

Not reportable

Delivered 030211

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JR 133/2011

In the matter between:

POPCRU obo IV MBOKANE

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

First Respondent

THE NATIONAL HEAD OF CORRECTIONAL

SERVICES

Second Respondent

JUDGMENT

VAN NIEKERK J

[1] This is an application in which the applicant, acting on behalf of its member Mbokane (to whom I shall refer as 'the individual applicant'), seeks to set aside the latter's suspension.

[2] The individual applicant is employed by the second respondent as a professional nurse at the Baviaanspoort management area. He is also a shop steward. On 19 January 2011, the individual applicant submitted a collective grievance to the employee relations manager. The grievance concerned a Mr Ndou, the centre coordinator, and made serious allegations of misconduct against him. On 25 January 2011, Mr Ndou addressed a letter to the individual applicant. In the letter, the individual applicant was advised that his suspension was being contemplated, and that he was afforded to furnish arguments as to why he should not be

suspended on charges relating to leaving the workplace without permission, insubordination, inciting members and the submission of forged documents at a disciplinary hearing. The individual applicant was given until 3pm on the afternoon of 26 January 2011 to make representations as to why she should not be suspended. A union shop steward then requested further particulars from the second respondent in respect of all four charges that were the subject of the pending disciplinary action, and also the basis for the individual applicant's suspension. The matter was also referred to the union's head office and unaware that the shop steward had already requested further particulars, the union's legal adviser prepared a request for further particulars of the charges so that representations could be made on behalf of the individual employee. The respective requests read as follows:

1. *Leaving the place of work without permission: we want to know who was giving permission?*
2. *Insubordination: we want to know insubordination to whom and where?*
3. *Inciting members: incitement for what and where?*
4. *submitting fraudulent documents as evidence in a disciplinary hearing: we need to know the specific fraudulent documents alleged to be submitted by Mbokane?*

and

Leaving place of work without permission

- *has it been ascertained where the incumbent had gone before taking disciplinary steps:*
- *is it conceded that the member is a shop steward:*
- *has disciplinary steps already been taken against the member.*
- *Is the contemplated suspension in respect of leaving the workplace without permission.*

Insubordination dated 19/01/2000 and

- *how did the member insubordinate himself;*
- *did he insubordinate himself as a member or as a shop steward;*

- *is the contemplated suspension in respect of the insubordination.*

Inciting members on the 17-18/01/2011

- *which members did he incite;*
- *what did he incite members to do;*
- *was this for a continuous period of two days on the 17th and 18th;*
- *where there members incited;*
- *is the contemplated suspension in respect of the incitement.*
- *Was this misconduct as a member or a shop steward.*
- *Was the union informed.*
- *Is the contemplated suspension in respect of the incitement.*

Submission of fraudulent documents as evidence

- *is this misconduct as a member;*
- *was this misconduct as a member or a shop steward.*
- *Was the union informed.*

[3] The second respondent failed to respond to either of the requests for further particulars and on 27 January 2011, Ndou issued a letter of suspension. On 27 January 2011, the collective grievance was discussed with the deputy director, who proposed that a formal investigation would be conducted into the allegations made against Ndou.

[4] The applicant contends that the charges against the individual applicant emanate from the collective agreement grievance submitted against Ndou whom, it is claimed, abused his authority when issuing the notice of contemplated suspension and the notice of suspension. In essence, the applicant claims further that the individual applicant is being victimised by Ndou for submitting the grievance.

[5] The applicant` claims a clear right to the effect that an employee is entitled to be heard before a final decision is taken that prejudicially affect that employees rights. In particular, the applicant claims that the *audi alteram partem* rule includes the right to a fair and reasonable opportunity to make representations as to why an employee should not be suspended, the right to request clarity on the charges, and the right to be provided with sufficient information to enable the employee to make

meaningful representations in response to the allegations. The applicant contends that the notice of contemplated suspension in the present instance is vague and embarrassing, and lacks sufficient particularity to enable the individual applicant to make meaningful representations on the charges levelled against him. In so far as the individual applicant was denied a proper opportunity to make representations, the applicant claims that there is no other adequate remedy at his disposal, and that for these reasons, the individual applicant's suspension should be set aside.

[6] When the application was argued, I enquired from Adv Basson, who represented the applicant, as to the legal basis on which the relief sought was claimed. I was referred to the decision of this court in *Baloyi v Department of Communications and others* (2010) 31 ILJ 1142 (LC). In that matter, the court held that an employee has the right to be heard before a decision is taken to suspend that employee. The basis for the decision appears to be the proposition that the *audi* rule is part of our law and applies to the suspension of employees. The court made reference to *Modise v Steve's Spar Blackheath* 2001 (2) SA 406 (LAC) in which it was held that the *audi* rule is part of the rules of natural justice, and deeply entrenched in our law.

[7] Adv Basson affirmed that the applicant's claim was not that the respondent had committed an unfair labour practice (an unfair suspension is an unfair Labour practice – see s 186 (2) (b)), or that the applicant was contending that the second respondent had breached the individual applicant's contract of employment, or that the claim was framed as one in which the individual applicant contended that he had been subjected to an occupational detriment as defined in the Protected Disclosures Act. The applicant's claim rested simply and solely on the right to be heard prior to suspension.

[8] I do not understand the *Baloyi* decision (or any other judgments by this court in which urgent relief has been sought in respect of suspensions) to dispense with the obligation, in an application such as the present, to establish a *prima facie* right (in the case of interim relief) or a clear right to the relief sought, in the case of an application for final relief. It is accordingly necessary in the present instance for the applicant to establish a right to a hearing that arises, for example, from a contract of employment, a collective agreement, or a statute. In other words, the right to be

heard in does not exist in the abstract, to be read down into cases such as the present – its legal foundation must be established and articulated if it is to be enforced in applications such as the present.

[9] In the absence of a proper legal foundation from which the right to be heard can be derived, the applicant has failed to establish a clear right and in these circumstances, the application must fail.

[10] Even if I am wrong in coming to this conclusion, in my view, the individual applicant was afforded sufficient information for him to make meaningful representations in regard to the proposed suspension. The right to a hearing prior to suspension is a process of dialogue and reflection between the parties (See *Mogothle v Premier of the North West Province & another* [2009] 30 ILJ (LC)). While this right incorporates the right to be placed in possession of details of the alleged misconduct that forms the basis of any contemplation of suspension, this is not a right, as the applicant appears to suggest, to be furnished with particulars as one might for the purposes of a criminal or civil trial. The test is whether the employee concerned is possessed of sufficient information to make representations as to why he or she should not be suspended. In the present matter, the letter of suspension sets out adequately the charges of misconduct against the individual applicant and places him in a position to make representations.

[11] In coming to the above conclusion, I make no finding as to whether it was justifiable for the second respondent to suspend the individual applicant. The circumstances in which an employee may be unfairly suspended is dealt with in *Mogothle (supra)* and other judgments by this court. Nor should my ruling in this application be construed as a bar to any further application that the applicant may wish to bring identifying the legal basis, be it statutory, contractual or otherwise, on which the setting aside of the individual applicant's suspension is sought.

I accordingly make the following order:

1. The application is dismissed
2. There is no order as to costs.

ANDRE VAN NIEKERK

Judge of the Labour court

Date of application: 2 February 2011

Date of judgement 3 February 2011

Appearances for the applicant: Advocate Basson instructed by Grosskopf Attorneys

For the respondents Advocate T Masevhe instructed by the State Attorney.

LABOUR COURT JUDGMENTS