IN THE LABOUR COURT OF SOUTH AFRICA HELD IN JOHANNESBURG

Case no: J270\07

In the matter between:

JACOB THEMBA DLADLA	**Applicant**
and	
COUNCIL OF MBOMBELA LOCAL MUNICIPALITY	**First Respondent**
MBOMBELA LOCAL MUNICIPALITY	**Second Respondent**

REASONS

MOSHOANA AJ

Introduction

[1] On 20 February 2008, I issued an order in the following terms:

1. The application is dismissed.
2. The applicant is to pay the costs of the respondents on a party and party scale, such costs to include costs of employing two counsels.

Hereunder follows the reasons for such an order.

Background facts

[2] The applicant is employed by the second respondent as municipal manager in terms of a written contract of employment fixed for five years. On 11 February 2008, the first respondent passed a resolution suspending applicant as municipal manager. According to the applicant such suspension is not consistent with the provisions of clause 9 of his contract of employment[1]. The respondents disputes that.

[3] In view of that suspension, the applicant approached this court on 15 February 2008, to be heard on 20 February 2008. There is a dispute about when exactly was this application brought. I shall not determine this dispute. Suffice to mention that on 14 February 2008, this court issued an order to the following effect:

1. The matter is enrolled.
2. The matter is struck off the roll.
3. The applicant is ordered to pay the costs of this application

on an attorney client scale including the costs of two counsels.

[4] The applicant's view is that on that day no application was brought. This dispute may be resolved by this court some other day. In the application I heard, the applicant sought the following:

1. That the rules of service and process provided for in the rules of this court be dispensed with in order that this matter be heard as one of urgency in terms of rule 8.
2. The respondents are called upon to show cause on a date

to be determined by the Registrar, why a final order

1 Clause 9

9.1 The municipality may suspend the municipal manager on full pay if it is alleged that he has committed a serious misconduct and the municipality in its sole and absolute discretion believes the presence of a municipal manager may jeopardise any investigation.

9.2 The municipal manager shall, in view of clause 9.1 above be notified in writing of his suspension and shall be entitled to respond to the allegations within seven working days.

9.3 If the municipality suspends the municipal manager as above, then a disciplinary hearing must be held within ninety days.

should not be made.

2.1. Declaring that the suspension of the applicant by first respondent is unlawful.

2.2. Reviewing and setting aside the resolution adopted by the first respondent on 11 February 2008 and purporting to suspend the applicant.

2.3. Directing that with immediate effect, the respondents shall uplift the applicant's suspension and permit him to resume duties as municipal manager of the second respondent.

2.4. Ordering the respondents to disclose and furnish a copy to the applicant attorneys of the interim investigation report prepared by Ngobe-Nkosi Attorneys and furnished to the respondent.

2.5. Costs of suit on attorney and own client.

3. Directing that paragraphs 2.1 to 2.4 above shall operate as interim orders pending the return date to be determined by this Honourable court.

4. Granting further and or alternative relief[2].

[5] In argument, Kennedy SC for the applicant moved for amendment of prayer 3 to refer only to paragraph 2.3. In support of his application, the applicant testified under oath that there is nothing in the resolution of 11 February 2008 that states that he has committed a serious misconduct. Also there is nothing to indicate or allege that his presence at work may jeopardise any investigation.

[6] Further, he testified that he is entitled to be afforded an opportunity to make representations to council as to why a decision suspending him should not be taken. In his view fairness required that he be heard before any decision to

2 Notice of motion filed on 15 February 2008.

suspend him is taken and that was not done.

[7] Alleging that the matter is urgent, he testified that his name and reputation is being tarnished in the community and public at large, including public media. Further, he testified that the suspension therefore has adverse effects on him and is continuing. He made reference to certain already published articles (B1 to B9).

[8] He testified that if the order is not issued, he will continue to suffer harm detrimental to his dignity and reputation. The respondents disputed all that. In its supplementary affidavit, the first respondent, through its speaker had set out various allegations against the applicant which were being investigated by Nkosi-Ngobe attorneys. On 24 October 2007, the first respondent resolved to appoint an independent service provider to investigate the conduct of the applicant. In that resolution various allegations of what appears to be serious misconduct were set out.

