



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J1011/15

In the matter between:

NDOU, TSHIMANGADZO SYLVIA

Applicant

and

THULAMELA MUNICIPALITY

Respondent

Heard: 28 MAY 2015

Delivered: 01 JUNE 2015

Summary: (Urgent – suspension – interdict - unlawfulness)

JUDGMENT

R LAGRANGE, J

- [1] This is an application for interim relief pending a final order in the matter. The applicant seeks an order declaring her suspension invalid, unlawful and of no legal force or effect. The respondent municipality opposed the application and in reply, the applicant challenged the authority of the deponent to the answering affidavit to represent the respondent in the proceedings based on a resolution adopted by the Council of the municipality on 19 May 2015.

Challenge to the authority of the municipal manager to oppose the application

- [2] In her replying affidavit, the applicant also challenged the authority of the acting municipal manager, Mr Maluleke, to oppose the application. The respondent argued that the appropriate procedure for raising this special defence was by means of an application under rule 7(1) of the High Court rules. A consequence of using that procedure is that because the objecting party initiates the application the respondent is entitled to file an answer as of right. Where this is not done the party whose authority is challenged must seek leave to file a supplementary affidavit in the main application. In a case like this, that application will only be heard on the day the main matter is set down for hearing. If leave to file a supplementary affidavit is granted, that in turn may lead to a delay while the objecting party files a reply, unless it waives its right to do so.
- [3] I was also referred to the judgment of Khumalo, AJ in ***SAMWU obo NEMO and Others v Mopani District Municipality***¹ in which, the learned judge relied on the authority of the judgement in the matter of the ***ANC Umvoti Coucil Caucus and Others v Umvoti Municipality***² in which the High Court adopted the approach in other judgements, namely that once an attorney had been instructed, the challenge should be to the attorney's power to act on behalf of the party and not to the deponent to the founding papers.
- [4] Whether or not that principle ought to apply in this instance is not necessary for me to decide, but I am satisfied that the applicant ought to have followed the procedure set out in rule 7 (1) rather than challenging the municipal manager's authority in reply and accordingly, the challenge to his authority should be dismissed.

Merits of the application

- [5] The applicant bases her right to relief on the principle of legality though she also makes reference to unfairness as a consideration. I do not intend to set out all the

¹ Unreported (J3047/12) [2013] ZALCJHB 34 (9 April 2013)

² 2010 (3) SA 31 (KZP).

facts contained in the affidavits, but will merely make reference to some of them, namely:

- 5.1 The applicant is employed by the respondent as a senior manager for community services.
- 5.2 In late November 2014 she was due to attend a meeting held at Akganang local municipality and she completed a travel and subsistence form claiming payment of the allowances for travelling 448 km to attend the meeting. Her claim for payment was approved at the time.
- 5.3 In early April 2015 the municipal manager, Mr Mathivha ('Mathivha') tabled a report before the Council alleging that the applicant had not attended the meeting in November 2014 as she had claimed. The council resolved to appoint an independent investigator to look into the alleged misconduct by the applicant.
- 5.4 Subsequent to this, on 28 April 2015, the municipal manager himself and another senior manager were suspended as a result of a judgement obtained against the council.
- 5.5 It is common cause that members of a union, the South African Municipal Workers Union ('SAMWU') began a campaign demanding the applicant's dismissal ostensibly on the grounds of the alleged misconduct she had committed. The applicant believes that Mathivha, who was being supported by the union, had encouraged the union to pursue the demand for her dismissal for two reasons. Firstly, owing to his own suspension and that of the other senior manager, he believed it would strengthen his hand in his own dispute with the Council if so many senior managers were on suspension. The applicant believed that Mathivha was of the view that the Council might be compelled to recall him from suspension because of the management deficit caused by the suspensions. She also believes that he wanted to prejudice her application for appointment to another municipality. The interview for that job is imminent. The municipality does not deny that the union was engaged in a 'vicious campaign' against her and also does not

deny that Mathivha has the support of the union. However, it insists that her suspension had nothing to do with prejudicing her job application and the reasons for her suspension had everything to do with the pending disciplinary enquiry into the attached allowance fraud and nothing to do with the suspension of the municipal manager and the other manager.

