



REPUBLIC OF SOUTH AFRICA

Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Case no: J1773/12

In the matter between:

VUSI MASHIANE

Applicant

and

DEPARTMENT OF PUBLIC WORKS

First Respondent

Heard: 17 July 2012

Delivered: 18 July 2012

Summary: (Urgent – interdict – suspension – SMS handbook – clause 7 – authority to suspend while enquiry underway).

JUDGMENT

LAGRANGE, J

Introduction and background

brief chronology

- 1] The applicant is employed by the respondent as the Director: Property Management- Pretoria Regional Office. On 30 November 2011 he

received a notice of suspension, which was issued pursuant to a notice of intention to suspend which he claims he never received on time to respond to. The notice of suspension advised him amongst other things:

"2. You are hereby informed of the decision to put you on precautionary suspension pending further investigations into allegations of misconduct levelled against you. Your suspension is in line with disciplinary code and procedures for members of senior management services (S M S). The suspension is a precautionary measure and does not in any way constitute a judgement or a sanction.

3. The reason for the above-mentioned decision is to create a conducive environment the internal investigation into the following allegations of misconduct:

...[The notice then describes his alleged involvement in the irregular leasing of a building in Pretoria]...

4. To avoid possible interference with the available documents and potential witnesses, you are directed not to enter the premises of the department during a period of suspension,...

...

7. Your suspension will be reviewed in the next 30 days, when you will be afforded opportunity to appear in a disciplinary hearing."

- 2] The applicant was booked off ill at the beginning of 2012 until 20 January. His attorney enquired whether he could return to work on 23 January as the 30 day period mentioned in the notice had expired. On 23 January 2012, the respondent advised that it was still busy with the investigation into his conduct and would communicate with him on the outcome of those investigations, but in the meantime his suspension was extended for a further 30 days. The applicant announced his intention to report for work when this period of suspension lapsed, but on 23

February 2012 the respondent issued a further letter saying that the investigation was still in progress and the precautionary suspension would be extended. It further advised that he would receive the outcome of the investigation on or before the end of March 2012 and that he should not report for duty pending the finalisation of the investigation. He was invited to make representations against this decision to extend his suspension. The applicant's response was that this extension of his suspension was *ultra vires* the provisions of the Senior Management Service handbook and was procedurally and, or alternatively, substantively unfair.

- 3] Pursuant to this letter, the applicant referred a dispute concerning an unfair suspension to the General Public Service Sectoral Bargaining Council ('the GPSSBC'). Ultimately, this referral culminated in an arbitration award issued on 22 June 2012 in terms of which it was ordered that his precautionary suspension should be uplifted with immediate effect.
- 4] The applicant then reported for duty on 2 July 2012, whereupon he was given a letter notifying him of the respondent's intention to suspend him afresh. The letter referred directly to the arbitration award and stated, among other things:

"3. I write to advise that the department remains concerned about Mr Mashiane being at work whilst he is facing a disciplinary process.

4. The department hereby invites Mr Mashiane to make written representations as to why he should not be placed on suspension pending the conclusion disciplinary process against him...."

- 5] In a letter dated 4 July 2012, the applicant's attorney retorted that the intended suspension of the applicant was an attempt to bypass the provisions of clause 2.7 (2) (c) of the SMS handbook and, in particular, to thwart the very purpose of that provision which is to avoid the protracted suspension of employees. The letter further pointed out that by that date

the applicant had been suspended for a period of 217 days, which was well in excess of the 60 day period contemplated for precautionary suspension in the handbook. The letter concluded by calling on the respondent to furnish an undertaking that it would not place the applicant on preventative suspension pending the finalisation of the hearing, failing which he would have no alternative but to approach the Labour Court for urgent relief.

- 6] The respondent's answer to this was to confirm on the same day that it had decided to suspend the applicant, supposedly after considering his attorneys representations. Material portions of the notice stated:

“2. In the light of (1) seriousness of the allegations, (2) overwhelming evidence that the department has against you and lastly, (3) prejudice that would be suffered as a result of your presence at work, we deem it appropriate to suspend you.

