

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J1469/11

In the matter between:

NOBUBELE JULIAN NGELE

Applicant

and

DEPARTMENT OF WATER AFFAIRS

Respondent

JUDGMENT

FRANCIS J

1. On 28 July 2011 the applicant brought an urgent application which she set down for a hearing on 29 July 2011 for the following relief:

“1. *Dispensing with the forms and service as prescribed by the Rules of the Labour Court and directing that this application be heard as one of urgency in terms of Rule 8;*

2. *Ordering that a rule nisi do issue, calling upon the respondent to show cause on a date and time to be determined by the Registrar or so soon thereafter as counsel may be heard why the following order should not be made final:*

2.1 *The suspension of the applicant on 20 July 2011 is unfair, invalid and unlawful;*

2.2 *The respondent is directed to forthwith and immediately withdraw the notice of suspension dated 20 July 2011;*

3. *The costs of the application shall be paid by the respondent;*

4. *Ordering that paragraph 2.2 hereof shall operate with immediate effect as an*

interim interdict pending the return date;

5. *Ordering that the return date of this order may be anticipated by the respondent on 48 hours notice to the applicant;*
6.
7. *Further and/or alternative relief.”*

2. The application was served on the respondent on 27 July 2011 at 16h47. The respondent opposed the application and filed an answering affidavit on 28 July 2011. The applicant did not deem it necessary to file a replying affidavit.
3. The applicant is employed by the respondent as the Deputy Director General of Corporate Services on a fixed term contract ending on 30 September 2015. Over the past year or two, Government, and in particular the respondent, has been engaged in significant efforts to address procurement irregularities by its officials. In May 2010 the Auditor-General delivered a report into alleged procurement irregularities at the respondent. Action was taken following the report, with further investigation conducted and disciplinary action taken against various officials of the respondent.
4. Further to the Auditor-General report, on or about 10 September 2010 the Public Service Commission (“the PSC”) advised the respondent that it had received a complaint on the National Anti-Corruption Hotline implicating the Applicant in irregular procurement practices concentrating the awarding of a contract to Autopage. The PSC advised the respondent that it would be investigating the said complaint.

5. The respondent notified the applicant on or about 27 October 2010 that it considered suspending her following, *inter alia*, the allegation of misconduct made against her on the National Anti-Corruption Hotline. The applicant made representations why she should not be suspended. After considering her written representations, the respondent suspended her on 1 November 2010. In the suspension letter the applicant was informed *inter alia* that “*the suspension will be with full emoluments until such time that a chairperson of a disciplinary enquiry has arrived at a decision regarding your guilt or innocence with regard to the allegations*”.
6. At the commencement of the disciplinary hearing into certain of the allegations of misconduct by the applicant, the respondent had not yet received the investigation report from the PSC that detailed the alleged misconduct in relation to Autopage. The respondent has no control over the PSC and could not dictate the progress of such an investigation. The respondent decided to commence with the disciplinary hearing after the applicant had insisted that the hearing had to commence. The respondent would have preferred to await the report of the PSC on the Autopage allegation to enable it to put that allegation of misconduct to the applicant in the same hearing. However, as the PSC had not concluded its investigation into that aspect and the applicant had demanded that her hearing commence within the prescribed period, the respondent could not deal with the Autopage at the same hearing as the other five counts of misconduct levelled against her. The respondent had in the disciplinary notice specifically reserved its right to later bring allegations of misconduct against

her concerning the Autopage incident.

