

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J 4158/98

In the matter between:

MABILO, NTATE JOSIAH

Applicant

and

MPUMALANGA PROVINCIAL GOVERNMENT

First Respondent

DIRECTOR-GENERAL, MPUMALANGA PROVINCIAL

GOVERNMENT

Second Respondent

THE DEPARTMENT OF PUBLIC WORKS,

ROAD AND TRANSPORT

Third Respondent

JUDGMENT

JAJBHAY, AJ:

[1] The parties in this matter are as follows: Mr Ntate Josiah Mabilo is the applicant; the first respondent is Mpumalanga Provincial Government; the second respondent is the Director-General, Mpumalanga Provincial Government and the third Respondent the Department of Public Works, Road and Transport. The applicant was employed by the first and third respondents as a Deputy Director-General and he was the head of the Department of Public Works, Roads and Transport.

[2] On 24 November 1998 the applicant received a notice, purportedly in terms of section 22 of the Public Service Act, Proclamation No. 103 of 1994, read with the regulations. This letter reads as follows - To Mr N J Mabilo:

"Dear Sir

1. You are informed that there is an investigation to be conducted regarding allegations made against you.
 2. The following allegations are made against you:
 - (a) That you have wilfully disobeyed carrying out a lawful order or instruction given to you by the member of the Executive Council for Public Works, Roads and Transport in that -
 1. on or about May 1998 you failed and/or neglected and/or refused to establish a fulltime secretariat for the Taxi Forum;
 - (ii) you failed and/or neglected and/or refused to set up a pilot project to enforce security at the Nelspruit/Bushbuck Ridge taxi route;
 - (iii) you failed and/or neglected and/or refused to appoint assessors to effect registration in the taxi industry;
 - (iv) you failed and/or neglected and/or refused to appoint non-executive directors to the Mpumalanga Provincial Co-operative of Taxis;
 - (v) you failed and/or neglected and/or refused to lead and report on the activities of the steering committee established as a result of the Roads Indaba held on or about November 1997.
 - (b) You wilfully disobeyed carrying out lawful orders or instructions given to you for the submission of the action plan for your department and its executives contained in the letter from the Director-General dated 10 October 1997.
 3. In view of the fact that your presence on duty may be prejudicial to the administration as you may interfere with the investigation and you may be prone to commit a similar offence, a decision to suspend you may be taken shortly after considering your reasons as to why you should not be suspended.
 4. Should you fail to provide satisfactory reasons within five working days, you will immediately be relieved of all your duties and be further prohibited from entering your workplace or building or even engaging yourself in any remunerative work during the suspension.
 5. Please be informed that your suspension will be with full emoluments although it may be stopped if the need arises."

This letter was signed by the Director-General.
- [3] Immediately upon receipt of this letter, the applicant telephoned his attorneys to arrange a consultation with them in order to obtain the necessary advice on the law and also to submit the reasons why he should not be suspended. The applicant's attorneys of record wrote a letter to the second respondent requesting further particulars as well as an

extension of the five day time period within which reasons were to have been furnished. In addition thereto the reasons were requested as to why the applicant should not be suspended. This letter was dated 27 November 1998.

ng to the applicant on 4 December 1998 he was handed a letter by a member of the Executive Council of the third respondent, purportedly from the second respondent, acknowledging the letter from his attorneys of record. He was also advised that his reasons not to be suspended were taken into consideration and a decision has been taken to suspend him from duty. The letter is dated 4 December 1998. It is addressed to the applicant and it says:

"Dear Sir

1. A letter of intended suspension was served on you and you were further advised to forward reasons within five working days why you should not be suspended from duty.
2. On 27 November 1998 your response was received regarding the allegations brought against you.
3. Your reasons have been taken into consideration but the following shall prevail.
4. You will be suspended from duty as your presence on duty may be prejudicial to the administration as you may interfere with the investigation. As soon as you receive this letter you are suspended.
5. You are further advised that you are prohibited from entering all buildings of your workplace until further notice.
6. You are further advised not to intimidate any person who has been consulted or who will be consulted regarding the allegations brought against you."

This letter was again signed by the Director-General.

- [5] The applicant's attorneys, on 8 December, communicated a letter to the respondents drawing their attention to certain contradictions in the above letter compared with another letter which is also dated 4 December 1998. The second letter, that is addressed to the attorneys of the applicant reads as follows:

"Re suspension of Mr N J Mabilo

1. Your letter dated 27th November 1998 has reference.
2. We regret to inform you that we are not agreeable to your request to be

afforded 21 working days to enable you to respond to the allegations levelled against your client. On investigations conducted thus far we are convinced that a prima facie case has been established against your client, hence his proposed suspension.

