

OF INTEREST  
IN THE LABOUR COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

C900/02

DATE OF HEARING: 12-09-02

DATE OF JUDGMENT: 13-09-02

In the matter between:

JEREMY VEARY

Applicant

and

THE PROVINCIAL COMMISSIONER OF  
POLICE & THREE OTHERS

First and  
Further Respondents

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\_\_\_\_\_

J U D G M E N T

PILLAY D, J:

The applicant is a Senior Superintendent in the South African Police Services and the Commanding Officer of the Slasher Task Team ("the slasher team"). The respondents are various representatives of the South African Police Services, including the Minister and the

MEC for Safety and Security. This application was launched as a matter of urgency for an order in the following terms:

*"1. Condoning the applicant's failure to comply with the Rules of the above Honourable Court relating to the time periods and service in granting leave for this matter to be heard as one of urgency.*

*2. Declaring that the instruction to temporarily transfer the applicant dated 22 May 2002 the instruction is unlawful and/or invalid, alternatively*

*3. Reviewing, correcting and setting aside the decision of the first respondent to issue the instruction, alternatively*

*4. Setting aside the instruction pending a hearing by the first respondent or alternatively a disciplinary hearing and/or*

*5. Declaring that the suspension of the applicant dated 8 August 2002 is unlawful and should be set aside, alternatively*

*6. Reviewing, correcting and setting aside the decision on or about 8 August 2002 of the first respondent to suspend the applicant without pay the suspension, alternatively*

*7. Setting aside the suspension pending a hearing by the first respondent alternatively a disciplinary hearing and/or*

*8. Ordering first respondent to deliver up to the applicant and / or his attorneys copies of the docket and printouts detailed in paragraph 10 of the affidavit, alternatively to allow the applicant to*

*copy the evidence so as to preserve it for purposes of the proceedings detailed in the applicant's affidavit and/or*

*9. Considering the applicant to institute the envisaged proceedings within one month of the date of this order and/or*

*10. Cost of suit only in the event of the application being opposed."*

Urgency.

The applicant was temporarily transferred on 22 May 2002. This application was launched on 22 August 2002, three months later. The explanation for the delay is that the transfer was not prejudicial as it did not affect his remuneration as his subsequent suspension without pay did. On the applicant's version alone the relief sought in paragraph 2 of the notice of motion is not urgent, nor is there any risk of harm as a result of his transfer.

The applicant was suspended on 8 August 2002 without pay. The mere loss of income is not a good ground for granting urgent relief. Special circumstances must exist. (University of Western Cape Academic Staff Union & Others v UWC [1999] 20 ILJ 1300 LC at 1304 17) In Koka v Director-General Provincial Administration North-West Government [1997] 18 ILJ 1018 LC, Landman, J was disposed to granting urgent relief where the employer refused to

furnish details of the alleged misconduct. The employee was suspended without pay for misconduct in that case. There was also an extremely sensitive overseas trip that he had to undertake a few days after his suspension. Revelas, J held in Hultzer v The Standard Bank of South Africa (Pty) Ltd [1999] 8 BLLR 809 LC that the loss of membership of the medical aid scheme and serious financial embarrassment were not sufficient grounds to grant urgent reinstatement. A similar view was held in SACWU & Others v Sentrachem [1999] 6 BLLR 615 LC and Tshwaedi v Greater Louis Trichardt Transitional Council [2000] 4 BLLR 469 LC.

No special circumstances exist in this case warranting urgent relief as a result of the alleged unlawful suspension.

The relief claimed in paragraph 8 of the notice of motion is a strange attempt at securing an Anton Piller order on notice. The applicant sought no interim relief pending the order for the delivery of the copies of certain documents. The respondents were not restrained by the Court from disposing of the documents after notice was given of this application on 21 August 2002, that is, more than three weeks before this hearing. The explanation for that, it was submitted from the Bar, was that the other members of the Slasher Team were still in control of the documents. In that

case there is no urgency and no evidence that the applicant had any reasonable apprehension that the documents would be damaged, destroyed or otherwise tampered with. No case is made out that the Slasher Team would lose control of the documents and if so when that might occur.

The application should therefore be dismissed for want of urgency.

#### Alternative remedy.

Section 186(2)(b) of Labour Relations Act 66 of 1995 (the "LRA") provides:

*"Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving.....*

*(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."*

Section 191 requires that such unfair labour practice disputes be referred to conciliation and thereafter to arbitration, if it is unresolved, before a council, if there is one, having jurisdiction.

