IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: J812\07

In the matter between:

NIREN INDARDAV SINGH **Applicant**

and

SA RAIL COMMUTER CORPORATION LTD t\a METRORAIL **Respondent**

JUDGMENT

MOSHOANA AJ

Introduction

[1] This matter came before me as an urgent application. The parties filed all the papers to enable the Court to hear the matter. Both parties went to the extent of filing Heads of Arguments. The Respondent opposed all the prayers including the fact that the matter is urgent. The urgency issue was argued before me and I then held that the matter is urgent and heard the mater. I do not wish to elaborate further why I exercised my discretion to hear the matter as one of urgency. Suffice to mention that the continued hardship to be suffered by the Applicant had the Court not held that

the matter is urgent far outweighs the alleged prejudice by the Respondent.

Background facts

[2] On 13 April 2007, the Applicant brought an application on seven days notice to the Respondent. The Applicant sought the following orders:

2.1. Dispensing with the forms and services provided for in the Rules of the above Honourable Court and disposing of the matter as one of urgency in terms of Rule 7;

2.2. Ordering the Respondent to reinstate the Applicant's monthly salary and benefits with immediate effect pending the finalisation of the investigation;

2.3. Ordering the Respondent to pay the Applicant's medical aid contribution for the month of March 2007;

2.4. Ordering the Respondent to uplift the Applicant's suspension;

2.5. Ordering the Respondent to pay the Applicant's costs on the scale between attorney and own client;

2.6 Further and\or alternative relief.

In the course of the submissions, Mr Wannenburg appearing for the Applicant moved for the amendment of prayer 2 which amendment was not opposed by Mr Maserumule who appeared for the Respondent. The amendment just added the words *"pending the finalisation of the investigations"*. Again in the course of the

submissions, he abandoned prayer 5 after the Court raised certain concerns. This I find was advisable and appropriate to do.

[3] It is common cause from the papers that Applicant commenced his employment on the 1st day of July 2000 and was employed as a regional engineer a managerial position with a level 109 grade. On 21 January 2007, the Applicant was suspended with full salary and benefits pending an investigation. On 15 March 2007, the Respondent unilaterally suspended the Applicant's medical aid benefits. On 27 March 2007, the Respondent unilaterally suspended the Applicant's salary benefits. Attempts were made by the Applicant's attorney to have the unilateral decisions reversed but to no avail. The Applicant then approached this Court for orders referred to above.

Applicant's contentions

[4] Applicant contends that the suspension without pay and benefits is unlawful and unfair. Mr Wannenburg referred the Court to **Damane v Premier, Mpumalanga & Another 2002 (23) ILJ 477 (T).** In addition, the Applicant contends that he has a Constitutional right, not to incriminate himself and any questions to be raised with him in the course of the corruption investigation should be raised with him in writing and he shall respond thereto. This clearly offended the Respondent.

[5] The Applicant further contended that his right to be suspended with pay and benefits emanates from the provision of the collective agreement and conditions of service applicable to management.

There were various other contentions raised, which in the Court's view are not worth mentioning in this judgment regard being had to the Respondent's contentions which shall be dealt with later.

Respondent's contentions

[6] Other than technical defences directed to urgency and remedy, the Respondent did not raise other contentions which merit serious considerations. Mainly, the Respondent contended that it interfered with the Applicant's benefits and salary because of the Applicant's perceived non-co-operation and refusal to tender unconditional services. The Respondent held a view that the Applicant has no right to dictate to it how the services should be tendered. The Applicant had no right to bring an attorney to its internal processes so the argument went. In view of that which the Respondent considered to be breach of the contract of employment it had a right in law to withhold the salary and benefits. During oral submissions in Court Mr Maserumule for the Respondent made the following crisp submissions:

6.1. The basis for the suspension without pay stems from the common law.

6.2. That the issues should be determined by the CCMA, under its unfair labour practice jurisdiction.

Analysis of the contentions

[7] The Court having considered the papers and submissions came to the conclusion that the matter raises one principal issue, namely is

the Respondent justified in suspending the Applicant without pay? Mr Maserumule relied on the common law. This in the Court's view he did because the collective agreement does not sanction suspension without pay, neither does the conditions service. He did not provide the Court with any authority to support the view that common law allows suspension without pay. Neither did he seek an opportunity to do so.

[8] Nonetheless the Court had an opportunity to consider the common law position. The position is simply this; an employer has no right to suspend without pay. The authorities reviewed reveal the following situation:

In **Norton v Mosenthal & Company 1920 EDL 115 Hutton J** held as follows:

> *"An examination of the authorities quoted on both sides seem to show that in order to justify a master withholding wages from a servant on the ground of misconduct warranting dismissal, the dismissal must either be in express terms or there must be facts brought to the servant's notice, from which a dismissal may be referred".*

[9] In the case of **Van der Merwe v Colonial Government (14 CTR P 732)** it was laid down by Maasdorp JP (at p 737) that where a master is prepared to hold the servant to his contract and according to the contract the servant may be called upon to come forward and do his work and when the contract prevents him from being free to earn wages in some other capacity, <u>then the master cannot claim any abdication of wages for the time the services are not actually performed.</u>

[10] In **Liebrandt v South African Railways 1943 AD 14, De Wet CJ** in quoting with apparent approval the learned Judge in the court a quo who said the following:

> *"If there is a suspension, but a suspension not in terms of the statute, the defendant is in the same position that purports to suspend his servant without actually dismissing him. An employer at common law who does this keeps the contract alive and is bound to pay the servant his wages right up to the date of his dismissal just as if the servant had been allowed to do his work".*

[11] In the **Liebrandt** matter section 15 (5) of the Railway and Harbours Services Act no 23 of 1925 allowed suspension with loss of emoluments for the period of suspension. I do not think that the decision of **Bloch v Cohen 1933 TPD 101** is an authority to the proposition that the common law allows suspension without pay. In that matter, Greenberg J sitting with Barry J said the following:

> *"But I know of no authority in law for holding that a servant is entitled to be paid wages if he has refused to do the work whether he has been dismissed or not".*

In that matter the Court was examining whether not doing work can be raised as a defence to meet the claim of unpaid wages.