3. Your suspension shall therefore endure until conclusion disciplinary process.

4. During the suspension, you are required not to contact members of staff unless prior permission is obtained... You are further required not to enter the premises of the employer unless prior written permission is obtained...”

- 7] The applicant felt in the light of this response that he had no meaningful alternative but to approach this court on an urgent basis to secure his return to work in the face of what he perceived to be a breach of the order contained in the arbitration award and an unlawful act of the respondent in trying to suspend him contrary to the provisions of the SMS handbook. This application was then launched on 12 July 2012.

The provisions of the SMS handbook

- 8] *Chapter 4, Part 1 of the Public Service Regulations, as amended on 16 July 2004 states:*

“D. HANDBOOK FOR SMS

The Minister may include any or all of the determinations, directives, guidelines and provisions applicable to the SMS in a Handbook for the SMS.”

- 9] *It has been suggested that the provisions dealing with discipline are guidelines and therefore are not binding. However, chapter 7 of the 2003 Handbook does not refer to any of the disciplinary provisions as ‘guidelines’. In the SMS handbook, the term ‘guideline’ is specifically used to describe other procedures or practices set out in the SMS handbook, such as: ‘Guidelines for the composition of advertisements’ (Clause 7.2); ‘additional guidelines on interviews’ (Clause 8.6 (3)) or, ‘National policy and guidelines on performance based pay and rewards’ (Clause 15.1).”*
- 10] *The introduction to chapter 7 of the 2003 SMS handbook, which is the chapter dealing with misconduct and incapacity, states among other things:*

“1. INTRODUCTION

1.1 The chapter contains the procedures that must be applied in cases of misconduct, incapacity due to poor performance and incapacity due to ill health of members of the SMS (hereafter referred to as “members”). As regards misconduct, PSCBC Resolution 1 of 2003 envisages the issuing of a directive by the Minister for the Public Service and Administration to cover the disciplinary matters of members of the SMS. The procedures for

misconduct in paragraph 2 below incorporates those provisions of PSCBC Resolution 1 of 2003, which were considered appropriate and practicable in respect of members of the SMS...

- 11] Resolution 1 of 2003 of the Public Service Coordinating Bargaining Council amended resolution two of 1999 containing the disciplinary code and procedure for the public service. This resolution amongst other things states that:

“3. Therefore the parties resolve-

- a) to amend resolution and 2 of 1999 as indicated in the attached schedule 1;*
- b) that the provisions of the amended disciplinary procedure remain applicable to members of the Senior Management Service of the public service until such time as the Minister for the Public Service and Administration issues a directive to cover the disciplinary matters of this group of employees;...”*

- 12] Clause 7.2 of the public service disciplinary code and procedure attached to resolution 1 of 1999 states:

“7.2 precautionary suspension

a. The employer may suspend an employee on full pay or transfer the employee if

- i the employee is alleged to have committed a serious offence; and*
- ii the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the*

well-being or safety of any person or state property.

b. A suspension of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay.

c. If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary enquiry within a month or 60 days, depending on the complexity of matter and the length of the investigation. The chair of the hearing must then decide any further postponement. “

- 13] Although it is not part of the handbook as such, the foreword to the handbook by the Minister of Public Service and Administration, assets that:

“The purpose of this handbook is set out, in clear and concise terms, the conditions of employment and the roles of SMS members.”

- 14] The relevant, and only, provision dealing with suspension in the context of a disciplinary enquiry is clause 2.7(2) which reads:

“(2) Precautionary suspension or transfer

(a) The employer may suspend or transfer a member

on full pay if -

- the member is alleged to have committed a*

serious offence; and

- the employer believes that the presence of*

a member at the workplace might

jeopardise any investigation into the alleged

misconduct, or endanger the well being or

safety of any person or state property.

(b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay.

(c) If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement.

- 15] It is readily apparent that this provision is identical to clause 7.2 of the public service disciplinary code and procedure.

