

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Not reportable
Case No: J593/2011

In the matter between:

MAPOULO SIMON MPATI

Applicant

and

THE PREMIER OF FREE STATE

PROVINCIAL GOVERNMENT

1st Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL,

FREE STATE DEPARTMENT OF POLICE,

ROADS AND TRANSPORT

2nd Respondent

ACTING HEAD OF DEPARTMENT OF

POLICE, ROADS AND TRANSPORT:

FREE STATE PROVINCE

3rd Respondent

ISAAC JABULANI GEORGE MAKAUKAU

4th Respondent

JUDGMENT

GUSH, J:

[1] This is an application, brought urgently, by the applicant for an order in the following terms:

- 1.1. Declaring that the suspension dated 29/10/2010 sanctioned by the third respondent was no longer valid.

- 1.2. ordering the second respondent to permit the applicant to resume duties as Acting Chief Director, Department of Police, Roads and Transport within (10) working days from the date of this order.
- 1.3. Declaring that the provisions of clause 2.7 (3) has expired and the second respondent has abandoned the one thousand two hundred and thirty six (1236) charges dated 28/01/2011 leveled against the applicant.

- [2] The applicant seeks final relief.
- [3] The applicant was appointed to the position of Director: Roads Construction and Maintenance on 15 February 2010 and was subsequently deployed in the position of acting chief director, the position he held at the time of his suspension.
- [4] The applicant avers in his founding affidavit that the disciplinary code (or “code of good practice”) applicable to employees of the rank he occupies is contained in the Senior Management Service (SMS) Handbook.
- [5] The applicant has referred to and quoted the following excerpts from the SMS handbook in his founding affidavit:

If the alleged misconduct justifies a more serious form of the disciplinary action that provided for in paragraph 2.5 the employer may initiate a disciplinary enquiry. The employer must appoint a person from within or from outside the public service as its representative to initiate the enquiry. Para 2.6(1);

If a member is suspended and transferred as a precautionary measure, the employer must hold a disciplinary hearing within sixty (60) days. The chair of

hearing must then decide any further postponement.

Para 2.7(2)(c);

If the member fails to attend the hearing the chairperson concludes that the member did not have a valid reason, the hearing may continue in the member's absence. Para 2.7(3)(f)¹

[6] The applicant was suspended on 29 October 2010 and was given a notice to attend a disciplinary hearing on 22 December 2010. He was also served with a preliminary charge sheet. The applicant did not challenge his suspension at the time and it is common cause that the enquiry did commence within the stipulated period.

[7] The hearing was postponed on 22 December 2010 and after a number of postponements was postponed to 11 April 2011. There is some dispute over the exact basis upon which the matter was to proceed on 11 April 2011. Suffice to say that on 8 April 2011 the applicant was advised that the enquiry would not be proceeding on 11 April 2011 and that a revised charge sheet was to be prepared.

[8] As a consequence, the applicant launched this application on 12 April 2011 to be considered as a matter of urgency.

[9] Apart from having to satisfy the court that the matter is urgent, in order for the applicant to be granted the final order he seeks, it is incumbent upon the applicant to establish "a clear right to the relief sought; an injury actually

¹ Founding affidavit para 7.

committed or reasonably apprehended; and the absence of similar or adequate protection by any other ordinary remedy”.²

[10] The respondents in their answering affidavit take issue with the applicant’s averment that the matter is urgent as well as challenging the applicant’s averment that he has a clear right to the relief.

[11] As regards the absence of a similar or adequate alternative remedy, the respondents aver that as they have not infringed on the applicant’s rights, the question of an alternative remedy does not arise.

[12] The applicant seeks specifically to have his suspension declared no longer valid and that the respondents be ordered to permit him to resume his duties.

[13] The basis upon which the applicant avers that he has a *prima facie* right to the relief he seeks, is that he is entitled to enforce his contract of employment in that it confers upon him the “right to render a service to the respondents and the community” and a “right to fair labour practice”. (sic)³ As the nature of the relief that the applicant seeks is final, the applicant is required to establish a clear right.

[14] In so far as the applicant may have established a clear right, it is a right to fair “labour practice”(sic) in respect of his suspension. The provisions of s

² Herbstein and van Winsen: *The Civil Practice of the High Courts of South Africa* 5th ed volume 2 at 1456.

³ Founding affidavit para 9.

186(2)(b) of the Labour Relations Act (ACT)⁴ specifically afford the applicant an alternative remedy that is “adequate in the circumstances; ordinary and reasonable; [and is a] legal remedy and which grants the applicant similar protection.”⁵

[15] It is common cause that the applicant has not referred a dispute regarding his suspension to the Bargaining Council or CCMA in accordance with the ACT. The applicant does not address this issue and offers no explanation why he has not availed himself of the alternative remedy provided for in s186(2)(b) of the ACT.

[16] As for the relief the applicants seeks in the form of an order that the second respondent has abandoned the charges against the applicant, the applicant specifically states in his affidavit that he is uncertain when the matter is to proceed and how long it will take to finalise.⁶ This certainly does not convey that the applicant believes that the respondents have abandoned the disciplinary enquiry. In reply, the respondents have filed a detailed affidavit explaining the reason for the delays and setting out very clearly that they have not abandoned their intention to proceed with the disciplinary hearing.

[17] In so far as the relief sought relies on a failure by the respondents to comply with the provisions of the SMS Handbook, it is so that the chairperson appointed to deal with the enquiry is seized of the matter and it is common cause

⁴ Act 66 of 1995. This section defines an unfair labour practice as including unfair suspension of an employee.

⁵ Herbstein and van Winsen above n 2 at 1468-9

⁶ Founding affidavit para 10.

that the applicant has not approached the appointed chairperson to address his concerns. The enquiry commenced on 22 December 2010 and the appropriate manner to deal with this issue is for the applicant to approach the duly appointed chairperson of the enquiry. There is no reason for the court to interfere in the disciplinary process at this stage.

[18] On these grounds alone the application should be dismissed.

[19] The major hurdle however that the applicant fails to surmount is that of urgency. It is appropriate to record in its entirety the applicants reason for arguing that the matter is urgent:

The matter is urgent in that the applicant and the second respondent have a valid contract of employment and the said contract still subsist and it is clear from the above background that representatives of the second respondent of failing to prosecute the charges against the applicant and the period of the prosecution has the matter is not yet finalised and suspension is still in force and there is no dates set for the conclusion of the matter. In actual fact, the hearing has not yet commenced and that is not as a result of the conduct of the applicant.⁷

[20] I am not satisfied that this any way whatsoever justifies the matter being brought as a matter of urgency. The suspension was brought into effect on 29 October 2010 and was not challenged. The applicant has had ample opportunity to avail himself of the alternatives at his disposal and has not done so. He has offered

⁷ Founding affidavit para 8.

no explanation other than that set out above why the application should be heard as a matter of urgency.

[21] The parties agreed that costs should follow the result and I see no reason why this should not be so.

[22] Whilst the absence of urgency would ordinarily result in the application being struck off the roll, the merits of the applicant's application justify it being dismissed. In the circumstances and for the reasons set out above I make the following order:

22.1. The applicant's application is dismissed with costs.

GUSH J

Date of Hearing : 4 May 2011

Date of Judgment : 11 May 2011

Appearances

For the Applicant : Adv K S Tip SC with him Adv Habedi

Instructed by : Minnaar Niehaus Attorneys

For the Respondent: Adv O C Mabaso

Instructed by : Mateme Makgahlele Attorneys