REPUBLIC OF NAMIBIA

Reportable

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00355

In the matter between:

FILEMON MAKILI	**1ST APPLICANT**
FRIEDA METUMO SHIMAKELENI	**2ND APPLICANT**
KONDJENI JELENI NGHIWANAPO	**3RD APPLICANT**
PAUL SOLOMON KAYAMBU	**4TH APPLICANT**
ASHIPALA PENDA SHILEMBA	**5TH APPLICANT**
JOHANNES PETRUS NANTUUA	**6TH APPLICANT**

and

COUNCIL OF THE MUNICIPALITY OF GOBABIS	**1ST RESPONDENT**
CHAIRPERSON: COUNCIL OF THE MUNICIPALITY OF GOBABIS	**2ND RESPONDENT**
CHAIRPERSON: MANAGEMENT COMMITTEE OF THE MUNICIPALITY OF GOBABIS	**3RD RESPONDENT**
ACTING CHIEF EXECUTIVE OFFICER: GOBABIS MUNICIPALITY (MR STEVE E. ADONIS)	**4TH RESPONDENT**
MINISTER OF REGIONAL AND LOCAL GOVERNMENT, RURAL DEVELOPMENT AND HOUSING	**5TH RESPONDENT**

Neutral citation: *Makili v Council of the Municipality of Gobabis* (HC-MD-CIV-MOT-REV-2021/00355) [2021] NAHCMD 522 (9 November 2021)

Coram: ANGULA DJP

Heard: **19 October 2021**

Delivered: **9 November 2021**

Flynote: Urgent application – Opposed – Local Authorities Act, 23 of 1992 – Section 29(6) of the Act – Clause 30(1) of the Council's Personnel Rules – Urgency alleged due to alleged illegality and violation of the Rule of Law – Applicants suspension amount to victimization because they are members the SWAPO Party and due to them being Oshiwambo speaking – The High Court has original jurisdiction to hear any matter where there is alleged violation of the Constitution even though some of the relief sought are obtainable in the Labour Court – An allegation of illegality without more is not a ground for urgency – Applicants have substantial redress in due course.

Summary: This is an opposed urgent application – The applicants were temporarily suspended from the first respondent's employment for varied acts of alleged misconduct – The suspensions were made in order to allow for unhindered investigations into the suspected incidents of misconduct – The applicants were all suspended with full remuneration – The applicants allege that the first to fourth respondents used statutory powers to persecute them for ulterior purposes – That is, that they were stigmatized against for being Oshiwambo speaking and for being members of the SWAPO political party – In this regard, the applicants rely on Article 25(2) and (3) on the Constitution as aggrieved persons who claim that their fundamental rights and freedoms have been infringed and thus have approached this court to enforce and to protect such rights and freedoms.

They assert that their suspension is invalid as it has not been made in compliance with provisions of the Act. The applicants accordingly launched a collateral attack challenging the lawfulness of the appointment of the acting chief executive officer (CEO) who in respect of most of the suspensions was the author of the letters of suspension. The thrust of their attack in this respect, is that the acting CEO was appointed by the council instead of being appointed by the Management committee as provided by s 27(4) of the Act. The applicants therefore assert that because of that invalid appointment all acts or steps taken by the acting CEO are invalid. Accordingly, they collaterally challenge the validity of his actions to author the letters

suspending them. They ask that his actions in this regard be declared unlawful in valid and be set aside.

In opposition to the application, the respondents contend that the applicants' complaints are in essence unfair disciplinary action which fall within the purview of s 48 of the Labour Act, 2007 and which in turn may be referred to the Labour Commissioner it terms of s 51 of the Labour Act. As regards the applicants complaints relating to discrimination, they point out that the complaint can similarly be referred to the Labour Commissioner pursuant to the provision of s 5(2)*(a)* of the Labour Act.

The respondents raised a point *in limine* based on the interpretation and application of, s 117 of the Labour Act which vests the Labour Court with exclusive jurisdiction to adjudicate all labour related disputes. The respondents therefore wants this court should decline to exercise its jurisdiction because the relief sought by the applicants can be obtained in the Labour Court.

