IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO. J 2242/10B

In the matter between:

SIMRON TIGERLS	**APPLICANT**
and	
DEVELOPMENT BANK OF SOUTHERN AFRICA	**First RESPONDENT**
PAUL BALOYI	**Second RESPONDENT**
ADMASSU TADESSE	**Third RESPONDENT**
LEONIE VAN LELYVELD	**Fourth RESPONDENT**
DEREK LINDE	**Fifth RESPONDENT**

JUDGMENT

LAGRANGE J:

[1] This is an urgent application in which the applicant seeks the following relief:

> "*Setting aside the suspension of the applicants to your letter of the first respondent dated 3 February 2011;*

Directing the respondents to resist and desist from victimising and intimidating from exercising my right is in terms of the law and place me in the position of Financial Administrator;

Finding the first to third respondents in wilful contempt of court for not complying with an order issued by this honourable Court on 7 December 2010 and a case J2242/2010 B;

Sentence the second and third respondents to imprisonment for such a period or any other appropriate sentence deemed necessary by the court;

Finding the fifth respondent to the post to the answering affidavit in the case J2242/2010B guilty of perjury, alternatively calling him before the honourable court to explain himself;

Order the second to third respondents to pay the applicant's costs of all other steps taken pursuant to a court order of 7 December 2010, jointly and severally on the scale of the journey and client;

Order the registrar of the court to furnish a copy of this order to the Auditor General for consideration of recovering all costs payable to the applicant from the second and third respondents and/or take appropriate steps which he may deem fit in terms of the Public Finance Management Act 1999 and the Treasury Regulations;

Punitive costs against the respondents;..." (sic)

[2] This application flows from an order granted on 7 December 2010. The application was initially set down for 10 February 2011, but was postponed by agreement to allow the applicant to file a replying affidavit.

Background

[3] The applicant was employed as an Audio Video Graphics editor in the Communication and Marketing Unit of the respondent. He remains currently employed by the respondent and has worked for the bank for 23 years. Currently he does not hold a specific job, which is the issue that appears to lie at the heart of this application.

[4] The application which was set down for hearing on 7 December 2010, which was also brought on an urgent basis by the applicant, sought slightly different relief. In that application he applied for an order against the bank to: prevent it from rendering him redundant; ordering the bank to provide him with a revised organisational structure that included him in the "restructured work stream", and directing the bank to furnish him with a copy of a job evaluation report in respect of himself.

[5] What lay behind that application was the restructuring of the department in which he was working. The applicant claims not to have opposed the restructuring as such but merely sought clarity on what the new structure would entail. It was only sometime in mid-October 2010 that he realised that there was no position for him in the revised structure and he was asked what position he would like to hold in the respondent. He was clearly concerned that he might be placed in a position for which he was ill-equipped which might lead to his eventual dismissal for poor performance.

[6] However, by the time the matter came before court in December 2010, the parties had reached an understanding and the application was withdrawn save in respect of one

prayer. The court recorded this arrangement. According to the applicant, he had accepted a position as a Financial Administrator, and this agreement was made an order court, but the bank had failed to place him in the position even though three months had elapsed since the court order was granted. He claims that when he made an enquiry about this he was suspended with immediate effect, and attributes the reason for his suspension to his enquiry.

[7] The bank agrees that the applicant was offered the position of Financial Administrator on 2 November 2010 and that he communicated his acceptance of the appointment on 28 November 2010. He only accepted the offer nearly three weeks after he had launched his first urgent application on 5 November 2010. However, sometime between 02 November 2010 and 7 December 2010 the position of Financial Administrator was filled by the Finance department. According to the bank, the fifth respondent, Mr D Linde, who is the chief of Legal Services, was present at the court hearing on 7 December 2010 when the understanding of the parties was recorded by the court. Mr Linde claims to have had no knowledge at the time that the post of Financial Administrator had been filled, and would have raised it had he known that this was the case.

[8] What the court order of 7 December 2010 actually stated is:

> "*Having read the documents in having considered the matter:*
> *IT IS ORDERED THAT:*
> 1. *The parties have agreed that in view of the applicant having accepted an alternative position and all in the notice of motion are abandoned save for prayer 4 in relation to which the first respondent will furnish a copy of the report referred to in prayer 4 to the applicant on 08th December 2010.*
> 2. *The issue of costs occasioned by the application is to be argued in the normal course and either party may enroll the matter for this purpose.*"

[9] Much of the relief sought by the applicant relates to his claim that the bank has failed to give effect to the court order. The bank concedes that it did not place the applicant in the Financial Administrator post, but denies that this was in breach of the court order because the order was not framed in the form which the applicant claims. The respondent points out that on 24 January 2011 it did make the position of Co-ordinator: Data and Information Management available to the applicant as an alternative. The bank contends that this position was in fact more suitable than the one the applicant was previously offered and did not entail any loss of earnings. To date the applicant had not indicated whether he would accept the alternative position offered or not.

