THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 88/2024

In the matter between:

PORTIA HALIO TSHABALALA **Appellant**

and

MOQHAKA LOCAL MUNICIPALITY. **First Respondent**

COUNCILLOR ME MOKATSANE **Second Respondent**

Heard: **19 November 2024**

Delivered: **21 November 2024**

Coram: **Savage ADJP, Van Niekerk JA *et* Govindjee AJA**

JUDGMENT

VAN NIEKERK, JA

[1] Regulation 6 of the Local Government: Disciplinary Regulations for Senior Managers, 2010 (regulations) provides for the precautionary suspension of senior municipal employees. Regulation 6 (6)(a) provides:

> 'If a senior is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.'

[2] This appeal raises the meaning of the word 'commence' and in particular, whether for the purposes of the regulation, a disciplinary hearing commences when a municipality serves charges of alleged misconduct in terms of regulation 8 (1), or when the officer leading evidence reads out the charges at a convened disciplinary hearing. The first respondent (municipality) contends for the former meaning; the appellant for the latter. The difference in meaning has profound consequences for the appellant. If the former meaning is correct, the appellant's suspension, which commenced on 1 March 2024 remains extant; if the latter meaning is correct, her suspension lapsed on 31 May 2024 and she is entitled to return to work.

[3] The appellant appeals against the judgment delivered by the Labour Court on 12 July 2024, when the Court dismissed an application for a declaratory order that the appellant's suspension had lapsed on 31 May 2024 in terms of regulation 6 (6).

Background

[4] The background facts are not in dispute. The appellant is employed by the first respondent, Moqhaka Local Municipality (the municipality) as the municipal manager. On 1 March 2024 the appellant was suspended, with immediate effect, pending an investigation into alleged misconduct. On 31 May 2024 the appellant was served with a notice to attend a disciplinary hearing, accompanied by charges. On 3 June 2024 the appellant reported for work, contending that her suspension had lapsed. An exchange of correspondence between the parties' respective attorneys followed. On 13 June 2024, the appellant filed an urgent application in the Labour Court contending that a

continuation of her suspension beyond a period of three months was in breach of her employment contract. Specifically, the appellant averred that her contract of employment incorporated the regulations, and that the municipality was in breach of regulation 6 (6)(a).

[5] In its judgment, the Labour Court held:

'[15] …A disciplinary hearing commences upon the service of the disciplinary charges and the notice of disciplinary charges. The service of such is an external manifestation that another party is beginning to claim something from the other party. As stated in the *Goba* matter, it will be incongruent to suggest that the proceedings commence only when the matter sits for trial.'

[16] In this case, the disciplinary proceedings against the applicant commenced upon the service of the notice of disciplinary proceedings, which was before the expiry of the three-month period. Her suspension has not lapsed.'

[6] The appellant submits that the Labour Court erred by failing to draw a distinction between the commencement of disciplinary proceedings and the commencement of a disciplinary hearing. There is merit in this submission. While disciplinary proceedings in a broad sense may commence with the service of a charge sheet, the regulations contain an internal definition of the point at which a disciplinary hearing commences. Regulation 5 contemplates the appointment of an independent external presiding officer and an officer to lead evidence. The officer leading evidence must formulate and serve charges of misconduct within 30 days of appointment. Regulation 6 provides that if a senior employee is suspended, the disciplinary hearing must commence within three months of the date of suspension; regulation 10 (3) provides that

'The officer leading evidence –

(a) must commence the disciplinary hearing by reading out the charges to the senior manager.'

[7] What this construction contemplates is a disciplinary process that is commenced by the service of charges on the employee and which culminates in the conclusion of a

disciplinary hearing. A disciplinary hearing is an integral part of the disciplinary process or proceedings; it does not constitute the proceedings in themselves. Read sequentially, the regulations contemplate that the disciplinary hearing is convened by the presiding officer and commenced by the reading of the charges to the senior manager accused of misconduct.

[8] This construction has previously been upheld and applied by the Labour Court. In *Mgengo v Lekwa-Teemane Local Municipality*[1] Nkuta-Nkotwana J (as she then was) said the following:

> '[22] The issuing of the charge sheet and the notice to attend the disciplinary hearing do not commence the disciplinary hearing but facilitates the process towards its commencement. I agree with Cele, J that the disciplinary hearing can only commence in the actual sitting when the presiding officer officiates over the proceedings or proverbially takes the captainship and navigate the ship. This construction accords with Regulation 10(1)(a) which states that the disciplinary hearing must commence within three months from the date that the Municipal Council resolved to institute a formal disciplinary hearing.
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> [23] I get the impression that the purpose of the Disciplinary Regulation is to ensure that the suspension and disciplinary hearing of a senior manager in the Municipality is attended to expeditiously so as to avoid prolonged leadership vacuity which could impede the rendering of the Municipal services. Also, it cannot be overstated that 'suspension is a measure that has serious consequences for an employee, and is not a measure that should be resorted to lightly'. Hence it is perfectly logical that, once the three-month period of suspension lapses, the Municipal Council is debarred by Regulation 6(6)(b) from extending it. In my view, it is incumbent upon the Municipal Council to act with the speed of a gazelle consequent to the resolution to institute a formal disciplinary hearing against a senior manager.'

