



REPUBLIC OF SOUTH AFRICA

Not reportable

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

CASE NO: J 690/14

In the matter between:

MIKATEKO FLOYD CHAUKE

First Applicant

and

**PAN SOUTH AFRICAN LANGUAGE
BOARD
MXOLISI ZWANE**

First Respondent

Second Respondent

Heard: 27 March 2014

Delivered: 28 March 2014

Reasons filed: 02 April 2014

Summary: (Urgent – application for upliftment of suspension pending determination of unfair labour practice dispute – Prima facie case of improper motive for suspensions rendering them unlawful – Alleged occupational detriment - Precautionary suspension employer wrongly placing onus on employee to justify continued presence at the workplace – Costs – poor handling of application wasting court and respondent's time – applicants not entitled to costs).

REASONS FOR JUDGMENT

LAGRANGE, J

Introduction

[1] On 28 March 2014 an order was handed down in the following terms:

“Order

- a. The matter is heard as one of urgency dispensing with the ordinary rules relating to time limits and service as envisaged in Rule 8.*
- b. The respondents’ suspension of the first to fifth applicants on 19 March 2019 is set aside and the respondents must allow the said applicants to return to work with effect from 31 March 2014, pending the outcome of the unfair labour practice dispute referred to the Commission for Conciliation, Mediation and Arbitration as set out in Annexures “KFC 24-30” to the founding affidavit.*
- c. The parties are to pay their own costs*

[2] This application takes place in the context of a torrent of urgent litigation between the respondents and a number of its employees. At the heart of the matter is a complaint that the second respondent who has been variously referred to as the first respondent’s ‘Administrator’, ‘CEO’, ‘acting CEO’ or ‘caretaker CEO’ is not the properly appointed executing authority of the first respondent. In consequence, various actions taken by him have been challenged at least in part on the basis of his alleged lack of executive authority, including his alleged unlawful appointment of a number of staff and retaliatory steps allegedly taken against employees of the first respondent who complained about those appointments.

[3] There is already an application pending before this court which seeks to invalidate the second respondents appointment as CEO and his

subsequent appointment of a number of other employees, but for reasons which remained obscure has not yet been set down for a hearing. The applicants in this matter are among the 26 applicants in that application bearing case number J 157/2014 ('the main application').

- [4] The affidavits in this matter also allude to an application brought by another employee of the respondent in the North Gauteng High Court under case number 64982/12 which was apparently dismissed on the merits. However no copy of the judgement was made available to the court by either party, so the actual findings of the High Court and the legal consequences of that decision for second respondent's status as the executing authority of the first respondent remain uncertain.
- [5] In this application the individual applicants sought to set aside their allegedly unlawful suspension from their duties by the second respondent while an investigation is being conducted into whether they were implicated in various disclosures made to the press about the affairs of the first respondent and the second respondent's role therein. They also sought to interdict anticipated disciplinary action. The relief is sought on an interim basis pending the finalisation of the main application above and the finalisation of their unfair labour practice dispute arising from the suspension.
- [6] The applicants claim that on or about 5 February 2014 the second respondent met with union officials and had suggested to them that the 26 employees who had initiated the application to set aside his own appointment and other staff appointments should be placed on special leave because of tension between them and the newly appointed staff. The proposal of taking special leave was rejected and in early March 2014 the applicants in this matter were served with notices that they were being placed on precautionary suspension. These suspensions were duly challenged and shortly prior to the scheduled hearing by this court, the respondents relented and withdrew the letters of suspension, no doubt having realised that they could not defend the suspensions in the absence of first having given the applicants an opportunity to make representations on why they should not be suspended.

- [7] A week after the suspensions were withdrawn the second respondent issued the applicants with notices of intended suspension pending the outcome of an investigation into allegations of misconduct against them concerning the alleged disclosure of confidential information of the first respondent to the press and the unauthorised use of the first respondent's equipment and resources to make copies of documents supposedly provided to the press. The letters concluded with the following:

"You are hereby called upon to show cause why you should not be suspended pending the investigation into the above-mentioned allegations.

In your written representation you must specifically show cause why your continued presence at the workplace while the investigation is being pursued will not jeopardise the investigation itself and/or interfere with the evidence and/or potential witnesses."

