IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

Case No: 652/19

NOT REPORTABLE

In the matter between:

MLULEKI FIHLANI Applicant

and

INGQUZA HILL LOCAL MUNICIPALITY First Respondent

MPOFANE TENYANE Second Respondent

MBONGENI ISAAC NKUNGU Third Respondent

THE ACTING MUNICIPAL MANAGER

INGQUZA HILL LOCAL MUNICIPALITY Fourth Respondent

JUDGMENT

TOKOTA J:

[1] This application consists of two components namely, Part A and Part B. In Part A the applicant seeks, apart from the prayer for costs, on an urgent basis, an interim order directing the first respondent to permit him to discharge his duties as Municipal Manager thereof together with an order restraining the first respondent from taking unlawful steps the effect of which would be to strip the applicant of his authority as Municipal Manager, pending the review in Part B of the notice of motion. In Part B he seeks an order, first, reviewing and setting aside his suspension from duty and, second, reviewing and setting aside the decision to appoint the third respondent as the first respondent's chief whip and removing the second respondent as a chief whip. This court is only concerned with Part A and Part B is to be determined at a later stage. The application is opposed by the first respondent, third and the fourth respondents.

[2] The factual matrix leading to the application can be summarised as follows: The applicant is employed by the first respondent as a Municipal Manager. His current contract of employment commenced on 1 August 2017 and will come to an end on 31 July 2022.

[3] On 7 August 2018 the Council of the first respondent convened a meeting. During the proceedings of the meeting chaos ensued. It is not clear from the papers at what stage this occurred. The police were called. There is a serious dispute of fact

as to whether any resolution regarding the removal of the second respondent as chief whip and the appointment of the third respondent in his stead was taken in that meeting. The applicant states that such resolution was never taken. He has attached unsigned minutes to reflect that the meeting was disrupted before any such resolution was taken. The first respondent maintains that the resolution was taken even before the disruption. It has attached signed minutes of the day which indicate that it was taken.

[4] The applicant was later instructed to implement the resolution. He refused to implement the decision stating that it was unlawful. He was then called upon to advance reasons why he should not be suspended. I assume that he responded to such invitation. His response however is not attached to the papers.

[5] On 12 February 2019 he was served with a letter of suspension. The suspension is for a period of three months pending the completion of an investigation and possible disciplinary action to be taken against him. The basis of suspension was that it was alleged that he had committed a gross misconduct of insubordination having refused to implement the Municipal Council's decision of 7 August 2018. He has since been served with a notice of disciplinary enquiry which is to take place on 8 March 2019.

[6] The applicant contends that the suspension was unlawful by virtue of the fact that the resolution which he was instructed to implement was invalid. The aspect of the validity or otherwise of either the suspension or the instruction has still to be

determined at later hearing. Since I am not called upon to decide that aspect I will refrain from commenting thereon. I now proceed to consider urgency of the matter.

Urgency

[7] When an applicant believes his matter to be urgent, his/her Counsel/attorney can sign a certificate of urgency setting out the basis upon which the matter is believed to be urgent. The duty Judge will then make a directive as to the further conduct of the matter. That directive does not dispense with the duty of the applicant to show in the papers good grounds why the matter should not be dealt with in the ordinary motion roll. In my view the directive does not deprive the court hearing the matter of the power to decide urgency.

[8] Once an applicant has decided that his matter is one of urgency, he may himself decide, without consulting any other parties, what times to allow affected parties for entering appearance to defend and for delivering answering affidavits. In the absence of a directive from the duty Judge, as in this case, he may then arrange with the registrar a date for hearing. In that event the applicant must allow other parties a reasonable time to file any opposing affidavits, if so minded. He/she must also allow reasonable time for the Judge to read and prepare for the hearing. The papers must be indexed and paginated. Unlike most of the cases in this court, the applicant considerately set the time table for the filing of papers by those minded to oppose it and set the date of hearing as 5 March 2019. In my view he was entitled to do so as he believed the matter to be urgent.

[9] In the exercise of its judicial discretion the Court has the power to abridge the times prescribed by the rules of court and to accelerate the hearing of matters upon sufficient and satisfactory grounds being shown by the applicant. The major considerations normally are three in number, viz the prejudice that applicant might suffer by having to wait for a hearing in the ordinary course; the prejudice that other litigants might suffer if the application was given preference; and the prejudice that respondent might suffer by the abridgment of the prescribed times and an early hearing.

[10] In **PFE International and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)** Para 30 it was stated thus:

'Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this court may in the interests of justice depart from its own rules.'

[11] In this matter the only ground for urgency is the suspension of the applicant. He contends that the suspension infringes upon his integrity and dignity. He contends further that the suspension has a connotation of corruption on the part of the suspended employee. Mr Bodlani, appearing for the applicant, argued that by remaining on suspension the applicant will miss an opportunity of working towards

achieving bonus performance. In any event I am not called upon at this stage to uplift the suspension. Although I do not agree that suspension is a ground for urgency I have decided to exercise my discretion and deal with the application.

[12] The suspension of an employee from work is a precautionary measure aimed at ensuring that the employer can conduct an investigation of the allegations unhindered by the interference of the employee concerned. Whilst the employee is on suspension the employer is not confined to investigate only the transgressions set out in the suspension letter. Mr Bodlani argued that the witnesses in the insubordination charges form the component of the applicant's employer. Consequently there is no room for an interference with them.

