IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J20/2010

Reportable

In the matter between:

MOHLOPI PHILLEMON MAPULANE	Applicant
and	
MADIBENG LOCAL MUNICIPALITY	First Respondent
ADV VAN GRAAN SC N.O	Second Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an opposed urgent application in which the applicant seeks an order *inter alia* that:

> *"2. A rule nisi is issued for the respondents to show cause on the date and time to be determined by the Registrar of the above Honourable Court why:-*
>
> *2.1 A declaratory must not issue that the suspension effected on 29 October 2009, suspending the applicant from duty has terminated on 30 December 2009.*
>
> *2.2 A declaratory must not issue that the decision of the second respondent, taken on 28 December 2009, in particular paragraph 5 thereof ("the ruling") is invalid, unlawful and of no legal force and effect.*
>
> *2.3 The applicant should not be permitted to resume his duties as a Municipal Manager in terms of the contract of employment signed on 30 April 2007".*

[2] The application is opposed by the first respondent. The second respondent does not oppose relief but filed an answering affidavit for the purpose of assisting the Court.

Background facts

[3] On 30 April 2007 the applicant entered into a fixed term contract of employment with the first respondent, in terms of which he was employed as Municipal Manager.

[4] On 4 August 2009 the applicant was placed on special leave. This decision was set aside by this Court on 7 August 2009.

[5] On 13 August 2009 the applicant was suspended.

[6] On 25 August 2009 this Court issued an order permitting the applicant to resume duties.

[7] On 30 October 2009 the applicant was again suspended.

[8] On 7 December 2009 the applicant was served with notice to extend the suspension.

[9] On 17 December 2009 the applicant was served with a charge sheet and notice to attend a disciplinary enquiry to be convened on 28 December 2009. At the enquiry the applicant unsuccessfully challenged the validity of the notice. Since the applicant was overseas at the time, and was represented by his attorney, the parties had agreed that if the point *in limine* concerning the validity of the notice was unsuccessful the enquiry would be postponed *sine die*.

[10] On 7 January 2010 the applicant advised the first respondent of his intention to resume his duties. The first respondent took the attitude that he is not entitled to resume duties as he remains suspended.

Urgency

[11] Mr Moshoana, appearing for the applicant, submitted that he is entitled to be heard as a matter of urgency. His fixed term employment contract expires on 31 March 2012 but is subject to renewal should he fulfil all performance agreements. He can only fulfil his performance agreements if he is allowed to resume his duties. He bears statutory and fiduciary duties in terms of *inter alia,* the Municipal Finance Management Act 56 of 2003, which he will be unable to discharge should he remain suspended indefinitely. The applicant alleges that his continued suspension is unlawful, affects his reputation as well as his advancement and the fulfilment of his contractual obligations: *Mokgotlhe v Premier of the North West and others* [1] and *Dladla v Council of Mbombela Local Municipality & Another* [2].

[1] [2009] 30 ILJ 605 [LC] at 616 para 31, 618 para 36, 620 para 44 and 611 para 16-18.

[2] [2008] 29 ILJ 1863 [LC] at page 1899 para 13-19 and page 1900 para 14F.

[12] Mr Rip, appearing for the first respondent, submitted that the applicant is not entitled in law to renewal of his fixed term contract. A new contract would have to be negotiated and the first respondent would not be in a position to simply extend his current term even if he met all his performance requirements. Moreover, the first respondent has an acting municipal manager in place who is accountable for all its statutory functions. The applicant's reliance moreover on the abovementioned authorities is ill founded in that we are not concerned, *in casu,* with an unlawful suspension. In the present instance the applicant seeks relief declaring his suspension to have had lapsed in terms of his employment contract, not that the extension of his suspension renders it unlawful. However, assuming for the purposes of urgency his suspension was unlawful, this, Mr Rip submitted, would still not found urgency in that the applicant's attorney of record, in his capacity as acting Judge of this Court, has held, albeit in passing, that where a suspension is with pay an employee who does not demonstrate the right to work cannot be prejudiced: *Dladla v Council of Mbombela Local Municipality & another*[3]. The applicant's reliance on his fixed term contract and the possible renewal thereof does not *per se* found a right to work. Moshoana AJ found furthermore that an applicant's image and reputation cannot be the basis upon which this Court can overturn a lawful suspension.

[13] The first respondent conceded that the rules of this Court should be dispensed with and the matter heard urgently and that it was in the interests of both parties to obtain clarity on the merits. I proceeded to hear the merits although I am not satisfied as to urgency.

