



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 610/12

In the matter between:

SAMWU OBO TENANE C MAKOLA

Applicant

And

NKANGALA DISTRICT MUNICIPALITY

Respondent

Heard: 23 March 2012

Delivered: 27 March 2012

JUDGMENT

VAN NIEKERK J

- [1] Mr Mokola is employed by the respondent as a municipal manager. On 27 January 2012, he was handed a letter advising him that he had been placed on precautionary suspension, with immediate effect, on full pay. No reasons were provided in the letter for the suspension, but Makola was afforded the opportunity to make written representations within seven days.
- [2] In this application, brought on an urgent basis, the applicant seeks to have Makola's suspension declared unlawful and set aside.

- [3] I do not intend to set out the facts relevant to the application; they are canvassed in the papers. There is a preliminary issue to be resolved. This matter originally came before this court on 9 March 2012, when Malindi AJ ruled that the matter was urgent, directed the parties to file answering and replying affidavits, and ordered the respondent to pay the costs of the day's proceedings. When the matter was called, the respondent had filed a brief answering affidavit dealing only with the question of urgency, in which it was disputed that the application was urgent. A second answering affidavit, dealing with the merits of the application, was later filed in accordance with the court's directive. The applicant contends that having failed in its first answering affidavit to deal with the merits, and not having denied or otherwise addressed the contents of the founding affidavit other than the averments relating to urgency, it was not open to the respondent to deal with the merits in a second answering affidavit and that the applicant's version is therefore deemed to be admitted.
- [4] There is no merit in this contention. The initial answering affidavit makes it clear that the response is limited to the question of urgency. Implied in that is a reservation of rights to deal with the merits if and when that should become necessary. As matters transpired, it became necessary for the respondent to address the merits. That is also the assumption that underlies the court's directive as to the filing of further affidavits – the court would hardly have directed the respondent to file an answering affidavit if it had considered the affidavit filed on the day of the hearing as conclusive of the respondent's averments in relation to the founding papers. In any event, given the conclusion to which I have come in relation to this part of the proceedings, and as will appear more fully from the reasoning recorded below, the application stands to be dismissed on its own version.
- [5] The applicant seeks a final order. The test that the applicant is required to meet is well-established. The applicant is to demonstrate a clear right to the relief sought, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.
- [6] It is not disputed that on 29 February 2012, the applicant referred a dispute to the CCMA, contending that his suspension constituted an unfair

labour practice. The dispute had been set down for con-arb on 22 February when the conciliation failed but the arbitration could not proceed, since the respondent had objected to an arbitration hearing immediately following the conciliation. An arbitration hearing has been scheduled next month, April 2012.

- [7] The applicant contends that the scheduled arbitration is not an alternative remedy, since that process concerns the fairness of Makola's suspension, while these proceedings concern the question of lawfulness. In my view, in the present circumstances, this is not a material distinction. At issue are the procedural requirements relevant to Makola's suspension, and in particular, those requirements established by Makola's contract of employment and the relevant regulations governing the suspension of a municipal official. Should the respondent's conduct be found wanting in the arbitration process (either on the basis that it failed to comply with the contract of employment or the applicable regulations), the suspension will undoubtedly be held to constitute an unfair labour practice, and will be set aside. A suspension that is unlawful (at least in relation to any non-compliance with contractual or regulatory measures) is by definition unfair. It seems to me that having invoked the arbitration process, there is no reason why the applicant should not permit that process to take its course. Since the applicant is afforded the same or similar protection by another available remedy, this application stands to be dismissed.
- [8] There is a dispute on the papers that concerns the clear right for which the applicant contends. The respondent avers that there was a discussion between Makola and the respondent's executive mayor prior to the council adopting a resolution to place the applicant on special leave, and that the applicant was well aware of the nature of the allegations of misconduct made against him. Given the conclusion to which I have come, it is not necessary for me to make any finding in this regard, and I refrain from doing so. It is ultimately for an arbitrator to decide whether there was substantial compliance with both Makola's contract of employment, and the regulations that governed that employment.

- [9] Finally, in relation to costs, I see no reason why costs should not follow the result. To be clear, the order for costs has no effect on the costs order made on 9 March 2012.

Order

For the above reasons, I make the following order:

1. The application is dismissed, with costs.

Van Niekerk J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

P Kennedy SC

Instructed by Allardyce & Partners

RESPONDENT:

R Edmonds, Ruth Edmonds Attorneys