IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no:J1940/19

In the matter between:

PHEKO IGNATIUS LETLONKANE **Applicant**

and

CITY OF TSHWANE METROPOLITAIN MUNICIPALITY **First Respondent**

MOOKETSI NTSIMANE **Second Respondent**

Date heard: 25 September 2019

Delivered: 15 October 2019

JUDGMENT

RABKIN-NAICKER, J

[1] The applicant sought the following relief on an urgent basis:

> "2. An order declaring that the further extension of Applicant's suspension on 13 September is unlawful;

3. An order compelling the First and Second Respondents to allow Applicant to return to work and to continue with his duties, responsibilities and functions as Group Head: Roads and Transport;"

4. In the alternative to the relief in paragraphs 2 and 3 above, an order that Respondent's suspension be uplifted and the Applicant be allowed to return to work and work as Group Head: Roads and Transport pending the outcome of the dispute that the Applicant referred to the South African Local Government Bargaining Council."

[2] On the 4 July 2019 the applicant had filed an urgent application under J1516/19 which sought: *"A final order declaring the ongoing precautionary suspension of the Applicant to be unlawful and that he be permitted to return to work."* That application dealt with a series of extensions of Applicant's suspension. He was originally suspended on 22 November 2018. As the applicant avers in this application, the respondents opposed his application on the basis that it was not urgent and it was struck off the roll "*for that reason*".

[3] Having been struck off the urgent roll, for want of urgency, the applicant was at liberty to enroll same in the normal course on its merits. However, what the applicant has done in this case is to bring a new urgent application and submits that because the suspension of the applicant has been extended once more, i.e. on September 13 2019, a new cause of action has arisen.

[4] The applicant relies on the judgment of Whitcher J in the unreported judgment of *Nontobeko Memela v The City of Tshwane Metropolitan Municipality and Another*[1]. In that matter the Municipality argued that the matter was *res judicata* because the applicant launched an urgent application on 12 March 2019 asking the court to order her suspension was unlawful and that she be permitted to return to work, which application was dismissed on 14 March 2019[2].

[5] The Court dealt with the above submission as follows:

[1] Case number: J1429/19 heard on 18 June 2019, delivered 20 June 2019.
[2] Ibid at para 3.

> "The first objection falls to be dismissed. The cause of action in the first matter related to the lawfulness of the respondents' decision of 28 February 2019 to extend the applicant's initial 3-month suspension for a further 3 months, which took it 6 months. One of the reasons the Court dismissed her application is because in its view "the intention [of the collective agreement] is that any period of suspension may not exceed 6 months, being the two periods of three months each". The dispute in the present matter concerns the alleged unlawfulness of a different act altogether, the municipality's refusal to uplift the suspension on the lapse of the 6-month period."

[6] This matter stands to be distinguished. In the matter under case number J1516/19, which was struck off the roll for want of urgency, the applicant averred, under the heading "*Prima Facie or Clear Right*", *inter alia* that:

> "6.3 The continued suspension is unlawful and I respectively submit that in terms of the Collective agreement any period of suspension may not exceed 6 months.
>
> 6.4 I respectively submit that the unlawfulness relates to the First Respondent's refusal to uplift my suspension on the lapse of the 6 month period."

[7] In the application before me the applicant avers *inter alia* as follows, under the same heading "*Prima Facie or Clear Right*":

> "6.3 The continued suspension is unlawful and I respectfully submit that in terms of the collective agreement any period of suspension may not exceed 6 months.
>
> 6.4 I respectfully submit that the unlawfulness relates to the First Respondent's refusal to uplift my suspension on the lapse of the 6 months period. My further suspension on 16 September 2019 is unlawful."

[8] This matter stands to be dismissed on the principle of *lis alibi pendens*. As the Court in *Keyter NO v van der Meulen and Another NNO*[3] summarized the principle thus:

> "[10] The defence of lis alibi pendens arises when four requirements are met. They are that: (a) there is litigation pending (b) between the same parties (c) based on the same cause of action and (d) in respect of the same subject-matter. Lis alibi pendens does not, if successfully invoked, put an end to the plaintiff's or applicant's case. Rather, it allows for the staying of the later matter pending the final determination of the earlier matter. Once the earlier proceedings have been finalised, however, the later proceedings will be struck by, and terminated by, the defence of res judicata."

[9] There is no merit in the applicant's submission that a new cause of action has arisen because a further extension of the suspension has been made as set out above. The urgent court is burdened enough without hearing an "*urgent application*" that has already been struck off the urgent roll. I express the Court's displeasure at these tactics.

[10] The matter was not opposed. As I stated in Court I was satisfied with the applicant's attorneys assurance that the matter had been properly served after I raised my concern with him.

[11] In all the premises I make the following order:

Order

1. The application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

[3] 2014 (5) SA 215 (ECG).

Appearances:

For the Applicant: G.J. Geldenhuys of Geldehuys @ Law Inc.