



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 999/11

In the matter between:

TP BIYASE

Applicant

and

SISONKE DISTRICT MUNICIPALITY

First respondent

NM MABASO

Second respondent

Heard: 18 November 2011

Delivered: 28 November 2011

Summary: Suspension of senior manager contrary to Local Government Disciplinary Regulations for Senior Managers, 2010. Suspension unlawful but not unfair, in light of judgment in *SAMSA v Mackenzie*.

JUDGMENT

STEENKAMP J

Introduction

- 1] This urgent application arises, like so many others before this court, from the suspension of a senior manager by a municipality. He asks that the suspension be set aside on the grounds that is unlawful and unfair. The question of a lawful suspension arises from an interpretation of the Local Government: Disciplinary Regulations for Senior Managers, 2010¹ (“the regulations”). Those regulations impose obligations on municipalities with regard to procedural steps in disciplinary proceedings that are far more stringent than those imposed by the Labour Relations Act² – and arguably unnecessary and out of line with the objectives of the LRA – but the first respondent is bound by them.

Background

- 2] The applicant, Mr Thokazani Paulinus Biyase, is the Executive Director: Corporate Services of the first respondent, the Sisonke District Municipality (“the municipality”). As such, he falls within the definition of “senior manager” in the regulations. The second respondent, Mr MM Mabaso, is the municipal manager.

- 3] On 27 October 2011 Mabaso gave the applicant a letter headed “notice of intention to suspend”. The letter included a “complaint sheet” setting out four allegations of gross misconduct by the applicant. Mabaso went on to state:

“The municipality intends conducting a full investigation into the matter. It is the municipality’s intention to suspend you pending the finalisation of the investigation. Before making a final decision to suspend you on full pay, the municipality wishes to give you an opportunity to make written representations as to why you should not be suspended. You are hereby afforded an opportunity to make written representations by **close of business on 31 October 2011.**”

- 4] The applicant’s attorneys of record made representations on his behalf on 31 October 2011 and more fully on 1 November 2011. At the outset, they

1 Government Notice No 344, *Government Gazette* No 34213, 21 April 2011.

2 Act 66 of 1995 (the LRA).

alleged that his suspension was “unlawful and/or unfair”. They pointed out that “the legislature saw fit to prescribe a period of seven days as an adequate period within which a person in our client’s position should make written representations as to why he should not be suspended”. They alleged that the applicant did not have sufficient notice. They nevertheless addressed the four complaints and alleged that, firstly, they were baseless; and secondly, that they did not warrant a precautionary suspension.

- 5] On the same day, 1 November 2011, the municipality’s executive committee resolved to suspend the applicant. Mabaso informed the applicant in writing that he was suspended on full benefits with immediate effect pending a further investigation. Mabaso instructed him not to attend the workplace or to contact any municipal employees.
- 6] The applicant launched this application on 7 November 2011. It was initially set down for hearing before Cele J on 8 November 2011. On that day the parties agreed to the further exchange of pleadings and the matter was postponed to 18 November 2011 by agreement.

Legal framework

The Regulations

- 7] The Regulations were made under s 120 of the Municipal Systems Act.³ Chapter 2 of the regulations is styled as a disciplinary code. It applies to all municipalities and “senior managers”, defined as municipal managers referred to in s 82(1) of the Municipal Structures Act⁴ or s 56 of the Systems Act.
- 8] The regulations stipulate that discipline must be effected with due regard to the Code of Good Practice in Schedule 8 of the LRA.⁵ However,

3 Local Government: Municipal Systems Act, Act 32 of 2000.

4 Local Government: Municipal Structures Act, Act 117 of 1998.

5 Regulation 4(3)(b).

contrary to the simple and expeditious disciplinary procedures provided for in those guidelines, the regulations proceed to impose rigid processes and timelines for disciplinary action against senior managers.

9] For instance, regulation 5 prescribed the following elaborate procedure:

“5. Disciplinary procedures.—(1) Any allegation of misconduct against a senior manager must be brought to the attention of the municipal council.

(2) An allegation referred to in sub-regulation (1) must be tabled by the mayor or the municipal manager, as the case may be, before the municipal council not later than seven (7) days after receipt thereof, failing which the mayor may request the Speaker to convene a special council meeting within seven (7) days to consider the said report.

