IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: J747/10

In the matter between:

PORTIA ANNA SEMENYA	Applicant
AND	
NGAKA MODIRI, MOLEMA DISTRICT MUNICIPALITY	1ST Respondent
MATLOLE N.O	2nd Respondent
ADV ESJ VAN GRAAN N.O	3rd Respondent
DE SWART N.O	4th Respondent

JUDGMENT

Molahlehi J

Introduction

[1] The applicant brought an urgent application on the 8th April 2010, for an order on the following terms:

> "*1. dispensing with the requirements of the rules relating to times and manner of service and directing that this application be heard as an urgent application in terms Rule 8 of the Labour Court Rules;*

2. *declaring the suspension of the applicant to be unlawful and / or violation of Section 33 of the Constitution and / or unconstitutional;*

3. *setting aside the applicants' disciplinary hearing as unlawful;*

4. *declaring the institution of disciplinary proceedings against the applicant to be unlawful and / or the violation of section 33 of the Constitution and or unconstitutional;*

5. *setting aside the institution of the disciplinary proceedings against the applicant. Alternatively, staying the disciplinary proceedings instituted against the applicant pending the final determination of the application to set aside the disciplinary proceeding;*

6. *directing the respondent to pay the costs of this application; and*

7. *further and or alternative relief."*

The first respondent, a Municipality established in terms of section 12 of the Local Government: Municipal Structures Act No 117 of 1998, opposed the application and raised a number of points *in limine* including urgency or lack thereof.

Background facts

[2] The applicant, is an employee of the first respondent employed as a Chief Financial Officer ("CFO") and employed as such on a 5 year fixed term contract. The second respondent, Mr Matlole is an Administrator of the first respondent appointed by the MEC: Department of Local Government and Housing; North

West in terms of section 33 of the Constitution of the Republic of South Africa Act No 108 of 1996. The Administrator was appointed on the 22nd July 2009.

[3] The applicant was placed on suspension during September 2009, pending the investigation concerning misconduct on his part alternatively poor work performance. The charges which concern breach of Municipal Finance Management Act 52 of 2003, were served on the applicant on the 12th November 2009, and the disciplinary hearing was set down for the 20th November 2009.

[4] At the disciplinary hearing the applicant's representative raised a number of preliminary points including amongst others the authority of the Administrator to institute disciplinary hearing against her. It was contended in this respect that the power to institute disciplinary proceedings vested with the Municipal Manager in terms of section 55 (1) (g) of the Local Government: Municipal Systems Act.

[5] The other point raised is that the Administrator did not have the power to appoint the chair person of the disciplinary hearing as such appointment constituted procurement of services by someone with executive and legislative authority contrary to the provisions of section 59 (1) (a) Act 32 of 2002.

[6] The authority of the chair -person of the disciplinary hearing was also challenged on the ground that he purported to exercise the power as the chair- person without necessarily having the terms of reference giving to him power to perform such a function.

[7] The chair person of the disciplinary hearing having heard the above objections ruled that he had the pre-requisite jurisdiction to conduct a disciplinary hearing.

The grounds of urgency

[8] The grounds of urgency are set out in both the founding and supplementary affidavits of the applicant in identically the same terms. They are set out in the supplementary affidavit as follows:

> *"22.1 the disciplinary proceedings are scheduled to begin on Friday the 9th April 2010. The bases of this application are that my disciplinary proceedings are procedurally flowed and are unlawful. Should this matter not be heard on urgent bases, disciplinary proceedings will be completed and I would have suffered irreparable prejudice as a result and will have been required to go through the expanse and difficulty of participating in an unlawful "sic."*
>
> *23 I summit that I have not unduly delayed in approaching this court the relief. I only discovered all about (sic) the letter of appointment on the 12 March 2010 at the disciplinary hearing. We then raised the preliminary point on it and the chair person only handed ex-tempory ruling on the 29 March 2010. I then had to consult my attorneys and prepare this application over the Easter weekend."*

[9] The principles governing consideration as to whether or not to dispense with the requirements of the Rules relating to the time frames and to entertain a matter as one of urgency and grant an interim interdict is well established in our law. In terms of Rule 8 of the Rules of this court the applicant is required to provide reasons why a matter should be entertained on an urgent base. The approach to

be adopted in considering whether to grant an interim relief is set out in *Harrison Motor (Welkom) Ltd v Protea Motors, Warrenton and Another, 1973 (3) SA 685 (A).* In terms of that decision the applicant is required to show that he / she has a *prima facie* right (even though may be open some doubt), there is no alternative remedy available, there is a reasonable apprehension that he / she will suffer irreparable harm if the order is not granted, and the balance of convenience favours the granting of the order.

Evaluation

[10] After a lengthy debate Counsel for the applicant conceded, correctly so, that it could not be said that the issue of suspension which arose in September 2009 needed to be dealt with on an urgent bases. It was for this reason that the issue of suspension was abandoned by the applicant.

[11] The issues that then remained for consideration were; declaring the disciplinary proceedings instituted against the applicant to be unlawful, and setting them aside for that reason.

[12] The existence or otherwise of the alternative remedy for setting the disciplinary proceedings on an urgent bases was also debated at length with Counsel for the applicant. The existence of the alternative remedy was not disputed by the learned Counsel. It was however submitted on behalf of the applicant that there was no reason for the applicant to be over burdened with the cost of having to engage legal representation at the internal disciplinary hearing. It was further agued that the alternative remedy was costly because it entails the applicant

having to engage the services of the legal representatives in the internal disciplinary hearing. The applicant contended that this would prejudice her.

[13] In my view the above contention of the applicant bears no merit. It is the applicant's own choice to use legal representation at the disciplinary hearing. There is nothing in law that she should appoint lawyers to represent her at the internal disciplinary hearing. The issue of affordability of legal costs if she chooses to appoint legal representatives at the disciplinary hearing would be her own choice which she would have made with no undue pressure from any one.

[14] In my view, for the above reasons alone the applicant's application stand to fail. The application also stands to fail because the urgency it self created. In this respect the applicant contended as indicated earlier that the institution of the disciplinary hearing was unlawful because it was instituted by the administrator who did not have the power and authority to do so. According to her the authority to institute disciplinary proceedings against employees in the Municipality vests with the Municipal Manager.

[15] The administrator instituted the disciplinary proceedings against the applicant during November 2009 when he served her with the charges of contravening the Municipal Finance Management Act. The applicant did nothing to challenge the exercise of that power by the Administrator. There is no satisfactory explanation as required by Rule 8 of the Rules of this court as to why the alleged unlawful exercise of the power to institute the disciplinary hearing against the applicant has suddenly become urgent in April 2010.

[16] I see not reason in both law and fairness why costs in the circumstances of this case should not follow the result.

[17] In the circumstances the application is dismissed with costs.

Molahlehi J

Date of Hearing : 8th April 2010

Date of Judgment : 16th April 2010

Appearances

For the Applicant : Mr PT Motaung

Instructed by : Motaung Inc

For the Respondent: Mr AD De Swardt

Instructed by : De Swardt Vogel Myambo Attorneys