IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE Case No. 1814/18

In the matter between:

SIKHATSI DLAMINI **Applicant**

And

THE MAYOR – MBABANE MUNICIPAL COUNCIL OF MBABANE **1st Respondent**
SABELO MAGAGULA N.O. **2nd Respondent**
SITHEMBILE HLANZE N.O. **3rd Respondent**
SIKHUMBUZO DUBE N.O. **4th Respondent**
BONGANI A. DLAMINI N.O. **5th Respondent**
MBABANE MUNICIPAL COUNCIL **6th Respondent**
GIDEON MHLONGO **7th Respondent**
THE MINISTRY OF HOUSING & URBAN DEVELOPMENT **8th Respondent**
THE ATTORNEY GENERAL **9th Respondent**

Neutral citation :Sikhatsi Dlamini VS The Mayor – Mbabane Municipal Council of Mbabane and Others (1814/18) [2019] SZHC 11 (05 February 2019)

Coram : **MAMBA J.**

Heard **: 5 DECEMBER 2018**

Delivered **: 05 FEBRUARY 2019**

[1] Civil Law Procedure – Urgent application per rule 6 (25) (a) and (b) of the rules of the Court. Applicant required to state grounds of urgency and why he thinks he will suffer irreparable harm should matter not be heard urgently – facts in justification of urgency to be stated.

[2] Civil Law – proceedings against a Municipality – Section 116 Urban Government Act 8 of 1969 (as amended) – litigant required to give at least 30 days notice to Municipality of his intention to sue it; stating clearly and explicitly the Nature of his claim.

[3] Civil Law – Proceedings against Municipality – litigant may in an appropriate case proceed in terms of Section 116 (3) of the Urban Government Act apply to Court for special leave to sue Municipality without giving required 30 days notice. Requirements for such special leave stated.

[1] The applicant is an adult Liswati male person of Gundwini in the District of Manzini. He is resident within the Mbabane City Urban area and is a councillor within the said City representing Ward 4. He is also Chairman of the Finance Committee within the City Council.

[2] Following certain allegations and disciplinary proceedings against the applicant, which commenced in August 2018 and culminated or ended on 19 October 2018, the applicant was suspended as a Councillor by the first respondent who is the City Mayor of Mbabane.

[3] The 6th Respondent is the Municipal Council of Mbabane, which is a statutory body established in terms of the Urban Government Act 8 of 1969 (as amended). The Mayor and the 2nd to 5th respondents are some of the Councillors and employees of the 6th Respondent.

[4] The 7th Respondent is Gideon Mhlongo, an adult Liswati male person of Mbabane and is the Chief Executive Officer of the 6th Respondent. He was re-engaged as such by the 6th Respondent, after his previous term of

employment as such CEO expired on 31 July 2018. I note that the legality of the renewal of his term of employment is one of the issues that have been questioned or challenged by the applicant in the urgent application.

[5] It is also common cause that the 7th Respondent was previously engaged or employed in his capacity aforesaid on a fixed term contract. It is common cause further that there have been more than one of such fixed term contracts – as they were being renewed at the appropriate times; based on the performance of the employee on certain specified deliverables. I do note though that the 8th and 9th respondents have, in their heads of Argument stated that in terms of Clause 3.2 of The Terms and Conditions of Executive Senior Management Policy of 2018, 'the term of office shall be renewed based on an aggregate above average performance assessed annually over the contract period [and that] in terms of Clause 8.7 'in the event the Council does not intend to renew the contract of an officer notwithstanding the above average performance, Council shall notify the officer at lease six months before the expiry date of the contract, and that the 6th respondent failed to notify the 7th respondent as obligated by Clause 8.7. Consequently, the said two respondents argue the renewal of the 7th respondent's fixed term contract was lawfully and tacitly renewed by the 6th respondent.

[6] The above submission by the 8th and 9th respondents, although legally sound, are irrelevant in these proceedings inasmuch as they do not form part of the pleadings. Heads of Argument are not pleadings. This is, one would hope, trite law.

[7] Following the Conviction and suspension of the Applicant as aforesaid and the renewal or re-engagement of the 7th respondent as the CEO of the 6th respondent, the applicant has filed this application wherein he seeks, inter alia, the following prayers namely:

> ‘1. Dispensing with the usual time limits, procedures and manner of service provided for in the rules of the above Honourable Court and hearing this matter as one of urgency.
>
> 2. That pending finalisation of the matter, the applicant be allowed to attend council meetings in his capacity as Councillor for Mbabane Ward 4 and in his capacity as the Chairman of the Finance Committee of the 6th respondent.
>
> 3. That pending finalisation of the matter, the 1st to 7th respondents or anyone acting in their behest or authority be

interdicted and restrained from removing or preventing the applicant from going about his duties at Council premises.

