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Delivered 280111

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J2242/10

In the matter between:

SAMWU OBO MONICA MATHABELA

Applicants

and

DR JS MOROKA LOCAL MUNICIPALITY

Respondent

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application brought yesterday. I indicated that I would make a ruling this morning. This is my ruling and brief reasons for it.

[2] The applicant initially sought a range of relief including a declaration that the respondent was in contempt of an order of this court made on 10 November 2010, declaring that the individual applicant's contract of employment (specifically clause 6.6.2, 6.6.4 and 6.6.10) are binding on the respondent, declaring the current

suspension of the individual applicant to be unlawful and declaring a disciplinary enquiry convened for 10am today, 28 January 2010, to be unlawful. When the application was heard, the applicant's abandoned the relief sought in respect of the contempt issue and what was ultimately left to be decided is the lawfulness of the individual applicant's suspension, and whether the respondent is entitled to conduct a disciplinary enquiry on the terms that it intends.

[3] I deal first with the lawfulness of the disciplinary hearing. A brief factual background is necessary. On 10 November 2010, this court, per Lagrange J, granted a final order in terms of which *inter alia* it was declared that the respondent was bound by the individual applicants contract of employment and in particular, by the applicable terms of the disciplinary code and procedure of the South African Local Government bargaining council. The respondent was interdicted from proceeding with a disciplinary enquiry into certain charges of misconduct brought against the individual applicant, and the respondent was ordered to uplift her suspension. The basis of the order was that the individual applicant's contract of employment obliged the respondent to comply with its disciplinary code and procedures, and if there were none, to comply with the disciplinary code and procedure of the South African Local Government bargaining council, as well as with the Labour Relations Act, 66 of 1995 (see clause 15.4 of the contract of employment). It was common cause then, as it is in these proceedings, that the respondent does not have its own disciplinary procedure, and that the provisions of the bargaining council's procedure therefore apply. The relevant provisions of the code read as follows:

6.6 *In the event of more serious misconduct, as referred to in clause 6.5 above:*

6.6.1 *the municipal manager or his authorised representative shall constitute a disciplinary hearing by appointing a suitable person to serve as the presiding officer.*

6.6.2 *A person appointed to serve as the presiding officer should be at a level more senior than the employees who is/are being charged and should be from within the Department, or from any other Department of that municipality, or from another municipality, or be a full-time SALGA official or in the full-time employee of Provincial Government or*

National Government provided that such person is not an employee of the judiciary.

6.6.3 The municipal manager or his authorised representative shall also appoint a person to be referred to as the employer representative to represent the employer and to serve the function of prosecution.

6.6.4 A person appointed to serve as the employer representative should be at a level more senior than the employees who is/are being charged and should be from within the Department, or from any other Department of that the disparity, or from another municipality, or be a full-time SALGA official, or in the full-time employee of Provincial Government or National Government provided that such person is not an employee of the judiciary.

[4] In the matter before Lagrange J, the applicants challenged the appointment of legal practitioners as the chairperson of the enquiry and the representative of the employer respectively. The court found that the composition of the disciplinary enquiry to which the individual applicant had been subjected was irregularly constituted, as it was a breach of the procedure expressly incorporated into the contract of employment. Reasons for the judgment were filed on 15 December 2010. On 19 January 2011, the applicant filed an application for leave to appeal against the ruling. I need not canvass the merits of that application. The present application has its roots in a decision made by the respondent during December to prefer new charges against the individual applicant. A notice of a disciplinary enquiry, in respect of these charges, was served on the individual applicant in the form of a letter dated 21 January 2011. In terms of that letter, the individual applicant is required to attend a disciplinary hearing to be held in Sandton, chaired by advocate J Nalane. The same letter advises that the prosecutor will be Ndhlovu AJ Attorneys.

[5] The applicants in essence raise the same argument that was raised before Lagrange. They contend that the disciplinary enquiry initiated by the respondent on the new charges of misconduct is a breach of the individual applicant's contract of

employment. In particular, they contend that the respondent is obliged to appoint a chairperson from the ranks of those persons described in clause 6.6.2 of the code, and that the respondent's representative may be drawn only from the ranks of those persons referred to in clause 6.6.4. The respondent's submissions are drawn from the merits of the application for leave to appeal filed in respect of the judgment by Lagrange J. The first point is a jurisdictional one. The respondent submits that the issue before the court is one that concerns the application and interpretation of a collective agreement, and that in terms of section 24 (8) of the LRA, the dispute must be referred to the bargaining council. I am not persuaded that this is the case. The applicant relies on a term of her own contract. The relevant term of the contract requires the respondent to apply the terms of the disciplinary code and procedure that is established by a collective agreement concluded under the auspices of the bargaining council. It is common cause however that the applicant is not bound by the collective agreement, in the sense that she does not fall within the bargaining unit in respect of which that agreement applies. The individual applicant does not seek to have the collective agreement enforced or interpreted. The rights she seeks to enforce are not based on the collective agreement *qua* collective agreement – its terms are terms of her contract, and she seeks to hold the respondent to the latter. In other words, the terms of the agreement are and remain contractual terms as between the individual applicant and the respondent.