The Safety and Security Bargaining Council has been established and has jurisdiction to conciliate and arbitrate the dispute relating to the suspension and the transfer insofar as it is alleged that it is unfair disciplinary action short of dismissal.

There is therefore an alternative remedy to challenge the fairness of the suspension and the transfer. Accordingly, the applicant may not claim through the back door a *status quo* order which is not authorised by the LRA. (See Ngwenya v Premier of KwaZulu Natal [2001] 8 BLLR 924 (LC); Koka (supra); UWC Academic Staff Association Union & Others (supra); Hultzer & Others (supra), and Fordham v OK Bazaars [1998] 19 ILJ 1156 LC).

### On the merits

In November 2001, the first respondent Provincial Commissioner, instructed the applicant and the Deputy Provincial Commissioner Blaauw that Deputy Provincial Commissioner Schooling was responsible for all operational actions, including those of the Slasher Team. Blaauw was no longer responsible for these activities. The applicant was, on receipt of that written instruction, to report directly to Director Booysen and to Schooling.

Significantly, this instruction was not attached to the applicant's founding affidavit, but to the answering affidavit of the Provincial Commissioner.

On 27 February 2002 the applicant was given notice of his possible suspension on charges of misconduct relating to, *inter alia*, his disobeying instructions. He was invited to make representations about his possible suspension and the retention of his remuneration. The response on behalf of the applicant by the Police and Prisons Civil Rights Union (Popcru), informed the Provincial Commissioner, *inter alia*, that the applicant consulted and worked with Blaauw, presumably as a motivation to allow the applicant to continue to report to Blaaw. It sought clarity on some of the allegations of misconduct. Blaauw also wrote to the Provincial Commissioner in support of the applicant and confirmed that the latter continued to report to him, i.e. Blaauw.

The Provincial Commissioner decided to transfer the applicant, pending the evidence to be heard at the disciplinary enquiry. In making this decision the Provincial Commissioner observed that the allegations against the applicant all related to either a refusal to obey a lawful and reasonable instruction or the interference with lawful instructions. The applicant's alleged conduct, he concluded,

amounted to gross insubordination and challenged the employer's authority.

The Provincial Commissioner suspended the applicant on 8 August because the applicant refused to comply with his instruction to transfer dated 22 May 2002, and that amounted to gross insubordination. The applicant was also informed that disciplinary action was to be instituted in terms of the South African Police Service Disciplinary Regulations.

On 1 August 2002 the applicant's attorney, Mr Murphy, applied for the establishment of a commission of enquiry to the Premier of the Western Cape Government. On 5 August the Minister of Community Safety requested that he be furnished by 14h00 that day with the names of the 17 high ranking police officers and the basis on which they were involved in corrupt practices as alleged by the applicant. When the information was not forthcoming, the Minister indicated that he would not be able to take the matter further. Disappointed by his response, the applicant thereafter brought this application.

The applicant admits that his attitude throughout has been that

requests for inspections and instructions should come to him through Deputy Commissioner Blaauw. He contends, however, that the reason for his transfer was to remove him from his post as Commander of the Slasher Team and to terminate or minimise the work of the Team. He denies that the transfer is lawful as the circumstances for the temporary transfer set out in Regulation 15 were not present in his case. He states on oath that he was not prepared to accede to unlawful instructions aimed at ensuring that the work of the Slasher Team would cease. He further states that the evidence cannot, through such unlawful means, be delivered to the hands of the very persons responsible for serious acts of corruption and gross negligence. Those responsible for the conduct which appears in the docket he seeks to secure relate, he alleges, to the very people directly involved in attempting to remove him from his post. He accuses the Provincial Commissioner of making common cause with those seeking to cover up evidence and to treat him unlawfully. It is in the public interest he says that he continue to carry out his duties.

Against this background, the applicant seeks urgent final relief by way of review of the respondents' decision to transfer and to suspend him, and the preservation of documentary evidence. He bears the *onus* of proving the invalidity of the decision of the

Provincial Commissioner to transfer and to suspend him (The Administrator Transvaal & The Firs Investment (Pty) Ltd v Johannesburg City Council 1971(1) SA 56 AD.

As a subordinate the Applicant is hardly in a position to dictate to the Provincial Commission about the line of authority for reporting. His stance manifests a distrust of the Provincial Commission. However, he fails to substantiate material allegations in support of his application. He may not refuse to disobey instructions that are *prima facie* lawful merely because he harbours certain suspicions. He must have substantial evidence if he wishes to do so with impunity.