- [8] The respondent itself did not provide its own reasons why it believed the suspensions were necessary, but imposed a duty on the applicants to show that there were no reasons to justify their suspension. Nonetheless, the applicants responded in some detail in the course of which they claimed, amongst other things, that:

- 8.1 investigations had already been conducted without them being removed from the workplace and without them hindering its progress thus far;
- 8.2 they were unaware of any witnesses they might potentially interfere with or what evidence they might tamper with, which could not be secured without them being absent from work;
- 8.3 the press report which prompted the investigation appeared to have been based on the founding affidavit in their main application and hence was information publicly available and there was no basis for believing it was obtained from one of the applicants by other means, and
- 8.4 that there was no basis for the complaint of an authorised copying.

- [9] On 19 March 2014, despite the very detailed representations made by the applicants, which contrast with the paucity of motivation provided by the respondents in support of the proposed suspension, the second respondent suspended the applicants. Paradoxically, given the lack of detail in his own letters to them of 12 March 2014, the second respondent stated in the suspension letter to the applicants that:

"I noticed that you failed to respond adequately to the allegations raised in that notice except to make a bear [sic] denial.

Taking into account the seriousness of the allegations levelled against you which allegations some of them places the organisation at risk of being sued, I have decided to authorise that there should be a further investigation on the matter."

(emphasis added)

- [10] The applicants' representative, *Mr Faku*, argued that the suspensions were not *bona fide* and that the respondents had wrongly cast the obligation on the applicants to provide reasons why they should not be suspended rather than providing them with its own reasons for the proposed retrenchment for their consideration and response. He argued, in effect that the suspensions had been implemented in bad faith, or for an improper purpose, because the employer had not genuinely intended to consider any representations from the employees before suspending them but had merely been going through the motions to implement a decision which it had already previously taken when it issued the first notices of suspension to them on 4 March 2014. He further pointed out that the initial suspensions had followed shortly after the 26 applicants in the main application had rejected the respondent's proposal to place them on special leave. He inferred that having been thwarted in that initiative to remove the applicants from the workplace, the respondent was now embarking on a more gradual alternative method of doing so by means of the suspension procedures it had invoked
- [11] In this regard, it is noteworthy that the respondents do not deny, except in the broadest terms, that a meeting as described by the applicants took place on five February, in which the second respondent proposed placing

the applicants in the main application on special leave because of tension between them and the newly appointed staff. It is simply insufficient to issue a broad denial of such allegations without clarifying the nature of the denial. A broad denial of this nature could mean that the respondents deny each and every allegation, which is not expressly stated in those terms by the respondents, or it could simply mean that they deny one element of those allegations and by association dispute the remaining averments. By way of illustration, the respondents may simply be denying that a meeting as alleged to place on or about 5 February 2014 and therefore denied that there was a proposal to place applicants on special leave on that day. What the bald denial does not explain is whether such a meeting took place but on a different day, or whether there was a proposal to place the applicants on special leave but it was not conveyed in the meeting as alleged. The respondents failed to take the court into their confidence in explaining the nature of their denial, and consequently create uncertainty about what they dispute.

[12] The regulation governing precautionary suspension of the first respondent's employees states:

"17. Subject to section 33 of the Constitution and the provisions of the Promotion of Administrative Justice Act 2000 (Act No. 3 of 2000) –

(a) the chief executive officer may, at any time before, while or after a member of staff is or has been charged with misconduct, suspend the member of staff from duty until an investigation or disciplinary hearing with regard to that charge, as contemplated in regulation 16, has been completed;

*(b) the chairperson may, at any time before, while or after the chief executive officer is or has been charged with misconduct, suspend him or her from duty until an investigation or disciplinary hearing with regard to that charge, as contemplated in regulation 16, has been completed."*¹

¹ Published in **Regulation Gazette No. 7354, 10 May 2002, GG No. 23404**

- [13] Given the date of the regulations, they plainly pre-dated decisions such as ***Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC)*** and ***Gcaba V Minister For Safety And Security and others 2010 (1) SA 238 (CC)***, which had the effect of rendering the law of fair administrative action and the Promotion of Administrative Justice Act ('PAJA') largely, if not wholly, inapplicable to relations between the state and its employees. Nonetheless, it seems at the time the respondent's regulations were promulgated it was clearly understood and intended that the suspension of employees would have to conform to the requirements of fair administrative action contained in PAJA and the Constitution. The fact that this regulation has not been amended in the wake of those decisions, suggests that the intention of incorporating the principles of fair administrative action in the regulation pertaining to suspension remains unchanged.