Analysis

[14] There are principally two issues for determination on the merits:
(a) Has the suspension of the applicant ended by virtue of clause 17.4 read with clause 16.3 of his contract of employment?
(b) Has the second respondent extended the suspension of the applicant, and if so, was he authorised to do so?

[15] I turn to consider the second issue first, for purposes of convenience as that was the order in which it was argued. The second respondent states in his answering affidavit that he was appointed to chair the disciplinary hearing involving the applicant on 28 December 2009. He alleges that there was no application before him to extend the 60 day period contemplated in paragraph 17.4 of the applicant's contract of employment, which in his view he would have been authorised to do. However, he states that he had no authority to extend the applicant's suspension and did not make a ruling in respect thereof. The contentious part of the second respondent's ruling, paragraph 5 ("the ruling"), is as follows:

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[3] (2008) 29 ILJ 1902 (LC).

"In the light of the fact that this disciplinary hearing has commenced within the 60 day period contemplated in paragraph 17.4 of the employee's contract of employment (annexure A to this notice), the employee's suspension has not been terminated and the employee is not entitled to return for duty as envisaged in the aforementioned paragraph".

[16] In the light of these facts Mr Moshoana conceded that the second respondent had not extended the applicant's suspension. This concession is in my view well made given the express wording of the ruling and the indisputable averments of the second respondent. Since no other basis was advanced for unlawfulness save for the decision in this regard being *ultra vires* and invalid, this dispenses with the issue.

[17] I turn now to consider whether the applicant's suspension had lapsed or ended by virtue of his employment contract.

[18] In terms of the applicant's employment contract the employer is entitled to summarily terminate his employment for any reason recognized by law, including serious misconduct or any other conduct that will justify summary dismissal at common law.

[19] Clause 17.1 provides for precautionary suspension on full pay if the applicant is alleged to have committed a serious offence and if the employer believes his presence at the workplace might jeopardize any investigation or endanger the well being or safety of any person or municipal property.

[20] Clause 17.4 provides:

"Furthermore if the employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within sixty (60) days, provided that the chairperson of the hearing may extend such period[4], failing which the suspension shall terminate and the employee shall return to full duty".

[21] Mr Moshoana submitted that the first rule of interpretation is to give these words their ordinary meaning. In interpreting similar provisions (clause 7.2(c) of Resolution 1 of 2003 of the Public Service Co-ordinating Bargaining Council), the Court held in *Lekabe v Minister: Department of Justice and Constitutional Development*[5] that :

"*At best, as I see it, the suspension falls way after 60 days unless the chairperson of the disciplinary hearing extends that period[6]".*

and:

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[4] Mr Moshoana's emphasis.
[5] (2009) 30 ILJ 2444 (LC) at para 17 and 19.
[6] Mr Moshoana's emphasis

"Thus the right of the employee in the event the employer does not uplift the suspension on the expiry of 60 days is to...bring an application directing the employer to uplift the suspension".

[22] Mr Moshoana submitted that on a proper reading, *Lekabe* suggests that any period of suspension beyond 60 days is invalid. He relies on this as authority for the proposition that in the applicant's suspension, the *"extended period should not be more than 60 days*". Thus whereas the applicant's suspension was extended for an indefinite period, it was, on the authority of *Lekabe,* unlawful. This means it is invalid and must therefore be understood to have ended. It was on this basis that the applicant's attorneys informed the first respondent on 7 January 2010 that *"[i]n terms of clause 17.4 of his contract of employment the suspension terminated and our client is entitled to return to full duty"*. The first respondent replied that in the light of 17.4 as confirmed in the ruling, the applicant was still suspended and was not entitled to resume duty. Mr Moshoana contended that this was incorrect as, in the light of *Lekabe*, the 60 day period was peremptory and had ended.

[23] Insofar as the first respondent had interpreted clause 17.4 to mean that once the disciplinary enquiry had **commenced** the 60 day period was interrupted, this was incorrect Mr Moshoana submitted. It was common cause that the disciplinary enquiry dealt with the validity of the notice to attend the enquiry and was then postponed by consent between the parties. It is absurd to suggest that this would interrupt the period of suspension, and this is factually incorrect as well as in direct conflict with authority to this effect. Clause 17.4 he submitted, must have envisaged that the enquiry would **commence and be completed** within the 60 day period. Any other interpretation would create the possibility of abuse by employers. This abuse was highlighted by Molahlehi J when he noted that the intention of the parties in promulgating clause 2.7(2)(c) of the SMS handbook was to "*curb the power of employers in the public service from using protracted suspension as a means of marginalizing those employees who may have fallen out of favour. The intention of the parties was also to minimize if not do away with resultant detrimental impact, the prejudice to the affected employee's reputation, advancement, job security and fulfilment that would arise from prolonged suspension"*[7]*.* In light of this concern, Mr Moshoana cautioned the Court to be vigilant in protecting employees.

