IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J499/06

In the matter between:

BOORMAN PHUTIYAGAE **Applicant**

And
TSWAING LOCAL MUNICIPALITY **Respondent**

JUDGMENT

MOKGOATLHENG A J:

INTRODUCTION

[1] This is an urgent application for leave to appeal against my order dated the 12th of April 2006 dismissing an urgent application instituted by the applicant for an interim order. The urgent relief sought by the applicant was, to set aside his suspension from performing his duties in terms of his contract with the respondent pending the determination of this application.

[2] The application was opposed.

[3] The application was dismissed with costs, on two grounds, namely

(i) that the applicant had an alternative remedy, and as a result the matter was not urgent, and.

(ii) that the applicant had not succeeded in showing that there where exceptional circumstances justifying the intervention of this court at this stage.

[4] The applicant's grounds of appeal are as follows:

> "The Court erred in finding that, although it has jurisdiction to entertain the application, the applicant needs to utilise the provisions of the Disciplinary Procedure Collective Agreement (DPCA) dated 3rd of February 2004, and entered into between The South African Local Government (herein referred to as the bargaining council) and two other parties, the South African Local Government Bargaining Council in accordance with the provisions of the Labour Relations Act, 65 of 1995, to entertain and resolve his suspension which was effected contrary to the provisions of clause 13 of the DPSCA, and can therefore not approach the Honourable Court as a court of first instance to have his suspension set aside".

[5] The applicant is employed by the respondent as a corporate services

manager, in terms of a written contract of employment, which is governed by section 57(2) of the Local Government Municipal Systems Act 32 of 2000 (hereinafter referred to as 'The Systems Act'). The applicant's position entails supervising subordinate employees in his department. He submitted that his suspension would cause immeasurable harm to the functions and obligations of his department, to his status, esteem and reputation. He further submitted that his suspension will place him at a serious disadvantage in the continued performance of his functions and the execution of his duties.

[6] The facts which gave rise to the application appear on the founding affidavit as follows;

> On the 30th of March 2006, the respondent convened a special meeting to discuss certain charges levelled against him concerning the payment effected by the respondent to the winning designer of it's coat- of – arms,When the item pertaining to the coat- of –arms came up for discussion, the applicant says he was ordered by the speaker to leave the council meeting.

[7] The special council meeting then adopted a resolution, suspending him

from his duties with immediate effect. He says he is unable to state what the content of the councils discussions were, or what precisely informed the resolution which was subsequently adopted by the respondent. The respondent also resolved, that three members of it's permanent executive committee be authorised to appoint a person to act in his position. The applicant contends that at no stage was any consultation or discussion held with him before the resolution suspending him was adopted.

[8] The applicant argues that the Disciplinary Procedure Collective Agreement (here-inafter referred to as the Collective Agreement) entered into between SALGA, the Independent Municipal and Allied Trade Union (herein referred to as IMATU) and the South African Municipal Workers Union on the 4th of February 2004 is applicable and binding on him, and is deemed to be a term of his conditions of service.

[9] Before launching the urgent application, the applicant's attorney addressed a letter to the respondent advising that it's purported suspension of the applicant was in breach of clause 13 of the Collective Agreement, that the respondent should rescind its resolution. The respondent refused to do so, as a result, the appellant's only remedy was

to seek redress from this court, by applying for an interim interdict.

[10] The respondent argued that it is lawfully entitled to suspend the applicant pending an investigation into certain alleged misconduct on his part, which was set out as follows:

[11] On the 4th of March 2003 it adopted a resolution inviting the general public to participate in a competition to design a coat- of- arms for its council. The designer of the selected coat- of –arms design was to be paid a cash prize in the amount of R570 .00,

[12] A certain Mr Mokgalagadi was declared the winning designer of the selected coat- of –arms. On the 11th of September 2003 the respondent adopted Mokgalagadi's design as its coat- of-arms and resolved to pay him the competition prize which was set at R570.00

[13] Ms Anneke Van der Merwe ("van der Merwe"), the secretary to the Municipal Manager was instructed to type the resolution. The applicant approached "van der Merwe" on two separate occasions and instructed her to alter the amount payable on the respondent's resolution. The

applicant wanted "van der Merwe" to change the amount of R570.00 payable as the prize, and substitute it with the amount of R57000.00. She twice refused to obey applicant's instructions. His conduct caused " van der Merwe" to believe that her employment with the respondent had become unbearable, and as a result she left her employment. Subsequently, the resolution was amended to reflect the prize money as R57 000.00 and it was submitted to the respondent's department of finance for payment.