5.6 It appears that not only did members of the union go on public radio claiming she had stolen money and made fraudulent claims, but a criminal case was also opened against her arising from the alleged misconduct by the municipal manager.

5.7 The applicant was served with a letter of notice of intention to suspend her on 30 April 2015. The notice makes it clear that the proposed precautionary suspension relates to the alleged misconduct she committed which the council regarded as “very serious”, pending finalisation of the investigation against. The letter then goes on to cite various reasons for the precautionary suspension including:

5.7.1 the instability caused in the workplace as a result of the work stoppage demanding that action be taken against her;

5.7.2 the council’s concerns about her safety in the circumstances;

5.7.3 her access to records and documents relevant to the investigations which she would have as a senior manager and a concern that she might tamper with such documents;

5.7.4 the fact that some of the potential witnesses would include her subordinates and might feel intimidated by her presence at work during the investigations which could compromise their cooperation with the investigators;

5.7.5 the possibility that she might interfere with her subordinates and thereby hamper the investigation;

5.7.6 the investigation would look at the procedures and systems in place when such travel claims are made and how travel by officials is monitored.

- [6] The applicant was afforded until 7 May 2015 to respond as to why she should not be suspended. On 5 May 2015 her attorneys wrote to the council asking for documentation appearing in the police docket in the criminal case which had been opened against her in order to be able to respond to the notice. In light of the lateness of the request, she also asked that the date for filing her submission on the precautionary suspension be extended until 15 May 2015.
- [7] The municipality's attorney replied on 8 May 2015 stating that the municipality did not have the documents in question and agreeing to extend the time for her submission to 12 May 2015. Despite requesting the extension and having been granted a substantial one, the applicant did make extensive submissions on 7 May 2015 and did not supplement these before 12 May 2015.
- [8] In her representations, the applicant claimed that:
- 8.1 her suspension was an afterthought to entice employees back to work and to appease the suspended municipal manager;
 - 8.2 item 32 (a) of the disciplinary code requires her to be given a fair hearing by the municipal manager, whereas she was being issued with the letter alleging misconduct and motivating her suspension without her side of the story being heard first;
 - 8.3 the charge against her was clearly spurious as it would have been raised earlier , rather than four months after the November trip;
 - 8.4 the investigations were already complete;
 - 8.5 the investigators report was only due within thirty days of his appointment and until it had been considered it was premature to consider suspending her;
 - 8.6 the terms of reference of the investigator's report concerned all managers and subordinates and not just herself;

- 8.7 the Council had decided on 7 April that there was no basis to charge her but had opted to review its operational processes and systems and accordingly ought to have soaked that decision before taking the decision of 28 April 2050;
- 8.8 no violence or threats were made against her while she was at work during the strike action;
- 8.9 she could not intimidate any potential witnesses that she did not know who they were and did not have the pertinent records in her possession;
- 8.10 she could not hinder her subordinates from assisting the investigator;
- 8.11 the fact that the suspended municipal manager had already opened a fraud case with the release against her shows that the council had already decided she was guilty;
- 8.12 the disciplinary code requires an allegation against a senior manager to be tabled in seven days of an allegation of misconduct being made against them. In terms of clause 5 (2) of the applicable Disciplinary Code.

[9] Though the respondent admits that there was no violence on the premises when the applicant was at work, the union had raised questions about her presence and the council had a legitimate concern that it might be seen to be acting inconsistently if she was not suspended while other senior managers were. The investigation report which was completed on 14 May 2015 indicated that there was a basis for charging the applicant which provided an even stronger basis for her suspension continuing. The respondent also denied that it was necessary for it to conduct an informal hearing before invoking the suspension procedure which it had done. The respondent argued that it was not necessary for it to have proof that the applicant would interfere with witnesses who were subordinates, but the fact that they worked in her section was sufficient reason to justify the suspension. The applicant points out that on the witness statements, there is a witness who supports a version that she attended the meeting on 20 November 2014.