Held; that this court has original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. This include labour related disputes. (*Article 80 applied and Onesmus v Minister of Labour and Another 2010 (1) NR 187 (HC) followed*);

Held; that firstly, the relief sought by the applicants as aggrieved person as contemplated by Article 25 of the Constitution can only be considered and enforced or protected by this court as the competent court in terms of the said Article. Secondly, this court is bound to consider the allegation of violation of person's fundamental rights and freedoms in order to determine whether there is substance in such allegation. This is subject to the proviso that such litigant makes out a case to move the court to embark on such enquiry;

Held; that the allegation of illegality without more, does not itself render a matter urgent. Particularly not in the present matter where there are serious allegations of

maladministration levelled against the applicants. It is in the interest of justice and proper corporate governance that such allegations be investigated unhindered.

Held; that the applicants failed to satisfy the two requirements of rule 73(4)*(a)* and *(b)* regarding urgency.

ORDER

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1. The point *in limine* that this court should decline to exercise its jurisdiction for the reasons that some of the relief sought are obtainable in the Labour Court is dismissed.

2. The application is struck from the roll for lack of urgency.

3. The applicants are to pay the costs of the respondents who opposed and such costs to include the costs of one instructed counsel and one instructing counsel.

4. The matter is removed from the roll and is considered as finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This matter is before me as an urgent application wherein the applicants seek orders in the following terms –

> '1. Condoning the Applicants' non-compliance with the Rules of the Court and hearing the application for an interim relief set out in Part A of this application below on an urgent basis as envisaged in terms of Rule 6(12) [the correct rule

since the rules were amended in 2014, is rule 74] of the Rules of the High Court including condoning non-compliance with time limits and mode of service; and where there may have been a delay, condoning the Applicants' delay to institute the application earlier.

2. An order calling upon the Respondents to show cause as to why the following orders should not be made:

(1) An order declaring the suspension of each of the Applicants as unlawful and invalid, and that same must be set aside.

(2) An order reviewing, correcting and setting aside the decisions to suspend each of the Applicants as identified in the Founding Affidavit as unfair, unreasonable and invalid, and setting them aside.

(3) An order to declare the meetings and resolutions taken at the following meetings as invalid and of no force and effect in law:

(i) Council meeting of 10 May 2021;
(ii) Council meeting of 14 May 2021;
(iii) Council meeting of 5 July 2021; and
(iv) Council meeting of 11 August 2021.

(4) An order declaring the appointment of the Fourth Respondent, Mr Steve Adonis, as the Acting Chief Executive Officer of Gobabis Municipality, made by the First Respondent on 5 July 2021, as invalid, and setting it aside together with all actions, acts, decisions and processes he may have taken or undertaken in relation to each and any of the Applicants.

(5) Costs of suit against any of the Respondents opposing the application.'

The Parties

Applicants

[2] The first applicant is Mr Fillemon Makili, a major Head of Department: Strategic Executive of Finance, IT and Procurement employed as such by the Council for the Municipality of Gobabis (the 'first applicant').

[3] The second applicant is Ms Frieda Metumo Shimakeleni, a major Head of Department: Strategic Executive of Corporate Services and Human Resources employed as such by the first respondent (the 'second applicant').

[4] The third applicant is Mr Kondjeni Jeleni Nghiwanapo, employed as such by the first respondent as an IT Officer (the 'third applicant').

[5] The fourth applicant is Mr Paul Solomon Kanyambu, employed as such by the first respondent as an IT Technician (the 'fourth respondent').

[6] The fifth applicant is Mr Ashipala Penda Shilemba, employed by the first respondent as an Acting Head of Department: Strategic Executive of Corporate Services and Human Resources (the 'fifth applicant').

[7] The sixth applicant is Mr Johannes Petrus Nantuua, employed by the first respondent as a Manager: Electrical Services (the 'sixth applicant').

Respondents

[8] The first respondent is Council of Municipality of Gobabis, a local authority council established in terms of the Local Authorities Act, 23 of 1992 (the 'Act') hereinafter referred to as (the 'Council').

[9] The second respondent is the Chairperson of the Council, holding that office in terms of the Act, and herein cited in his capacity as such (the 'second respondent').

[10] The third respondent is the Chairperson of the Management committee of the Council holding that office in terms of the provisions of Act, 23 of 1993 and herein cited in his capacity as such (the 'third respondent').

[11] The fourth respondent is Mr Steve Adonis, holding the office as the Acting Chief Executive Officer for the Council herein cited in his capacity as such (the 'acting CEO').

[12] The fifth respondent is the Minister of Regional and Local Government, Rural Development and Housing cited herein in his official capacity as such (the 'Minister').

