

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case Nr: 2800/2004

In the matter between:

MOHANOE MPAKANE

Applicant

And

TSWELOPELE MUNICIPALITY

First Respondent

LESANE SHADRACK SESELE

Second Respondent

MMATHEBE VIOLET PHATSHOANE

Third Respondent

JUDGMENT: MUSI J

HEARD ON: 14 OCTOBER 2004

DELIVERED ON: 21 OCTOBER 2004

[1] The applicant is employed by Tswelopele Municipality (the first respondent) as its manager for technical services. On 2 December 2003 the applicant together with his co-worker and first respondent's municipal manager, one Mr. Mpatshe, were suspended from their duties with full pay pending an investigation into matters relating to their employment. The

internal investigation led to charges being framed and a disciplinary inquiry set in motion against the applicant and his fellow employee aforesaid. The charges against the applicant essentially relate to disposal of certain assets of the first respondent without proper authorisation and are not intricate at all. The second and third respondents are practising attorneys who have been appointed by the first respondent respectively as presiding officer and prosecutor in the disciplinary inquiry of the applicant and both acted throughout the events forming the subject of this application in their capacity as such.

It is necessary to give a summary of what transpired and in so far as there are disputes of fact, I shall rely on the version of the respondents.

- [2] The disciplinary hearings of both the applicant and the municipal manager were initially set down for 15 March 2004, which date had been arranged with their then representative, one Mr. van Heerden, a labour consultant.

Such hearing was, however, postponed at the instance of Mr. Sizephe, the attorney now representing the applicant, who had then taken over the case of the municipal manager from Mr. van Heerden, apparently due to a conflict of interest. Because of difficulty in reconciling the dates on which both representatives would be available, the hearings of the two employees who were separated and postponed to different dates. That of the applicant was postponed to 26 and 27 July 2004. That of the municipal manager was postponed to 5 and 6 August 2004. However, in June 2004 the municipal manager terminated the mandate of Mr. Sizephe and appointed another attorney, who apparently fitted himself into the pre-arranged dates enabling the disciplinary hearing of the municipal manager to continue as planned.

- [3] Not so with the case of the applicant because on 26 July 2004, his labour consultant representative was nowhere to be found and Mr. Sizephe had now been roped in to represent him. The latter was, however, not available on that

date and sent another attorney (Mr. Beukes) to appear on his behalf purely to seek a postponement. He had given Mr. Beukes dates to which the matter could be postponed but these could not fit in with those of the second and third respondents. On the first proposed date of 3 August 2004, the second respondent was not available and the second proposed date of 20 August 2004 was conditional upon Mr. Sizephe securing a remand of a criminal matter in which he had been scheduled to appear elsewhere. The second respondent was not prepared to fix what he regarded as an uncertain date. A deadlock developed over dates and Mr. Sizephe withdrew from the matter there and then through Mr. Beukes. The second respondent then postponed the matter in order to give the applicant an opportunity to find another representative. The applicant was advised that the matter would be heard in the week of 16 – 20 August 2004 and that his new representative must contact the second respondent to confirm two dates within that week for the hearing.

When nothing was heard from the applicant's side by 4

August 2004, the third respondent directed that a notice be served on the applicant advising that the inquiry would be heard on 18 August 2004. It is clear that the expectation throughout was that the inquiry would need at least 2 days to be concluded and it can be accepted that the date of 18 August 2004 would only be the first day of the hearing.

- [4] In the meantime, the applicant had gone back to Mr. Sizephe who, on 2 August 2004 wrote a letter to the third respondent advising of his reinstatement and indicating that he would not be available on the dates given to the applicant. He refers to 19 and 20 August 2004 but this is clearly incorrect. By his own admission, the applicant had been told that the hearing would take place on 2 days between 16 and 20 August 2004. The letter of 2 August 2004 did not reach the third respondent as a wrong fax number had been used and a further letter was then faxed on 11 August 2004 when the dates of 24 and 31 August 2004 were proposed. This was followed by another letter dated 13 August 2004 when it was indicated that if the date of 24 August 2004 was not

acceptable to the respondents, Mr. Sizephe would go ahead with his criminal trial in New Castle. The third respondent's reply was that the inquiry would go on as scheduled on 18 August 2004 and that the applicant's representative must simply make himself available on that day. This triggered the instant application which was launched on 17 August 2004. Upon being served with the papers in the morning of 18 August 2004 the respondents postponed the inquiry *sine die* and opposed the application. On the self same 18 August 2004 the application was postponed *sine die* with directions as to the filing of further papers.

- [5] It is obvious that once the disciplinary hearing was postponed *sine die* upon service of the court papers herein, the purpose of the application fell off. This must have been clear to all and sundry when this matter was postponed *sine die*. In oral argument, I took up with counsel for the applicant the question of what order does the applicant now seek. Mr. Edeling conceded that prayer 2.1 was now academic but submitted that I could still grant prayer 2.2 and costs. He

submitted that the conduct of the respondents in refusing to postpone the disciplinary hearing to the dates proposed by the applicant's attorney, to wit 20 August 2004, was unreasonable and prejudicial to the applicant. In particular, going ahead with the disciplinary hearing on 18 August 2004 in the absence of the applicant's attorney would have entailed grave consequences for the applicant. The applicant was thus entitled to bring this urgent application in order to ward off the potential prejudice, so the argument went. Counsel thus submitted that I should grant the order sought in prayer 2.2 and order that the respondents pay the costs of the application up to 18 August 2004. He submitted that each party should pay their own costs incurred after the latter date.