[14] The above allegations were confirmed by "van der Merwe" in a confirmatory affidavit which remains undisputed.

[15] As a result of this irregular alteration, the respondent mistakenly effected payment of the amount of R57000.00. The discovery of this irregular payment caused consternation in the respondent's council. An investigation was launched. The respondent instructed the Municipal Manager to investigate the matter and to prepare a report thereon for the respondent's council.

[16] On the 26th of May 2005, in consequence of the investigation, a report

was presented to the respondent's council which confirmed that an amount of R57000.00 was paid out by the respondent as the prize to the winner of the coat- of - arms design competition. The respondent decided to ratify the irregular payment. The ratification became controversial and attracted the public's attention. Because the ratification attracted adverse publicity, the respondent rescinded the ratification resolution.

[17] On the 24th of June 2004 the chairperson of the Tswaing Local Branch of IMATU (a signatory to the Collective Agreement with SALGA) wrote a letter to the respondent, seeking clarification of the report of the commissioning of the respondent's coat- of -arms. In that letter IMATU raised certain concerns it had about the above mentioned report, the transparency of the business in question, the minutes of the council meeting and error therein. Questions were raised regarding the procedure followed in writing out the cheque for R57 000.00.

[18] It is not clear how IMATU, as a trade union became seized with this dispute, but it is trite that a trade union normally protects the interests of it's members.

[19] The matter relating to the irregular payment of the amount of R57 000,00 was reported to the South African Police who on the 6th of April 2004, arrived at the respondent's premises with a search warrant and demanded the production of all the cheques paid to all service providers since October 2003 to December 2003, proof of all payments made to the corporate services manager (the applicant); the applicant's motor vehicle travel claims, his` motor vehicle log book, and the registration number and speedometer reading of his vehicle.

[20] The applicant and other persons, were arrested. The applicant also appeared in the district court. The case was thereafter transferred to the Regional Court for hearing. In the interests of transparent governance, the respondent said it resolved to investigate the issue relating to the irregular payment of the amount of R57 000.00. This action was also decided to afford the applicant an opportunity to clear his name.

[21] The respondent wanted the integrity of the investigation to be beyond question. As a result, it resolved to suspend the applicant. It argued that a proper investigation could not be conducted whilst the applicant was in the office, as he is the manager of the division to be investigated and his

subordinates may have to give evidence in the investigation. The respondent also expressed a fear that documents may be tampered with if the applicant were to be kept in office.

[22] The respondent contended that the suspension of the applicant was a precautionary measure and that is why he was suspended with full pay and benefits. The respondent argued that since it appointed an acting corporate services manager in the applicant's position, no harm will be visited on it's activities. It also argued that the applicant would suffer no prejudice from his suspension and will have an opportunity in due course to clear his name.

THE APPELLANT'S SUBMISSIONS

[1] The applicant argued that the Collective Agreement referred to above is a product of collective bargaining and that, the application thereof is peremptory and it is deemed to be a condition of service. He contends that the respondent is in breach of Clause 5.3 of the Collective Agreement which provides that the principles of natural justice and fair procedure must be adhered to, notwithstanding any criminal and/ or civil action having been instituted. He argued that that the respondent suspended him without adhering to the peremptory and unequivocal provisions of clause 13 of the Collective Agreement. This suspension is a breach of his conditions of service.

[2] In evaluating whether the applicant was subjected to an unfair labour practice it is appropriate to have regard to the applicable disciplinary and

dispute resolution provisions contained in the Collective Agreement. Clause 13.1 thereof provides:

> " The employer may at any time before or after an employee has been charged with misconduct, suspend the employee or utilise him temporarily in another capacity should the Municipal Manager be of the opinion that it would be detrimental to the interests of the employer if the employee remains in active service".

Clause 13.2 of the agreement provides:

> "If the Municipal Manager intends to suspend an employee he shall give notice of such intention and afford the employee with an opportunity to make representation as to why he should be suspended. The enquiry shall be done by means of the Summary Procedure as provided for herein".