Background

[13] The second and the third applicants were suspended from the employment with the council during May 2021. All the other applicants were suspended during August 2021. All the applicants were suspended for the reason that they were suspected of having committed various acts of misconduct. Their suspension was effected in terms of s 29(6)(*b*) of the Act read with clause 30(1) of the Council's Personnel Rules ('Personnel Rules'). The suspension was made in order to allow for unhindered investigation into the suspected incidents of misconduct. The applicants were all suspended with full remuneration.

[14] In respect of the second applicant, she was informed that the Management committee had taken the decision to suspend her. The letter of 10 May 2021 was signed by the chairperson of the management committee. Thereafter, then Chief Executive Officer (who passed away in the meantime) addressed a further letter to the second applicant dated 14 May 2021 informing her that the council had resolved on 14 May 2021, to approve the recommendation of the Management committee and to confirm her suspension.

The applicants' case

[15] The founding affidavit has been deposed to by the first applicant. The rest of the applicants filed confirmatory affidavits confirming the allegations made in the founding affidavit. The applicants allege that they are aggrieved by their suspension and assert that their suspension is unlawful. The applicants allege further that the first to fourth respondents used statutory powers to persecute them for an ulterior purpose. In this regard, the applicants state that they rely on Article 25(2) and (3) of the Constitution as aggrieved persons who claim that their fundamental rights and

freedoms have been infringed and thus have approached this court to enforce and to protect such rights and freedoms.

[16] The applicants assert further that their suspension is invalid and must be set aside on varied bases. Either that one or some of the applicants', suspension was invalid for the reasons that it was made in terms of s 29(6)(*b*) of the Act which requires the minister to make regulations which *inter alia* should provide for the procedure for the suspension and discharge of staff members. The applicants point out in this regard that no such regulations, have been made by the minister. Therefore, the applicants contend that the respondents' decision to suspend them in terms of the personnel rules is invalid.

[17] The applicants further allege, that in other instances their suspension is invalid in that the various meetings at which the respective decisions were taken to suspend them were invalid in that such meetings were for varied reasons not properly convened or lawfully held in terms of the provisions of the Act.

[18] As a result of all those alleged non-compliances with the Act and other illegalities and irregularities committed by the respondents, the applicants launched a collateral attack on the appointment of the acting chief executive officer, who in respect of most of them was the author of the letters of their suspension. The thrust of their attack in this respect, is that the acting CEO was appointed by the council instead of being appointed by the management committee as provided by section 27(4) of the Act. The applicants therefore assert that because of that invalid appointment all the acts or steps taken by the acting CEO are invalid. Accordingly, they collaterally challenge the validity of his actions to author the letters suspending them. They ask that his actions in this regard be declared unlawful in valid and be set aside.

[19] Furthermore, the applicants allege that the various meetings of either of the council or the management committee at which decisions were taken in relation to their suspensions were not properly convened in terms of the provisions of the Act and were accordingly unlawful and the decisions taken thereat were invalid and are liable to be set aside.

[20] The applicants' main thrust of their challenge to their suspension is that their respective suspensions were racially and politically motivated. According to them, a number of employees of the council who are of Oshiwambo ethnic origin and who are members of SWAPO, were victimized by the erstwhile CEO based on their ethnic origin. I interpose here, for the purpose of providing context and not for reasons advanced by the applicants, it is a notorious fact in respect of which the court can take judicial notice that the Gobabis area is pre-dominantly and historically occupied by Otjiherero-speaking people.

[21] The applicants further allege in this connection that, apart from relying on the common law grounds, as advanced, they also rely on Article 25(2) and (3) of the Constitution, as aggrieved persons whose rights and freedoms have been infringed, for the court to treat the application as urgent.

Respondents' case

[22] The acting CEO deposed to the answering affidavit on behalf of the council and the rest of the respondents. The fifth respondent, the minister, did not oppose the proceedings. The acting CEO denies the applicants' allegation that their suspension is racially motivated. He opines that that the purpose of this application is that the applicants' are attempting to 'gain unwarranted sympathy from the court and perhaps to obfuscate the deeply concerning maladministration over the years' at the council. He further implores the court to take a dim view of the applicants' allegations in this regard as there is no objective evidence in the founding affidavit to support the allegation that the applicants' suspension is motived by racism or ethnicity.