(3) If the municipal council is satisfied that—

(a) there is a reasonable cause to believe that an act of misconduct has been committed by the senior manager, the municipal council must within seven (7) days appoint an independent investigator to investigate the allegation(s) of misconduct; and

(b) there is no evidence to support the allegation(s) of misconduct against the senior manager, the municipal council must within seven (7) days dismiss the allegation(s) of misconduct.

(4) The investigator appointed in terms of sub-regulation (3) (a) must, within a period of thirty (30) days of his or her appointment, submit a report with recommendations to the mayor or municipal manager, as the case may be.

(5) The report contemplated in sub-regulation (4) must be tabled before the municipal council in the manner and within the timeframe as set out in sub-regulation (2).

(6) After having considered the report referred to in sub-regulation (4), the municipal council must by way of a resolution institute disciplinary proceedings against the senior manager.

(7) The resolution in sub-regulation (6) must—

(a) include a determination as to whether the alleged misconduct is of

a serious or a less serious nature;

(b) authorise the mayor, in the case of municipal manager, or municipal manager, in the case of the manager, directly accountable to the municipal manager to—

(i) appoint—

(aa) an independent and external presiding officer; and

(bb) an officer to lead evidence; and

(ii) sign the letters of appointment.”

10] This is a far cry from the simple process outlined in the guidelines contained in Schedule 8 to the LRA.

11] The process for a precautionary suspension is dealt with specifically in regulation 6. Unfortunately, it is a badly drafted regulation and its intention is far from clear. It reads as follows:

“6. Precautionary suspension.—(1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that—

(a) the presence of the senior manager at the workplace may—

(i) jeopardise any investigation into the alleged misconduct;

(ii) endanger the well-being or safety of any person or municipal property;
or

(iii) be detrimental to stability in the municipality; or

(b) the senior manager may—

(i) interfere with potential witnesses; or

(ii) commit further acts of misconduct.

(2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven (7) days of being notified of the

council's decision to suspend him or her.

(3) The municipal council must consider any representation submitted to it by the senior manager within seven (7) days.

(4) After having considered the matters set out in sub-regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.

(5) The municipal council must inform—

(a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and

(b) the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven (7) days after such suspension.

(6) (a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.

(b) The period of three months referred to in paragraph (a) may not be extended by council."

12] The contentious sub-regulation on the facts of this case is regulation 6(2):

"(2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven (7) days of being notified of the council's decision to suspend him or her."

13] The sub-regulation appears to contain an inherent contradiction: The council must give the manager an opportunity to make representations before he or she is suspended; but must do so within seven days of the council's decision to suspend him or her.

14] How can the council give the manager an opportunity to make representations before deciding to suspend him if the decision to suspend

has already been taken?

- 15] In order to make sense of this provision, one has to give meaning to the clause “within seven days⁶ of being notified of the council’s decision to suspend him or her.”
- 16] In *Nell v Mulbarton Gardens (Pty) Ltd*⁷ the phrase “within seven days of the posting of a written notice” was construed to mean “within seven days after the posting of a written notice”, and the first day was excluded. That seems like an obvious and sensible interpretation.
- 17] If the provision to make representations before suspension is to have any meaning, it must mean that the manager must have a period of seven days within which to make representations before a final decision to suspend is taken.
- 18] Mr *Pillay*, for the respondents, sought to persuade me that the clause could mean that a manager is suspended on day one; and that he then has a further seven days within which to make representations. Thus, said Mr *Pillay*, a manager who is suspected of serious misconduct – eg fraudulent tender procedures – can be removed immediately, but the principle of *audi alteram partem* will still be complied with.
- 19] Such an interpretation cannot be sustained in the context of the regulation as a whole. Sub-regulations (3) and (4) make it clear that, after the manager had made representations, the council must consider them; and only thereafter can it suspend the manager. Ergo, the manager must be given at least seven days within which to make representations why he or she should not be suspended; then the council has another seven days within which to consider those representations; and only then, should the representations not be persuasive, may the council suspend the manager.
- 20] These provisions may well be unduly onerous. But it is common cause that the parties are bound by them. Failure to do so would make the suspension unlawful for want of compliance with the regulations.

