



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

JUDGMENT

Case no: J 291/12

In the matter between:

POPCRU obo O M SEPHANDA AND
ANOTHER

Applicant

and

THE PROVINCIAL COMMISSIONER:
SOUTH AFRICAN POLICE SERVICES,
GAUTENG PROVINCE

First Respondent

THE MINISTER OF SAFETY AND
SECURITY

Second Respondent

Heard: 15 February 2012

Delivered: 17 February 2012

Summary: (urgent – suspension without pay –SAPS Regulations -
precautionary requirement not met)

JUDGMENT

LAGRANGE, J

Introduction

[1] This application was brought as a matter of urgency on 3 February 2012 after the applicants had only been advised of their suspension on 30 January 2012. The applicants were suspended without pay after their disciplinary enquiries had already commenced and after the principal witness of the employer had already testified. The applicants face serious charges of defeating the ends of justice relating to an alleged attempt to suppress a complaint of bribery against two subordinates.

[2] The employer was aware of the factual basis of the complaint since late in 2010, yet only suspended the applicants on 30 January 2012 after notifying them of their prospective suspension on 13 December 2011 and after receiving their representations. In the notice of the contemplated suspension the reason for the proposed suspension provided by the Provincial Commissioner was stated in the following terms:

"1. Take note that your suspension without remuneration is being considered in terms of regulation 13 (two) of the South African Police Service Discipline Regulations 2006 promulgated in accordance with section 24 (1) (g) of the South African Police Service Act No. 68 to 1995, for the following reason (s):

1.1 it is alleged that on 2010 – 08 – 31 you were approached by the complainant to want to open a criminal case of corruption against members under your command, namely W/O Seshweni and Const. Mooka. You then pleaded with the complainant not to open a criminal case and you are raised or allowed the erasure of the video footage. A

criminal case Pta-Central CAS 1214/09/2010 – defeating the ends of justice has subsequently [been] opened.'

- [3] In the notice of suspension issued to the applicants on 31 January 2012, the commissioners reasoning for the suspension reads:

"1. Take note that after due consideration of all the relevant facts and circumstances, as well as your representation:

you are suspended without remuneration with effect from the date of receipt of this notice in accordance with the provisions of regulation 13(2)....

1.1.1 I am satisfied on reasonable grounds that you have allegedly committed serious misconduct as contemplated in regulation 20 in that:

It is alleged that on 2010 – 08 – 31 you were approached by the complainant to want to open a criminal case of corruption against members under your command, namely W/O Seshweni and Const. Mooka. You then pleaded with the complainant not to open a criminal case and you are raised or allowed the erasure of the video footage. A criminal case Pta-Central CAS 1214/09/2010 – defeating the ends of justice has subsequently [been] opened.

2. Take further note that the misconduct as described above is misconduct as contemplated in an Annexure A of the Disciplinary Regulations. I am satisfied that the case against you is so strong that it is likely that you will be convicted of a crime and be dismissed as a result of the disciplinary hearing."

Urgency

- [4] It cannot be said that the applicants did not launch this application at the earliest opportunity. However, the respondent argued that since the relief sought concerned the payment of salary this could not be a ground of urgency. It is also submitted that any loss of dignity or respect occasioned by being removed from the workplace was not something which the court ought to take account of. Accordingly, there was no reason to deal with the matter on an urgent basis. Lastly, the respondent submits that the challenges to the

Commissioner's decision based on the points raised in this application, were not issues put before the Commissioner when he called upon the applicants to make submissions on why they ought not to be suspended.

