

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

CASE NO J291/2011

LIEUTENANT COLONEL

Applicant

D. S. SEKWATI

and

BRIGADIER N. P. MASIYE, STATION

1st Respondent

COMMANDER, S A POLICE

SERVICE, BRAKPAN

LIEUTENANT GENERAL

M. PETROS, PROVINCIAL

2nd Respondent

COMMISSIONER, GAUTENG

COLONEL P. VAN DER MERWE,

3rd Respondent

PRESIDING OFFICER

JUDGMENT

LAGRANGE, J

- 1] The applicant in this matter is a Lieutenant Colonel in the South African Police Services. He has brought an application on an urgent basis to set aside his suspension without pay on 7 January 2011. It appears that he was previously on suspension but without loss of benefits pending a disciplinary enquiry into serious charges of fraud.

Although some motivation was provided for setting aside the initial suspension, an examination of the notice of motion shows that the real object of the application is his suspension without pay.

- 2] This application was only brought some six weeks after the imposition of the suspension without pay. There is no explanation in the founding affidavit for the delay other than the fact that criminal charges against the applicant and his wife were withdrawn on 14 February 2011. It appears that the applicant is of the view that this turn of events demonstrates that he is innocent of any misconduct and accordingly any suspension premised on a suspicion of misconduct on his past cannot be justified.
- 3] Mr Mossam, who appeared for the respondents, rightly pointed out that it is trite law that an employee's exoneration on criminal charges does not preclude an employer from proceeding with disciplinary charges dealing with the same alleged conduct. I agree. I also do not understand why the withdrawal of the criminal charges would now make an application to set aside the suspension, which took place several weeks ago, urgent. In my view the application can be set aside for lack of urgency alone, but in the event that I am wrong in this regard, I deal with the merits below.
- 4] The applicant asserts that the suspension was unlawful because it was in breach of the regulations governing disciplinary proceedings and suspensions connected therewith.¹ The relevant provision is regulation 18, which is entitled 'Securing the attendance of an employee at a disciplinary hearing'. Regulation 18 reads as follows:

“(1) (a) An employee who is served with a notice in terms of regulation 12(4) must attend a disciplinary hearing at the place, date and time specified in such notice.

(b) The employee may at any time after receipt of the notice, but not later than two (2) working days before the receipt of such notice, liaise with the employer representative with a view to reschedule such hearing to an agreed place, date and time: Provided that the

¹ South African Policy Service Disciplinary Regulations, Regulation Notice R 643, GG 28985 dated 03/07/2006

final decision on this matter ultimately rests with the employer representative.

- (c) If the hearing is rescheduled, the employer representative must inform the chairperson thereof on or before the date stated in the notice, and the chairperson must endorse the original notice to this effect.*

- (2) In the event that the employee fails to -*

- (a) appear at the place, date and time specified in the notice or such rescheduled place, date and time; or*

- (b) remain in attendance at the disciplinary in hearing,*
such failure shall, subject to sub regulation (3) and (4), constitute

misconduct.

- (3) (a) Upon a failure as contemplated in subregulation (2), the chairperson must postpone the hearing for not less than seven (7) calendar days and the notice of the postponement, issued by the chairperson must be served on the employee.*

- (b) The notice, in the form determined by the National Commissioner, must comply with regulations 12 (3).*

- (4) On the date on which the disciplinary hearing has been postponed, the chairperson must summarily enquire into the failure of employee to appear or remain in attendance at the disciplinary hearing and, in the absence of good cause shown, make a finding that the employee committed misconduct.*

- (5) (a) In the event that the employee fails to appear at the disciplinary hearing on any date to which the disciplinary hearing has been postponed, or a date to which it was an postponed in terms of subregulation (3) -*

- (i) *the employee shall, from the date of such failure to appear or remain in attendance, be deemed to be suspended without remuneration; and*
 - (ii) *the chairperson must postpone the disciplinary hearing indefinitely, and the disciplinary hearing shall only be reconvened at the instance of the employee concerned, after liaising with the employer representative, as contemplated in sub regulation (1) (b): Provided that in the event the employee fails to take steps to reconvene the hearing within two (2) months of such that, the chairperson must record such failure on the record of the disciplinary hearing, and the employee shall forthwith be deemed to be discharged from the Service in terms of regulation 15(1) (e).*
- (b) *In the event of a hearing being reconvened in terms of sub regulation (5) (a) (ii) the chairperson must summarily enquire into the reasons for the employee's failure to appear or remain in attendance at the disciplinary hearing and confirm or set aside the suspension as contemplated in sub regulation (5)(a)(i) .*
 - (c) *Notwithstanding paragraphs (a) and (b), the chairperson may, on good cause shown, at any time set aside the suspension _ concentrated in subregulation (5)(a)(i).*
 - (d) *Notwithstanding paragraphs (a) and (b), the chairperson may, _ upon could caution and, decided the employee must not be _ suspended and that the hearing be postponed to a later date."*

(emphasis added)

5] Paragraph 1 of the suspension notice reads:

"In terms of regulation 18 of the South African Police Service Discipline Regulations, you are hereby informed that you are deemed to be suspended from service without any remuneration, with effect from 2011. 01. 07 (date). suspension is a result of your failure to appear at the hearing on 2011. 01. 07 (date) to answer to the charge(s) as stated in the Notice of your hearing had been remanded and you had been properly warned by the chairperson of the hearing on 2010. 12. 21 (eight) to appear before him on the adjournment date, namely on 2011. 01. 07 (date) and you failed to appear at the hearing."

