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Delivered 280111

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO J103/11

In the matter between:

**SOUTH AFRICAN MUNICIPAL
WORKERS UNION**

1ST Applicant

PARTICK MOKONE & 11 OTHERS

2ND & further applicants

and

MAGALIES WATER

Respondent

JUDGMENT

VAN NIEKERK J

[1] This is an application, brought yesterday on an urgent basis, in which the applicant seeks a final order declaring the current suspension of the individual applicants to be unlawful, and to interdict the respondent from continuing to suspend the individual applicants until such a time the respondent has complied with the relevant provisions of their contracts of employment. The applicant had initially

sought in the alternative an interim order restraining the respondent from suspending the individual applicants until such time as the bargaining council having jurisdiction over the parties decides the fairness of the individual applicants' suspension. The alternative claim was abandoned and in circumstances where the applicant elected to rely on the individual applicants contractual rights and, in effect, to contend that there suspension was unlawful on the basis that it constituted a breach of contract.

[2] The material facts are a matter of common cause. The individual applicants were suspended from their employment on 19 July 2010. They were subsequently charged with various acts of misconduct. The respondent convened a disciplinary enquiry before an independent third party, a Mr Levi Nakedi of firm Ncube Incorporated Attorneys. The disciplinary enquiry commenced on 23 August 2010. On 8 December 2010, the chairperson handed down a ruling in terms of which he found that the respondent had failed to prove the guilt of the individual applicants on a balance of probabilities, and that they were accordingly not guilty on all the charges brought against them.

[3] On the day that the ruling was handed down, the first applicant wrote to the respondent advising that the individual applicants would commence work on 9 December 2010. In response to this letter, the respondent's labour relations manager advised that the respondent "was not happy" with the chairperson's ruling that it was under considering the ruling and that in the interim, the individual applicants remain suspended on full pay.

[4] When the applicants' attorneys' office opened after the holiday period, the applicants' attorneys addressed a letter to the respondent requiring that what was contended to be an unlawful and unfair suspension be immediately terminated, and that the individual applicants be allowed to return to work. The respondent faxed a letter to the applicant's attorney on 19 January 2011 in which the respondent stated the following:

... The management of Magalies Water is not pleased with the outcome of the disciplinary enquiry (that was instituted against your clients); and is currently considering various legal options and/or avenues in this regard.

In consideration of all the options we would approach the Labour court or any other relevant court to have the outcome of the disciplinary hearing put aside for reasons that will be stated in our court papers.

In view of the seriousness of the charges that your client said to answer to and considering the new evidence which has come to light in relation to charges which were proffered against them, it is the position of the water management that your clients remain suspended under the circumstances in order to protect the workplace as we are an essential service...

That it is in the light of the aforesaid that the Magalies Water management is of the firm view that the continued suspension of your clients is neither unlawful nor unfair as they suffer no prejudice whatsoever...

[5] The respondent's disciplinary procedure forms part of the terms and conditions of employment of each of the respondent's employees. The code requires the respondent to maintain a fair and consistent disciplinary procedure, and to treat employees with respect and dignity. The code provides for suspension only as an alternative to dismissal.

[6] The applicants' claim, although not as clearly articulated in the papers as it might have been, is that the continued suspension of the second to 13th applicants' constitutes a breach of their contracts of employment. As noted in paragraph [1] they expressly disavow any reliance on the alternative prayer in the notice of motion that in the effect seeks interim relief pending the outcome of the referral to the bargaining

council of a dispute concerning the respondent's failure to unconditionally reinstate the applicants' following the finding made by the chairperson of the disciplinary enquiry.

[7] In *Mogothle v Premier of the North West Province and another* [2009] ZALC 1, after a review of the relevant authorities, the court said the following:

In summary: each case of preventative suspension must be considered on its own merits. At a minimum though, the application of the contractual principle of fair dealing between employer and employee, imposing as it does take continuing obligation of fairness on employers when they make decisions affecting their employees, requires first that the employer has a justifiable reason to believe, facing at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of effect parties in jeopardy; and thirdly, that the employee is given the opportunity to state the case before the employer makes any final decision to suspend the employee.