- [5] The respondent cited a number of cases in which financial or pressures were deemed insufficient to justify urgency, on the basis that alternative mechanisms existed for a party to recover financial loss and financial pressure, as such, was not deemed to be a valid reason for treating the matter as urgent, such as ***Hultzer v Standard Bank of SA (Pty) Ltd (1999) 20 ILJ 1806 (LC)*** at and ***Democratic Nursing Organisation of SA & Another v Director-General, Department of Health & Others (2009) 30 ILJ 1845 (LC)***. In those cases the employees claiming payment of remuneration or continuation of benefits had already been dismissed when they initiated urgent proceedings. It stands to reason that granting relief in the form of remuneration or other benefits of employment when the very employment status of the individual is in issue, would be an extraordinary remedy.
- [6] However, the circumstances in this case are not strictly comparable. The applicants currently remain employees of the respondent. The drastic measure taken by the employer of stopping the applicants' salaries whilst they remained employed is the exercise of an extraordinary power which makes a serious inroad into an employee's common-law employment right to be remunerated so long as one remains in employment and tenders one's services. To my mind, this is the type of situation in which a claim for payment of salary can be raised on an urgent basis, in the same way that any failure to pay wages to an employee who remains in service could give rise to an urgent application for specific performance.¹ An

¹ ***Nationwide Airlines (Pty) Ltd v Roediger & Another 2008 (1) SA 293 (W)*** at 296-299, [14]-[28].

employer's obligation to remunerate an employee is a fundamental component of the reciprocally rendered obligations of the employment contract. Moreover, where suspension is implemented without pay, it is difficult to ignore the punitive connotation of such a measure, especially where it is premised on the employer having anticipated the probable outcome of disciplinary and criminal proceedings. In these circumstances, where there is a procedure with some procedural safeguards to minimise the arbitrary use of this power, if important components of those safeguards are bypassed an employee ought to be entitled to approach this court on an urgent basis for relief.

Lis alibi pendens and Jurisdiction

- [7] The respondents' other points *in limine* are closely related. Firstly the respondent contends that because the applicants had referred an unfair labour practices claim to the bargaining council over their suspension, the matter which the court was asked to determine in this forum was already pending before another one. Secondly, it argued that the applicants were essentially asking this court to determine an issue which is the exclusive preserve of the bargaining council and therefore this court had no jurisdiction in terms of section 157 (5) of the Labour relations act, 66 of 1995 ("the LRA"). The answer to both these objections lies in whether or not the claim before the bargaining council is identical to claim the court is asked to adjudicate.
- [8] The primary relief the applicants ask is for this court to review and set aside the decision to suspend them without pay on the basis that there was no factual basis which entitled the Commissioner to act in
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terms of regulation 13 which provides for precautionary Suspensions. Essentially, this amounts to saying that the suspension lacks any precautionary character, the timing of the suspension suggests the commissioner did not act *bona fide*, and there is no factual basis for the Commissioner to conclude that the case against the applicants was so strong that it was likely to result in a conviction and dismissal.

- [9] This kind of attack goes to the legality of the Commissioner's decision. The requirements of legality are well-established. To satisfy the principle that a person exercising a statutory power may not do so in bad faith, arbitrarily or irrationally², and may not exercise a power or perform a function beyond that conferred upon them by law.³ It is true as Mr Mtsweni contended for the respondent that there will be an overlap between questions of legality and some issues that might be considered by an arbitrator deciding whether the suspension amounts to an unfair labour practice, but the application for review on the basis of legality is quite distinct: it concerns the lawfulness and not the unfairness of the Commissioner's action. Moreover, the arbitrator has no authority to determine the lawfulness of the suspensions, as such. For this reason neither the *in limine* objection based on *lis alibi pendens* nor the one based on jurisdiction can succeed.

The merits of the review

- [10] The notice of suspension relies solely on the Commissioner stating that he is satisfied that the requirements of Regulation 13(2) were

² ***Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC)*** at 575,[23].

³ ***Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)*** at 400,[58].

met, namely that the applicants were charged with serious misconduct and that the case against them was so strong that it was likely they would be convicted of a crime and dismissed as a result of a disciplinary hearing.