[9] On 21 November 2007, Ngobe's preliminary report was furnished to the first respondent. That preliminary report according to the first respondent highlighted a series of allegations of serious misconduct. As a result of that, the first respondent purporting to act in accordance with clause 8.4 of the employment contract, placed the applicant on special leave. Although the applicant defied this, the issue became a subject of litigation which is apparently still pending in this court.

[10] At the time of argument of this application, the MEC: Local Government and Housing had already issued a notice in terms of section 139 of the Constitution to place the second

respondent under an administrator. At the time of preparing this judgment, the second respondent was placed under such administrator.

[11] Further allegations also surfaced that the applicant deleted certain information on his laptop and that he failed to co-operate with the investigator who had already expressed discomfort about the presence of the applicant and his non-cooperation to his attorneys on 28 January 2008.

[12] It was in this letter of 28 January 2008, that the investigator refuted allegations that the applicant did not know anything about investigations into his conduct.

[13] On 12 February 2008, after his suspension, the applicant was informed of his suspension. On the same day, the full resolution of 11 February 2008, together with the draft resolution was faxed to the applicant's attorneys of record.

[14] On 14 February 2008, the applicant was served with an affidavit of Msomi Jimmy Mohlala which sets out the allegations already referred to earlier in this judgment (resolution of 24 October 2007). In his replying affidavit, the applicant baldly denied allegations of tampering with laptop and failure to co-operate with the investigator.

Argument

[15] In court Kenny SC appearing with Mokhare pegged his submissions on two arguments. The first one related to proper interpretation of clause 9 of the contract, which I shall later term breach of contract argument. The second one which was persued with vigour relates to a right to be heard before

suspension, which for the purpose of this judgment, I shall call the fairness argument. On the other hand, Barrie SC appearing with Buirski argued that there was no breach of contract and or unfairness.

Analysis

The breach of contract argument

[16] In the applicant's short heads it was contended that, when endorsing the resolution suspending the applicant, no allegations had been communicated to the applicant that he has committed a serious misconduct. Furthermore, no allegation has been communicated to the applicant that his presence at work may jeopardise any investigation.

[17] It is apparent that this submission is premised on the assumption that clause 9.1 properly interpreted places a duty on the first respondent to communicate the allegations and the fact that his presence may jeopardise any investigation.

[18] Clause 9.1 gives the second respondent, obviously through the first respondent a discretion to suspend. However, that discretion has to be triggered in my view by the presence of allegations that he has committed a serious misconduct. Clause 9.1 does not suggest that the said allegations ought to be communicated to the municipal manager before suspension.

[19] The wording is clear. Once an allegation exist that a serious misconduct has been committed that is sufficient to trigger the coming into operation of clause 9.1 in particular. The believe that the municipal manager may jeopardise investigation is in the absolute discretion of the municipality.

Therefore the test is subjective. Such believe need not be communicated to the applicant before suspension.

[20] At the time when Nkosi tabled his preliminary report various instances of serious misconduct on the part of the applicant were brought to light. Therefore since then (21 November 2007) the second respondent acquired what one would call a right to suspend which at its discretion may be effected.

[21] Since the believe in my view is subjective, it only takes the municipality to form that believe. It matters not that the applicant would say that as a matter of fact he is not interfering with the investigation. That may be so factually, but the issue is the believe of the second respondent. I take this view, even if I were to accept the applicant's version that he is not interfering with the investigation.

[22] Therefore in my view clause 9.1 has not been breached. In so far as clause 9.2, Kennedy argued that such would be superfluous as the applicant knows of no allegations. Clause 9.2 in my view has nothing to do with the lawfulness or otherwise of the suspension. All it does, it guarantees the applicant a right to be heard after the suspension, which may make the second respondent perhaps to change its believe and uplift the suspension in terms of clause 9.1.

[23] On 12 February 2008, the applicant was notified of his suspension in writing. Therefore the first part of clause 9.2 has been complied with. I am convinced that the applicant has knowledge of what is alleged against him. He should have been aware of the resolution taken on 24 October 2007. He is now aware of the allegations set out in the affidavit of Mohlala. Therefore, if he need to put up any response, he knows what to respond to.

[24] In terms of the resolution of 11 February 2008, all the applicant is afforded is an opportunity to make representation

whether his suspension should continue until the finalisation of the investigation by Ngobe[3].