[1] (J452/20) [2020] ZALCJHB 255 (11 June 2020). The judgment by Cele J to which the Court refers is *Moloto and Another v Kagisano Molopo Local Municipality and Others* (J4415/18 [2019] ZALCJHB (21 February 2019).

[9] To that construction I would add that the regulation of precautionary suspension is directed not only at the interests and protection of the affected employee; the general public has an interest in the funds expended on public sector employees who remain on suspension for inordinate periods. As the Court in *Mgengo* observed, the regulations holds municipalities to tight timetables. The interpretation for which the municipality contends is more likely than not to protract periods of suspension, particularly where charges of misconduct are served and the convening of disciplinary hearings are delayed.

[10] A contrary view, on which the Labour Court relied, was expressed by the Labour Court in *Goba v Rand West City Local Municipality* [2] where the Court held that a disciplinary hearing commenced when the charge sheet was served on the employee. The reasoning of the Court in that matter, that the grammatical meaning of the word 'commence' means to begin or start (in a legal context, by the issuing of a statement of claim or summons or notice of motion), overlooks the fact that the object of the verb 'commence', as regulation 10 (3)(a) indicates, is 'the disciplinary hearing', and not the disciplinary proceedings. The error in *Goba*, and perpetrated by the Labour Court in the present instance, is demonstrated in the Labour Court's conclusion that *'(a)s stated in the Goba matter, it will be incongruent to suggest that the proceedings commence only when the matter sits for trial*' (own emphasis). Regulation 6 makes no reference to the commencement of 'proceedings' - what is at issue is the commencement of the disciplinary hearing.

[11] The appellant raised the issue of authority of the second respondent to oppose the application, and of the respondents' attorneys, in the absence of a resolution of the first respondent's council authorising the attorneys to oppose the application. In regard to the former, the Labour Court held that the second respondent had the necessary authority to oppose the application. It did so on the basis that the second respondent was the deponent to the answering affidavit, and a party to the proceedings. There is no

[2] J1069/21 [2021] ZALCJHB 301, 20 September 2021, following *Ntsimane v Tshwane Municipal Council and another* (J 761/21,10 May 2021).

basis to interfere with the Labour Court's conclusion in relation to authority. It is not clear from the notice of motion and founding affidavit that the second respondent was cited in a representative capacity, and he was entitled as a named respondent to oppose the application in that capacity. In so far as the authority of the respondents' attorneys is concerned, the Labour Court has held that when the mandate of an attorney is challenged, the procedure contemplated by rule 7 of the Uniform Rules is to be followed. The appellant did not avail herself of that procedure, and there is thus no merit in the appellant's submissions regarding the respondents lack of authority to oppose the proceedings before the Labour Court.

[12] In sum: the disciplinary hearing did not commence within three months of the date of her suspension, 1 March 2024. The suspension thus lapsed on 31 May 2024. The Labour Court thus erred in applying the *ratio* in *Goba*, and the appeal stands to be upheld. The appropriate orders ought properly to be made against the first respondent, the appellant's employer. The second respondent, so it transpires, is the first respondent's executive mayor. It is sufficient that the declaratory order sought and the consequential order of reinstatement be made against the first respondent.

[13] In so far as costs are concerned, the application to the Labour Court was brought in terms of section 77(3) of the Basic Conditions of Employment Act[3], in which the appellant in effect, sought to enforce a term of her employment contract. In the case of contractual claims referred to the Labour Court as an alternative to the civil courts, the ordinary rule to be applied is that which applies in the civil courts, i.e. in the ordinary course, costs follow the result. There is no reason to deny the appellant her costs in the Labour Court, or the costs of the appeal.

[14] I make the following order:

Order

1. The appeal is upheld.

[3] No. 75 of 1997.

2. The order of the Labour Court is substituted by the following:

'1. It is declared that the Applicant's suspension lapsed automatically on 31 May 2024 in terms of Regulation 6 (6)(a) of the Local Government: Disciplinary Regulations for Senior Managers.

2. The First Respondent is ordered to reinstate the Applicant as Municipal Manager of Moqhaka Local Municipality, with immediate effect.

3. The first respondent is ordered to pay the costs of the application.'

3. The first respondent is ordered to pay the costs of the appeal.

A. van Niekerk JA

Savage ADJP *et* Govindjee AJA concur.

APPEARANCES:

FOR THE APPELLANT: Mr MD Maluleke, with him Mr DF Makhubele
Instructed by MM Baloyi Attorneys

FOR THE THIRD RESPONDENT: Mr LA Roux
Instructed by Peyper Attorneys