3. We have reason to believe that your client's continued presence in his employment might prejudicially hamper our continuing investigations.
 4. As for the request for further particulars to the allegations levelled against your client, kindly be advised that your client would be formally charged soon and would thereafter be afforded ample opportunity to request for further particulars and state his side of the case
 5. Due to your client's noticeable failure to indicate as to why he should not be suspended, your client has been suspended with full pay with effect from the 4th December 1998.
 6. Kindly note further that the proceedings are being brought in terms of the Public Service Act, 103 of 1994, as amended."
- This letter was again signed by the Director-General.

[6] It was contended on behalf of the applicant that the two letters dated 4 December 1998 were mutually contradictory of each other. The one was submitted to the applicant himself while the other was submitted to his attorneys of record.

[7] In terms of section 158(1)(h) of the Labour Relations Act, No. 66 of 1995 (the LRA), this court is empowered to review actions of the State as an employer. This section reads:

"A Labour Court may review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law."

See the case of Koka v Director-General, Provincial Administration, North West Government (1997) 7 BLLR 874 LC. A Provincial Government is part of the State in accordance with the Constitution of the Republic of South Africa, 1996.

- [8] In the present application the applicant seeks the following relief:
- (a) Reviewing and setting aside the decision of the respondent of 4 December 1998 or so about (sic).
 - (b) Uplifting the decision of the respondent to suspend the applicant's contract of employment.

- (c) Interdicting and restraining the respondents from suspending or terminating the applicant's contract of employment without complying with fair labour practices.
- (d) Ordering the respondent to pay the costs of this application on a Supreme Court scale.
- (e) Further and/or alternative relief.

[9] In terms of section 22 of the Public Service Act -

- (1) a head of department may in writing under his/her hand charge an officer referred to in section 21 with misconduct if he or she is of the opinion that sufficient grounds for a charge of misconduct against him or her have been found during the investigation.
- (2) If the head of department is of the opinion that an investigation in terms of section 21 is not necessary he or she may in writing under his or her hand charge the officer concerned with misconduct and appoint an officer to exercise the powers of an investigating officer in terms of section 23.

[10] There are several other subsections. It is important to note that this particular section deals with the disciplinary action that the head of department may take against an officer referred to in section 21. Section 21 refers to "an officer other than a head of a department or a member of the services or an educator or a member of the agency or the service ..."

[11] It is also relevant for the purposes of this particular application to have recourse to section 27 of the Public Service Act, 1994. The heading refers to misconduct of heads of department:

- (a) When a head of department is accused of misconduct, the relevant executing authority may appoint a person to investigate the matter and report to him or her thereon and such authority may thereupon report the matter to the President or, in the case of a Provincial Administration, to the Premier of the Province who may direct the said authority to charge the head of department concerned with the misconduct.
- (b) ...
- (2) The provisions of sections 21 to 26 shall apply mutatis mutandis to any proceedings following upon an investigation and direction under (1) (a) of the section ..."

- [12] The different sections set out above, envisage different processes in the resolution of the disciplinary measures. In the present matter, we are dealing with a head of department. Consequently, the provisions of section 27 apply.
- [13] The allegations set out in the letter to the applicant are of a serious nature. The applicant has been suspended on full pay pending the enquiry. In the circumstances of the present matter the employer must be afforded an opportunity to investigate the charges in a fair and objective manner. The employee, in my opinion, will be afforded an opportunity to respond to the allegations once a proper charge sheet has been drawn up. It is at this stage that the employee must be afforded a right to be heard before a decision is taken.
- [14] In the present matter the employee was afforded an opportunity to set out reasons "as to why you should not be suspended". Instead of acceding to this invitation the attorneys on behalf of the applicant requested elaborate particulars to a charge sheet which was not in existence. In addition, the attorneys requested an extension of 21 days to furnish the reasons. The employee would be perfectly entitled to these particulars and a reasonable time to prepare his case once the employer has finalised the investigations and thereafter decided to prefer charges against the employee.
- [15] I am alive to the fact that the suspension in operation in the present matter unquestionably constitutes a disruption in the life of the applicant. In the matter of Miller and Others v The Chairman of the Minister's Council, House of Representatives and Others (1991) 12 ILJ 761 at 775G-J Howie J says:
- "The implications of being deprived of one's pay are obvious. The implications of being barred from going to work and pursuing one's chosen calling and of being seen by the community around one to be so barred, are not so immediately realised by the outside observer and appear, with respect, perhaps to have been under-estimated in the Swart and Jacobs case. 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."

