



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 25068/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

17/08/20
DATE

[Signature]
SIGNATURE

In the matter between:

PHINEAS KGAHLISHO LEGODI

Applicant

and

MINISTER OF DEPARTMENT OF HUMAN

SETTLEMENT SANITATION AND WATER

First Respondent

DEPARTMENT OF HUMAN

SETTLEMENT SANITATION AND WATER	Second Respondent
DIRECTOR – GENERAL DEPARTMENT OF HUMAN	
SETTLEMENT SANITATION AND WATER	Third Respondent
JOE MATHEBULA N.O	Fourth Respondent
YVONNE DELIWE MBANE N.O	Fifth Respondent
JACK MATLALA N.O	Sixth Respondent
MOSIBUDI MAKHWEDI MAKGOPA – MADISA N.O	Seventh Respondent
MFANELO CHARLES TWALO N.O	Eighth Respondent
MAUDINE MABI N.O	Ninth Respondent
BOUY GAOREKWE N.O	Tenth Respondent
GEZANI PATRICK RITSHURI N.O	Eleventh Respondent
LEPELLE NORTHERN WATER BOARD	Twelfth Respondent
NTALE HAROLD MATSEPE	Thirteenth Respondent
MATSEBE IVOR PHASHA	Fourteenth Respondent
LANGANANE LUCY CATHERINE MALAMBA	Fifteenth Respondent
MANKONE MABATAUNG NTSABA	Sixteenth Respondent
JOSEPHINE MAMPHERI LETSOALO	Seventeenth Respondent
BOXING PHILLIMON SEBOLA	Eighteenth Respondent
MAKGETSI ANNABELLE MPHAHLELE	Nineteenth Respondent

JUDGMENT

BAQWA J

INTRODUCTION

- 1 The applicant is the Chief Executive Officer of the Lepelle Northern Water Board ("Lepelle") who was put on precautionary suspension on 2 June 2020.
- 2 He has brought this application on an urgent basis in which he seeks an order declaring the appointments of the fourth to the eleventh respondents by the first respondent as interim board members of the Lepelle Northern Water Board, *ultra vires*, unlawful and *void ab initio*.
- 3 He further seeks an order declaring the fourth to the eleventh respondents' decision contained in their resolution dated 31 May 2020 suspending the applicant as Chief Executive Officer of the twelfth respondent to be invalid unlawful and of no force and effect and that it be set aside.
- 4 The application was initially launched in two parts, namely Part A and Part B. In Part A the applicant sought the relief which has been referred to above whilst Part B was sought in the alternative that the appointments of the fourth to the eleventh respondents by the first respondent as interim board members of the twelfth respondent be reviewed and set aside and that the suspension of the applicant be declared unconstitutional invalid and unlawful, with costs.

- 5 When the proceedings began, Counsel for the applicant, Mokhare S.C indicated that the applicant would only be pursuing the final relief in Part A and not Part B. The hearing proceeded on that basis.

BACKGROUND

- 6 Lepelle is established and governed in terms of the *Water Services Act* 108 of 1997 ("the Act") and its financial administration is managed and implemented in terms of the Public Finance Management Act 1 of 1999 ("PFMA").
- 7 The Lepelle Board is appointed in terms of Section 35 read with Schedule 1 of the Act and the outgoing Board had been appointed in terms of that section.
- 8 Lepelle, like many other similar structures created in terms of the Act is utilised, *inter alia*, for the provision of an efficient, reliable and sustainable water services; using water optimally whilst taking into account national and provincial policies.
- 9 On 17 October 2019 the Minister was advised that the term of the Board would be ending on 30 March 2020.
- 10 On 2 April 2020 the Minister re-appointed members of the outgoing Board for a period of 30 days with effect from 1 April 2020 in terms of Section 35 read with Schedule 1 of the Act.
- 11 After the extension, the Minister appointed an Interim Board on 29 May 2020 with the fourth to the eleventh respondents as its members.