[23] The answering affidavit raises a point *in limine* of jurisdiction of this court. The deponent contented that the cause of action or the applicants' complaints are labour relationship issues and are accordingly to be dealt with by the Labour Court and not by this court, sitting as the High Court. According to him, s 117(1)*(c)* and *(e)* as well as s 115 of the Labour Act 11 of 2007, the Labour Court has jurisdiction to hear this urgent application. The deponent points out that the applicants' allegation that the suspensions are unlawful and violate Article 1(1), 5 and 18 of the Namibian Constitution can all be dealt with by the Labour Court. For those reasons the

deponent urges this this court to decline to exercise its inherent jurisdiction to hear this matter.

[24] As regards the urgency, in the event that this court were to decide not to decline to exercise its jurisdiction, then in that event the deponent contends that this matter is not urgent. It is his contention that the applicants have not made out a case for urgency. Therefore there is no reason why this matter should jump the queue, particularly given the undisputed fact that the applicants have been suspended with full remuneration. He further points out that the suspension is temporary in nature for the purpose to merely facilitate unhindered investigations into the serious allegations of misconduct levelled against the applicants.

[25] According to the acting CEO the allegations of misconduct against the applicant are contained in a report of an external audit conducted by the Ministry of Urban and Rural Development. In his deposition that the report 'paints a picture of maladministration, mismanagement, failure to follow procedures, failure to adhere to tender regulations, incurring expenditure without authorization, incurring expenditure without a budget allocation, unilateral decisions to incur expenditure or to make unsubstantiated payments to third parties and general lack of care in the handling of the affairs of the municipality'.

[26] The deponent states that he received a complaint from the widow of the late former Chief Executive Officer, that the first applicant, the fifth applicant and the sixth applicant had summoned the widow to a meeting held at the council's office. At that meeting they requested her to hand over to them, her late husband's laptop and laptop bag, BIQ (Business Intelligence Quotient) server data back-up tape, a pocket Wi-Fi and an electronic banking device. He points out that this was not the said applicants' job, particularly due to the fact that the late CEO had removed the 'back-up tape' from the server which was crucial to the investigations for such investigations. According to the deponent, when the said applicants were questioned why they requested the mentioned items from the late CEO's widow, they could not explain the reasons for their action.

[27] In respect of the third applicant, according to the deponent, he is suspected of conveying confidential information *inter alia* to the second applicant and interfering

with the investigation against the second applicant. Regarding the fourth applicant, it is the deponent's deposition that, he too was on numerous occasions requested to provide his BIQ password. He refused to do so. He was thus suspended for disobeying or disregarding work-related orders and interfering with the ongoing investigation.

[28] As regards the first applicant's allegation that his appointment is unlawful, the deponent denies such allegation. He points out there is nothing in the Act that prevents the management committee from making recommendation to council for the suspension of a Head of Department. He asserts that the applicants' suspensions were warranted given the allegations of misconduct against them.

Issues for determination

[29] It would appear to me that the issues for determination in this application are: First, whether, in light of the fact that the main dispute between the parties is rooted in a labour relationship, whether this court should decline to exercise its original jurisdiction? Secondly, whether the matter is urgent? Thirdly, whether or not the acting CEO was lawfully appointed? Fourthly, whether the meetings at which the decisions to suspend the applicants were taken were invalid?

Court's jurisdiction

[30] Mr Narib, who appeared on behalf of the first to fifth respondents submits that the applicants' complaints are in essence unfair disciplinary action which fall within the purview of s 48 of the Labour Act, 2007 and which in turn may be referred to the Labour Commissioner in terms of s 51 of the Labour Act. As regards the applicants complaints relating to discrimination, counsel points out that complaint can similarly be referred to the Labour Commissioner pursuant to the provision of s 5(2)*(a)* of the Labour Act.

[31] Counsel points out further that s 117 of the Labour Act provides for the exclusive jurisdiction of the Labour Court and in terms of that section the Labour Court has exclusive jurisdiction to review any decision, if such decision concerns a matter which falls within the scope of the Labour Act, 2007. In this connection Mr

Narib submitted during oral argument that if the applicants' complaint is that the Labour Court is in adequate to deal with all the aspects of their labour dispute, they must first challenge the constitutionality of s 117 of the Labour Act, because it does not afford them adequate relief.

