REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J2566/14

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

OBO RICHARD CHARLES MATOLA **Applicant**

And

MBOMBELA LOCAL MUNICIPALITY **Respondent**

Heard: **31 October 2014**

Delivered: **10 November 2014**

Summary: **Urgent Interdict of a suspension of the General Manager. The Local Authority failing to comply with its regulations in suspending the manager. The respondent labeling suspended as special leave.**

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an urgent application in terms of which the applicant seeks an order declaring the decision taken by the respondent on 9 October 2014 to place him on special leave with full pay to be unlawful. The applicant further seeks an order setting aside the decision taken by the respondent to place him on special leave.

Background Facts

[2] The applicant is the General Manager; Community Services employed by the respondent on a fixed term contract of five years. During September 2013, the MEC Corporate Governance commissioned the investigation whose work was concluded during October 2013. The Commission recommended disciplinary action be taken against a number of employees including the applicant. Following this recommendation, and on 22 October 2013, the respondent resolved that the applicant be placed on precautionary suspension. To this extend the applicant was served with the letter calling upon him to show cause why he should not be suspended.

[3] The responded having considered the submission made by the applicant as to why he should not be suspended resolved on 24 January 2014 that:

> 'The General Manager: COMMUNITY SERVICES, Mr RC Matola, not be suspended whilst the disciplinary procedures against him unfold.'

[4] On 3 February 2014, the applicant was served charges and informed that the disciplinary hearing would commence on 17 March 2014.

[5] On 30 June 2014, the municipal manager notified the applicant that he was suspended on the basis of the resolution of council which purport to revoke the previous resolution. The resolution reads as follows:

> "Notice is hereby given that Council has revoked resolution B (1) of 24 January 2014 which provided that you should not be suspended while the disciplinary procedures against you unfold.

You are therefore suspended from Council's activity active service in terms of regulation 6 of Regulation 344 Local Government: Disciplinary Regulation for Senior Managers, 2010 of 21 April 2011 and Council Regulation; J (i) of 26 June 2014; that:

(a) note be taken or further serious allegations of misconduct against the General Manager; Community Service, Mr RC Matola pertaining to unauthorised deviation from procurement processes and intimidation of witnesses;

(b) the General Manager Community Services, Mr RC Matola, be charged with additional allegation of misconduct and be put on precautionary suspension, with immediate effect, in terms on regulation 6 of regulation 344; Local Government; Disciplinary Regulation for Senior Managers, 2010 of 21 April 2011;

(c) the appointed initiator in the case of the General Manager; Community Services, Mr RC Matola be informed accordingly to the above;

(d) The matter regarding the appointment of security companies without following the prescribed up supply to management processes, be addressed as a matter of urgency.'

Your suspension is with immediate effect and shall last until 30 September 2014 or any earlier date that may be determined by the Acting Municipal Manager, pending the outcome of the investigation"

[6] It is apparent that further allegations of misconduct were made against the applicant in the above notice of suspension. Since then and up to 20 October 2014, the respondent has not taken any further steps against the applicant. It was as a result of the above that the union acting on behalf of the applicant referred the dispute concerning an unfair labour practice to the bargaining council.

[7] The arbitrator who considered the dispute found that the suspension constituted an unfair labour practice and ordered the respondent to reinstate the applicant. The respondent failed to comply with the award. The suspension lapsed on 30 September 2014 and consequently the applicant's

attorney addressed a letter to the respondent requiring it to allow the applicant to report for work.

[8] On 7 October 2014, the applicant received an sms from the municipal manager advising him to report for work. He reported for work as advised and specifically reported at the municipal manager's office. He was then told not to go to his office.

[9] On 10 October 2014, the applicant received a letter from the municipal manager which reads as follows:

> "Notice is hereby given that Council resolved at its special meeting of 09 October 2014 that you be put on special leave with full pay until 31st December 2014 in terms of clause 13.5 of your employment contract.
>
> Kindly acknowledge receipt hereof by attending your signatures on the space provide for you hereunder.
>
> It is trusted that the above mentioned information is received in good order. Yours Faithfully."

[10] The case of the respondent is that it was entitled to place the applicant on special leave and require him not to report for duty pending the outcome of the disciplinary hearing.