[25] Accordingly clause 9.2 has not been breached at all. Nothing much turns on clause 9.3 because it may still happen. On those basis, I conclude that the breach of contract of argument must fail.

The fairness argument

[26] This is the argument as mentioned before, Mr Kennedy SC persued passionately with vigour. In his submission, the applicant had a right emanating from common law to be heard before the suspension. As it was common cause, that the applicant was not given any form of hearing before the suspension, then suspension is unlawful so the argument went. He cited various authorities to support the proposition that a suspension without a hearing is unlawful.

See: Muller v Chairman of the Ministers Council House of Representatives & Others 1991 (12) ILJ 761 (C),
Ngwenya v Premier Kwa-Zulu Natal 2001 (8) BLLR 924 (LC),
Venter v SATB 1999 (10) BLLR 1111 (LC),
Marcus v Minister of Correctional Services 2005 (2) BLLR 215 (SE),
SAPU v National Commissioner of Police 2006 (1) BLLR 42 (LC),
Saloojee v Mackenzie NO 2005 (3) BLLR 285 (LC)
Bula v Minister of Education 1992 (4) SA 716 (TKA),
Mbuyeka v MEC welafare Eastern Cape 2001 (1) ALL SALR 567 (TK),
Mahlauli v Minister of Home Affairs 1992 (3) SA 635 (SE),
SAPU v SAPS 2005 (5) BLLR 490 (LC).

[27] In **Muller's** decision the court was dealing with exercise of public power. There the court found that the Public Service Act

3 Clause (c) Mr JT Dladla be given an opportunity until Thursday 21 February 2008, to deliver written representation to the speaker of council…regarding his suspension whether it should continue until Mr S Ngobe's investigation has been finalised…
Clause (d) Mr JT Dladla's representation in terms of (c) above if any, be placed before council at its meeting on 26 February 2008 to enable council to consider and decide whether Mr Dladla's suspension should continue.

of 1984 did not empower suspension in the absence of a hearing. Of course the question that comes to mind is when the first respondent suspended the applicant was it exercising public power or powers emanating from the contract of employment (clause 9.1). In my view, the first respondent was exercising contractual power.

[28] In **Ngwenya v Premier Kwa-Zulu Natal**, the court had to consider the provisions of clause 7.2 (c) of the PSCBC Resolution 2 of 1999 which provided that once an employee is suspended, the employer must hold a disciplinary hearing within a month. Most importantly, the court at paragraph 35 said the following after having considered the quotation from **Muller's** decision:

"In my view, the applicant needed to be heard before the second suspension was imposed, in the light of the agreement that had been concluded".

[29] The court also distinguished the case before it with the one of **Mabilo v Mpumalanga Provincial Government and Others (1999) 8 BLLR 821 (LC)** on the basis that **Mabilo** was given a letter and he was asked to state why he should not be suspended.

[30] In the **Mabilo** judgment, the court accepted that there is a need for flexibility when considering the one facet of the rules of natural justice, being, *audi alteram partem*. Therefore in my view, **Ngwenya** is not authority to the proposition that in all suspension cases, a hearing has to take place.

[31] In **Venter v SATB (1999) 10 BLLR 1111 (LC)** this court per Revelas J said the following before refusing a similar application:

"*The respondent, in my view, correctly contended that the*

respondent's failure to give applicant a hearing or opportunity to make representation before he was suspended was, in the circumstances, not unfair, at all. The suspension was not meant to be punishment either. In this regard see ***Lewis v Heffer and Others (1997) 3 ALL ER 354 (CA)*** *at* ***364C—E*** *where Lord Denning held that it was not unfair to refuse a hearing before suspension"*.

[32] In the **Marcus** matter, the court found that paragraph 5.2 of the suspension policy made specific reference to the *audi alteram partem* rule and such paragraph was not complied with. In the **Bula** matter, the suspension was in terms of section 26 of Education Act 26 of 1983. It was without pay as contemplated by subsection 6 of the said section

[33] The **Mahlauli** decision dealt with the suspension in terms of section 20 (2) of the Public Service Act of 84 and which was without pay. In **SAPU & Others v Minister of safety and Security 2005 (5) BLLR 490 (LC)**, this court found the suspension to be unlawful in that it contravened the applicable collective agreement. Therefore all of the above authorities do not support the proposition contended by Kennedy SC.