7. A charge contained in the suspension letter relates to the tender processes followed in the awarding of a contract to Autopage. This charge was however not included in the disciplinary notice that she was given. She was informed in the said disciplinary notice about the Autopage issue and that investigations were still being investigated and that charges might ensue. She was informed that the respondent reserved the right to add any further charges emanating from the investigations that were being conducted by the respondent into other areas of procurement including the abovementioned investigation that was underway by the PSC. Some charges were duly added.
8. The applicant appeared at a disciplinary hearing. She was found guilty of some of the charges. The chairperson of the disciplinary enquiry found that an appropriate sanction was a final written warning. He found that she had to return to her job and position with restoration of all of the employment benefits and other entitlements that she enjoyed before her suspension and had to report for duty on 12 July 2011.
9. The respondent received the provisional report from the PSC concerning the Autopage allegations on 19 July 2011, the same day that the applicant reported for duty. She could not report for work earlier and did so on 19 July 2011. On 20 July 2011 the respondent informed her in writing that her continued suspension relating to the Autopage allegation continued. She was instructed to vacate her office with

immediate effect pending further notice. The applicant's attorney on 22 July 2011 wrote to the respondent about her further suspension from employment with effect from 20 July 2011. It was pointed out that the suspension was unfair, invalid and unlawful and the respondent was requested to immediately withdraw the letter dated 20 July 2011 and to allow her to resume her duties with the respondent in line with the chairperson's ruling dated 4 July 2011 failing which she would approach this Court for urgent relief with an appropriate cost order against the respondent. The respondent's attorney on 26 July 2011 wrote to the applicant's attorney stating that the respondent intended serving the applicant with a notice to attend a disciplinary enquiry into allegations of misconduct to take place during the next week, i.e. 1 - 5 August 2011. It advised that it would not deal with the allegations contained in the applicant's letter of 22 July 2011.

10. The applicant contended that since the respondent had refused to withdraw the suspension, she had no option to approach this Court for urgent relief.
11. The applicant contends that the application is urgent for the following reasons:
 - “70. As stated above, the disciplinary proceedings against me were concluded on 8 July 2011.
 71. Notwithstanding the lengthy proceedings and the outcome of that process, the respondent has sought to suspend me yet again on a spurious, unfounded and illegitimate basis.
 72. Despite my request that the respondent withdraw the notice of my further

suspension from employment with the Department, it has threatened the launch of further disciplinary proceedings in an effort to undermine my efforts to challenge my subsequent suspension. In the circumstances, I have no other option but to launch this application and to seek appropriate assistance from this Court.

73. *Having regard to the circumstances of this matter, it will be submitted on my behalf that I have acted expeditiously in bringing this application”.*

12. The applicant was opposed by the respondent on the following grounds:

12.1 The applicant was not suspended for a second time on 20 July 2011, but instead the respondent continued to enforce her suspension which was effected in 1 November 2010;

12.2 There was no reason or requirement for the respondent to again afford her the opportunity to be heard before continuing the suspension;

12.3 The suspension was effected for valid reasons and following adherence to a fair procedure and is therefore valid and lawful;

12.4 There is no urgency requiring intervention by this Court in the light of the imminent hearing that will take place into the allegations of misconduct levelled against the applicant. In any event there was no reason for the applicant to launch this application on less than 48 hours notice, as she has done;

12.5 The applicant has an alternative remedy that she could use should she wish to challenge the fairness of her suspension;

- 12.6 There is no irreparable harm faced by the applicant that warrants the granting of an order interdicting the respondent from continuing the suspension of the applicant in the light of the facts of the suspension; and
- 12.7 The balance of convenience favours the respondent because the applicant faces disciplinary action for not only failing to comply with the requisite supply chain management procedures, but also failed to disclose when making representation on her suspension that she had in fact, signed an airtime agreement with Autopage and had not instead, only signed the approval for such an agreement and the hearing is set to take place on 17 August before advocate John Myburgh SC, a date on which the applicant's attorney of record confirmed her availability to attend to the hearing.
13. The applicant has brought this application on an urgent basis. Since the applicant is seeking urgent relief, the application must comply with the provisions of rule 8 of the Rules of this Court. The founding affidavit must contain the reasons for urgency and why urgent relief is necessary and the reasons why the requirements of the rules were not complied with. It must also provide reasons why a shorter period than that provided for in terms of section 68(2) of the Act why a shorter period should be permitted.
14. The grounds of urgency contained in paragraphs 70 to 74 of the applicant's founding affidavit can hardly be called grounds of urgency. Before the applicant was suspended on 1 November 2010 she was allowed to make representations around the