[11] In the answering affidavit, the respondent states the following:

> '3.5 The central tenet of the current application remains an inquiring whether, in light of the serious misconduct allegations preferred against the Applicant for which a disciplinary hearing is currently underway, he should be allowed to continue with his duties ordinarily as if the allegations in the disciplinary hearing were not in existence.
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> 3.6 Conversely, the inquiry is whether the Respondent, through evoking special leave provisions is entitled to pend adherence to and performance by Applicant of his contractual duties pending the finalization of the disciplinary hearing.
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> 3.7 Respondent readily admits the following:

"3.7.1 Applicant currently faces twenty-eight catches of serious misconduct…

3.7.2 There currently is under way disciplinary hearing against Applicant.'"

[12] The respondent further states the following at paragraph 3.7.6 of its answering affidavit:

> "Against the background of this matter, placing Applicant back into his position pending finalization of the disciplinary hearing militates against good governance, is not in the interest of justice and accordingly cannot be countenanced."

[13] In defending its decision of refusing the applicant access to the workplace pending the outcome of the disciplinary hearing, the respondent relies on the provisions of clause 13.5 of the employment contract which reads as follows:

> 'The Employer may grant the Employee special leave with or without pay for a reasonable number of working days with prior approval in terms of the relevant special leave policy or by decision of council.'

[14] It is common cause that the applicant is a senior manager and therefore his conditions of employment is governed by the Local Government: Regulations: Appointment and Conditions of Employment of Senior Managers promulgated in terms of the Local Government: Municipality Systems Act of 2000 (the Regulations).

[15] The Regulations recognises three circumstances or conditions which would qualify an employee to take leave, amongst which is family responsibility leave and special leave. The issue in this judgment relates to special leave which is governed by clause 32 of the Regulations which reads as follows:

> '32(1) A municipality may grant special leave to a senior manager in accordance with the policies of the municipality.
>
> (2) A senior manager must apply for special leave on an official leave form attached as Annexure E to these regulations.

(3) The municipality must adopt a special leave policy that defines-

(a) circumstances and conditions under which special leave is granted;

(b) as far as possible, events for which senior managers may be granted special leave.'

[16] It is clear from the reading of Regulations 32 (2) of the Regulations that special leave is granted upon application by an employee.

[17] Clause 32 (3) of the Regulations requires a municipality to adopt a special leave policy which has to define the circumstances and conditions under which special may be granted. It is apparent that the respondent has since the promulgation of the Regulations adopted a policy which is attached to the applicant's papers. Clause 4 of the policy provides circumstances which qualify an employee for special leave. It reads thus:

'Special leave shall be granted to an employee if the employee is attending a meeting or conference approved by council.'

[18] In *Heyneke v Umhlatuze Municipality*,[1] the Court faced with the situation similar to the present held that:

"[33] Special leave that is imposed on employees is effectively a suspension in the hope of subverting the residual unfair labour practice provisions of the Labour Relations Act No. 66 of 1995 (LRA) and all the time and other constraints that accompany suspensions.

[34] To discharge its onus of proving the... lawfulness of the special leave the municipality has to show that the special leave was at all times at the instance of the employee and with his consent, that it was not imposed on him, that exceptional circumstances existed and that the special leave resolution was adopted in good faith, and that it was rational, reasonable, proportionate and in the public interest."

[18] It is apparent that the resolution to place the applicant on special leave was taken by the respondent without consulting the applicant. The applicant did

[1] (2010) 31 *ILJ* 2608 (LC).

not as envisaged in clause 13.5 of the contract of employment apply for the special leave. It is also clear from the facts and the circumstances of this case that the special leave can only be at the instance of the applicant. Special leave at the instance of the respondent, imposed for that matter on the applicant without his consent, amount to nothing but a suspension.

[19] I accordingly find, based on the above discussion that, what the respondent labelled "special leave" resolution was nothing but the suspension of the applicant.

Lawfulness of the suspension

[20] The next inquiry to conduct is whether the suspension is in compliance with the terms of the employment contract, the regulations and policies of the respondent.

[21] In case of misconduct by a senior manager, the respondent is obliged to institute disciplinary proceedings in terms of regulation 4(1) of the Regulations which reads as follows:

> 'If a senior manager is alleged to have committed misconduct, the municipal council must institute disciplinary proceedings in accordance with this Disciplinary Code.'

[22] In certain circumstances set out in regulation 6 of Regulations the respondent is entitled to suspend an employee pending the outcome of a disciplinary action. In this respect the regulation 6 provides:

> "(1) The municipal council may suspend a senior manager on full pay if it is alleged that the senior manager has committed an act of misconduct, where the municipal council has reason to believe that- (a) the presence of the senior manager at the workplace may-
>
> (i) jeopardize any investigation into the alleged misconduct;
>
> (ii) endanger the well-being or safety of any person or municipal property; or

(iii) be detrimental to stability in the municipality; or

(b) the senior manager may-

(i) Interfere with potential witnesses; or

(ii) commit further acts of misconduct."

