] It must also be remembered that any intervention in terms of Section 139(1)(c) of the Constitution entails an actual dissolution of the municipal council until it can be replaced by a newly elected council. To then suggest that this defunct municipal council still retains some functions, or that certain administrative and management functions cannot be fulfilled until the new municipal council is elected, is simply incomprehensible. The administrator is for all practical purposes an interim council, to be replaced with a new council once elected.

[31] In order for the administrator to effectively discharge his or her duties, then surely the administrator must exercise control and supervision over the senior managers of the municipality. After all, that is what the municipal council did prior to dissolution. In my view, and for the reason given, any reference to the 'municipal council' in the Municipal Regulations must, as a necessary consequence, include a reference to the administrator in the case of a Section 139(1)(c) intervention.

[32] I accordingly reject the applicant's contention that the second respondent did not have authority to suspend him. It is my view that 'executive obligation' in the case of an intervention in terms of Section 139(1)(c) also contemplates all aspects of management and supervision of the first respondent's senior managers, by the second respondent.

[33] The applicant's case as to the terms of reference of the second respondent can be swiftly disposed of. It is clear from a simple reading of the second respondent's letter of appointment with accompanying terms of reference that he has the power to attend to all 'labour matters' of the first respondent. Mr

Scholtz sought to submit that the reference to 'discipline of workers' in these documents where it came to labour matters, meant that senior managers were not included, because they were not 'workers'. This argument has no merit. The actual provision in the letter of appointment reads, *in toto*: 'Attend to all labour matters [outstanding disciplinary cases, labour disputes, functionality of LLFF, instil culture of work and discipline of workers]'. The reference in brackets, in my view, is not a closed list, but is simply pertinent examples of what is envisaged under "labour matters'. If the functions of the second respondent were to be only limited to what is contained in the brackets, then there would have been no reference to 'all labour matters'. In any event, the second respondent is given the general power to manage the overall administration of the first respondent. I am therefore satisfied that the second respondent's letter of appointment and terms of reference do make provision for the authority to suspend the applicant, being a 'labour matter'.

[34] In the circumstances, the applicant's case that the second respondent had no authority to suspend him falls to be rejected. The applicant accordingly has not shown the existence of a clear right in this regard.

Clear right: Regulation 6

[35] There is no doubt that Regulation 6 of the Municipal Regulations does apply in this case. These regulations also form part of the applicant's contract of employment, by incorporation therein. If Regulation 6 has not been complied with by the second respondent in effecting the suspension of the applicant, the applicant's suspension would be unlawful, and the applicant would succeed in demonstrating the existence of a clear right. In considering this question, I will only have regard to the judgments post the *McKenzie*[18] and *Gradwell*[19] judgments of the SCA and LAC respectively, in that the determination of this issue following these judgments is no longer contaminated by general consideration of fairness and fair labour practices.

[18] *SA Maritime Safety Authority v McKenzie* (2010) 31 ILJ 529 (SCA).
[19] *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC).

[36] In *Mojaki v Ngaka Modiri Molema District Municipality and Others*[20] the Court held as follows:

> 'The object of regulation 6 of the regulations is to afford an employee a hearing before the decision to suspend him or her is taken. That object is achieved by calling on the employee to show cause why he or she should not be suspended pending an investigation or disciplinary hearing. ….'

[37] Regulation 6 thus contemplates the opportunity to make representations before the final decision is taken to suspend a senior manager. That means that the senior manager must at least be placed in a position where he or she is able to make such representations. It is for this reason that the municipality must give the senior manager notice of intention to retrench, and in such notice call upon the senior manager to make representations[21]. In *Lebu v Maquassi Hills Local Municipality and Others (2)*[22] the Court held as follows insofar as it concerns this notice:

> '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. ….'

[38] A similar approach was followed in *Retlaobaka v Lekwa Local Municipality and Another*[23] where the Court said:

> '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 are 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

[20] (2015) 36 ILJ 1331 (LC) at para 29.
[21] See Regulation 6(2).
[22] (2012) 33 ILJ 653 (LC) at para 16.
[23] (2013) 34 ILJ 2320 (LC) at para 8.

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 employer's representations on the purpose of the proposed suspension, which clearly must be made known to the employee for those representations to be meaningful.'

[39] The Court in *Tsietsi*[24] also analysing the recent authorities relating to Regulation 6 and said:

'In my judgment, the above authorities on which applicant relies, should *not* be understood to amount to the following two propositions:

12.1 that the particularity of the allegations of misconduct must be of such detail as to allow for the setting out of a defence in response thereto in the applicable representations in terms of regulation 6.
Or as applicant averred to: "show that the allegations have no prospects." This is because the suspension in terms of the Regulation is precautionary, and resorted to in order for an investigation to take place as to whether charges should follow, and not a disciplinary sanction in its own terms.

12.2 that a municipality must set forth *evidence* to show that the person involved may interfere in the conduct of the investigation against him or herself. Reference to the position of the senior official and the attendant powers and responsibilities that he or she has, read with the allegations of misconduct as set out in the pre-suspension letter, should suffice.'