The submissions of the parties

- 16] The applicant's representative, Mr Rhooode, in seeking to establish the basis of the applicants' right to relief, argued that only the chairperson of the enquiry could extend the period of suspension after the 60 day period had expired. Alternatively, he submitted that even if it was a fresh suspension and not a continuation of the previous one it was contrary to the SMS handbook which was binding on both parties by virtue of being endorsed in a collective agreement. It does seem clear from the various extracts cited above that the SMS handbook was intended to set out terms and conditions of employment except where it is clearly intended to only provide guidelines. In any event, resolution one of 1999 contains the identical provision at issue in this instance and by virtue of being a collective agreement is clearly binding on the parties.

- 17] The applicant placed reliance on the case of ***Lekabe v Minister:***

Department of Justice & Constitutional Development (2009) 30 ILJ 2444 (LC) in which Molahlehi J said:

“[16] Turning to the specific issue in the present instance, in my view it could never have been the intention of the parties that clause 2.7(2)(c) of the SMS Handbook should take away the right of an employer to discipline an employee on the expiry of the 60 days from the date of suspension . In essence the case of the applicant in the present instance is that the right of the respondent to proceed with the disciplinary hearing prescribed on the expiry of the 60 days from the date of his suspension .

[17] In my view clause 2.7(2)(c) deals with suspension and not disciplinary action. There is nothing in this clause that says an employer would lose the right to discipline an employee on the expiry of the 60 days from the date of the suspension . I have not been able to find even a basis for implying the interpretation sought by the applicant or the one given by the court in Mlambo. At best, as I see it, the suspension falls away after the 60 days unless the chairperson of the disciplinary hearing extends that period.

[18] The purpose of clause 2.7(2)(c), as I see it, is to address the problem of protracted suspensions which demoralize and unfairly prejudice the suspended employee. It would appear that the mischief which the parties sought to address with the provisions of clause 2.7 was to deal with what Van Niekerk J in Mogothe v Premier of the Northwest Province & another (2009) 30 ILJ 605 (LC) regarded as the tendency by certain employers to -

'regard suspension as a legitimate measure of first resort to the most groundless suspicion of misconduct, or worst still, to view suspension as a convenient mechanism to marginalize an employee who has fallen from favour'.

[19] Thus the right of the employee in the event that the

employer does not uplift the suspension on the expiry of the 60 days is to file an unfair labour practice claim or bring an application to have an order directing the employer to uplift the suspension . I need to emphasize that in my view it could never have been the intention of parties that the right to discipline by an employer would fall away on the expiry of the 60 days.

[20] The court in Mogothle's case quoted with approval what this court had said in SAPO Ltd v Jansen van Vuuren NO & others (2008) 29 ILJ 2974 (LC); [2008] 8 BLLR 798 (LC). The court in that case was dealing with the abuse of power by the employer through the use of suspensions . As stated earlier the real intention of the parties in promulgating clause 2.7(2)(c) of the SMS Handbook was to address this abuse. The intention was to curb the power of employers in the public service from using protracted suspension as a means of marginalizing those employees who may have fallen out of favour. The intention of the parties was also to minimize if not do away with the resultant detrimental impact, the prejudice to the affected employee's reputation, advancement, job security and fulfilment that would arise from prolonged suspension . See in this regard SAPO at para 37."

(emphasis added)

- 18] I am satisfied that the provision regarding a 60 day time limit within which a disciplinary enquiry must be held was intended to be peremptory and the discretion to extend the enquiry beyond that date rests with the chairperson. It seems to be reasonably incidental to the exercise of that discretion that he must consider the extension of the precautionary suspension, since the purpose of the provision is to prevent lengthy suspensions without disciplinary steps being brought to a conclusion. The chairperson will need to consider after 60 days whether the reasons for the suspension remain valid depending on the progress of the

enquiry.