- 6] The applicant contends that the presiding officer failed to comply with the provisions of regulation 18(3)(a) because in terms of that subregulation he was required to postpone the hearing for not more than seven calendar days and serve the notice of the postponement on the applicant. Since the chairperson issued the notice of the suspension without following the provisions of regulation 18 (3) (a), the suspension was contrary to the regulations and therefore invalid, so the applicant's argument goes.
- 7] To understand how matters reached the point where the suspension notice was issued it is useful to look at the chronology of the disciplinary hearing. On 19 November 2010 the applicant was issued with a notice to appear at the disciplinary hearing on 30 November 2010. It was only on the day of the scheduled hearing that the applicant's union at the time, POPCRU, requested a postponement. Although the respondent ought to have been given at least two working days prior to the date of the hearing, a postponement was still granted and the matter was set down for 3 December 2010. On the next occasion, the disciplinary officer was phoned by the applicant, who said he was unable to attend the enquiry because he would be appearing in the criminal court proceedings. The disciplinary officer issued a further notice rescheduling the enquiry for 14 December 2010. On that day the applicant was not represented and requested a further postponement. It was then agreed that the matter would be postponed to 21 December 2010. Once again the applicant attended and was unrepresented and requested a further postponement which the disciplinary officer opposed. Nonetheless, the presiding officer reluctantly agreed to postponement of the matter until 7 January

2011. The disciplinary officer reminded the applicant that in terms of regulation 13 (4) the employer was required to hold the disciplinary enquiry within 60 days of the commencement of the suspension and if the 60 day period had expired the chairperson had to take a decision on whether the suspension would continue.

- 8] Only the date of the rescheduled hearing the applicant telephoned the disciplinary officer, saying that he was ill and faxing a medical certificate to confirm his illness. The disciplinary officer advised the applicant that the medical certificate was not sufficient. A short digression on the certificate is necessary at this point. The certificate was issued by a Dr M Pitzer on the day prior to the hearing and states that he had examined the applicant and prescribed medication and treatment which had been administered on the premises. The certificate also stated the signatory's opinion that the applicant should not report for duty for a 10 day period. No details of the illness were provided.
- 9] It was not disputed that the South African police services only accepts certificates from a registered medical practitioner and does not appear to accept certificates from traditional or natural healers which Dr Pitzer appears to be. The disciplinary officer contested the validity of the certificate on the face of the contents of the certificate itself. His concerns in this regard cannot be faulted as unreasonable. As it turns out, Dr Pitzer is a member of the union which represented the applicant in these proceedings and he appeared in that capacity on behalf of the applicant. Dr Pitzer's dual role in the matter does raise concerns about his independence as a medical practitioner.
- 10] Looking at the sequence of the adjournments and postponements of the disciplinary hearing meetings, it was perfectly reasonable for the respondent to have become increasingly frustrated with the failure of the enquiry to proceed. Was the employer entitled to suspend the applicant was at pay when he failed to attend this current hearing on 07 January this year without first postponing the hearing once more for not less than seven calendar days on written notice to the applicant? For the reasons below it appears not.

11] It seems to me that the provisions of subregulations 18(2), (3) and (4) are intended to address the procedure to be followed before the employer can take disciplinary action against the employee for his failure to attend the enquiry on proper notice. The emphasised introductory portion of regulation 18(5)(a) tends to confirm this interpretation. Regulation 18(5)(a) clearly envisages circumstances in which the automatic suspension of an employee can occur without the employer invoking the provisions of regulation 18 (3). Where the applicant's argument breaks down, is it that it presupposes that a suspension without pay can only proceed if subregulations 18(2),(3) and (4) have been followed, but clearly a suspension without pay is competent, indeed possibly automatic, under subregulation 18(5)(a) even if the employee simply fails to attend.

12] It is also noteworthy that even if the suspension was automatic and did not require a decision by the chairperson, the chairperson may still revoke the suspension under the provisions of subregulations 18(5)(c) or (d). This provides an avenue for an aggrieved employee to pursue if he feels that he has been unjustly suspended without pay on account of being absent from the hearing.

13] In the circumstances, I am satisfied that the chairperson did not have to postpone the hearing again in terms of subregulation 18(3)(a), which only have to be invoked if the employer wishes to take disciplinary action against the employee for their non-attendance at the hearing. He could rely on the provisions of subregulation 18(5)(a) which permit, and in fact probably impose automatically, suspension without pay on account of the applicant failing to appear at the hearing on the date to which had been postponed, namely 07 January 2011.

14] Accordingly, the applicant has failed to demonstrate a clear right to relief. He also could approach the employer again to reconsider the suspension without pay under the provisions of subregulations 18(5)(c) or (d). Thus, even if the application ought not to

be dismissed for lack of urgency, the application has failed to demonstrate a clear infringement of a right which is a pre-requisite for final relief, quite apart from other considerations.

Order

15] In view of the reasoning above, the application is dismissed. No order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 23 February 2011

Date of judgment: 24 February 2011

Appearances:

For the Applicant: Dr C M Pitzer of the South African Health & Care Trade Union

For the Respondents: Mr A Mosam instructed by the State Attorney