

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

Reportable
CASE NO. J 1764/11

In the matter between:

NONHLANHLA C CHIBI

Applicant

and

THE MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS
(MPUMALANGA PROVINCIAL GOVERNMENT)

First Respondent

DEPUTY DIRECTOR GENERAL:
DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS
(MPUMALANGA PROVINCIAL GOVERNMENT)

Second Respondent

Date of Hearing: 22 SEPTEMBER 2011

Date of Judgment:

JUDGMENT

REDDY AJ

Introduction

[1] This is an urgent application for final relief in the following terms:

- 1 dispensing with the provisions of the Rules relating to times and manner of service referred to therein and dealing with the matter as

- one of urgency in terms of Rule 8 of the Labour Court Rules;
2. declaring the disciplinary sanctions of three months suspension without pay and demotion from applicant's previous level 13 position to a level 12 position *apropos* to disciplinary proceedings against applicant are invalid and unlawful;
 3. interdicting and restraining the respondents from giving effect to the disciplinary sanctions of three months suspension without pay and demotion from applicant's previous level 13 position to a level 12 position;
 4. directing the respondents to comply with the terms and conditions of applicant's contract of employment in so far as applicant's level 13 position and remuneration attached to the position of Director: Supply Chain is concerned;
 5. the costs of this application be paid by the respondents in the event of opposition

[2] This application is opposed by the respondents.

Factual background

[3] The applicant was employed as a director: supply chain of the department of co-operative governance and traditional affairs (Mpumalanga provincial government). Her position of director is on level 13. She was appointed to the post with effect from 1 February 2009.

[4] The department in which the applicant works manages the procurement of goods, works and services for the department by means of petty, verbal or written price quotations or competitive bids or tenders.

[5] The work and activities of the supply chain department are regulated by a number of legislative instruments which include the applicable provisions of the Public Finance Management Act, 1999, relevant treasury regulations and the Preferential Procurement Policy Framework Act, 2000.

[6] The applicant was instructed during the first week of May 2010 to assist with the procurement of VIP catering for the then approaching 2010/2011 MEC budget speech. The applicant was also instructed to procure banners for the budget speech and for other departmental use.

[7] The actual procurement of the catering services and the banners by the applicant is in dispute, however this issue is of no relevance to this application suffice it to say that the procurement led to the applicant being charged with three acts of misconduct: charge one related to falsification of records or supply chain documents; charge two related to gross negligence in failing to follow procurement procedures and charge three related to gross misconduct in failing to follow national regulations or departmental policies or procedures.

[8] A disciplinary enquiry was held on 23 and 24 June 2011. The applicant attended the hearing. The applicant was found guilty of charges 1 and 3 and not guilty of charge 2. The parties were heard in aggravation and mitigation of sentence. The sanction, which was received by the applicant on 26 July 2011, reads as follows:

“ 13.4 Sanction

The appropriate sanctions under the circumstances are as follows:

Charge 1: three months suspension without pay

Charge 3: the employee is demoted from level 13 to level 12 with immediate effect.”

[9] The applicant with the assistance of her union lodged an appeal against, amongst other things, the sanction. The appeal was lodged with the first respondent on 28 July 2011. In his written reply to the union (dated 4 August 2011), the first respondent informed the union that the first respondent did not have jurisdiction to consider appeals in respect of senior management service (SMS). The applicant was a member of the SMS. The applicant was directed to lodge an appeal with the relevant bargaining council or the Labour Court, “whichever is applicable”. The applicant’s union only informed the applicant of this letter on 17 August 2011.

[10] The applicant then sought legal advice on 19 August 2011 and was advised to lodge this application. Prior to doing so, the applicant’s attorney wrote to the applicant’s head of department informing him of the alleged unlawfulness

of the sanctions and requested that the sanctions be uplifted failing which an urgent application to this Court would be brought. That letter was sent on 19 August 2011 and it gave the respondents until 24 August 2011 to uplift the sanctions and comply with the terms contended for.

[11] On 24 August 2011, the respondents replied to the letter informing the applicant that the sanctions were not imposed as alternatives to dismissal. The respondents were satisfied that the sanctions were lawful and enforceable.

[12] The applicant then launched this application, on an urgent basis, on 2 September 2011. The matter was set to be heard on 13 September 2011 but the parties agreed to the filing of further pleadings and the matter was adjourned to 22 September 2011.

[13] For the purposes of this application, the applicant does not challenge the fairness of the disciplinary process or the findings on guilt. She is also not challenging the fairness of the sanctions. She is challenging the validity of the sanctions that were imposed. She contends that the sanctions were imposed as an alternative to dismissal and in such circumstances her contract of employment requires that the sanctions could only be imposed after consultation with and agreement by her to their imposition. She further contends that there was no consultation with her and consequently no agreement by her that the sanctions be imposed, resulting in their invalidity and unlawfulness. The applicant seeks

that the sanctions be uplifted and the *status quo ante* resumes.