[24] Mr Rip submitted that the obligation to "*hold"* a disciplinary enquiry does not envisage a finalisation of the enquiry. The requirements are met if the hearing has commenced, notwithstanding that in this instance it was postponed by agreement between the parties' legal representatives, which agreement was confirmed by the second respondent. As a result the suspension remains in place. Mr Rip submitted that the only issue of relevance was the interpretation of clause 17.4 as *Lekabe*[8] was not applicable. The continued suspension of the applicant did not flow from the ruling but from clause 17.4 of his employment contract. Mr Moshoana submitted that if it

[7] Lekabe supra para [20].
[8] Supra.

was correct that the suspension was "automatically extended" by virtue of merely commencing the enquiry, then the proviso in clause 17.4 to the effect that the chairperson could extend the period is rendered meaningless.

[25] Mr Moshoana also referred to the remark in *Lekabe* made by my learned brother Molahlehi J that since the investigations into the employee's alleged misconduct were complete, there was no rational and defensive reason why suspension should be prolonged. In *casu*, the applicant was charged with misconduct on 17 December 2009, at which stage the investigation conducted by the first respondent would have been completed. On the facts as well as the law therefore the first respondent could not justify the continuation of the suspension. Mr Rip agreed with Mr Moshoana's submission that this Court had an obligation to prevent abuse but contended that in the same vein the employer must have the opportunity to investigate fully the more than 18 serious charges and multiple sub-charges involved concerning all manner of fraud and impropriety which are involved here. In any event, I fail to see the relevance of this submission given the concession as to lawfulness and given that we are not concerned here with *audi alteram partem* as in *Dince v Department of Education North West Province and others*[9].

[26] Mr Rip submitted that in addition to the interpretation of 17.4 there was a second issue arising from the disciplinary enquiry, i.e. the agreement to postpone. The applicant refers to this as a *"tentative agreement*" in that it was contingent on the chairperson's ruling. The facts however were that the applicant had been abroad when the hearing commenced and had been represented by his legal representative who challenged the validity of the notice of disciplinary enquiry. It had been agreed between the parties' legal representatives that if the notice was found to be valid after arguing this point *in limine*, the enquiry would be postponed *sine die* so that it could resume when the applicant was present in the country. This can hardly be said to constitute a "tentative" agreement, and which would justify the lapse of the suspension. Moreover, Mr Rip submitted, the applicant acknowledges that that there was no need to seek an extension. It brought and subsequently withdrew an application to extend the suspension on 10 December 2009. This was an erroneous application given the facts of this matter, which the applicant would have realised and which must have prompted the withdrawal. There was accordingly no need for the chairperson to order the extension of the 60 day period.

[27] Mr Rip submitted further that the only relevant consideration was whether the employee had been treated fairly or whether he had been subjected to an unfair labour practice. In *Jonker v Okhahlamba Municipality and others* [10], my learned sister Pillay J held, in responding to a contention that the time limits for holding an enquiry had expired, that "..*the procedures and time limits are a commitment to deal with discipline expeditiously, and they serve as a guide as to how this can be*

[9] Unreported judgment of Molahlehi J under case number J2234/09 and J2193/09 dated 5 November 2009.
[10] [2005] 6 BLLR 564 (LC) at para [20].

accomplished. To hold that the procedure and the time limits are written in stone and immutable must necessarily imply that the first respondent elected to abandon or waive its wide powers of discipline, which the law requires it to exercise in a reasonable manner. Why the first respondent would contract away such substantial rights in favour of the applicant is unfathomable. The waiver or abandonment by the first respondent cannot necessarily or reasonably be inferred from the contract. Neither the terms of the contract nor the conduct of the first respondent's representatives amounts to an unequivocal waiver of the right to discipline the applicant. (RAF v Mothupi 2000 (4) SA 38 (SCA)). This approach, Mr Rip submitted, is consistent with that of the Labour Appeal Court. Since the applicant is not relying on a waiver, whether the employee was treated unfairly is the key consideration, and it was submitted that he had not been subject to any unfairness.