Clause 13.3 thereof provides:

> "The suspension or utilization in another capacity shall be for a fixed and pre- determined period and at any rate shall not exceed a period of three (3) months. Any suspension effected shall be on full remuneration.

[3] On the face of these provisions, the respondent was entitled to suspend the applicant.

[4] The applicant contends that this court has jurisdiction to entertain the urgent application because there are exceptional circumstances, arising

from his unfair suspension, which resulted in a grave injustice to him. The applicant states that he cannot obtain justice by any other means except by the intervention of this court.

[5] The applicant states that he cannot obtain justice by invoking Clause 16 of the Collective Agreement, which enables the applicant to pursue his unprocedural suspension by the respondent in another forum and argues that this provision was inserted merely to comply with the prescriptions of section 24 of the LRA, that it cannot be construed as providing an alternative remedy,

[6] Clause 16 provides as follows;

> "16.1 Any person or party may refer a dispute about the interpretation or application of this collective agreement to the Central Council of the SALGBC".

"16.2 In the event of uncertainty on the part of the referring party, as to whether a dispute should be referred to a Division or the Central Council, or after a dispute has been referred to a Division, a party who disputes the jurisdiction of such Division, the dispute shall be referred to the Executive Committee which shall determine the appropriate jurisdiction".

"16.3 The General Secretary or Regional Secretary as the case may be, shall investigate the dispute or cause the dispute to be investigated and attempt to resolve the dispute by issuing a directive, and in the event of a dispute not being resolved:

16.3.1 appoint a conciliator from the appropriate panel of conciliators, (doing so as far as possible on a rotational basis) or if the dispute remains unresolved;

16.3.2 refer the dispute to arbitration".

[7] The applicant argued that he did not comply with the above provisions because he is suffering irreparable harm, being denied the right to resume his employment, because his constitutional rights to dignity are being infringed in that he has not been afforded the opportunity to respond to the serious allegations underpinning his suspension. As a result he said his reputation is being tarnished by unsubstantiated allegations. He insisted that he had to be heard before being suspended and that, he therefore has a right which has to be protected and, that can only be effectively achieved, by approaching this court in terms of section 158(1)(a)(i) of the LRA.

[8] The applicant further contends that if the urgent application is granted, it will prevent the respondent from flouting with impunity, the rights clearly afforded him by the Collective Agreement. By first approaching the bargaining council he would be denied the expeditious relief afforded him by an intervention of this court with an interdict which would effectively protect his entrenched constitutional and statutory rights.

[9] The Labour Court has the jurisdiction to grant urgent relief in terms of section 158(1)(a)(i) pending the finalisation of the matter before another forum, such as a bargaining council or the CCMA, if there are exceptional circumstances. This court will only exercise this power where detrimental consequences of unlawful or unprocedural conduct cannot be addressed effectively by conciliation or arbitration, or if it is shown that the failure by this court to intervene at that stage would result in a grave injustice happening or a serious miscarriage of justice being perpetrated and that justice cannot be attained by any other means.

[10] The contention that the dispute resolution mechanism contained in the Collective Agreement was inserted in order to comply with section 24 of the LRA is disingenuous, and is not borne out by the objective facts and the provisions of the Collective Agreement.

[11] An employer has the prerogative to investigate allegations of misconduct within the employment environment, and may in it's discretion institute disciplinary proceedings against it's employees if such proceedings are justifiable.

[12] The respondent is entitled in terms of Clause 6 of the Collective

Agreement, to conduct an investigation against an employee if there are allegations of misconduct.

Clause 6(a) of the Collective Agreement provides that:

> "6.1 An accusation of misconduct against an employee shall be brought in writing before the Municipal Manager or his authorised representative for investigation. If the Municipal Manager or his representative is satisfied that there is prima facie cause to believe an act of misconduct has been committed, he may institute disciplinary proceedings. The employer shall proceed forthwith or as soon as reasonably possible with a disciplinary enquiry".

[13] That the respondent has satisfied this requirement is apparent from the facts contained in it's answering affidavit which is not disputed.