[14] The applicant launches this application in terms of section 77 (3) of the Basic Conditions of Employment Act. In terms of that section this Court has concurrent jurisdiction with the civil courts in respect of any matter concerning contracts of employment.

Urgency

[15] The respondents submitted that the applicant's matter is not urgent as the sanctions were imposed with effect from 1 August 2011 and there is no explanation by the applicant why she took so long to approach this Court.

[16] On a reading of the papers, the only period that is not explained is that between 4 August 2011 when the union would have received the letter in respect of the appeal and its informing the applicant on 17 August 2011 thereof. This is a significant period of time and the union should have put up an explanatory affidavit for the delay in bringing the letter to the applicant's attention.

[17] The remaining periods have been explained and I am persuaded that the applicant was not dilatory in approaching this Court.

[18] It is trite that an applicant for urgent interdictory relief must satisfy the Court that she has a clear right to enforce, that there is an injury actually

committed or reasonably apprehended and that there is an absence of any other satisfactory remedy. I will deal with each principle in turn.

Clear right

[19] The applicant submitted that (and it was not disputed by the respondents) her contract of employment incorporates the disciplinary code and procedures for the SMS members. The disciplinary code and procedures are contained in the SMS handbook. Chapter 7 of the handbook provides the code and procedure for misconduct and incapacity. Clause 2.7 of chapter 7 sets out the procedures to be followed in disciplinary enquiries. Clause 2.7.4 provides the following in respect of sanctions:

“(4) Sanctions

(a) If the chairperson finds a member has committed misconduct, the chairperson must pronounce a sanction ...depending on the nature of the case and the seriousness of the misconduct, the member’s previous record and any mitigating or aggravating circumstances. Sanctions consist of -

- counselling;
- a written warning;
- a final written warning;
- suspension without pay, for no longer than three months;
- demotion;
- a combination of the above; or
- dismissal.

- (b) With the agreement of the member, the chairperson may only impose the sanction of suspension without pay or demotion as an alternative to dismissal. If a member is demoted, after a year he or she may apply for promotion without prejudice.”

[20] The applicant also referred to a ministerial directive dated 3 September 2003 wherein it is recorded in clause 4 (c) that:

“Unlike the case of public servants (below the SMS level) where ... the sanctions of demotion and suspension without pay would become stand-alone sanctions, ... in the case of SMS members these two sanctions may only be imposed as alternatives to dismissal and the employee concerned has to agree to such alternative. The reason for this is that the employer cannot unilaterally reduce the salary and benefits of an employee.”

[21] The applicant submitted that on a reading of clauses 2.7.4 and 4(c) that the chairperson of the disciplinary enquiry was obliged to consult with her and obtain her agreement to the sanctions of the suspension without pay for three months and demotion (the sanctions) before he imposed them.

[22] The respondents submitted that the sanctions were not imposed as alternatives to dismissal, there was no need to obtain the applicant’s agreement and that they are valid and enforceable sanctions.

[23] The applicant could not supply any information that supported her contention that the chairperson considered the sanctions as an alternative to dismissal.

[24] For the applicant's submissions to be accepted the only logical interpretation of clauses 2.7.4 and 4(c) is that the chairperson must have concluded that dismissal could apply but was not appropriate in the circumstances and that he therefore imposed the sanctions he did as alternatives to dismissal.

[25] I do not accept the above interpretation as having application in this matter for the following reasons: not every act of misconduct necessarily attracts the sanction of dismissal. Clause 2.7.4 offers any one of a range of sanctions or a combination of them (excluding dismissal) or dismissal as applicable sanctions depending on various factors namely the nature of the case and the seriousness of the misconduct, the member's previous record and any mitigating or aggravating circumstances.

[26] Clause 2.7.4 gives the chairperson a wide discretion insofar as appropriate sanctions are concerned. It is to my mind imperative that chairpersons retain wide discretions so that fairness results in the disciplining of employees. Clause 2.2 of the SMS handbook provides that discipline is a management function. This function must be cautiously and fairly exercised to ensure that employee's rights not to be unfairly dismissed remain intact.

[27] Further the SMS handbook incorporates the Labour Relations Act's Code

of Good Practice on dismissal. This means that the respondents intended that progressive discipline be applied to acts of misconduct rather than employees being dismissed in the first instance.