[11] The respondent argued that this is sufficient in order to suspend the applicants without pay. However, this cannot be correct. Firstly, this regulation is merely one provision in the regulations governing precautionary suspension. Secondly, Regulation 13(3) clearly states: "A suspension is a precautionary measure". Regulation 13(3) does not distinguish between suspensions with or without pay, or any other type of suspension, and there is no reason to believe it does not apply equally to suspensions without pay under Regulation 13 (2). Consequently, even if the respondent is right to say that the requirements of regulation 13 (2) have been met, the suspension in question must still be for a precautionary purpose.

[12] A precaution is "*a measure taken beforehand to avoid a danger or ensure a good result*" (Shorter Oxford English Dictionary, 6ed, 2007, vol2). There is nothing in the respondent's notice of suspension that provides any indication why it considered it necessary to suspend the applicant's at a stage when the enquiry was already well underway. It is only in its answering affidavit that it says it became apparent to it on 7 December 2012 that some of the witnesses it intended to call were the applicants' subordinates and were reluctant to testify against them in fear of victimisation and harassment or victimisation. However, firstly there is no claim that the applicants had acted improperly in this regard, but most tellingly there is not the slightest hint of this being the reason for the suspension in the notice of proposed suspension, nor in the notice confirming the suspension.

[13] Moreover, in so far as the real reason was to prevent interference with potential witnesses, the applicants were not even given an opportunity to respond to this suspicion before they were suspended,

so the notice of possible suspension was materially defective because it did not fulfil the purpose of giving them advance warning of why the employer intended to suspend them so they could respond to that reason. Mr Mtsweni conceded, rightly, that the absence of any stated precautionary purpose in the notices was a fundamental difficulty with the respondent's case.

- [14] Ms Prinsloo argued that regulation 13 (2)(c) could be read to mean that the Commissioner could not implement a suspension without pay in terms of the regulation unless this occurred before the commencement of the disciplinary process. However, she conceded, also correctly, that the more probable purpose of that provision was to limit the abuse of suspension as a way of removing an employee from the workplace and thereafter never initiating any disciplinary action. I do not read that provision to mean that the employer is confined to suspending a person without pay only if it is done no less than 14 days before the commencement of disciplinary proceedings.
- [15] Nevertheless, in this instance the suspension was implemented long after the matter had been investigated and the allegations against the applicants were known, on top of which the disciplinary hearing was well advanced. These are all circumstances which call for an extremely well motivated explanation why a precautionary suspension is implemented at such a late stage.
- [16] It is clear on the evidence before me, that the suspension was not prompted by a precautionary consideration. Because this is a prerequisite of any suspension under the regulations, the Commissioner in acting solely on the purported basis of the severity of the charges and the prospect of conviction and dismissal, acted outside of the powers conferred on him by Regulation 13, and thereby breached the principle of legality. For this reason alone, the suspension ought to be set aside.

[17] Even if the employer has grounds for believing that there is a strong likelihood they will be convicted of a crime and dismissed, which is not necessary to consider in this instance, the suspension must still serve a precautionary purpose. Such a purpose is absent in this case. In view of this finding, it is not necessary to consider the applicant's other grounds of review.

Relief and costs

[18] As the suspension is so fundamentally wanting on a basis that provides legal grounds for relief quite distinct from the applicants' rights in respect of unfair labour practices, there is no reason to grant temporary relief pending the outcome of proceedings in the bargaining council.

[19] On the basis of the grounds given for the proposed suspension, the respondent should not have contested this matter and there is no reason why the applicants should incur the costs of the matter. Also, despite the ongoing relationship between the parties, both asked for costs if they were successful.

Order

[20] Accordingly, an order is granted in the following terms:

20.1 The matter is dealt with as one of urgency;

20.2 The first respondent's decision to suspend Lt-Colonel Sephanda and Captain Modise without remuneration is reviewed and set aside;

20.3 The respondents must permit the abovementioned applicants to return to work on the next working day after this order is granted;

20.4 The respondents must pay the costs of the application.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: C Prinsloo, instructed by Grosskopf Attorneys

RESPONDENTS: D Mtsweni instructed by the State Attorney