

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case no: J 46 /2011

In the matter between:

MAMAGABE HENRY THOBEJANE

Applicant

and

MOGALAKWENA LOCAL MUNICIPALITY

First respondent

SHELLA WILLIAM KEKANA

Second respondent

JUDGMENT

STEENKAMP J:

INTRODUCTION

- [1] This is an urgent application brought during the court recess. As the duty judge, I dealt with it over the telephone from the Labour Court in Cape Town. The parties conducted their argument in Johannesburg.
- [2] The applicant, Thobejane, is the Manager: Corporate Support Services of the first respondent ("the municipality"). The second respondent is the municipal manager.
- [3] The applicant previously brought an urgent application before me in Johannesburg on 7 December 2010. He prayed for a declaratory order declaring his suspension to be "invalid, unlawful and of no force and effect". The suspension was a precautionary one arising from an

investigation into alleged serious misconduct by the applicant. The applicant also sought a declaratory order that the municipal manager (the second respondent in that application and in this one) had no legal authority to institute disciplinary proceedings against him.

- [4] I handed down an *ex tempore* judgment on 7 December 2011 dismissing the application with no order as to costs. On 10 December 2010 the applicant delivered an application for leave to appeal. Despite the fact that his attorney of record was present in court when I read the *ex tempore* judgment into the record, he did not request a copy of the transcript of the judgment. I did so upon my return to chambers during the recess period, on 14 January 2011, when the application for leave to appeal was brought to my attention. At the time when this application was heard today, on 19 January 2011, the transcript was not yet available.
- [5] What the applicant now seeks on an urgent basis, is for his disciplinary hearing scheduled for 20 January 2011 to be stayed pending the outcome of the “finalisation of the appeal” under case number J 2441/2010 (ie the judgment of 7 December 2010).
- [6] I will deal, firstly, with the issue of urgency, and then for the requirements for an interim interdict.
- [7] Given that the disciplinary hearing is scheduled for tomorrow, my written reasons will be brief.

URGENCY

- [8] I handed down judgment in the earlier urgent application (under case number J2441/1010) on 7 December 2010. The applicant applied for leave to appeal on 10 December 2010. He only brought this application more than a month later, on 14 January 2011.
- [9] I take into consideration, though, that the notice to attend a disciplinary hearing was only served on the applicant on 12 January 2010.

[10] The applicant is justly criticised by the respondents for not clearly establishing the grounds for urgency in his founding affidavit. Nevertheless, given the fact that he received the notice on 12 January 2011, I am prepared to accept that the matter should be dealt with as an urgent one – even during the court recess – and to condone the non-compliance with the normal time periods provided for in the Rules.

INTERIM INTERDICT

[11] The applicant essentially seeks interim relief pending the finalisation of the appeal against my judgment of 7 December 2010. I will therefore consider the factors to be taken into account in matters of this nature, as set out in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*¹ and numerous subsequent cases.

***Prima facie* right?**

[12] The applicant seeks to stay the disciplinary inquiry. In his previous urgent application, he sought to declare his suspension unlawful; and to set it aside. It is not clear to me how his pending application for leave to appeal against that judgment has any effect on the disciplinary inquiry scheduled for tomorrow. Should he succeed in the current application, the municipality will be precluded from holding a disciplinary inquiry pending the “finalisation” of the appeal process. The applicant has not sought to bring an urgent appeal. In the normal course, it may take a year or two before the appeal – if any – is heard by the Labour Appeal Court.

[13] I say “if any” because I have not yet applied my mind to the question whether leave to appeal should be granted. I can only do so once the transcript of that judgment is available.

¹ 1969 (2) SA 256 (C) 267 A-F

- [14] But in any event, even if the applicant were to be granted leave to appeal against that judgment, and even if the appeal were to be successful, that would not preclude the municipality from proceeding with a properly constituted disciplinary inquiry.
- [15] The disciplinary inquiry scheduled for tomorrow was convened by the acting municipal manager, LJ Sebola, in accordance with a council resolution. The applicant, in his previous application, contested the legal authority of the second respondent, SW Kekana. Even if the applicant were to be successful on that leg of the appeal, it would have no influence on the authority of Sebola and the municipality to proceed with the disciplinary inquiry. And Sebola has not been joined to these proceedings.
- [16] The applicant has no *prima facie* right not to be called before a disciplinary hearing. And, as I have set out above, there is no legal *nexus* between the application for leave to appeal under case number J 2441/2010 and the present application.
- [17] In any event, the delivery of an application for leave to appeal does not automatically suspend the operation of a judgment. Appeals to the Labour Appeal Court are governed by s 166 of the Labour Relations Act², rule 30 of the Rules for the Conduct of Proceedings in the Labour Court and rule 5 of the Rules for the Conduct of Proceedings in the Labour Appeal Court. As this court noted in *NAPOSU v National Commissioner of the National Police Services & others*,³ the Act is silent on the effect of noting an appeal save that section 166(3) provides that “leave to appeal may be granted subject to any conditions that the court may determine”.
- [18] This is to be contrasted with the position in the High Court, where rule 49(11) provides that an application for leave to appeal suspends the operation of an order.
- [19] In the present case, if I should grant the relief sought, it would, in effect, have the same effect of granting the applicant the relief he sought in December 2010 when I ruled against him. He then sought a declaratory

² Act 66 of 1995

³ [1999] 10 BLLR 1068 (LC)

order that the municipal manager did not have the legal authority to institute disciplinary proceedings against him. He now seeks to stay the disciplinary hearing pending a decision on appeal on that question. It is doubtful that such an appeal, if granted, would be heard in less than a year's time. The applicant is thus seeking substantially the same relief that I had already refused in different terms.