[32] Mr Namandje who appeared for the applicants labelled the point in *limine* as 'spurious'. I do not agree with him for the reasons that the provisions of s 117 of the Labour Act in relation to the jurisdiction of this court and the Labour Court proved to be problematic. As Mr Narib correctly points out, there are conflicting decisions of this court on the application and interpretation of s 117. For example in *Katjiuajo*[1] the court held that the language of s 117 lacks the intent to exclude the jurisdiction of the High Court. On the other hand, as recently as June 2021, the court in *Fisheries Observer Agency*[2] held that 'it is clear that the original and unlimited jurisdiction of it (ie. the High Court) enjoys under Article 80 of the Namibian Constitution and s 16 of the High Court Act 16 of 1990 has been excluded by the legislature in the clearest of terms… And it should be remembered, no competent court has found s 117(1) to be unconstitutional, as aforesaid'.

[33] Mr Narib's submission in this regard is, that those 'decisions are not entirely correct'. He made it clear that he does not contend that this court does not have jurisdiction. He simply craves the court to decline to exercise its inherent jurisdiction. In my view, counsel's approach is correct and commendable.

[34] For my part, I have, with respect, grave doubt about the correctness of those decisions which say that the jurisdiction of the High Court has been excluded in labour based dispute matters. I hold this view, for the reason that Article 80(2) of the Constitution vests the High Court with 'original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions...' I also subscribe to the view that this court has a discretion to decline to exercise its inherent discretion in labour disputes where appropriate remedies exist in the Labour Court and that this court will exercise its jurisdiction where just cause is shown in a particular case.[3]

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[1] *Katjiuanjo v The Municipal Council of the Municipality of Windhoek* (I 2987/2013) [2014] NAHCMD 311 (21 October 2014).
[2] *Fisheries Observer Agency v Evenson and Others* (HC-MD-CIV-MOT-GEN-2021/00179) [2021] NAHCMD 301 (23 June 2021).
[3] *Namibia Premier League vs Namibia Football Association and Others* (SA 71/2021) [2020] NASC 44 (19 February 2021).

[35] Having said that, it would appear to me that Mr Namandje's persuasive argument on this point is that the nature of the relief sought by the applicants in the present matter is, cumulatively obtainable in this court, exercising its original jurisdiction. This is irrespective of the fact that some of the relief sought is without doubt obtainable in the Labour Court. The further reason is that the applicants are approaching this court as 'aggrieved persons' in terms of Article 25(2) and (3) on the Constitution who claim that their fundamental rights and freedoms have been infringed. There is no doubt that this court is the 'competent court to enforce and protect such rights and freedom'.

[36] To my mind the facts and issues raised in the present matter are similar to the facts and issues which were raised in the *Onesmus*[4] matter to which Mr Namandje referred the court. In that matter, the applicant had been temporarily removed from her office as CEO of the Social Security Commission for an indefinite period by the line minister. Aggrieved by the minister's decision she launched an application to the High Court relying on Article 18 of the Constitution which guarantees fair administrative justice. The minister raised a point *in lim*ine that the High Court lacked jurisdiction by virtue of the provisions of s 18 of the Labour Act No. 6 of 1992 (the predecessor of the current Labour Act. Section 117 of the current Act is a *verbatim* reproduction of s 18 of the 1992 Act which vested the Labour Court with exclusive jurisdiction in labour disputes. The court rejected the minister's point *in limine* holding *inter alia* that the court was bound by the Constitution to consider the applicant's claim namely that the decision she sought to have set aside, infringed upon her fundamental right to administrative justice. It further held that Parliament could not diminish the applicant's fundamental right by establishing a labour court with exclusive jurisdiction to adjudicate cases of that nature. The court further held that the constitutional powers vested in the High Court remained unaffected following the enactment of the 1992 Labour Act.

[37] By parity of reasoning, I fully associate myself with the *Onesmus's* judgment and adopt its approach in the present matter. I therefore decline to accede to the respondents' request not to exercise this court's jurisdiction in this matter for the reasons that follow. First, the relief sought by the applicants as aggrieved persons as

[4] *Onesmus v Minister of Labour and Another* 2010 (1) NR 187 (HC).

contemplated by Article 25 of the Constitution, can only be considered, enforced and protected by this court as the competent court in terms of the said Article. Secondly, my decision is further influenced by allegations on the papers of the subversion of the principles of legality and the rule of law, which this court is under a constitutional obligation to protect. In other words, this court is bound to consider the allegations of violation of a party's fundamental rights and freedoms in order to determine whether there is substance in those allegations. This is subject to the proviso that such litigant makes out a case to move the court to embark on such enquiry.

