IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1484/19

In the matter between:

MOEKETSI LEPHEANE **Applicant**

and

TELKOM SA SOC LTD **First Respondent**

EDWIN NKWANA **Second Respondent**

Heard: **04 July 2019**

Delivered: **04 July 2019**

Edited: **07 August 2019**

***EX-TEMPORE* JUDGMENT**

CELE, J

Introduction

[1] The application before me is one brought in terms of section 158(1)(a) of the Labour Relations Act[1] (LRA) where the applicant seeks to be granted an order cast in the following terms:

> "1. Dispensing with the forms and service period provided for in the rules of the court and treating this application as one of urgency in terms of rule 8.

[1] Act 66 of 1995, as amended.

2. A final order declaring the ongoing precautionary suspension of the applicant to be unlawful and that he be permitted to return to work.

3. Cost to be paid by the first and second respondent jointly and severally, the one paying the others to be absolved who opposes this relief sought by the applicant on a punitive scale as between attorney-and-own-client.

4. Further, an alternate relief as the court may deem appropriate or fit."

[2] The application is opposed by the respondents in these proceedings. The applicant is currently employed by the first respondent as a Group Head: Road and Transport. His contract of employment incorporates a disciplinary procedure, collective agreement entered into between the South African Local Government Association, IMATU and SAMWU enforceable for the period 1 February 2018 to 31 January 2023 (the collective agreement).

[3] In terms of clause 7.4 of that collective agreement, the following appears:

> "The disciplinary hearing shall commence as soon as reasonably possible, but not later than three months from the date of the municipal manager's or the authorised representative's decision to institute disciplinary proceedings."

[4] This clause must be read together with clause 16.4 which reads:

> "The suspension or utilisation of employees in another capacity shall be for a fixed and predetermined period and shall not exceed the period of three months from the date that the municipal manager or his authorised representative is satisfied that there is a *prima facie* case that an act of misconduct has been committed. However, where circumstances prohibit the conclusion of disciplinary proceedings within the aforestated timeframes, such suspension or utilisation in another capacity can be extended for a further three months' period."

[5] The applicant received a notice of suspension pending allegations of financial misconduct from the office of the city manager on 22 November 2018. He

was called upon to give reasons why he should not be suspended and barred from the premises until investigations were finalised. He only responded on 26 November 2018, by which time he had already been put on suspension with effect from 22 November 2018. Therefore, the reasons he gave did not materialise in the employer revisiting its decision to suspend him and uplifting the suspension. So the suspension took effect from 22 November 2018 and was to last for three months.

[6] The suspension ordinarily would have lapsed on 22 February 2019. This suspension was, however, not extended. On 26 February 2019 attorneys for the applicant directed correspondence to the first respondent, asking what was happening and, if needed be, why the suspension was not extended. The employer advised that the 90 days' period, that is three months that had run from November, had lapsed. What effectively then happened is that the suspension was further extended from February which suspension would have gone from February up to May 2019.

[7] At the time when the first suspension lapsed, the employee did not present himself at work. That is why then his attorney apparently, believing that he would not be accepted at work, decided to write the letter to the employer and there was a further extension of the suspension. Apparently the employer had problems in finalising investigations so that a firm decision could be taken to charge the employee. There was a further extension of suspension and this was done in June this year. I think it took effect from 12 June 2019. Again at the expiry of the second extension, the employee did not present himself at work. Letters were on the contrary written by his attorneys.

[8] What the applicant has then done is to approach this court on urgent basis, seeking to set aside this extension of suspension on the basis that the extension runs contrary to the collective agreement and therefore the extension is unlawful. In the meantime, what has happened is that the applicant has referred a dispute of unfair suspension in terms of section 186 (that is unfair labour practice) for consideration. I believe that matter is still pending.

[9] The respondent opposes this matter, firstly, on the basis that the Court is being invited here to interpret the clauses of the collective agreement and that this Court has no jurisdiction so to do, because that falls squarely on the powers of a bargaining council, if there is one, or to the Commission for Conciliation, Mediation and Arbitration (CCMA). The second objection is that this matter has not been demonstrated to be urgent, because the letter of further suspension was received by the employee on 12 June 2019 and that this application was filed some two weeks later, it being filed on 1 July 2019.

[10] I have been referred to some decisions of this court, one of which was by Judge Whitcher, which I now am told is subject to an appeal and therefore I may not allow myself to be guided by it. In considering this application, I bear in mind that it is not within the purview of the Labour Court to interpret a collective agreement. It would appear that for me to grant the order sought I do need to interpret the collective agreement; however, the applicant contends in this application that I would need to interpret the collective agreement.

[11] The judgment by Whitcher J involves the interpretation of clause 16.4 of the same collective agreement. I take the view, as already alluded to, that it is not within the purview or the powers of the Labour Court to interpret the collective agreement. The applicant could easily refer that matter to a bargaining council or the CCMA. Certainly the applicant has already referred an unfair labour practice dispute relating to suspension.

[12] The question I ask myself is whether that would not grant him substantial relief, because that institution would have the power to decide on the unfairness of the suspension; and in considering that, the commissioner would have the power to order the upliftment of the suspension, notwithstanding the fact that the commissioner will be dealing with the unfairness and not unlawfulness as is sought to be done by the applicant in the present case. In my view, the applicant has therefore substantial relief available to him.

[13] In relation to the question of urgency, he has waited for a two weeks' period. In his founding papers he did not deal explicitly with urgency. He merely referred to irreparable harm that he stands to suffer. I now have to check whether that irreparable harm could possibly encompass or include some sense of urgency. He says the following in his papers:

> "7.1. I respectfully submit that from the context of the affidavit, it is clear that the first respondent is acting unlawfully as it is respectfully submitted that it is unlawful conduct of the first and second respondents; are not prohibited. The applicant will suffer irreparable harm if that is not prohibited.
>
> 7.2. It is further respectfully submitted that I have at least a *prima facie* right in terms of clause 7.3, 7.4 and 16 of the collective agreement.
>
> 7.3. It is respectfully submitted that if the order is not granted, I will suffer irreparable harm if the first and second respondent are allowed to abuse and breach the collective agreement which is a result of a collective bargaining.
>
> 7.4 I shall further suffer irreparable harm in that my employment opportunities are severely prejudiced because of the fact that I was removed from my position for a period of approximately 10 months.
>
> 7.5 It is thus respectfully submitted that I made out a case that I suffer irreparable harm if the relief is not granted."

[14] I do not quite understand what irreparable harm he stands to suffer, except the lost opportunities that were to progress during that period. But beyond that, these are merely bold statements of irreparable harm having to be suffered by him. He received the salary as he is on suspension and he knows that he stands to be charged, because I am told that there is now a provisional report pending. And perhaps whilst he is on suspension, he might benefit by taking good use of the time available to defend himself and to fight, making sure that he spends his energies in preparing for the defence that he needs to lodge against the charges once this comes through.

[15] So I do not really think he has demonstrated any irreparable harm in this respect. He has therefore not demonstrated to me why this matter is so urgent that it had to be heard or entertained during recess period.

[16] In the premises the following order is made:

Order

1. The application is accordingly struck off the roll;

2. There is no order as to costs.

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H. Cele

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate N Ralikhavhana

Instructed by: Madlela Gwebu Mashamba Inc.

For the Respondent: Mrs T Makamu of Maserumule Attorneys