



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J1832/18

In the matter between:

IMATU obo SHIHAMBI AND 3 OTHERS

Applicant

and

CITY OF EKURHULENI

METROPOLITAN MUNICIPALITY

First Respondent

THE MUNICIPAL MANAGER-

CITY OF EKURHULENI METROPOLITAN

MUNICIPALITY: DR IMOGEN MASHAZI

Second Respondent

THE HEAD OF DEPARTMENT: HUMAN RESOURCES

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

MS NALEDI MODIBEDI

Third Respondent

Application heard: 31 May 2018

Judgment delivered: 6 June 2018

JUDGMENT

VAN NIEKERK J

- [1] This is an urgent application to set aside as unlawful the suspension of the individual applicants (the employees), and for an order that they be permitted to resume their duties with immediate effect.
- [2] To the extent that the urgency of the application was challenged by the respondents, I am satisfied that contrary to the respondents' submissions, the applicant (the union) acted with due diligence in filing the application. The notices of suspension that is the subject of these proceedings were issued on 15 May 2018; the application was filed on 25 May 2018. The employees were obliged to consult the union and secure its support prior to filing the application. Ten calendar days is not an unreasonable period within which to secure the necessary authority, consult, prepare papers and serve and file an application such as the present. I am satisfied that the application is urgent and intend to treat it as such.
- [3] Turning to the merits of the application, both parties in their affidavits have addressed the issue of the balance of convenience, a consideration that is relevant only to interim relief. The applicants seek a final order, and must accordingly meet the requirements for final relief. Those are a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy (see *Setlogelo v Setlogelo* 1914 AD 221).
- [4] The material facts are not in dispute. The employees are all senior managers, employed by the first respondent. On 7 February 2018, they were suspended after having been invited to make representations as to why they should not be, pending an enquiry into alleged misconduct. That suspension continued until 8

May 2018. On 9 May 2018, the employees were handed letters notifying them that they had been granted special leave (for which none of them had applied) until 'the final determination of the envisage (sic) enquiry.'

- [5] On 11 May 2018, the union addressed a letter to the first respondent disputing the special leave and stating that the respondent had failed to demonstrate any reasonable cause to believe that the employees had committed any misconduct, and further that they had failed to make out a case to remove the employees from the workplace during the investigation.
- [6] Despite this correspondence, on 14 May 2018, the employees were again suspended, until 14 August 2018. The only reason for suspension is reflected as 'Possibility of tampering with evidence during the investigation'.
- [7] The applicants submit that they have a clear right to the relief sought on account of the respondents' breach of the requirements of a lawful suspension. These are:
 - a. reasonable cause to believe, *prima facie*, that an employee has committed misconduct;
 - b. reasonable cause to believe that the employee's continued presence in the workplace will jeopardise any investigation into the misconduct, and
 - c. the employee must be given a hearing, at least in the sense of an opportunity to make representations as to why he or she should not be suspended;
 - d. compliance with any relevant contractual and other regulatory requirements, including the provisions of any binding collective agreement.
- [8] The clear right on which the applicants rely is a breach by the respondents of the provisions of disciplinary procedure collective agreement concluded under the auspices of the bargaining council. Clause 16 of that agreement regulates precautionary suspensions pending a disciplinary hearing and provides that an employer may suspend an employee pending an investigation into alleged conduct if the municipal manager or his or her authorised representative has reasonable cause to believe that the employee may jeopardise any investigation

into the alleged misconduct, interfere with potential witnesses or commit further acts of misconduct. The agreement further requires that the municipal manager must give written notice of any intention to suspend and afford the employee 48 hours to make representations as to why he or she should not be suspended. The municipal manager is thereafter required to make a determination as to whether the employee concerned should be suspended, after having considered the representations.