[10] The second part of the relief the applicant seeks relates to his suspension on 3 February 2011. The applicant believes that his suspension was an attempt to silence him and was unlawful and un-procedural. He does not elaborate on either of these grounds, but further claims that he is being victimised for exercising his rights by querying the bank's failure to appoint him as Financial Administrator, contrary to the court order of 7 December 2010. As such, he believes that his suspension is an automatically unfair labour practice.

[11] On his own account, the applicant was called to a meeting just after 15:00 hours on 03 February 2011 with the Group Chief Operating Officer and Acting Group Executive of Human Resources ('the COO'), who also deposed to the answering affidavit on behalf of the respondent. He was given a letter and asked to give reasons why he should not be suspended by 16h00 hours. When he complained that the notice was too short he was given until 18h00 hours to respond.

[12] The applicant claims that he explained why he should not be suspended when the meeting resumed at 18h00, but the COO did not consider his reasons and gave him a suspension letter. Before suspending him the COO demanded that he should, within 48 hours, give information to certain bank officials regarding his claims of alleged

corruption at the bank. However, he would not accede to this demand because of the "current problems" he was experiencing as a consequence of the conduct of some of the bank's officials.

[13] The COO claims that the representations made by the applicant regarding his pending suspension included the following: the fact that he had made disclosures during a previous disciplinary enquiry in November 2009; nobody at the bank had apologised to him after he'd been found not guilty; he was unfairly subjected to the previous enquiry because of the information he had against the bank which he had raised, and he was being suspended because of the civil action which he had brought against the bank for damages of R 15 million because he claims that disciplinary action should never have been instituted against him. The COO also alleges that the applicant advised her he was not obliged to provide her with information he intended using in his civil case. The COO further mentions that before she made a decision to suspend the applicant she was presented with a letter prepared by the applicant's attorneys of records which she had to consider first.

[14] The COO justified the decision to suspend the applicant on the basis that there were serious allegations of misconduct levelled against him which were the subject of investigation and it was not in either party's interest for him to be in the workplace while the matter was being investigated. The COO also took into account the applicant’s view that he was entitled to withhold information.

[15] The bank claims that the applicant’s suspension is unrelated to the difficulties of placing him in an alternative position, but is a direct consequence of his alleged approach to a number of the bank’s employees, including the COO herself, whom he advised that he had information regarding alleged corruption and mismanagement at the bank which he intended to share with various individuals and the media. An investigation by the Forensic Investigation department of the respondent was initiated and statements were taken. A recommendation was made by the department to instruct the applicant to

provide the necessary evidence to support his allegations. On 01 February 2011, this culminated in a letter being sent to the applicant, in which he was advised to make disclosure of the specific details of alleged corruption and mismanagement to one of a number of specified official channels for doing so.

[16] The applicant replied through his attorneys, disputing that he had made any such approaches to other senior staff about any corruption and mismanagement that extended beyond matters disclosed in his High Court litigation. Accordingly, the applicant argued that he could not assist with the instruction from the respondent. His attorneys further advised: "*We are further instructed the information that our client was in possession of, was handed to his attorneys in preparation for the case pending before the High Court and is thus, privileged*."

[17] The respondent contends that far from being privileged the applicant is in fact under a common law and statutory obligation to provide such information. The applicant's refusal to disclose it in accordance with the mechanisms available to him to make a protected disclosure, led the bank to infer that he was not acting in good faith.

Analysis

The alleged failure of the bank to comply with the court order

[18] In essence, the applicant claims that the court ordered the respondent to appoint him to the position of Financial Administrator. However, the court order simply records that the parties had reached agreement on him accepting an alternative position and that all other prayers of relief had been abandoned, save for one. There is nothing before me that indicates the court was even made aware of the detailed agreement reached between the parties.

[19] In any event, there is nothing in the wording of the order which would provide a foundation for an application for contempt of court: there is no clear obligation imposed on the respondent by the order, which the applicants can say unequivocally that the respondent breached, by failing to appoint him to the specific position of Financial Administrator. What's the applicant could have done, but chose not to, was to try and enforce the underlying agreement which motivated him to withdraw his application. Attempting to use the mechanism of a contempt application given the content of the court order is, in the circumstances, inappropriate and cannot succeed.

[20] Had the order been worded differently, and included an express provision making the agreement itself an order of court, the position might have been different.

[21] Before moving onto the applicant's other complaint, I should mention that on the affidavits before me, no case of perjury against the fifth respondent was made out, in so far as that is a matter the court could consider. The evidence does not support a claim that he knowingly misrepresented the availability of the position of the Financial Administrator.

Was the applicant's suspension automatically unfair?