- [16] In the case of Miller and Others (supra) the employee was suspended under somewhat similar circumstances to the applicant but without the benefit of any salary during the suspension period. This case is clearly distinguishable.
- [17] In the present case I am of the view that the maintenance of the integrity and morale of the employer, required the action taken by the respondents. The suspension here was a necessary measure aimed at promoting orderly administration and was required to be implemented. In suspensions such as the present one, the employee is entitled to a speedy and effective resolution of the dispute. Employers must not be allowed to abuse the process. The investigation must be concluded within a reasonable time taking all the relevant factors into consideration and the employee must be informed without undue delay about the process steps that the employer is initiating. This may take the form of allowing the employee to return to his or her work or alternatively furnish this individual with a charge sheet summoning the individual to a properly constituted disciplinary hearing. The disciplinary hearing must be initiated within a reasonable time of the individual being suspended.
- [18] The objects underlying the right to a speedy investigation, without unreasonable delay, can be stated to be the following:
- 2.To prevent the unnecessary disruption in the life of the employee.
 - 3.To minimise the anxiety and concern of the employee.
 - 4.To limit the possibility that the employee will not be allowed a fair hearing.
 - 5.To resolve the dispute expeditiously.
- [19] Mr Seima, who appeared on behalf of the applicant, referred me to the administrative sections in the Constitution. It is clear that when interpreting any legislation it has to be done in the shadow of the Constitution and the point was correctly made. In the circumstances, it was submitted as I understood the argument, that the audi alteram partem principle ought to have been adhered to at the time the decision to

suspend the applicant was taken. The audi alteram partem maxim, (which for the sake of brevity I will call the audi principle) was described in the case of South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A), as follows:

"A rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such an individual has a legitimate expectation entitling him to a hearing unless the statute expressly or by implication indicates the contrary."

[20] In my opinion the audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly. In the case of Du Preez and Another v Truth and Reconciliation Commission 1997 (4) BCLR 531 (A) at 542D-I Corbett CJ states the following:

"What does the duty to act fairly demand of a public official or body concerned. In the answering of this question useful guidance may be derived from some of the English cases on the subject. In Doody v Secretary of State for the Home Department and Others (1993) All ER 92 (HL) Lord Mustel stated the following in his speech, concurred with by the remaining members of the court, at 106D-H:

'What does fairness require in the present case? My lords, I think it necessary to refer by name or to quote from any of the often cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derive the following:

1. When an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
2. The standards of fairness are not immutable. They may change with the passage of time both in the general and in their application to decisions of a particular type.
3. The principles of fairness are not to be applied by a rod identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all aspects.
4. An essential feature of the context is the statute which creates the

discretion as regards both its language and the shape of the legal and administrative system within which the decision is taken.

5. Fairness will very often require that a person who may be adversely affected by the decision would have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification or both.
6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

[21] It is clear in that in circumstances such as the present one the need for flexibility has to be emphasised and each case must be considered individually.

[22] Mr Seima placed emphasis on the argument that the applicant was afforded an opportunity to furnish reasons. Whilst being afforded an opportunity he was not allowed to do the same. In response, as I understood Mr Ndou's argument, he stated that after the expiry of the time period allowed it was well assumed that reasons would not be forthcoming, particularly in the light of the onerous demands made on behalf of the applicant. In my view, Mr Ndou's argument is compelling, if this were not so, I can foresee employees frustrating the process through spurious requests.

[23] In my opinion, and with specific emphasis to the facts of this particular case, the employer could not be faulted in the process that it adopted. The intention was to effectively and speedily resolve the dispute that was on hand. This ought to have been done without any delay. Mr Ndou explained to me from the Bar that had it not been for the launching of this particular application, the charges would have been preferred against the applicant. However, as Mr Ndou explained, out of respect and due reverence to this court, the respondents had decided to allow this matter to come to an end prior to initiating any

further steps. I cannot find fault with that response.

[24] In conclusion, I am of the view that the suspension of the applicant has been implemented not so as to impose a discipline but for reasons of good administration.

[25] It follows that the applicant has not made out a case for the relief sought and in the premises the application is dismissed with costs.

JAJBHAY AJ

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

SIGNED and DATED on this the 30th day of April 1999

: 22 APRIL 1999

: 22 APRIL 1999 (*EX TEMPORE*)

: ADV SEIMA

: SERTI, MAVUNDLA & PARTNERS

MR NDOU

: NDOU ATTORNEYS