<u>IN THE LABOUR COURT OF SOUTH AFRICA</u>

<u>HELD AT JOHANNESBURG</u>

<u>CASE NO</u>: J2532/15

<u>DATE</u>: 2016-01-12

In the matter between

MOJALEFA JOHANENES NALE Applicant

and

NORTH WEST DEVELOPMENT CORPORATION First Respondent

MEC FOR FINANCE, ECONOMY
AND ENTERPRISE DEVELOPMENT Second Respondent

EX TEMPORE JUDGMENT

<u>STEENKAMP, J</u>:

This is an application brought on urgent basis to declare the applicant's suspension to be "invalid, unlawful, unconstitutional and of no legal force and effect," and to set it aside or to uplift it. The background to the application is that the applicant, Mr Nale, who is the Chief Executive Officer of the first respondent, the North West Development Corporation, a State-owned company, has been suspended by the Corporation as a precautionary suspension pending a disciplinary hearing that is due to commence tomorrow, 13 January 2016.

The applicant faces serious allegations of misconduct. In the course of the investigation into those allegations, he was initially put on special leave on 2 March 2015. The Corporation then formally suspended him, after giving him the opportunity to make written representations, on 4 August 2015. He challenged both of those acts at the CCMA. The CCMA, under its unfair labour practice jurisdiction, declared the initial suspension under the guise of special leave to constitute an unfair labour practice and also expressed the view that the suspension on the 4 August constituted un unfair labour practice; however, that ruling has subsequently been rescinded.

On 11 December 2015 the Corporation once again suspended Mr Nale, and it is that suspension that he challenges before this court. He does so on the basis of legality. Mr *Scholtz* argued, firstly, that the suspension is invalid because the Board did not have the authority to suspend him; secondly, that it is unlawful for lack of compliance with his contract of employment; and, thirdly, that it undermines his right to fair labour practices and is therefore unconstitutional. Mr *Kirstein*, for the Corporation, firstly takes issue with the question of urgency.

I have asked both parties to address me both on urgency and on the merits as the issues relating to the requirements for an urgent interdict, such as the existence of a clear right, also impacts on the question of urgency. As Mr *Kirstein* pointed out, the current suspension took effect on 11 December. It is only on the 17 December that the applicant delivered the urgent application to this court to be heard on 29 December; however, it did not serve all the annexures to the application, and although that is the matter of some dispute, it is beyond dispute that on 29 December, when the matter served before my brother Van Niekerk, it was postponed to today in order for those annexures to be made available and they were only made available on 5 January.

I agree with Mr *Kirstein* that, in the circumstances of this case, where the hearing is to commence tomorrow, there is no urgency in granting the relief sought. The applicant is suffering no prejudice in circumstances where he is being remunerated with full benefits and where he will have an opportunity to state his case in the hearing to commence tomorrow. Although he complains about the length of the suspension, that is about to come to an end when the hearing commences, and when the outcome of that hearing will make it clear whether he is to return to work or whether a sanction may be imposed upon him.

I would strike the matter from the roll for that reason alone, but I will nevertheless express my opinion -- albeit *obiter* -- on the merits insofar as it impacts the applicant's case.

With regard the averment that it is only the MEC that has the power to suspend the applicant, Mr *Scholtz* relied not only on the NWDC Act (North West Development Corporation Ltd Act) and on the Companies Act, but also on the authority of the Constitutional Court, that the power to dismiss is necessary in order to exercise the power to appoint, as expressed in *Masetlha v President of the Republic of South Africa & Another,* 2008 (1) SA 566 (CC) at 68.

There are in my view two answers to that argument. The first is that Mr Nale has not been dismissed but merely suspended. The second is, more importantly, that it does not appear to me, from my reading of the Act, that it is only MEC that has the power to either appoint, suspend or dismiss him. (When I refer to "the Act", I am referring to the North West Development Corporation Ltd Act, Act No 6 of 1995). In that Act, at section 11, it deals with the appointment of the Managing Director of the Corporation, which is indeed something to be done by the responsible member, i.e. the Member of the Executive Council. However, there is nothing on the papers before me to show that Mr Nale was indeed appointed as MD. His letter of appointment and his contract of employment clearly refer to him only as the CEO. In his fixed term contract, he is referred to as "The Employee" and the preamble reads:

> "The company wishes to engage in an employment relationship with the employee on the terms and conditions of this contract."

And in paragraph 2.2 it says:

> "The position of the employee shall be Chief Executive Officer (CEO), together with such additional duties as may be reasonably attached thereto, as laid down by the company from time to time. The employee will report to the Chairperson of the Board of Directors of all matters of employment and work performance."