⁶ “day” is defined as “calendar day”.

⁷ 1976 (1) SA 294 (W) 297H.

- 21] Mr *Mkwibiso*, for the applicant, also sought to base his claim on a common law right to fair dealing to be implied in the contract of employment. He persisted with that argument despite the clear authority in *South African Maritime Safety Authority v Mackenzie*⁸ that no such implied right exists in our law. He went so far as to suggest that the judgment of the Supreme Court of Appeal is “clearly wrong” and that I should reject it. I will not accept that invitation. I am clearly bound by the pronouncement of the SCA in *Mackenzie*.
- 22] But that does not detract from the applicant’s claim based on regulation 6, as opposed to any implied right to fair dealing to be read into his contract of employment. As I recently pointed out in the similar case of *Lebu v Maquassi Hills Local Municipality*⁹:

‘It must also be borne in mind that the language of ... the regulations is clear in this case. The employee has a contractual right to know what the reasons are for his intended suspension, and to make representations in regard thereto. This is not a case where the employee’s claim is based on an implied right to fairness. In *South African Maritime Safety Authority v McKenzie*¹⁰ the Supreme Court of Appeal has now held that no such an implied right can be read into contracts of employment generally. Therefore, Lagrange J held in *Mahlalela v Pensions Fund Adjudicator*¹¹, with reference to the earlier judgment in *Mogothle v Premier of the Northwest Province & others*¹²:

“In that case, the court held that a trio of decisions by the Supreme Court of Appeal had established an employee’s contractual right to fair dealing that can be enforced by the Labour Court under the provisions of s 77(3) of the Basic Conditions of Employment Act 75 of 1997, which exists independently of any statutory rights to protection against unfair labour practices.

8 (2010) 31 *ILJ* 529 (SCA).

9 J 2039/11 (Unreported, 21 October 2011) at paras [36] – [39].

10 2010 (3) SA 601 (SCA); [2010] 3 All SA 1 (SCA).

11 (2011) 32 *ILJ* 1932 (LC) paras [11] – [12].

12 (2009) 30 *ILJ* 605 (LC); [2009] 4 BLLR 331 (LC).

However, since this decision, the SCA decisions referred to in *Mogothle* have been revisited by the SCA in its recent decision in the *McKenzie* case. In that case the SCA unequivocally held that, in the absence of specific provisions in a contract of employment to the contrary, an employer did not owe an employee a contractual obligation to act fairly. Wallis JA distinguished the authority of the previous decisions referred to by Van Niekerk J [in *Mogothle*], finding in effect that those decisions did not establish the existence of a contractual right to fairness. It might be that there could be sound reasons not to follow the apparently authoritative dicta in *McKenzie*, but none were advanced and accordingly I must accept for present purposes that the latest pronouncement of the SCA on the non-existence of a contractual duty of fairness must prevail. Consequently, insofar as the applicant relies on a contractual obligation of fair dealing, he cannot succeed.”

‘But as I have pointed out, the applicant in this case has a clear contractual right, and there is no need to read such a general implied term into his contract of employment. There is a specific provision in the contract – and in regulation 6 – dealing with the employee’s rights prior to suspension.

The sentiments expressed by Van Niekerk J in *Mogothle* are therefore still applicable to the case before me, even if no general right to fair dealing can be implied in the contract of employment. In this case, the contractual rights pertaining to the reasons for suspension are set out in the applicant’s contract of employment and in the Regulations.

‘And, as Nugent JA recently pointed out in *Manana v King Sabata Dalindyebo Municipality*¹³:

“The evidence in this case establishes the existence of a contract of employment between the municipality and [the applicant]. And he wishes to enforce the contract... That he might have been entitled to other relief under the remedies provided for under the Labour Relations Act does not somehow extinguish his contractual rights.”

- 23] In the current case, I will disregard the applicant’s claim to an implied right to fair dealing, following the judgment in *Mackenzie*. I will, however, consider his rights under regulation 6.

13 [2011] 3 BLLR 215 (SCA) para [23].