[38] It follows therefore that the point *in limine* that this court should decline to exercise its original constitutionally vested jurisdiction in the present matter is dismissed. Having decided to exercise this court's jurisdiction, I now turn to consider the remainder of the issues identified for determination earlier in this judgment. The first issue is whether the matter is urgent. I deal with that issue immediately below.

Urgency

[39] The applicants confirm in their founding affidavit that they are aware of their duty to make out a case for urgency as required by rule 73 of the rules of this court. They allege in the first place, that there is a concerted and calculated campaign of victimization and harassment which is at odds with a democratic and constitutional order in Namibia.

[40] As for the reason why this application should be treated as one of urgency, the applicants allege that through the acts of their suspension they are being discriminated on tribal lines because of them being Oshiwambo speaking persons and also being Swapo Party members especially in view of the fact that the Swapo Party lost its control of the council's affairs following the local authority elections held during November 2020. On the basis of that alleged discrimination, they contend that their suspension constitutes a coercive action. As a result they have formed a view that they will not obtain substantial redress at a hearing in due course.

[41] According to the applicants, there is a complete disintegration of good governance and administration at the Municipality of Gobabis. It is for this reason that they ask the court to protect their rights and to vindicate the rule of law.

[42] The applicants narrate the steps they took to engage the council through a labour union, Namibia Public Workers Union (Napwu), and through their legal practitioners. Ultimately the respondents informed them that they would not entertain communication from lawyers on issues concerning council's internal matters.

[43] Finally, the applicants maintain that the manner in which they were suspended stigmatized them which warrants the court's immediate intervention by way of granting of an urgent basis.

[44] The respondents for their part deny that the matter is urgent. The deponent to the respondents' answering affidavit points out that the applicants' suspension is of temporary nature, aimed at facilitating investigations about serious allegations of maladministration. It is the respondents' case that even if it is were to be found that the suspensions were unlawful and that fact would not render the application urgent.

[45] The respondents further deny that the applicants would not be afforded substantial redress at a hearing in due course. If they were to be subsequently dismissed they have the right to file their dispute with the Office of the Labour Commissioner.

Submissions on behalf of the parties

[46] Mr Namandje for the applicants, argues in his useful heads of argument, with regard to urgency, that the application being a collateral challenge is urgent and is not subject to legal impediment relating to delay or limitation of time. He relies for this submission on *Hashagen*[5]. I have had regard to that judgment and I do think that it is applicable to the determination of the issue of urgency. My understanding of that portion of the judgment relied upon by counsel, was made in the context of the delayed objection raised to the review application collaterally challenging the coercive action by the PAAB to bring the appellant before the disciplinary hearing. In my view, that observation by the court, is not supportive of the proposition that a collateral challenge is by nature urgent.

[5] *Hans Frederich Hashangen v Public Accountants and Auditors* Board (SA 57/2019) delivered on 5 August 2021 at para 50.

[47] Mr Namandje further referred the court to the South African judgment of *Alpeni*[6] to support his submission that in view of the fact that the applicants' suspensions were carried out in a manner incompatible with the Rule of Law and the doctrine of legality, so the argument goes, the court is entitled to step in and enforce and protect the applicants' rights where a functionary acted without power.

[48] I have had regard to the *Alpeni* judgment. In that matter the applicant, a Director-General (DG), was suspended by a minister whereas in law only the President had the power to suspend a DG and for that reason the suspension was ruled to be unlawful. The applicant also alleged that he brought the application to vindicate the Rule of Law and to ensure that the power is exercised by the correct repository of power. The court ruled that the application would be urgent where allegations are made relating to abuse of power by a public official which may impact on the Rule of Law and may have a detrimental impact on the public purse.

[49] I agree with that court's view as a general proposition of the law. However, when it comes to the application of that principle to the facts of the present matter, the *Alpeni* matter is distinguishable from the facts of this matter. In that matter, the applicant alleged that his suspension as the DG had negatively affected on service delivery and critical projects; that certain of those projects required experience and institutional knowledge. He also alleged that the minister was abusing her powers in attempting to remove him from his position so that the minister could influence operational decisions in the department. In that matter, the deponent to the respondents' answering affidavit could not substantiate the allegations of misconduct leveled against the applicant on the basis of which the applicant was suspended. This was because the facts upon which the applicant's suspension was premised were not within the deponent's personal knowledge. It was for that reason that it was open to the court to treat the application as urgent.