Evaluation

[10] On the question of urgency, I am satisfied that the applicant acted with reasonable expedition in challenging her suspension and as an unlawful suspension amounts to an ongoing wrong, which cannot be addressed in the arbitration proceedings. I am also mindful of the impending interview the applicant has with another municipality, which might be prejudiced by her current status, and that the respondent did have enough time to answer her founding affidavit comprehensively. I am satisfied that the matter was sufficiently urgent to warrant it being heard.

[11] In relation to the merits, having considered the above, and having regard to the applicable Disciplinary Code set out in regulations in government Gazette number 34213 of 21 April 2011 I am satisfied that:

11.1 The applicant was not entitled to a hearing before she was suspended. The procedure followed in suspending her was specifically intended to provide her with an opportunity to make representations why she ought not to be suspended, which she did. Where the employer follows the procedure and there is no bad faith or patent irrationality in arriving at the suspension decision, a court will be slow to find the employer acted unlawfully. In this case the reasons provided were detailed and not without merit and the applicant was given more than ample time to make submissions.

11.2 The merits of the charge, unless obviously groundless or based in bad faith, are not appropriate matters for consideration at the stage of determining the lawfulness of a precautionary suspension. Moreover, the investigation report, which is extremely detailed, does provide support for the *bona fide* nature of the charge of misconduct.

11.3 In the context of the suspension of other senior managers, the conduct of SAMWU members demanding the applicant's suspension made the potential instability at the respondent a legitimate consideration for the respondent to have taken into account in terms of Regulation 6(1) of the disciplinary code.

[12] The tabling of the alleged misconduct before the Council in April, even if it was contrary to clause 5 (2), does not affect the lawfulness of the suspension. Once the Council was apprised of the alleged misconduct, it could not simply ignore the allegation. In this regard, I note that the applicant cites an earlier decision of mine in **Lebu v Maquassi Hills Local Municipality & others** ³ in support of her argument, but in that judgment on this issue, I made the following finding, which I believe is equally apposite here:

“Non-compliance with regulation 5(2)

[14] The applicant complains that only two of the allegations of misconduct with which he was eventually charged were actually discussed at the first special council meeting. Also, these allegations were not tabled by the mayor or by himself (at that stage he had not yet been suspended and no acting municipal manager had been appointed). This, he submits, is a breach of regulation 5(2), which is a mandatory step in the institution of disciplinary proceedings.

[15] I do not believe the obligation on the mayor to table the allegations constitutes a peremptory step in the sense that it is a necessary prerequisite which must occur before the council can consider any particular allegation against the municipal manager. What regulation 5(2) does do is to place an obligation on the mayor to table such allegations if they are made, and the mayor would be failing in her duties if she did not do so when that happens. But merely because the mayor does not table allegations of misconduct against the municipal manager, does not prevent the council from discussing them.” ⁴

12.1 The completion of the investigation was not the only consideration in suspending the applicant and accordingly it cannot be said that the Council acted in a grossly unreasonable manner or *ultra vires* in continuing with her suspension on 19 May 2015.

³ (3) (2012) 33 ILJ 2623 (LC)

⁴ At 2628

12.2 Although the applicant also raised an additional ground in argument relating to the respondent's alleged violation of Regulation 6(2) this was not pleaded in the founding affidavit and accordingly cannot be entertained.

[13] On the question of costs, in light of the fact that it is partly in response to pressure from a third party, which may or may not be legitimate that is one of the reasons for the applicant's suspension and that she might understandably be particularly aggrieved about that, I do not think that her application was vexatious or that it would be fair to mulct her with costs.

Order

[14] In light of the above,

14.1 the application is dismissed;

14.2 no order is made as to costs.



R LAGRANGE, J

(Judge of the Labour Court)

Appearances:

For the Applicant: M S Sikhwari

Instructed by: PBN Mawila Attorneys

For the Third Respondent: MK Mathipa

Instructed by: Lebea: and Associates

LABOUR COURT