

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NUMBER: J120/04

In the matter between:

NGWENYA, LUCKY

FIRST APPLICANT

MODIBA, PRECIOUS

SECOND APPLICANT

NJOVANE, ZOLILE

THIRD APPLICANT

AND

**THE STATISTICIAN GENERAL OF STATISTICS
SOUTH AFRICA**

RESPONDENT

JUDGMENT

PAKADE .J

[1] The applicants are before this court seeking an urgent relief in the following terms:

1.1 That, pending the resolution of an unfair labour practice dispute between the applicants and the respondent which was referred to the General Public Service Sectoral Bargaining Council on 27 January 2004, the respondent be interdicted and restrained from proceeding with any disciplinary hearings already instituted against them;

1.2 That, pending the resolution of the unfair labour practice aforesaid, the respondent be ordered to uplift the suspension of the applicants from duty.

[2] The three applicants are the employees of statistics South Africa. The first applicant holds the rank of

Manager Data Collection and Logistics and is acting in a higher post of Executive Manager: Census Programme Office, also known as Co-ordination and Monitoring.

The second applicant is a Manager in Health and Vital Statistics and the third applicant is a Manager in Methodology and Audit.

[3] The history of the matter is bizarre and astonishing. The three applicants and another wrote an anonymous memorandum directly to the Minister of Finance in which they brought to his attention what they term various irregularities and acts of maladministration in the statistics South Africa. This was in November 2003. They signed the memorandum but did not disclose their names. However, the first applicant did furnish his cellular telephone number. In the memorandum they expressed various concerns against the respondent. Some of those concerns were about insufficient human resources practices, over expenditure on census 2001, poor management, complaints raised by the Parliamentary Standing Committee on Public Accounts, disappearance of money, corrupt practices ect.

[4] On receipt of the memorandum the Minister telephoned the first applicant and took issue with him over the fact that the memorandum was sent by “faceless persons”.

[5] It would appear that the memorandum was subsequently forwarded to the respondent who in turn wrote letters to the applicants expressing disgust and concern about the contents of the memorandum and the fact that they did not observe the channels of communication. On 28 November 2003 the respondent suspended the first applicant from duty and directed investigation on the memorandum and the conduct of the applicants.

[6] On 5 and 15 December 2003 the respondent suspended the second and the third applicants from duty respectively.

[7] On 23 January 2004 the respondent forwarded a notice of a disciplinary hearing and a charge sheet to the first applicant. He claims to have received them on 26 January 2004.

[8] Being of the view that the actions of the respondent in suspending them and initiating disciplinary hearing against them constitute an unfair labour practice in the form of an occupational detriment (section 186 (2) (d) of Act 66 of 1995), the applicants referred the dispute to the General Public Service Sector Bargaining

Council (GPSSBC) on 27 January 2004. On the same day, the applicants' attorney informed the respondent of the occupational detriment. He further requested an undertaking from the respondent that she shall not proceed with the disciplinary hearings pending the resolution of the unfair labour practice dispute failing which the applicants would approach this court for urgent relief.

[9] On 27 January 2004 the respondent faxed a letter to applicants' attorneys refusing to stay the disciplinary hearing and confirming that the hearing against the first applicants would continue without fail.

[10] On 30 January 2004 the respondent sent two further notices of disciplinary hearing against the second and third applicants to their attorney.

[11] On 4 February 2004 the three applicants approached this Court on an urgent basis seeking the relief set out in paragraph [1] above. The matter was argued on 27 February 2004 after the opposing and replying affidavits were filed.

[12] There are two issues for determination in this matter. The first, which is a preliminary point taken by the respondent, is about urgency of the matter. The second, on which the applicants rely, is whether their disclosure in their memorandum is protected by the Protected Disclosures Act, No 26 of 2000.

[13] I will consider these two issues in turn. I will, however, first deal with the preliminary issue involving the urgency of the matter. It will depend on the finding on urgency whether I should or I should not deal with the second issue. Logically if the finding on the preliminary issue is that the matter is not urgent the matter should be disposed of on this point alone.

[14] The applicants base their urgency on their suspension from duty which came about at the end of November and early to middle December 2003. They further place reliance for urgency on the fact that their attorney placed the respondent on terms on 27 January 2004 to withdraw the charges against them or to hold the same in abeyance until the resolution of the unfair labour practice.

[15] Before considering the urgency or otherwise of the matter it is necessary that I determine the cause of action and when it arose. In this respect it is important to bear in mind that the very founding papers of the applicants reveal that their case is entirely premised on the existence of occupational detriment which arose

according to them, from their suspensions and the institution of disciplinary hearing against them. On this basis they allege an unfair labour practice and have referred the matter to the GBSSBC.