[6] The respondent contends further that it is not possible for it to comply with clause 6 of the individual applicant's contract. In particular, and insofar as clause 6.6.1 requires the municipal manager or his (sic) authorised representative to constitute the hearing, the respondent claims that the individual applicant, being the municipal manager, cannot constitute the hearing. Similarly, in relation to clause 6.6.3, the respondent contends that the individual applicant, as municipal manager, cannot appoint a person to be the prosecutor. In these circumstances, the respondent contends that it has the right to appoint an independent third party to preside at the hearing, and to appoint its attorneys as its representative.

[7] I fail appreciate on what basis it might be contended that the terms of the contract should not be enforced or, put another way, that the respondent is entitled to appoint a person other than a person referred to in the contract as the chairperson of the disciplinary enquiry and prosecutor respectively. The terms of the individual

applicant's contract clearly preclude the respondent from appointing a practising advocate and a practising attorney to either of the roles concerned. The terms of the contract clearly anticipate circumstances where the chairperson of the disciplinary hearing and the prosecutor are to be appointed by a person other than the municipal manager, and that where a municipal manager is concerned, a hierarchy is established that is sufficiently expansive to accommodate the municipal manager's status. It simply remains for the respondent, in the form of the person currently exercising the powers of municipal manager or his or her authorised representative, to make the necessary appointments from the ranks of the officials concerned. That is what the parties have agreed, and the respondent has advanced no other cogent reasons why it is necessary, in the absence of the individual employee's consent, to engage the services of counsel and of its attorneys in order for the charges of misconduct made against the individual applicant to be adjudicated. The individual applicant affirms that she is ready and willing to face a disciplinary enquiry – she insists that it be convened and conducted in terms of her employment contract. That is her right.

[8] For the above reasons, it is my view that the form of the disciplinary enquiry contemplated by the respondents letter dated 21 January 2011 constitutes a breach of the contract of employment between the individual applicant and the respondent and that the applicant is entitled to the relief that they seek in respect of that enquiry.

[9] Turning next to the relief sought in respect of the individual applicant's suspension, it is common cause that the applicant, who has effectively in terms of a decision taken by the respondent on 1 December 2010. That decision, as i have indicated above, was taken in circumstances where the respondent adopted a resolution to comply with the order made by Lagrange J and lifted the precautionary suspension of the individual applicant. Immediately thereafter, the respondent adopted a resolution to institute fresh disciplinary action (that referred to above) against the individual respondent in the light of recommendations emanating from what has been referred to as the Gobodo report. At the same time, the respondent resolved again to suspend the individual applicant. That decision was the subject of the proceedings before Basson J on 14 December 2010 when a rule nisi was granted interdicting the respondent from continuing to suspend the individual applicant until such time as there was compliance by the respondent with the terms

of the her contract of employment and with the relevant provisions of the bargaining council's code. The rule nisi was confirmed on 17 December 2010. On 17 December 2010, the respondent lodged an application for leave to appeal against the judgment and order of Basson J.

[10] In short, what I have before me is an order granted by Basson J to the effect that the suspension of the individual applicant is unlawful, and a notice of application for leave to appeal against that order. The rule that ordinarily applies (i.e. that a notice of appeal suspends the operation of the order that is the subject of the appeal) suspends the operation of the order made by Basson J. In these circumstances, I do not think that it is appropriate for me to make any further order in respect of the individual applicant's continued suspension. Of course, it is open to the individual applicant, should she so wish, to bring an application for the implementation of the order pending the outcome of any appeal. Despite the invitation by Ms Edmonds, who appeared for the applicants, to make in order to this effect on the basis of the papers before me, this is not an issue specifically addressed in these papers, and in these circumstances, it is appropriate that a discrete, substantive application be brought if the applicants so elect.

[11] Finally, this brings me to the issue of costs. Mr Lengane, who appeared for the respondent, submitted that the rules established by *NUM v East Rand Gold and Uranium Ltd* should apply, and that in view of the collective bargaining relationship that exists between the parties, it is appropriate that there should be no order as to costs. Of course, this is a relevant factor, but I bear in mind too that of the applicants have partially succeeded in obtaining the relief that they initially sought, and to that extent, that the respondent has been partially successful in resisting the applicant's claims. In these circumstances, it seems to me that the requirements of fairness dictate that there should be no order as to costs. Of course, the only persons prejudiced by an order to this effect are the ratepayers of the respondent, who will ultimately bear the costs of the opposition to this application. This is the fifth occasion on which this dispute, in one form or another, finds itself before this court, in circumstances where the charges of misconduct brought against the individual applicant have yet to be the subject of any form of adjudication. I fail to appreciate why some six months after the individual applicant's initial suspension, a properly convened a disciplinary enquiry has yet to be constituted. I would urge the parties to

ensure that this matter is brought to an expeditious conclusion, and that the statutory objectives of expeditious dispute resolution are met.

I accordingly make the following order:

1. The constitution of the disciplinary enquiry convened on 28 January 2011 does not comply with the individual applicant's contract of employment, and the respondent's conduct in persisting with the enquiry is a breach of the contract..
2. The respondent is interdicted and restrained from proceeding with the enquiry referred to in paragraph 1.
3. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application: 27 January 2011

Date of judgement 28 January 2011

Appearances:

for the applicant: Ms: Edmonds from Ruth Edmonds attorneys.

For the respondent: Adv Lengane,, instructed by Ndhlovu AJ Attorneys