[20] This court, in the case of *NAPOSU*⁴, referred to an analogous situation that arose in *Constantinides v Jockey Club of South Africa*⁵. In that case, after an application for leave to appeal had been filed, Herbstein J noted:

“On the main application I held that the applicant made out no case for an interdict. It seems to me that I would be stultifying myself and frustrating that judgment if I now held that the applicant is entitled to an interim interdict pending the decision on the appeal.”

[21] I am faced with a similar situation in this case. I have already ruled on the legality of the municipal manager's actions. If I were to grant the relief sought, it would, in effect, nullify that ruling. And in any event, the second respondent, Kekana – against whom the December relief was sought and who is cited in this application as well – is not the person who initiated the disciplinary hearing scheduled for tomorrow. That was the acting municipal manager, Sebalo, who is not a party to this application.

[22] The Labour Appeal Court has now put beyond dispute that this court does have jurisdiction to interdict disciplinary proceedings.⁶ But it will only do so if grave injustice might otherwise result. Is this such a case? I think not, given my view on the further requirements for an interim interdict, dealt with below.

⁴ Supra para [16] – [18]

⁵ 1954 (3) SA 35 (C).

⁶ *Booyesen v Minister of Safety and Security* [2011] 1 BLLR 83 (LAC)

Apprehension of irreparable harm

[23] The applicant makes on bald averment in his founding affidavit, in these words:

“If the order is not granted I will suffer irreparable harm in that the disciplinary hearing will proceed and my right to have the appeal heard more especially with regard to the second respondent’s legal authority to institute the same disciplinary hearing will not have been determined by a court of law”.

[24] The applicant has not made out a case for the apprehension of irreparable harm. Apart from the fact that he has no inherent “right to have the appeal heard” – a question on which I have yet to rule – any harm he might suffer as a result of the disciplinary inquiry is not irreparable.

[25] The municipality has alleged that the applicant has committed some 26 serious instances of misconduct, including fraud and contraventions of the Municipal Finance Management Act⁷. The applicant has the opportunity to be heard and to counter these allegations. He has even been granted the right to be legally represented in that inquiry. He has not alleged any bias on the part of the appointed chairperson, who is an advocate. There can be no harm in attending those proceedings and defending himself.

[26] And even if the chairperson of the disciplinary inquiry were to find against the applicant, and even if the applicant were to be dismissed, the clear harm to him is not irreparable. He can then refer an unfair dismissal dispute to the South African Local Government Bargaining Council and challenge his dismissal.

[27] I am not satisfied that the applicant will suffer irreparable harm, should the interdict not be granted.

⁷ Act 56 of 2003

Balance of convenience

[28] The applicant makes out no case in his founding papers why the balance of convenience should favour him. He baldly states: "It is my respectful submission that the balance of convenience favors [sic] the granting of the order as prayed on the notice of motion to which this affidavit is attached."

[29] But in any event, the balance of convenience does not favour the applicant. As I have stated above, at worst for him, if the disciplinary inquiry were to be adverse to him, and even if he were to be dismissed, he is not without a remedy. On the other hand, if I were to grant the relief sought, the municipality would be prevented from investigating serious allegations of misconduct involving public money for a lengthy period of time. It would also have to continue using public money to pay the applicant's substantial salary until such time as a possible appeal may eventually be heard.

[30] Moreover, as is standard in the public service, the applicant's contract of employment states that, if he is suspended as a precautionary measure, the employer must hold a disciplinary hearing within 60 days of the date of suspension. That period lapses on 23 January 2011. The municipality must start the hearing before that date.

Adequate alternative remedy

[31] The applicant has an adequate alternative remedy. Should the findings of the disciplinary inquiry not be in his favour, and even if he were to be dismissed, he can refer an unfair dismissal dispute to the SALGBC. Should his complaint have merit, he could be reinstated retrospectively.

Costs

[32] Both parties asked for costs on a punitive scale. I do not think that a punitive costs order is warranted. But I can see no reason in law or

fairness why I should not heed the parties' request that costs should follow the result.

ORDER

[33] The application is dismissed with costs, including the costs of counsel.

STEENKAMP J

Date of hearing: 19 January 2011

Date of judgment: 19 January 2011

For the applicant: Attorney RK Mashego

For the respondents: Adv J Nel

Instructed by: Mohale Inc.