4. Reviewing and setting aside of the proceedings held by the 2nd to 5th respondent and the decision issued by the 1st respondent for non compliance with the rules of Natural Justice and or section 21 of the Kingdom of Eswatini Act No 1 of 2005.

5. That the relevant record or proceedings in both written and audio (Hansard) form be provided to the above Honourable Court within 14 days upon receipt of this application.

6. Declaring that the 7th respondent is not the Chief Executive Officer of the 6th Respondent after his contract lapsed on the 31st day of July 2018 and from that date having no valid contract with the 6th respondent.

7. Condoning the Applicant for non-compliance with the provisions of section 116 of the Urban Government Act 8 of 1969.

8. That papers 2 and 3 are to operate with immediate interim effect.

9. Costs of Suit in the event of opposition.'

[8] The application is dated the 20th day of November 2018 and was served on the respondents and filed with the registrar of this court on 21 November 2018. The application was set down for hearing on 23 November 2018 at 9:30 in the forenoon. The applicant demanded that the respondents, in the event they opposed the application, must file and serve the opposing affidavit, if any, before the close of business on 22 November 2018. The application is accompanied by a certificate of urgency duly signed and executed by an attorney of this Court.

[9] The grounds and or reasons for urgency stated in the Certificate aforesaid are as follows:

'1. Should this application not be heard, as a matter of urgency the applicant will be left out of Council business [based on] incompetent charges and sentence that were granted irregularly.

2. The 6th respondent, who is not fully constituted shall take decisions which will [affect] the applicant's ward without his involvement and to his prejudice and that of [the] community of ward 4.

3. The Applicant is the Chairman of the Finance Committee of 6th respondent, a Committee that is the lifeblood of the 6th respondent and everyday that the applicant is out of Council is affecting service delivery of the 6th respondent.

4. The 2nd, 3rd and 4th respondents have caused a motion to [be] moved in Council for the applicant and other members of the finance committee. Should the matter be heard in due cause by the time the matter is finalised the motion, to remove the finance committee will have been dealt with. [And],

5. Matters concerning the [deprivation] or interference with a person's Constitutional rights are by their nature urgent.'

[10] In his founding affidavit the applicant states that should the debate on the disbandment of the finance committee take place whilst he is on suspension, '… I will suffer irreparable harm in that by the time the matter is finalised I would not have had the opportunity to defend my

committee.' He states further that the suspension adversely impacts on his personal rights to dignity and reputation and submits that matters pertaining to deprivation of a person's Constitutional rights are by their very nature urgent.

[11] Broadly or generally speaking, the applicant is challenging two issues, namely; his suspension as a councillor and the renewal of the contract of employment of the 7th respondent by the 6th respondent. One of the ground s for challenging his suspension is that the whole process resulting in his

suspension was materially flawed because the committee that tried his case was biased against him and refused to recuse itself when he asked them to do so on 4 September 2018. The result is that the applicant removed himself from the whole process but later resurfaced to mitigate before the 1st respondent. No explanation is given why the applicant did not appeal

the refusal by the committee to recuse itself when it did so. He waited until 20 November 2018 to file this challenge.

[12] The 1st to 7th respondents filed their papers in opposition to this application. Preliminary or points in limine were also raised by then regarding the issue of urgency and the applicant's locus standi or

standing to seek some of the prayers or orders stated above; in particular prayer 6 in the Notice of Motion.

[13] I observe that the applicant has not stated in his papers the period of his suspension. What is stated though is that he was a repeat offender, having been first convicted and sentenced in June 2018 – for a transgression of the same code of conduct for councillors annexure SJ6 which is the written verdict or ruling by the first respondent appears to be incomplete. Paragraph 5, of the said annexure at Page 47 of the book is obviously incomplete and I suspect that the sentence or period of suspension is contained in the missing text or bit.

[14] In his application, the applicant also seeks an order condoning his failure to comply with section 116 (1) and (2) of the Urban Government 8 of 1969. He states that the respondent will not be prejudiced by his failure to comply with the provisions in question and that in the circumstances of this case, he could “not be” reasonably expected to comply with the requirements, of notice to the respondents in that by the time the matter is heard the very harm that I seek to prevent would have already occurred.’

[15] Section 116 of the Urban Government Act provides as follows:

(1) No legal proceedings of any nature shall be brought against a Council in respect of anything done or omitted by it after the commencement of this Act, unless such proceedings are brought before the expiry of twelve months from the date upon which the claimant had knowledge or could reasonably have had knowledge of the act or omission alleged.

(2) No such action shall be commenced until thirty days written notice of the intention to bring such proceedings have been served on the Council, and particulars as to the alleged act or omission shall be clearly and explicitly given in such notice.