I agree with the above reasoning in *Tsietsi*.

[40] Therefore, and for a senior manager to be lawfully suspended in terms of Regulation 6, the municipality must have reason to believe that at least one of the circumstances as contemplated by Regulation 6(1) exist. The municipality must then notify the senior manager of its intention to suspend him or her, and provide, at the very least, basic particulars as to what motivated this intention to suspend, so that the senior manager can provide informed answers as to

[24] *Tsietsi v City of Matlosana Local Municipality and Another* (*supra*) at para 21.

why he or she should not be suspended. Detailed evidence or particulars need not be provided. The senior manager must then be given at least seven days to provide such a response. Once this response is given, it must be considered by the municipality, and if it decided to continue with the suspension, the senior manager must be informed in writing of the suspension and the reasons why he or she is being suspended, with reference to the grounds set out in Regulation 6(1).

[41] If the above is not adhered to, the suspension may well be unlawful. In *Biyase v Sisonke District Municipality and Another*[25] the Court held:

> 'These provisions may well be unduly onerous. But it is common cause that the parties are bound by them. Failure to do so would make the suspension unlawful for want of compliance with the regulations.'

[42] It is equally important to consider that the senior manager must utilize the opportunity to make representations when called on to do so. The failure or refusal by the senior manager to make such representations would mean that the senior manager cannot be seen to thereafter complain about the lawfulness of his or her suspension when it is then implemented[26].

[43] Applying the above principles to the facts *in casu*, I am satisfied that there has been substantial compliance with Regulation 6 by the respondents, for the reasons I will now set out.

[44] I accept that the notice of intention to suspend dated 1 June 2015 only refers to alleged misconduct and no particularity is provided of the kind that would enable the applicant, as senior manager, to make informed representations as to why he should not be suspended. If the suspension was founded only on this notice, the applicant's suspension may well have been unlawful.

[45] But this was not just a case of the applicant only being presented with the notice of intention to suspend and nothing else. A meeting was convened between the applicant and second respondent to discuss the notice upon it

[25] (2012) 33 ILJ 598 (LC) at para 20.
[26] See *Mojaki v Ngaka Modiri Molema District Municipality and Others* (*supra*) at paras 29 and 33.

being presented, and in this meeting the applicant was indeed informed in sufficient particularity as to why the second respondent intended suspending him. It is so that in the replying affidavit, the applicant does deny this meeting was held, but the *Plascon Evans* principle works squarely against the applicant in this respect, and the events of the meeting was confirmed by Moses Pholo, who was also present. Further, and in the ultimate notice of suspension dated 17 June 2015, which was written before this dispute was initiated by the applicant, specific reference is made to the meeting of 2 June 2015. I remain convinced that the reasons for the applicant's suspension was discussed in the meeting.

[46] There is nothing in Regulation 6(2) (as read with Regulation 6(1)) that prescribes that the notice if intention to suspend given to the senior manager must be in writing. It is only the actual notice of suspension in terms of Regulation 6(5) that must be in writing. In my view, there is therefore nothing wrong in a municipality giving a senior manager a short written notification of the intention to suspend him or her for 'alleged misconduct', and then, when presenting such notice, informing the senior manager verbally of the reasons why this is intended. This is what happened *in casu*. As the Court said in *Mojaki*:[27]

> 'In my view, whilst the administrator may be criticised for failing to respond to the applicant when he requested the copy of the letter, this, however, does not detract from the fact that the applicant was made aware of the action which the administrator intended taking and was offered an opportunity to make his representation which he failed to do ….'

[47] I accept that the notice of intention to suspend of 1 June 2015 records that the applicant had 48 hours to provide written reasons as to why he should not be suspended. This, on face value, would be at odds with the 7 day time period in Regulation 6(2) to make such representations. However, the same notice says that the applicant must submit these written reasons by no later than 9 June 2015, which would be in compliance with the 7 day time period in the Regulation. In my view, the applicant clearly understood that he had 7 days to make his representations as to why he should not be suspended. This is

[27] (*supra*) at para 32.

evident from his written response to the notice of intention to suspend, only submitted on 8 June 2015. I am satisfied that there is no irregularity in the notice of intention to suspend in this regard.

[48] The applicant then in fact made representations, as referred to above. In my view, these representations were deliberately written on the basis that the applicant allegedly was not informed of the reasons for his intended suspension. I believe that the applicant opportunistically seized on the opportunity created by a lack of particulars on the actual written notice of 1 June 2015 and ignored what he had been told in the meeting of 2 June 2015 because it was verbal. The fact that the applicant chose to respond in this way thus cannot detract from the fact that he was given an opportunity to make representations, and did so. The applicant has not made out any case that what he submitted on 8 June 2015 was not considered by the second respondent, and I accept that it was.