Preliminary issues

- [14] Both parties raised a number of preliminary issues. The applicants sought to contest the authority of the second respondent to oppose the application based on the challenge to the validity of his appointment. Similarly, the respondents complained that in the absence of confirmatory affidavits filed by the second to fourth applicants, the first applicant lacked authority to depose to the founding affidavit on their behalf. The respondents also pointed out that the founding affidavit did not strictly meet the requirements of rule 7 of the Labour Court in that there were pages and annexures missing from the application.
- [15] I declined to entertain the challenge to the second respondent's authority given the existence of the pending application to determine that and other issues under Case number J157/2014. In the course of debating the pending status of that application I could not get a clear answer why no attempt has been made to prioritise the enrolment of that matter when it could have a decisive impact on other pending disputes involving the respondents and employees of the first respondent. On the face of it, the enrolment of that case for a hearing should be expedited in the interests of all parties and the effective management of the court's roll.

- [16] On the procedural defects in the application, I am satisfied that even though the confirmatory affidavits of the second to fourth applicants were not filed together with the founding papers, they were able to adequately respond to the applicants' founding papers by way of their answering affidavit by 27 March 2014 even if that was outside of the deadline imposed by the applicant. Moreover, most of the documentary annexures to the founding affidavit are ones that the respondents would have copies of, unlike the court. On balance, I am satisfied that the even though the respondents might have been unnecessarily inconvenienced by the filing of the incomplete papers, ultimately they were in a position to address the merits of the application, and indeed did so.
- [17] Nonetheless, as I pointed out to *Mr Faku* in court, the filed application did not meet the standards the Court is entitled to expect from an attorney, and these omissions were compounded by his failure to paginate the court file. The court was hampered by the absence of necessary documents in preparing to hear the matter. In the circumstances, even though the applicants who are ultimately successful on the merits of the application, I do not believe they are entitled to their costs because of the shambolic manner in which the matter was placed before the court.

Evaluation

- [18] The application is one for interim relief pending the finalisation of the unfair suspension dispute referred to the CCMA and the main application pending before this court. Since the main application has been pending long enough for the applicants to seek its enrolment on a semi-urgent basis and no date of set down has been determined yet, it would be highly speculative to anticipate any early resolution of that matter at this stage. In any event, judgement in that matter will not necessarily be determinative of the fairness or lawfulness of the applicants' suspensions.
- [19] On the other hand, there is no reason why a hearing on the fairness of the suspensions under the auspices of the CCMA could not be convened without undue delay and the outcome of that matter, will finalise the unfair labour practice dispute arising from the suspensions.

- [20] In essence, it seems to me that the challenge raised by the applicants to the fairness of their suspension is procedural and substantive. It is procedural in the sense that they argue the employer ought to have set out its own reasons why it was contemplating their suspension so that they could respond to those reasons rather than them having to first make out a case why they ought not to be suspended. Secondly, the applicants dispute the *bona fides* of the respondents in ordering their suspension. Effectively, they suggest that it is an act of retaliation for their institution of the main application proceedings. Moreover they contend that the press report which so upset the respondents contained nothing that was not a matter of public record and accordingly disciplinary action relating to such disclosure as the respondents alleged is not justified. Related to their claim that the suspensions are not a *bona fide* reason, the applicants invoke the protection of the Protected Disclosures Act 26 of 2000 ('the PDA').
- [21] They claim that even though they do not admit to have made the disclosure to the press complained of by the respondent in the charges under contemplation, which are described in the notice of intention to suspend, they also allege that in the course of instructing their attorney in the main application they have made disclosures to him of irregular conduct, alleged financial misconduct and the like about the second respondent, which he has not disputed. They claim that these disclosures amount to protected disclosures in terms of the PDA² and that their suspension followed the making of these disclosures in the founding affidavit amounted to an occupational detriment. They identified the source of the press report for which the respondents are contemplating disciplinary action against them as being the founding affidavit. They contend their suspension is also unlawful on this account. Such a claim is an issue that might constitute an unfair labour practice, to be determined ultimately in the Labour Court if it cannot be resolved by conciliation in the CCMA. Insofar as they appear to be alleging that the suspension is substantively unfair because it relates to a prohibited reason, that is a