(3) The High Court may, on application by a claimant debarred under subsection (1) or (2) from instituting proceedings against a Council, grant special leave to him to institute such proceedings if it is satisfied that –

(a) the Council against which the proceedings are to be instituted will in no way be prejudiced by reason of the failure to institute the proceedings within the stipulated period or by reason of the failure to give or the delay in giving the required notice; or

(b) having regard to any special circumstances, the person proposing to institute the proceedings could not reasonably be expected to have complied with the requirements of subsection (1) or (2).'

[16] Sub-Section (3) as quoted above envisages an application for special leave to institute proceedings against a Council. That, I would have thought, presupposes an independent and stand-alone application to institute proceedings. It matters not whether those proceedings are by way of Motion of action. In the instant case, the applicant failed to give the requisite notice of 30 days to the 6th respondent, stating the particulars of the intended claim, in an explicit and clear manner. The applicant has, however, filed his claim without giving such notice and has, in the same claim sought for Condonation for such non-compliance with the provisions of sub-rule (2) of Section 116 above. Paragraph 14 of the applicants founding affidavit is nothing but a regurgitation of the provisions of 116 (3) (b) above. The special circumstances have not been given or listed by the applicant in his affidavit. Strictly speaking, there has been less than complete compliance with the section in question. In substance, the applicant has told the Court, 'the special circumstances of this case are self-evident, I need not state them and the respondents will

in no way be prejudiced by the failure to give prior notice, accept or admit these proceedings.'

[17] I am, in the interests of justice, prepared to condone this failure to comply with the said provisions by the applicant. I do so partly because I am of the considered view that to require the applicant to file a stand-alone application for special leave to sue would in substance be tantamount to putting form before substance. This, the Court must not do in circumstances such as in the instant case.

[18] Allowing or accepting the application as being in compliance with the provisions of 116 (3) does not mean, however, that it complies with what the applicant has to plead to satisfy the Court that special leave must be granted. Its only the form rather than the substance.

[19] It is not insignificant to observe that there is no indication on the papers when the debates in the Council pertaining to the disbandment of the Finance Committee will take place. In any event, it is completely illusory or fallacious and perhaps even condescending to suggest that such an event may not be properly conducted in the absence of the applicant. As already indicated or shown in the papers herein, the 6th respondent was able to operate and function without any hardship or obstacles during the

first suspension of the applicant which began in June 2018. For the record, there is no evidence or material before me to suggest that the applicant is indispensable for or in the proper management, functioning or operation of the 6th respondent. The same is equally true regarding his ward. Therefore, his absence in council meetings – due to his suspension – does

not constitute adequate or sufficient grounds of urgency in this case.

[20] That all matters pertaining to the violation of one's constitutional rights are by their very nature urgent, is plainly incorrect. It is rather outlandish and over simplification of the matter and is hereby rejected. For instance, it can hardly be said that an application to vindicate one's right to read the ***The Dictionary of Outrageous Quotations*** by C.R.S Marsden, would be sufficient to be heard as an urgent application. (Assuming of course that one has a constitutional right to read such a book). Each case, as the saying goes, will always be viewed and decided on its own particular and peculiar facts.

[21] As already noted above, the certificate of urgency does not at all say what irreparable harm would be suffered by the applicant in the event this matter is not heard as a matter of urgency. He ought to have stated the alleged irreparable harm. The applicant has himself not stated any such

irreparable harm, save that he would not be in a position to defend his committee. This Committee by the way is a sub-committee of the 6th respondent. It is not a personal entity that is owned by the applicant who would personally suffer should it be disbanded. Apart from this, the applicant has failed to divulge the irreparable harm that would ensue by the mere disbanding of the Finance Committee.

[22] Where a trier of fact or functionary declines to recuse itself from proceeding with the matter at hand, that decision is, as a matter of law, appealable or reviewable. In the matter under consideration, the recusal application by the applicant was dismissed by the relevant or special sub-committee on 4 September 2018. At that stage, the applicant was at liberty to give Notice to the 6th respondent that he was taking up that decision on review before this Court. He chose not to do so and he has not seen it fit or incumbent upon him to explain his decision to this Court.

[23] Again, the 6th respondent renewed the 7th respondent's employment contract in August 2018. There is no explanation whatsoever by the applicant as to why he was unable to give the required notice to the 6th respondent that he intends to challenge this decision before this Court – stating clearly and explicitly the reasons for his dissatisfaction, as required by section 116 (2) of the Urban Government Act 8 of 1969. In

an application for Condonation, the applicant is required or expected to show cause why his failure to comply with the applicable rule or regulation must be condoned. He is required to be frank and candid with the Court and explain his failure or non-compliance with the relevant rule or precept. A failure to do so would invariably be fatal. It is fatal in this case, i.e. the applicant has failed to satisfy this Court that he must be granted special leave to institute these proceedings against the 6th respondent.