[50] In the present matter, unlike in the *Alpeni's matter*, there are serious allegations of maladministration and irregularities made against the applicants in the answering affidavit which similarly may impact on the public purse. The court gains

[6] *Apleni v President of the Republic of South Africa & Another* [2018] 1 ALLSA 728 (GP) (25 October 2017).

the impression that the applicants' strategy with this application is to try to prevent the allegations against them being fully investigated. Otherwise, it begs the question why they are putting so much effort into being re-instated. Being suspended on full remuneration, I would have expected the applicants, to take the position that they would wait for the outcome of the investigation which would, on their case, exonerate them from the unfounded and baseless discrimination and victimization allegations levelled against them.

[51] Mr Narib points out in his heads of argument that apart from alleging that their suspension is unlawful and unconstitutional, there are no facts alleged in the founding affidavit which make the matter urgent. Counsel further points out the approach by the court at this stage of the proceedings is the applicants' case is a good one and illegality is assumed. In other words, it does not follow as a matter of course for the applicants to merely allege illegality against them. Much more is required. As regards the bare allegation of illegality counsel referred the court to the remark by Masuku J in *Dr Tjipangandjara*[7] where the learned judge said the following:

'[13] I am of the view that the fact that a litigant, a respondent, in particular, has embarked on an illegal crusade, does not of its own render a matter urgent. There must be something more than just illegality that warrants the invocation of the urgency regime. As it is, each matter, it must be pointed out, will turn on its own facts. My general view is that illegality of an action does not, without more, render the matter urgent. There may well be circumstances where an illegal action, coupled with other considerations, may render the matter urgent and there may be other circumstances where the same result does not eventuate. To however equate illegality to urgency, is in my considered view not a correct approach.'

I fully agree with the learned judge's view in that regard. I deal with it in more detail below.

Determination

[7] *Dr Tjipangandjara v Namwater Corporation (Pty) Ltd* (LC 60/2015) [2015] NALCMD 11 (15 May 2015) at para 13.

[52] As mentioned earlier, I fully agree with the view expressed by the learned judge in the *Tjipangandjara* matter *(supra).* It accords with the view I expressed in *Koopman*[8] matter to which Mr Namandje referred the court. In that matter, I expressed the view that a court may depart from the mandatory compliance with the requirements of rule 73(4) if the dictates of justice so require and in exceptional cases. I further cautioned that the allegations of violations of the rule of law and illegality should not be lightly made and should not be employed as strategy by litigants to lead the court to believe that the matter is urgent. This is because in the nature of litigation particularly where an interdict or a declarator is sought there is, inherently some sort of illegality at play which the applicant seeks to be prevented. To accord urgency to every case where illegality is alleged, as counsel's submitted would result in the derogation of the laudable jurisprudence developed by the courts to intervene on urgent basis, in deserving cases where real illegality and violation of the Rule of Law is taking place.

[53] In the present matter, as earlier observed in this judgment, there are serious allegations of maladministration levelled against the applicants. I am of the view that it is in the interest of justice and proper corporate governance that such allegations be investigated unhindered. Maladministration and lack of corporate governance are in my view, the primary source of corruption which deprive the citizens and in the present case ratepayers and urban dwellers of proper and adequate service delivery by the local authorities.

[54] The allegations of illegality complained by the applicants, are in my view, of a technical nature and as such do not immediately and directly affect the applicants' fundamental right such as for instance being deprived of liberty. In my view, the allegations that the applicants' rights to fair and administrative justice have been violated because the council's officials have failed to comply with the provisions of the relevant legislation for instance, just to mention one, by failing to convene the meetings in terms of the provisions of the Act, do not qualify as special circumstances justifying this court invoking urgency procedure on the basis of the alleged illegality. It follows therefore that the applicants have to satisfy the two requirements of rule 73(4)*(a)* and *(b)*.

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[8] *Koopman v Acting Chief Executive Officer: Namibia Students Financial Assistance Fund (Mr Kennedy Kandume)* (HC-MD-CIV-MOT-GEN-2021/00230) [2021] NAHCMD 325 (7 July 2021).