[12] In **Myers v SA Railways and Harbours 1924 AD 85,** Solomon JA at p 90 said the following:

> *"If however, it was due to his employer that he had been unable to perform his work, then he would be entitled to be paid notwithstanding that no service had been rendered by him".*

In my view the learned Judge was referring to situations like suspension. A suspension prevents an employer to perform work and such is done at the behest of an employer. Then such situations entitled an employee to be paid even if there is no service by him \her.

[13] In terms of the letter of suspension, the Applicant was to enter the Respondent only if escorted, was to hand over all property including office keys, cellular phone, parking and access permits, lap top and palm top. He was to refrain from making contact with current or previous employers as well as current and previous suppliers and contractors (p 27 of founding affidavit).

[14] Surely the prevention to do work was brought about by the Respondent and in line with the **M**yers decision supra, the common law dictates payment even if no services (**Goldstone v Thorton's Garage 1929 TPD P 116).** Besides, even if the common law position was otherwise, the Constitution needed to be resorted to.

[15] Section 23 of the Constitution of the Republic of South Africa Act 108 of 1996 provides thus:

> *"Everyone has the right to fair labour practice".*

Section 39 (2) thereof provides thus:

> *"When interpreting any legislation, and <u>when developing the common law</u> or customary law, every court or tribunal or forum must promote the spirit, purport and objects of the Bill of right".*

One of the purposes of the Labour Relations Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of the Act, being amongst others, to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.

[16] That being so, I do not think that any common law position that conflict with the supreme law should be developed in such a way that it does not give effect to the spirit and the objects of the Bill of rights (**Peko v National University of Lesotho (1998**) **JOL 2187 (LC).**

[17] The second contention simply relates to the lack of jurisdiction of the Court to grant the remedy. This submission is premised on the fact that if fairness is raised, then the matter becomes one of fair labour practice and accordingly, the CCMA should have dealt with the matter. I do not agree with Mr Maserumule.

[18] When asked by the Court which form did the suspension effected by the Respondent take, he answered that it is neither a holding

operation nor a disciplinary suspension (**Koka v Director General: Provincial Administration Northwest Government (1997) (LC).** His argument could have held water, if the contention of the Respondent was that the suspension was a disciplinary one.

[19] Section 186 (2) (b) of the LRA defines unfair labour practice as any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee. Section 191 (1) (a) provides that if there is a dispute about … an unfair labour practice… the employee alleging the unfair labour practice may refer the dispute in writing to the commission if no council with jurisdiction.

[20] It is obvious that the unfair labour practice referred therein is defined in section 186 of the Act, no more no less. The suspension referred to in the section takes the form of a disciplinary suspension. Accordingly, there is no merit in the contention of Mr Maserumule that the Court lacks jurisdiction and or power.

Conclusion

[21] The Respondent failed to show any basis in law, why the Applicant's right to his salary and or benefits should be interfered with (see section 32 (1) of Basic Conditions of Employment Act 75 of 1977). Even if one were to suspect that the contract of employment which has not been produced in Court provides for such, I would believe that such provision would be invalid for two reasons.

21.1. It is unfair and deprives the Applicant his fundamental right to fair labour practices. This is so considering the fact that the Applicant did not suspend himself, the Respondent did.

21.2. Section 49 (4) would be offended thereby.

Besides, if the right to withhold the salary and benefits emanated from the terms of the contract of employment one would have expected the Respondent to produce such a contract as it is germane to its defence to the Applicant's claim.

[22] During submissions, Mr Maserumule implored the Court to grant an order if it is inclined to do so, with the following additions:

> "That prayer 2 is subject to Applicant making an unconditional tender including complying with his duties set out in paragraph 24 of the answering affidavit".

I have a difficulty with that proposition. Firstly, the Court has not been told in any amount of certainty as to what exactly is an unconditional tender.

[23] If that means, compelling the Applicant to incriminate himself then the Court cannot. If it simply means him complying with his terms and conditions of the contract of employment, the answer is simple and does not warrant an order of this Court. That being to uplift the suspension and to call the Applicant to perform his duties. Having looked at the suspension letter, I do not agree that same can be

interpreted to mean that the Applicant is left with no option but to be dictated upon by the Respondent to his prejudice.

Order

Accordingly I make the following order:

1. The Respondent is ordered to reinstate the Applicant's monthly salary and benefits with immediate effect. This shall be so pending the finalisation of the investigation.
2. The Respondent is ordered to pay the Applicant his net salary for the month of March 2007.
3. The Respondent is ordered to pay the Applicant's medical aid contribution for the month of March 2007.
4. The Respondent to pay the Applicant's costs.

_____

G N MOSHOANA AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Adv Wannenburg
Instructed by	: Tana Van Vuuren & Associate
For the Respondent	: Mr Maserumule
Instructed by	: Maserumule Inc
Date of hearing	: 20 April 2007

Date of Judgment : 26 April 2007