(2) Before a senior manager may be suspended, he or she must be given an opportunity to make a written representation to the municipal council why he or she should not be suspended, within seven [7] days of being notified of the council's decision to suspend him or her.

(3) The municipal council must consider any representation submitted to it by the senior manager within seven [7] days.

(4) After having considered the matters set out in sub-regulation (1), as well as the senior manager's representations contemplated in sub-regulation (2), the municipal council may suspend the senior manager concerned.

(5) The municipal council must inform -

(a) the senior manager in writing of the reasons for his or her suspension on or before the date on which the senior manager is suspended; and

(b) the Minister and the MEC responsible for local government in the province where such suspension has taken place, must be notified in writing of such suspension and the reasons for such within a period of seven [1] days after such suspension.

(6) (a) If a senior manager is suspended, a disciplinary hearing must commence within three months after the date of suspension, failing which the suspension will automatically lapse.

(b) The period of three months referred to in paragraph (a) may not be extended by council.'

[23] The question that arises in this matter is whether the respondent in suspending the applicant complied with regulation 6 of the Regulations. The other related question is whether the respondent has complied with the principles of nature of justice as provided for in regulation 4 (4) of the Regulations which reads as follows:

> 'The principles of natural justice and fairness must be adhered to notwithstanding criminal or civil action having been instituted.'

[24] It is apparent from the reading of the various judgments of this court that suspension is a serious matter which has serious implications for the employee. It is for this reason that suspension has been equated to an arrest. [2]An employer should therefore not rush to suspend an employee whenever allegations of misconduct are raised against the employee.

[25] It is of course well-established approach in our law that the employer would be justified in suspending an employee for serious misconduct allegations or whenever it is clear that the employee may pending the investigation of discipline interfere with witnesses or information relevant to the investigation. However, before taking a decision to suspend the employer is enjoined by the principle of natural justice to afford the employee the opportunity to be head. In other words the employer has a duty to show that there exist justifiable reason for suspending an employee.

[26] The procedure to follow in compliance with the requirements of natural justice is for the employer call on the employee to show cause why he or she should not in light of the seriousness of the allegations made against him or her should not be suspended. In this respect the allegations made against the employee must be set out in sufficient details to enable the employee to respond to the allegations and make submissions as to why the employer should not in the circumstances, suspend him or her.

[27] In the present case, there can be no doubt that the respondent in suspending the applicant failed to comply with the requirements of regulation 6 of the

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[2] See Mogothle v Premier of North West Province (2009) 30 ILJ 605 (LC) AND Lebu v Maquassi Hills Local Municipality (2012) 23 ILJ 642 (LC).

Regulations. In failing to comply with the requirements of regulation 6 the respondent infringed on a clear right of the applicant not to be suspended without a prior hearing.

[28] The harm that the applicant suffers pending the finalization of the disciplinary hearing is not financial because he receives his salary during the suspension. The irreparable harm that he suffers has to do with his dignity and freedom to work. The impact of the suspension on the freedom to work and dignity of the suspended employee was stated in *Minister of Home Affairs and Others v Watchenuka*,[3] in the following terms:

> '[27] The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.'

[29] In Muller *and Others v Chairman of the Ministers' Council House of Representative an Others,*[4] where the court held:

> 'The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community round one to be so barred, are not so immediately realized by the outside observer and appear, with respect, perhaps to have been underestimated in the Swart and Jacobs cases. There are indeed substantial social and personal implications inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do in other countries.'

[30] In light of the above, I find that the applicant has satisfied the essential requirements of the claim set out in his notice of motion. In this respect, the applicant has satisfied the requirements of urgency, a clear right, irreparable harm and the balance of convenience for the granting of the urgent relief.

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[3] 2004 (4) SA 326 (SCA).
[4] (1991) 12 *ILJ* 761 at 775 to 776.

Order

[31] In the premises, the following order is made:

1. This application is treated as one of urgency and the Rules of Court relating to form and manner of service is dispensed with.

2. The decision taken on 9 October 2014 by the respondent's council to place the applicant on special leave with full pay until the 31 December 2014 is unlawful.

3. The decision taken on 9 October 2014 by the respondent's counsel placing the applicant on special leave is set aside.

4. The respondent is directed to allow the applicant to resume his duties immediately.

5. The respondent is to pay the applicant's cost of the application.

Molahlehi, J

Judge of Labour Court of South Africa

Appearances:

For the Applicant: Advocate Riaan Venter

Instructed by: Maenetja Attorneys

For the Respondent: Mrs Nomqhele Moyo of Mculu Inc Attorneys