[13] Ms Allen for the respondents argued that Mr Bodlani's argument overlooks the fact that there are other charges that have been added. These charges will involve employees who are juniors to the applicant. In my view the argument is relevant to the suspension. I am not called upon to uplift the suspension. What needs to be considered is whether the applicant is entitled to the mandatory interdict claimed in his first prayer and the prohibitory (interim) interdict claimed in the second prayer. I will therefore proceed to consider whether on the papers the applicant has satisfied the requirements for an interim interdict.

Requirements for an interim interdict.

[14] The requirements for an interim interdict are trite and can be briefly summarised as follows: a prima facie right even though open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the lack of another satisfactory or adequate remedy in the circumstances.

Prima facie right even though open to some doubt.

[15] The question is whether the applicant has, despite his suspension, shown that he has a right to be allowed to resume his duties as Municipal Manager. The suspension of an employee is a prerogative of an employer. Before doing so, the employer must consider whether the presence of the employee concerned at workplace is undesirable regard being to the nature and seriousness of the allegations against him, whether there is likelihood that he may jeopardise the integrity of the investigation or pose danger at workplace.

[16] Generally it is the duty of an employee when rendering his services to act exclusively in the interests of the employer. Therefore his conduct when rendering services should never result in him promoting his private interests or other person’s interests. An employee has a duty to give full and conscientious effect to the employer's lawful and reasonable instructions and not frustrate and thwart legitimate instructions. The applicant is a senior manager and ought to set an example to other

employees. He deliberately refused to obey the instruction on the basis that it was unlawful. As pointed out above the lawfulness or otherwise of the instruction remains to be decided on review. In my view whilst he is still on suspension and whilst the validity of that suspension is still to be determined the applicant has no right to be allowed to go and perform his duties.

[17] Lest it be said that there are prospects of success on review and therefore the applicant has shown a prima facie right which needs protection pending that review, I can put it no better than the constitutional court where it was stated thus:

"[48] At the outset the high court had to decide whether the applicants had established a prima facie right, although open to some doubt. It examined the grounds of review and was persuaded that they bore prospects of success and that therefore the applicants had established a prima facie right to have the decisions reviewed and set aside. Two comments are warranted. First, we heard full argument on the merits on the grounds of review. I am unable to say without more that they bear any prospects of success. That decision I leave to the review court.

[49] Second, there is a conceptual difficulty with the high court's holding that the applicants have shown 'a prima facie right to have the decision reviewed and set aside as formulated in prayers 1 and 2'. The right to

approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.

[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite." [1] (footnotes omitted).

There is no evidence that the applicant is likely to commit unlawful acts in the future which require an interdict. The suspension is for a limited period of three months.

A well-grounded apprehension of irreparable harm if the interim relief is not granted.

[18] In the founding affidavit the applicant argues that until his right not to be unlawfully suspended is determined and if the *status quo* remains the first respondent will perpetuate its unlawful conduct. He contends that he is currently in a situation of harm and it is foreseeable that the same will continue indefinitely unless this court intervenes. This contention loses sight of the fact that the suspension is not indefinite. It is for three months. In the charge sheet there are charges relating to misuse of funds and abuse of power. The applicant being in a senior position may jeopardise the disciplinary process having unlimited access to the records of the first respondent. I

[1] **See National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) para.**

am not persuaded that he may suffer irreparable harm if the interim interdict is not granted.

The balance of convenience.

[19] In **National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC**) it was said:

"(w)hen a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.[2]

The learned Judge delivering the majority judgment went on and said:

"While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases."[3]

[20] The general rule is that the employer has the right to control and direct how, when and where the services are to be rendered by its employees. The employee's duty to obey lies at the heart of the employment relationship. Obedience implies discipline, discipline implies rules, and rules, to be effective, imply the power to impose

[2] Para.47
[3] **Ibid para.65**

sanctions on those who break them.[4] The court has no right to tell the employer to allow its employees to perform their duties. That function falls within the ambit of employer's obligation. If the employer acts contrary to its prescripts the employee has different remedies depending on the nature

of the transgression by its employer. The courts will refrain from entering into the domain of the exercise of power by an employer unless it is shown that intervention is necessary. In this case the first respondent is permitted by both the contract of employment and legislation to suspend its employees under certain circumstances such as gross insubordination.

Lack of another satisfactory or adequate remedy.

[21] It has not been argued that there is no other satisfactory remedy for the applicant to warrant the grant of the interim interdict. In the light of the above it is unnecessary to make a finding in this regard.

[22] In my view the applicant has not satisfied the requirements of an interim interdict and his application cannot succeed.

[4] Grogan Workplace 12th edition 2017 p127

[23] What remains is the question of costs. The general rule is that costs must follow the result. Nothing emerges from this matter warranting a deviation from this principle.

[24] In the result I make the following order.

1. The application for an interim interdict is dismissed with costs.

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B R TOKOTA
JUDGE OF THE HIGH COURT

For the applicant: Adv Bodlani

With him Adv N Klaasman

Instructed by Sakhela Inc.

For the first, third and fourth respondents: Adv K Allen

Instructed by Jafta Inc.

Date Heard: 5 March 2019

Date judgment delivered: 12 March 2019.