[28] A reading of the chairperson's findings on sanction does not reveal that he concluded that dismissal could apply but was not appropriate in the circumstances. He arrives at no such conclusion.

[29] In his ruling the chairperson records the following observations after considering the submissions in aggravation and mitigation:

1. the acts of misconduct revealed an element of gross negligence;
2. the applicant could not claim not to be properly trained;
3. the procurement committee was not fully operative and this could have been a contributory factor to the misconduct;
4. the lack of policies could not be a contributory factor as all policies were clearly laid down;
5. there was no motive that was established therefore the only conclusion was that the applicant lacked the necessary diligence to carry out her functions – this to his mind was poor performance related to negligence rather than to incapacity;
6. the applicant was the head of the supply chain, was not on probation and failed in her stewardship;

7. the offences of which she was found guilty were of a serious nature and they could potentially harm the department of co-operative governance and traditional affairs and they could bring the public service into disrepute.

The chairperson then records the sanctions as recorded in paragraph 8 above.

[30] As the chairperson did not conclude that dismissal could be applied but was not appropriate in the circumstances there was no need for him to engage the applicant to elicit her agreement to the sanctions he imposed.

[31] The applicant referred to the matter of *Department of Labour v General Public Service Sectoral Bargaining Council and Others*¹ in support of her contention that her consent must have been obtained prior to the imposition of the sanctions. I do not find any support for this contention in the LAC decision referred to when viewed against the circumstances of this matter.

[32] The employees in the Department of Labour case were found guilty of sexual harassment and as an alternative to dismissal they were offered the sanctions of a final written warning together with a suspension from duty without pay for three months. They were informed, *inter alia*, that should they not accept the alternate sanctions they would be dismissed. They did not accept the alternate sanctions and they were dismissed. The Labour Appeal Court found

¹ (2010) 31 ILJ 1313 (LAC).

that the alternative sanctions to dismissal were offered by the employer as a means to rehabilitation in compliance with the principle of progressive discipline. The employees had shown no remorse for their conduct, refused to acknowledge the wrongfulness of their conduct and were not willing to be rehabilitated. The alternate sanctions to dismissal were therefore not appropriate. Their dismissals were upheld.

[33] The *Department of Labour* decision above shows that in the public service context, there is no automatic application of sanctions other than dismissal to misconduct. For alternatives to dismissal to be applicable, it requires the precursor that dismissal must be applicable in the circumstances. Once this is established, an employee may be offered as an alternative to dismissal a lesser sanction. Where the alternate sanctions are a suspension without pay or a demotion the employee's consent is required.

[34] As stated above, the chairperson in this matter did not arrive at a conclusion that dismissal could be applied. He found that the sanctions were appropriate in the circumstances of the case. In other words, he did not conclude that the applicant ought to be dismissed but through the application of progressive discipline alternate sanctions should be applied. If this were the case, then the applicant's consent ought to have been acquired beforehand. As this was not the case her consent was not necessary.

[35] To accept the applicant's argument that dismissal must have been considered because the sanctions of demotion and suspension without pay were imposed, means that a chairperson does not retain any discretion as to the appropriateness of the sanction. The only conclusion he could reach is that an employee ought to be dismissed. The consequence of this argument is that irrespective of how minor an offence may be an employee who is demoted and suspended without pay for three months, would have ordinarily been dismissed. This argument will not survive judicial scrutiny. It turns the policy of progressive discipline on its head and makes a mockery of the policy of alternate discipline in terms of clause 2.7.4.

[36] I therefore find that the imposed sanctions are valid and enforceable.

[37] Further, if the applicant's contention is accepted it does not follow that if the imposed sanctions are uplifted the *status quo ante* will resume. Given my findings on the lawfulness of the sanctions, the only way in which the sanctions can be set aside and the *status quo ante* resumes, is if there is a finding that the applicant was not guilty of the charges. As she is not challenging the findings of guilt, such a conclusion is not possible.

[38] The applicant also contends that she ought to have been consulted prior to the implementation of the sanctions. I do not agree with this submission for the following reasons. There is no provision that specifically records that the

employee must be consulted. The two clauses the applicant referred to in support of her submission only refer to an agreement by the employee concerned. This does not include consultation. To my mind, the most that an employee is entitled to is being informed of the possibility of dismissal and as an alternative thereto she is given the opportunity to accept an alternate sanction.

[39] Further, the only reason for the requirement of the consent is that an employer cannot unilaterally reduce the salary and benefits of an employee. There is no need for the employer to enter into a consultative process with the employee. Discipline is a managerial function. The only duty of the employer in carrying out this function is that it must act fairly. The fairness of the sanctions is not an issue before me.