- 12 The Interim Board held virtual meetings on 29 May 2020, 31 May 2020 and on 1 June 2020 after which a media statement was released by the twelfth respondent announcing the suspension of the applicant.
- 13 A notice of precautionary suspension pending an investigation was hand delivered by the fourth respondent on the premises of Lepelle on 2 June 2020.
- 14 It was these events which eventually led to the launch of the present urgent application on 5 June 2020.

URGENCY

- 15 At the commencement of these proceedings I requested Counsel to address the Court on the issue of urgency.
- 16 As required by Rule 6(12) of the *Uniform Rules of Court*, the applicant does deal with the issue in his founding affidavit. Whether he does so adequately is a matter to be decided below.
- 17 Upon reading the relevant section of applicant's affidavit, he deals with the events surrounding the appointment of the Interim Board and the subsequent meetings which they held after their appointment and the delivery of the suspension notice. After referring to these events he concludes that the first respondent had acted *ultra vires* her powers in appointing fourth to the eleventh respondents. He makes reference to ministerial powers in terms of Section 73 of the Act and then concludes that the Act does not provide for the appointment of or empower the Minister to appoint an interim board and that such appointment is unlawful.

- 18 Applicant's Counsel makes the submission that such unlawfulness flouts the rule of law and ought to be terminated on an urgent basis.
- 19 The applicant concludes by making the allegation that he has no alternative remedy other than launching this application to review the appointment of the respondents.

FAILURE TO DISCLOSE PREVIOUS APPLICATIONS

- 20 The first, second and third respondents strenuously oppose the applicant's submissions regarding urgency with Erasmus S.C (for first, second and third respondents) submitting not only that the application lacks urgency but also that it amounts to abuse of the process of the Court.
- 21 According to the three respondents the application was brought with unreasonable time frames in that they were given three Court days within which to note their intention to oppose and to file their opposing affidavits.
- 22 The respondents also point out that the applicant has deposed to a founding affidavit in not less than four urgent applications in which relief was sought to prevent the Minister from appointing the eleventh respondent as an executive caretaker. The second application on 1 June 2020 sought an urgent declaratory relief that the appointment of the Interim Board be declared unlawful pending finalisation of Part B which was intended to review the appointment of the Interim Board. The basis and facts of these application were the same as the present application.

- 23 The most significant one of these applications was the one launched in the early hours of 3 June 2020. The relief sought was to interdict the Interim Board from executing and performing its duties including the convening of Board meetings.
- 24 That application which served before Madam Justice van der Schyff was struck from the urgent roll for want of urgency and a cost order was made against the applicants.
- 25 As indicated above, the present application was launched on 5 June 2020, a mere two days after the striking of the third application. Even though the facts of this application are similar to the third application, the applicant makes no mention of all of these applications. I find this conduct on applicant's part rather reprehensible as he was duty bound to take the Court into his confidence in narrating the events which preceded this application. This is tantamount to abuse of the Court in his quest to obtain relief in this matter.

HEARING IN DUE COURSE

- 26 An applicant in an urgent application has to explain why a matter cannot be heard in the ordinary course and why he cannot allow respondents sufficient time to respond to the case he is bringing against them. See **Republikeinse Publikasies (Edms.) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk and Luna Meubels Vervaardigers v Makin 1972 (1) SA 773 (AD) at 782B**. In this case, whilst the applicant makes the allegation that he has no alternative remedy, he fails to set out the basis why the matter cannot be heard in due course either in the ordinary

motion Court or in whatever action is brought after the conclusion of investigations against him.

27 It is common cause that this case involves not only the interpretation of the *Constitution*, the *Water Services Act* and the *Public Finance Management Act* but also jurisprudence and principles evolved by various Courts.