Autopage incident. She was informed that those investigations were not concluded at the time when the disciplinary proceedings were instituted against her. She was suspended on 1 November 2000 but decided not to challenge her suspension. She endured her suspension for a period of nine months. The respondent has now received a report from the PSC and has decided to charge the applicant with the misconduct. Her disciplinary hearing is scheduled to take place on 17 August 2011. It is unclear why the application has now become so urgent that it should be heard now. No explanation was tendered why a further three weeks before the disciplinary hearing would tarnish her reputation.

15. The applicant has dealt with the requirements for urgent relief in the founding affidavit. The first is that she has a prima facie right. She proceeded to deal with the requirements of a “well grounded apprehension of irreparable harm”. She stated *inter alia* that “*after the outcome of the disciplinary proceedings, both my professional and personal reputation was restored, and I was willing to render my services to the Department with the same enthusiasm and commitment with which I had previously rendered my services. The impact of a further period of suspension is arguable even more harmful to my reputation and integrity than the first suspension because it creates the impression that I am incapable of rendering my services to the Department as a senior manager and that despite the outcome of the disciplinary proceedings, I may be guilty of serious acts of misconduct. Given the impact of such action on my personal and professional reputation, I continue to suffer irreparable harm and will continue to do so if interim urgent relief in this application is not*

granted. The respondent has had the opportunity to test my innocence or guilt in a process that commenced in November 2010 and was concluded some 8 months later in July 2011.”

16. I have already pointed out that the grounds of urgency advanced by the applicant in her founding affidavit are hardly grounds of urgency. Those contained under the heading “well grounded apprehension of irreparable harm” deal with the requirements for interim relief. Even if they could be construed as dealing with urgency, the facts in this case are not exceptional circumstances that would prompt this court to come to the applicant’s assistance on an urgent basis. In *Zwakala v Port St John’s Municipality & Others* [2000] 1 BLLR 117 (LC) the Court held at page 118 as follows:

“The only grounds of urgency advanced by the applicant in his founding affidavit relate to humiliation suffered by him by reason of the suspension and the tarnishing of his name which it implies.

The difficulty I have is that almost every suspension by reason of the investigation of allegations of misconduct would cause this type of prejudice. This does not make the matter urgent in the sense described above. Furthermore, urgency can surely not be created by “rumour mongering” and “unfounded allegations of embezzlement”.

Right thinking inhabitants of Port St Johns must know, or ought to know, that a suspension pending further investigations is nothing more than that. Such further investigations may establish impropriety on the applicant’s part. On the other hand they may not”.

17. There are no exceptional circumstances set out in this application why the court should deal with this matter on an urgent basis. In this regard see *Mosiane v Tlokwe City Council* [2009] 8 BLLR 771 (LC), *Jiba v Minister of Justice and Constitutional Development* [2009] 10 BLLR 989 (LC). The applicant has brought this upon herself. I have pointed out that she did not deem it necessary to file a replying affidavit. The respondent stated that it has no control over the PSC and that it was waiting for their report to be completed before deciding whether to charge her or not. It had requested that the disciplinary proceedings be held over until those investigations were concluded before she was charged. She refused and insisted that the disciplinary proceedings go on. When she was charged, she was informed by the respondent that it reserved the charge her with the Autopage allegation. She knew that those charges were still pending against her.
18. The application stands to be struck from the roll.
19. Since the parties have an ongoing relationship I do not believe that this is a matter where costs should follow the result.
20. In the circumstances I make the following order:
- 20.1 The application is struck from the roll.
- 20.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANT : H VAN DER RIET SC INSTRUCTED BY CHEADLE
THOMPSON & HAYSOM INC

FOR RESPONDENT : M VAN AS INSTRUCTED BY STATE ATTORNEY

DATE OF HEARING : 29 JULY 2011

DATE OF JUDGMENT : 02 AUGUST 2011