[14] The applicant's unfair labour dispute has it's genesis in the controversy arising from the irregular payment by the respondent of the amount of R57 000.00 for the design of coat- of – arms in September 2003. This resulted in the respondent investigating the circumstances surrounding such an irregularity. Investigations were conducted by the Municipal Manager and a report was tabled at the respondent's council, which resulted in the matter being reported to the South African Police.

[15] The question of whether the applicant has established a right to have this court intervening on his behalf, has to be answered by considering all the circumstances relating to his suspension.

[16] Before this court will grant urgent interim relief, an applicant must satisfy the following applicable requirements in interdict proceedings:

(a) a clear right or a right prima facie established though open to some doubt,

(b) a well grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is granted,

(c) a balance of convenience in favour of the granting of interim relief, and,

(d) the absence of any satisfactory remedy.

(See: Spur Steak Ranches v Saddles Steak Ranch 1996(3) SA 706 (C) at 714 B-C. See also: Setlogelo v Setlogelo 1914 AD 221.)

[17] The question of urgency has to determined in conjunction with the establishment of a right to obtain the relief the applicant seeks, at the stage when this urgent application was instituted.

[18] The applicant was suspended in terms of a letter dated the 30th of March 2006. The letter of suspension states that the applicant is suspended with full pay and benefits pending investigations. The period of suspension is unspecified but there is no indication yet that there would be an undue delay. On the facts before me, the respondent was within it's rights to suspend the applicant.

[19] In the case of *Maropane v Gilbeys Distillers and Ventners Pty (Ltd) and another 1998 (19) ILJ 365 (LC),* Landman J had occasion to address the nature and ambit of the jurisdiction of the Labour Court to intervene by way of an interdict to correct the issue pertaining to an employer's alleged procedural unfairness conduct. The learned Judge emphasised that the Labour Court would only in exceptional circumstances interfere with an employer's prerogative to hold disciplinary enquiries.

[20] Landman J found that the procedural fairness guidelines contained in schedule 8 of the Act in the Code of Good Practice were only guidelines and did not give rise to rights capable of sustaining an independent action at the Labour Court. He held that when the execution or the failure to execute these rights, led to an unfair dismissal, are such rights recognised, and only then can consequences of the failure to abide by them be

remedied. This exigency will only obtain if there are cogent exceptional circumstances.

[21] He further held that it was incompetent for the Labour Court to come to the assistance of a party, where such party intended to interrupt the proceedings of another forum like a council or the Commission, when such fora are seized with the adjudication of unprocedural conduct, where such party has an alternative remedy

[22] In the case of *Highveld District Council v CCMA and others 2003 24 ILJ 517 (LAC),* the Labour Appeal Court in an appeal concerning a disciplinary hearing, dealt with the question of procedural unfairness that related to an employer who failed to comply with the peremptory stipulations of a clause in a collective agreement. The clause in question provided that:

> 'any accusation against an employee shall be brought in writing before the head of department concerned or his authorised representative by the person making the accusation'.

[23] This provision was not complied with, as the accusation giving rise to the disciplinary hearing originated from an anonymous complaint which was

not in writing. The employee contended that this constituted an unprocedural unfairness, that as a result thereof he had suffered prejudice because he did not know the identity of the initial complainant that, he could thus not properly prepare his defence.

[24] The Labour Appeal Court rejected this contention, holding that the respondent was nevertheless fully informed of all the allegations against him before the disciplinary hearing was held, and that the respondent, with all the evidence against him during the disciplinary hearing, had ample opportunity to dispute every piece of evidence that was put before the disciplinary committee.

[25] Having regard to the rationale of the Labour Appeal Court, it seems that a collective agreement merely represents guidelines. It is not an immutable code which is to be applied rigidly irrespective of the prevailing circumstances. In any event the applicant has not demonstrated why the agreement was breached by suspending him.

[26] The respondent advised the applicant of the reason for his suspension. The applicant does not deny that on two occasions he instructed and or attempted to influence "van der Merwe" to irregularly alter the

respondent's resolution by substituting the amount payable as R57 000.00 instead of R570.00. in possible contravention of section 7(a) Schedule 2 of (the Systems Act 42 of 2003).

[27] The applicant is the head of the department the respondent intends investigating. During the course of the investigation there is a possibility that, the applicant's subordinates may have to be interviewed, that documents may have to be accessed. The continued presence of the applicant might possibly hinder the investigations.