- [6] The latter submission in respect of costs is interesting. It was made in response to my following query: Since by 18 August 2004 the purpose of the application had been achieved, why did the applicant still pursue the matter? Why did he not go back to the respondents with proposals for new

dates for the hearing? In prayer 2.2 the applicant requests the Court to order that the parties arrange dates for the disciplinary hearing to take place within two months. But two months have almost elapsed since the matter was last on the roll and nothing has been done in the way of arranging new dates. It is no good for the applicant to put the blame on the respondents, as Mr. Edeling has sought to do by saying that the respondents are *domini litis* in the disciplinary hearing and it is they who should have set new dates. It was equally for the applicant to realize that no further purpose would be served by pursuing the application. He is not saying that he tried to talk to the respondents about new dates but that he drew a blank. He did not approach the respondents at all and was content to simply proceed with the application. It is safe to assume that the applicant was happy that the disciplinary inquiry remained stalled so he could keep on drawing his full pay. His conduct post 18 August 2004 will have a bearing on what had happened leading to the launching of the application.

[7] Now Mr. Benade for the respondents has submitted that the purpose of this application is very much alive. He argued that what the applicant seeks with prayer 2.1 is in fact an order that he is entitled to his preferred attorney and that the disciplinary inquiry could not go on in the absence of such attorney. Viewed in that context, with prayer 2.2 the applicant seeks an order directing that new dates be arranged with the particular attorney. He then argued that the applicant has no right to insist on representation by a specific attorney and cited *inter alia* **HAMATA AND ANOTHER v CHAIRPERSON, PENINSULA TECHNIKON INTERNAL DISCIPLINARY COMMITTEE AND OTHERS** 2002 (5) SA 449 SCA. He submitted that the appropriate order would be to dismiss the application with costs.

[8] This argument is not without basis. It arises from the language of prayer 2.1 as well as passages in the applicant's founding papers. Prayer 2.1 seeks to stop the disciplinary inquiry from going ahead in the absence of "his preferred legal representative" and throughout the founding affidavit

the applicant talks of the need for “my legal representative” as opposed to a legal representative.

However Mr. Edeling has stated categorically that the applicant does not insist on the services of a particular attorney but that all he wants is to have legal representation. He attributed prayer 2.1 to inept language. I agree that prayer 2.1 should not be read as seeking an order that the applicant is entitled to legal representation by a specific attorney. But that does not detract from the inescapable inference that the applicant did insist on a particular attorney in the dispute over postponements and this will have a bearing on an assessment of the reasonableness or not of the conduct of the parties.

- [9] In my view, the real purpose of this application was to stop the disciplinary inquiry from proceeding as scheduled and that is the essence of prayer 2.1. That purpose was achieved when the disciplinary inquiry was postponed *sine*

die upon service of the Court papers. However, in the absence of any agreement as to what was to happen further to the application, it had to be adjudicated upon.

- [10] The cardinal question is whether the applicant was justified in launching the application in the first place. Put otherwise, was the conduct of the respondents in refusing to grant a further postponement beyond 18 August 2004 reasonable or not? This refusal should be viewed in the light of the history of the matter. It was of the utmost importance that the disciplinary inquiry be finalized as expeditiously and promptly as reasonably possible. The Disciplinary Procedure Collective Agreement applicable to this matter (Annexure “K” to the applicant’s founding affidavit) makes this clear. Clause 6.5.7 thereof states that the inquiry should be initiated upon five days notice to the accused and should take place within 15 days of service of such notice. The Code allows for extension of these periods but it is significant that clauses 6.5.8 and 6.5.9 vest the disciplinary tribunal with the power of control. If agreement cannot be reached on

suitable dates, the affected party may “apply to the disciplinary tribunal for an extension”. It is clear that the presiding officer, in this case the second respondent, has a final say in the matter. Of course he cannot act arbitrarily or unreasonably and must conduct matters in line with the principles of natural justice and fair procedure.

- [11] The reasons for the need for the prompt commencement and conclusion of a disciplinary inquiry of this nature are obvious. It is of the utmost importance to both the employer and employee that there be certainty in their relationship. A state of limbo where the employee’s future is uncertain and the employer cannot fill his/her position is undesirable. *In casu*, the applicant had been earning a full monthly salary for some 8 months to July 2004 while (11 months to date) whilst rendering no service at all. It is causing the first respondent considerable loss and is untenable a situation. It was therefore reasonable of the second respondent to insist that the disciplinary inquiry be concluded by no later than 20 August 2004.