[55] It is now trite that both requirements of rule 74(4) must be satisfied. As regards the first requirement that the applicant must set out explicitly the circumstances which he or she avers render the matter urgent, I agree with the submissions made on behalf of the respondents that no facts have been alleged which make the application urgent. The applicants make general and vague allegations in this regard. For instance, they allege that the matter is urgent because they are being victimized by the community of Gobabis. Another vagueness of the applicants' affidavit is for instance a statement like: 'The stigmatization continues at an unbearable scale and level that requires the court's immediate intervention.' How can the court stop stigmatization on urgent basis? In my view, stigmatization involves a perception by members of the community. In this case in respect of the applicants, such perception is not capable of being removed, let alone by a court – not even on urgent basis. In this connection, I agree with the respondents' that no letter or document has been produced by the applicants to substantiate the allegations of stigmatization and victimization. I accordingly find that the applicants have failed to satisfy this requirement. I turn to consider whether the applicants have satisfied the second requirement.

[56] In respect of the second requirement for urgency, the applicants contend in main that because of 'the continuous and pernicious effect of the suspension and coercive actions of the respondents' they will not be able to obtain substantial redress in due course except through the orders sought in this application.

[57] It is common cause that the applicants have been temporarily suspended. In my view, it is highly unlikely that the council can afford to keep five executives on suspension for indefinite period with full remuneration, while the council is not receiving a corresponding benefit. In this connection, I should mention that some of the letters of suspension informed the applicants that their suspensions was effective until end of August 2021. It is fair to assume that with the launching of this application the suspensions are still in place pending the outcome of this application. It is further fair to assume that the investigations have in the meantime been completed or at best have reached an advanced stage of completion. These factors, in my view, has an ameliorating effect on urgency.

[58] In my view, the applicants would be afforded substantial redress at a hearing in due course. I say this for the following reasons: There is a possibility that the suspension of some or all of them might be uplifted once the ongoing investigation has been completed. In my view, the upliftment of the suspension would constitute a substantial redress. In the event of the applicants being charged with acts of misconduct they will have an opportunity to put their case before the internal disciplinary hearing. They might be found not guilty and suspension might be uplifted resulting in them resuming their official duties. On the other hand if found guilty there would normally be an opportunity to appeal internally which appeal might succeed resulting in some or all them being re-instated. A further redress available to the applicants would be to file a dispute with the Office of the Labour Commissioner in the event they are found guilty of the misconduct levelled against them. Should they not succeed with their complaints at the Office of the Labour Commission, they have a right to appeal to the Labour Court. Finally, the applicants have a further redress available, namely by re-launching this application on the same papers, duly amplified if so advised to this court in the normal course. It follows therefore, that I hold that the applicants have equally failed to satisfy this requirement of urgency.

Observation

[59] Before I conclude, I feel compelled to express my disappointment with the applicants' that they felt it appropriate to play a race-card in these proceedings. It is regrettable to say the least. Emotional points do not assist the court in its adjudicative functions. It rather obscures real issues for determination. It is common knowledge that the Namibian nation is in the process of reconciliation after it emerged from the racially based segregation system at independence just some 30 years ago. It is therefore not helpful nor desirable to disturb that healing process by resorting to racial accusations in a legal disputes where the dispute can be addressed on pure facts. It is retrogressive to do so and is not in the interest of the broader national interests.

[60] That said, I hope that legal practitioners will in future advise their clients not to litigate or base their cases on racial grounds unless a racial issue is the cause of action upon which the whole case is premised. In the present matter, the applicants' case could have been be pleaded without throwing a race-card. As it turns out the

race-card did not play any role in the court's consideration of the issues before it. I rest that issue here.

Conclusion

[61] In the light of those reasons and considerations, I have arrived at the conclusion that the applicants have failed to satisfy the requirements for urgency. Accordingly, the matter is struck from the roll.

Order

[62] In the result I make the following order:

1. The point *in limine* that this court should decline to exercise its jurisdiction for the reasons that some of the relief sought are obtainable in the Labour Court is dismissed.

2. The application is struck from the roll for lack of urgency.

3. The applicants are to pay the costs of the respondents who opposed and such costs to include the costs of one instructed counsel and one instructing counsel.

4. The matter is removed from the roll and is considered as finalized.

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H Angula

Deputy Judge-President

APPEARANCES:

APPLICANTS: S NAMANDJE (with him G KASPER *and* S KANYEMBA)
Of Sisa Namandje & Co. Inc., Windhoek

RESPONDENTS: G NARIB (with him M KUZEEKO)
Instructed by Dr Weder, Kauta & Hoveka Inc. *and* Office of the Government Attorney, Windhoek