[24] One further point deserves mention in this case and it is this: the harm envisaged by the rule and the law in matters of urgency is irreparable harm; irreparable in the sense that it is irreversible and cannot be redressed by an adequate relief in due course. *Vide Nhlavana Maseko and 2 Others V George Mbatha and Another. App 7/2005, Frederick Mapandzene & Others V Standard Bank, Yonge Nawe Environmental Action Group V Nedbank (Swaziland) Ltd Case 4165/2007, New MALL v Tricor International (Pty) Ltd, Case 302/2012, Megalith Holdings V RMS Tibiyo (Pty) Ltd Case 199/2000 & Swazi MTN LIMITED V Presiding Judge of Industrial Court & Others (325/16) [2016] SZHC 33 (23 February 2015).*

[25] It has to be noted that a ruling on the issue of urgency is admittedly a technical one in the sense that it does not dispose of the matter or the lis on the merits. However, such a ruling does not, in my Judgment, run counter to the salutary rule that matters must, as far as it can possibly be done, be decided on the merits rather than on technicalities. A ruling on urgency does not prejudice the litigants inasmuch as the issue or issues between them remains live and may be brought to court after the ruling by employing or adopting the appropriate procedure or mode. By ruling that

a matter is not urgent, the Court tells the applicant that he has employed a wrong procedure and not that he has no justiciable cause. Besides, a ruling against urgency serves, amongst other things, to regulate and facilitate the smooth and orderly running of the court roll without disturbance from new yet undeserving matters being enrolled on the urgency ticket. Again, whether a particular case is urgent or not, would eventually depend on the pleadings and particular facts of each case.

[26] On the issue of legal standing, it is clear to me that the applicant has the requisite standing to challenge his suspension and the proceedings that resulted in such suspension. However, he lacks such standing to challenge the renewal of the employment agreement between the 6th respondent and 7th respondent. His role or capacity in these proceedings

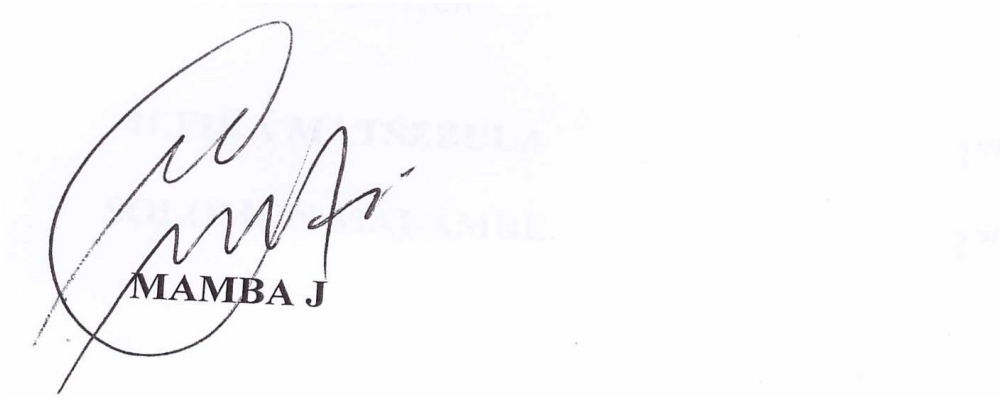
or such challenge is that of a mere Councillor or employee of the 6th respondent. In *Muldersdrift Sustainable Development Forum V Mogale City (2015) ZASCA 118,* a case cited by the respondents herein, the Court stated as follows:

> 'Of course, ratepayers – indeed the residents – of a Municipality have an interest in its Municipal Manager being properly appointed but this does not, without further ado, qualify it as a necessary interest: something more is required. In other words, is it not "any old interest that will suffice; the interest must be one that, in the eyes of the law, may deserve the intervention by the court on behalf of the applicant….'

[27] In his replying affidavit, the applicant challenges the locus standi of the 7th respondent to speak on behalf of the 2nd to 6th respondents. The applicant argues or avers that the 6th respondent is unlawfully in office and thus has no authority to speak on behalf of the 6th respondent, in particular. Until and unless declared invalid, by a competent authority, the renewal of the 6th respondent's contract of employment remains valid.

[28] For the above reasons, I hold that the applicant has failed to demonstrate or establish that this application is urgent or that he must be granted special leave to institute these proceedings against the 6th respondent.

(The other respondents of course do have a real and substantial interest in the matter). Consequently, the application is refused with costs.



For the Applicant	**Mr S. Jele**
For the 1st – 7th Respondent	**Mr Z.D. Jele**
For the 8th – 9th Respondent	**Office of the Attorney General**