[12] But whose fault was it that the disciplinary inquiry could not proceed on earlier dates? Certainly not that of the respondents. The matter had been set down for hearing on 15 March 2004 having been postponed from January at the instance of the applicant's representative, Van Heerden. Three clear months had been allowed. On 15 March 2004 it was again postponed due to no fault on the part of the respondents. This postponement was at the instance of Mr. Sizephe as he had not been ready to proceed on that day.

[13] The crucial date is that of 26 July 2004, a date that had been arranged with the plaintiff's former representative. Five months had elapsed since the last sitting and suddenly Van Heerden disappears from the scene with no explanation whatsoever. Though the applicant is not personally responsible for this unacceptable development, Van Heerden was nonetheless his representative. And why does the applicant become aware of Van Heerden's absence only on 17 July 2004? When would they have consulted to prepare

for the hearing? Why not keep contact with his representative? Even then there was still enough time to find another attorney and prepare for the hearing when the applicant consulted his present attorney. The latter had been involved in this matter whilst representing the municipal manager and he should have been aware that the matter had been dragging on. Knowing that he would not be available on 26 July 2004 he nonetheless accepted instructions. Now the respondents were still pliable and prepared to postpone the matter further. But when the days that the applicant's attorney proposed were not acceptable to the respondents the applicant's attorney unceremoniously withdrew.

- [14] In my view, the applicant's attorney adopted wrong attitude in this matter. He did not seem to appreciate that the second respondent, as presiding officer, had the final say in fixing dates. Throughout the wrangling over dates he talks of him accommodating the respondents when the opposite should have been the case. Now having withdrawn due to his non-

availability on the dates that suited the respondents the applicant's attorney agrees to be reinstated in the matter within almost a week of the earlier deadlock. By this time the second respondent had fixed dates for the hearing and had told the applicant in no uncertain terms that he must find a representative who would be available on those dates. Yet the applicant goes back to the same attorney. The attorney is fully aware of the problems herein and is again not available on the stipulated dates yet he accepts instructions.

- [15] In the circumstances, the second respondent was justified in insisting that the disciplinary inquiry would proceed on 18 August 2004 with or without the applicant's attorney. He was thereby not denying the applicant his right to legal representation. All that the applicant had to do was to find an attorney who would be available. And the applicant had been giving enough time to do that. The applicant's excuse that he could not find one is lame. He did not need a labour law expert given the nature of the charges. Moreover, he was free to engage even a non-lawyer to represent him, as is

provided for in the relevant Code. The problem is that both the applicant and his attorney were harbouring a misconception that the applicant was entitled to his preferred attorney and that the inquiry could not go ahead as long as such attorney was not available. That is unacceptable and the remarks of Lombard, J in **S v KYRIACOU 2000 (2) SA CR 704 OPD**, though relating to a criminal trial, are equally applicable to a situation like this and I quote at 705 J – 706 C:

“The only question that presently calls for an answer is whether the right to have legal representation of one’s choice goes so far as to include the scenario where a Court finds itself in a situation that it is at the mercy of its officers as regards the commencement and or continuation of any particular case or trial. If this had to be so it means in effect that Courts surrender themselves to the dictates of their officers in respect of their uppermost function and that is to dispense justice. The interest of the ‘other side’ and the Court are completely ignored. This Court cannot and will not allow itself to be kept or taken hostage by its own

officers – the legal practitioners. Such procedure or practice is unacceptable – it can and will lead to an abuse of the process of the Courts. It would enable any litigant or accused to literally one-handedly frustrate the proceedings in any court by changing legal practitioners regularly, thereby enabling him or her to gain extra time – to encourage delaying tactics. What makes the situation even more unbearable is the fact that in the process the hands of all the other interested parties, including the Court, are tied.”

[16] I hold that the applicant was the author of his own misery and that he himself created the dilemma in which he found himself when he launched the application. I have already indicated that once the inquiry was postponed on 18 August 2004 the applicant should have taken steps to arrange new dates with the respondents, which could have obviated the need to proceed further with this application and saved costs. The respondents could also have done that and not proceeded to file opposing papers. But in view of the inept wording of the prayers and the language of the founding affidavit the respondents can be excused for adopting the

attitude that the matter needed to proceed to trial so as the question of whether the applicant had a right to be represented by his preferred attorney be adjudicated upon. It is obvious also that the applicant stood to benefit at the expense of the respondents as long as the matter was dragged out. He continued to draw a salary for which he was rendering no services. That probably explains why he took no steps to bring closure to the matter much earlier.

- [17] Finally, Mr. Edeling submitted that I should give directions as to how the inquiry should be carried forward. I do not think that I should usurp the functions of the second respondent. I am mindful of the principle of judicial deference. See **LOGBRO PROPERTIES CC v BEDDERSON NO AND OTHERS 2003 (2) SA 460 SCA at 471.**

If no agreement can be reached as to new dates, he can use his discretion and set down the matter for hearing upon a reasonable notice, of say 3 weeks, to the applicant.

- [18] In the result, the application is dismissed with costs.
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H.M. MUSI, J

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On behalf of Respondents: Advocate H.J. Benade
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