Urgency

24] Mr *Pillay* submitted that the matter was not urgent. I disagree. The applicant was suspended on 1 November. (He says that he only received the letter of suspension on 2 November). He launched the application on 7 November. He does not know when his disciplinary hearing will take place. In terms of the regulations it must be within three months. He acted with sufficient alacrity in bringing this application, and he could not be expected to wait until the suspension had run its course.

Clear right?

25] In terms of regulation 6, the applicant had a clear right to be given seven days' notice of the council's intention to suspend him. He was given notice on 27 October to submit representations by 31 October. That amounts to four days' notice. It is a contravention of the regulations. Technical as it may seem, it renders the suspension unlawful. The applicant has established a clear right for the first part of the relief he seeks, i.e. to declare the suspension unlawful and to set it aside.

26] The applicant also seeks consequential relief to order the respondents to investigate alleged acts of fraud and corruption by other employees and to deliver a report to this court within three months. He has not established a clear right to that relief.

Irreparable harm

27] Although the applicant has had the opportunity to make representations, is still suffering harm. As he set out his affidavit, his integrity and reputation has been sullied. And, as Van Niekerk J pointed out in *Mogothle (supra)*:¹⁴

“In so far as the substantive dimension of fair dealing in relation to suspension is concerned, Halton Cheadle has observed that suspension is the employment equivalent of arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. On this basis, he suggests

14 *Mogothle v Premier of the Northwest Premier & another* [2009] 4 BLLR 331 (LC) para [31].

that employees should be suspended pending a disciplinary enquiry only in exceptional circumstances. The only reasonable rationale for suspension in these circumstances, Cheadle suggests, is the reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question (see Cheadle “Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA” (DPRU Working Paper number 06/109 DPRU, University of Cape Town, June 2006, also published in edited form in (2006) 27 ILJ 663 at paragraph [71])).”

28] In the current case, the municipality has simply provided the applicant with a copy of the “complaint sheet” outlining the allegations of misconduct. It has not explained why, or even if, in the language of regulation 6, there is reason to believe that –

- “(a) the presence of the senior manager at the workplace may—
 - (i) jeopardise any investigation into the alleged misconduct;
 - (ii) endanger the well-being or safety of any person or municipal property; or
 - (iii) be detrimental to stability in the municipality; or
- (b) the senior manager may—
 - (i) interfere with potential witnesses; or
 - (ii) commit further acts of misconduct.”

29] In these circumstances the applicant is suffering harm that cannot be repaired in any way other than to reinstate him pending a proper procedure in terms of the regulations.

Absence of alternative remedy

30] The applicant specifically disavows any reliance on an unfair labour practice in the form of unfair suspension as contemplated by s 186(2)(b) of the Labour Relations Act.¹⁵ Had he relied on that provision, he may have had an alternative remedy by referring an unfair labour practice dispute to

¹⁵ Act 66 of 1995.

the relevant bargaining council in terms of s 191 of the LRA. (Although that subsection could be interpreted to apply only to suspension as a disciplinary measure in itself, and not as a precautionary suspension pending a disciplinary process). But his claim is founded on a breach of the regulations. The only alternative remedy would be a claim for damages. That would be nearly impossible to quantify and would in any event be too late, as it would not be heard before he is due to face a disciplinary hearing, which has to take place within three months from the date of suspension in terms of regulation 6(6).

Conclusion

- 31] The applicant has established that his suspension is unlawful. He is entitled to a declaratory order in that regard and to an order that he must be reinstated. He is not entitled to the further consequential relief he seeks.

Costs

- 32] The applicant has had to incur legal costs in order to enforce his rights. His attorneys alerted the municipality to its failure to adhere to the regulations, even before he was suspended. The municipality could easily have rectified its unlawful actions. It did not do so. Costs must follow the result.

Ruling

- 33] Therefore, I issue the following order:

33.1 The applicant's suspension by the respondents on 1 November 2011 is declared unlawful.

33.2 The applicant's suspension is set aside and the respondents are ordered to reinstate him.

33.3 The respondents are ordered to pay the applicant's costs.

A J Steenkamp
Judge

APPEARANCES

APPLICANT: VG Mkwibiso of Shepstone & Wylie.

RESPONDENTS: I Pillay
Instructed by Norton Rose.