[28] The rationale underpinning the applicant's suspension appears to be reasonable and it is prima facie informed by the suspicion that the applicant has committed serious misconduct.

[29] The applicant contended that he was not informed of the reasons of his suspension; in my view on the conspectus of the available evidence, the applicant is fully aware of the allegations against him and the reason why the respondent has launched an investigation against him.

[30] The investigation is at its inception, and it is the preliminary step in the commencement of the disciplinary proceedings should the evidence

gathered in such investigations justify the convening of a disciplinary hearing.

[31] Before the commencement of the disciplinary proceedings, the applicant is entitled to be appraised of the case against him, he has a right to be provided with the evidential material to be used against him.

[32] Should there be a disciplinary hearing, the applicant has a right to put his version before the disciplinary hearing, confront any evidence tendered against him, and has a right to make submissions and address the disciplinary hearing on the law and the facts.

[33] The applicant if not satisfied with the decision arrived at, at the disciplinary hearing, has a right to refer the matter to arbitration, and if aggrieved by any award, he has a right to review such award in the Labour Court.

[34] There is also the question of the balance of convenience to be considered. It is clear that the interests of the respondent which intends conducting investigations will be detrimentally affected, if the applicant continues with his duties during such investigations.

[35] This is not a case where the respondent has unfairly dismissed the applicant. The applicant is suspended with full pay and benefits, his suspension is a holding operation intended as an interim measure undertaken for accountable and transparent governance whilst the respondent is conducting investigations pending a disciplinary enquiry if such proceedings are justifiable.

[36] The prejudice the respondent will suffer, is far greater than the potential prejudice if any the applicant will suffer, all the applicant has to do is remain on suspension whilst the investigations are proceeding, such suspension in terms of the Collective Agreement may not be for a period exceeding three months.

[37] The applicant has an appropriate remedy should his suspension exceed three months. The fact that the period of suspension is not specified does not abrogate the applicant's remedy.

[38] The applicant contends that the unfair suspension tarnishes his image, esteem and reputation. It is common cause that the applicant was arrested. The applicant's arrest and appearance in a criminal court is

public knowledge since April 2004.

[39] In my view the image, esteem and reputation of the applicant has already being tarnished. It is a moot point whether the applicant's suspension can conceivably be construed as more injurious to his character, esteem and reputation than the ignominy of being arrested and arraigned before a criminal court and being accused of committing a crime in a public forum.

[40] The question is whether the applicant has shown that as a result of his suspension he will suffer irreparable harm if this court does not grant him the interim relief he seeks.

[41] In my view the applicant's suspension cannot be adjudged to be a grave injustice, or a serious miscarriage of justice, or that by such suspension the applicant is subjected to an injustice which cannot be subsequently and effectively addressed by conciliation or arbitration.

[42] In my view the applicant's right to be heard before suspension cannot by any stretch of logic be construed as a glaringly grave injustice, or a serious miscarriage of justice justifying the conclusion that the failure by

this court to intervene will result in the applicant suffering irreparable harm.

[43] The applicant will in due course obviously have an opportunity to put his version, when this matter is referred to conciliation and/ or arbitration proceedings, where he will be afforded a full opportunity to defend himself and clear his name on the ultimate question whether the charge is or is not made out.

[44] In my view the applicant has failed to prove on a balance of probabilities that there are exceptional circumstances justifying this court to intervene at this stage.

[45] The question whether the suspension of the applicant is unfair and consequently an unfair labour practice must be adjudicated upon and decided by the appropriate forum; in this case, the bargaining council.

[46] The applicant has failed to satisfy the requirements for an urgent interdict in respect of irreparable harm and the absence of an alternative remedy.

[47] Having regard to the reasons enunciated above I am of the view that there

are no reasonable prospects that another court would come to a different conclusion than I have, in this matter.

[48] In the premises the application for leave to appeal is dismissed with costs.

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RD MOKGOATHLENG

ACTING JUDGE OF THE LABOUR COURT
FOR THE APPLICANT: ERIC H LOUW ATTORNEYS

FOR THE RESPONDENT: NOKO INCORPORATED

DATE OF HEARING: 26 APRIL 2006
DATE OF JUDGMENT: 11 MAY 2006

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