28 **In re: Several matters on the Urgent Court Roll [2012] 4 All SA 570 para 17**

Wepener J said in this regard:

“an abuse of the process has developed (in all likelihood with a hope that the respondents would not be able to file opposing affidavits in time) in order to steal a march upon such respondents. This practice must be addressed in order to stop matters being unnecessarily enrolled and clog a busy urgent roll. In these matters, sufficient time should be granted to the respondents to file affidavits and they can rarely do so when papers are served less than a week before the matter is to be heard. That week includes a weekend when state machinery comes to a standstill.”

29 In this case the application was launched Friday, 5 June 2020. The respondents were called upon to file answering affidavits on Tuesday, 9 June 2020. This is the kind of abuse alluded to by Wepener J in the *Several Matters on the Urgent Court Roll* case.

PRECAUTIONARY SUSPENSION

30 The applicant's suspension is a precautionary one and he has been suspended on full pay with his normal benefits as Chief Executive Officer. It cannot be argued therefore that he is suffering the kind of prejudice that is contemplated in Rule

6(12) of the Uniform Rules. The applicant is not suffering any prejudice. There can be no apprehension of irreparable harm as he can deal with any process as a result of any investigation against him in due course.

FRUITLESS AND WASTEFUL EXPENDITURE

- 31 Counsel for the fourth to the twelfth respondents, Maleka S.C makes reference to the fact that the applicant alleges that he has a duty to ensure that the Lepelle Board does not incur unlawful, fruitless and wasteful expenditure.
- 32 The applicant fails to place any evidence before this Court to demonstrate that there is unlawful, fruitless and wasteful expenditure at Lepelle Water incurred by the Interim Board as a result of which Lepelle has suffered financial harm. There is simply no factual basis for the applicant's allegation.

CONCLUSION

- 33 As stated by Notshe AJ in **East Rock Trading (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196** (20 September 2011) para 6 and 7, the procedure set out in Rule 6(12) is not there for the taking. An applicant must clearly and succinctly set out the facts which unequivocally demonstrate the urgency.
- 34 In the present case, the persons appointed by the Minister to serve in the Interim Board were appointed to serve for an interim period. It is not in dispute that the Minister is currently engaged in the process of selecting and appointing members

of a Board as provided for in Section 35 of the Act, the application is therefore not urgent.

35 In the circumstances the validity or otherwise of the challenge regarding the unlawfulness of the appointment of the Interim Board is a matter that can be determined in the normal course.

36 The procedure of precautionary suspension has been accepted by our Courts as a lawful procedure in appropriate cases. It is therefore not inherently unlawful. It is up to the applicant to clear his name and demonstrate that it was wrongly applied, in due course, if that be the case.

COSTS

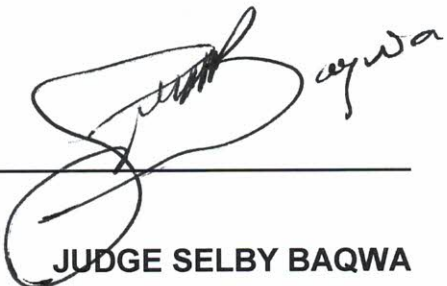
37 As alluded to above, the manner in which this application has been brought is vexatious, reckless and malicious and without appropriate disclosures. That conduct abuses the process of this Court which warrants an appropriate costs order.

THE ORDER

38 In light of all the above, I make the following order:

38.1 The application is struck off the urgent court roll;

38.2 The applicant is ordered to pay the respondents' costs on an attorney and client scale, such costs to include the costs of two Counsel in respect of the respondents who opposed this application.



JUDGE SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on : 18 June 2020

Judgment delivered : 17 August 2020

Appearances:

For the Applicant : Adv. W Mokhare S.C

: Adv. M.C Makgato

Instructed by : PK Mashamba Attorney

For the 1st – 3rd Respondent : Adv. CMC Erasmus S.C

: Adv. M Vimbi

Instructed by : The State Attorney

For the 4th – 12th Respondent : Adv. I.V Maleka S.C

: Adv. B.L Manentsa

Instructed by : Mkhabela Huntley Attorney