[16] Section 186 (2) of the Labour Relations Act of 1995 defines unfair labour practice as any unfair act or omission that arises between an employer and employee involving-

“ (a) - (c).....

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 2000 (Act 26 of 2000) on account of the employee having made a protected disclosure defined in that Act”

In other words anyone who relies on section 186 (2) (d) must show that the occupational detriment is in contravention of the Protected Disclosures Act of 2000. The applicants’ case is that the unfair labour practice to which they have been exposed by the respondent involves an occupational detriment in contravention of the Protected Disclosure Act. In support of this contention the applicants rely on the fact that their disclosure of acts of maladministration corruption etc in the Statistics South Africa to the minister is protected by the Protected Disclosures Act and the respondent contravened that Act by suspending them and preferring misconduct charges against them. On this basis Mr. Kuhn, Attorney for the applicants, while conceding that the cause of action arose on their respective dates of suspension, nevertheless argued that they could not bring an urgent application seeking relief based on suspensions alone. They had to wait for the charges on disciplinary inquiry to be served on them as well to complete the cause of action. Mr. Kuhn submitted on this premise that the matter became urgent on the service of the charges to the applicants on 26 January 2004. In developing this argument Mr. Kuhn submitted that there was a risk of dismissal of the applicants pursuant to the disciplinary inquiry and they would thereby suffer an irreparable harm. He conceded though that the basis of the cause of action is the memorandum written by the applicants to the Minister on 17 November 2003.

[17] In my view the cause of action is embodied in letters of suspension addressed to each applicant on 28 November 2003 (LN 6), 5 December 2003 (LN12), and 15 December 2003 (LN 13), respectively. These letters are worded identically. The penultimate paragraph of each letter reads as follows:

“ you will be informed of the finding of the investigation. If the investigation finds you not guilty of misconduct,

you will be cleared of the charges. In case of the contrary a disciplinary hearing would be instituted.”

Some of the charges referred to in this paragraph are alluded to in the suspension letters of the applicants. In paragraph 2 of the first applicant's suspension letter the contents of the memorandum are regarded as denoting insubordination and a breach of the Public Service Code of Conduct. This cause of concern is framed as charge 3 of the charges which were served on the first applicant on 23 January 2004. He was, however, aware on receipt of his suspension letter on 28 November 2003 that one of the charges on which he would be investigated on the memorandum was insubordination.

Again in paragraph 6 of his suspension letter, the first applicant was informed of his refusal to attend the meeting of the 28 November at 15h00 with the Statistical-General. This cause of concern is framed as second charge of the charges preferred against him. The applicants could not be so naïve as not to realize that their memorandum to the minister would result in misconduct charges being preferred against them. The letters of their suspension were so clear that in view of the concern expressed about the seriousness of the matters embodied in the memorandum, there would certainly be charges preferred against them. All the applicants are senior employees in the government service.

[18] In my view if there was any occupational detriment generated by suspensions and disciplinary inquiry, as alleged by the applicants which constitutes the cause of action, such occupational detriment arose wholly on 28 November, 5 December and 15 December 2003 respectively when the letters of suspensions also informing them of the charges were served on the applicants. Apart from what has been stated by Mr. Kuhn as the reason for not bringing the urgent application on receipt of the letters of suspension which is not acceptable, there is no other explanation why the matter was brought to Court two months' delay. The urgency which the applicants allege exists is not there, if it is there it is of their own making and cannot benefit the applicants.

Although the applicants received letters of suspension on 28 November, 5 December and 15 Decembers 2003 respectively they only referred the matter to the GPSSBC on 27 January 2004. Their explanation of what they had been waiting for from the date of their suspension is not reasonable and is rejected. Even their suspension is with full pay and gives rise to no urgency hence they also did not regard them as urgent and challenge them from the outset.

[19] In view of the finding I have arrived at, namely, that the applicants fail on urgency, the matter falls to be

disposed off on this basis alone. There is therefore no need for me to consider the rest of the merits.

[20] Accordingly the application is dismissed with costs such costs to include costs occasioned by the employment of two counsel.

PAKADE J

JUDGE OF THE LABOUR COURT

APPEARANCES

FOR THE APPLICANT : MR. R. KUHN
Instructed by RUDOLPH KUHN ATTORNEYS

FOR THE RESPONDENT : ADV MADLANGA SC and ADV. TOKOTA
Instructed by STATE ATTORNEY

DATE OF HEARING : 27 FEBRUARY 2004

DATE OF JUDGMENT : 26 MARCH 2004