[49] In the founding affidavit, the applicant has said that Regulation 6(5) has not been complied with in that he has not been given reasons for his suspension and that the MEC was not informed of his suspension as required. There is simply no substance in these contentions. A mere reading of the suspension notice of 17 June 2015 shows that he applicant was given clear reasons why he was being suspended, and these reasons corresponded with the requirements for a lawful suspension in Regulation 6(1). As to whether or not the MEC was informed, this simply, in my view, cannot detract from the lawfulness of the suspension of the applicant where Regulations 6(1), (2), (3), (4) and (5)(a) have been substantially complied with, as they were, and it is not necessary to devote any further time to this contention.

[50] Mt Scholtz heavily relied on the judgment in *Lebu v Maquassi Hills Local Municipality and Others (2)*[28] in support of his case, in which judgment the Court indeed interdicted the suspension of the senior manager on the basis that it was unlawful for want of compliance with Regulation 6. I however point out that this case is distinguishable on the facts, considering that in that case, the municipality notified the manager of its justification for his suspension and called on his to make representations, on the same day that he was actually

[28] (supra)

suspended. The municipality in that matter also failed to articulate the purpose of the suspension. Although I agree with the general principles enunciated by the Court in *Lebu* with regard to Regulations 6 in general, which I have dealt with above, I do not believe this judgment assists the applicant's case *in casu*.

[51] I finally refer to the fact that the applicant has not made out a case that the suspension was unlawful for want of a proper reason to suspend him as contemplated by Regulation 6(1).

[52] The seniority of the position of the applicant and the fact that he in effect refuses to recognize the authority of the administrator (second respondent) are also important factors in deciding whether the applicant's suspension was objectively justifiable. *In casu*, the applicant, as municipal manager, was the most senior of the managers and his approach towards the second respondent entirely counterproductive. Also, the applicant's continued presence at work, considering his position, would make it very difficult for the second respondent to conduct a proper investigation into what was a dysfunctional municipality. As was said in *Mojaki*:[29]

> 'The allegation that the applicant refused to obey instructions from the administrator is in my view very serious taking into account in particular the level of his responsibility and seniority. It is for this reason that I am of the view that the facts and the circumstances justified the action taken by the administrator to suspend him. In other words, there exists an objectively justifiable basis for the administrator to deny the applicant access to the workplace.'

And also in *Phutiyagae v Tswaing Local Municipality*[30] the Court held:

> 'The applicant is the head of the department the respondent intends investigating. During the course of the investigation there is a possibility that the applicant's subordinates may have to be interviewed, that documents may have to be accessed. The continued presence of the applicant might possibly hinder the investigations.

[29] (*supra*) at para 34.
[30] (2006) 27 ILJ 1921 (LC) at paras 27 – 28.

> The rationale underpinning the applicant's suspension appears to be reasonable and it is prima facie informed by the suspicion that the applicant has committed serious misconduct.'

[53] I thus conclude that there has been substantial compliance with Regulation 6 in this instance by the respondents. The suspension of the applicant was motivated by objectively justifiable considerations, of the kind envisaged by Regulation 6(1). The applicant was properly notified of the intention to suspend him and the reason for this intended action, partly in writing and partly verbally. The applicant was given 7 days' notice to file representations, which he did. The applicant's representations were considered and he was thereafter given proper written notice of his suspension. His suspension was thus lawful.

[54] Accordingly, the applicant's case that his suspension was unlawful for want of compliance with Regulation 6 must thus also be rejected.

Conclusion

[55] As the applicant has failed in establishing that his suspension by the respondents was unlawful on the two principal grounds he has raised, it follows that the applicant had failed to establish a clear right to the relief sought. In the absence of a clear right, the applicant's application must fail for this reason alone.

[56] I may however point out that the applicant still has his remedy of challenging his suspension in terms of the dispute resolution processes under the LRA based on alleged unfair conduct on the part of the respondents. Similarly, the suspension is of limited duration, coming to an end after three months if the disciplinary proceedings have not commenced by then.[31]

[57] In the light of all of the above, I therefore conclude that the applicant has failed to demonstrate a clear right to the relief sought and has failed to provide any

[31] See Regulation 6(6).

compelling considerations of urgency or exceptional circumstances to justify intervention in his suspension in this case.

[58] This then only leaves the issue of costs. The applicant has elected to approach the Labour Court on an urgent basis when it must have been clear there was no basis for doing so. Mr Scholtz, who represented the applicant, raised a similar case in the judgment of *Tsietsi v City of Matlosana Local Municipality and Another*[32] which was dismissed with costs. He should thus have been properly forewarned. Also, the applicant was legally assisted from the outset by Mr Scholtz. There is accordingly simply no reason why costs should not follow the result in this matter.

Order

[59] I accordingly make the following order:

59.1 The applicant's application is dismissed with costs.

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S.Snyman

Acting Judge of the Labour Court

[32] (*supra*) footnote 10.

Appearances:

For the Applicant:	Mr F Scholtz of Scholtz Attorneys
For the Respondents:	Advocate Ramoshaba
Instructed by:	Mokhetle Inc Attorneys