That appears to me to be in compliance with section 13 of the Act, which provides that the Board may appoint employees, and furthermore section 13(c) provides that the Board may on good cause shown suspend an employee. That power of the Board is reiterated in section 15(w), which reads that:

> "The Board shall have the power to employ, remunerate, house, discharge or suspend officers and employees required for its operations…"

In my view, therefore, that leg of the argument has no merit.

Regarding the argument that the suspension is unlawful because a month has elapsed since his suspension, I take into account that after the initial suspension of 4 August, a disciplinary hearing was initially set down within a month, on 2 September, and it was then postponed by the chairperson, and it appears with no objection from the applicant. It was further postponed, and as I have said, it is now set down for hearing tomorrow, barely a month after the later suspension of 11 December.

Although Mr *Scholtz* bases his argument on lawfulness and not fairness, the sentiments of the Labour Appeal Court in *Gradwell* must be considered. That is the case of *MEC for Education*, *North West Provincial Government v Gradwell* [2012] 8 BLLR 747 (LAC); (2012) 33 *ILJ* 2033 (LAC), where that court, by whose authority I am bound, said the following in paragraph [44]:

"The proposition that all suspensions should be procedurally fair to avoid the stigma of an unfair labour practice … requires some qualification. Fairness, by its nature, is flexible. Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors, including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made and the consequences resulting from it. When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standadrd of procedural fairness, may legitimately be attenuated for three principle reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice following from the action is significantly contained and minimised. Secondly, the period of suspension often will be (or at least should be) for a limited duration… And, thirdly, the purpose of the suspension – the protection of the integrity of the investigation into alleged misconduct – risks being undermined by the requirement of an in-depth preliminary investigation. Provided the safeguards

> of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer. Therefore, an opportunity to make written representations showing cause why a precautionary suspension should not be implemented will ordinarily be acceptable and adequate compliance with the requirements for procedural fairness."

Those requirements have been met in this case, and with regard to the application for a declarator that the suspension was unlawful, the court in *Gradwell* goes on to say at paragraph [46] that, in dealing with such an allegation -- where in that case the allegation was that the suspension was, 'unfair, unlawful and unconstitutional – "a declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those available under the unfair labour practice jurisdiction."

In this case, the applicant chose not to avail himself of that alternative remedy, contrary to his previous suspension when he did so successfully. It would seem to me that that does constitute an attempt to circumvent the provisions of the Labour Relations Act, which provides for specific relief in cases such as this.[1]

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[1] Subsequent to this judgment having been delivered *ex tempore*, the Constitutional Court handed own judgment in *Steenkamp v Econ Ltd* [2016] ZACC 1 on 22 January 2016. Writing for the majority, ZOndo J held that the LA does not contemplate

And lastly, with regard to the allegation of unconstitutionality, as Mr *Kirstein* points out, the applicant attempts to rely on direct access to the Constitution, which he cannot do. The right to fair labour practices has been codified in the Labour Relations Act, and that Act makes specific provision for the unfair labour practice in the guise of a suspension to be addressed in the appropriate forum, which is the CCMA. For all those reasons also, I would not have been inclined to grant the relief sought.

With regard to costs, I take into account that the applicant is still employed by the Corporation and that the major skirmish in this ongoing battle is due to commence tomorrow. Should he be found not to have committed the misconduct complained of, he would have to return to work in his senior position as CEO and a costs order at this stage would in my view have a chilling effect on that prospect. I also take into account that the applicant is entitled to vindicate his rights, although he has in this case been unsuccessful.

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unlawful – as opposed to unfair – dismissals. He said at para [136]: "I conclude that invalid dismissals and a declaratory order that a dismissal is of no force and effect fall outside of the contemplation of the LRA." And he upheld the principle (at para 137) that, if a litigant's cause of action is the breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy". It seems to me that the same should hold true for suspension s as it does to dismissals.

O R D E R

In all those circumstances, I order that the applicant be struck from the roll for lack of urgency with no order as to costs.

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STEENKAMP J

APPEARANCES

APPLICANT:	W Scholtz (attorney)
RESPONDENTS:	P Kirstein
	Instructed by the State Attorney.

CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, ***in as far as it is audible***, the aforegoing is a ***VERBATIM*** transcription from the soundtrack of proceedings, as was ordered to be transcribed by iAfrica Transcriptions and which had been recorded by Digital Court Recording Services by means of digital recording equipment.

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M J NALE Applicant

and

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Case No	**J33 No / Client Ref**	**Tariff**	**Pages as per invoice**
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