[40] I find that the applicant has not established a clear right that warrants protection. I also find that the respondents are not in breach of sections 32 and 34 of the Basic Conditions of Employment Act as alleged by the applicant [see SA Breweries Ltd (Beer Division) v Woolfrey and Others (1999) 20 ILJ 1111 (LC)].

Injury actually committed or reasonably apprehended

[41] The applicant submits that if the Court does not come to her assistance she will suffer grievous harm. The demotion has the effect of impairing her dignity and self worth as she will be expected to complete tasks usually

completed by her subordinates. She will face ridicule and contempt from her fellow employees and subordinates. Her right to perform functions commensurate with her status, skills and competence have been infringed. Her prospects of promotion are bleak. The drop in her remuneration means that she cannot meet her monthly financial obligations.

[42] Financial hardship and loss of income do not constitute grounds for urgency (see *Jonker v Wireless Payments Systems CC* (2010) 31 ILJ 381 (LC) at paragraphs 14 to 20 and the cases referred to therein).

[43] The applicant also wishes not to endure the consequences of her misconduct. This does not justify her approaching this Court urgently.

[44] I have already found that the applicant has not established a clear right to the relief she claims. She has not challenged the fairness of the sanctions in the relevant bargaining council. The hardships that she seeks to avoid could be alleviated if she referred her dispute to the relevant bargaining council.

Absence of other satisfactory remedy

[45] It is common cause that the disciplinary code and procedure is a collective agreement applicable between the parties. The respondents submitted that the applicant can enforce the collective agreement in terms of section 24 of the LRA and the applicant would be able to argue for the same relief as in this application.

[46] The applicant did not rebut this submission.

[47] I find that the applicant has an alternate remedy in terms of section 24 of the LRA in that she could have approached the relevant bargaining council for enforcement of the interpretation she contends for.

[48] The respondents further submitted that the applicant could also lodge an unfair labour practice dispute in terms of section 186 (2) (a) relating to demotion and/or in terms of section 186 (2) (b) relating to disciplinary action short of dismissal.

[49] The applicant submitted that those disputes relate to the fairness of the sanctions and not to the lawfulness and that the applicant would only be able to claim compensation and not reinstatement into her original post. The respondents submitted that the relief the applicant seeks in this application would also be available to her in terms of section 193 (4) of the LRA if she referred a dispute in terms of section 186 of the LRA. In terms of section 193(4), an arbitrator may reinstate an employee who has lodged an unfair labour practice dispute.

[50] The employee referred to the cases of *Sappi Forests (Pty) Ltd v CCMA*²

² (2009) 30 ILJ 1141 (LC).

and *Hospersa v MEC for Health*³ in support of her contention that the employer cannot unilaterally reduce her salary and benefits.

[51] The *Sappi* case supra, was a dispute referred as an unfair labour practice in terms of section 186 (2) (b) of the LRA. The Court in that matter found that although the employee had been suspended pending disciplinary action, section 186(2) (b) could be widely interpreted to include suspensions as a form of disciplinary sanction. The Court found that the suspension in that matter was a disciplinary sanction and that the CCMA had jurisdiction to determine the dispute.

[52] I find that the above case far from supporting the employee's contention that she had to approach this Court for relief, confirms that the employee ought to have lodged an unfair labour practice dispute in terms of section 186(2)(b) in the respective bargaining council.

[53] In the *Hospersa* case, the employee's salary was unilaterally stopped when she refused to perform her services at another workplace. The employee had been unilaterally transferred to another workplace whilst there was an ongoing dispute between the parties. The Court held that the non-payment of her salary was unlawful and that the employee should have been heard before her salary was stopped. The Court also referred to a suspension without pay as being unlawful unless it is a specific term of the applicable contract or it is implemented as an alternative to dismissal.

³ (2008) 29 ILJ 2769 (LC).

[54] The above case is distinguishable on the facts from this application. The employee in this matter was heard in mitigation before the sanction of suspension was imposed. Further, the sanction was not imposed as an alternative to dismissal.

[55] I find that the applicant has alternate remedies in terms of the LRA. The relief that she claims in this application could also be granted in terms of section 193(4) of the LRA.

Costs

[56] Having considered the facts, the relevant issues and the applicable legal principles I am persuaded that the applicant ought not to have approached this Court and that the Respondents were entitled to oppose the application.

[57] In the circumstances, I am of the view that the respondents are entitled to their costs, especially in light of the fact that the matter was brought urgently.

[58] In the circumstances, I make the following Order:

1. The application is dismissed with costs.

Reddy AJ

Appearances:

1. For the Applicant: Mr Verster of JD Verster Labour Law Office
2. For the Respondents: Mr Zulu instructed by Nkosi Attorneys and Associates