[22] If one has regard to the sequence of events set out in the affidavits, it would appear that in mid-January 2011, the respondent was engaged in taking steps to further investigate the applicant's alleged approaches to senior members of staff intimating that he had information about corruption and mismanagement at the bank.

[23] It was only on 20 January 2011 that the applicant met with the COO and discussed, amongst other things, the issue of his placement in the bank. This much is common cause from the letters exchanged between the applicants and the COO on 24 January

2011. Where the correspondence differs markedly is that the COO claims the applicant said that the purpose of the meeting was to request permission to approach the Chairman of the bank and Minister to make them aware of certain allegations of fraud and corruption, which the applicant was not prepared to share with the management of the bank itself. The applicant never disputed the COO's claim in any subsequent communications with the bank. Given the alacrity with which the applicant appears to contest anything he does not agree with, his failure to dispute this suggests he accepted it was true.

[24] There is no 'automatically unfair labour practice' in the LRA. In truth it seems the applicant is alleging that his right not to be discriminated against for pursuing his rights has been infringed on account of his suspension. Assuming for the time being that his prosecution of his grievance relating to his placement falls within the rights conferred by the Act, as required by sub-sections 5(1) and (3) of the Act, in order to succeed the applicant must prove that facts of the impugned act complained and then the other party must establish that the action did not infringe the provision.[1]

[25] From the evidence available, it is difficult to find a basis for holding that the applicant's complaints about his placement prompted the investigation conducted by the respondent's Forensic Department. Moreover, his attitude towards making available the incriminating information of corruption and mismanagement at the bank, which he supposedly possesses does indeed give the impression that his own motives are not *bona fide*, and that the respondent might well have grounds for taking action against him for not making use of the appropriate channels to make a protected disclosure of the information he has. If he is obliged to provide such information under the Public Finance Management Act, he cannot hold it on the basis that he has communicated to his attorneys in preparation for other litigation.

[1] LRA, s 10

[26] In any event, as he seems to suggest by alluding to his discovery affidavits in the High Court matter, if the information he has is evidence that might be used in the course of those proceedings, then it is a mystery why he would not simply provide his employer with the information it is entitled to.

[27] On the information available I am not satisfied that the applicant has demonstrated that the reason for his suspension is in some way a consequence of him pressing the respondent on the question of his placement, which he must do to establish an infringement of his rights under section 5. It is more clearly related to the pending disciplinary action about his alleged threats to report on corruption and mismanagement, which he is reluctant to substantiate, and the respondent appears to have good cause for pursuing disciplinary steps against him.

[28] Other grounds raised by the applicant in support of his bid to set aside his suspension relate to the kind of prejudice which every person who is suspended on pay suffers. Even if he had established that a right had been infringed when he was suspended, nothing distinguishes his position in regard to the prejudice he is suffering to make a case for urgent relief compelling. I have taken note of the applicant's allegations about his depressed condition, but in view of the constant litigation he has been involved in with the respondent, and continues to be involved in, it is difficult to see how revoking his suspension alone would resolve matters. I am also mindful in this regard of the dictum cited in ***Jonker v Okhahlamba Municipality & others*** **(2005) 6 BLLR 564 (LC)** at 570,[32]-[33] in which the court cautioned against identifying one factor as the sole cause of an employee's medical condition. Moreover, it cannot be that an employer is denied the right to suspend an employee in appropriate circumstances, simply because that might induce a degree of stress or depression in the employee. Many circumstances in life induce stress, and that is indeed regrettable, but the stressful consequences of otherwise legal acts will not, as a matter of course, support a cause of legal action.

Conclusion

[29] On the basis of the above, I am satisfied that the applicant has failed to establish that he has demonstrated a *prima facie* right, though open to doubt, to have his suspension set aside, let alone a clear right, which must be established for final relief. I also find that the applicant is not entitled to relief in respect of the alleged failure of the bank to comply with the court order of 7 December 2010, and he has alternative remedies to enforcing any agreement concluded with the bank in respect of his appointment to the post of a Financial Administrator.

[30] The respondent asked for a punitive cost award against the applicant on the basis that his application was vexatious and frivolous. I would agree that there is an element of vexation in some of the more extreme relief he sought. However, because I believe the applicant might have had a *bona fide* belief that the court order of 7 December 2010 entitled him, by means of contempt proceedings, to enforce the underlying understanding that led him to withdraw the primary relief he was seeking. Considering also that the parties are still in an employment relationship, even though it is one that is evidently very fraught, I decline to make a cost order on this occasion.

Order

[31] The application is dismissed.

[32] No order is made as to costs.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 24 February 2011

Date of judgment: 01 March 2011

Appearances:

For the Applicant: M A Chauke instructed by Mokoena Attorneys

For the Respondent: Mr G Malan instructed by Edward Nathan Sonnenbergs