[8] In the present matter, it is common cause that the second to 13th applicants were not afforded an opportunity to be heard prior to the employer's decision to continue their suspension after the chairperson of the disciplinary enquiry acquitted them of the charges of misconduct that were the subject of the enquiry. That alone constitutes a breach of their employment contracts and renders the continued suspension unlawful on that basis. In regard to the substantive issues relevant to these proceedings, the suspension has not been affected in circumstances where there is any ongoing investigation into allegations of misconduct. On the contrary, the second to 13th applicants have been found not guilty of the allegations made against them, after an enquiry conducted by an independent third party appointed by the respondent. The respondent has failed to disclose, with any degree of particularity, the 'new evidence' to which it refers in the letter of 19 January. The only

substantive reason proffered by the respondent for the continued suspension is the effect of its unhappiness with the outcome of the disciplinary enquiry. The respondent's degree of happiness or otherwise is not a legitimate basis on which to continue to suspend the second to 13th applicants. Even if it were, the respondent has taken no steps to address any concerns that it might have with the outcome of the disciplinary hearing. I fail to appreciate, in the circumstances, on what basis it can be suggested, either substantively or procedurally, that the continued suspension of the second to 13th applicants is fair.

[9] In *Mogotlhe's* case (*supra*) the court referred to a tendency by employers to regard suspension as a legitimate measure of first resort on the most groundless suspicion of misconduct, or worse still, to view the suspension as a convenient mechanism to exclude employees from the workplace. The court also referred to the statement by Nugent JA in *Minister of Home Affairs and others v Watchenuka and another* 2004 (4) SA 326 (SCA):

The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity... For mankind is pre-eminently a social species with an instinct for meaningful association. Self esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.

[10] The nexus between the freedom to engage in productive work and the right to dignity could not be drawn in clearer terms. To the extent that the respondent contends that this application is not urgent because the applicants proffer only the risk of reputational damage as a grounds for urgency ignores the role that the right to dignity must necessarily play in circumstances such as the present. In any event, it seems clear to me from the papers that the applicants' do not rely only on potential reputational damage to contend that their application is urgent. The conduct of the respondent must be seen in context. The second to 13th applicants have remained

on suspension since 19 July 2010, more than six months ago. The finding by the chairperson of the disciplinary enquiry disposes of any possible basis on which their continued suspension might be justified. They have, within a reasonable time, sought to challenge the respondent's decision and I am satisfied that in these circumstances, the application ought to be treated as urgent.

[11] Insofar as the respondent claims that the applicant sought to be denied the final order that they seek on accounts of safe failure to satisfy the court that they have no alternate remedies, this submission overlooks the applicants' reliance on the terms of the second to 13th applicant's contracts of employment. The applicants are perfectly entitled to claim, as they have, that the respondent's refusal to reinstate the second to 13th applicants following the outcome of the disciplinary hearing constitutes an unfair labour practice. But that does not mean, as the respondent appears to suggest, that any bargaining council arbitration proceedings that might be convened constitutes an adequate alternative remedy.

[12] Finally, in relation to costs, I see no reason why costs should not follow the result. It is not apparent to me from the papers that the first applicant and the respondent are engaged in a collective bargaining relationship, or that an order for costs in the present circumstances will necessarily prejudice that relationship. The fact remains that the second to 13th respondents were for some five months subjected to the ordeal of a disciplinary enquiry, and that more than a month later, following their acquittal by an independent enquiry, they remain denied access to their workplace. Of particular concern in this regard is the complete absence of any legitimate basis for the continued suspension. I have dealt with this issue in a different context, but in the context of a consideration of what is fair in relation to any order for costs, I cannot ignore that the only substantive basis proffered by the respondent for its actions is its own unhappiness, coupled with a failure to take any substantive action available to it (assuming that such action is available) to challenge the outcome of the enquiry since the chairperson made his finding known on 8 December 2010.

[13] For the above reasons, I am satisfied that the applicants have made out their case and are entitled for the relief that they seek and I accordingly grant the following order:

1. The continued suspension of the second to 13th applicants constitutes a breach of their contracts of employment.
2. The respondent is interdicted and restrained from continuing to suspend the second to 13th applicants until such time as it has complied with the terms of their employment contracts.
3. The respondent is to pay the costs of these proceedings.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application: 27th January 2011

Date of judgement: 28th January 2011

Appearances:

For the applicant: Ms R Edmonds, instructed by Ruth Edmonds attorneys.

For the respondent advocate C Orr, instructed by Van Velden Duffy attorneys.