² The relevant provision being s 5 of the PDA though not expressly referred to in the founding affidavit.

matter which might ultimately come to this court for determination as it falls within its jurisdiction.

[22] On what is before me, there seems to be good reason to believe that an improper motive might lie behind the ostensible reason given for the suspensions. This concern is also reinforced by the way in which the second respondent motivated his intention to suspend the applicants and the way he responded to their quite detailed representations. In characterising those representations as 'a bare denial', which is quite obviously wrong, it is difficult to believe that the second respondent even applied his mind to them before deciding to press ahead with the suspensions. Even if the respondent did not set out in any detail his motivation of the perceived need to suspend the applicants pending the outcome of the investigation, he has also not made any greater attempt to explain his reasoning to the court. He also has not made any attempt to explain why the applicants claim in their representations to the effect that investigations have already been conducted and without hindrance is not a correct representation of the factual position. The second respondent has placed nothing before the court to explain why the investigation mentioned by the applicants was incomplete or on what basis he suspects they might interfere with any further investigation based on the conduct of the investigation thus far. Instead of elaborating on the justification for the suspension, the respondents merely reiterated in a wooden manner how the necessary procedural steps had been taken before suspending them. Nowhere in the answering affidavit do the respondents provide the basis for a reasonable suspicion on their part and that the applicants would interfere with any further investigations.

[23] In the circumstances, I believe that the respondent has failed to demonstrate that there is a *prima facie* justification for the suspensions on an objective basis either arising from the nature of the possible charges against them, or that there is a reasonable basis for suspecting that any further investigations might be prejudiced by the applicants remaining at work pending the outcome of the CCMA proceedings to make a final determination on the fairness of the suspensions. The balance of

convenience favours uplifting the suspensions pending the outcome of the CCMA proceedings.

- [24] Given the respondent's failure to provide any substantiation of a sufficient reason to justify the suspension decision, coupled with the *prima facie* evidence that it may be for an improper motive which may also entail the suspension being found to be unlawful and, or alternatively an unfair labour practice in terms of section 4(2)(b) of the PDA on account of amounting to an occupational detriment, I am satisfied that the applicants have established a right though open to some doubt, to interim relief to stay the imposition of suspension on the basis that there is reason to believe that it was initiated for an improper purpose which would render it unlawful, or that the suspensions amount to occupational detriments.
- [25] In the circumstances I consider it would be appropriate to uplift the suspensions at least pending the outcome of the CCMA proceedings arising from the unfair labour practice referral which would obviously also entail at least the conciliation of the PDA related version of the unfair labour practice.
- [26] Although the CCMA may not adjudicate on an unfair labour practice claim relating to an occupational detriment under the PDA, the first stage for considering that dispute is conciliation of the alleged unfair labour practice at the CCMA.³ The upshot of that might be that one or more strands of the unfair labour claim arising from the suspension may be settled, or the applicants might abandon the unfair labour practice claim relating to an occupational detriment and pursue only an ordinary unfair labour practice claim on the substantive and procedural unfairness of the suspensions, or they may elect to refer the claim based on an alleged occupational detriment to the Labour Court for adjudication. In any event there would be an outcome of the dispute referral, at which juncture the ongoing status of the suspensions could be reconsidered in the light of the developments to date. I do not think it would be wise to extend the upliftment of the suspensions beyond that point, because if the employer wished to resume the suspensions at that stage, assuming that option is still open to it, the

³ See s 4(2)(b) of the PDA.

circumstances prevailing then might be different, and might require re-consideration of whether the upliftment of the suspensions should be extended further.

R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants: T Faku of Faku Attorneys

For the Respondents: E M Baloyi-Mere instructed by M B Mokoena