- 19] He argued also that there was no other practical relief that would be a reasonable substitute for returning him to work without further delay. The previous referral of the first suspension to the Bargaining Council had taken a couple of months to resolve itself, and as things stood it appeared that the fresh suspension was simply an attempt to continue the same even after an award in the applicant's favour.
- 20] Apart from being unable to obtain the benefit of the arbitration award, the applicant also cited other prejudice he might suffer as a result of being away from the workplace. I do not intend to go into detail about this save to say that it concerned his apprehensions about being overlooked in the course of the respondent embarking on a major "turnaround strategy", which involve, amongst other things, looking at the capabilities and capacities of existing senior staff. Although, the respondent was at pains to point out that nobody need fear that they would be prejudiced by this process and that it was not a restructuring program that might lead to retrenchment, the applicant was not appeased by these promises. Nonetheless, I am satisfied that the turnaround strategy being undertaken does not hold any latent or patents prejudice for the applicant. Even so, I accept that if the court did not intervene, it might render the value of the arbitration award meaningless and effectively deprive him of the benefit of a process right, whose principal value lies in being exercised at the time the employee is entitled to rely on it.
- 21] Mr Mooki, for the respondent, rightly questioned the prejudice alleged by the applicant arising from the turnaround strategy, which I have commented on above. As mentioned, I do not think that the applicant could persuade me on the evidence that his position would be irreparably prejudiced by the implementation of the turnaround strategy in his absence, especially in the light of undertakings that any adverse consequences that might arise, even though these are not anticipated, will be the subject of consultations between him and the respondent.
- 22] On the question of whether the fresh suspension was subject to the

provisions of the SMS Handbook, Mr Mooki first attempted to argue that the respondent had a distinct and separate right to suspend an employee, which did not originate in the provisions of clause 2.7. However, no legal basis for this distinct right was advanced. Moreover, the respondent could not explain how an untrammelled right to suspend an employee without regard to the safeguards in clause 2.7 of the Handbook - and by necessary implication, of the provisions of clause 7.2 of resolution 1 of 1999 - would not permit the very mischief which that provision was intended to prevent.²

- 23] A further argument advanced was that the fresh suspension was not merely a continuation of the previous one relating to the current pending disciplinary proceedings against the applicant, but was prompted by further investigations into other tender irregularities which might result in the proffering of additional charges against the applicant. The broad outlines of these investigations were set out in the respondents answering affidavit. Even if I accept this, the notice of intention to suspend the applicant and the decision to suspend him conveyed to him after his return to work do not contain the faintest suggestion that the purpose of the intended suspension related to such fresh investigations and pending charges. On the face of the extracts from those notices cited in paragraphs 4 and 6 above, it is difficult to come to any other conclusion but that the suspension the employer instituted after the applicant returned to work on 2 July 2012 was simply a continuation of the previous suspension. As such it flew in the face of the arbitration award. More over the chairperson of the enquiry did not authorise it, as clearly contemplated by the provisions of the disciplinary code.
- 24] Obviously, if the respondent has bona fide reasons for a fresh suspension, or can persuade the chairperson of the enquiry that it is justified and in keeping with the provisions of the disciplinary code for the applicant to still be suspended in relation to the current proceedings, it might well succeed in having him suspended at a later stage. However,

² The importance of the issue is alluded to in the *Lekabe* decision. Support for the severity of the abuse of suspension is also illustrated in a recent document entitled Report on Management of Precautionary Suspension in the Public Service, July 2011, Public Service Commission.

the respondent's conduct in implementing the fresh suspension on 5 July 2012 was in flagrant disregard of the award and the provisions of the disciplinary code. The abrogation of the applicant's transient process rights in this regard is sufficient to justify granting the applicant relief. There is no other suitable remedy which could afford him equivalent redress.

Order

25] in the light of the above, an order is granted in the following terms:

- 25.1 The non-compliance with the normal rules governing the form and service and timing of applications is condoned and the matter is dealt with as one of urgency;
- 25.2 The suspension of the applicant by the respondent on 5 July 2012 is declared invalid being in contravention of clause 2.7 (2) (c) of the SMS Handbook and clause 7.2 of the disciplinary code and procedure for the public service.
- 25.3 The respondent is interdicted from suspending the applicant in relation to the disciplinary proceedings which are currently set down to continue on 23rd of July 2012 unless authorised by the chairperson of those proceedings.
- 25.4 The arbitration award attached as Annexure "VM 16" to the applicant's founding affidavit is made an order of court in terms of section 158 (1) (c) of the Labour Relations Act, 66 of 1995.
- 25.5 The respondent must pay the applicant's costs on an attorney and own client scale.



R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: B L Rhooode instructed by Deon de Bruyn
Attorneys

FIRST RESPONDENT: O Mooki, instructed by Maserumule Attorneys