- [9] Clause 16.4 of the agreement provides that the suspension of an employee may not exceed a period of three months '*from the date that the means by manager ... is satisfied that there is a prima facie case that an act of misconduct has been committed*'. However, if circumstances prohibit the conclusion of disciplinary proceedings within that period, the suspension may be extended for a further three months.
- [10] It seems to me, consistent with the applicant's submission, that what the collective agreement requires before a lawful suspension can be implemented is at least a reasonable belief on the part of the employer that *prima facie*, the employee has committed an act of serious misconduct, an objectively justifiable reason to deny the employee access to the workplace for reasons related to the integrity of any investigation into the alleged misconduct, and a reasonable opportunity to make representations prior to any decision to suspend.
- [11] This formulation resonates with the decision of the Labour Appeal Court in *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC), where the court held that the conditions precedent to the lawful exercise of the party suspend where the existence of a 'prima facie case of serious misconduct and the risk of the investigation being jeopardised'. The court held further that the 'justifiability of the suspension invariably rests on the existence of a *prima facie* reason to believe that the employee committed serious misconduct'.
- [12] In the present instance, in my view, the respondents have failed to allege and demonstrate the existence of any *prima facie* evidence of serious misconduct

against the employees. The letter dated 1 February 2018 giving notice of an intention to suspend says no more than that 'an investigation into the allegation of procurement irregularities (PS-PT 03 – 2015) is being investigated against you'. There is nothing said about the nature of the allegations said to the subject of the investigation. In so far as the purpose of the suspension is concerned, the letter of suspension dated 7 February 2018 records no more than that the reason for suspension is the 'Possibility of tampering with evidence, during investigations.' In the answering affidavit, the respondents seek to make a case that the seniority of the applicants will have the result that they may intimidate witness engaged in more junior positions, or seek to destroy evidence.

[13] It serves little purpose for an employer simply to assert in nebulous terms that there is *prima facie* reason to believe that the employee committed serious misconduct and that he or she may interfere with witnesses or temper with the evidence. Some specificity is required; were it not so, the protections that the collective agreement establishes would be rendered nugatory. This is not to say that the employer is required to furnish a list of specific charges and make out a comprehensive case for interference. The provisions of the collective agreement are not purely procedural – they are substantive to the extent that the employee ought to be accorded sufficient information to be able to respond in a meaningful way to the employer's stated intention to suspend, by recording with some specificity exactly what allegations are under investigation, the seriousness with which they are viewed and its concerns regarding the consequences of an employee's continued presence in the workplace.

[14] In my view, the information provided by the respondents was insufficient to fulfil the requirements of the collective agreement and to enable the employees to make meaningful representations in response to the invitation to make submissions as to why they should not be suspended. This is particularly so in circumstances such as the present where the employees had already been suspended for three months, where their head of department had already been charged following the investigation that gave rise to their suspension. I am

satisfied that the respondents have acted in breach of the collective agreement and that the applicants have thus established clear right to the relief that they seek.

[15] Insofar as the respondents submit that the applicants should be denied the relief they seek because they have an alternative remedy in the form of a referral of their dispute to the bargaining council, it should be recalled that the applicant's contention is that there suspension is unlawful. The bargaining council has jurisdiction only over suspensions that are alleged to be unfair labour practices. That is not the respondent's case and the bargaining council has no jurisdiction to decide whether the suspension is lawful. There is accordingly no alternative remedy available to the employees.

[16] In short, I am satisfied that the respondents have failed to ensure substantial compliance with the collective agreement and that applicants have established that they are entitled to the relief that they seek. There is the further matter of authority – the applicants contend that the official who issued the notices of suspension had no authority in terms of the collective agreement to do so. On a plain reading of the agreement, there is merit in this point, which the respondents do not appear to dispute.

I make the following order:

1. The suspension of the applicant employees effected through letters issued by the third respondent on 14 May 2018 is declared unlawful.
2. The suspension of each of the applicant employees is set aside.
3. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicants: Union official

For the respondent: Adv. M. Tshivase, instructed by Mogaswa Inc.

Labour Court