[28] Accordingly, Mr Rip submitted, the applicant has failed to establish the requirements for urgent interim relief, in that it has failed to show irreparable harm, lack of an alternative remedy, and that the balance of convenience favours relief. Mr Moshoana submitted that fairness was not the relevant test and the *Jonker*[11] *dictum* was not applicable. He reiterated that the courts have recognised, as in *Dince*[12], that suspension "*has substantial prejudicial consequences relating to both social and personal standing of the suspended employee*",[13] and that although the suspension of the applicant is with pay, the benefits associated with his position (among others, use of a credit card and laptop), have been denied him. The automatic extension of the suspension leads to a manifest injustice to the applicant and also prejudices the first respondent as well as the taxpayer. In addition, Mr Moshoana submitted, the suspension affects the applicant's job security, his personal advancement and fulfilment, but is also causing irreparable harm to his dignity. He continues to suffer prejudice and the balance of convenience favours the granting of relief in that the extension of the 60 day period is unlawful.

[29] I do not consider *Lekabe* to be authority for the proposition advanced by the applicant, and Mr Moshoana appeared to concede this. *Lekabe* dealt with provisions (Public Service Co-ordinating Bargaining Council Regulations and clause 2.7.(2)(c) of the Senior Management Service Handbook) substantially different to those contained in the applicant's employment contract. It is further distinguishable in that it was common cause that the employer had failed to take steps to discipline within the 60 day period. At issue therefore was whether thereafter it could still discipline the employee. The court held: *"The 60 days having expired and the employer, having not taken any further steps in the initiation of the disciplinary hearing, I see no reason why the respondent should not be ordered to uplift the suspension and allow the applicant to resume his duties"*[14]. However although I did not understand him to be expressly relying on a waiver, Mr Moshoana cited *Mlambo & another v Head of Department : North West Department of Agriculture, Conservation & Environment*

[11] Supra.
[12] Supra note 8.
[13] Dince, supra at para [23].
[14] Supra, at para [21].

and another[15]as authority for the proposition that once the period of suspension had expired, the employer no longer had any right to discipline the employee. In *Lekabe* Molahlehi J however correctly declined to follow *Mlambo*, which he considered to be wrong.

[30] Insofar as Mr Moshoana cited *Minister of Labour v General Public Service Sectoral Bargaining Council & Others*[16] as further support for the submission that the 60 day period had expired, Molahlehi J also distinguished this. In dealing with the issue in *Lekabe* he pointed out that the considerations taken into account by Francis J therein on review were not relevant to declaratory relief. In that decision[17], my learned brother Francis J held: *"It is clear from clause 7.2 (c) of the resolution that after an employee has been suspended a disciplinary hearing must be held within a month or 60 days. If the matter is complex, the disciplinary hearing must be held within 60 days and the chairperson of the hearing must then decide on any further postponements. The suspension can therefore not exceed more than 60 days without a disciplinary hearing being held. Facts can be placed before the chairperson to grant a further postponement due to the complexities of the matter".* Francis J was dealing with a situation where the applicant had referred an unfair labour practice dispute arising out of his suspension. More than six months after he was suspended and an arbitration award was issued, the employer initiated disciplinary proceedings, but this did not proceed. The employer then sought to review the award. The applicant conceded at the review that there was no substance to its review relating to the interpretation of clause 7.2 (c) given that the issue before the arbitrator was whether the suspension was unlawful in that it exceeded the period mentioned in the clause. The arbitrator was not required to determine the interpretation of the clause. The review was dismissed. Although I agree that *Minister of Labour* is distinguishable on the facts, it is implicit from the above *dictum* that notwithstanding a postponement by the chairperson in a complex matter, a disciplinary hearing that has commenced can still be said to have been "*held".*

[31] In considering whether to grant relief in applications of this nature this Court has consistently applied the test established in *Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton & another* [18]. This requires an applicant for interim relief to establish *prima facie* the right that forms the basis for the application even though open to some doubt; a well grounded apprehension of irreparable harm if interim relief is not granted; the absence of any other satisfactory remedy and that the balance of convenience favours granting of relief. In applying this test to the facts and submissions presented it is clear that the applicant has failed to meet the threshold requirements for interim relief.

[32] In the circumstances, I make the following order:

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[15] Unreported at case number CA1202/06.
[16] (2006) 27 ILJ 2650 (LC).
[17] Supra at para 11.
[18] 1973 (3) SA 685 (A).

(a) The application is dismissed, with costs.

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Bhoola J
Justice of the Labour Court of South Africa

Date of judgment: 09.02.10

Appearance:

For the applicant: Mr G N Moshoana, Mohlaba and Moshoana Inc.

For the first respondent: Adv Rip SC instructed by De Swardt Vögel Myambo