[34] Ngcobo J in the matter of **Chirwa v Transnet case CCT 78\06 (2007) ZACC 23** said the following:

"The subject matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising contractual power. It does not involve the implementation of legislation which constitutes administrative action".

[35] I refer to this judgment simply to illustrate that when the first respondent decided to suspend the applicant it was exercising

contractual power as opposed to public power. The line of authorities relied on by Kennedy SC mainly had to do with exercise of public power (power emanating from the statute).

[36] Clause 9.1 being the source of the power, does not provide for a hearing before suspension. However, the court might imply such.

See: Boxer Superstores Mthatha & Others v Mbeya (2007) 8 BLLR 693 (SCA),
Old Mutual Life Assurance Co LTD v Gumbi 2007 (8) BLLR 699 (SCA).

[37] These decisions were about pre-dismissal hearing. I do not see how and why the same principle should not apply to pre-suspension. If the court considered that alone, I should have concluded that in the absence of a hearing then the suspension is unfair and unlawful and ought to be set aside. Approaching matters of suspension with pay for that matter in that manner would in my view be a serious miscarriage of justice. Of course there is merit in a submission that in suspension cases, there may be a need to show a right to work. However, a right that has to be protected in matters of this nature is a right to be heard (*audi alteram partem*).

[38] In the resolution of 11 February 2008, the applicant was afforded a right to be heard. This was after the decision though. Of importance is the fact that the purpose of the representation to be made on 21 February 2008, is to consider whether suspension should continue. This clearly evinces open mind to be persuaded otherwise.

[39] In our law, *audi alteram partem* can still be observed after the prejudicial decision. In **Mamabolo v Rustenburg Regional Local Council 2001 (1) SA 135 (SCA)** the court said the

following:

"In certain instances a court may accept as sufficient compliance with the rules of natural justice a hearing held after the decision has been taken, where:

-there is sufficient interval between the taking of the decision and its implementation to allow fair hearing.

-the decision maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision and

-the affected individual has not thereby suffered prejudice".

[40] In conclusion the court in **Mamabolo** found that the termination was valid. This decision was followed by the LAC in its judgment of **Semenya & Others v CCMA & Others 2006 27 ILJ 1627 (LAC)**

See also: SAA v Bogopa & Others (2007) 28 ILJ 2718 (LAC).

[41] Where a suspension is with pay I do not see how an employee who does not demonstrate a right to work is prejudiced by a suspension.

See: Faberlan v Mckey and Fragen 1920 WLD 23,
Consolidated Woolwashing LTD v Press of Industrial Court 1986 (3) 786 (AD),
SAJID v The Juma Musjid Trust (1999) 20 ILJ 1975 (CCMA),
Compare-Singh v SA Rail Commuters t\a Metrorail (2007) JOL 19782 (LC).

[42] In **Phutiyagae v Tswaing Local Municipality (2006) 27 ILJ 1921 (LC)** Mokgoatheng AJ said the following:

"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 a conclusion that the failure by this court to intervene will result in the applicant suffering irreparable harm".

[43] In my view, the applicant's image and reputation cannot be the basis upon which this court can overturn the suspension. If

the applicant convinces the respondents in the representation, the respondents may uplift the suspension.

See: Zwakala v Port St Johan's Municipality & Others (2000) 21 ILJ 1881 (LC)

[44] Accordingly, the fact that the decision was taken without a hearing does not render the suspension unlawful. Therefore the fairness argument ought to fail.

Issue of costs

[45] Both counsels were in agreement that costs should follow results. However, Barrie argued that such costs should be at a punitive scale. Although in my view, the matter was not even urgent, the applicant had some arguable case on his right to be heard. Unfortunately the court is not in agreement that failure of such right renders the suspension unlawful. In that regard it was appropriate to award costs on party and party scale. The order is therefore confirmed.

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Moshoana AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Kennedy SC
Instructed by	: Werksmans Attorneys
For the Respondent	: Barrie SC
Instructed by	: Cliffe Dekker Inc
Date of hearing	: 20 february 2008
Date of Reasons	: 03 March 2008