His allegations are such that they create a substantial dispute of fact. He must have anticipated such a dispute when he lodged this application. While I may decide this matter on the respondents' papers (Plascon-Evans Limited v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 AD), I find that the applicant has failed to make out a sufficient case warranting the extraordinary remedy of final relief on an urgent basis. I say so for the following reasons which I may amplify in due course:

Regulation 15 provides for the suspension of employees without

pay. Consistent with the law and practice, the applicant was invited to make representations before the decision to transfer and suspend him were taken. That, in my view, was sufficient compliance with the audi rule. The acts constituting the misconduct are not seriously disputed. The dispute is really whether the instructions were lawful and whether the applicant was obliged to abide by them. It is common cause that the applicant refused to abide by the instructions. That is, in my view, a valid reason for suspending the applicant.

The lawfulness of the instruction is challenged principally because it is tainted by corruption. Given the dispute of facts in this regard, I am not able to determine whether the instructions were lawful or not. As I have said above, the applicant will have to have hard evidence to discharge the onus of proving this allegation.

Regulation 8 provides for the institution of disciplinary proceedings. Regulation 9 provides for the charging of an employee with misconduct. Mr Murphy suggested, without foundation, that the institution of disciplinary proceedings include the charging of an employee for misconduct. This submission must, in the context of the ordinary meaning of the text, be rejected. They are conceived as two distinct processes.

The applicant has not complied with the requirements for an order for the preservation of documents. He has not testified about what case he intends to bring. In Roma Watch Company South Africa v African Textile Distributors 1980 (2) 254 at 272-275 the requirements for such a remedy which I summarise as follows, were spelled out:

- (a) The applicant should make out a clear case against the party against whom the order is sought.
- (b) The remedy of the attachment and where appropriate removal of documents, information, articles and the like, must be the only practical means of protecting the applicant's rights and doing justice between the parties.
- (c) The evidence provided by the documents, information, articles and the like to be attached must be material to the applicant's case.
- (d) There must be clear evidence that the respondent has such incriminating documents, information, articles and the like in his possession.
- (e) The applicant must fully set out cogent reasons for believing that there is a real danger that the documents, information, articles and the like will be removed and destroyed and the ends of justice will be defeated if the respondent were given notice of the

proceedings against him.

(See also Shoba v Officer Commanding, Temporary Police Camp Wagendrift: Maphanga v Officer Commanding, Dsouth African Police Murder and Robbery Unit, Pietermaritzburg 1995 (4) SA 1 (A); Ex Part Dabelstein v Hildebrandt 1996 ALL SA 17 (C).)

Although this application is brought on notice, the requirements set out in the Roma decision are relevant insofar as it sets out the elements that the applicant has to prove. An address from the Bar by Mr Murphy about what the contemplated action might be is not good enough. I am therefore not able to determine whether the documents are relevant for the intended action. In view of the disputes of fact I also cannot say whether there is a well founded apprehension that the documents will be destroyed, tampered with or disposed of before the trial of his intended action. I am, therefore, not able to assess whether the order sought in paragraph 8 of the notice of motion is warranted.

Furthermore, the material allegations about the possibility of the documents being destroyed or unavailable when the applicant eventually launches his case, are serious, unsubstantiated and in dispute. They involve corruption. They imply that senior officers of

the police force are corrupt and that they conspire to destroy material evidence. The applicant ought to have known that such allegations can hardly be resolved on papers in this Court. It requires a proper ventilation by leading of oral evidence and production of documentary and other evidence in substantiation.

The applicant should pursue his claims for alleged unfair labour practices through the Bargaining Council. He has not initiated such proceedings.

If the applicant has a genuine case, then it has been obscured by irrelevant, unsubstantiated allegations which have detracted from the true issues in dispute that properly fall within the jurisdiction of this Court. A considerable part of the applicant's papers relate to the establishment of a commission of enquiry which does not in any way support the relief sought; nor could it possibly fall within the jurisdiction of this Court.

In the circumstances the application is dismissed with costs.

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JUDGE D PILLAY

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FOR THE APPLICANT : MURPHY WALLACE

INSTRUCTED BY : MESSRS MURPHY WALLACE  
SLABBERT INC.

FOR THE RESPONDENT : ADVOCATE MICHAEL DONEN

INSTRUCTED BY : STATE ATTORNEY